

THE RELATIONSHIP BETWEEN RELIGION AND STATE FROM A JEWISH VIEWPOINT IN COMPARATIVE PERSPECTIVES: SELECTED ISSUES

1. Legal Protection for Religious Liberty in Israel

The *Palestine Mandate* of 1922 contained a number of provisions ensuring freedom of religion and conscience and protection of holy places, as well as prohibiting discrimination on religious grounds. Further, the *Palestine Order in Council* of that same year provided that «all persons [...] 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». It also laid down that «no ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship»¹. These provisions of the *Mandate* and of the *Palestine Order in Council* have been recognized in the Israeli legal system and are instructive of Israeli policy in safeguarding freedom of conscience and religion.

Israel's *Declaration of Independence*, promulgated at the termination of the British Mandate in

¹ See Articles 2, 13-18 of the *Mandate for Palestine*, and Articles 83 and 17 (1) (a) of the *Palestine Order in Council* of 1922.

1948, is another legal source that guarantees freedom of religion and conscience, and equality of social and political rights irrespective of religion. Although it notes that the land of Israel is the birthplace of the Jewish people, and that the State of Israel «will be based on the precepts of liberty, justice, and peace taught by the Hebrew Prophets», it also states that the State of Israel «will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions». The *Declaration* itself does not confer any legally enforceable rights; however, the Israeli High Court has held that «it provides a pattern of life for citizens of the State and requires every State authority to be guided by its principles»².

To support the fundamental existence of the right of freedom of conscience and religion, the courts have relied on the reality that Israel is a democratic and enlightened state. In one significant court decision, Justice Moshe Landau stated that «the freedom of conscience and worship is one of the individual's liberties assured in every enlightened democratic regime»³. In dealing with questions of religious freedom, as well as other human rights, the Israeli courts have relied on the *Universal Declaration of Human Rights* and the *International Covenant on Political and Civil Rights*, which reflect «basic principles of equality, freedom and justice which are the heritage of all modern

² H.C. [=High Court] 262/62, *Perez v. Kfar Shmaryahu Local Council*, *Piskei Din* 16 (1962) 2101, 2116 (per Justice Summon).

³ Cr.A. [=Criminal Appeal] 112/50, *Yosifof v. Attorney General*, *Piskei Din* 2 (1948) 486, 598, 612 (per Justice Landau).

enlightened states»⁴. In doing so, the courts have required that two conditions be met: that the principle in question is common to all enlightened countries and that no contrary domestic law exists. In this regard, Justice Haim Cohn has said:

It is decided law that rules of International law constitute part of the law prevailing in Israel insofar as they have been accepted by the majority of the nations of the world and are not inconsistent with any enactment of the Knesset. The principles of freedom of religion are similar to the other rights of man, as these have been laid down in the *Universal Declaration of Human Rights, 1948*, and in the *Covenant on Political and Civil Rights, 1965*. These are now the heritage of all enlightened peoples, whether or not they are members of the United Nations Organization and whether or not they have as yet ratified them [...] For they have been drawn up by legal experts from all countries of the world and been prescribed by the [General] Assembly of the United Nations, in which by far the larger part of the nations of the world participates⁵.

This ruling gives way to an interesting situation: although the State of Israel need not sign, ratify, or otherwise adhere to a given international treaty and will, therefore, not be bound by it in international law, the private Israeli citizen is nevertheless able to rely on that same treaty in domestic Israeli court proceedings.

⁴ H.C. 301/63, *Streit v. Chief Rabbi, Piskei Din* 18/1 (1964) 598, 612.

⁵ H.C. 103/67, *American Orphan Beth El Mission v. Minister of Social Welfare, Piskei Din* 21/2 (1967) 325.

On the other hand, Justice Yitzhak Kister has expressed the view that, because of the special nature of the Jewish religion, «it is not possible, or at least very difficult, to employ with regard to the Jewish people and the Jewish religion the forms and definitions common among the peoples of the world in respect of freedom of religion»⁶. With that view, this author cannot agree. There is nothing to prevent resort to principles common to foreign legal systems and accepted by civilized peoples, so long as the special considerations stemming from the peculiar character of the Jewish religion and a Jewish state are not ignored, where they have their proper place. It is noteworthy that the Israeli Supreme Court customarily avails itself of leading principles in foreign law in matters of religious freedom, and this course is followed even by those of its judges who explicitly recognize the singularity of the Jewish religion⁷.

Many provisions of Israeli statutory law are devoted to the protection of holy places and sites which are used for prayers and, other religious purposes⁸. The *Protection of Holy Places Law, 1967* makes it a penal offense punishable by up to seven

⁶ H.C. 132/66, *Segev v. Safad Rabbinical Court*, *Piskei Din* 21/2 (1967) 560.

⁷ See, e.g., Cr.A. 217/68, *Izramax v. State of Israel*, *Piskei Din* 22/2 (1968) 343, where Justice Silberg resorted to American case law regarding the Sabbath to justify the prohibition of the opening of a petrol station under a by-law.

