

Solidarity, Religious Freedom and COVID-19

The Case of the Ultra-Orthodox Sects in Israel*

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Introduction

The ethos of social solidarity plays a significant role within Israeli society. During the COVID-19 pandemic, there were many touching instances of interpersonal solidarity: young people helped the elderly, and money and food were collected and handed out to the needy. However, a different kind of solidarity was required to reduce the spread of the pandemic. Social distancing regulations made it necessary for individuals to change their lifestyle for the benefit of others. Most communities in Israel adhered to the regulations during the first lockdown (25 March 2020 - 4 May 2020). However, as the pandemic went on, the mutual responsibility and personal discipline needed to slow the progress of the pandemic were eroded. Huge weddings and parties were held, bars were crowded, and large-scale prayer services took place, all of which violated social distancing regulations.

Although violations of COVID-19 regulations occurred in various communities in Israel, the refusal to comply with COVID-19 restrictions within the ultra-Orthodox Jewish communities had unique characteristics. Noncompliance with the regulations restricting mass prayers and requiring the shutting down of synagogues and *yeshivas* (Jewish seminaries for men) was ordered by (some of) the ultra-Orthodox spiritual leaders – the rabbis. The police, whose duty it was to enforce the COVID-19 regulations on the ultra-Orthodox sects as on everyone else, were reluctant to do so.

This article discusses the unique tension between social solidarity and religious freedom as demonstrated by the refusal of the ultra-Orthodox sects in Israel to comply with COVID-19 regulations, and suggests that such refusal should not be tolerated, not even in the form of non-enforcement.

The article proceeds as follows. Section 1 discusses the tension between solidarity and freedom. It provides a detailed description of the ultra-Orthodox sects' refusal to comply with the COVID-19 regulations which interfered with their religious life – the regulations restricting mass prayer services in synagogues and studying Torah in the *yeshivas*. Section 2 suggests possible explanations for that refusal, based on either religious beliefs or a socio-political claim to autonomy. Section 3

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discusses whether a polity should be willing to tolerate refusal to comply with COVID-19 regulations on the basis of claims of religious autonomy, when that refusal undermines efforts to reduce the risk to the health and lives of society at large.

1. The tension between social solidarity and freedom in Israel during the COVID-19 pandemic

There is an inherent tension between social solidarity and individual freedom. Solidarity-based duties, such as Good Samaritan duties that require individuals to rescue those who are under imminent and severe danger to their lives or health, significantly restrict individual freedom. Individuals have to abandon their other activities in order to be able to act and prevent the danger, with no control over when and where they may be required to intervene. The need for intervention may come upon them at the worst possible time.¹ Legal systems differ in how they resolve this tension. In civil-law systems, the tendency is to prefer solidarity over individual freedom and to impose Good Samaritan legal duties, while in common-law systems, the tendency is to prefer individual freedom over solidarity. In many of these systems the duty to rescue others from imminent danger to their lives or health is imposed on those who bear a special responsibility either for the source of the danger (such as those who own a dangerous product) or to those who are endangered (such as parents towards their children).²

The preference for solidarity over individual freedom in Israel stems from the Jewish tradition. The Talmudic dictum that ‘all of Israel are guarantors for one another’³ originally meant that each member of the Jewish people is responsible for the sins of all other members, but later was understood as imposing a mutual obligation on all Jews to care for each other’s wellbeing.⁴ The ethos of solidarity derived from this Talmudic dictum became a central theme of the Zionist movement, which emphasized social cohesiveness and mutual commitment as resources for the national project.⁵ For many years the perception was that Israel does not need to enact Good Samaritan laws: Israelis will always do everything in their power to rescue people in danger.⁶ When a Good Samaritan law was eventually enacted in 1998 – with a name derived from the biblical injunction: ‘Thou shalt not stand idly

1 For an elaborate discussion in this context, see, Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 165-69, 171-81.

2 For comparative perspectives, see Kai Ambos, ‘Omissions’, in *Core Concepts in Criminal Law And Criminal Justice, Anglo-German Dialogues*, ed. Kai Ambos, Antony Duff, Julian Roberts, and Thomas Weigend (Cambridge: Cambridge University Press, 2020), 17-47; Miriam Gur-Arye, ‘Boundaries of Criminal Liability: Participation in Crime, Preparatory Offences and Omissions: Book Review of Core Concepts in Criminal Law and Criminal Justice, Anglo-German Dialogues’, *Israel Law Review* 53, no. 3 (2020): 392, 404-407.

3 *Bavli, Shavuot* 39a; for a translation, see: <https://www.sefaria.org.il/Shevuot.39a?lang=bi>.

4 See, e.g., *Sefer Chasidim*, 753 [Hebrew].

5 Oz Almog, *Ha'Tzabar—Dyokan* (Tel-Aviv: Am Oved, 1997) [Hebrew].

6 Maya Nestelbaum, ‘Why didn’t Passers-by Jump into the Yarkon River to rescue Yasmin Feingold?’, *Globes*, 9 May 2009, retrieved from www.globes.co.il/news/article.aspx?did%1000447417 [Hebrew].

by the blood of thy neighbour⁷ – it was primarily as a symbolic law, with only a fine as maximum punishment for its violation.⁸

Indeed, there were many touching instances of solidarity during the COVID-19 pandemic. Social distancing and the economic crisis intensified the need for help and assistance. During the first lockdown (25 March 2020 – 4 May 2020),⁹ ad hoc civic initiatives swept the country. Young people created neighbourhood WhatsApp-groups so that the elderly could use them to seek help; a movement named ‘culture of solidarity’ arose spontaneously in order to collect and distribute money and food to the needy;¹⁰ and various business assistance initiatives sprang up.¹¹

However, a different kind of solidarity was needed in order to reduce the pandemic’s spread and to ensure that hospitals would not exceed their capacity to provide adequate treatment to those who developed serious COVID-19 symptoms. It became necessary for individuals to change their lifestyles and daily routines for the benefit of those who were at special risk of being severely affected by the pandemic – the elderly and people suffering from certain health conditions. The social distancing regulations considerably restricted individual freedom. People were required to stay at home; they were unable to meet elderly family members, to have a social life, to go to their workplaces, to send children to school, and more. As the pandemic continued, that sense of solidarity eroded. Huge gatherings within all the communities in Israel – weddings, funerals, parties, the unlawful opening of some businesses, and other personal activities, all of which violated the COVID-19 regulations – took place.¹²

7 *Leviticus* 19:16.

