

State and Religion in Israel
A Perspective by an Arab Christian Citizen and Judge
Salim Joubran

The State of Israel is a unique country in regard to its human composition — Jews, Arabs, Muslims, Christians and Baha'is.

The population of Israel today is close to 8 million, of which 1.5 million are Arabs - 1,350,000 Muslims, 150,000 Christians. There are 10 recognized Christian communities: the Roman Catholic, Armenian, Maronite, Syriac and Chaldean Catholic Churches; the Eastern Orthodox Greek Orthodox Church; the Oriental Orthodox Syriac Orthodox Church; the Armenian Apostolic Church and the Anglican Evangelical Episcopal Church. In addition there are other small Christian communities.

The institutions of the various religions enjoy full autonomy regarding the internal management of their affairs beginning with control of their holy sites and up to the fact that each community has its own religious tribunals for matters of personal status, in particular marriage and divorce. The state does not intervene in the internal affairs of the different communities save that the High Court of Justice will occasionally intervene in decisions of the religious tribunals when the latter transcend their authority, or in matters of natural justice.

The peaceful coexistence of all communities in the State of Israel is based on mutual respect. We try to create a good atmosphere for peaceful life and are guided by two important terms — tolerance and respect. In many places in Israel we have succeeded in achieving this aim. An example of this is the city of Haifa where I reside; all religions and communities — Jews, Muslims, Christians and Baha'is - live there together. The international center of the Baha'i faith is situated in Haifa.

Once a year, during the month of December, the city of Haifa celebrates the Holiday of all Holidays — Christmas, the birthday of the Prophet Muhammad and Hanukkah. During that month social events take place in which every community participates. Israel is defined as a Jewish and democratic state, as formulated in the Basic Laws dealing with civil and human rights.

The Declaration of Independence of the State of Israel of 1948 in accordance with which the Basic Laws are interpreted, states that Israel will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex, and guarantees freedom of religion, conscience, language, education and culture.

All religious communities in Israel enjoy freedom of religion and freedom from religion. Each community may maintain its religious beliefs and standards. The Muslims may build their mosques, the Christians may build their churches and the Jews may build their synagogues. For many years Muslims have been allowed to visit the city holiest to Islam, the city of Mecca in Saudi Arabia, on Pilgrimage. They usually travel to Mecca via Jordan with permission from the Jordanian, Israeli and Saudi Arabian authorities.

Until 1967, the Christians living in Israel were permitted to cross the border in Jerusalem to the eastern part that was under Jordanian rule, to celebrate the Christian holidays in the holy churches. Since 1967, there is, of course, free access.

Every year the President of the State of Israel holds a festive event at his residence honoring the heads of the different religious communities who celebrate Christmas and the New Year. All the leaders of the Christian communities take part in this event. Many

government ministers and public figures visit the heads of the Christian and Muslim communities in order to bestow their good wishes for their respective holidays. An interfaith committee exists, which includes leaders of all the religious communities, its role is to initiate collaboration and understanding between all sectors of society. There is also a joint Israel - Vatican commission that deals with various issues of common interest.

Freedom of religion in Israel is recognized as one of the constitutional civil rights because it forms part of the Declaration of Independence and due to its links to Human Dignity which is the core of Basic Law: Human Dignity and Liberty.

The starting point is that basic constitutional rights of freedom **of** and **from** religion are not absolute rights. In a multi-cultural society one cannot achieve full protection of one's basic constitutional rights without encountering a conflicting basic right held by another which also calls for constitutional protection. Freedom of religion may conflict with freedom from religion, both of which are constitutional rights of the individual. The judicial solution to this conflict is found in the balance-formula which evaluates the relative weight of each conflicting basic right and searches for the point of balance between them.

In Israel, there has never been a question as to the right of an observant Jew to observe the Sabbath in accordance with his beliefs, as part of the freedom of religion bestowed upon him. But what about a secular individual who wishes to spend time on the Sabbath according to his own belief and life-style — to drive on the Sabbath, watch television, go to a restaurant or theatre, and make use of public transportation? A balance has been reached by law between the full private ability to freely exercise one's right to enjoy one's day of rest and the partial limitations (which have been moderated over the years) on public observance of the Sabbath.

Each religious group in Israel enjoys freedom of religion on the basis of which it is able to practice its beliefs and determine the personal status law to which its congregation is to be subject. Therefore, Israel has maintained a system of religious tribunals which possess exclusive jurisdiction in matrimonial and divorce matters and share parallel jurisdiction with the state's family courts in a number of other matters related to personal status. The four main religious groups that have been granted the authority to establish tribunals and enforce their personal status laws are Jews; Christians; Muslims and Druze. Since the establishment of the state in 1948, by virtue of being a Jewish and democratic state, certain Jewish religious restrictions apply to Jews working on the Sabbath as well as to public transportation on the Sabbath.