⁸ E.g., Section 3 of the *Local Authorities (Vesting of Public Property) Law, 1958*, excludes property used for religious purposes and services from that which a local authority is empowered to acquire compulsorily for public purposes.

years imprisonment for desecrating or violating a Holy Place, and punishable by up to five years imprisonment for preventing a member of a different religion from accessing places sacred to them, or for violating their feelings with regard to such places. Similarly, the *Basic Law: Jerusalem, Capital of Israel*, a law with constitutional status, provides in section 3 that:

The Holy Places shall be protected against desecration and any other violation, and against anything that is liable to interfere with freedom of access by members of different religions to the places they hold sacred, or that is liable to offend their feelings toward those places.

In Israel there are penal sanctions for trespass on places of worship and burial, for indignity to corpses, and for disturbances at funeral ceremonies. The Supreme Court has dealt very stringently with acts that offend religious sentiment.

The protection of religious liberty is not expressly provided by the *Basic Law: Human Liberty and Dignity 1992* or in the *Basic Law: Freedom of Occupation*. However, according to the interpretation of each of the Basic Laws, there is implicit protection to rights in addition to those expressly enumerated⁹. One of the non-enumerated rights within the context of human dignity has been interpreted to be religion.

An important provision in both the *Basic Law: Human Dignity and Liberty* and in the *Basic Law:*

⁹ H. SOMER, «Non-enumerated Rights: on the Scope of the Constitutional Revolution», *Mishpatim* 28 (1997) 259.

Freedom of Occupation refers to a Jewish and democratic state. What is the meaning of a “Jewish State” in this provision? Justice Barak ruled that, in a democratic state, when a judge adjudicates a certain issue, that judge must be mindful of the values of the state in which the adjudication is taking place. Similarly, when a judge interprets a legal statute or a broadly stated basic law provision, it is similarly the role of the judge to ensure that the statute or law will be interpreted according to the basic values of the applicable system.

The basic principle can be found in the *Declaration of Independence of the State of Israel*, which is based on the principles of equality and justice, democracy, public order, national security, the separation of powers, and human rights in the context of Israel. The Court has recognized Israel’s Jewish nature, originally by virtue of the *Declaration of Independence*, and later by express provisions in the Basic Laws (Israel’s constitutional laws) that Israel is a Jewish and democratic state. In order to illustrate what is a Jewish state, I find it most useful to quote *verbatim* from a leading book of Professor Aaron Barak on legal interpretation:

“Jewish State” is the state of the Jewish People: «this is the natural right of the Jewish people to be like all other peoples depending on its own right and his own sovereign state». A State every Jew will have the right to immigrate to and in which the gathering of the Jewish Diaspora is one of its basic values. “Jewish State” is a state whose history is integrated in the history of the Jewish people, its language is Hebrew, its main holidays reflect the national revival. “Jewish State” is a state whose main concern is Jewish settlement in its fields, cities and villages. “Jewish State” is

the state that eternalizes the memory of the Jews that were mass murdered in the Holocaust and is designed to form «a solution to the problem of the Jewish people without homeland or independence by reviving the Jewish State in the land of Israel». “Jewish State” is a state that promotes Jewish culture, Jewish education, and the love of the Jewish people. “Jewish State” is «materialization of the yearnings of the generations for the redemption of Israel». “Jewish state” is a state where the values of freedom, justice, and equity of the heritage of Israel are its values. “Jewish State” is a state that its values are derived from its Jewish tradition, and the bible is its basic book, and the prophets of Israel are the foundation of its morality. “Jewish State” is a state that the Jewish law plays a very important part in it and where matters of marriage and divorce of Jews are adjudicated according to the laws of the Torah. “Jewish State” is a state that the values of the Torah of Israel, values of Jewish heritage, and the values of Jewish *halacha* are part of its basic values¹⁰.

Chief Justice Barak, on another occasion, has also commented on the meaning of the phrase «the values of the State of Israel as the Jewish State»:

This provision is the conclusion that the values of the state of Israel as a Jewish state have two main aspects: the first aspect being the Zionist aspect, the other aspect being the cultural, the heritage, or the *halachic* aspect as may be defined by each individual. The Zionist aspect is reflected, for example, in the right of a Jew to immigrate to Israel and the *Law of Return* 1950. The cultural aspect is reflected, for example, in

¹⁰ A. BARAK, *Constitutional Interpretation*, volume 3 of *Legal Interpretation*, Jerusalem 1992, 332.

the *Foundations of Law Act 1980* which provides that when there is *lacuna*, it is to be filled by the principles of freedom, justice, equity, and peace of the heritage of Israel. [...] All of this and other elements make the State of Israel a Jewish state even for a person who is not familiar with the world of *halacha*¹¹.

Elsewhere I have expressed the view that Jewish state means traditional Jewish but not halachic nor religious state¹².

2. Vision and Realities

When Benjamin Ze'ev Herzl dreamt about the state of the Jewish nation, he had the vision of separation of state and religion¹³. However, his vision has not been realized. In Israel, there is no separation of religion and state. However, at the same time, there exists no recognized religion in the accepted sense, as described at the beginning of this essay.