8 When MK Hanan Porat presented the bill in the Knesset, he emphasized that: ‘We are witnessing, fortunately enough not in Israel, that in New York and other cities in the world, those who see a person bleeding to death and pass by, indifferently, without giving him any help.’ From the Israeli Parliament discussion of Proposed Act, ‘Thou shalt not stand idly by the Blood of thy Neighbour’, 1995 (first reading).

9 Emergency Regulations (New Corona Virus) (Restriction of Activity) (10th Amendment), 2020, Prime Minister’s Office Policies, 4 May 2020, https://www.gov.il/he/departments/policies/dec5044_2020 [Hebrew].

10 Lee Yaron, ‘They Just Wanted to Prepare a few Food Packages for the Needy. Nine Months Later They Discovered they Changed the Country’, *Haaretz*, 22 November 2020, retrieved from <https://www.haaretz.co.il/news/education/.premium-MAGAZINE-1.9318706> [Hebrew].

11 See, e.g. Shani Ashkenazi, ‘Solidarity in crisis or long-term change: Will social unity remain even when the pandemic passes?’, *Globes*, 9 April 2020, retrieved from <https://www.globes.co.il/news/article.aspx?did=1001324878> [Hebrew].

12 Noa Shpigel, ‘Police Arrested 300 people who broke into the area of the Rashbi Tomb on Mount Meron and attacked Police Officers’, *Haaretz*, 12 May 2020, retrieved from <https://www.haaretz.co.il/news/law/1.8841121> [Hebrew]; Bar Peleg, ‘Thousands visited Tel Aviv Beaches in spite of the Prohibition: Inspectors focused on Bikers’, *Haaretz*, 15 May 2020, retrieved from <https://www.haaretz.co.il/health/corona/1.8848879> [Hebrew]; Aaron Rabinovich, ‘Thousands of Hassidim Took Part in a Jerusalem Wedding against orders’, *Haaretz*, 5 August 2020, retrieved from <https://www.haaretz.co.il/health/corona/1.9050247> [Hebrew]; Hassan Sha’alan & Gilad Cohen, ‘Sixteen weddings were dispersed in Northern Israel: Some Families couldn’t care less’, *Ynet*, 10 September 2020, retrieved from <https://www.ynet.co.il/news/article/ry0dytDVP> [Hebrew].

The COVID-19 regulations had a unique impact on ultra-Orthodox daily life, due to the importance that Jewish law attributes to the performance of religious rituals in public. The lives of many religious people, particularly men, revolve around the synagogue. They go there three times a day, every day, to pray in a *minyan* (a group of at least ten men). They often study together and conduct social gatherings there. Additionally, young men are expected to learn Torah all day long in the *yeshivas*. The regulations shutting down the synagogues and *yeshivas* and forbidding mass gatherings required the ultra-Orthodox to abandon both praying in a *minyan* and studying Torah in groups.¹³ For at least some of the ultra-Orthodox sects, giving up prayer in synagogues and studying Torah in *yeshivas* was an unacceptable price to pay due to a central tenet of Jewish tradition according to which 'on three things the world stands: on Torah, on worship and on the bestowal of kindnesses'.¹⁴ The belief is that praying and studying Torah together preserves the Jewish people, the Jewish state, and the entire universe. While all religious Jews subscribe to these ideas, the ultra-Orthodox community tends to take them at face value. Members of this group, who are more dependent on the pronouncements of the rabbis, and are less connected to and trusting in state entities, tend not to weigh these ideas against other, secular, considerations. The clash between the ultra-Orthodox convictions and the COVID-19 regulations intensified as the pandemic progressed.

Israel went into the first lockdown on 25 March 2020.¹⁵ As of that date, governmental regulations mandated the closing of *yeshivas* and forbade conducting prayer services indoors;¹⁶ further, as of 1 April, all open-air social gatherings, including prayer services, were forbidden as well. Israel's chief rabbis called on the various congregations to close down their synagogues.¹⁷ However, in mid-March, one of the most prominent leaders of the Ashkenazi-Litvak (non-Hassidic) ultra-Orthodox community – Rabbi Chaim Kanievsky – ordered his followers to ignore the regulations and maintain normal religious life. Soon afterward, it turned out that ultra-Orthodox sects were being disproportionately affected by COVID-19.¹⁸ Special efforts were made to try to reduce the pandemic's spread in ultra-Orthodox cities. Soldiers were recruited to offer assistance and distribute food to the resi-

- 13 As part of the shutdown of the entire education system, the regulations shut down all schools and not only *yeshivas*. However, the shutdown of schools (as opposed to *yeshivas*) is not discussed in this article, since it was not a uniquely religious challenge.
- 14 *Mishna, Avot* 1:2. For a similar, though not identical, English translation, see https://www.sefaria.org.il/Pirkei_Avot.1?lang=bi. Later sources clarify that 'worship' means prayer (*Bavli, Ta'anit* 2a. For the English text, see <https://www.sefaria.org.il/Taanit.2a?lang=bi>).
- 15 *Supra* note 9.
- 16 Noa Landau, Joshua Breiner and Aaron Rabinovich, 'The new Regulations go into effect: Prohibition to Leave Home Surroundings; starting this Evening, Trains will no longer run', *Haaretz*, 25 March 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-1.8708288> [Hebrew].
- 17 'Israel's Chief Rabbis give Passover Instructions regarding Covid-19 virus', Chief Rabbinate News, 3 March 2020, <https://www.gov.il/he/departments/news/hanchayot-harabanim-erev-pesach> [Hebrew].
- 18 Aaron Rabinovich, 'Morbidity in Ultra-Orthodox Cities: One-third of surveyed Bnei Brak residents are infected', *Haaretz*, 31 March 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-1.8726268> [Hebrew]. See also Aaron Rabinovich, 'Number of Covid-19 patients in Bnei Brak rises to 730 – Increase of 27% in a Day', *Haaretz*, 1 April 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-1.8730242> [Hebrew].

