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STATE AND RELIGION: FUNDING OF RELIGIOUS INSTITUTIONS—THE CASE OF ISRAEL IN COMPARATIVE PERSPECTIVE

SHIMON SHETREET*

INTRODUCTION

When I thought about what I should prepare for this analysis and debate on state funding of religious institutions, I concluded that I should try to bring together the comparative dimension and the broader context from a bystander's perspective. The challenge of the role of religion and religious institutions in modern societies is shared by every society on the face of the globe, regardless of the model of the concept that it has selected for the interrelation between state and church, or state and relig-

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gion. The analysis of the broader conceptual models and practices in other countries should serve to clarify the dilemma and the desired choices for resolving it. In Israel we have been subjected to the excessive use, and often misuse, of state funds by religious institutions in the formal education system as well as in the formal education and social services. Not only is a great and effective organizational power exercised by these religious institutions in Israel, that is defined by American standards as "pervasively sectarian" in American terminology, but this power has been employed to introduce social changes and to effect strong political impact. Thus, for example, the "Shas" party in Israel has grown from four seats in the Knesset (the Parliament) in 1988 to ten seats in 1996.

Education systems of religious movements in Israel—"El-Hamaayan" and the "Independent Haredi Education"—tend to have an advantage over the regular education system, as they provide lower or no-cost education. The result is that these systems divert the student and his family to a Haredi Ultra-Orthodox way of life, competing with the secular way of life. This is not merely a matter of belief but it results in a structural social change because it causes the exclusion of the student from the work force and from the regular military service as well as the reserve duty.

Some of the lines of argument advanced by scholars on the issue of the constitutionality of the voucher system in the United States such as the focus on equality by Professor Alan Brownstein, and the great concern for excessive government entanglements, could find support in the undesirable and objectionable practices which developed in Israel in the area of state funding of faith-based institutions.

I shall attempt to give in this paper a brief analysis of the conceptual models of church and state relationships and analyze

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2. See Agostini v. Felton, 521 U.S. 203 (1997); Lemon v. Kurtzman, 403 U.S. 602 (1971); Brownstein, supra note 1; Esbeck, supra note 1, at 304-11; Hamilton, supra note 1.
contemporary issues of law and religion in Israel in comparative perspectives with a view that some of my comments can add a dimension to the ongoing debate in the United States on charitable choice. It is not my intention to directly take sides between the alternative approaches of Professors Carl Esbeck, Alan Brownstein, Marci Hamilton and John Garvey on the very hot issue of charitable choice; nor is it my intention to address myself in detail to the controversy in the United States on the limits of government grants, direct and indirect, to faith-based agencies which provide social services.

I will venture to say that the pervasively sectarian test seems a reasonable formula that should be developed as much as the primary-secular purpose test was developed to give a dynamic response to other challenges on the government actions in matters of religion.

The question of allocating financial support to religious institutions has lately become a central and crucial question in Israel. Increasing criticism over this question has been heard amongst the Israeli secular society and in the Knesset. Many sectors that request the state's financial support claim that the state should not support the religious institutions, or at least distribute the money equally between the religious and secular organizations. In fact, this question is part of a broader debate—the question of the relationship between state and religion: Should the modern state interfere with matters of religion? Should we allow religious interests to influence the state's policy and legislation? These questions have preoccupied the Israeli nation since the state's establishment, but lately they have assumed a greater place in the public agenda. These issues will be discussed in this article. The issue of state funding of religious institutions is largely dependent on the concept of the relationship between state and religion.

I will first examine the question of state and religion, reviewing the possible models concerning the relationship between state and religion. I will then offer an examination of the solutions adopted in the United States, England, and in Canada. Later, I shall offer an analysis of the complicated situation in Israel regarding state and religion with a focus on state financing of religious institutions. In the last section, I will discuss the recent challenges of Israeli society as a result of the increasing

3. See Esbeck, supra note 1, at 285-87; Monsma, supra note 1, at 321 & n.1; Hamilton, supra note 1.
power of religious parties, predominantly because of the large funds the religious institutions receive for schools, and other non-profit organizations.

I. AN ANALYSIS OF THE MODELS OF THE INTERRELATION BETWEEN STATE AND RELIGION

The relationship between state and religion can be reflected in different models. These models can be divided into five models: the theocratic model, the absolute-secular model, the separation of state and religion model, the established church model, and the recognized religion model. Two of these models are non-democratic: the theocratic model and the absolute secular model, which are the most extreme models. The theocratic model suggests that the religion will dominate the state. This theory means that there is one officially recognized religion, and other religions are forbidden. The ruler of the state is a representative of this religion, and the state's law is religious law. This model is held as non-democratic because it maintains a system that causes the deprivation of freedom of religion (and freedom from religion). In the contemporary world we may find theocratic elements in the Middle East countries such as Saudi Arabia and the Chumenistic Islamic Republic of Iran. The other non-democratic model, the absolute secular model, is the rejection of any religion, and adherence to formal atheism by the state. The law forbids any religious act, and freedom of religion is deprived. Examples of this model could be found in communist regimes, as in the former Soviet Union.

A modern theory of law and government rejects these forms of non-democratic models of state and religion. The democratic state must promise and preserve the freedom of religion, which is defined as the freedom of any religion to maintain its religious activity, and the freedom of any person to maintain his faith and religion, to fulfil its commandments, and to worship. Another right that a democratic state must ensure is the freedom from religion, which is the freedom of any person not to fulfil any religious commandments. The individual should be free from fulfilling any religious duty, and be free from being subjected to the need for recourse to religious institution, or religious ritual. He must be free of any religious restriction, and he should have every right of speech, belief and equality before the law, regard-

5. See RALPH BENJAMIN NEUBERGER, RELIGION AND DEMOCRACY IN ISRAEL 16 (1997) (Hebrew). The freedom of religion will be limited only when the fulfillment of the religious commandments would result in violence, in breach of the public order, or in deprivation of civil rights.
less of his religious affiliation. The foundation of the democratic state is secular law: the law that rules is the secular law, which has been accepted and determined in a democratic way by legislation in a democratic parliament and which does not contradict the principles of democracy.  

There are (as mentioned above) three models of the relationship between state and religion which maintain these important principles of democracy. The first model is the separation of state and religion model. The idea is that there is a distinction between the government and religion. The legislation, in its nature, is secular, its purposes are non-religious, and there is no preference for any religion. The separation of state and religion is expressed in the principle that the state does not interfere with religious organizations and these organizations do not interfere in the matters of the state. This separation can be created in different ways: the state can declare itself expressly as a secular or non-religious state (as declared in the constitutions of France, India, and post-communist Russia) or as "neutral" concerning matters of religion (such as in the constitutions of Australia, Ireland, and Spain). Another way is an explicit declaration of the separation of state and religion (as declared in the constitution of Catholic Poland, or the First Amendment of

6. See id. at 17.

7. Today, the United Nations accepts that the fact that a state adopts a regime of state-religion separation or establishes a formal religion does not necessarily mean a violation of freedom of religion or discrimination on a religious basis. See Note by the Secretary-General: Elimination of All Forms of Religious Intolerance, U.N. Doc. A/8330, Ann. III (1971).

8. See FR. CONST. art. 2, § 1 ("France is an indivisible, secular, democratic, and social Republic.").

9. See INDIA CONST. preamble ("having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic.").

10. See RUS. KONSTITUTSIJA [Constitution] RF art. 14, § 1 (1993) ("The Russian Federation shall be a secular state. No religion may be instituted as state-sponsored or mandatory religion.").

11. See AUSTL. CONST. § 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.").

12. See IR. CONST. art. 44, § 2.2 ("The State guarantees not to endow any religion.").

13. See SPAIN CONSTITUCIÓN [Constitution] [C.E.] art. 16, § 1 ("Freedom of ideology, religion, and cult of individuals and communities is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law.").

