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FREEDOM OF RELIGION AND OF CONSCIENCE IN ISRAEL

Ruth Lapidoth*

I. INTRODUCTION

For almost two thousand years the Jews lived as a religious minority, sometimes tolerated and at other times persecuted in a great number of countries. Only in 1948 did they succeed in establishing a State in which they constituted a majority of the population. Moreover, this State was formally established as a "Jewish State." These circumstances explain the special interest in the question of how and to what extent Israel recognizes and implements the right to freedom of religion and of conscience.

Like all other human rights, this one has to be judged not simply by the general proclamation of the right but by the details of its implementation and by its limitations. It is therefore our intention to start, after a few preliminary remarks, with an examination of the Jewish character of the State, and of the principle of freedom of religion and of conscience, as well as of the limitations of this freedom. The study of the implementation of the principle requires an analysis of certain details: the status of the Holy Places, equality of rights of members of different religions, the right to change one's religion, regulation of proselytizing activities, the right to a religious education, matters of personal status, and the situation of persons who do not belong to any religious group. The 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also mentions

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most of these subjects as ingredients of freedom of religion but some are not, namely, those that are relevant only to few countries, including Israel, specifically, the Holy Places and jurisdiction in matters of personal status.

II. SOME PRELIMINARY REMARKS

1. Israel has a rather heterogeneous population, belonging to various ethnic groups, adhering to different religions, speaking several languages, having different cultural and social traditions, and with many different political allegiances and ideologies. Thus, religious affiliation is often connected with ethnic origin, language, culture, and political allegiance.

2. The country is not only inhabited by adherents of various religions, but it is also holy to four major faiths: Judaism, Christianity, Islam, and Baha'i. For Judaism, the country as such is holy; for Christianity and Islam several places in the country are holy; and for the Baha'is it is not only the site of various Holy Places but also of their spiritual and administrative world center.

3. About eighty percent of the population is Jewish, but the Jews are rather divided on matters of religion.

4. Israel has no written constitution. When the State was established, the Constituent Assembly decided not to draft a Constitution; instead, basic laws on the various aspects of government and administration would be adopted gradually. Until 1992, human rights and civil rights were not codified in a basic law. Rather, they were guaranteed by the Judiciary, which has gradually developed a voluminous case law on the subject (similar to the situation in the United Kingdom). In 1992, however, the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty were adopted These laws do not deal specifically

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2. See id. However, due to the objection of some Muslim States, the Declaration does not expressly mention the right to change one's religion. See Natan Lerner, The Final Text of the U.N. Declaration Against Intolerance and Discrimination Based on Religion or Belief, 12 ISR. Y.B. HUM. RTS. 185, 185-89 (1982). It is, however, generally recognized that under international law freedom of religion includes the right to convert. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, 999 U.N.T.S. 172, 178 [hereinafter ICCPR]; Universal Declaration of Human Rights, Dec. 10, 1948, art. 18, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 74 (1948) [hereinafter Universal Declaration]; see also Lerner, supra, 185-89.

with freedom of religion, but they do have an impact on this subject, to be explained below.

5. Due to the system of government that prevails in Israel, a multi-party parliamentary democracy, Jewish orthodox religious parties have a considerable influence on the political life of the country.

6. Like many other Middle Eastern countries, Israelis fear the spread of religious fundamentalism.

III. THE JEWISH CHARACTER OF THE STATE

Although there is a Jewish majority in the country, Judaism has not been proclaimed the official religion of the State. Neither is Jewish law the applicable legal system, except in certain matters of personal status of Jews.

Some legal instruments, however, refer to the Jewish character of the State. Thus, the 1948 Declaration on the Establishment of the State of Israel proclaimed "the establishment of a Jewish State in Eretz-Israel [the Land of Israel] . . . the State of Israel."* Similarly, the Basic Law: The Knesset, provides that:

[a] candidates' list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following:

(1) negation of the existence of the State of Israel as the State of the Jewish people;

(2) negation of the democratic character of the State;

(3) incitement to racism.5

The Jewishness of the State is also reflected in the fact that the Sabbath and the Jewish holidays have been declared to be the official days of rest for the majority of the population, that the flag and emblem express Jewish tradition, and that the army has to provide only Kosher food to its soldiers.6

Another interesting Jewish-oriented provision has been included in the Law on the Foundations of Law, 5740-1980,7 which deals with the filling

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of lacunae by the judges: "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage." The term Israel, in this context, refers to Judaism, or the Jewish people.

Another relevant provision has been included in the two 1992 Basic Laws on human rights mentioned above: their purpose is to protect the rights dealt with by these laws, namely, human dignity, liberty, as well as freedom of occupation, "in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."

Several authors have discussed the compatibility of the Jewishness and the democratic character of the State, according to Supreme Court Justice I. Zamir, there is no contradiction if both terms are interpreted reasonably and moderately. In no official text has the Jewish character of the State been defined. It should, however, be remembered that the term "Jewish" has a religious as well as an ethnic connotation, and the two aspects are interwoven. It is almost impossible to make a clear distinction between them.

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8. Id.; see also RUBINSTEIN & MEDINA, supra note 6, at 79-80.
12. As stated by BARAK, supra note 10, at 332.
IV. THE PRINCIPLE OF FREEDOM OF RELIGION AND OF CONSCIENCE

The basic attitude of the State toward religious freedom and pluralism is reflected in the 1948 Declaration on the Establishment of the State of Israel: “[The State] will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions . . .” The Declaration is neither a constitution nor a statute, but the Supreme Court has decided that it “expresses the nation’s vision and its credo,” and should be taken into consideration “when we attempt to interpret or clarify the laws of the State.” Moreover, the legislature has also recognized the relevance of the Declaration by including in the two above mentioned 1992 Basic Laws a provision which says that “these [fundamental human] rights shall be upheld in the spirit of the principles set forth in the Declaration on the Establishment of the State of Israel.”


Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration on the Establishment of the State of Israel.
In this context one should also refer to a legislative text enacted in 1922 at the time of the British Mandate, and which is still in force in Israel:

All persons in Palestine [now Israel] shall enjoy full liberty of conscience, and the free exercise of their forms of worship subject only to the maintenance of public order and morals. Each religious community . . . shall enjoy autonomy for the internal affairs of the community subject to the provisions of any Ordinance or Order issued by the High Commissioner.18

As mentioned, the two 1992 Basic Laws deal specifically with “Human Dignity and Liberty” and certain rights which derive therefrom, and with “Freedom of Occupation.” However, the general reference to “Fundamental Human Rights” in the context of “Basic Principles”19 may perhaps be interpreted as a recognition of the applicability of other fundamental human rights, including freedom of religion, although not specifically mentioned in the text. If this broad interpretation of the two 1992 Basic Laws is adopted by the Supreme Court, the result could be that freedom of religion would, to a certain extent, prevail over regular laws.20

Israel has also committed herself to freedom of belief and religion in various international instruments. Thus, she has ratified the 1966 International Covenant on Civil and Political Rights which provides for religious freedom.21 Similarly, under the 1993 Fundamental Agreement between the Holy See and Israel, the latter has committed herself to uphold and observe this freedom.22 This text also gives legally binding effect, as

Id.
18. Palestine Order in Council, 1922, 3 DRAYTON, LAWS OF PALESTINE 2587, section 83 (1934).
20. See id. This would be the consequence of the provision in section 8 of the Basic Law: Human Dignity and Liberty: “The rights according to this Basic Law shall not be violated except by a statute that befits the values of the State of Israel, and is enacted for a worthy purpose, and to an extent that does not exceed what is necessary, or by regulation enacted by virtue of express authorization in such a statute.” Basic Law: Human Dignity and Liberty, 1993/94, S.H. 90. However, the law has no retroactive effect: “Nothing in this Basic Law affects the validity of any law (din) in force prior to the entry into force of this Basic Law.” Basic Law: Human Dignity and Liberty, 1993/94, S.H. 90; see also RUBINSTEIN & MEDINA, supra note 6, at 176; Hillel Sommer, The Non-Enumerated Rights: On the Scope of the Constitutional Revolution, 28 MISHPATIM 257, 324-26 (1997) (Hebrew).
between the two contracting parties, to the relevant provision of the 1948 Universal Declaration of Human Rights.23

Compliance with freedom of religion in Israel has been assured by the criminal law which made it a punishable offence to outrage religious sentiments, to disturb worship, or to desecrate places of worship.24 The above mentioned rights, and the protection of criminal law, have been granted to "all religions," without distinction.

The Supreme Court of Israel has recognized and implemented the principle of freedom of religion in various cases. In Faithful of the Temple Mount v. Commander of Police in the Jerusalem Area,25 Justice Barak said:

Every person in Israel enjoys freedom of conscience, of belief, of religion, and of worship. This freedom is guaranteed to every person in every enlightened democratic regime, and therefore it is guaranteed to every person in Israel. It is one of the fundamental principles upon which the State of Israel is based . . . . This freedom is partly based on Article 83 of the Palestine Order in Council of 1922, and partly it is one of those "fundamental rights which 'are not written in the book' but derive directly from the nature of our State as a peace-loving democratic State" . . . . On the basis of these rules—and in accordance with the Declaration of Independence—every law and every power will be interpreted as recognizing freedom of conscience, of belief, of religion and of worship . . . .

However, freedom of religion is not an absolute right. It is subject to limitations and derogations. Thus, Israel's Supreme Court said that:

entre le Saint-Siège et Israël, 40 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 326 (1994).

23. See Universal Declaration, supra note 2, art. 18. Originally, the United Nations General Assembly adopted the Declaration "as a common standard of achievement" to which people should strive. Id. preamble. Opinions are divided on whether it has later acquired binding legal force. Its provision on religious freedom is referred to in the Fundamental Agreement as follows: "The State of Israel . . . affirms its continuing commitment to uphold and observe the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it is a party." Fundamental Agreement, supra note 22, art. 1(1).


26. Id. (internal quotation from Landau J. in H.C. 243/62, 16 P.D. 2407); see also H.C. 7128/96, Movement of the Faithful of the Temple Mount v. Government of Israel, (not yet published) ("Solomon's Stables" case).
Freedom of conscience, belief, religion and worship is a relative one. It has to be balanced with other rights and interests which also deserve protection, like private and public property, and freedom of movement. One of the interests to be taken into consideration is public order and security.\textsuperscript{27}

Not every concern for public order justifies a restriction on freedom of religion and of worship. Only if the danger to public order is very probable or almost certain may the authorities restrict this freedom.\textsuperscript{28} The relevant case concerned the refusal of the police to allow a group of Jews to pray outside the Temple Mount near one of its gates on the anniversary of the unification of Jerusalem, because of an alleged danger to public order. The Court rejected the police's argument and ordered the police to permit the holding of the prayers under certain conditions.

This limitation on freedom of religion is in line with the provisions of the relevant international documents. Thus, Article 29(2) of the 1948 Universal Declaration of Human Rights provides that "[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of . . . meeting the just requirements of morality, public order and the general welfare in a democratic society."\textsuperscript{29}

Similarly, under the 1966 International Covenant on Civil and Political Rights, "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."\textsuperscript{30} Moreover, the Supreme Court of Israel has emphasized that it recognizes and sanctions not only freedom of religion, but also freedom from religion, namely, the freedom not to practice any religion.\textsuperscript{31}

An interesting question concerning freedom of religion has been raised in several bigamy cases. In Israel, bigamy is forbidden by penal law but it is permitted according to Islamic law and according to the custom of several Jewish communities. In some cases, people accused of bigamy tried to defend themselves by claiming that the law against bigamy was contrary to the principle of freedom of worship. The Supreme Court has rejected this argument by making a distinction between what religion al-

\begin{thebibliography}{1}

\bibitem{27} H.C. 292/83, \textit{Faithful of the Temple Mount}, 38(2) P.D. at 455.
\bibitem{28} See id. at 456.
\bibitem{29} Universal Declaration, \textit{supra} note 2, Article 29(2).
\bibitem{30} ICCPR, \textit{supra} note 2, art. 18(3), at 178.
\bibitem{31} See, e.g., H.C. 3872/93, Meatrael Ltd. v. The Prime Minister and Minister of Religious Affairs, 47(5) P.D. 485, 506.
\end{thebibliography}
lows, on the one hand, and what it commands, on the other hand. Since bigamy is, at the most, allowed by the relevant religious laws and not commanded, its outlawing by the secular legislature is not contrary to the freedom of worship.  

