

Constitutional Secularism in an Age of Religious Revival

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The Ultra-Orthodox Community in Israel and the Right to an Exclusively Religious Education

Gila Stopler

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 states must show to their diverse citizenry. Accordingly, section 18 of the 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.” 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. One such case which I wish to discuss in this chapter is the case of the education of ultra-Orthodox boys within the ultra-Orthodox (UO) community in Israel.

In 2008 the Israeli parliament passed a law entitled Unique Cultural Educational Institutions Act (the Act).¹ The Act legalized an existing, albeit until that time illegal situation, which has continued for many years, in which UO high schools for boys did not teach their students any part of the mandatory state core curriculum, but were nevertheless given generous state funding. These schools have for years restricted their curriculum strictly to religious studies, since according to UO ideology the study of the Torah is every man’s highest obligation and is the equivalent of all other religious commandments.² The Act was passed in order to circumvent the expected outcome of petitions to the Israeli Supreme Court against the illegal funding of UO schools that do not teach the core curriculum.³ In the explanatory notes for the proposed Act it was stated that the purpose of the act 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.⁴ The Act defines a “unique cultural educational institution” as

¹ The Unique Cultural Educational Institutions Act 2008, s. 1.

² Ehud (Udi) Spiegel, *Talmud Torah is Equivalent to All: The Ultra-Orthodox (Haredi) Education System for Boys in Jerusalem* (Jerusalem: Jerusalem institute for Israel studies 2011), 32 [Hebrew].

³ H.C. 4805/07 *The Center for Jewish Pluralism and Others v. The Minister of Education and Others* (27 July 2008).

⁴ Proposed Act: Unique Cultural Educational Institutions, 2008, 239 Proposed Acts (23 June 2008), 350.

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.⁵ The Act grants UO high schools (Yeshivot Ketanot) 60 percent 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 or English, or citizenship education. Although the Act applies only to high schools the *de facto* situation is that UO schools for boys have for years been teaching almost only 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.

The purpose of this chapter is to question the soundness of the Act from comparative and theoretical perspectives and especially in light of the unique circumstances of the UO community in Israel, and the distinctive relations between religion and state that exist in this country. While it is customary to compare the situation of the UO minority in Israel to that of religious minorities in western liberal states, I will argue that although such a comparison may expose some of the shortcomings of the Act, only a deeper analysis of the illiberal nature of religion state relations in Israel and of the central role that the UO community holds in the Israeli religious establishment and in its politics can fully capture the flawed nature of the Act.⁷ Consequently my analysis will proceed in two stages. In the first stage, after giving a brief description of the UO community and its unique position in the Israeli polity in Part II, I will conduct, in Part III, a comparative analysis of the autonomy granted to religious education in three liberal countries in which controversies over religious education have erupted in recent years. 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, which 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 and which combines almost no state funding with rather lax supervision. I will argue that the situation in Israel which combines a high degree of funding with no supervision is neither required by liberal theory, nor comparable to the situation in other liberal countries.

In the second stage of my analysis I will show that the shortcomings of the Act are further exacerbated by the illiberal nature of religion state relations in Israel and by the position of the UO community within the Israeli religious establishment and Israeli politics. Since Israel deviates considerably from the liberal model with respect to the role that the Jewish religion plays within the state, its treatment of UO education should also be compared to the measures that non-liberal countries which exhibit similarly close ties between religion and the state take with respect to the education of religious groups within them. Consequently, in Part IV I will discuss religious education in Malaysia, in

⁵ Proposed Act: Unique Cultural Educational Institutions. 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 purposes of the act, but thus far no other group has been recognized as such.

⁶ Spiegel, *Talmud Torah is Equivalent to All 33*.

⁷ It is important to note at the outset that the analysis in this chapter will focus on the rights and interests of the UO parents and community *vis-à-vis* the state, and will not deal with the rights of the children, which deserve separate treatment. Since my analysis will conclude that the UO community does not have the right to an exclusively religious education funded by the state, any analysis of the harm caused to UO children by such limited education will further support the outcome.

which Islam is the official state religion, and show that contrary to the situation in Israel, in Malaysia private religious education, and especially Muslim education, is closely supervised by the state regardless of its funding. I will argue that this close supervision results from the power and importance that the Muslim religion holds in the life of the nation. Because the Malayan state uses the Muslim religion as an important source of authority it restricts the educational autonomy of Muslim religious groups within it as a means of preventing challenges to its own religious, and hence—political, authority. Thus, Malaysia is an example of a third, non-liberal model, where precisely because religion is powerful and has considerable state authority, the autonomy granted to private religious education is restricted.