14. See POL. CONST. art. 25, § 3 ("The relationship between the State and churches and other religious organizations shall be based on the principle of
the Constitution of the United States as interpreted by the Supreme Court\(^5\)). A regime of separation of religion and state does not indicate the state's approach toward religion. The separation may be a result of a favorable attitude toward religion and a commitment to a respectful approach to religion (as in the case of the United States) or of a less favorable attitude towards religion (as in the case of France).

The second model is the *established church model*, which means that the state recognizes a certain religion and a certain church as the state's national church. This recognition does not mean that other religions are prohibited or that a person must be a member of the established church, but that the state formally prefers a certain religion and gives it a priority over other religions. It can be expressed in a constitutional provision, in the state's financial support to institutions of this religion, and in benefits given to the members of this religion. The difference between this model and the theocratic model is in the approach towards other religions and non-religious people. While the state in the theocratic model does not tolerate other religions and non-religious groups, the state in the established church model is a democratic state (or at least it has democratic characteristics in the matter of freedom of religion). Examples of states that adopted this model are: England (the Anglican Church is the Church of England),\(^16\) Denmark,\(^17\) Norway,\(^18\) Iceland,\(^19\) Finland (the Anglo-Lutheran Church),\(^20\) Greece,\(^21\) and Bulgaria respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

15. See U.S. Const. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ").

16. See Act of Supremacy, 1534 (Eng.) (issued by King Henry VIII, repudiating papal supremacy and declaring the King to be the supreme head of the Church of England).

17. See Den. Const. part 1, § 4 ("The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State.").

18. See Nor. Const. art. 2, § 2 ("The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.").

19. See Ice. Const. art. 62 ("The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the state.").

20. See Fin. Const. § 83 ("Provisions on the organisation and administration of the Evangelical Lutheran Church shall be prescribed in the Church Code.").

21. See Greece Const. art. 3, § 1 ("The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ.").
(the Eastern Orthodox Church).22 There are states in which the recognition of one formal church is only a symbolic-declarative one (such as the recognition of the Catholic Church in Liechtenstein,23, Monaco,24 and Malta25). This is the endorsed church sub-model. In other states, the recognition of the established church has operative implications.

Another model is the recognized religions model. The state in this model does not recognize one formal religion; a formal national state church does not exist. Rather, the state’s approach in the matters of state and religion is a neutral approach. This model is reminiscent of the separation model, because the state does not interfere in the internal matters of the religion, such as the appointment of the priests. The difference between these two models is that in the recognized religions model, the churches are recognized by the state as special corporations, and the state is responsible for supplying religious-services and for financing the foundation and maintenance of the churches. There is a cooperation of the state with all the recognized churches, without preferring one to the other. This is the model adopted in Germany, which accepts as “recognized religions” the Catholic, the Protestant, the Anglican, the Jewish and the Muslim communities.26 Another country which adopted this model is post-communist Hungary, which implements this model in a more liberal way.27

II. RELIGION AND STATE IN COMPARATIVE PERSPECTIVE

Having presented the possible models and attitudes toward the question of the preferable relationship between state and religion, I will now focus on the solutions adopted in some of the above-mentioned states.

22. See Bulg. Const. art. 13, § 3 (“Eastern Orthodox Christianity is considered the traditional religion in the Republic of Bulgaria.”).
23. See Liech. Const. art. 37, para. 2.
25. See Malta Const. § 2 (1) (“The religion of Malta is the Roman Catholic Apostolic Religion.”).
26. See F.R.G. Grundgesetz [Constitution] [GG] art. 140, incorporating F.R.G. Weimar Constitution (1919) art. 137, § 4 (“Religious bodies acquire legal capacity according to the general provisions of civil law.”), § 6 (“Religious bodies that are corporate bodies under public law are entitled to levy taxes in accordance with State law on the basis of the civil taxation lists.”).
27. For the differences between the Hungarian system and the German system, see Neuberger, supra note 5, at 15.
A. The United States

The United States of America adopted the separation of state and religion model, and, in fact, the U.S. is the common example for this model. The First Amendment of the federal Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Literally, this clause does not constitute a regime of separation. However, this section is interpreted as the adoption of the separation model. This interpretation is based on two important parts of the section: the Establishment Clause and the Free Exercise Clause. The purpose of the Establishment Clause is to protect the State from any religious regime and from religious influences. Neither the Congress, nor any other state actor, may establish any formal preferable religion, and the state's view on the matters of religion shall be neutral. This clause disestablishes the connection between the church and the government, and assures the pluralism of religions. The second clause, the Free Exercise Clause, deals with the other aspect of separation of state and religion. Its purpose is to protect the churches from the interference of the state and to maintain the freedom of religion and belief. The combination of the two clauses is the basis of the "wall theory," that claims that the Constitution creates a complete separation between state and religion. In the words of Thomas Jefferson, the clause against the establishment of religion by law was intended to erect "a wall of separation between church and State." This means that the government must maintain strict neutrality, neither aiding nor opposing religion, a neutrality between the different religions, and between the religious and non-religious.

Generally, the meaning of the separation principle is that the state does not prefer one religion to the others and that discrimination of this kind is forbidden. However, there is serious controversy over the question of the desirable degree of separation. The same controversy arises with regards to the question of financial support granted to religious institutions. According to one approach, separation must be widely interpreted, and the

29. See Everson v. Board of Educ., 330 U.S. 1, 16 (1947). This case dealt with the question of governmental financial allowances for travel expenses for a Catholic school's students. The Court adopted the "wall theory" and decided that these payments were not against the Constitution.
prohibition of the state’s interference in matters of religion should be total and strict. The state must not be involved in any matter concerning religion and must not finance any religious goal by public funds. Any governmental action that may assist imposition of a religion or that might create this sort of risk is forbidden, according to this view, by the Constitution, because it is “an establishment of a religion.” Those who hold this view oppose any governmental support. Therefore, they oppose not only religion lessons in public schools, but they negate the carrying out of those lessons in the public schools’ buildings in the afternoons, as well as any governmental support to private religion lessons outside school. This was the dominant approach by the Supreme Court of the United States during the period of the late 1940s until the early 1980s. Hence, it was decided that all prayers in school are unconstitutional and that religious symbols cannot be set up in public places.

However, this approach is not the only view held in the United States. According to the other interpretation to the “separation” concept, the interpretation of the First Amendment should be literal and strict, and therefore, as long as the state does not prefer one religion or church over the others, the state is allowed to support religious schools and to introduce any other religious customs which are common to all religions (such as introducing a moment of silence, when the students may pray or not pray, according to their belief and view). The fact that a certain matter involves religious elements or that the governmental act results in an indirect support of a certain religion does not make this activity unconstitutional. Some of the scholars claim that religious services are a basic need, and that the preservation of the freedom of religion obliges the state to support these kinds of services. According to this view, a coherent ideal obliges adopting the stricter interpretation of the separation term (the second view). Thus, in a modern welfare state, which is supposed to support basic public services, there is a conflict between


33. Although it must be mentioned that the judgments on this topic are inconsistent. Compare, for example, the contradicting verdicts: Illinois ex rel. McCollum v. Board. of Educ., 333 U.S. 203 (1948), with Zorach v. Clauson, 343 U.S. 306 (1952). See also Shimon Shetreet, Freedom of Conscience and Religion 103 n.13 (1975) (Hebrew).