Some have argued that this merging of state and religion is due to the nature of Judaism, which embodies a pattern of religious daily life rather than a mere set of religious dogmas, and which intermingles religious and national elements, therefore not lending itself to a natural separation of religion and state. As David Ben-Gurion explained, «the conven-

¹¹ A. BARAK, «The State of Israel as a Jewish and democratic state», *Iyuni Mishpat* 24 (2000) 9; 11.

¹² SH. SHETREET, *The Good Land: between Power and Religion*, Yediot Aharonot Publishinf, Tel-Aviv 1998.

¹³ See A. RUBINSTEIN, «State and Religion in Israel», *J. of Contem. History* 2 (1969) 4, 107; 108.

ient solution of separation of church and state, adopted in America not for reasons which are anti-religious but on the contrary because of deep attachment to religion and the desire to assure every citizen full religious freedom, this solution, even if it were adopted in Israel, would not answer the problem»¹⁴. This solution would not work for in the US, the primary religion is Christianity, a religion which better lends itself to a separation from the state than does Judaism, the primary religion in Israel.

Another reason for the connection between religion and state in Israel are rooted in the absence of clearly defined rules in Jewish law regarding the relationship between Judaism and an independent Jewish state¹⁵.

Apart from the peculiar nature of Judaism, an further factor contributing to the melding of religion and state in Israel flows from the decision by Israel's lawmakers to assign legal jurisdiction for matters of personal status (a legal concept encompassing "status" issues such as marriage and divorce) to religious bodies according to an individual's religion or religious affiliation. Furthermore, the plaintiff may select a religious court for other types of judicial matters. This approach, predating the establishment of the state and reinforced through legislation enacted after the creation of the state, guarantees an even deeper intertwining of religion and state. One law, for instance, pro-

¹⁴ D. BEN-GURION, *Nezah Yisrael*, Tel-Aviv 1964, 154-155.

¹⁵ See B. ENGLARD in *Molad* 22 (1964) 702-703 and the authorities that he cites. Cf. Y. LEIBOWITZ, «Jewish Law as the Law of the State» 3 *Sara* 495.

vides that *kashruth* shall be observed in the Israeli Defense Forces and in other government institutions.

The existence of two parallel court systems with concurrent jurisdiction has led to some tension. In *Katz*, a check was put on the power of the religious courts when the Supreme Court held that they were not allowed to issue a *Ketav Serouv*, or refusal order, in matters outside of their exclusive jurisdiction¹⁶. A *Ketav Serouv* is, in effect, an order compelling a defendant in an action within the non-exclusive jurisdiction of the religious courts to appear before the religious court. If the defendant fails to appear, he or she is subject to religious sanctions. The practice of the religious courts to issue such an order for all matters created an unjust situation, for plaintiffs in the same cases were permitted, according to Jewish law, to appear in a secular court.

The integration of religion and state in Israel is visible in many other fields, some expressly regulated by statutory law¹⁷, and others relying on a delegated regulation. Among them are the application of a religious

¹⁶ HCJ [= High Court of Justice Case] 3269/95 *Katz v. Jerusalem Regional Rabbinical Court*. The case involved the issue of a writ of denial by the rabbinical court against an individual who refused to have his civil matter be adjudicated by the rabbinical court in accordance with the terms of a complaint filed according to Din Torah. It is established that the supreme court has a supervisory jurisdiction over the religious courts.

¹⁷ Such as the expression "Jewish and democratic state" in *Basic Law: The Dignity and Freedom of a Person*, 1992, s. 1A; *Basic Law: Freedom of Occupation*, 1994, s. 2; These laws are relatively recent, but the principle of a Jewish state existed from the day of the establishment of the State, in the *Declaration of Independence*, and later in various judgments. See for example: *Elections Appeal 1/65, Yardor v. The Chairman of the Election*

test to the *Law of Return*¹⁸, which provides for automatic Israeli citizenship to Jews wishing to reside permanently in Israel but not for non-Jews¹⁹; the exclusive application of religious jurisdiction and religious law in matters of marriage and divorce²⁰, the conduct of religious education financed out of state funds²¹, the

Committee, Piskei Din 19/3 (1965) 365. However, there is the claim that the expression "Jewish" refers to the cultural and historical belonging, and has no direct connection to the Jewish religion. For this perspective, see R. GABISON, «Religion and State: Separation and Privatization», *Mishpat u Mimshal* 2 (1994) 55; 57 (Hebrew). About the "Jewish" term see A. MAOZ, «The Rabbinate and the Courts: Between the hammer of law and the anvil of "Halakah"», *Hebrew Law Yearbook* 16-17 (1991) 289; 308 (Hebrew); «The Role of Religion in Public Debate in a Liberal Society», *San Diego L. Rev.* 30 (1993) 643. There is a common claim that the Jewish values (those that the Justice Foundations Law refers to) are broad enough to include all matters that seem related to our culture and heritage. In this context see H. COHEN, «The Law of Remnant», *Hebrew Law Yearbook* 13 (1987) 285; 300; A. BARAK, *Commentary in Law*, vol. I, Jerusalem 1992, 528-529.

¹⁸ The *Law of Return* (1950).