In Part V I will show that Israel, which does not fit any of these three models, emerges as a unique hybrid which on the one hand gives extensive religious autonomy in education to the UO community, on misguided liberal grounds, while on the other hand, it allows the same community to retain control over the Israeli religious establishment and to enforce its increasingly radical religious ideology through this establishment. In Part VI I will claim that far from being a disempowered enclave community, the UO community in Israel emerges as what I will call a *prodigious enclave community*, which is politically strong and highly influential, and that therefore the multicultural discourse used to justify the Act and the accommodations that it offers is misplaced. My conclusion 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 constitutes a challenge to the rights of others as well as to the already shaky liberal democratic foundations of Israel.

II. The UO Community in Israel

The UO community, or in its Hebrew name—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 (haredim) at His word.”⁸ 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.⁹ The UO are fundamentalists who believe in the fundamental truths of their religion, which they assume are unchanging from the time of Abraham, and who view the past as “the great teacher.”¹⁰ A crucial feature of their existence is their refusal to endorse contemporary Western culture and their entire lives are dedicated to fortifying their form of traditional Judaism in opposition to modernity.¹¹ 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.¹² The UO community has objected to the establishment of the state of Israel and still retains an anti-Zionist ideology to this very day.¹³ Furthermore, the UO consider themselves, and are often perceived by others, as a

⁸ Samuel Heilman and Menachem Friedman, “Religious Fundamentalism and Religious Jews: The Case of the Haredim,” in Martin E. Marty and R. Scott Appleby (eds), *Fundamentalisms Observed* (Chicago: University of Chicago Press, 1994), 197, 198.

⁹ Heilman and Friedman, “Religious Fundamentalism and Religious Jews” 197, 199.

¹⁰ Heilman and Friedman, “Religious Fundamentalism and Religious Jews” 197.

¹¹ Heilman and Friedman, “Religious Fundamentalism and Religious Jews” 198.

¹² Heilman and Friedman, “Religious Fundamentalism and Religious Jews” 257.

¹³ Menachem Friedman, *The Haredi (Ultra-Orthodox) Society—Sources, Trends and Processes* (Jerusalem: Jerusalem Institute for Israel studies, 1991), 19–20.

secluded enclave community, and have on that basis successfully secured multicultural accommodations such as the Unique Cultural Educational Institutions Act.

The UO community is the fastest growing community in Israel, with an average fertility rate of almost 7.7 children per woman.¹⁴ One out of every four Jewish students in the Israeli primary school system is educated in an UO school. The continuous study of Tora (Talmud Tora) has always been a central ideal in Jewish tradition and in contemporary UO society in Israel the full realization of this ideal has become the sole goal of the education system.¹⁵ Consequently, the UO education system centers on teaching all boys rigorous religious studies throughout their school years with almost no secular subjects.¹⁶ 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 Gdilot (until their marriage) and later in Kolelim.¹⁷ As a result almost half of UO men dedicate their time to studying religious studies and live off stipends they receive from the government in return.¹⁸ Because of the combination of very high fertility rates with very low workforce participation the UO community's mode of existence is heavily dependent on state funding and on donations.¹⁹

III. Religious Education in Liberal Democracies

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."²⁰ 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.²¹ First, the interest of the parents, whose right to decide the education of their child is part of their religious freedom.²² Most often the parents belong to a religious community and aspire to inculcate in the child the community's religious values and way of life, an interest which they share with the community.²³ 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.²⁴

¹⁴ As of 2001. Hagai Levin, "The Haredi Sector in Israel: Empowerment through Workforce Integration," *The National Economic Council* (2009), 10 [Hebrew].

¹⁵ Levin, "The Haredi Sector in Israel" 33.

¹⁶ Levin, "The Haredi Sector in Israel" 33.

¹⁷ Yaacov Lupu, "Haredi Opposition to Haredi High-School Yeshivas," *The Floersheimer Institute for Policy Studies* (2007), 30.

¹⁸ Lupu, "Haredi Opposition to Haredi High-School Yeshivas" 13.

¹⁹ Lupu, "Haredi Opposition to Haredi High-School Yeshivas" 41–43.

²⁰ Elizabeth Minnich, *Transforming Knowledge* (Philadelphia: Temple University Press, 1990), 53.

²¹ Rob Reich, *Bridging Liberalism and Multiculturalism in American Education* (Chicago: University of Chicago Press, 2002), 148–57.

²² Galston refers to this right as their right to expressive liberty, see e.g. William Galston, *The Practice of Liberal Pluralism* (Cambridge, UK: Cambridge University Press, 2005).

²³ The right to instill their values and lifestyle to their children is also part of the parents' right to culture.

²⁴ As will be discussed below, different theorists have different perspectives as to what an enabling education entails.

