

ABHANDLUNGEN

Freedom of Religion: The Israeli Experience

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I. Introduction

Two Tel Aviv motion picture theatres stand at a distance of less than 1000 meters apart. On Friday evenings (the Jewish Sabbath), both cinemas screen movies contrary to the city by-laws which prohibit commercial establishments from being open on the Jewish Sabbath or Holidays¹.

With respect to the first theatre owner, no legal proceedings will be commenced, no inspector of the municipality authorities will visit the motion picture establishment, so that the owner will be permitted to continue to violate the by-laws with the apparent blessing of the municipality authorities who enacted these very by-laws.

On the other hand, the second motion picture owner is likely to have an administrative report issued against him, and he will be liable to payment of a fine. If he persists in violating the by-laws, more severe enforcement measures will be taken against him. The second cinema owner has no recourse to any legal remedy. His act constitutes a violation of a by-law; therefore, he cannot rely upon the fact that the city turned the other cheek to the violation that the other theatre owner committed in the same vicinity². A claim of discrimination will not stand him in good stead. He also

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¹ The By-law of Tel-Aviv (Opening and Closing of Shops) 1980 which prohibits the opening of shops during the Jewish rest day and the Jewish holidays.

² Selective enforcement of the law does not entitle the violator to bring an action against the authorities in order to prevent them from exercising their powers even though

will not be able to appeal against the leniency shown by the authorities to the actions of his colleague. The Court will not accept his claims because, as to the relation of the enforcement authorities towards the other violator, the cinema owner has no standing. His aim is to deprive another person of something, and such an interest is not sufficiently legitimate for the purposes of standing³.

From another aspect, in the absence of a direct, real and substantive harm, a religious belief or way of life in itself wouldn't be sufficient ground to give *locus standi* to a person whose religious feelings or religious conscience have been hurt by the act of the authority. Being interested in a certain result by virtue of belonging to a larger community does not include this interest among the legal defended interests⁴. This gate for judicial review is closed too.

This paradox occurs in Tel Aviv, as well as in other cities in Israel every Sabbath Eve. It is based on an "administrative arrangement" that, at its foundation, represents an uneasy *status quo* between the religious community, seeking to enforce Sabbath observance in public places, and the secular community trying to prevent the imposition of restrictions by the religious community. This "administrative arrangement" essentially amounts to selective enforcement by the administrative authority on the following considered basis: In an area in which there is a large concentration of observant Jews, the law will be enforced; in contrast to this, in an area which is sparsely populated by observant Jews, no enforcement procedures are taken.

Legal norms stand on one side, while the "administrative arrangement" stands on the opposite side; life begets the way of compromise outside the confines of the law. On first glance, the solution amounts to a favorable

such practice might be based on discrimination. It is considered an exception to a claim of discrimination. See H.C.147/84, *Hefetz v. The General Commissioner of the Police*, 39(3) P.D. (Piskei Din – Law Reports of the Supreme Court of Israel) 412; H.C.460/63 *Lash v. The Assessment Committee*, 18(1) P.D.318; H.C.248/80 *Cohen v. The Chairman of the Parliament*, 34(4) P.D.813, 820.

³ See H.C.100/64 *Emek Haarazim v. The District Commissioner*, 18(2) P.D.280; H.C.19/64 *The Association of Insurance Agents v. The Inspector of Insurance*, 18(3) P.D.506; A. Rubinstein, *Locus Standi of Applicant in the High Court of Justice Seeking to Deprive Another of his Right*, 27 *Hapraklit* (1971) 499.

⁴ See H.C.161/70 *Zacksh v. The Mayor of Petah Tikva*, 24(2) P.D.698 (dismissal of a petition to enforce by-law which prohibits the opening of a motion picture theatre on Sabbath); H.C.287/69 *Meron v. Minister of Labor*, 24(1) P.D.337; H.C.40/70 *Becker v. Minister of Defense*, 24(1) P.D.238; H.C.332/70 *Zalzburg v. The Mayor of Ashkelon*, 24(2) P.D.537; H.C.348/70 *Kefir v. The Religious Council of Ashkelon*, 25(1) P.D.685.

compromise for both concerned! When the legislator has no power to impose the secular ideology prevalent among the majority of the population, a partial arrangement, administrative in nature, is satisfactory. In this manner each one of the parties concerned can claim a partial achievement.