¹⁹ A notable (and large) exception to this law is that individuals with a Jewish parent or a grandparent, or who are the spouse of an individual with a Jewish parent or grandparent, are eligible for the same rights of immigration as a Jew: *Law of Return* 5710-1950, s. 4A(a). The reasoning behind this exception is historical – because in Nazi Germany such individuals were liable to the same prosecution as were Jews, it was decided that in Zionist Israel, they would also be subject to the same benefits.

²⁰ The *Rabbinical Courts Adjudication Law [Marriage and Divorce]* (1953); Also see P. SHIFMAN «State Recognition of Religious Marriage: Symbols and Content», *Isr. L. Rev.* 21 (1986) 501.

²¹ *State Education Law* (1953); see S. GOLDSTEIN, «The Teaching of Religion in Government Funded Schools in Israel», *Isr.L.Rev.* 20 (1992) 1, 36; 64.

validation of non-orthodox conversions in Israel by a declaration rather than an operative verdict²², and the establishment of a special Ministry of Religious Affairs²³.

Other examples of religious norms being seen in political life is the law, passed in 1977, prohibiting the opening of "houses of amusement" on the Ninth of Av, the memorial day of the Talmudic destruction of the temple, as well as the law requiring state and governmental institutions to use the Hebrew, along with the Gregorian, date to documents.

A compromise between those who support and those who are against the mingling of religion and state is seen in the *Foundations of Law Act, 1980*. This law provides that when the judiciary cannot reach a decision through the interpretation, analogy or inference of existing law, the court shall invoke the legal principles of the "heritage of Israel". The wording of the phrase "heritage of Israel" constitutes a compromise solution between those who preferred a direct reference to Jewish law, and those who categorically rejected any such reference. The phrase "heritage of Israel" has been interpreted to refer to Jewish cultural values generally, rather than their narrow Halachic meaning only. Section one of the *Foundations of Law Act, 1980*, was passed with the following wording:

Should the court consider a legal question that requires resolution, and the solution is not to be found in the existing legislation, judge-made law, or by

²² H.C. 1031/93, *Pissaro v. Minister of the Interior, Piskei Din* 49/4 (1995) 661 (Isr.).

²³ Further see *The Religious Councils Act by the Jewish Religious Services Law*.

means of analogy or inference, the court will resolve the question on the basis of the principles of freedom, justice, integrity and peace of the heritage of Israel.

In *Handles*²⁴ the court interpreted the meaning of "heritage of Israel". Justice Aharon Barak viewed the phrase as meaning that it is permissible to refer to Jewish law in order to learn, as a treasury of legal thought, which might provide inspiration to the judges.

The reference by Justice Barak was to "law" in its cultural, rather than its normative, context. In Justice Barak's view, Jewish law does not constitute a system of justice that applies in Israel, but rather it exists for the purpose of providing a comparative legal system. In contrast, Justice Elon, expressing the minority opinion, opined that the law refers to Jewish law in order to clear up any uncertainties as to its own content. Jewish law may not constitute a binding body of laws, but it can provide guidance to the court regarding the issue before it.

The religious segment of Israel, being opposed to rulings that treat Jewish law as cultural rather than legally binding, oppose the secularization of the legal system. This is contributed to the peculiar situation where Israel's constitution is being written in a piecemeal fashion, in the form of a series of "*Basic Laws*". Opposition to the passage of a constitution comes from the Knesset's religious parties, who believe that the Torah is the sole constitution of the Jewish people, and that therefore it may not be replaced by a secular constitution. The religious parties are concerned that a sec-

²⁴ Z. SHARF, 12, 13, 14 of May 1948, Tel-Aviv 1965, 214-226.

ular constitution based upon the democratic-liberal principles contained in the *Declaration of Independence* will undermine the religious influence that now exists in the state, including the undermining of the legality of religious marriage laws²⁵.

Those who are opposed to regulation in the religious sphere do not, in fact, desire absolute separation, but rather they contest those provisions which force religious norms upon the individual and compel recourse to religious authorities. What is asked for is not, for instance, the abolition of marriage by religious ceremony, but rather the alternative of civil marriage. In this author's opinion, Jewish religious law is better placed with the individual than with the state²⁶. Following this, as the individual is entitled to religious freedom, it is incumbent upon the state to enable the individual to observe his religious precepts without interference²⁷.

There have been several Supreme Court decisions which have supported this view. Thus, for instance, the Supreme Court has ruled that state-supported television may operate on the Sabbath²⁸, it has overturned a municipal bylaw forbidding cinema houses from operating on the Sabbath²⁹ and it has recognized the

²⁵ C.A. [= Civil Appeal] 546/78 *Kupat Am Bank, Ltd. v. Handles, Piskei Din* 34/3 (1980) 57.

²⁶ In a Jewish state, however, there is the further requirement that the ancestral past of Judaism should not be forgotten.

²⁷ See B. ENGLARD, «The Relationship between Religion and State in Israel», *Scripta Hierosolymitana* 16 (1969) 274.

²⁸ District court 708/69 *Adi Kaplan v. the Prime Minister and the Broadcasting Authority, Piskei Din* 23/2 (1969) 394.