34. See Ruth Gavison, Religion and State: Separation and Privatization, 2 Mishpat ve’ Mimshal 55, 63 (1994) (Hebrew) (especially note 15, which directs to the important judgment); see also Mueller v. Allen, 463 U.S. 388 (1983) (upholding as not violating the Establishment Clause a Minnesota statute which
the principles of separation on the one hand and freedom of religion on the other hand. Preserving the freedom of religion without violating the establishment prohibition is a very difficult task. Therefore, this view supports the stricter interpretation of "establishment."  

It should be mentioned that the fact that the United States adopted the separation model does not mean that its approach toward religion is hostile. On the contrary, American society is very religious, and anti-religious groups are considered marginal. The religiousness of American society can be found in all areas of life. For example, some of the formal holidays are Christian, and on Good Friday the flag is lowered in memory of Jesus' crucifixion; the words "In God We Trust" are written on every unit of currency; the oaths of trust of the President and his executive officers, the judges, and the members of Congress conclude with the words, "so help me God"; priests and rabbis serve in the army; and churches are exempt from taxation. An analysis of all of these religious characteristics reveals that the state religiousness is mostly not of a specific religion, but rather a reflection of the faith in one God (and not particularly in Jesus). This is a kind of a new religion, a "civil religion" that contains components of many different religions, although it is closer to Christianity than to any other religion.  

It may be argued that this religiousness of the society contradicts the separation principle, or at least the aim of the separation. However, in fact, there is no conflict between those two principles. Separation's aim is to ensure that the pluralism of religions and views are respected and preserved. The separation model intends to ensure a complete freedom of religion and from religion, and the method chosen to achieve this goal is the neutrality of the state on the question of religion. Therefore, the government would not finance religious activities and religious institutions (this is the first approach—the broadening approach, which was described above), but some forms of indirect support are not totally excluded.

35. The value of freedom of religion is more important, according to this view, than the value of separation. For the comparison of these values, see Wilber G. Katz, Freedom of Religion and State Neutrality, 20 U. Chi. L. Rev. 426 (1953).

B. England

England adopted a different answer than that of the United States on the question of the link between state and religion: the established church model. However, what does the term "establishment" mean in the British context? Two decisions in this century have attempted to define "establishment" in the law. In Marshall v. Graham, Judge Phillimore stated that

a church which is established is not thereby made a department of state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position and to its decrees, if rendered under certain legal conditions certain civil sanctions.

The House of Lords also considered the legal characteristics of establishment and decided that in one sense,

the words "established church" are used to mean the church as by law established in any country as the public or state-recognized form of religion. The process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, in heres given its a certain legal position and to its decrees, if given under certain legal conditions, certain legal actions. In the fullest sense, a church is said to be established when all the provisions constituting the church's system or organization receive the sanction of a law, which establishes that system throughout the state and excludes another system.

The expressions of the adoption of the establishment system can be found in many areas. First, the King (or the Queen) is the head of the Established Church, and he must be Anglican in order to rule the kingdom. He cannot convert his religion—in the Coronation Oath he pledges to maintain the Protestant Reformed Religion established by the law, and to declare himself as the "Defender of the Faith."

The acknowledgement and support by the state of one formal religion can be illustrated with many other examples: the Established Church organizes the formal state ceremonies, such as the monarch's coronation ceremony or requiem ceremonies.

37. 2 K.B. 112 (1907).
38. Id. at 126.
41. Coronation Oath Act, 1688, 1 W. & M. 1, ch. 6.
for soldiers who died in a war; twenty-six of the senior bishops, including the archbishops of York and Canterbury, sit in the House of Lords as "Lords Spiritual"; all the measures of the Established Church, which are accepted by the General Synod (the general assembly of the church) must get the confirmation of the Parliament; the Book of Common Prayer is confirmed by the Parliament; and the monarch appoints the archbishops and bishops at the recommendation of the Prime Minister. Another example is the Law of Blasphemy, which holds that "to reproach the Christian Religion is to speak in subversion of the law." In the schools, a daily act of collective worship is accustomed, and the prayers in most of the country schools in England and Wales are of a Christian nature and reflect the basic principles of the Christian tradition (without referring a specific church). In addition, religious lessons are carried out in the public schools, but the parents may forbid their children's participation in those lessons and in the daily conduct of collective worship.

The conclusion of this analysis is that the British system created a strong linkage between state and religion, between the British nation and the Established Church. It must be mentioned that despite the fact that there is one religion that the state formally prefers, other religions are not discriminated against and there is complete freedom of religion.

In this system, where religion takes a great part in the nation's life and gets a formal acknowledgement from the state, it is natural that the state financially supports religious institutions that belong to the Established Church. This is another expression of the tight link between the state and its formal religion.

C. Canada

The constitutional relationship between state and religion in Canada reflects the historical and constitutional inheritance of the British understanding of the proper relationship of "church and state" and of parliamentary government, as modified by the historical evolution in the Canadian experience. Canadian constitutional law has never fully accepted the Christian theolo-

42. For example, the Book of Common Prayer was annexed to the Act of Uniformity in 1662. Similar confirmation of the Book of Common Prayer occurred in 1588, 1872, 1990 and 1994.

43. See generally Robert C. Post, Blasphemy, the First Amendment and the Concept of Intrinsic Harm, 8 Tel Aviv U. Stud. L. 293 (1988).

gies, despite the fact that Canada is, and has always been, a country with an enormous Christian majority. The British concept of parliamentary sovereignty means that in the Canadian practice, Parliament has supreme and sovereign authority over the affairs of all individuals and institutions within its geographical jurisdiction, including all religious institutions and the religious practices of individual citizens, subject only to the generally applicable constitutional limitations on its sovereign legislative power. This means that the Canadian Parliament theoretically has supreme authority over all religious institutions and individuals engaged in religious practices. There are, however, some limitations on the exercise by Parliament of its sovereignty, especially in matters of religion. The entrenchment of the Canadian Charter of Rights and Freedoms, which creates standards against which legislation and administrative actions must be measured by the courts, limits the exclusive sovereignty of the legislature when the courts strike down legislation failing to meet these standards. It should also be mentioned that the Constitution Act of 1867, which is the major source for the principal division of sovereignty, is silent in relation to jurisdiction over religion, religious institutions, and religious practice in Canada, and in relation to the protection of freedom of religion. However, this lacuna can be explained: the protection of the liberties in matters of religion was left to the common law, inherited as part of the United Kingdom's constitutional system. Moreover, there was pre-confederation legislation, which guaranteed the free exercise and enjoyment of religious profession and worship, without discrimination or preference.
The Constitution Act of 1982 focuses on the protection for religious freedoms. The preamble to the act states: "Canada is founded upon principles that recognize the supremacy of God and the rule of law." The Canadian Charter of Rights and Freedoms further states that everyone has certain fundamental freedoms, such as the freedom of conscience and religion, and the right not to be discriminated against based on religion.

As to the legal status of religious institutions, the Canadian system should, by conceptual analysis, be classified somewhere between the British model of establishment and the American model of a complete formal equality of all religions (resulting from the constitutional requirement of separation). The legal status of religious institutions in Canada encompasses elements of establishment and of equality. Prior to the Conquest of Quebec in 1759, the Roman Catholic Church was the only church permitted in the French colony and enjoyed the status of an established church. After the enactment of the Constitutional Act, 1791, the Church of England enjoyed certain property rights, although the law had never formally recognized it as an established church. Thus, one may claim that the Church of England is still the established church of some regions of Canada, since the legislation which established it with certain statutory privileges remains in force in the absence of legislation disestablishing it. Moreover, the provision in the preamble to the Constitution Act, 1982, relating to the "supremacy of God" might be said to accord some constitutional privilege to those religious institutions that acknowledge this "God."