dents of these cities, in order to allow social distancing and ensure compliance with the lockdown order.¹⁹ These steps seemed to give rise to a moment of unity and understanding between the ultra-Orthodox community and the general public, particularly the IDF (Israeli Defence Forces).²⁰ In that moment of solidarity, leading ultra-Orthodox rabbis such as Rabbi Gershon Edelstein and even Rabbi Kanievsky ordered a halt to conducting prayer services in a *minyán*, instructing their followers to pray in private and to shut down the *yeshivas*.²¹

This compliance with the COVID-19 regulations relating to praying and learning Torah did not last long. On the Jewish New Year, 18 September, a second lockdown was declared, with the aim of limiting family gatherings and social mixing in the synagogues during the High Holidays. To enable organized services, permission was granted for indoor services attended by ten people at most, and outdoor services attended by no more than twenty.²² However, some ultra-Orthodox sects chose to blatantly disregard the regulations, and reports emerged of communities that conducted their Yom Kippur services in gross violation of the ordinances. The services in a synagogue of the Belz Hassidim were attended by 4,000 men, all in one space; in the synagogue of the Ger Hassidim, 3,600 people were in attendance.²³ This scenario recurred during the holiday of Sukkot (October 2020). The Hassidic rabbis ignored the lockdown completely, holding huge indoor services and gatherings.²⁴

- 19 Kobi Nakhshoni, 'Bnei Brak: Residents are confined to Home – Soldiers hand out Food', *Ynet*, 31 March 2020, retrieved from <https://www.ynet.co.il/articles/0,7340,L-5705007,00.html> [Hebrew].
- 20 Anshel Pfeffer, 'Soldiers entered Bnei Brak with a Sense of Mission, but mainly helped to improve the Atmosphere', *Haaretz*, 8 April 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-1.8749979> [Hebrew]; 'You've thrilled us: A Collection of some Letters received by IDF Soldiers', IDF Website, 19 April 19, 2020 (<https://www.idf.il/%D7%90%D7%AA%D7%A8%D7%99%D7%9D/%D7%97%D7%99%D7%9C-%D7%9E%D7%A9%D7%90%D7%91%D7%99-%D7%94%D7%90%D7%A0%D7%95%D7%A9/2020/%D7%90%D7%96%D7%A8%D7%97%D7%99%D7%9D-%D7%9E%D7%95%D7%93%D7%99%D7%9D-%D7%9C%D7%A6%D7%94%D7%9C/>) [Hebrew]; Yaniv Kubovitz, 'IDF has handed out Yiddish-Hebrew Dictionaries to Soldiers deployed to Bnei Brak', *Haaretz*, 5 April 2020, retrieved from <https://www.haaretz.co.il/health/corona/1.8742706> [Hebrew].
- 21 For Rabbi Edelstein's order, see: <https://www.bhol.co.il/news/1090980>, 31 March 2020, 22:10 [Hebrew]. For Rabbi Kanievsky's order, see: 'Rabbi Kanievsky: "It's Time to stop praying in Minyan"', *Kipa*, 9.3.20, <https://www.kipa.co.il/%D7%97%D7%93%D7%A9%D7%95%D7%AA/957703-%D7%94%D7%A8%D7%91-%D7%A7%D7%A0%D7%99%D7%99%D7%91%D7%A1%D7%A7%D7%99-%D7%99%D7%A9-%D7%9C%D7%94%D7%A4%D7%A1%D7%99%D7%A7-%D7%9C%D7%94%D7%AA%D7%A4%D7%9C%D7%9C-%D7%91%D7%9E%D7%A0%D7%99%D7%99%D7%9F> [Hebrew].
- 22 Ynet, 'What will be shut down and when, and what is still undecided? This is how the Second Lockdown will look during the Holidays', *Calcalist*, September 13, 2020. Retrieved from <https://www.calcalist.co.il/local/articles/0,7340,L-3849603,00.html> [Hebrew].
- 23 Anshil Pepper, 'Infection versus infection: In ultra-Orthodox Jerusalem, Yom Kippur customs overcame the virus', *Haaretz*, 29 September 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-1.9192718> [Hebrew].
- 24 Aaron Rabinovich, 'In Spite of Incidence, many Hassidim build huge "Sukkot" and prepare for thousands of Worshippers during the Holiday', *Haaretz*, 1 October 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-1.9198975> [Hebrew].

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The High Holidays of September-October 2020 seem to have been a turning point. Thereafter, significant parts of the ultra-Orthodox sects and their leadership were no longer willing to adhere to the COVID-19 regulations, mainly those requiring the shutting down of synagogues and *yeshivas*. Rabbi Kanievsky decreed that all ultra-Orthodox *yeshivas* should be opened immediately after the Sukkot holiday.²⁵ From that point onwards, the ultra-Orthodox *yeshivas* remained open much of the time, regardless of the COVID-19 regulations.

The ultra-Orthodox sects' refusal to comply with COVID-19 regulations, which resulted in a disproportionate impact of COVID-19 on their members, with a death toll higher than their proportion in the general population, is puzzling. It stands in contrast to both a fundamental norm in Jewish law, *pikuach nefesh*,²⁶ according to which saving lives overrides religious rules,²⁷ and the Jewish sources of solidarity imposing a mutual obligation on all Jews to care for each other's well-being.²⁸ How can this apparent contradiction be explained?