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, 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.²⁵

A central proponent of the autonomy-based conception of liberalism is Brian Barry. 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.²⁶ As far as the interests of the state are concerned, Barry argues that all citizens have an interest in the future of their society, and that the future of society "depends on the way in which those who are now children turn out."²⁷ A major aim of education should, according to Barry, be to develop in the child a capacity for autonomy.²⁸ 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.²⁹ Nevertheless, he insists that all schools must have a common curriculum, since it is impossible for society to function if it is divided into mutually exclusive groups whose separate schools follow different curricula.³⁰ While he supports state funding for suitable private religious schools,³¹ he insists that other private religious schools, such as the Christian fundamentalist schools in the United States, which teach only creationism and whose biology textbooks explain that evolutionary theory is a creation of Satan that is used effectively against Christians, must be shut down.³²

A position which is arguably even more uncompromising is expressed by Will Kymlicka, who holds that requiring separate religious schools to teach a core curriculum that includes citizenship education may not be sufficient to provide the appropriate sort of citizenship education.³³ Kymlicka posits that inculcating essential traits such as civility and public reasonableness in our interactions with others can only be done in a pluralistic, non-homogenous, environment in which children can interact with those who have different religious beliefs and ethnocultural backgrounds than their own.³⁴ Consequently, while he supports the existence of private religious schools, he believes that in later stages of education, all children, including those belonging to separate religious groups, must attend public schools. As will be discussed in Part VI of this chapter, the only exemption from attending common schools should, according to Kymlicka, be given to small isolationist religious groups, such as the Amish, who completely withdraw from society and do not exercise their political rights.³⁵

²⁵ William Galston, "Two Concepts of Liberalism" (1995) 105 *Ethics* 516.

²⁶ Brian Barry, *Culture and Equality* (Cambridge, MA: Harvard University Press, 2001), 209. According to Barry there is no group right to the education of children, only the right of the parents (207) nevertheless, the group to which the parents belong has a crucial influence on the education that the children receive.

²⁷ Barry, *Culture and Equality* 207.

²⁸ Barry, *Culture and Equality* 224–5.

²⁹ Barry, *Culture and Equality* 238.

³⁰ Barry, *Culture and Equality* 237.

³¹ Barry, *Culture and Equality* 204–5.

³² Barry, *Culture and Equality* 249.

³³ Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford, UK: Oxford University Press, 2001), 303–4.

³⁴ Kymlicka, *Politics in the Vernacular* 304.

³⁵ Kymlicka, *Politics in the Vernacular* 305–7.

On the other side of the spectrum, a most avid supporter of diversity liberalism, Chandran Kukathas, posits that since two core principles of liberalism are toleration of diversity and limited government, the liberal state should not educate its citizens or shape their thinking.³⁶ The state should allow communities to educate their children according to their own beliefs, although it need not subsidize such education.³⁷ He criticizes the position which insists 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.³⁸ 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.”³⁹ According to Kukathas, it is hard to see how the same political order which 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.”⁴⁰ 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 swiping toleration he advocates, he is careful to note that such qualifications are due,⁴¹ and that his theory is probably not feasible for any actual liberal state.⁴²

Proponents of the Israeli Unique Cultural Educational Institutions Act maintain that granting the UO education system extensive state funding while exempting it from the duty to teach the national core curriculum is required by liberal and multicultural precepts. However, neither of the theorists discussed above seem to advocate such an arrangement. While Barry advocates tight control over private education but allows for state funding, Kukathas rejects any state control over education, but at the same time rejects demands for funding. Furthermore, an examination of the autonomy granted to religious education in the United States, the Netherlands and England, three countries which in recent years have debated the relationship between religious education and the state, also reveals the existence of these two models. One model, which combines a relatively slack supervision of private religious education with no funding: the American model. And a second model, which combines a much closer supervision of religious education, with a more generous funding: the European model.

A. The American model

In the United States the right of parents to send their children to private religious education has been recognized by the American Supreme Court as early as 1925.⁴³ While parents have a fundamental liberty to give their children private religious education,

³⁶ Chandran Kukathas, “Education and Citizenship in Diverse Societies” (2001) 35 *International Journal of Educational Research* 319, 321–2.

³⁷ Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford, UK: Oxford University Press, 2003), 162.

³⁸ Kukathas, “Education and Citizenship in Diverse Societies” 326–7.

³⁹ Kukathas, “Education and Citizenship in Diverse Societies” 328.

⁴⁰ Kukathas, “Education and Citizenship in Diverse Societies” 328.

⁴¹ Kukathas, “Education and Citizenship in Diverse Societies” 329–30.

⁴² Kukathas, *The Liberal Archipelago* 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.