While the legal status of religious institutions in Canada partly reflects the British establishment influence, their status is also subject to the principle of equality of all religions other than the established church. The Ontario High Court held that

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54. See id. § 15.
55. See M.H. Ogilvie, What is a Church By Law Established?, 28 Osgoode Hall L.J. 179 (1990).
56. See Constitution Act, 1867 (U.K.), 30-31 Vict., ch. 3, § 129, reprinted in R.S.C. 1985, App. II, No. 5. This is the situation in Nova Scotia, see 32 Geo. II, ch. 5 (1758) (N.S.), New Brunswick, see 26 Geo. III, ch. 4 (1786) (N.B.), and Prince Edward Island, see 43 Geo. III, ch. 6 (1802) (P.E.I.).
57. See supra note 52 and accompanying text.
58. See Ogilvie, supra note 44, at 154.
there is no established church in Ontario as there is in England, and that all religious bodies are equal before the law. However, the Ontario courts expressed in several cases the view that while all religious institutions enjoy equality before the law, Christianity deserves a special protection since it is a part of the common law. But, it seems that these rulings would be rejected in modern circumstances. It was held that all religious organizations are equal in the eyes of the law, including the Church of England, which has the same status as that of any other religious body. Moreover, it was held that the common law regarded all religious organizations as voluntary associations, whose authority over their members is based on their voluntary membership. The tribunals of religious organizations are not civil courts and have no authority derived from the Crown; rather, in order to give effect to their decisions, church tribunals must apply to the courts.

III. State and Religion in Israel: Challenges and Problems

When Benjamin Ze’ev Herzel, founder of the Zionist idea, dreamt about the state of the Jewish nation, he had the vision of separation of state and religion. This vision has not become the reality in Israel. Separation of state and religion does not exist in Israel. Israel is defined in its legislation as a "Jewish and democratic state."

59. Dunnet v. Forneri [1877] 25 Gr. 199 (Ont. H.C.); see also Regina v. Dickout [1893] 24 O.R. 250 (Ont. C.A.), in which the Ontario Court of Appeal stated that the fundamental law of the province makes no distinction between churches and denominations and that everyone is at liberty to worship God as they please.
61. See Ogilvie, supra note 44, at 155 (referring to the decision of the House of Lords in Bowman v. Secular Society, Ltd. [1917] A.C. 406 (H.L.)).
63. See id. These principles were accepted in Canada in subsequent late nineteenth-century cases, such as Lyster v. Kirkpatrick [1866] 26 U.C.Q.B. 217 (Ont. H.C.).
64. See Amnon Rubinstein, State and Religion in Israel, 2 No. 4 J. CONTEMP. HIST. 107, 108 (1969).
65. See, e.g., Basic Law: Human Dignity and Freedom, § 1(a), 1391 L.S.I. 150 (1992) (stating its purpose as "to protect human dignity and freedom in order to affix in a basic law the values of the State of Israel as a Jewish and democratic state.") (Hebrew); Basic Law: Freedom of Occupation, § 2, 1454 L.S.I. 90 (1994) (setting out its purpose as defending the freedom of occupation in order to affix in a basic law the values of the State of Israel as a
ing formal constitutional validity, serves the courts as a general guideline in the process of statutory construction and declares the establishment of a Jewish State based on freedom, justice, and peace, envisaged by the prophets of Israel.66

One may argue that the term "Jewish" does not necessarily refer to a religious identity, but rather a national identity. According to this line of argument, the usage of this term is intended to describe a common cultural and historic affiliation that does not have a direct connection to the Jewish religion.67

Religious interference in matters of state and the state's establishment of religion can be found in various fields. State establishment of religion is expressed, for example, in the field of education (there is an established state religious education system68), and in the fact that the Rabbinate and the religious courts are authorities established by the state's laws. Moreover, the official status of the Rabbinate in the framework of the state carries with it the inevitable question of how to determine the limits of the Rabbinate's freedom of activity. The secular approach tends to view the Rabbinate as an ordinary government agency charged with judicial functions specially laid down for it by state law. Therefore, the Rabbinate is accordingly subject to judicial review by the Supreme Court in the exercise of its functions, and the exercise of any action not provided by law constitutes an excess of power to be enjoined.69 This status of the

Jewish and democratic state). It should be noted that although Israel has no formal constitution, the eleven Basic Laws enacted by Israel's parliament together comprise the evolving Israeli constitution. These laws are relatively recent, but the principle of a Jewish State existed from the day of the establishment of the State, in the Declaration of Independence, and later in various judgments. See, e.g., Elections Appeal 1/65, Yardor v. The Chairman of the Election Committee, 19(3) P.D. 365.

66. 1 L.S.I. 3-5 (1948).

67. See Gavison, supra note 34, at 57. For a discussion about the term "Jewish," see Asher Maoz, The Rabbinate and the Courts: Between the Hammer of Law and the Anvil of "Halakah," 16-17 Hebrew Law Yearbook 289, 308 (1991) (Hebrew); Symposium, The Role of Religion in Public Debate in a Liberal Society, 30 San Diego L. Rev. 643 (1993). There is a common claim that the Jewish values, the heritage of Israel (to which The Foundations of Law refers), are broad enough to include all matters that seem related to our culture and heritage. In this context, see Aharon Barak, 1 Statutory Interpretation 528-29 (1992) (Hebrew); Haim Cohen The Law of Remnant, 13 Jewish Law Yearbook 285, 300 (1987).


69. On the other hand, the Rabbinate's approach is that it is an autonomous body, free to exercise all the functions ordered or permissible under Jewish religious law. For example, the Rabbinate Court has passed
Rabbinate, especially when seen as a government agency that can be judicially reviewed, illustrates the strong association of state and the religious bodies in Israel.

The population's religious needs are supplied for by authorities established by law (through the religious councils), budgets are allocated for religious purposes, and there is a Minister of the Cabinet responsible for religious affairs. Religion's involvement in the state's matters is further expressed, for example, by the fact that Kosher food is provided for by law in the Israeli Defense Force, the Israeli army, and in the government facilities, and special orders in matters of religion were set in the Israeli Defense Force. Many laws are of a religious nature, such as the laws limiting the raising of swine, or the laws forbidding the public showing of leaven ("hamez") during Passover.

This situation causes a continuous debate. There are scholars who claim that the lack of separation between the state and religion results in the absence of "freedom from religion," which is, as described above, a fundamental value in a democratic state and in a system of fundamental civil rights. Thus, every citizen in Israel is subject to the authority of religious institutions in matters of marriage and divorce even against his will. There is no civil alternative for religious marriage. The situation creates difficulties, especially when religion forbids the marriage of a couple (such as in the case of a divorced woman and a "Cohen"), but also in the case of a secular couple that refuses to marry in a

judgements denouncing or ostracizing people who refuse to be judged by the Rabbinate Court, considering themselves to be outside the Court's jurisdiction. See H.C. 3269/95, Kats v. The Rabbinate Regional Court in Jerusalem, 50 (4) P.D. 590 (Hebrew); see also Izhak Englard, Law and Religion in Israel, 35 Am. J. Comp. L. 185, 197 (1987).


71. These include, for example, orders that forbid entertainment activities that involve desecration of the Sabbath. Additionally, the soldier's burial is a religious ceremony.