However, from the vantage of public law this compromise solution is undesirable. The action of the authority whose purpose is the enforcement of laws is tainted by irrelevant considerations, that is, selective enforcement based upon a political arrangement. This is precisely the way in which unjustified discrimination between citizens is created. This message which is transmitted to the public with respect to the enforcement of the laws, is a negative one, and is likely to engender public demoralization, the final result of which is disregard for the law in general. Selective application of the law on account of political considerations also exacerbates the lack of confidence of the public in the governmental authority⁵.

This introduction merely accentuates the ambivalence in which Israeli law is steeped in connection with the constitutional law aspects of freedom of religion.

II. The Special Situation of Israel

We will treat first the special situation of the State of Israel which has created a unique, yet problematic, arrangement. The Jewish religion, throughout the generations, has been identified with the Jewish nation. The Jewish tradition, as expressed in the aphorism of Rav Sa'adia Gaon, holds that "our nation is a nation only by virtue of its Torah (its laws)"⁶. The Jewish national tradition, as opposed to the tradition of the Christian peoples, desists from giving to Caesar what belongs to him; rather, it demands from its adherents to give to the religion their all.

In this context, one may say, by way of analogy, that – just as the rule of law imposes equal obligations on governmental authorities and on indi-

⁵ See A. Rubinstein, *Constitutional Law in Israel* (Tel Aviv, 3rd ed. 1980) 168–169.

⁶ Saadia Gaon, *The Book of Beliefs and Opinions*, translated by Samuel Rosenblatt (New Haven 1948) Treatise III, p.158: "Furthermore, our nation of the children of Israel is a nation only by virtue of its laws. Since, then, the creator has stated that the Jewish nation was determined to exist as long as heaven and earth would exist, its laws would, of necessity, have to endure as long as would heaven and earth". See also A.J. Waldenberg, *Hilkhot Ha-Medina*, Part 3 (Jerusalem 1955) 1–24; J.L. Hacohen Maimon, *The Torah of Israel and the State of Israel* (1954) 9–10 *Ha-Torah Weha-Medina*, 11. The well-known saying "The Holy One, blessed be He, the Torah and Israel – are one" is based on the *Zohar*, *Leviticus*, *Ahare Mot*, 73; see also I. Englard, *The Relationship Between Religion and State in Israel*, 16 *Scripta Hierosolomitana* (1966) 254.

viduals – so, too, in the areas of religion, the authority imposes obligations on the ruler and subordinates the State to religion. The principle in the matter of the mutual guarantee of all Jews imposes the responsibility for failure to adhere to the religious commandments not merely upon those who transgress the commandments, but on the community as a whole⁷. Because there is value in the observance of religious commandments even if they are performed due to compulsion⁸, the religious Jew sees religious compulsion as part of his religious duties⁹, and in a more radical form, as part of his religious freedom¹⁰.

⁷ "All Israel are surety for one another", Shevuot 39a.

⁸ See Englard (note 6), at p.257; The Jewish sources, Ketubot 86a; Hulin 132b; see also E. Don-Yehiya/C. Liebman, Separation of Church and State: Slogans and Contents, Molad (1973) 71, 81–82.

⁹ "The Clear Knowledge ... that the Jewish people can't long endure in the Land of Israel except by observing the Torah, and that the Jewish State that obliterates the name of Heaven from itself has no right to exist; this knowledge itself enjoins us towards joint action so as to impress the stamp of the Torah, as far as possible, on the way of life of the people in the state". Rabbi S. Israeli "on Defining the Duty to infuse the Torah in Israel", 9–10 Ha-Torah Weha-Medina 160; see also Englard (note 6), at p.257 It explains in part the fierce obligation of a religious man towards the infusion of Jewish religious norms in the Jewish State.