⁴³ *Pierce v. Society of Sisters* 268 U.S. 510, 535 (1925).

the constitutional “wall of separation” between church and state was held to prohibit any direct government funding for private religious education.⁴⁴ Although the state cannot fund private religious schools the Supreme Court held that it retains the power to reasonably regulate them.⁴⁵ 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.⁴⁶ Nevertheless, most of the 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.⁴⁷

The strict prohibition on state funding for religious private schools has been somewhat narrowed in 2002. That year the US Supreme Court paved the way to indirect government funding of religious schools when it held that a voucher program which gives parents tuition aid through vouchers they can use towards tuition costs in any private school of their choice, can be used for tuition in private religious schools.⁴⁸ However, the program approved by the Supreme Court 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.”⁴⁹ Finally, a third form of private religious education that exists in the United States and which is not funded is homeschooling. While homeschooling is the least supervised, most states do supervise it to various extents, and several state and federal courts have rejected the claim that homeschoolers are constitutionally entitled to complete freedom from state supervision.⁵⁰ Nevertheless, the level of supervision of private religious education in the United States is on the whole much lower than it is in Europe.

B. The European model

In contrast to the American model, the European model can be generally characterized as combining funding for private religious schools with close supervision of these schools. Two European countries in which the number of religious schools is particularly high, and which in recent years have debated the relationship between religious education and the state, especially in the context of Muslim religious education, are the Netherlands and England.

In the Netherlands only about a third of the primary schools are public, while the other two-thirds are private schools, mostly religious, that are fully funded by the state. The vast majority of these private schools are Protestant and Catholic and very few

⁴⁴ For example, *Everson v. Board of Education of Ewing Tp.* 330 U.S. 1 (1947).

⁴⁵ *Everson v. Board of Education of Ewing Tp.* 330 U.S. 534.

⁴⁶ Richard W. Garnett, “Regulatory Strings and Religious Freedom: Requiring Private Schools to Promote Public Values,” in Patrick Wolf et al. (eds), *Educating Citizens: International Perspectives on Civic Values and School Choice* (Washington, D.C.: Brookings Institution Press, 2004), 324, 329. See also Rob Reich, *Bridging Liberalism and Multiculturalism in American Education* (Chicago: University of Chicago Press, 2002), 147.

⁴⁷ Catherine J. Ross, “Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling” (2010) 18 *William & Mary Bill of Rights Journal* 991, 992. 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).

⁴⁸ *Zelman v. Simmons-Harris* 536 U.S. 639 (2002).

⁴⁹ *Zelman v. Simmons-Harris* 536 U.S. 645.

⁵⁰ *Zelman v. Simmons-Harris* 536 U.S. 993.

belong to other denominations, including Muslim.⁵¹ The freedom of education is guaranteed in the Dutch constitution, but is subject to the right of the authorities to supervise the schools and the teachers, and to set educational standards.⁵² The constitution further stipulates that supervision of private schools must be done with due regard to the freedom to provide education according to religious or other belief, and that private schools that meet the standards set by parliament are entitled to public funds equal to those received by public schools.⁵³

Although private schools have rather extensive autonomy in determining what is taught and how, this autonomy is restricted by qualitative and quantitative standards that they have to meet, including teacher qualifications, curriculum requirements and in secondary schools the examination syllabus and the national examinations.⁵⁴ The strict conditions that have to be met in order to establish a fully funded private school have made it difficult for the Muslim community to establish Muslim schools and only a small percentage of Muslim primary school children attend Muslim schools.⁵⁵ Islamic Studies teachers are required to obtain teacher diplomas,⁵⁶ and all Islamic schools teach the official Islamic teaching curriculum.⁵⁷ Dutch law requires all state funded schools, including religious ones, to offer education that is aimed at developing active citizenship and social integration.⁵⁸

The same model of close supervision with generous funding to those schools that meet the standards also exists in England. One-third of the state-maintained schools in England are religious schools, but the overwhelming majority of them belong to Christian denominations, while only around 50 are non-Christian.⁵⁹ All state-maintained schools must fully incorporate the national curriculum.⁶⁰ Muslim children comprise more than 5 percent of the total school population in Britain, but the vast majority of them attend public community schools or Church schools, and only around 1 percent of them are educated in independent or state-maintained Muslim schools.⁶¹ Muslim independent schools do not receive any state funding and consequently they are usually small and suffer from severe financial limitations.⁶² While Islamic independent schools may apply for state funding the process is long and complex, and often depends on political power relations, and consequently very few have managed to gain such funding.⁶³

⁵¹ Geert Driessen and Micheal Merry, "Islamic Schools in the Netherlands: Expansion or Marginalization?" (2006) 37(3) *Interchange* 201, 203.