V. THE HOLY PLACES

Freedom of religion also implies certain rights with regard to the Holy Places, namely, freedom of access and of worship, as well as the protection of those places. The Holy Places have often been a source of conflicts. In the nineteenth century a bitter controversy arose when certain European countries extended their protection over the various Christian churches in Palestine, and over the places which were holy to them. In order to regulate the status of the different churches at the Holy Places, the Ottoman government promulgated a number of firman, the most important one being that of 1852. That firman dealt with certain Holy Places and determined the powers and rights of the various denominations in those places. That arrangement became known as the historical status quo. The status quo has been applied to the Church of the Holy Sepulcher and its dependencies, the Convent of Deir al-Sultan, the Sanctuary of the Ascension on the Mount of Olives, and the Tomb of the Virgin Mary near Gethsemane, all four in Jerusalem, as well as to the Church of the Nativity, the Milk Grotto, and the Shepherds' Field near Bethlehem.


34. English translation reproduced in Zander, supra note 33, at 178-80.

The status quo obtained international recognition by the 1856 Conference of Paris after the Crimean War and by the 1878 Treaty of Berlin. It has also been reconfirmed by the 1993 Fundamental Agreement between the Holy See and Israel.

The 1922 Terms of the British Mandate for Palestine, drafted by the Council of the League of Nations, also dealt with the Holy Places. The Mandatory power was requested to preserve existing rights in those places and to ensure free access and worship, subject to requirements of public order and decorum. An international commission which was "to study, define and determine the rights and claims in connection with the Holy Places" was never established due to lack of agreement among the Powers about its composition.

In 1924, Britain adopted the Palestine (Holy Places) Order in Council under which “no cause or matter in connection with the Holy Places or religious buildings or sites in Palestine or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any Court in Palestine.” Although the Order in Council does not say so expressly, these matters were to be handled by the British High Commissioner (today the Minister of Religious Affairs).

37. See Fundamental Agreement, supra note 22, art. 4.
39. Id. at 28; ZANDER, supra note 33, at 64-70.
40. The Palestine (Holy Places) Order in Council, 25 July 1924, 3, DRAYTON, LAWS OF PALESTINE 2625 (1934). In implementing this provision, the courts had to deal with the question, what is a Holy Place. The courts have generally held that, in the absence of a definition in the Order in Council, it may be presumed that the intention was that the holiness depends on the belief of members of the relevant group, namely, on their religion. See Berkovitz, supra note 33, at 410-91; see also Haim Cohen, The Status of Jerusalem in the Israel Legal System, in TWENTY YEARS IN JERUSALEM 1967-1987, at 246, 258-61 (Joshua Prawer & Ora Ahimeir eds., 1988).
41. See Shmuel Berkovitz, The Holy Places in Jerusalem: Legal Aspects (Part Two), 12 JUSTICE 17, 17-19 (1997) (discussing jurisdictional issues). According to Justice Agranat, the President of the Supreme Court, in H.C. 222/68, National Groups—A Registered Association v. Minister of Police, 24(2) P.D. 141, 203, 211, the authority of the Mandatory power derived from the Terms of the British Mandate for Palestine, supra note 38, and from the purpose of the Order in Council. In Israel it is also based on Basic Law: The Government of 1968, Section 29, which grants the Government all powers not given to another organ. In the later, 1992 version of this Basic Law, the relevant provision is in section 40.
The 1936 Criminal Law Ordinance\(^4\) by which the Mandatory codified the penal law in Palestine, includes several provisions on the protection of Places of Worship against desecration. These provisions are today included in Israel's Penal Law.\(^3\) In 1948 the State of Israel was established, and, as mentioned earlier, the Declaration signed at that time by the leaders of the Jewish community included a provision on the safeguarding of the Holy Places of all religions.\(^4\)

Until 1967, most of the Holy Places in the territory of former mandatory Palestine were under Jordanian control. However, as a result of the 1967 Six-Day War, they came under the administration of Israel. Immediately after the fighting ended, Prime Minister Levi Eshkol convened the spiritual leaders of the various communities and reassured them of Israel's intention to protect all the Holy Places and to permit free worship.\(^5\) Soon the Knesset adopted the Protection of the Holy Places Law,\(^6\) which ensures protection of the Holy Places against desecration as well as freedom of access thereto. These principles were reconfirmed with regard to Holy Places situated in Jerusalem by the 1980 Basic Law: Jerusalem Capital of Israel.\(^7\) The details of the implementation with regard to Jewish Holy Places were laid down by the Regulations enacted by the Minister of Religious Affairs in accordance with the protection of the Holy Places Law.\(^8\) In addition, one has to remember that there are certain provisions dealing with the Holy Places in various specific laws, such as the Mining Ordinance of 1925\(^9\) and the Antiquities Law 1978.\(^5\)

In order to complete the picture, one should mention certain international texts related to the Holy Places. We have already mentioned the