2. Possible explanations for the ultra-Orthodox sects' refusal to comply with COVID-19 regulations

One possible explanation for the ultra-Orthodox sects' refusal to comply with COVID-19 regulations is based on religious beliefs. According to Jewish law, 'any expression of sanctity may not be [done, recited amongst] fewer than ten [men]'.²⁹ Based on this rule, many religious commandments (*mitzvot*) are customarily performed in a *minyan*, which is a group of ten men or more. One may pray in private, but the religious rules maintain that private prayer is of lesser quality, and acceptable only when unavoidable.³⁰ Further, some parts of the prayer may only be recited in public.³¹

Learning (and teaching) the Torah is a pivotal point of Jewish life.³² According to various Jewish sources, the study of Torah is of greater value than any other reli-

25 Yehuda Schlesinger, 'Contrary to Instructions: Rabbi Kanievsky Ordered Return to Yeshivas and Schools', *Israel Hayom* 17 October 2020 retrieved from <https://www.israelhayom.co.il/article/810855> [Hebrew].

26 Based on the discussion in *Mishna Yoma*, chapter 8 mishna 7.

27 There are only three cardinal sins for which one should let himself die and not commit: the killing of another innocent person, idolatry and incest.

28 See *supra* note 4 and accompanying text.

29 *Bavli, Brachot* 21b. For a similar, though not identical, translation, see <https://www.sefaria.org.il/Berakhot.21b.4?lang=bi&with=all&lang2=en>.

30 According to the religious principle that a 'victim of circumstances beyond his control is exempted [from the guilt of performing a wrong deed or not performing a *mitzva*] by the Merciful One [=God]', *Bavli Nedarim* 27a, *Bava Kama* 28b, *Avoda Zara* 54a.

31 For example, *Kaddish*, the prayer for deceased family members, the Thirteen *Midot*, an essential recurring part of the prayer on the Day of Atonement (Yom Kippur), and the ceremonial reading of the Torah. See Maimonides, *Yad Hachazakah-Ahava*, Tfila, ch.8 halacha A.

32 See e.g. Rambam, *Sefer HaMitzvot*, Ase, 11; *Sefer HaChinuch*, *Mitzva* 419.

gious action, its weight equal to a whole list of central *mitzvot*.³³ A Jew is expected to study the Torah at any time and in any place, ‘when you sit at home and when you walk along the road, when you lie down and when you get up’.³⁴ However, Jewish sources also stress the importance of learning in a group (of two or more), as the only way to actually acquire knowledge of the Torah.³⁵ That is because Torah learners sharpen each other, just as iron tools do.³⁶ *Yeshivas* are structured according to these principles, such that classes are held in public by rabbis, and later further discussed by students, each student with a regular study partner (*chavruta*) for each class.

Prayer services in a *minyan* and Torah study in *yeshivas*, however important, are supposed to be overridden by the normative superiority of life-saving *pikuach nefesh*, which overrides most religious commandments (as explained above). Indeed, some rabbis explicitly ordered obedience to the COVID-19 regulations on the basis of the *pikuach nefesh* norm.³⁷ Some went even further: Rabbi Ben-Zion Mutzafi, a prominent Sephardi ultra-Orthodox rabbi, declared that those who disobey the regulations must not be allowed to join a *minyan* since their disobedience risks other people’s lives and desecrates God’s name by their immoral behaviour.³⁸ To reconcile Rabbi Kanievsky’s contrary orders to keep both the synagogues and *yeshivas* open with the norm of *pikuach nefesh*, a socio-religious explanation based on the notion of *gzerot shmad* may be suggested.

According to Jewish law, the principle of *pikuach nefesh* can be temporarily suspended in times of religious persecution when non-Jewish authorities issue decrees that are aimed at forcing Jews to abandon their faith by violating religious orders (also known as *gzerot shmad*). In such a time, Jews must keep each and every *mitzva*, even at the cost of their lives.³⁹ Historically, such times have been very few and included extreme circumstances such as the edicts of the Greek King Antiochus (167 BC) and of the Roman Emperor Hadrian (130 CE), as well as the Alhambra

33 *Mishna, Pe’ah* 1, 1, translation on the Sefaria website https://www.sefaria.org.il/Mishnah_Peah.1.1?lang=bi&with=all&lang2=he: ‘These are the things that have no definite quantity [...] and the study of the Torah. The following are the things for which a man enjoys the fruits in this world while the principal remains for him in the world to come: Honouring one’s father and mother; The performance of righteous deeds; And the making of peace between a person and his friend; And the study of the Torah is equal to them all.’ See also *Bavli, Kiddushin* 40b.

34 Deuteronomy, 6:7 (NIV translation, available at <https://www.biblegateway.com/passage/?search=Deuteronomy%20%3A7&version=NIV>).

35 *Bavli, Brachot* 63b. For a similar translation see <https://www.sefaria.org.il/Berachot.63b.12?lang=bi&with=all&lang2=en>.

36 *Bavli, Taanit* 7a.

37 Channel 7, ‘MK Moshe Gafni Protests: “Real Pikuach Nefesh”’, 19 January 2021, retrieved from <https://www.inn.co.il/news/464891> [Hebrew]; United Torah Judaism party, ‘Literally Pikuach Nefesh’, Facebook, 19 January 2021, <https://www.facebook.com/yahdutatora/videos/238287847738163> [Hebrew]; https://www.gov.il/BlobFolder/news/meida_rabanut_korona/he/corona_4_תחרימה%20תורה%20פיח%20ניעב%20תרינכדע.pdf [Hebrew].

38 Avi Wolfson, ‘Great Rabbi Mutzafi: *Kittel* and *Streimel* [ultra-Orthodox garments] won’t help those who don’t wear a Mask’, *Hamechadesh*, 19 October 2020, <https://hm-news.co.il/96566/> [Hebrew].

39 *Bavli, Sanhedrin* 74a.

Decree (also known as the Spanish Expulsion, 1492).⁴⁰ Although Israel is a Jewish state and ultra-Orthodox Jews are not persecuted, some of them may still feel that the COVID-19 regulations, which restricted both praying in synagogues and studying Torah in groups in *yeshivas*, would pose a spiritual risk to ultra-Orthodox Jews.⁴¹ Therefore, in order to preserve Jewish spiritual life, they may feel obligated to insist on fulfilling any *mitzva*, even at the cost of risking lives.