⁵² Article 23, ss. 2, 5 can be found at <http://www.servat.unibe.ch/icl/nl00000_.html>.

⁵³ Article 23, ss. 5, 7.

⁵⁴ Ben P. Vermeulen, "Regulating School Choice to Promote Civic Values: Constitutional and Political Issues in the Netherlands," in Wolf et al., *Educating Citizens* 46.

⁵⁵ Driessen and Merry, "Islamic Schools in the Netherlands" 204. As of 2006 only about 10 percent of Muslim pupils attended Muslim schools.

⁵⁶ Inga Niehaus, "Emancipation or Disengagement? Islamic Schools in Britain and the Netherlands," in Aurora Alvarez Veinguer et. (eds), *Islam in Education in European Countries* (Münster: Waxmann, 2009), 113, 120.

⁵⁷ Lisa Baughn, "Islamic Education in Europe," *Euro-Islam.Info*, can be found at <<http://www.euro-islam.info/key-issues/education/>>.

⁵⁸ "Inclusive Education in The Netherlands," *SLO • national institute for curriculum development* (2007), 44.

⁵⁹ Rob Berkeley, *Right to Divide?: Faith Schools and Community Cohesion* (London: Runnymede Trust, 2008), 11. Thirty-seven of the non-Christian maintained schools are Jewish.

⁶⁰ Damian Breen, "A Qualitative Narrative of the Transition from Independent to Voluntary Aided Status, A Problem for the Concept of the 'Muslim School,'" in Alvarez Veinguer et al. (eds), *Islam in Education in European Countries* 95, 105.

⁶¹ Inga Niehaus, "Emancipation or Disengagement? Islamic Schools in Britain and the Netherlands," in Alvarez Veinguer et al. (eds), *Islam in Education in European Countries* 113, 114.

⁶² Breen, "A Qualitative Narrative of the Transition from Independent to Voluntary Aided Status" 101.

⁶³ Niehaus, "Emancipation or Disengagement?" 114–15.

Unlike state-funded schools that must fully incorporate the national curriculum, independent Muslim schools can determine their own curriculum. Nevertheless, they too have to meet academic standards that are checked through periodic inspections and compulsory national tests.⁶⁴ Among other things, independent schools are required to provide their students with an education that “gives pupils experience in linguistic, mathematical, scientific, technological, human and social, physical and aesthetic and creative education,” that ensures “adequate preparation of pupils for the opportunities, responsibilities and experiences of adult life,” and that “promotes tolerance and harmony between different cultural traditions.”⁶⁵ 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 and state-funded schools were required to actively promote social cohesion.⁶⁶

IV. Religious Education in Democracies with a Thickly Established Religion

While it is customary to compare Israel to liberal states, Israel is in fact a hybrid whose legal system combines certain liberal protections of human rights with a thick establishment of religion, and especially of the Orthodox Jewish religion, that has close ties to the state and coercive authority over its citizens.⁶⁷ The close ties between the Orthodox Jewish religion and the state make Israel similar in various ways to other countries with thickly established religions, and especially to those that attempt to combine thick establishment with a more than symbolic protection of human rights, such as Malaysia.⁶⁸ It is therefore worthwhile, before engaging with the Israeli case, to examine how countries such as Malaysia deal with the religious education of citizens, and especially with the religious education of citizens who belong to their dominant religion.

Malaysia is an Islamic federation that has a non-Muslim population of around 40 percent.⁶⁹ Religion and ethnicity are closely intertwined in Malaysia and though 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 Muslims.⁷⁰ While the constitution guarantees individual religious freedom and the right of every religious group to manage its own religious affairs, it includes special provisions for Islam.⁷¹ 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.”⁷² The control over the propagation of Muslim religious doctrines granted to the

⁶⁴ Niehaus, “Emancipation or Disengagement?” 115.

⁶⁵ The Education (Independent School Standards) (England) Regulations 2010 (SI 2010/1997), Sch. 1, Parts 1 and 2.

⁶⁶ Niehaus, “Emancipation or Disengagement?” 121–2.

⁶⁷ I use the term thick establishment to denote an establishment of religion which is more than merely symbolic and which gives the established religion both authority and coercive power over citizens.

⁶⁸ For a detailed description of the Malay combination see Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010), 127–39.

⁶⁹ Article 3 of the Constitution of Malaysia; 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 Farish A. Noor et al. (eds), *Madrassa in Asia: Political Activism and Transnational Linkages* (Amsterdam: Amsterdam University Press, 2008), 191, 192.

⁷⁰ Hirschl, *Constitutional Theocracy* 128.

⁷¹ Article 11(1)–(3) of the Constitution of Malaysia.