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42. See 1936 PALESTINE GAZETTE, Supp. 1, 285.
44. See Declaration on the Establishment of the State of Israel, 1948, 1 L.S.I. 3, 4, (1948).
45. See Prime Minister Levi Eshkol's Address to the Spiritual Leaders of All Communities in Jerusalem (June 7, 1967), reprinted in 1 ISRAEL'S FOREIGN RELATIONS 1947-1974, at 244-45 (Meron Medzini ed., 1976).
49. See The Mining Ordinance of 1925, 2 DRAYTON, LAWS OF PALESTINE 938-39 (1934).
50. See The Antiquities Law, 1978, section 29(c), 32 L.S.I. 93, 100 (1978); BERKOVITZ, supra note 24, at 27 (for additional provisions, and for an analysis); see also Berkovitz, supra note 43, at 6.
1993 Fundamental Agreement between the Holy See and Israel which deals both with the preservation of the historical status quo in those Christian Holy Places to which it applies, and with the protection of freedom of Catholic worship at others.\textsuperscript{51} In the 1994 Treaty of Peace between Israel and Jordan, Israel promised to "[respect] the present special role of ... Jordan in Muslim Holy Shrines in Jerusalem," and "[w]hen negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines."\textsuperscript{52}

With regard to the Palestinians, one should mention a letter sent by then Foreign Minister of Israel Shimon Peres to the Foreign Minister of Norway in October 1993. The letter was kept secret for some time, and its discovery aroused much criticism in Israel. According to this letter, "all the Palestinian institutions of East Jerusalem, including the economic, social, educational, cultural, and the holy Christian and Moslem places, are performing an essential task for the Palestinian population . . . ." and "will be preserved . . . ."\textsuperscript{53} The meaning of this text and its effect raise difficult questions of interpretation.\textsuperscript{54}

Freedom of access and of worship at the Holy Sites in the West Bank and Gaza Strip, as well as the protection of those sites, have been dealt with by the 1994 Agreement on the Gaza Strip and the Jericho Area,\textsuperscript{55} by the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,\textsuperscript{56} and by the 1997 Protocol Concerning the Redeployment in Hebron.\textsuperscript{57} How do courts in Israel deal with disputes in which Holy Places are involved? We have seen above that the principles of freedom of religion and of worship are generally recognized. Moreover, no serious disputes have erupted with regard to freedom of access and of worship in places that are holy for only one religion or denomination. How-

\textsuperscript{51} See Fundamental Agreement, \textit{supra} note 22, art. 4.
\textsuperscript{53} Full text \textit{reprinted in JERUSALEM POST}, June 7, 1994, at 1.
ever, in recent years, disputes, sometimes accompanied by violence, have erupted among various Jewish denominations, in particular with regard to prayer at the Western Wall.\textsuperscript{58} Most disputes concern places that are holy to two or more religions or denominations. The attitude of the courts may be summarized as follows: the 1924 Palestine (Holy Places) Order in Council\textsuperscript{59} is still in force except where it has been superseded by later Israeli legislation, like the 1967 Protection of the Holy Places Law.\textsuperscript{60} Therefore, the courts will not decide questions of rights and claims to "Holy Places, religious buildings or sites."\textsuperscript{61} Similarly, in principle, courts do not consider themselves authorized to adjudicate on matters related to the implementation of the right to worship at Holy Places.\textsuperscript{62} It is the government that has to deal both with disputes about rights to Holy Places and with the modalities of worship. Thus, the Supreme Court has so far refused to intervene in order to ensure the right of Jews to pray in groups on the Temple Mount, which is holy to both Jews and Muslims, and is under the administrative control of the Muslim \textit{Waaf}.\textsuperscript{63}

On the other hand, the courts consider themselves authorized to deal with all matters mentioned in the Protection of the Holy Places Law,\textsuperscript{64} namely, protection against desecration, against violation of freedom of access, and against violations of the feelings of the members of a community with regard to the place which is sacred for them.\textsuperscript{65} The courts

\textsuperscript{58} See, e.g., H.C. 257/89, 2410/90, Hoffman v. Custodian of the Western Wall, 48(2) P.D. 256 (considering a dispute over the rights of worship and prayer at the Western Wall between Jews of different religious convictions).

\textsuperscript{59} The Palestine (Holy Places) Order in Council of 25 July 1924, 3 DRAYTON, LAWS OF PALESTINE 2625 (1934).


\textsuperscript{62} See, e.g., H.C. 222/68, National Groups—A Registered Association v. Minister of Police, 24(2) P.D. 141; H.C. 33/92, Baruch Ben-Yosef v. Minister for Religious Affairs, 46(1) P.D. 855; H.C. 537/81, Hayim Stanger v. Government of Israel, 35(4) P.D. 673.

\textsuperscript{63} The special difficulty with the Temple Mount is that it is not only holy for Jews as well as Muslims, but it has also become a national symbol for both communities. See YITZHAK REITER, THE TEMPLE MOUNT/AL-HARAM AL-SHARIF: POINTS OF AGREEMENT AND DISPUTE 2 (1997) (Hebrew); NADAV SHRAGAI, THE TEMPLE MOUNT CONFLICT (1995) (Hebrew).


\textsuperscript{65} For an analysis of these notions, and the relations among them, see H.C. 7128/96, Movement of the Faithful of the Temple Mount v. Government of Israel (Justice I. Zamir) (not yet published) ("Solomon's Stables" Case).
are also authorized to deal with criminal offences in order to preserve public order at the Holy Places. Even where a dispute actually relates to claims or rights to a Holy Site, the courts may intervene in order to restore possession to a community if it had been deprived of this possession by a recent act. The reason for this rule is that the courts have an obligation to preserve law and order.

This last consideration—the preservation of law and order—is so important that in some cases the Supreme Court has even refused to override a decision of the police to deny freedom of mere access (independent of worship) because of the fear that such access would jeopardize law and order. Thus, in certain cases individual Jews were denied access to the Temple Mount for reasons of public order. Moreover, even a temporary complete prohibition for all Jews to ascend the Mount may be lawful if needed for reasons of safety.