To explain the refusal to comply with COVID-19 regulations on the basis of *gzerot shmad*, as suggested above, seems extreme. A less extreme explanation is socio-political, and grounded in the need to keep the ultra-Orthodox community apart from Israeli society at large. The notion of apartness and maintaining the tradition to the letter is a crucial part of the ultra-Orthodox ethos, as the faithful have been constantly tried throughout history, yet have managed to preserve the Jewish people.⁴² In order to do so, they had to resist the temptation of assimilating into the secular state. Keeping the ultra-Orthodox community separate from the general public strengthens the power of their spiritual leaders – the rabbis – who supervise all aspects of daily life.⁴³ The COVID-19 regulations threatened both the ultra-Orthodox ethos and the power of their spiritual leaders. Closing synagogues and *yeshivas* was harmful not only to religious life and education, and to the emotional well-being of community members, but also to the autonomy of the community and the authority of its leaders. Indeed, after the first lockdown, the media reported a rise in the number of ultra-Orthodox people obtaining an internet connection in order to work and study online or receive relevant information.⁴⁴ Secular influences on ultra-Orthodox daily life could have caused drastic social changes,⁴⁵ particularly at a time when the central social institutions of the ultra-Orthodox sects – the *yeshiva* and the synagogue – were supposed to be closed. Refusal to comply with COVID-19 regulations under the orders of the rabbis reinforced the bounda-

40 *Makkabim* A. a. 45-46; *Shir HaShirim Rabbah* B. 7; Yitzhak Baer, *A History of the Jews in Christian Spain* (Tel Aviv: Am Oved, 1987), 323-325 [Hebrew]; Haim Beinart, *Alhambra Decree* (Jerusalem: J.L. Magnes, 1994), 80 [Hebrew]; Henry Kamen, 'The Mediterranean and the Expulsion of Spanish Jews in 1492', *Past & Present* 119 (1988): 37.

41 See, e.g., Rabbi Yoel Ben-Nun, 'A Foreigner will not Understand this: The ultra-Orthodox Consider the Restrictions as "Gzerot Shmad"', *Ynet*, 15 October 2020, <https://www.ynet.co.il/judaism/article/Bk2u9nBPv> [Hebrew].

42 See, e.g., *Be'er Mayim Chaim*, Exodus 1:1 [Hebrew], deeming that when scripture mentioned that the Israelites became a nation in Egypt, that is because they did not change their names and clothing, and thus remained distinct and were identifiable as a nation separate from the Egyptians.

43 See, e.g., Netta Barak-Corren and Lotem Perry-Hazan, 'Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities' Compliance with COVID-19 Regulations', 7-8, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797433.

44 Anshel Pfeffer, 'Israel After Covid-19: An Opportunity for ultra-Orthodox to Connect to Outer World', *Haaretz*, 28 April 2020, retrieved from <https://www.haaretz.co.il/health/corona/.premium-MAGAZINE-1.8803930> [Hebrew].

45 E.g., Nati Tucker, 'Covid-19 shook off ultra-Orthodox Internet and might lead to a deep social Change', *The Marker*, 27 April 2020, retrieved from <https://www.themarker.com/advertising/.premium-1.8801015> [Hebrew]; Sivan Klingbail, 'Covid-10 has Connected ultra-Orthodox to the Web and Created a rare Opportunity for an Employment Revolution', *The Marker*, 9 June 2020, retrieved from <https://www.themarker.com/career/.premium-1.8906279> [Hebrew]; David Galperin of Gil Group, 'Ultra-Orthodox Digital in the Covid-19 Era', *Israel Hayom*, 27 August 2020, retrieved from <https://www.israelhayom.co.il/article/795233> [Hebrew].

ries of the community.⁴⁶ By ignoring the COVID-19 regulations, the ultra-Orthodox community not only maintained its normal life and religious observances, but also clearly kept away from the general public and reaffirmed the rabbis' power over the community.

How should the polity react to a refusal to comply with COVID-19 regulations motivated by these kinds of considerations?

3. Should the polity tolerate refusal to comply with COVID-19 regulations among the ultra-Orthodox sects?

The COVID-19 regulations relating to prayer in the synagogues and learning Torah in the *yeshivas* were hardly enforced on the ultra-Orthodox sects. Police statistical reports reveal that the regulations restricting prayer within the synagogues were enforced on the ultra-Orthodox sects in Jerusalem only once, as opposed to 91 fines imposed in Tel Aviv, which is a more secular city.⁴⁷ Many *yeshivas* were known to be open and active despite the lockdown.⁴⁸ The media reported an agreement between the police and the leaders of the ultra-Orthodox sects in Jerusalem according to which the police would refrain from enforcing the regulations against mass prayers during the Jewish holidays, as long as the mass gatherings would not be photographed.⁴⁹ Could such non-enforcement, which resulted in the *de facto* exemption of the ultra-Orthodox sects from complying with COVID-19 regulations relating to praying and learning Torah, be understood on the basis of the cultural defence?

The cultural defence reflects the willingness of a multicultural society to tolerate, to some extent, either religiously or culturally motivated noncompliance with the law.⁵⁰ Tolerance is usually achieved by various legal techniques, rather than by an

46 Yair Ettinger, 'Has Integration of ultra-Orthodox in Society failed?', KAN News, Video, 1:18 & 1:57, December 7, 2020, retrieved from <https://www.youtube.com/watch?v=XDXamCwxU3w> [Hebrew].

47 Shirir Avitan Cohen, 'Police: Just One Report was given in Jerusalem during Lockdown for Violation of Prayer Instructions', *Globes*, 12 October 2020, retrieved from <https://www.globes.co.il/news/article.aspx?did=1001345348> [Hebrew].

48 Barak-Corren and Perry-Hazan, 'Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities' Compliance with COVID-19 Regulations', 10.