A supplementary explanation, from the standpoint of the organized religious public, is as follows: for the religious-zionist parties in Israel what is called religious coercion is one of the main features of the ideological justification for their existence. The ultra orthodox Jews maintained the ideology of passive expectation for the Messiah and disassociated themselves from the zionist movement (whose ideology was the opposite, i.e. active involvement in the foundation of a Jewish State). The acts of the zionist movement, in their eyes, were seen as a defiance against God. In the painful split between the religious zionist movement and ultra orthodox Jewry, the justification of the former was that the building of a new State would be based on the Torah, on the foundation of the religious laws and on strict observance of the Halacha. The leaders of the religious zionist movement were ready to take measures of coercion in order to fulfill this goal. For the religious parties in Israel religious coercion has become not a political issue or a pragmatic question of political achievements but rather an existential question. See I. Katz, The Historical Image of Rabbi Z. H. Kalisher, Jewish Nationality (Jerusalem 1978); E. Luz, Parallels Meet, Religion and Nationalism in Early Zionist Movement (1882–1904) (Tel-Aviv 1985) 72.

¹⁰ Religious scholars and philosophers split in their attitude towards the religious significance of absorbing religious norms into the Israeli legislation. I. Englard, The Problem of Jewish Law in a Jewish State (1968) 3 Israel Law Review 254, states that the reception of religious law by the State means making it the law of the State; need for a legislative act involves secularization of the Halacha (the religious law). Such formal secularization, resulting from reception, raises an initial doubt as to whether there is any positive religious significance in the incorporation of the Halacha into the law of the State. Furthermore, the selective reception of the religious law – which stems from a secular outlook of the legislation rather than a recognition in the sanctity of the religious law – constitutes, in the eyes of Englard, a direct attack on the religious law. "Selective reception is an explicit denial of the

The return of the Jewish people to national autonomy in the Land of Israel, which is accounted for by means of diverse theo-historical reasons, has also created among the secular community a certain feeling of obligations regarding the claims of religious circles. Along with this feeling there also exists the sense of identification with a Jewish history replete with religious principles¹¹.

The desire to establish a Jewish identity for the country and to reach a common denominator on the basis of Jewish culture together with the difficulty of finding a secular common denominator, has created a situation in which the secular majority was willing to make concessions to the religious community. Part of the secular community distinguished between its personal, secular, permissive, liberal behavior and between its position regarding the question of the place of religion in the life of the State. In this way, legislation conferring upon religion a degree of influence also in public matters of the State was supported by the large secular community, agreeing to subordinate itself to the views of a particularly intensive minority¹².

The historical partnership, prior to the establishment of the State, with the religious Zionist movement throughout the various national organs that evolved into a compromise, also created a convenient conviction for

sanctity of the Halacha and therefore of anti-religious significance". For a similar position, see I. Leibovitz, *Torah Law as a Law of Israel*, 3 sura 495. Contrary to these views, M. Elon, *Jewish Law, History, Sources and Principles* (Jerusalem 1978) 117-128, states that one should accept what he can get under the present circumstances rather than deny it all on the account of the lack of total reception. In Elon's view the denial of reception is part of a more comprehensive ideological outlook which negates the recognition of the Jewish existence from a secular Jewish State.

¹¹ See Luz, *ibid.*; Z. Yaron, *Religion in Israel*, *American Jewish Year Book* 1976, 42; Don-Yehiya/Liebman (note 8), at p.86 *et seq.*

¹² Don-Yehiya/Liebman, at p.86 *et seq.*; M. Elon, *The Problems of Halacha and Law in Israel* (The Institute for Contemporary Judaism, the Hebrew University of Jerusalem, 1973) 15; *idem*, *Religious Legislation in the Laws of the State of Israel* (Tel-Aviv 1968) 32. Careful examination of the debates in the Israeli parliament during the proceedings of religious legislation indicates a broad consent to its contents far beyond pragmatic political reasoning; see, for example, 14 *Divrei Ha-Knesset* (Records of Knesset – the Parliament – proceedings) (1953) 1468.