²⁹ Criminal case (Jerusalem) *State of Israel v. Kaplan, Piskei Din* 5748 (1988) 265(B).

right to secular burial³⁰, leaving the decision as to one's participation in religion in these matters to the individual. Furthermore, the Supreme Court recognizes secular marriages and non-Orthodox conversions of Israeli residents performed abroad³¹.

Despite the attempt to reconcile religious tensions, they are often evident in Israel between the religious and non-religious sides of Israeli society. An example is the trial of Knesset Member (MK) Arie Derei, the Leader of *Shas* religious political party who was convicted for bribery and sentenced to four years imprisonment. The trial and prosecution were viewed by significant segments of Israel's religious society as having been discriminatory. The sharp increase in *Shas*' representation in the Knesset in the following elections, occurring in 1999, has been at least partly attributed to the Derei trial and the alienation felt by religious segments of Israeli society³².

³⁰ H CJ 397/88 *Menucha Nechona v. Minister of Religious Affairs* (not published).

³¹ H CJ 143/62 *Funk-Schlesinger v. Minister of Interior, Piskei Din 17/1* (1963) 225 (marriage). H CJ 143/62 *Funk-Schlesinger v. Minister of Interior, Piskei Din 17/1* (1963) 225 (conversion).

³² The 1999 election has sent two conflicting messages. The prime minister Ehud Barak was elected by a majority of secular and traditional vote prevailing over the Haredi and religious vote which supported Netanyahu. The Left parties which advocated anti-religious coercion platform increased in power. The Left, secular party Mertz increased from nine to ten seats in parliament. The Centre Party newly emerged with six seats and Shinui, a radical anti-religious party, received six seats (a five seat increase from the previous Knesset). On the other hand, the *Shas* movement increased from 10 to 17 seats, United Torah Judaism (a modern Orthodox party) increased from four

3. Imposition of Religious Norms

The most difficult problem relating to religious liberty in Israel is posed by the imposition of religious norms and restrictions of a religious nature on all Jews, whether or not they are religiously observant. This is a live issue in Israel, where only about twenty percent of the population describes themselves as religious (of this number, five or six percent considering themselves “ultra-religious”). Of the remaining Israelis, forty percent of Israeli population label themselves as “traditional” (a Jew that selectively observes some, but not all, religious dictates), and somewhat over forty percent of Israelis consider themselves to be completely secular.

To determine whether the enforcement of a norm of religious origin infringes freedom of conscience and religion, a distinction must be drawn between a norm of religious origin which is not generally recognized and adopted by society, and one which is. The enforcement of a norm of the first type – such as the application of religious law in marriage and divorce – involves a violation of religious liberty; the enforcement of a norm of the second type – such

to five seats, whereas the influence of Mafdal – NRP (another religious party) was reduced from nine to five seats. The overall balance was an increase from 23 to 27 seats for the religious and Haredi parties. In the subsequent elections at 2003 the Shas movement was reduced down to 11 seats, United Torah Judaism kept the same number of seats (5), and the Mafdal increased up to 6 seats. After that, in the 2006 elections, both Shas and the United Torah Judaism increased in one seat (to 12 and 6), while the Mafdal increased up to 9 seats.

as the prescription of a day of rest³³ – does not. In this second case, the enforced norm is treated like any other norm which has been accepted by society, and which the state may enforce through legislation. As Justice Simon Agranat, the President of the Supreme Court, has observed:

The function of the State, so democratic theory teaches, is to fulfill the will of the people and give effect to those norms and standards, which it prizes. It follows from this that the common conviction must first form among enlightened members of society that these norms and standards are true and just, before we can say that a general will has been created to give them binding force, to stamp them as positive law and attach its sanctions³⁴.

This opinion involves the much-debated issue of whether the state may legislate morality or compel a moral norm. With regard to Jewish law, Justice Landau has distinguished between «rules which prescribe man's behaviour to his fellow man and those, which affect the relationship between man and Divinity»³⁵. This view prescribes that coercion of non-believers does not derogate from freedom of conscience and religion. The difficulty I find with this distinction is that it implies that there would be nothing wrong with the enforcement of conduct, religious in origin and in substance, provided only

³³ As has been permitted by the Canadian and US courts, as noted above.

³⁴ H.C. 58/66, *Shalit v. Minister of the Interior, Piskei Din* 23/2 (1969) 477, 602.

³⁵ H.C. 51/69, *Rodnitzki v. Rabbinical Court of Appeal, Piskei Din* 24/1 (1970) 704, 712.

that it concerns human relations. However, such a concept, when taken to its logical extension, is objectionable. A law, for instance, compelling the sending of Purim gifts, or the opening of one's doors to the poor on Passover (following the injunction of the *Haggadah*, «Let all in need come and eat»), or the consolation of those in mourning, would be entirely valid according to Landau J.'s perspective because it relates to man's conduct toward his fellow men, although its source and substance are religious. However, on a moral level, such legislation would be objectionable. Furthermore, the distinction between relations between fellow man and with the divine are not always clear-cut. By what criteria does one determine whether a norm is of one or the other? With a religious yardstick, or a secular one? And where a rule is measurable by both measurements, which one prevails³⁶?