⁷² Article 11(4) of the Constitution of Malaysia.

government in the constitution has enabled the government, among other things, to clamp down on dissident Muslim organizations and shut down their schools.⁷³

While all religious groups have the right to establish and maintain religious schools, the government runs and funds only Muslim religious schools.⁷⁴ 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.⁷⁵ A separate religious education division was established in order to gradually turn all Islamic schools into national Islamic schools with a uniform curriculum.⁷⁶ Although private Islamic schools are allowed to operate, and some are even partly funded by the state, after 9/11 the pressure on private Islamic schools to conform to national authorities has increased, and funding has been withdrawn from hundreds of schools.⁷⁷ Some of these schools have closed for lack of funding, while others have forgone their independence and become fully aided government Islamic schools.⁷⁸ The government accused private Islamic schools of stocking Islamic extremism and of teaching a deficient non-religious curriculum that left the children graduating from them virtually unemployable.⁷⁹ 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 to private Islamic schools.⁸⁰ By 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.⁸¹

Thus in Malaysia, because Islam forms such an important part of the Malay state, both in terms of identity and in terms of structure and authority, the state exercises close supervision over Islamic education. Not being committed to liberal principles the state does not hesitate to restrict the propagation of Islam and to enforce an official Islamic education curriculum in all schools in order to prevent extremist religious challenges to its political and religious authority.

V. UO Education in Israel—An Analysis

Three models of the treatment of religious education by the state emerge from the above analysis. In liberal countries two models can be detected—the American model which combines a relatively lax supervision of private religious education with no funding, and the European model, which combines a much closer supervision of religious education, with a more generous funding. In view of these two liberal models it seems plausible to say that the situation in Israel in which UO education receives considerable funding

⁷³ For example the government has banned the Darul Arkam movement in 1994 and closed down its schools. Ahmad Fauzi Abdul Hamid, "Islamic Education in Malaysia" (2010) 18 *RSIS Monograph* 60.

⁷⁴ Hamid, "Islamic Education in Malaysia" 25.

⁷⁵ Hamid, "Islamic Education in Malaysia" 29.

⁷⁶ Hamid, "Islamic Education in Malaysia" 29.

⁷⁷ Hamid, "Islamic Education in Malaysia" 45; Noor, "From Pondok to Parliament" 209. According to Noor, funding was cut to 260 schools.

⁷⁸ Hamid, "Islamic Education in Malaysia" 4, 45.

⁷⁹ Jonathan Kent, "Malaysia's Doubts over Muslim Schools," *BBC News* (4 March 2003), available at <<http://news.bbc.co.uk/go/pr/ft/-/2/hi/asia-pacific/2913565.stm>>.

⁸⁰ Richard G. Kraince, "Reforming Islamic Education in Malaysia: Doctrine or Dialogue?," in Robert W. Hefner (ed.), *Making Modern Muslims: The Politics of Islamic Education in Southeast Asia* (Honolulu: University of Hawaii Press, 2009), 106, 124–5.

⁸¹ Hamid, "Islamic Education in Malaysia" 46–7.

but retains an almost complete autonomy is neither practiced by liberal countries nor required by liberal precepts. Moreover, the distinctiveness of the treatment of UO education in Israel becomes even more evident when considering the thick establishment of the Orthodox Jewish religion that takes place in Israel, and comparing Israel to countries with a similarly thick establishment of religion. Like Israel, Malaysia has a thickly established religion, which exercises coercive power and authority over the country's citizens. Consequently, in Malaysia the education of Muslims is closely monitored by the state to ensure that the authority given to religion is not turned against the state by extremist Muslim groups. In contrast, in Israel the state gives extensive funding and autonomy in education to the UO community, while at the same time allowing it to control the state's religious establishment and to use it to enforce its radical religious ideology on all citizens, thereby eroding Israel's already shaky liberal democratic structure.

Thus, while giving the Orthodox Jewish religion both state power and state budgets, Israel refrains from exercising direct control over religious ideology. Israel's reluctance to control religious ideology in the way that Malaysia does stems from the fact that such control 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 purports to respect liberal ideals such as religious freedom in all areas not directly subject to religious law. The result is that the UO community is given state coercive power and state funds through its control over Israel's religious establishment, but at the same time it is given extensive autonomy to pursue its own deeply conservative way of life. The Unique Cultural Educational Institutions Act is but one example of this problematic mix. On misguided liberal and multicultural grounds it guarantees funding for UO boys' schools without any state supervision of their curriculum, while at the same time also it ignores the fact that the same UO boys, who are not taught any secular subjects or civic education, and whose religious education is dictated solely by UO sages, will later become public officials in the state's religious establishment, and enforce the dictates of their radical version of Orthodox Judaism on all Jews in Israel.