73. The Rabbinical Courts Jurisdiction Law [Marriage and Divorce], 134 L.S.I. 165 (1953), applies to all Jewish citizens and residents by the "Halachah of Israel religious law criteria," even despite their will. About religious marriage, see Pinhas Shifman, State Recognition of Religious Marriage: Symbols and Content, 21 ISR. L. REV. 501 (1986).
religious ceremony.\textsuperscript{74} The legislature's choice of an exclusive form of religious marriage violates freedom of marriage, and also freedom from religion, because it obliges the couple to get the services of a religious agency in its most intimate hour.\textsuperscript{75}

Another example of the deprivation of one's freedom from religion, which results from the lack of separation between state and religion, can be found in the subject of the "Sabbath," the day of rest, and especially concerning the issue of opening businesses on the Sabbath. Until 1990, the law authorized municipalities to regulate the opening and closing of shops, workshops, cinemas and other places of public entertainment, and to decide the opening and closing hours on holidays.\textsuperscript{76} Under this law, many municipal bylaws were enacted, which forbade the opening of businesses on the Sabbath.\textsuperscript{77} This bylaw was reviewed in the court and was declared void, because it limited the freedom of religion (which also includes the freedom not to believe).\textsuperscript{78} This limitation can only be effected by the authorization of the legislature (the Knesset). In response to this decision, the Government, which was supported by a coalition composed in part by religious parties, advanced an amendment to the Municipalities Ordinances that reversed the court's decision, and allowed the municipalities to forbid businesses from opening on the Sabbath.\textsuperscript{79} This development in the law has shown that the lack of separation between law and religion enables the legislature, influenced by political considerations, to command the support of the religious parties in the Knesset and to diminish the civil rights and freedom of religion.

This latter example reflects the complicated situation in matters concerning political considerations. Generally, the different branches of government act in opposite directions: while

\textsuperscript{74} In the matter of marriage and the democratic right for civil marriage and divorce, see Jessaiah Berlin, \textit{Judaism and Israel as a Democracy}, in \textit{Secular Humanistic Judaism} 2, 4-7 (1988) (Hebrew).


\textsuperscript{76} The Municipalities Order, § 249(20), 8 L.S.I. 197 (1990).

\textsuperscript{77} See, e.g., The Bylaw of Jerusalem (Businesses opening and closing), 1955.

\textsuperscript{78} See Cr. P. (Jerusalem) 3471, 3472/87, State of Israel v. Kaplan, 1988(2) P.M. 265.

\textsuperscript{79} The Municipalities Order Amendment Law (No. 40), 1336 L.S.I. 34 (1990). However, the municipalities usually do not force the law in this field, and by this, allow the opening of cinemas and restaurants on Saturday. See Shimon Shetreet, \textit{Between the Three Branches of Government—The Balance of Rights in Matters of Religion in Israel} 25-26 (1998) (Hebrew).
the judiciary has contributed to the protection of civil rights in matters concerning religion and the freedom of and from religion, the executive and the legislative branches have decreased this protection, usually at the behest of political interest groups.80 The Knesset has enacted many laws that have adversely affected the freedoms and rights in matters of religion, by its own initiative or as a response to the decisions of the courts. Under most of the governments, the executive branch had a negative impact on the balance of the civil rights in matters of religion. The executive branch’s policy throughout these governments amounted to a constant pattern of refusal to obey the court’s judgments that improved civil rights and freedoms in matters of religion, or to strengthen the recognition of the supremacy of the judiciary. However, sometimes, the policy of the executive branch strengthened these rights when the executive refused to enforce the laws that imposed a religious regime (such as in the case of the Sabbath that was mentioned above). The problem is that this non-enforcement policy has been changed lately, resulting in a direct restriction of the rights in matters concerning religion.

The only ray of light in this situation is the judiciary. The courts have listened to the public’s outcry for freedom from religious coercion and have rendered judgments improving secular life and civil rights. Thus, for example, the courts have decided that public television could broadcast on Saturdays, that cinemas could remain open to the public on Saturdays, and that Israel would recognize a non-orthodox conversion that was performed abroad. These judgments that have strengthened civil rights in matters of religion, have often caused the executive and legislative branches to reverse them. Usually this would occur through executive-initiated legislation, which would effectively reverse the progress achieved by the judiciary. Despite these laws, however, the social climate and the public pressure prevented a complete retreat from the courts’ decisions.81 On rare occasions, the legislation actually continued the improvement tendency achieved by the courts, such as in reputed spouse cases.82

The situation is even more problematic, since there are non-orthodox Jewish communities which feel discriminated against and feel that their freedom of religion and belief has been severely restricted. It is clear that Orthodox Judaism is the for-

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80. For comprehensive research on this subject, see generally SHETREET, supra note 79.
81. For example, in the case of businesses opening on the Sabbath, see id.
mally preferred religion and school of Judaism. The state has constantly refused to grant the Conservative and Reform Rabbinites the formal status that the Orthodox Rabbinate holds. Conservative and Reform rabbis do not sit on the religious courts, are not allowed to carry out marriage ceremonies, do not serve in the military rabbinate, and do not receive salaries from the state. Until this author began serving as the Minister of Religious Affairs, the ministry refused to provide any financial support to these communities at all, even though the court had so ordered. These communities feel that this sort of discrimination severely violates their freedom of religion, especially since they are forced to use the orthodox services (such as in the fields of marriage and divorce), even though it is against their belief and conscience.

This discrimination against the non-Orthodox Jews is also reflected in the denial of membership to non-Orthodox Jews in religious councils, which are responsible for providing religious services. Until recently, non-Orthodox Jews could not participate as members of the religious councils, as a matter of policy of the dominant orthodox group. This practice was recently overruled by the Supreme Court, which allowed non-Orthodox Jews to be members of the religious councils. In one case, the Supreme Court ordered the Netanya Religious Council to admit Mrs. Brener, a non-Orthodox female who was excluded from a city’s religious council, in place of another member. Although the council allegedly obeyed this decision, it in fact found a way to avoid its proper implementation. A limited administrative panel of the council was founded, and the larger panel, in which Mrs. Brener was admitted to membership, stopped gathering. This issue of membership in the religious councils has entered public debate these days because the religious parties have threatened to withdraw their support of the coalition and the government if the judgments of the Supreme Court on this topic are enforced.

These numerous examples of violation of rights, equality, and the freedom of religion and conscience have brought many people to reconsider the idea of separation between state and religion. It should be mentioned that those who claim that we in Israel should separate state and religion often base their argument on the premise that one’s religion is a private matter, and

83. See H.C. 3551/97, Brener v. Ministers Committee According to the Religious Services Law (not yet published); see also H.C. 4560/94, Hofman v. Ehud Olmert and the City Council of Jerusalem (not yet published).

84. See H.C. 3551/97, Brener v. Ministers Committee According to the Religious Services Law (not yet published).
therefore the state should not interfere in such matters of conscience and religion. 85

A number of proposals for the separation of state and religion in Israel have been put forward. The Knesset has continuously rejected these attempts. A recent example of an unsuccessful attempt was the rejection of a bill calling for the separation of state and religion by May 6, 1999. The bill, among other things, would have provided for civil marriage and divorce in Israel. The legislation, proposed by Meretz Knesset member Naomi Hazan, was defeated 46-22. Justice Minister Tzachi Hanegbi, who responded for the Government, countered that the bill, rather than fostering pluralism, would only cause further division and dissent between secular and religious Israelis. 86

Prime Minister Benjamin Netanyahu voted against the bill. The Labor faction decided in principle to oppose the bill, but gave its members independent discretion on voting. This rejection shows that the Israeli public, as represented by its elected Knesset members, objects to the conceptual model of separation between state and religion. 87

However, a number of developments may lead to more solutions for pressing problems in matters of religion, including marriage, burial, and the like. It is doubtful whether the direction will be towards separation. 88 The pressure for change will be exercised on a number of fronts. First, the traditional religious society in Israel is becoming more open to liberal values. Another development is the increased support for pluralism in Israeli society. Non-Jewish groups and non-Orthodox Jewish groups have become more insistent on their civil rights, and the current situation in matters concerning state and religion has become unacceptable. The religious institutions themselves have begun to understand that this politicization has damaged the religious sector and that only independent religious institutions can function properly. Another current development is the growing openness of Israeli society towards civil rights and human rights.