49 Aaron Rabinovich, 'The police secretly agreed with Hasidism: they will be allowed to hold mass events – without documentation', <https://www.haaretz.co.il/news/law/.premium-1.9210569> [Hebrew].

50 For a general discussion of the cultural defence in the criminal law, see Alison Dundes Renteln, *The Cultural Defence* (Oxford: Oxford University Press, 2005); Mitra Sharafi, 'Justice in many Rooms since Galanter: De-romanticizing Legal Pluralism through the Cultural Defence', *Law & Contemporary Problems* 71 (2006): 139; Julia P. Sams, 'The Availability of the Cultural Defense as an Excuse for Criminal Behavior', *Georgia Journal of International and Comparative Law* 16 (1986): 335, 344; Note, 'Cultural Defense in the Criminal Law', 99 *Harvard Law Review* 99 (1986): 1293, 1309; Caroline Choi, 'Application of a Cultural Defense in Criminal Proceedings', *UCLA Pacific Basin Law Journal* 8, no. 1 (1990): 80, 81; Tamar Tomer-Fishman, "'Cultural Defense," "Cultural Offense", or No Culture At All?: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them', *Journal of Criminal Law & Criminology* 100, no. 2 (2010): 475, 476.

explicit defence. In exceptional cases a legal system may be willing to recognize an exception to its criminal law prohibition for a unique culturally motivated practice. The exception may be granted either implicitly, by interpreting the scope of the prohibition as to exclude the practice, or explicitly.⁵¹ In such cases, the polity does not object to the culturally motivated practice of the minority; the practice is not perceived to be a criminal wrong. Other instances of culturally motivated noncompliance are perceived by the polity as wrong, but nonetheless worthy of tolerance under existing excuses, such as the unavoidable mistake of law defence granted especially to immigrants,⁵² or under the doctrine of provocation that allows reducing the charge from murder to manslaughter.⁵³ In other cases, tolerance of culturally motivated noncompliance is achieved by non-enforcement.⁵⁴

The COVID-19 social distancing regulations created a unique challenge for the cultural defence. As long as minorities are not physically isolated from the rest of the population, their noncompliance with COVID-19 restrictions is likely to undermine the efforts to reduce the spread of the pandemic and to ensure that hospitals do not exceed their capacity to provide adequate treatment to those who have developed serious COVID-19 symptoms. In such cases, minorities who enjoy autonomy with regard to various aspects of their lives cannot legitimately expect that the polity, whose duty it is to protect the lives and health of the entire population, will tolerate their refusal to comply with COVID-19 regulations. This reasoning applies to the refusal of the ultra-Orthodox sects in Israel to comply with the regulations, if we assume that it is motivated by political claims to autonomy based on the need to keep the ultra-Orthodox community separate from Israeli society at large (the socio-political explanation for the ultra-Orthodox sects' refusal to comply with the COVID-19 regulations suggested above). Although significant parts of Israel's ultra-Orthodox community are clustered in specific neighbourhoods and cities, it is by no means isolated from the rest of the population. Members of the community use various services outside the cities in which they reside, and are served by the

- 51 As was done in 2012 by the *Bundestag* (the German Federal Parliament) in the case of the performance of non-therapeutic male circumcision on infants, motivated by either Jewish or Muslim religious commandments. For the background leading to the enactment of such an exception, see Reinhard, Merkel and Holm Putzke, 'After Cologne: Male Circumcision and the Law. Parental Right, religious Liberty or criminal Assault?', *Journal of Medical Ethics* 39 (2013): 444-449; Eldar Sarajlic, 'Can Culture justify Infant Circumcision?', *Res Publica* 20 (2014): 327-343.
- 52 Sec. 17 of the German Criminal Code recognizes an unavoidable ignorance of law as an excuse. For applying that excuse to ignorance based on minorities' culture, see Marin Golding, 'The cultural defense', *Ratio Juris* 15, no. 2 (2002): 146. See also the discussion by Sams, 'The Availability of the Cultural Defense as an Excuse for Criminal Behavior', 338-339, 344.
- 53 The most cited case is that of Dong Lu Chen, No. 87-7774 (Sup. Ct. N.Y. County, December 1989). For discussion, see Renteln, *The Cultural Defence*, 11. For a general discussion of honour killing in this context, see John Alan Cohan, 'Honour Killings and the Cultural Defence', *California Western International Journal* 40 (2010): 191-2014.
- 54 For the various techniques of non-enforcement in cases of honor killing, see Badi Hasisi & Deborah Bernstein, 'Echoes of domestic silence: mechanisms of concealment in cases of "Family Honour Killings" in Mandate Palestine', *Middle Eastern Studies*, 55, no. 1 (2018): 1-14. For non-enforcement of the offence of polygamous marriage on the Bedouins in Israel, see Rawia Aburabia, 'Trapped Between National Boundaries and Patriarchal Structures: Palestinian Bedouin Women and Polygamous Marriage in Israel', *Journal of Comparative Family Studies* 48, no. 3 (2017): 339, 343-345.

general hospitals and medical clinics. Due to the interconnections between the ultra-Orthodox and the general population, the former, who refuse to comply with the COVID-19 regulations, are liable to infect others who do not belong to their own community and to impact hospitals' capacity.

Whether the ultra-Orthodox sects' refusal to comply with the COVID-19 regulations should be tolerated becomes a more complicated issue if we assume that the refusal is motivated by religious beliefs, according to which when Jews are forced to abandon their faith, any *mitzva* ought to be fulfilled even at the cost of risking lives (as suggested in the second explanation discussed above).