See also D. Ben Gurion's (Israel's first Prime Minister) letter to the editor of *Davar* (an Israeli daily newspaper) from 24/7/1970, in which he explains that after the holocaust and due to the great immigration to Israel from all over the world there was a need to find a common denominator at least in matters of marriage and divorce and to follow the Jewish religious rules. In his letter he suggests that the reasoning doesn't exist anymore and that Israel should revoke the laws which enforce the religious rules. Rubinstein (note 5), at p.154, quotes the letter.

continuing the partnership at the expense of freedom from religion¹³. Likewise, it prevented a social fissure in addition to the painful controversy which already existed between the Left and the Right in the years immediately following the establishment of the State. It is not incorrect to say that the fledgling country, surrounded as it was by enemies bent upon its destruction, could not have afforded a deepening of this social fissure.

Moreover, the idea that the State of Israel was to be a Jewish State itself leads to the conclusion that those Jews who live in a Jewish State are not permitted to simply drop out from the course of Jewish history and from the bond with the Jewish presence in the Diaspora. This fear of severing themselves from the mainstream of Diaspora Jewry itself served to persuade the secular majority to accede the demands of the religious community and to confer a certain religious character to the State.

Alongside these ideological considerations, however, there did operate more mundane political-pragmatic motives regarding submission to religious-political pressure. The socialist-oriented majority reasoned that it was easier to pay the price sought by the religious community than to cooperate with the Right. At the time such political cooperation seemed out of the question because it carried an unacceptably high political price. Since then, the religious political parties have served as the tongue of the political scales in the world of Israeli coalition politics, thereby enabling them to preserve the gains obtained in religious matters and on occasion even to broaden them¹⁴.

The nature of the arrangements with respect to religion can therefore be explained against an ideological background, against a social background and pragmatic-political background. Against the claims heard to the effect that the Jewish people who suffered religious persecution should therefore demonstrate a tolerant attitude¹⁵, the response is that regarding other religions, there exists religious tolerance and absolute religious freedom, and that the question of coercing religious norms upon the population is limited to Jews.

¹³ Luz, note 9; Yaron, note 11; E. Goldman, *Religious Issues in Israeli Political Life* (1974).

¹⁴ E. Don-Yehiya, *Religion and Coalition: The National Religious Party and Coalition Formation in Israel*, *The Elections in Israel* (A. Arian, ed., 1973) 255. As mentioned above (note 9), from the standpoint of the religious parties religious legislation does not mean a pragmatic-political issue but rather an ideological one.

¹⁵ C.P.525/63 *Shmuel v. The Attorney General*, 18(3) P.D.452, 471.

III. The Legal Arrangement

What then, is the Israeli arrangement? Freedom of religion is recognized in Israel as a fundamental constitutional principle¹⁶. The principle is based upon various sources. Section 83 of the Palestine Order in Council 1922 provides that "All persons in Palestine shall enjoy full liberty of conscience and the free exercise of all forms of worship subject only to the maintenance of the public order and morals". The third part of Israel's Declaration of Independence, 1948, guarantees "Freedom of religion and conscience" to all citizens of the country¹⁷. Note that the accepted interpretation of the Palestine Order in Council and the fundamental constitutional principles mentioned below suggest that the obligations derived from the principle of freedom of religion and conscience include both freedom of religion and freedom from religion¹⁸. However, the Declaration of Independence is not considered a legal norm¹⁹; rather, it is a guiding principle and in the absence of any contradictory order, it serves as a principle of interpretation that is binding on all administrative authorities²⁰.

In the absence of a written constitution the Israeli courts have looked for other sources to base, support and strengthen the right to freedom of religion and conscience. Such a source was found in the fact that Israel is a

¹⁶ H.C. 80/63 *Gurfinkel v. Minister of Interior*, 17 P.D. 2048, 2059; H.C. 72/62 *Rufaizen v. Minister of Interior*, 16 P.D. 2428, 2447; H.C. 262/62 *Perez v. Kfar Shmaryahu Local Council*, 16 P.D. 2101, 2107, 2113, 2116; H.C. *Segev v. Safad Rabbinical Court*, 21(2) P.D. 505, 551.

¹⁷ "The State of Israel ... will be based on freedom, justice and peace as envisaged by the prophets of Israel, it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, education and culture".

¹⁸ C.A. 112/50 *Yosif v. Attorney General*, 5 P.D. 481; see also the references above in note 16.