Another proposal is that the state would give formal recognition to the religious communities that are not recognized today

85. See Gavison, supra note 34, at 56.
86. For an opposing view, see Alon Harel, Liberalism Versus Jewish Nationalism: A Case for the Separation of Zionism and State (Hebrew) (unpublished).
87. Some believe that the separation model is still possible in Israel. I doubt it.
(for example, non-Orthodox Judaism). This would enable the state to support equally all existing religions and to correct the discrimination that occurs today.

Others propose a different approach to keep the current relationship between state and religion, but to complement it. According to this proposal, specific arrangements intended to solve the current difficulties will be implemented to remedy certain aspects of the present legislation. For example, in matters of marriage, the religious marriage would still remain the only form of marriage possible in Israel, except in cases where the person is disqualified from marriage according to religious law, in which case there would be a civil alternative.

My view on state and religion in Israeli perspective is that we should review the definition of the State of Israel as a Jewish and Democratic State and that this definition should be clarified. Israel is neither a completely religious state nor a completely secular one. Israeli society is a Jewish-traditional society, and therefore, this should be the constitutional assumption that would guide the courts when deciding matters of religion.

IV. STATE FUNDING OF RELIGIOUS INSTITUTIONS

After having analyzed the relation of state and religion as reflected in Israeli law and practice, we can turn to the question of state financial support allocated to religious institutions. As stated above, the model that society had chosen on the issue of state and religion provides the answer to the question of state support for religious institutions. When the state adopts a separation model, it is clear that the religious institutions will not receive any direct financial support. Therefore, it was important for me to state clearly that Israeli practice does not follow a separation model. It is also important to mention that there are proposals to change Israeli practice in this regard. Such a change would certainly alter the state’s position on the funding of religious institutions, although it seems remote that such a change would be adopted.

As mentioned above, there is no separation of state and religion in Israel. Therefore, the state broadly supports and finances religious institutions, especially Orthodox-Jewish ones, which are backed by the significant political power of the ultra-orthodox parties in the Knesset.

Government funding for religious institutions has different sources within the government. Various ministries provide this funding, including the Ministry of Religious Affairs, the Ministry of Education, the Ministry of Internal Affairs, the Ministry of
Labor and Welfare, and other ministries that allocate budgets for specific purposes, many of which are ostensibly non-religious, but which indirectly contribute to the development of those religious institutions. The main supporter, however, is still the Ministry of Religious Affairs, whose budget is mostly designated to the ultra-orthodox ("Haredi") educational and social services, religious educational institutions (the "Yeshivas"), religious youth movements, religious cultural institutions (which are institutions that hold Torah lessons for the ultra-orthodox public), and the religious research institutions. A much smaller part of the Ministry's budget is designated for services to the whole public, such as synagogues, the Chief Rabbinate, the religious courts, and cemetery development. It should be mentioned that the religious education system is also supported by the Ministry of Education.

In the past, the government's budget included a list of the sums allocated to religious institutions by name. This grant system caused great controversy, and consequently was changed by an amendment to the Budget Foundations Law. This amendment provided that the Budget Law would appropriate an inclusive sum of support for every category of public institutions, which would be equally distributed to all institutions included in that same category. Although the amendment apparently aimed at achieving a fair and equal allocation, equal distribution was not achieved. The government could continue discriminating between different public institutions, and could grant greater allowances to the Yeshivas. This discrimination was possible due to the formulation of the law. The equal allowance duty applied only to institutions in the same category, and the government was not obligated to provide equal funding to different categories. Another way in which the law deviated from the principle of equality was through its exception of two institutions—"The Independent Education System of the 'shkenazi'" and "The Sephardi Center of Fountain of Religious Education in Israel"—which are religious "Haredi" education networks, and allowed the government to provide more support for them. They have become much larger educational systems as a result of the big budgets they get from state sources. They offer education, for lower or no fees, though they do not have a high quality of education.


90. See Budget Foundations Law, §§ 3(a)(9)-(10), 1139 L.S.I. 60 (1985). Note that the equality duty is explicit in the words of the law.
The system of distribution of public funds was challenged in the Court. An association named “Ma’ale” appealed to the Supreme Court after its request for allocations had been denied.91 This association was a nonprofit organization whose activity focused on “organizing and maintaining religious services by combining the Torah of the Israeli people, the Israeli nation, the land of Israel and the State of Israel.”92 It requested funding by virtue of the budget section that was concerned with cultural activities for the “Haredies.” The Supreme Court dismissed the petition. Justice Barak (now the President of the Supreme Court) reviewed the legal arrangement and decided that it was valid. The law, according to his reasoning, properly expressed the principle of equality in distribution of allowances and in the authority’s duty to act equitably according to reasonable guidelines and clear, relevant criteria. I respectfully disagree with this approach. In his opinion, Justice Barak failed to examine the actual discrimination in the distributions of allowances and the priority that was clearly given the “Haredi” institutions.93 He also dismissed the arguments of the “Ma’ale” association, by determining that the association was not a “Haredi” one,94 and therefore was not allowed to receive the allocations.

The question was raised again in 1995, when the State Auditor Report was published.95 The report showed that the Amendment to the Budget Foundations Law had not solved the serious disorders in the field of financial support given to religious institutions. The Ministry of Religious Affairs could still support “preferred” institutions, motivated by political considerations, in the disguise of neutral legal criteria. The Report described and criticized serious violations and disorders in the allocation system. For example, the Ministry funded various organizations although clearly knowing that these organizations’ reports were false. In many cases, the Ministry disregarded the fact that the organizations had not fulfilled the required terms. Another violation was the fact that the Ministry ignored the findings of its own internal audit unit. Even when the Ministry found that there had been

92. See id. at 592.
94. Justice Aharon Barak defined “Haredis” as Jews who keep the commandments, and whose unity is the fact that they are religiously stricter in the matters of education, community character, and lifestyle than other religious Jews. See id.
95. See STATE AUDITOR, ANNUAL REPORT No. 45, at 236 (1995).
almost no activity in the institutions that requested support, the Ministry supported them. The report found that the Ministry had failed in its duty as a public trustee and as responsible party for the fair and equal distribution of public funds.\(^6\)

At that time, this author was appointed Minister of Religious Affairs. I decided to set up a public committee, headed by Professor Avraham Friedman, to review the appropriate criteria for financial support of the Ministry. Another decision was to cut off immediately the support until the Committee had published its Report. The Committee's Report was published in August 1995.\(^7\) The report focused on the procedures and standards of the allowances committee. It was decided that the allowances committee must publish its recommendations that public representatives would be members of the allowances committee, and that an appeal committee would be set up to provide for an appropriate appellate procedure. The supervision and review over the decision making and distribution procedures was reinforced. In September 1995, I submitted a Notice to the Cabinet, in which I adopted the Committee's conclusions and hence these conclusions have become binding. I explained that an extensive revision was taking place in the Ministry of Religious Affairs and that my policy, concerning the priorities in the process of the support allocation, was based on the considerations that had been acknowledged by the law or by Government decisions, in order to act with an equal and uniform policy. When the Committee's Final Report was published in May, 1996, I ordered that it should be implemented. Unfortunately, the government changed after the 1996 elections and the new Ministry did not implement the committee's recommendations.\(^8\)

The conclusion to be drawn from this broad review is that even when the state's policy is to support religious organization, and to maintain the connection between state and religion, it is highly important to ensure that principles of justice, equality, reasonableness, fairness, and appropriate procedure operate in the allowance distribution process.

As to the question of the appropriate policy on the subject of government funding of religious institutions, this author has expressed the view that the answer is derived from the policy adopted concerning the relationship between state and religion. The lack of separation in Israel together with the growing power

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\(^6\) See id. at 261.