Limitations are imposed on the public sale of pork and during Passover on the sale of "hametz" (bread). The Jewish religious parties usually form part of the Israeli government coalition and this to a certain extent maintains the status quo agreement which dates back to the days of Ben-Gurion, in the early years of the state.

Religious Tribunals

Israel has no formal constitution but the Supreme Court regards the existing Basic Laws as a functioning constitution and has applied judicial review to Knesset laws for many years in particular since a landmark decision of the Supreme Court in 1995. Indeed, the Basic Laws of Israel that serve in place of a constitution define the country as a "Jewish and democratic state". These Basic Laws, coupled with Knesset statutes, decisions of the Supreme Court of Israel and various elements of the common law prevailing in Israel, also

protect the free practice of religion in the country. The religious courts are part of this wide picture. Legal accommodation of the non-Jewish communities follows the pattern and practice of the Ottoman and British administrations with some important modifications.

For Jews, the religious tribunals are the Rabbinical Courts which consist of twelve regional Rabbinical Courts, the Special Court for Conversion Matters and the Great Rabbinical Court of Appeals.

For Muslims, the religious tribunals are the Sharia Courts which consist of eight regional courts and a court of appeals. The Sharia Courts are empowered to rule in matrimonial, divorce and inheritance related matters.

As to the Christians, each and every church provides its congregation with varying religious services, some of which are related to personal status Christian laws. Although the Christian tribunals are a remnant of the Ottoman Empire era and their existence and work is not regulated by Israeli law and thus they are not part of the official Israeli judicial system, their rulings are recognized and enforced. The Christian tribunals deal with matrimonial and divorce related matters as well as alimony, custody and inheritance matters.

Not only are these tribunals free to apply the respective laws of marriage and divorce to their members, but unlike other religious communities, they are free to appoint the clergy to their religious courts without the involvement or supervision of any public or government agencies. In the Israeli legal system, the rule of thumb is to allow the religious courts to exercise their powers independently. Even though the rulings of religious courts are final, petitioners have attempted to challenge them before the Supreme Court sitting as the High Court of Justice.

Therefore, over the years the HCJ has developed rules according to which it determines when it will intervene in a religious court's rulings.

There are two basic grounds for HCJ intervention:

- A. If the Religious Courts exceed their authority.
- B. If the conduct of the Religious Courts conflicts **with principles of natural justice**.

Religious court judges, Dayyanim, Cadis and Cadis Madhab are appointed by the President of the State based on the recommendations of the appointment committees which, like the regular judicial appointment committee, comprise a mix of political and professional people and produce balanced results.

The interesting composition of Israeli society can occasionally give rise to complex problems that reach the High Court of Justice. I will give some examples which relate to the Jewish majority.

The Shabbat and Kosher eating OR the ultra-orthodox-secular dispute

Shabbat (Saturday) is the seventh day of the Jewish week and the Jewish day of rest. On Shabbat, Jews recall the Genesis creation narrative in which God created the Heavens and the Earth in six days and rested on the seventh. Shabbat observance entails refraining from a range of activities prohibited on Shabbat, such as lighting fire and cooking. Generally speaking, the operation of a motor vehicle constitutes multiple violations of the prohibited activities on Shabbat.

If religious Jews do not drive on Shabbat in accordance with Jewish Law, what about other people?

A famous case regarding this matter is the “Bar Ilan Street case”¹.

Bar Ilan Street in Jerusalem is currently in an ultra-orthodox area where about 98% of the people observe Shabbat, but it is also a main road leading to a hospital. Moreover, we understand that 2% of the locals are non religious Jews or non Jews. Petitions were submitted against the Transport Minister’s decision to close Bar-Ilan Street on Shabbat. The ensuing judgment opens by saying: "In Israeli public discourse, Bar-Ilan Street is no longer simply a street. It has become a social concept reflecting a deep-seated political dispute between the ultra-orthodox and the secular populations in this country". Three justices sat on that case and decided, as in the famous “Solomon trial”, to cut the apple into two parts. They decided to keep the street open except during hours of prayer when the local residents were going to or from the synagogues. The Court, with the very significant exceptions mentioned above, created a balanced approach. The Court recognized the clash between Israel’s values as a democratic and a Jewish state - the clash between freedom of movement and freedom of religion — and expressed understanding for the Jewish orthodox point of view, while not accepting it in its totality. The Court expressed its understanding of the delicate situation in the following words: "The harm to the ultra-orthodox public’s religious feelings ensuing from the free-flow Of traffic on Shabbat in the heart of their neighborhood is severe, grave and serious". Were the petitioners happy with this decision? Both sides had mixed feelings about it but this is how the Court solved a very tricky problem and the area has been quiet ever since.