Admittedly, the compulsion of rules affecting man's relations with his Maker is a more serious invasion of freedom of conscience, still in the realm of man's conduct toward his fellow men, enforcement of norms which have not secured the societal approval that is generally considered a prerequisite for their enforcement offends against freedom of conscience. It should be added that the enforcement of the provisions of private law drawn from Jewish sources, such as those relating to baileys, guarantee, sale, and the like, does not violate religious freedom provided that the inherent religious elements have been filtered off.

³⁶ This critique of the distinction set up by Justice Landau also applies to the one suggested by Justice Silberg.

Justice Moshe Silberg has distinguished between the “rational” and the “creedal” commandments of Judaism³⁷. While the former may, in his opinion, rightly be enforced on the public without prejudicing religious freedom, the coercion of the latter does not offend against that freedom. Again, I cannot agree with this distinction. That a religious norm is rational does not justify its compulsion until it has won the social approval required to render it a norm binding upon society. It is possible also for such societal approval to be gained by creedal norms. Moreover, does this mean that, before deciding to enforce any norm, one must inquire and ascertain whether it is “rational” or “creedal”? Justice Agranat has held alternatively, that one must find out whether the general public will exert itself to turn the religious norm in question into a norm of socially binding effect. I agree with that view. The point is that the test of whether a norm having its source in religion deserves to become a binding one in society cannot be a religious test—namely, its classification as “rational” or “creedal” within the Jewish religion—but solely the test of whether it has won contemporary social consensus³⁸. Ultimately, the test for justifying coercion of norms is not their content but the measure of social consent, which they have received.

Further, when the question arises whether to impose an obligation regarding an act which may affect religious freedom, it is not enough to inquire

³⁷ Cr.A. 217/68, *Izramax v. State of Israel*, *Piskei Din* 22/2 (1968) 343, 354 et seq.

³⁸ H.C. 58/66, *Shalit*.

generally into the nature of the proposed norm. A religious norm may, in its totality, be a positive social norm, but the specific acts involved may not have gained the necessary consensus justifying coercion. Thus, although few dispute that the introduction of a Saturday day of rest, despite (or because of) its religious origin, is a positive social norm, one should not thereby infer that every restriction regarding the type of activities that may be carried out on the Sabbath is justified and involves no violation of religious freedom. Army regulations relating to the Sabbath and the festivals provide that entertainment in army units should be so arranged as to avoid "profanation" of the holiness of the day. Soldiers have thus been prohibited from listening on those days to the radio and recordings in messes and club-rooms. For secular soldiers, these regulations have nothing to do with the positive norm of a rest day that has social value, but are rather connected with the religious prescript in Jewish law against "profanation" of the Sabbath day, a religious precept which holds not personal meaning to them. From the fact that observance of a weekly rest day is, in general, a positive norm, no inference can be drawn that these particular regulations are, or are not, repugnant to religious freedom.

Israeli law, at present, provides examples of coercion of religious law that are not accepted norms within Israeli society. The application of Jewish law to marriage, including the requirement of an engaged woman to partake in religious classes and submerge herself in a religious *mikvah* prior to being allowed to marry, and divorce, with its arguably sexist overtones whereby only men have the right to divorce, as well as the subjection of citizens and res-

idents to the exclusive jurisdiction of the religious courts in such matters, are an improper coercive enforcement of a religious norm. The very necessity to marry before a religious authority results in further restrictions: a woman who leaves the faith loses property rights, and the marriage of a *Cohen* (a man whose descent is traditionally traced to the ancient priesthood) with a divorcee or a woman with "questionable morals" is forbidden. None of these matters are to be found in any statute. The enforcement of Jewish religious dietary laws was attempted, but overruled in *Mitrael*³⁹, which held that it was an infringement to occupation (work) to prohibit the importation of frozen non-Kosher meat. However, on account of the court ruling, religious norms were again instituted through the inclusion of an overriding clause in the legislation at issue, the *Basic Law: Freedom of Occupation*⁴⁰.

In the *Marina Solodnik* case the Court dealt with the power of local governments to prohibit and regulate the sale of pork products. The Court held that before a local government may decide on the content of the regulation, such as limiting the shops selling pork products to remote areas or industrial zones outside the centre of the city, the views of the community must be considered. However, this is a *consideration* only, not a following of such community views⁴¹.

³⁹ H.C. 3872/93, *Mitrael v. Prime Minister and Minister of Religions*, *Piskei Din* 47/5 (1993) 485 (Isr.).

⁴⁰ *Basic Law: Freedom of Occupation*, 1984, S.H. 90, s. 8 [hereinafter *Basic Law: Freedom of Occupation*].

⁴¹ H.C. 953/01 *Marina Solodnik v. Beit-Shemesh Municipality and others*.

The court reviewed the constitutionality of bylaws regulated by several local authorities, forbidding the selling of pig products within the municipal territories. The authority to institute the bylaws was rested upon the parliament's *authorization act*. Therefore the high court was asked to criticize the municipality discretion by judging the coherence of the bylaws alongside the aims of the *authorization act*.