¹⁹ H.C. 10/48 *Ziv v. Gubernik*, 1 P.D. 85.

²⁰ *Perez* (note 16), at p. 2116: "Even if the Declaration itself has not conferred rights upon the citizen enforceable by way of legal action, it provides a pattern of life for citizens of the State and requires every State authority to be guided by its principle"; H.C. 301/63 *Streit v. Chief Rabbi*, 18(1) P.D. 598, 612; H.C. 73, 87/53 *Kol Ha-Am v. Minister of Interior*, 7 P.D. 871 (1 Selected Judgements of Israeli Supreme Court 90); El. A. 1/65 *Yeridor v. Central Elections Committee*, 19(3) P.D. 365. See also A. Rubinstein, *Law and Religion in Israel*, 3 *Israel Law Review* (1967) 380, 381; Z. Berinson, *Freedom of Religion and Conscience in the State of Israel*, 3 *Israel Yearbook on Human Rights* (1973) 223-224; S. Shetreet, *Freedom of Religion and Freedom from Religion: A Dialogue, Some Reflections on Freedom of Conscience and Religion in Israel*, 4 *Israel Yearbook on Human Rights* (1974) 194, 195-196.

democratic and enlightened State²¹. Courts have also resorted to the Universal Declaration of Human Rights, 1948, and the International Covenant on Civil and Political Rights, 1966, as far as the principles and rules included therein are not inconsistent with any enactment of the Parliament²².

Freedom of religion and freedom of conscience are considered basic human rights which serve as a rule of interpretation. According to this rule, there is a presumption that in the absence of an explicit intent of the legislator to the contrary, every law must be interpreted in a manner compatible with these basic human rights²³.

Another way in which the courts surmounted the political pressure and as a result the secondary legislator's inclination to incorporate religious rules in the State's legal norms, in the absence of constitutional restraint, was to impose unwritten constitutional restriction on the power of the administrative authorities. The legal source of this restriction was based on the rules of administrative law²⁴.

According to the developed principles of Israel case law, every administrative order and secondary legislation that contradicts basic concepts of religious freedom, or any other fundamental rights and liberties of the individual, are viewed as unreasonable and hence void.

Furthermore, neither the administration nor the local authority is entitled, in the exercise of its powers, to impose any prohibition in order to attain a religious objective. The achievement of religious ends is considered beyond the powers of the executive or local authority and the court will not permit the use of administrative powers or secondary legislation for a religious purpose unless the authorities concerned are expressly competent so to do²⁵. The restriction of the freedom of the individual for religious

²¹ See Shetreet, *ibid.*, at p.196; *Yosifof* (note 18), at p.486; *Perez* (note 16), at p.2107; *Kol Ha-Am*, note 20.

²² H.C.103/67 *The American European Beth El Mission v. Minister of Social Welfare*, 21(2) P.D.325, 331. See also *Streit* (note 20), at p.612; *Segev* (note 16), at p.551. Shetreet (note 20), at pp.196-197 states that an interesting situation results from this ruling; a private citizen may rely on a treaty in court proceedings even though the State of Israel will not be bound by it in international law (because of the lack of signature or ratification).

²³ See *infra* note 58 and the references therein.

²⁴ It is connected with the issue of relevant and irrelevant considerations or the issue of improper purpose in the course of exercising the discretionary powers of the executive or local authority. See S.A. de Smith, *Judicial Review of Administrative Action* (London, 4th ed. 1980) 325-344.

²⁵ See on this subject Rubinstein (note 20), at pp.380-382. See H.C.122/54 *Aksel v. Mayor of Netanya*, 8 P.D.1524, in which the Court held as illegal the Municipality of Netanya's refusal to grant a shop license to a butcher until the applicant undertook not to sell pork in the shop. In H.C.72/55 *Fredi v. Municipality of Tel Aviv*, 10 P.D.734, the High

reasons, in the opinion of the High Court of Justice, is a general national problem not confined to any particular place, and its solution lies within the exclusive competence of the national legislature (The Knesset)²⁶. The same principle led the courts not to recognize hurting religious feelings as a sufficient ground for imposing restriction on a religious basis²⁷.