Another case brought before the Court related to operating cinema theaters on Shabbat²:

The judgment in this case dealt with the legal question whether a Jerusalem municipal by-law forbidding opening cinemas and other entertainment businesses on Shabbat was void as it had been enacted without authority.

The Court accepted this argument and ruled that freedom of religion is one of the fundamental basic rights. The freedom to believe holds under its wings the freedom not to believe. In some cases, in order to ensure proper social life, freedom of religion must be limited.

Generally, decisions of a religious nature should be dealt with by the primary legislature and not by secondary legislation such as municipal by-laws. In this case, the legislature had not explicitly or indirectly authorized the municipality to manage the cultural life of the city’s residents during Shabbat in so far as it dealt with their fundamental rights. Furthermore, it was maintained that the prohibition on opening cinemas during Shabbat was unreasonable as the municipal by-law intervened in the secular population’s civil rights, without properly balancing the competing interests.

Kashrut is the body of Jewish law dealing with what foods Jews may or may not eat and how those foods must be prepared and eaten. “Kashrut” comes from the Hebrew root Kaf-Shin-Reish, meaning fit, proper or correct. It is the same root as the more commonly known word “kosher,” which describes food that meets these standards. Pork for instance, is not kosher. About ten years ago, controversies regarding pork-trading

¹ H CJ 5016/96 Horev v. Minister of Transportation, 51(4) PD1 (1997).

² Crim. 3471/87 State of Israel O. Amatzia Kaplan, 48(2) PD265 (1987).

prohibitions in the municipal arena reached the Supreme Court when several municipalities enacted by-laws in this sphere.³

The controversies affected cities and towns with relatively large populations of immigrants from the former Soviet Union, which influenced the local trade in pork. The demographic change suddenly highlighted the problem.

This was the background for developments in the city of Beth-Shemesh, which had no prior municipal by-law on pork trading. At the same time as immigrants were asking for pork trading, an orthodox neighborhood was built in the city which led to an influx of orthodox Jews. The city council voted to promulgate a municipal by-law that would set limitations on the sale of pork. At this stage, a petition was submitted to the High Court of Justice emphasizing the harm that this would cause to the immigrant population. The petition stated that the new by-law lacked proportionality, arguing that it should have restricted the prohibition to religious neighborhoods. The Court granted broad discretion to municipalities in the matter subject to certain normative guidelines. According to the Court, promulgating such a by-law would only be justified when a significant majority felt offended by the absence of such a regulation.

The Court's ruling was confined to the prohibition on pork in view of its particular sensitivity to certain Jewish individuals and communities.

Gender segregation in buses

In 1997, public transport companies began to operate special bus lines for the ultra-orthodox public, "mehadrin" lines. The lines ran mostly between major ultra-orthodox population centers and in which gender segregation rules applied. In these sex-segregated buses, female passengers were to sit in the back of the bus and if possible enter and exit the bus through the back door, while the male passengers were to sit in the front part of the bus and enter and exit through the front door. Additionally, "modest dress" was required for women, playing a radio or secular music on the bus was to be avoided and advertisements were censored in terms of modesty. Mehadrin lines were generally cheaper than other lines.

In January 2011, the High Court of Justice ruled that gender segregation was unlawful and abolished the "mehadrin" public buses.⁴ However, the Court ruling allowed the continuation of gender separation in public buses on a strictly voluntary basis. In this ruling, the Supreme Court said: "A public transportation company (like any other entity) cannot say, ask or tell women where to sit on a bus simply because they are female, nor can the company tell the women what they should wear; they are entitled to sit anywhere they wish. Of course, this also applies to the men, but for reasons that are obvious, the complaints have to do with the harmful behavior towards women. "

Couple formation and divorce

One of the unique features of marriage and divorce in Israel is the religious legal system that regulates marital and family status. This goes back many centuries, to the Ottoman (Turkish) rule in the country. As I mentioned before, all matters of marriage and divorce have been delegated to the religious courts of the various communities. All issues of property division and child custody may be adjudicated in either a civil court or a religious

³ HCJ 953/01 Solodkin v. Beit Shernesh Municipality, 58(5) PD595 (2004).

⁴ HCJ 746/07 Naomi Ragen O. Ministry of Transport, Tak-EI

court but the writ of divorce remains solely within the authority of the religious courts. Since the civil courts are generally viewed as more favorable to women, it is in each spouse's interest to be the first to file suit in the court of his or her preference.