\(^7\) See Amendment no. 10 of the criteria of the Ministry of Religious Affairs Allocating of Funds to Public Institutions, Y.P. 1995, 500.

\(^8\) See Shetreet, supra note 89, at ch. 15.
of religious parties in the Israeli parliament, has resulted in continuous government funding of religious institutions, sometimes even at the expense of the general public's religious needs. This preference for the "Haredi" sector will continue as long as it keeps its political power.

If the author's proposal for a new conception of the term "Jewish State" is accepted, and we interpret the term to mean a traditional-Jewish state, we will be able to continue supporting religious institutions and to allocate that support to the ultra-orthodox institutions, but also to traditional Jewish institutions, such as institutes for traditional and secular communities, in which lessons in Judaism will be taught. Another change that should occur is a reallocation of the Ministry of Religious Affairs' budget, so that part of the budget allocated to the general public's needs will grow, in order to provide better public religious services.

V. REFLECTIONS ON ISRAEL AS A JEWISH AND DEMOCRATIC STATE

The flow of substantial state funds to religious institutions has caused a major change in the power structure of the State of Israel. The funding of ultra-religious school systems and the distribution of large amounts of state funds to religious institutions gave the religious parties and their institutions a great advantage. Likewise, the large funds granted to Yeshivas for an increasing number of Yeshiva students has brought about a social crisis and a structural deficiency in Israeli society, which required immediate remedy.

The present and future character of the State of Israel is now at one of the most significant crossroads in the history of the country. The issue is the direction in which Israel will develop, given the substantial increase of the religious parties due to the large amounts of state funds transferred to their institutions. Will it be a Halacha state? A religious state?

I wish to express some reflections on Israel as a Jewish and democratic state. I also wish to refer to a strategy to ensure that Israel remains democratic and yet respectful of its Jewish tradition. This can be done by adopting an ideology that would view Israel as Zionist, democratic, and traditional, and by initiating an Alternative Strategy including an alternative educational system which would offer three options in one school: general, traditional, and religious.99

99. Two of the most disputed issues in Israeli society have been brought to the Supreme Court, the first is the issue of recruiting Yeshiva students to the armed forces in H.C. 3267/97, Rubinshtein v. Minister of Defence (not yet
The Conversion Bill, providing that conversion to Judaism in Israel can be done only in orthodox ceremony, has instigated a major crisis in the relationship between Israel, the Jewish community in Israel, and the Diaspora. This crisis must give rise to an in-depth analysis of the challenges that are posed by the developments which have resulted in the Conversion Bill. Before suggesting an Alternative Strategy, which should provide a constructive response to the increasing power of non-democratic fundamentalists and nationalistic groups in Israel, I wish to outline the options that are being proposed by various groups for dealing with the Conversion Bill. The options are as follows: first, procedural compromise—freezing the legislation, and withdrawing the court petitions; second, passing of the present Conversion Bill; third, initials on ID cards (e.g., Y, M, N); fourth, amending the present bill to limit the requirements of Rabbinical approval only for marital status (marriage and divorce); fifth, expanding the Conversion Bill to invalidate non-orthodox conversions, whether conducted in Israel or abroad; sixth, a compromise agreement that will give some role to non-Orthodox Jewish communities in Israel, along the lines suggested by the Ne’eman Committee (non-orthodox participation in the education program, and the shared ceremony will be the orthodox procedure). All of these preceding options would not be necessary if common sense and good judgment had prevailed, and the sense of strength and power of the religious parliamentary factions had not given rise to this legislation.

This is another indication of the great need to develop a new strategy, an Alternative Strategy, for assuring that Israel continues to be a Zionist, democratic, but yet traditional country; not a Halacha country, not a strictly religious state, but yet not totally secular.

I wish to present an Alternative Strategy that could provide an action plan for making Israel a Zionist, democratic, and traditional state which will maintain a moderate approach, respect democracy, and maintain the unity of the Jewish people, but which will maintain tradition and attachment to Jewish culture.

published); the second is the issue of Jewish Conversion in H.C. 1031/93, Pesaro v. Minister of Interior, 49 (4) P.D. 661.

100. For an account of the Ne’eman Committee for the Giur issue of 1997, see SHETREET, supra note 89, at 326.
A. The Diagnosis and Possible Remedy

The aim of the Alternative Strategy is to provide an action plan in order to develop a constructive response to the challenge of recent trends in Israeli society of nationalistic radicalization and religious extremism.

These trends caused the democratic bloc to lose ground to religious nationalists and ultra-orthodox non-Zionist groups. These groups defy democratic values, claim exclusivity, and reject moderation, tolerance, and the pluralism of Jewish people in Israel and elsewhere. These trends have produced negative symptoms in Israeli society, including attacks on the Supreme Court, denial of the principle of the rule of law, delegitimization of secular Zionism, and the beginning of the legislation of the Conversion Bill.

The strategy of meeting the challenge of the increasing power of the radical nationalistic groups and the religious groups is based on the creation of a partnership between the democratic secular bloc and the traditional bloc, which is democratic and mostly Sepharadi, together with the moderate religious.

This strategic partnership will enable the democratic bloc to maintain the character of the state as Jewish and democratic and will enable it to prevent developments which are contrary to democratic values or offensive to certain sectors of the Jewish people, such as the secular or the non-orthodox.

The Conversion Bill and the previous attempts to change the definition of who is a Jew illustrate that the extreme religious groups as well as the religious nationalist groups affect the status of Diaspora Jews, not only that of Jews in Israel. It is therefore as much the responsibility of Diaspora Jews, as it is that of the democratic bloc in Israel, to develop a meaningful response to the challenge of the increasing power of the non-Zionist and anti-democratic forces in Israeli society. The Diaspora Jews must take part in the Israeli agenda in order to prevent an adverse impact on them by extreme or nationalist religious groups. The relationship between Israel and the Diaspora should be modeled on an extended family relationship.

B. The Traditional Bloc

The traditional bloc in Jewish society in Israel has been overlooked by sociologists and political leaders, as most of them were unaware that there is an identifiable bloc practicing a certain way of life that could be defined as "traditional."

The traditional is defined in Israel as middle of the road, moderate in matters of tradition, respecting tradition, and sup-
porting democracy. A traditional Jew exercises freedom of choice in matters of tradition and respects the free choice of others. The traditional Jew (as well as the secular) defines himself as orthodox, but is more moderate in his approach to practicing the *tariag mitzvot* (the 613 commandments of Judaism). The traditional Jew often combines prayer in an orthodox synagogue on Shabbat and driving to a soccer stadium, to a barbecue, a beach, or a museum.

The division of Israeli Jewish society according to personal attitude toward religion and tradition is as follows: 4% are ultra-orthodox (*Haredim*), 12% are religious (*datiim*), almost 40% are traditional (*masortiim*) and over 40% define themselves as secular (*hiloniim*).¹⁰¹

Traditional Jews supported for many years the first Prime Minister, David Ben-Gurion and his Mapai Party, but in recent times, have been reluctant to support the Labor Party because of its strong association with the radical Left, which caused the Labor Party to be viewed, by the traditional bloc, as anti-religious. This is also related to the very strict and hostile attitude of the ultra-orthodox rabbis toward the Labor Party leaders, in contrast to their highly forgiving approach to the violations of religious commandments by leaders of the Right.

Many families from the traditional bloc have been more inclined to send their children to religious nursery schools because those schools offer free or low-cost education with transportation, compared to the ordinary high-cost nursery schools of *Naamat* or *Wizo* or other kindergartens. The result is that people who are democratic and traditional in attitude are attracted by religious organizations at an early age, and later become associated with a political movement which is religiously extreme, although originally they were not ultra-orthodox.