An interesting question concerns the distinction between the right to worship at Holy Places, which according to the courts is not within their jurisdiction, and the right to access with which the courts are authorized to deal. The request of Jews for permission to pray in a group on the Temple Mount was considered a matter of worship, but it seems that according to the Supreme Court the right of an individual to pray by himself is part of his right of access.

66. See, e.g., Cr. C. (Jm.) 2986/87, Government of Israel v. The Idra Institutions and Rabbi Goren, 1988/89(2) P.M. 156 (Justice Procaccia), and the petition to the Supreme Court—H.C. 267/88, The Idra Institutions and Rabbi Goren v. The Local Court in Jerusalem and the Government of Israel, 43 (3) P.D. 728 (Justice Barak); Cr. C. (Jm.) 203/84, State of Israel v. Livni 1989/90(3) P.M. 330 (the case of the Jewish underground); Cr. C. (Jm.) 51/76, State of Israel v. Chanan, 1976/77(1) P.M. 392. In principle, the courts may deal with criminal cases related to the Holy Places unless the offence is directly connected with the sanctity of the place where it was perpetrated. But so far in no criminal case have the courts abstained from assuming jurisdiction because of such a connection.


68. See, e.g., H.C. 2725/93, Salomon v. Commander of the Police in Jerusalem, 96(1) Takdeen-Elyon 370; H.C. 4044/93, Salomon v. Commander of the Police in Jerusalem, 96(1) Takdeen-Elyon 447. In both cases the Supreme Court decided by majority vote, and not unanimously.


70. See, e.g., H.C. 222/68, National Groups—A Registered Association v. Minister of Police, 24(2) P.D. 141; H.C. 33/92, Baruch Ben-Yosef v. Minister for Religious Affairs, 46(1) P.D. 855; H.C. 537/81, Hayim Stanger, adv. v. Government of Israel, 35(4) P.D. 673.

71. See H.C. 67/93, "Kach" Movement v. The Minister for Religious Affairs, 47(2) P.D. 1, 6 (recognizing that the right of an individual to pray by himself is a part of his right of access, but refusing to implement this right under the circumstances due to police fear that prayer with a prayer shawl may cause provocation); see also Izhak Englard, The Legal Status of the Holy Places in Jerusalem, 28 ISR. L. REV. 595, 597 n.24 (1994) (stating that
An overall consideration of the courts has been that there is a presumption in favor of the courts having jurisdiction, and that "where there are two possible interpretations, the interpretation which should be chosen is the one which preserves jurisdiction and not the one which excludes it." 72

Even in those cases where the courts do have jurisdiction, they exercise it with great caution:

There are certain matters, in the sphere of law, which are also matters of society, faith, morals and policy. In such matters the Court is apt to decide not strictly according to the law, but it may interpret and implement the law flexibly, in accordance with non-legal considerations, if the public welfare requires it. Such are, usually, matters related to the Holy Places. 73

The Holy Places in Israel are administered by members of the faith for whom those places are holy. In practice, Israel has been very careful to carry out the policy of respect for the Holy Places of all religions. At the entrance of each Holy Place the Ministry of Religious Affairs has posted an announcement in several languages requesting visitors not to desecrate the place, to be properly dressed, and to behave becomingly. In the few cases of violations of the sanctity of Holy Places, the police have acted diligently to apprehend the offenders and bring them to justice.

Sometimes it is difficult to strike the right balance between the granting of autonomy to the administrators of the Holy Places on the one hand, and assuring adequate protection on the other hand. Too much protection might be interpreted as interference.

VI. EQUALITY OF CIVIL AND POLITICAL RIGHTS OF MEMBERS OF VARIOUS RELIGIONS AND COMMUNITIES

Discrimination on grounds of religion or belief would certainly be contrary to religious freedom, and Israel’s legislation and court decisions would not tolerate it. The Declaration on the Establishment of the State proclaimed that “[the State of Israel] will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex . . . .” 74 An interesting example demonstrating this equality is the provision in the Basic Law: The President of the State of 1964 which lays

down only two conditions for a person to qualify as a candidate for this office: he must be a citizen and a resident of Israel. An amendment proposed at the time, which would have reserved this office for Jews, was not adopted by the Knesset.

According to the Supreme Court, the general principle of equality is a basic value of the legal system of Israel. It is a central ingredient of the social consensus on which Israel's society is based. This principle implies that any differentiation must be justified by the nature of the case and its circumstances. Such differentiation exists, for instance, in matters of military service. Only Jews and Druze citizens have been subject to compulsory service in the army. The special treatment given to most non-Jews in this respect was designed to prevent a conflict of conscience, most of the non-Jews being Arabs (Muslim or Christian), who may have close relatives in countries which are not yet at peace with Israel. However, many non-Jewish youths serve in the Israeli army on a voluntary basis. Respect for religious pluralism is at the base of various laws which reject automatic equality in order to preserve the identity and tradition of a religious community. Thus, the Adoption of Children Law prescribes that the adopting persons be of the same religion as the adoptee. In the matter of weekly rest, it is provided that non-Jews may choose Sunday or Friday instead of Saturday, which is the Jewish Sabbath.

It is of course true that equality cannot be measured only by reference to the legal system, and some inequality on the social level may exist despite the law. But it seems that in hardly any heterogeneous society are social relations between members of the various groups based on complete equality. Moreover, in Israel this lack of full social equality and intermingling has probably been compounded by the political element. As mentioned, most of Israel's non-Jews are ethnically Arabs, and some suspicion or distrust may have resulted from their affinity with the people in some neighboring areas who are still hostile towards Israel.