The objective and subjective aims founding the *authorization act* were judged to be based on three interests: The first was the interest to protect the Jewish religious sentiment due to the image of the pig as a religious symbol of defilement. The second was the interest to protect the individual's fundamental rights, including the rights to freedom of occupation and freedom of conscience and religion – an objective aim that found every single legislative act in Israel. The third was the interest to authorize the local authorities to establish instructions as to selling pig products considering the distinctive characteristics of each municipality.

Stating those three interests as basing the aims of the *authorization act* the High Court refrained from judgement as to the coherence between the bylaws and the act. Instead the bylaws were suspended by the High Court in order to afford the municipalities to re-examine the coherence between the bylaws and those three interests.

Justice Landau has observed that

the enforcement of religious law in marriage and divorce [...] is not actually the same as the full operation of all the halachic rules affecting marriage and divorce [...] [the *Marriage and Divorce Law* of 1953] is not to be read as imposing any prohibition which is really religious in origin and substance on the Jewish

population of Israel, including those for whom the observance of religious prohibition is not a matter of religious belief⁴².

The law, he argues, «is not intended to offend against freedom of religion guaranteed to all citizens of our State or to impose the observance of religious precepts on the non-religious public». Justice Landau urged that the law of 1953 that had granted jurisdiction over marriage and divorce to the Rabbinical Courts be interpreted in ways which would avoid inconsistency with the basic principles of freedom of religion that are part of the law of the land.

Because the army controls the lives of soldiers in service more closely than the state controls the lives of its citizens, religious norms are enforced to a larger extent on soldiers than on civilians. Army regulations regarding the High Holy Days, for example, provide for obligatory participation in educational activities conducted by the army chaplaincy. The Minister of Defence has explained in the Knesset that, for two reasons, this does not involve any assault upon freedom of conscience and religion. First, the regulations do not oblige any soldier to do anything apart from listening to talks on the moral

⁴² Even were the distinction adopted, it is not practical nor can it always help to justify the coercion of norms, due to the multicultural diversity of the population in Israeli cities. Justice Silberg himself faced difficulties in explaining the nature of the Sabbath commandment and found in it both “rational” and “creedal” elements intermingled. He also found it difficult to justify the closing of businesses on Jewish festivals and had to appeal to the fact of those festivals being national values. See Cr. A. 217/68, *Izramax*, 356-358.

values of the Jewish festivals. Second, the talks correspond to those on other subjects given by education officers of the army, where attendance is also mandatory. It seems to this author, however, that the information work of the education officers has nothing in common with the educational activities of the chaplaincy. This author also believes that these army regulations are invalid because, at least in theory, they make it a duty for all soldiers to attend, including Druses, Circassians, and other non-Jewish soldiers.

A similar problem arises in connection with the study of the Bible in state schools. While the *State Education Law* does assert that elementary education is to be based on “the values of Jewish culture”, the use of the Bible and other religious literature as “religious instruments” within the compass of prayer or religious preaching is appropriately forbidden as repugnant to freedom of conscience and religion. Such a use is totally different from the use of this literature as an “educational instrument” for teaching Jewish cultural values or even for inculcating moral values⁴³.

Similarly, the issue of Shabbat (the Jewish Sabbath), the mandatory day of ritualistic rest for religious Jews, has caused much debated controversy in Israel. According to Halacha, there are many restrictions imposed on Shabbat, many which are objectionable to secular Jews. The judicial branch took measures to defend individual freedoms, by invalidating

⁴³ H.C. 51/69, *Rodnitzki*, 712. There are further grounds for this view, but they lie outside the scope of the present study.

many restrictions imposed by local authorities in an effort to meld public operations with religious laws. These operations included the opening hours of businesses, public transportation, and the operation of gas stations and television stations on the Sabbath⁴⁴. The legislative branch empowered the local authorities to close businesses on the Sabbath, but the executive branch failed to enforce municipal bylaws or national legislation that shut down businesses on the Sabbath⁴⁵. There has been a recent change in this matter, with heightened enforcement of the *Work and Rest Hours Law*, which forbids the employment of Jews on the Sabbath without a permit, even within the jurisdiction of the regional (rural) councils⁴⁶. As for the closure of streets on Shabbat, the judicial branch tried to maintain a balance between the religious sensibilities of religious residents and the freedom of movement of secular residents⁴⁷. Recently, the executive branch has faced increased pressure from religious quarters to close even more streets on the Sabbath. The Supreme Court is inclined toward a social compromise⁴⁸. How-

⁴⁴ Criminal case (Jerusalem) *State of Israel v. Kaplan*, *Piskei Din* 5748 (1988) 265(B).

⁴⁵ E. DON-YEHIYA, *The Politics of Accommodation*, Jerusalem 1997, 48-51.

⁴⁶ Civil appeal 217/68 *Isramax, Ltd. v. Israel Police*, *Piskei Din* 22/2 (1968) 343.

⁴⁷ HCJ 174/62 *League for Prevention of Religious Coercion v. Jerusalem City Council*, *Piskei Din* 16/4 (1962) 2665.

HCJ 531/77 *Baruch v. Traffic Commissioner of Tel Aviv and Central Districts – Central Road Sign Authority*, *Piskei Din* 32/2 (1978) 160.