Due to the importance attached to the freedom of religion, limitations on the exercise of religion, even for the sake of reducing the pandemic in order to protect life and health, ought to be considered carefully. Indeed, in various legal systems some of the COVID-19 limitations on the exercise of religion were considered disproportionate and therefore held to be unconstitutional. The US Supreme Court held that a regulation, which limits the number of people who may attend a religious service in either a Catholic church or a Jewish synagogue to no more than 10 or 25 persons (depending on the risk assessment of the relevant zone), irrespective of the capacity of the church or synagogue, is unconstitutional.⁵⁵ Similarly, the German Federal Constitutional Court held that a regulation, which did not allow Friday prayers to be held in a mosque during the month of Ramadan, without allowing individual cases to be considered, is unconstitutional.⁵⁶

Despite the importance of freedom of religion, COVID-19 limitations on the exercise of religion are unavoidable. In imposing such limitations, the Israeli government was sensitive to the importance of religious public rituals and the regulations allowed groups of at least ten men to attend outdoor services together throughout most of the pandemic.⁵⁷ The government further allowed for indoor services (with limited attendance) during the Jewish High Holidays.⁵⁸ Most religious congregations obeyed the regulations, shutting down the synagogues and *yeshivas* on the basis of the *pikuach nefesh* norm.⁵⁹ However, as mentioned above, some ultra-Orthodox sects sincerely believe that to abandon praying in synagogues and learning Torah in *yeshivas* is inconsistent with religious commandments, and therefore they have no choice but to refuse to comply with the regulations even at the cost of

55 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 582 U.S. (25 November 2020). For its discussion, see Javier Martínez-Torrón, 'COVID-19 and Religious Freedom: Some Comparative Perspectives', *Laws* 10, no. 39 (2021): 1, 11.

56 German Federal Constitutional Court, 1 BvQ 44/20 (29 April 2020), as discussed by Burkhard J. Berkmann, 'The covid-19 Crisis and Religious Freedom', *Journal of Law, Religion and State* 8 (2020): 179, 185.

57 Outdoor public services were banned on 1 April 2020 and reinstated on 19 April, see Itamar Eichner & Asaf Zagrigak, 'Allowances and Restrictions: Full List', *Calcalist*, 19 April 2020, retrieved from <https://www.calcalist.co.il/local/articles/0,7340,L-3809051,00.html> [Hebrew].

58 Ynet, 'What will be shut down and when, and what is still undecided? This is how the Second Lock-down will look during the Holidays'.

59 Channel 7, 'MK Moshe Gafni Protests: "Real Pikuach Nefesh"'.

risking lives. The question is whether the polity should tolerate such refusal and refrain from coercing the believers to act against their religious belief.⁶⁰

Had those who preferred to continue both praying in a *minyán* in synagogues and studying Torah in *yeshivas* been risking solely their own lives and health, the issue would have involved paternalistic considerations. In legal systems that impose paternalistic duties in order to protect an individual from risking her own life and health,⁶¹ religiously motivated refusal to comply with paternalistic duties may have justified non-enforcement.⁶² A believer should not be coerced to act in violation of his religious beliefs for the sake of his own interest.⁶³ In such cases, the polity should accommodate the believers' preference to maintain their religious life despite the risks to their own lives or health.

However, COVID-19, like other pandemics, is highly infectious, and the regulations were aimed at restricting its spread. The ultra-Orthodox who refuse to comply with the regulations risk the lives and health of others. When they come home from the synagogues and *yeshivas*, they may infect their families. It could be argued that when the family members believe in the importance of praying in synagogues and studying Torah in *yeshivas*, and are therefore willing to accept the risk of being infected by COVID-19 for the sake of having the family's men uphold their religious way of life, the men's preference to maintain their religious way of life despite the risk to their families should be tolerated. Such a claim could be based on the view that 'a cultural defense should more readily be admitted when the crime is limited to persons capable of meaningful consent who belong to that culture and subscribe to its tenets'.⁶⁴ However, the vulnerable members of the family, both those at special risk (such as the elderly) and children, are owed special care. The willingness of the family's men to continue with their religious way of life should not override the special duty to protect the lives and health of vulnerable family members.⁶⁵

60 According to Joseph Raz, coercing an individual to act against her conscience (in our case religious belief) humiliates her, and infringes her autonomy to live a life according to her conscience. However, the right not to be coerced by law is not an absolute right. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 263, at 280-287.

61 See, e.g., the discussion by L.O. Gostin and K.G. Gostin, 'A Broader Liberty: J.S. Mill, Paternalism and the Public's Health', *Public Health* 123 (2009): 214-221.

62 See, e.g., *People v. Woody* 61 Cal 2d. 716 (1964), in which the California Supreme Court acknowledged the right of Native Americans to use peyote in their religious ceremonies despite it being a hallucinogenic drug whose use is legitimately forbidden by the state. For a general discussion of religious exemption for the use of forbidden drugs, see Renteln, *The Cultural Defence*, 78-84.

63 Raz, *The Authority of Law: Essays on Law and Morality*, 283. But see Itzhak Kugler, 'On the Possibility of a Criminal Law Defence for Conscientious Objection', *Canadian Journal of Law & Jurisprudence* 10 (1997): 387, at 415 (arguing that the right against being coerced to obey paternalistic laws ought not to be absolute).

64 Note, 'Cultural Defense in the Criminal Law', 1309. See also Clark, 'Guidelines for the Free Exercise Clause', *Harvard Law Review* 83 (1969): 327 at 361-362.

65 Parents, for example, cannot invoke their right to religious freedom to refuse life-sustaining treatment for a child.

Moreover, when those who have chosen to either pray in the synagogue or study in a *yeshiva* enter the public sphere, by going grocery shopping for example, they pose a risk to other members of their community using those services at the same time and to those who serve them. Some of the other members of the ultra-Orthodox sects do comply with the COVID-19 regulations, and they cannot be presumed to prefer to take the risk of being infected. Indeed, the impact of COVID-19 on the ultra-Orthodox sects was exceptionally high, up to five times more severe than its impact on the general population.⁶⁶ At one point, 70% of those with COVID-19 were members of the ultra-Orthodox community, despite the fact that they account for only 12.6% of the Israeli population.⁶⁷ In early 2021 the death toll among elderly ultra-Orthodox people was four times higher than that of their counterparts in the general public.⁶⁸