Among the specific provisions of Israel's laws which are intended to guarantee equality to members of the various religions, let us mention

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76. See e.g., H.C. 721/94, El-Al Israel Airlines Ltd. v. Danilevitz, 48(5) P.D. 749, 759.
77. See id. at 761; see also the general comment on discrimination prepared by the Human Rights Committee established under the ICCPR, U.N. Doc. CCPR/C/21/Rev. 1/Add. 1 (1989), para. 13.
78. Adoption of Children Law, 1981, 35 L.S.I. 360, (1980-81). In December 1997 the law was amended in order to permit adoption of children from abroad even if they are not of the same religion as the adopting parents.
the law on the Crime of Genocide (Prevention and Punishment), the Employment Service Law, the Succession Law, and the Defamation Law. Equality among the members of various ethnic groups and faiths has to be supplemented by provisions against intolerance. But a prohibition of intolerance may easily be interpreted as a violation of the principle of freedom of opinion and of expression, which is the cornerstone of every democratic society. Hence the legislature interferes only when the intolerance reaches the level of incitement. Thus, in the Penal Law, the offence of sedition includes the promotion of feelings of ill-will and enmity between different sections of the population. The law also prohibits the publication or reproduction of publications of a seditious nature. Sedition is considered a serious offence, and the perpetrator is liable to up to five years imprisonment. In this context one should also refer to the exclusion from elections to the Knesset of parties whose objectives or actions entail incitement to racism, and to the general prohibition of incitement to racism. Despite these legal provisions, incitement to hatred on religious or ethnic grounds occurs among members of some extremist groups, and one may deplore that the State, despite its efforts, has not been more diligent in prosecuting the offenders.

It has been alleged that there is discrimination against non-Jews in the fields of immigration and nationality. The Declaration on the Establishment of the State has stated that "The State of Israel will be open to Jewish immigration and for the Ingathering of the Exiles . . . " Consequently, the Law of Return provides that "every Jew has the right to immigrate to the country," and according to the Nationality Law, he may easily acquire Israeli nationality unless he does not wish so. However,

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85. See id. sections 145, 198, 170-74 (including provisions on unlawful associations, public mischief, and offences against sentiments of religion and tradition).
87. See Penal Law (Amendment No. 20), 1986, 40 L.S.I. 230, (1985-86) (adding sections 144a to 144e to the Penal Law).
88. 1 L.S.I. 4, (1948).
89. See 4 L.S.I. 114, (1949-50). This right may be refused to a person engaged in activity directed against the Jewish people, a person who endangers the public health, and a person with a criminal past liable to endanger public welfare.
90. See 6 L.S.I. 50, (1951-52); see also Claude Klein, La nationalité israélienne, in JURISCLASSEUR (1983).
this privilege does not involve improper discrimination on religious grounds for several reasons.

(1) When a people attains statehood in fulfillment of its aspiration for national liberation, it is common and natural that all members of that people are permitted and invited to come and live in that country. From this point of view, Israel is no more discriminatory than most other new States. In fact, many States, new and old, have granted preference, for the purpose of bestowing their nationality, to persons who have close social, cultural, or ethnic links with the nation. Examples include Greece, the Federal Republic of Germany, the former USSR, Italy, former Czechoslovakia, Denmark, El Salvador, Guatemala, Honduras, Liberia, Mexico, Nicaragua, Poland, Venezuela, and Jordan.

(2) In 1965, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination, which has been in force among more than 140 States, including Israel. Although this document deals with racial discrimination, it seems that by analogy one can draw some important conclusions with regard to restrictions or preferences on religious grounds as well. The Convention has laid down that in matters of nationality, citizenship, and naturalization, States are free to prefer certain persons, on condition that there is no discrimination against any particular group (Article 1(3)). Since Israeli legislation does not impose restrictions on any particular group, it is within the letter and the spirit of the Convention.

(3) Moreover the Convention permits the granting of preferences, if necessary, to undo the effects of prior discrimination, namely, affirmative action (Article 1(4)). In the case of Israel, one has to remember that since 1939 the gates of Mandatory Palestine had almost been closed to Jewish immigration, thus contributing to the perishing of millions of Jews in Europe during World War II. The wide opening of the gates for Jews

94. The term racial discrimination has a very comprehensive meaning for the purpose of this Convention: "[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin . . . ." Id. at 195.
on the establishment of Israel can thus be considered a lawful case of affirmative action.

(4) It should be underlined that the law does not close the State's doors to anybody, but only creates a preference in favor of Jews. With regard to non-Jews, the applicable rules of immigration are quite similar to those that exist in other States. Everybody, including non-Jews, may apply for permission to enter Israel, and for naturalization. It is only the automatic right to enter and the easy acquisition of nationality that is reserved for Jews.

(5) Moreover, not only do Jews enjoy those rights, but also family members, whether they be Jewish or not.

In the matter of immigration and nationality, the dual nature of Judaism, as a religion and as an ethnic origin, is of particular relevance. Despite the semi-religious definition of a Jew, the relevant laws are basically concerned with the return of members of the Jewish people to their homeland. This right involves a continuing debate over the question, "Who is a Jew?"—a matter which is beyond the scope of this article.

VII. THE RIGHT TO CHANGE ONE'S RELIGION

Another aspect of religious freedom concerns the possibility to change one's religion. This right has been the subject of a special enactment adopted during the mandatory period, the Religious Community (Change) Ordinance, of 1927, which is still in force. Since—as will be seen later—belonging to a religious community has important consequences in matters of personal status and the jurisdiction of the courts, it was laid down that a change of religion has to be registered. Thus, everyone is free to change his religion, but in order for that conversion to have legal consequences, and only for that purpose, he needs the con-

95. See Natan Lerner, Equality of Rights Under Israeli Law, 9 PATTERNS OF PREJUDICE 1, 3 (1975); see also KLEIN, supra note 13, at 35.


97. See on this question, for example, RUBINSTEIN & MEDINA, supra note 6, at 111-31; AVNER H. SHAKI, WHO IS A JEW IN THE LAW OF THE STATE OF ISRAEL (1976-1978) (two volumes) (Hebrew); M. Shava, Comments on the Law of Return (Amendment no. 2), 5730-1970 (Who is a Jew), 3 TEL AVIV U. L. REV. 140 (1977) (Hebrew).