⁴⁸ HCJ 5016/96, 5025/96, 5090/96 *Horev and others v. Minister of Transport and others*, *Piskei Din* 51/4 (1997) 1.

ever, this compromise is beginning to seem more like a concession to demands of the religious public than the proper implementation of judicial principles as would be the case if the sides adopted a traditional-Jewish democratic approach.

Another issue arises with respect to the issue of the enlistment of *Yeshiva* students (students that study Torah) into the army. Although in Israel enlistment is generally universal, the Israeli Supreme Court held in *Rubenstein*⁴⁹, that *Yeshiva* students may receive an exemption through the postponement of their service but this cannot be done by the Minister of Defence. Rather that exemptions must be granted through primary Knesset legislation. The Court did not nullify the arrangement but granted the Knesset time to amend the legal situation⁵⁰. The issue of the exemption of *Yeshiva* students is controversial, with the number of exempted students today numbering approximately 41.000.

4. The Secular Primary-Purpose Test

In legal terms, the difference between religious norms, which are not part of the societal consensus, and norms with religious roots, which have been adopted by the society, assumes the form of the secular primary-purpose test. If the primary purpose meant

⁴⁹ H.C. 3267/97, *Rubenstein v. Minister of Defense, Piskei Din* 52/5 (1998) 481 (Isr.).

⁵⁰ For a comparative look, see S. SHETREET, «Exemptions and Privileges on Grounds of Religion and Conscience», *Kentucky Law Journal* 62 (1974) 377-420.

to be served by the law is secular – that is to say, is acceptable to enlightened members of society – no improper coercion is involved, even if a religious purpose is incidentally served. For instance, the designation of Sunday as the general day of rest in much of the western world would *prima facie* constitute the coercive enforcement of a Christian religious norm on the entire population, but since the primary purpose is now primarily secular, the incidental result of enforcing a religious norm does not invalidate such a law.

The secular primary-purpose test is acceptable to the courts in Israel, whether or not they apply it explicitly. Justice Silberg has held that where a religious purpose is not primary to a law but the provisions of that law can be justified by the secular purpose achieved, no infringement of religious freedom occurs, even if the statutory provision also serves some religious purpose⁵¹. Justice Zvi Berinson has held that the fact that a municipal bylaw, dealing with the opening and closing of businesses, accords with religious demands will not invalidate all or any part of it «if the primary purpose sought to be achieved by means of it is not a religious purpose»⁵².

A legislative or administrative act serving a religious purpose, if effected by an administrative authority, possesses force only on the condition that the religious purpose is incidental or marginal to the secular primary purpose. Thus, the Israeli Supreme Court has decided that the introduction into an

⁵¹ In Cr.A. 217/68, *Izramax*, 353, Justice Silberg sums up the secular primary-purpose test adopted in the United States.

⁵² Cr.A. 217/68, *Izramax*, 362.

import license of a condition whereby the importer of food must produce a certificate of *kashrut* from the Rabbinate to obtain clearance of the goods from customs does not serve the economic purposes of the law restricting imports. Therefore, the court found that the authority, in imposing such a condition, had improperly exercised its powers in order to attain a religious purpose⁵³. Similarly, the Supreme Court has denied validity to an order of the Food Controller that prohibited the breeding of pigs in certain areas by virtue of his general power to regulate the inspection of food. In its ruling, the court noted that «the sole firm grounds, or at least the primary and decisive grounds, for the Food Controller's administrative and legal acts in this matter were national-religious and not economic grounds inherent in the purposes of food control»⁵⁴.

5. National-Religious Norms

A special problem arises with what are termed in Israel national-religious norms. Certainly, religious freedom is consistent with the imposition of national norms that bind a society to its historic values and cultural heritage. The intermingling of national and

⁵³ H.C. 231/63, *Retef Ltd. v. Minister of Commerce and Industry*, *Piskei Din* 17 (1963) 2730.

⁵⁴ H.C. 105/54, *Lazarovitz v. Food Controller*, *Piskei Din* 10 (1956) 44, 55, per Justice Berinson. It may be contended, however, that prohibition of pig-breeding in respect of Jews is warranted, because the entire matter is rooted in Jewish national tradition.

religious elements in Judaism requires, however, that a distinction be drawn between purely religious norms and norms which display national features.

National-religious norms are enforceable upon individuals only when they have secured societal consensus. However, their introduction into official state institutions may be warranted, even when their enforcement upon the individual citizen is not justified. Thus, the State of Israel may properly require that Jewish symbols and values should be preserved by governmental authorities and the official representatives of the state in the course of their duty even though these may lack the consensus which would transform them into norms binding on all citizens. Analogously, it is this author's view that the observance of the dietary laws in the army is justified. This is not because military standardization and national unity make it undesirable to set up two kitchens in every army unit, or because there is no hardship involved in non-observant soldiers eating *kosher* food while the alternative policy creates severe hardship for many soldiers, but rather because the observance of dietary laws in the army forges a bond with the Jewish people's past by means of one of the most conspicuous of Jewish symbols.

SHIMON SHETREET