Against this background there is a pressing need to develop a partnership of the democratic bloc with the traditional bloc on the ideological and operational levels. Such a partnership could also include the moderately religious as well as those who are concerned with excess religious radicalism.

The plan to create a partnership between the democratic secular bloc and the traditional (democratic) bloc and the moderate religious is based on two levels. One is on the ideological level; the other is on the operational level. On the ideological level, there is a need to promote, develop, and market a moderate ideology of the State of Israel as a Zionist, democratic, and traditional state. On the operational level, there is a need to

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¹⁰¹ See *id.* at 498.
develop an alternative educational system, and to lobby for legislation to implement it. This alternative educational system should offer three options of education in one school: general (secular), traditional, and religious.

C. The Ideological Level

As to the first level, the development and dissemination of an ideology of a Zionist, democratic, and traditional state, a number of points need to be emphasized. The concept of “Zionist” emphasizes commitment to Zionism and rejects the position of the ultra-orthodox. At the same time, it rejects religious radical nationalistic attitudes.

The rejection of the ultra-orthodox position is important. The real meaning of Zionism has to be reinstated and emphasized because the ultra-orthodox do not recognize Zionism of the state nor do they respect its flag. They do not share the recognition of Independence Day, nor do they participate in the memorials to the dead Israeli Defense Force soldiers, nor of the Holocaust victims, hence the importance of the emphasis on Zionism.

The nationalistic religious groups have, in recent years, directed themselves less to religious Zionism and more to nationalistic religious directions, with the result being greater radicalization at the expense of democratic values. This underscores the importance of emphasis on a Zionism that is democratic.

The emphasis on a democratic state refers to the importance of the rule of law, human rights, rights of non-Jews, judicial independence, the High Court of Justice, and equality of all, including the recognition of pluralism in Jewish life.

The principle of “traditional” denotes that the country is neither a religious nor a Halacha state, but neither is it totally secular; rather, it is in the middle of the road, moderate, and traditional. This concept is generally reflective of the factual situation since 1948 and the subsequent changes.

This concept reflects the de facto practice of observance of certain basic Jewish values by the Jewish State, including Shabbat, kosher, religious marriage, and education. This arrangement was effected by virtue of the agreements, known as the Status Quo Statement, between the founder, David Ben-Gurion, and other Zionist leaders. The Zionist groups formed the consensus and then committed to the Haredi group—“Aguda.” This agreement was designed to form a unanimous agreement on the Declaration of Independence and to create a united front of the Jewish
people vis-à-vis the British and the international community in the efforts to achieve the establishment of the State of Israel.

The concept of traditional country will enable the democratic bloc to make an honest effort at attracting the support of the traditional bloc. The adoption of the proposed ideology will give a clear message that the democratic bloc respects tradition and Jewish heritage and culture, as well as democratic values and principals. Such ideology will make it difficult, though not totally impossible, for the opponents and rivals of the democratic bloc to depict it as anti-religious and hostile to tradition as is the situation today.

On the cultural level, the alternate parallel education system will give an adequate response to the present unsatisfactory state of affairs in which the ordinary secular Jewish Israeli is totally detached from his Jewish culture.

D. The Operational Level

The second level of the action plan is operational. It relates to the creation of an alternative educational system and the lobbying for such alternative education in Parliament and in general public opinion. I propose that the democratic bloc will support a system of education that will offer both democratic and traditional Jewish values.

The alternative education school should offer one school and three options. The options should be the general, the traditional, and the religious. The idea is that all will study democracy and tradition, and the Jewish tradition studies will encompass a different scope in each of the options. The general will study less, the traditional option will study more, and the religious option will study the most Jewish tradition as well as conduct prayers in school. In the alternative education system, teachers will be excluded from proselytizing. They will teach Jewish customs, traditions, and thoughts, but must refrain from advocating hazara bitshuva (changing one's way of life to that of a religious, observant Jew). Whoever is not able to refrain from proselytizing should be disqualified from teaching in the alternative system.

The alternative system will be created to parallel and supplement the existing educational systems, which will continue to operate. The alternative system will only add to the existing options of schools.

Another aspect of the action plan is legislation providing for the compulsory study of democracy and tradition in all schools. Schools that refuse to include democracy or tradition studies will lose 30% of their state support. The action plan will be paid for
by funds from non-governmental organizations plus state funds that are afforded to schools. In addition, a public campaign will be conducted to promote legislation introducing the alternative education system.

The work plan of the Alternative Strategy calls for a study group of education experts and educators to lay down in detail the "one-school three-option" plan, and to establish pilot projects in a number of cities. In addition, a lobby strategy has to be laid down for a legislative program for free and compulsory education beginning at age four, for the "one-school three-option" model, and for compulsory studies of tradition and democracy in all schools.

This concept is a result of the analysis of Jewish society in Israel: 40% of the Jewish population define themselves as secular, 20% as religious, and 40% as traditional (Jews that fulfill most of the religion's commandments, but oppose any kind of religious coercion). The majority of Israel's Jewish society opposes a regime of separation of state and religion and would like to maintain the state's definition as a Jewish State.

According to this new approach which I have advocated, the term "Jewish" in the definition of the state as a "Jewish and Democratic State" will be understood as "traditionalism." Therefore, legislation of a national nature, such as the law that forbids opening of "entertainment businesses" (such as restaurants, cinemas, and theatres) on the "Ninth of Av" (the date of the destruction of the Jewish Temple), is justified. The interpretation of the terms in Jewish traditionalism should neither be strict nor broad. We should find a moderate way, for example, the Kashrut (the Jewish dietary laws). We should not abolish the Kosher requirement in government institutes and in the army, but the interpretation of this term should not use the orthodox strict approach. Thus, the Kashrut of a restaurant will be examined by the Kashrut of the food served, and not by the religiousness of its owners. This is, in this author's view, the solution for most problems in matters concerning religion in Israel.

102. See id.

103. See Shetreet, supra note 79, at 43. This majority is composed of many of the liberal seculars, the traditional society, and the religious Jews that respect democracy and civil rights.

104. The Prohibition of the Opening of Entertainment Business on the Ninth of Av Law, 1637 L.S.I. 8 (1997). The Ninth of Av is the day of the destruction of the Temple according to the Jewish calendar.

105. This is true if we explain this law as a national memorial day for the destruction of the Kingdom and the Temple (Beit ha-Mikdash). See Shetreet, supra note 75, at 467.
CONCLUSION

What lesson, if any, can be learned by American students of the relationship between religion and the state from the Israeli experience of state funding of religious institutions? The voucher system, if operated innocently by individuals, may seem completely required by an equality and neutrality approach. But one should also consider the possibility that powerful religious institutions might alternatively take advantage of the voucher system. They can attempt to attract students and families to their own way of life, and thus, they can create centers of power through the provision of social services.

This power can be employed for political purposes to increase the resources given to them, and thus generate a dynamic process of increased power resulting in turn in increased resources, and so on. This is what happened in Israel, and it may possibly occur with differences of circumstances and scope in other societies such as the United States.

In Israel, the result is that students who go to Haredi-Religious School (ultra-orthodox schools) will never become high-tech company executives such as the “Mirabellis” wizards, who sold their company to America On Line (AOL) for $400 million.

In Israel, it is a struggle between two cultures, civil and productive society on the one hand, committed to distinction, competition, and entrepreneurship, and religious non-productive society on the other.

Human experience suggests that powerful religious organizations can operate similarly in widely different societies. Those who will receive the vouchers to religious schools will not be AOL executives. Thus, they will lose personal wealth and well-being, and society at large will lose productive power. Likewise, the increased role of religious institutions may affect the values of civil society if the religious institutions select to employ their increased political power to further values which are inconsistent with those of civil society.

106. See Hamilton, supra note 1, at 78.