98. 2 DRAYTON, LAWS OF PALESTINE 1294 (1934).

99. The Supreme Court has decided that the requirement of the consent of the head of the new religious community is relevant only for the purpose of the jurisdiction of the religious tribunals. See H.C. 1031/93, Pesachu Goldstein v. Minister of the Interior, 51(4) P.D. 661. The case arose because the authorized orthodox Rabbinate had not recognized a conversion to Judaism effected by the petitioner before a tribunal of the Conservative movement.
sent of the new religious community which he joins. The head of this religious community will provide him with an appropriate certificate, and he has to notify the Ministry of Religious Affairs of the change. The consent of the community which he leaves is not needed. The religion of a minor shall not be changed unless both of his parents consent or with a court’s approval, and if the minor is above the age of ten, his consent is also required.

VIII. PROSELYTZING

It is doubtful whether a right to proselytize is included in the principle of freedom of religion. The above mentioned international instruments provide for the right to manifest one’s religion or belief “in teaching, practice, worship and observance,” but proselytizing is not mentioned. Nevertheless, we will add a few clarifications on this matter.

Proselytizing is legal in Israel, but since 1977 it has been prohibited to promise money or other material advantages in order to induce someone to change his religion. Similarly, it is prohibited to receive material advantages in exchange for a promise to change one’s religion.


It should be underlined that missionary activity is allowed, but the buying of souls for money has been prohibited. It has also been condemned by various religions. This law applies equally to all religions. According to an instruction issued by the Attorney General, no one shall be prosecuted under this law without prior authorization by the State Attorney. In fact, the law has never been applied.

From time to time, tensions rise as a result of overzealous attempts to proselytize, probably because of the differing attitudes of the various religions to proselytizing: for instance, the Jewish and the Druze religions do not encourage people to join their ranks, while some Christian groups consider proselytizing a holy mission. It is understandable that members of a religion, who do not try to influence others to join it, are irritated if members of other religions try to proselytize among its own ranks.

As a reaction to the mailing of Christian literature to one-half million Israeli homes by an American evangelical organization in San Diego, some members of the Knesset proposed bills in 1997 that would limit missionary activity in Israel. At the time this article was written, it was unknown whether (and if so in what terms) these bills would ever be adopted. The government of Israel has declared that it strongly objects to them.

IX. THE RIGHT TO A RELIGIOUS EDUCATION

The right to religious education is guaranteed by law. It is essentially based on governmental support, while recognizing the autonomy of the various religious communities. The parents of a child may choose to send him to a secular state school, to a religious state school, or to a private religious school. In this context it should also be mentioned that the 1989 U.N. Convention on the Rights of the Child was ratified by Israel on August 4, 1991.

X. MATTERS OF PERSONAL STATUS

It is perhaps in matters of personal status that religious freedom in Israel is most complicated and controversial. Under Ottoman rule (1517-1917), the recognized religious communities (Millets) were granted autonomy in matters of personal status. This system was taken over with

104. The main enactments in this field are Compulsory Education Law, 1949, 3 L.S.I. 125, (1948-49); State Education Law, 1953, 7 L.S.I. 113, (1952-53); see also Klein, supra note 13, at 133-34.
105. See generally Goldstein, supra note 14.
some modifications by the Mandatory authorities\textsuperscript{106} and later by the State of Israel. Today there are, besides the Jewish community, thirteen Recognized Religious Communities in Israel: the Muslim, Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic-Melkite, Maronite, Syrian Orthodox, Druze (since 1962), Episcopal-Evangelical (since 1970) and Baha'i (since 1971) communities. The last two do not have their own religious tribunals. The list of Recognized Religious Communities\textsuperscript{107} does not include several Christian communities, such as Christian Monophysite, like the Copts and the Ethiopian Orthodox Church, the Protestant-Lutheran, the Baptist and the Quaker, nor certain other religious communities within or outside the bounds of the Jewish community. Priests of the various religious communities are in charge of conducting marriages and notifying the authorities for the purpose of registration,\textsuperscript{108} and the tribunals of recognized communities have jurisdiction in certain matters of personal status, sometimes to the exclusion of the jurisdiction of civil courts. There are differences in the scope of jurisdiction among the various communities. The Muslim tribunal has the broadest powers. In certain matters the jurisdiction of the religious tribunals is exclusive, while in others it is concurrent and depends on the consent of all the parties involved.\textsuperscript{109}

Both the religious tribunals and the civil courts primarily apply the religious laws of the relevant parties to questions of personal status,\textsuperscript{110} in addition to relevant laws enacted by the Knesset.\textsuperscript{111} The difference between the application of religious law by the civil courts on the one hand and the religious tribunals on the other hand is apparent in two matters: first, each of these jurisdictions applies its own rules of procedure and evidence, and second, the civil courts take into consideration rules of private international law (conflict of laws) whereas the religious tribunals

\textsuperscript{106} See generally EDOARDO VITA, THE CONFLICT OF LAWS IN MATTERS OF PERSONAL STATUS IN PALESTINE (1947).
\textsuperscript{107} See Palestine (Amendment) Order in Council, 1939 PALESTINE GAZETTE, Supp. 2, no. 898, 459 (adding the Second Schedule to the Palestine Order in Council, 1922-1947); see also RUBINSTEIN & MEDINA, supra note 6, at 149.
\textsuperscript{108} See Marriage and Divorce (Registration) Ordinance of 1919, 2 DRAYTON, LAWS OF PALESTINE 903 (1934).
\textsuperscript{109} See Palestine Order in Council, 1922, 2 DRAYTON, LAWS OF PALESTINE 2581 (1934), Arts. 47, 51-54; Rabbinical Tribunals Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. 139, (1952-53); Druze Religious Tribunals Law, 1962, 17 L.S.I. 27, (1962-63); see also PINHAS SHIFMAN, FAMILY LAW IN ISRAEL (Jerusalem, 1984) (Hebrew).
\textsuperscript{110} See 1922 Order in Council, art. 47 (for the civil courts); Rabbinical Tribunals Jurisdiction (Marriage and Divorce) Law, section 2 (for the Jewish religious tribunals).
disregard them. Due to the jurisdiction and autonomy of the religious tribunals, Israel had to add to its 1991 ratification of the 1966 International Covenant on Civil and Political Rights a reservation that “to the extent that such law [the religious law of the relevant parties] is inconsistent with its obligations under the Covenant, Israel reserves its right to apply that law.”