Conversion to Judaism

Conversion to Judaism is a formal act undertaken by a non-Jewish person who wishes to be recognized as a member of a Jewish community. Under Jewish law, a person is Jewish if born to a Jewish mother or if he or she converts. Any individual, regardless of former religion, race, color or sex, is eligible to apply for conversion.

In Israel, any person who successfully completes the conversion process then becomes a "Jew for all intents and purposes" and his or her status is identical to that of any other Jew.

Israel has historically adopted the orthodox conversion process. Orthodox Jews do not necessarily recognize conversions performed under the auspices of other Judaic trends. The Israeli rabbinate (e.g. for purposes of marriage) only recognizes orthodox conversions. Conversion traditionally requires a three-member religious court and involves acceptance of Judaism, immersion in a ritual bath (mikveh), and circumcision for males. Studying the basics of Judaism is a necessary precondition for conversion.

As one can see, the main theme when balancing between conflicting basic rights pertaining to freedom of and from religion is to identify the point of equilibrium within a pluralistic, multi-cultural society. The mode of creating this balance and the outcome of this process are often matters of controversy both within the Court itself, and in the public at large.

It is important to understand that due to the complexity and sensitivity of religious matters, the High Court of Justice deals with these issues with much compassion and caution. In many ways it acts as a mediator bringing the sides to some form of dialogue so that they can find a solution that fits them both.

Israel is a Jewish state. At the same time, it is a democratic country committed to the protection of human rights. The harmonious combination of these two basic values, lying at the core of our state is an on-going process.

Section 1 of the Foundations of Law Law, 1980 states: "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 the issue in the light of the principles of freedom, justice, equity and peace of the Jewish heritage". Generally speaking, this section relates to the interpretation of the law in cases of lacunae.

In addition, as an inspiration for my own judgments I try to combine and rely on holy sources. I tend to quote and compare laws and case laws from the Bible, the New Testament and the Koran, in the belief that we can learn from the past and that we should respect the heritage of all religions.

A good example of the synthesis between the conflicting values of the religions is Israel's attitude towards non-Jews in Israel. In Israel itself, all should be equal. True, a special key to enter Israel was given to Jews and their families as Israel was established to solve the Jewish historic problem that finds its expression in the Law of Return which entitles any Jew to immigrate to Israel. However, once the individual is inside the house, he should enjoy the same rights as every other member of the house. There should be no discrimination between the members of the house. I cannot say that there is full equality

between Arabs and Jews in Israel. There are still some fields of life where there is no equality although I should mention that in the last few years there has been some progress in this matter. In a great number of cases, the Israeli Supreme Court expressed this principle, for example, a judgment in which the High Court of Justice declared that the state must treat Jews and Arabs equally in the allocation of state land.⁵ We were criticized on the ground that this decision would bring about the end of Zionism. Nothing could be more false. As the former President of the Supreme Court, Aharon Barak said: "Zionism is not based on discrimination between Jews and Arabs. Zionism views Israel as a national home for Jews; however, it is based on the negation of racism, and on concepts of equality".⁶

Jewish minority attacks on Christian churches

Before concluding, I would like to mention a very severe and troubling matter of attacks by extreme Jewish religious groups against Muslim and Christian religious institutions. We are dealing with a small number of people and incidents but by their actions they cause great affliction to co-existence between all religions. These actions have been publicly and widely condemned by political and religious leaders including the President of the State, the Prime Minister, the Speaker of the Parliament, Ministers of the Government, leaders in academia and other prominent leaders. I am hopeful that we will not see similar actions in the future so that we can maintain the unique relations between all religions and denominations in the State of Israel. After the attack at the Latrun Monastery two months ago a group of students from the Hebrew University in Jerusalem came to support the residents of the Monastery and assisted in cleaning up the horrible graffiti that was written on the walls of the Monastery. We are determined to continue our joint living together — Jews, Christians and Muslims in peace, quiet coexistence and mutual respect. I believe that this is in the best interest of the country and its citizens. The normal day to day life, as I described before, is totally different to these few incidents. Our country can serve as a fine example not only in our war afflicted part of the world, but elsewhere too.

Justice Salim Joubran, born 1947, is an Israeli Arab judge on the Israeli Supreme Court. He has served as a Supreme Court justice since 2003, and became a permanent member in May 2004. Justice Joubran is the first Arab to receive a permanent appointment in the Supreme Court. He is the second Arab judge to hold a Supreme Court appointment.

⁵ HCJ 6698/95 Aadel Kaadan v. Israel Lands Administration, 54(1) PD 258 (2000).

⁶ Aharon Barak, Zionism is not based on discrimination between Jews and Arabs, Globes, 22.5.2000.