The risk of being infected by the virus following the refusal of some within the ultra-Orthodox communities to comply with COVID-19 regulations is not limited to the ultra-Orthodox sects. As already mentioned, the ultra-Orthodox community is not isolated from the rest of the population. Members of the community use services outside the cities in which they reside, and are served by the general hospitals. Due to the interconnections between the ultra-Orthodox and the general population, those among the former who refuse to comply with the COVID-19 regulations are liable to both infect others who do not belong to their own community and have an impact on hospitals' capacity. The main aim of the COVID-19 regulations, particularly those imposing lockdowns, has been to flatten the epidemic curve and thus slow the spread of the epidemic so that the peak numbers of patients who need to be treated at hospitals at the same time are reduced, and the hospitals do not exceed their capacity. The number of ultra-Orthodox patients hospitalized with COVID-19 was much higher than their proportion in the population.⁶⁹ In April 2020, ultra-Orthodox patients accounted for 40-60% of hospitalized COVID-19 patients across Israel, and were similarly overrepresented in the intensive care units.⁷⁰ In January 2021, hospitals in Jerusalem, which is home to many of the large ultra-Orthodox sects, announced that they could no longer admit

66 Roni Linder, 'In order to understand Israel's Covid-19 Story, you should know these three Charts', *The Marker*, 7 October 2020 (updated 9 October 2020), retrieved from <https://www.themarker.com/coronavirus/.premium-1.9217121> [Hebrew].

67 Sami Peretz, 'Minister of Interior Deri Admitted that 70% of Covid-19 Infected are ultra-Orthodox: Will we shut ourselves at Home again in the next Round?', *The Marker*, 12 May 2020, retrieved from <https://www.themarker.com/coronavirus/.premium-1.8840658> [Hebrew].

68 Doron Avigad, 'Ultra-Orthodox Adults died of Covid-19 four Times more than general Population', *Calcalist*, 10 February 2021, retrieved from <https://www.calcalist.co.il/local/articles/0,7340,L-3892790,00.html> [Hebrew].

69 See Gilad Malach and Lee Cahaner, *Statistical Report on ultra-Orthodox Society in Israel 2020* (The Israel Democracy Institute, 2020), 12, retrieved from <https://www.idi.org.il/media/15500/haredi-2020.pdf> [Hebrew].

70 Yoav Even & Keren Marciano, 'Here is the Data: How many ultra-Orthodox People are hospitalized with Covid-19', *N12*, 29 March 2020, retrieved from https://www.mako.co.il/news-israel/2020_q1/Article-c3a328f0d472171027.htm [Hebrew].

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any more COVID-19 patients; all new cases had to be diverted to hospitals in other cities.⁷¹

For all these reasons, the Israeli polity ought not to tolerate the refusal among the ultra-Orthodox sects to comply with the COVID-19 regulations, by way of non-enforcement, even when the refusal is motivated by religious beliefs. By failing to enforce the regulations on the ultra-Orthodox sects, the polity failed to fulfil its obligation to reduce the spread of the pandemic in order to protect the lives and health of its entire population, and to guarantee that hospitals have enough capacity to provide adequate treatment for all.

The discussion in this section highlights the importance of adding a limit to the cultural defence. The traditional limits of the cultural defence relate to culturally motivated practices that infringe upon the polity's basic values, such as honour killing, which infringes on the right to life of vulnerable members of the cultural community (women, either as wives or as daughters) and sustains patriarchal practices.⁷² Other limits relate to equality in the distribution of societal burdens, as in the Israeli case of the *de facto* exemption of ultra-Orthodox young men who study at the *yeshivas* from compulsory military service.⁷³ That exemption has been subject to ongoing political pressure for equality in the military draft.⁷⁴ An additional limit has surfaced during the COVID-19 pandemic: when the life and health of the entire population are at stake, the polity ought not to tolerate noncompliance even when motivated by religious beliefs, and despite the importance of freedom of religion.

Conclusion

The COVID-19 social distancing regulations considerably restricted both the personal freedom of individuals, who were required to dramatically change their way of life and stay home, and the religious freedom of various religious congregations,

71 Roni Linder, 'Jerusalem has become Israel's sickest City. We've been transferring Patients to other Areas for the past two Weeks', *The Marker*, 21 January 2021, retrieved from <https://www.themarker.com/coronavirus/.premium-1.9468608> [Hebrew].

72 For example, according to Sec. 301Aa(5) of the Israeli Penal Law, as amended by Israeli Penal Law (Amendment 137) 2019, honour killing is aggravated murder. For various techniques adopted in the past in order to accommodate to a certain extent honour killing, see Badi Hasisi & Deborah Bernstein, 'Multiple Voices and the Force of Custom on Punishment: Trial of "Family Honour Killings" in Mandate Palestine', *Law and History Review*, 34, no. 1 (2016): 115-154.

73 See Daphne Barak-Erez, 'The Military Service of Yeshiva Students: Between Citizenship and Justiciability', *Bar-Ilan Studies* 22, no. 2 (2006): 233-234 (2006) [Hebrew]; Asaf Malchi, 'The "People's Army"?', *Israel Democracy Inst.* (16 October 2018), retrieved from <https://perma.cc/PH3B-48QH> [Hebrew].

74 Following such pressure, since 2002 the Knesset (the Israeli parliament) has passed several laws aimed at regulating draft deferment for limited periods of time for ultra-Orthodox men attending *yeshivas*; the laws were struck down (twice) by the High Court of Justice on the ground that they do not guarantee equality in compulsory military service. However, the government has been given an extension to draft a different law regulating the ultra-Orthodox exemption – an extension that is constantly extended. For the analysis of the Supreme Court's cases, see Malchi, 'The "People's Army"?'.

who were required to give up, at times, praying in a *minyan* in synagogues and studying Torah in *yeshivas*. Despite the drastic restrictions, and the special importance of freedom of religion, reducing the pandemic's spread called for awarding priority to solidarity over both personal and religious freedom, and the enforcement of social solidarity legal duties – the social distancing regulations – on all.