Although, as mentioned, the religious tribunals are in principle autonomous and may apply their respective legal system, Israel’s Supreme Court has decided that these tribunals have to comply with certain laws of the State, such as the Succession Law. Moreover, they also have to apply general legal principles derived from the basic values of Israel’s legal system, including human rights. Thus, in view of the right to freedom of movement, the Supreme Court has limited the power of a Jewish religious tribunal to prohibit a party to leave the country. Similarly, the Court has ruled that the tribunal must judge in conformity with the presumption of equal partnership of spouses in the property acquired by one of them.

Although the jurisdiction of the Rabbinical tribunals is not broader than that of some of the other communities, it has given rise to special problems and considerable opposition from many Jews, while it seems that no such resentment with regard to tribunals of other religious communities has been recorded. Probably, the opposition to the Jewish religious tribunals stems from three reasons. First, many non-religious Jews resent the exclusive authority of the religious institutions and consider it a case of religious coercion. Second, although Jewish law is quite liberal on certain matters, such as divorce by consent, it nevertheless includes some rather strict rules and restrictions, as well as discrimi-

112. The International Covenant on Civil and Political Rights, 1966, was signed by Israel on December 19, 1996, and ratified in 1991 with the above reservation. Under an additional declaration, Israel’s state of emergency constitutes a public emergency within the meaning of Article 4(1) of the Covenant and, therefore, the State may derogate from some of its obligations under Article 9 of the Covenant.

113. The Succession Law, 1965, 19 L.S.I. 58, (1964-65). If a religious tribunal disregards a provision of a law of the Knesset expressly addressed also to the religious tribunals, its decision may be set aside by the Supreme Court because of excess of jurisdiction. However, the case law of the Court on this matter is not uniform. See RUBINSTEIN & MEDINA, supra note 6, at 194.


115. See H.C. 1000/92, Bavli v. The Supreme Rabbinical Tribunal, 48(2) P.D. 221. For an analysis of this judgment, see Halperin-Kaddari, supra note 114.

nation between the genders,\textsuperscript{117} which may be considered outdated and may create unnecessary hardship. Third, while other religious communities in Israel are rather homogeneous, the Jewish population is very heterogeneous, but so far the State has in fact given the Orthodox movement a monopoly over official activities, namely, the registration of marriages and jurisdiction in matters of personal status. This has engendered resentment from members of other movements, including the Conservative, Reform,\textsuperscript{118} Kara’ites,\textsuperscript{119} and Falashas (the Ethiopian Jews).\textsuperscript{120}

It thus follows that non-believers and members of an unrecognized religious group are at a disadvantage in matters of personal status. There are no lay officials authorized to celebrate and register marriages, there is no secular law on marriages, and civil courts have no jurisdiction in matters of marriage and divorce. However, in order to alleviate the situation, in those matters of dissolution of marriage which are not within the exclusive jurisdiction of a religious tribunal, the civil courts do have jurisdiction in certain circumstances.\textsuperscript{121}

\section*{XI. CONCLUSION}

This survey has shown that under Israeli law, freedom of conscience, belief, religion, and worship is guaranteed in most spheres, in line with the State’s international obligations. This freedom is based both on legislative acts and on court decisions. It must, however, be balanced with other rights and interests and may be restricted for reasons of public order and security. It is protected inter alia by provisions of the penal law.

Israel also respects freedom of access and of worship at the Holy Places and ensures the protection of these sites. However, in this sphere the powers of the courts are somewhat restricted in favor of the govern-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} See ABRAMOV, supra note 14, at 354-79.
\item \textsuperscript{119} The Chief Rabbi of the Kara’ites in Israel is, however, recognized as a competent “Registering Authority” under the Marriage and Divorce (Registration) Ordinance of 1919. See supra note 108; see also MICHAEL CORINALDI, THE PERSONAL STATUS OF THE KARA’ITES (1984) (Hebrew); Lapidoth & Corinaldi, supra note *, at 289-92.
\item \textsuperscript{121} See Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969, 23 L.S.I. 274, (1968-69).
\end{enumerate}
\end{footnotesize}
ment, which is considered to be better suited to deal with certain matters concerning the Holy Places because of the international aspects of this sphere. An overriding consideration is the need to preserve law and order—a consideration which is of particular relevance with regard to the Temple Mount.

Freedom of religion requires equality of civil and political rights among members of different faiths. Equality of all citizens is a basic tenet of Israeli law, and distinctions are only permitted if they are objectively justified by the nature and circumstances of the case. Such distinctions are sometimes necessary in order to respect the right of a religious group to be different and preserve its identity.

Incitement, namely severe intolerance, is outlawed by the provisions of penal law. Israel also recognizes the right to change one's religion. Proselytizing is permitted, but not for material gain. The subject may be dealt with in new legislation. Every Israeli has the right to choose between a secular and a religious school for his children. Private religious schools are also recognized.

In matters of personal status, religious freedom is both particularly evident and problematic. The right of priests to celebrate and register marriages and the jurisdiction of the tribunals of the recognized religious communities in certain matters of personal status do enhance the religious freedom and autonomy of those communities. But on the other hand, since some of these powers are exclusive, people who do not belong to any religious group and those who are part of an unrecognized denomination may have grave difficulties. One way to overcome this hardship would be the introduction of an optional civil marriage as well as a secular law on matters of personal status to be applied by the civil courts which would have parallel jurisdiction.