In order to understand the depth of the problem a more detailed description of the religion state relations in Israel is required. Israel was defined in its Declaration of Independence and later in its Basic Laws as a Jewish and Democratic state, and while there is an ongoing debate whether the reference to "Jewish" in this definition denotes the Jewish religion or merely the Jewish nation, the Orthodox Jewish religion was partially established in the state through laws and administrative decisions from Israel's early years.⁸² 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, members of other recognized religious communities such as Muslims and various Christian denominations are also subject to the personal religious laws of their particular

⁸² Basic Law: Human Dignity and Liberty, 1992, SH No. 1391, 60; The Declaration of Establishment of the State of Israel (Israel, 14 May 1948) available at <<http://www.mfa.gov.il/mfa/go.asp?MFAH00hb0>>; see Avigdor Levontin, "Jewish and Democratic"—Personal Reflections," in Yossi David (ed.), *The State of Israel: Between Judaism and Democracy* (Jerusalem: The Israel Democracy Institute, 2000), 251 (taking a position against interpreting the term Jewish in the Basic Laws as including the Jewish religion). Cf. Menahem Alon, "Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom" (1993) 17 *Lunei Mishpat* 659, 668–70 (taking a position supporting the inclusion of the Jewish religion in the term "Jewish").

religions.⁸³ The imposition of the religious personal laws of the various religious communities on all residents and the lack of an alternative civil marriage, constitute 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.⁸⁴ 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 other areas in which the Orthodox Jewish religion is given a preferred status by the state. The state has established a chief rabbinate and has given full control over it to Orthodox Judaism.⁸⁵ The chief rabbinate is a powerful state organ which enjoys large budgets and which controls the religious services given by the state to the Jewish population such as marriage and divorce, burial, kashrut, synagogues, conversion to Judaism and so forth, through organs such as the rabbinical courts and the regional religious councils.⁸⁶

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, and have full control over it.⁸⁷ 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.⁸⁸

In addition, the influence of UO political parties, which has started as early as the establishment of the state, has strengthened considerably ever since. This influence has allowed UO politicians to obtain considerable budgets for the UO community, which support their Yeshiva studies and their increasing families.⁸⁹ It has also allowed them to have significant impact on general issues affecting the Israeli society at large, by securing appointments to key state and municipal positions such as the Minister of Interior, the Minister of Religion, the head of the Israeli Parliament's Budget Committee, and the mayor of Jerusalem. In their capacities in the government, in the Knesset, and in the local municipalities UO politicians and public servants strive to implement 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

⁸³ The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law, Sign 51(1) of the King's Order in Council, 1922. The detailed authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act 1953. The detailed authority of the Muslim religious courts can still be found in Sign 52 of the King's Order in Council, 1922.

⁸⁴ See e.g. Frances Raday, "On Equality," in Frances Raday et al. (eds), *Women's Status in Israeli Law and Society* (Jerusalem and Tel Aviv: Schocken, 1995), 19.

⁸⁵ The Chief Rabbinate of Israel Law, 1980, SH No. 965, 90.

⁸⁶ The Jewish Religious Services Law, 1971, SH No. 628, 130.

⁸⁷ Nissan Slominski, "The Appointment of Rabbinical Court Judges—An Ultra-Orthodox State or a Zionist State?," available at <<http://www.toravoda.org.il/node/584>>.

⁸⁸ To give just one example, in 2011 a rabbinical court has 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. It further ruled that until the wife consents to her husband's financial demands she is not entitled to the divorce. Rivka Luvitch, "Rabbinical Courts, Raise the Anchor," *Ynet* (8 February 2011), available at <<http://www.ynet.co.il/articles/0,7340,L-4025574,00.html>> [Hebrew].

⁸⁹ Friedman, *The Haredi (Ultra-Orthodox) Society* 189.

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.⁹⁰ Another example is a religious ruling issued in 2010 by 50 municipal rabbis forbidding the sale and rental of homes to gentiles, particularly to Arabs.⁹¹ These examples all 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 education system is entitled to full autonomy as part of the freedom of religion and of the multicultural respect owed to the UO community as an isolated religious minority, which is dedicated to its deeply religious (yet deeply illiberal) way of life. This position was adopted by the Israeli parliament in the Unique Cultural Educational Institutions Act which exempts UO high school students from studying the core curriculum. As will be discussed in the last part of this chapter, in light of the considerable political and state power that the UO community yields through its representatives, this allegedly multicultural accommodation is not supported by multicultural theory.

VI. Multiculturalism and the UO as a Prodigious Enclave Community

In multicultural theory there are typically two types of groups that require multicultural accommodations. One type is the integration seeking group: this type of group is usually a newly arrived immigrant group that comes from a different cultural and religious background and requires multicultural accommodations such as the right to deviate from school or workplace dress code for religious reasons, or the right to have a different day of rest. Most often these groups do not question the liberal democratic structure of society and require multicultural accommodations in order to enable them to integrate in the larger society on an equal footing while still retaining their religious and cultural practices.⁹² Many Muslim immigrants to Europe fall under this category. The other type of group is the isolationist group: this would typically be an old minority, which shuns the larger society and demands to be left alone to lead its own way of life and run its own affairs. An example of such a group is the Amish in the United States.⁹³ While the Amish lead an illiberal way of life, they are completely withdrawn from society, do not discriminate against others in civil society, and do not participate in politics. According to Kymlicka, as long as such 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 requirements such as sending their children into common public schools for part of their education. 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 as long as they remain small the liberal state can afford to

⁹⁰ See A.A. (administrative appeal) 343/09 *Open House v. Municipality of Jerusalem* (14 September 2010).

⁹¹ Kobi Nahshoni, "50 Municipal Rabbis: Don't Rent Flats to Arabs," *Ynet* (12 July 2010), available at <<http://www.ynetnews.com/articles/0,7340,L-3995724,00.html>>.

⁹² Kymlicka, *Politics in the Vernacular* 162–72.

⁹³ Kymlicka, *Politics in the Vernacular* 305–7.

accept them.⁹⁴ A similar argument is made by Jeff Spinner-Halev who suggests referring to groups such as the Amish as *partial citizens*, that may be exempted from certain duties of citizenship, as long as they are completely self-reliant and do not participate in politics.⁹⁵ Spinner Halev distinguishes between the Amish and another old and arguably isolationist minority—the Satmar Hasidim of Kiryas Joel in NY. According to him, while the former do not ask the state to help them maintain their isolationist way of life, the latter depend on public funds to maintain their illiberal and isolationist way of life and use their voting power in order to get politicians to cater to their needs. Consequently, the Satmar Hasidim should not be considered *partial citizens* or enjoy exemptions from the obligations of citizenship.⁹⁶

Despite the fact that the UO are portrayed by supporters of the Unique Cultural Institutions Act as an isolationist group such as the Amish, who should be entitled to exemptions from the obligations of citizenship, they are 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 large 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 education 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 increasing state funding has led to the growing radicalization of the UO community.⁹⁷

Due to their size, the UO community cannot even be compared to the Satmar Hasidim of NY, despite the fact that both communities subsist mainly on public funds and use their political power to obtain them. The UO are by no means a small minority whose free riding can be easily absorbed by the larger Israeli society. One out of every four 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. 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, and creates 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 citizen's marriages and divorces, of their conversions

⁹⁴ Kymlicka, *Politics in the Vernacular* 305–7.

⁹⁵ Jeff Spinner-Halev, "Extending Diversity: Religion in Public and Private Education," in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000), 68–97, 71–2.

⁹⁶ Spinner-Halev, "Extending Diversity" 79–80.

⁹⁷ Friedman, *The Haredi (Ultra-Orthodox) Society* 80–6.

and of their children's religious status on the basis of their own radical religious ideology.⁹⁸ 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 isolationist groups discussed above, 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. This points to a final important distinction between the UO and both isolationist and integrationist groups; while both isolationist and integrationist groups do not challenge the liberal democratic structure of the country within which they reside, the UO do challenge the liberal features of the Israeli state structure and are striving to change them to conform to their radical religious ideology.⁹⁹

VII. Conclusion

One out of every four Jewish children in Israel is educated in the UO education system, which is heavily funded by the state, but at the same time does not teach boys almost any secular studies. This state of affairs poses a serious challenge to the continued sustainability and stability of Israeli democracy. Those who support its continuation claim that it is required by the right of UO parents and community to freedom of religion and to multicultural accommodation. The comparative and theoretical perspectives discussed in this chapter refute 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 their extensive political power and their 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, homosexuals, converts, and others suffer as a consequence of the application of deeply illiberal ultra-Orthodox religious ideology by UO politicians and state officials who are the products of an UO education system that shuns any civic education. Since the right to an exclusively religious state-funded education was given to the UO minority on the basis of misguided liberal and multicultural grounds, and constitutes a challenge to the rights of others as well as to the already shaky liberal democratic foundations of Israel, it should be revoked.

⁹⁸ It should be noted that another group which is influential in the Israeli religious establishment are the religious Orthodox Zionists, but the UO are the more powerful of the two groups.

⁹⁹ On respect for liberal democratic values as the basis for multicultural policies see Kymlicka, *Politics in the Vernacular* 172–6.