However, in the absence of a written constitution, the legislator is free to enact laws that contradict this principle. Like every constitutional unwritten principle, the principle of freedom of religion has also retreated in the face of enacted laws²⁸.

In Israel, freedom of religion is guaranteed to religious minorities as well as to Orthodox Jews without virtually any exceptions. One exception is found in connection with other Jewish religious groups, such as the Reform Jews. They are not prejudiced with respect to their right to freedom of ritual. Moreover, governmental authorities are obligated at the public level to enable them to practice their ritual and to prevent discrimination in the renting of halls for prayer and the like²⁹.

However, their rabbis are not authorized to conduct a wedding ceremony pursuant to Reform practice involving members of their group because they are not recognized as a "registering authority" according to the

Court invalidated a by-law that purported to prohibit the raising of pigs and restrict the sale of pork. See also H.C.105/54 *Lazarovitch v. The Food Controller*, 10 P.D.40; C.A.6/66 *Klau v. Mayor of Bat Yam*, 20(2) P.D.327; H.C.231/63 *Ratof Ltd. v. Minister of Commerce*, 17 P.D.2730, 2732; H.C.155/60 *Elazar v. Mayor of Bat Yam*, 14 P.D.1511; on the question of balancing the interests and the circumstances, scope and degree in which the executive may take religious matters or the needs of religious citizens into consideration while exercising administrative powers, see *infra* notes 73–77 and accompanying text.

²⁶ *Aksel*, *ibid.*, at p. 1531.

²⁷ H.C.357/61 *Tetlis v. Mayor of Hertzlia*, 16 P.D.902. In *Meron*, note 4, the applicant failed in his attempt to prevent TV broadcasting on the Sabbath on the ground that it offends his religious feelings. In H.C.230/73 *S.Z.M. Ltd. v. Mayor of Jerusalem*, 28(2) P.D.113, 119, the refusal of the municipality to grant a license to a sex shop in Jerusalem on the ground that it would hurt religious feelings was set aside. See also *Perez* (note 16), at p.2106; H.C.531/77 *Baruch v. The Traffic Controller*, 32(2) P.D.160, 164–165; see *Berinson* (note 20), at pp.229–230. As to the circumstances in which the executive may take religious feelings into consideration and the distinction between mere feelings and legitimate needs and interests of a religious public, see *infra* notes 73–77 and accompanying text.

²⁸ In C.A.450/70 *Rogozinski v. State of Israel*, 26(1) P.D.129. The petition was filed by a non-believing couple requesting to be relieved of the obligation to undergo a religious ceremony of the Rabbinat. The Court could see no way of allowing the petition inasmuch as "The law of the State which submitted matters of marriage and divorce of Jews ... to the law of the Torah, takes precedence over the principle of freedom of conscience".

²⁹ See *Perez*, note 16.

law³⁰, and their religious officials are not considered as formally recognized by those State institutions that give formal recognition to religious Jewish officials³¹. The reason for this is that by being Jewish, and in the absence of their recognition as a separate religious community, they are subject to the institutions of the Orthodox Jewish rabbinate, just like the secular Jews.

However, even the exception to freedom of religion, namely that of the public policy³² has practically not been used in Israel in this context. The main exception concerns the penal provisions that make bigamy a criminal offense³³: in regard to Moslems it is assumed that bigamy lies in the realm of a religious commandment³⁴.

In Israel, as in other countries such as England, and in contrast with the United States³⁵, there is no separation between "Church and State"³⁶. However, there is no necessary connection between the absence of such a separation and between harm to freedom of religion³⁷. This is because the connection between Church and State will likely be found at the levels of

³⁰ Marriage and Divorce (Registration) Ordinance.

³¹ Rubinstein (note 20), at pp.402-403.

³² *Reynolds v. U.S.*, 98 U.S.145 (1879); *Davis v. Deason*, 133 U.S.333 (1890); *Late Corporation of the Church of Jesus of Latter Day Saints v. U.S.*, 136 U.S.1 (1890). In these cases the Supreme Court of the United States upheld a criminal statute prohibiting bigamy even for Mormons whose religion not only allows but requires the taking of several wives. The public order, the general welfare, prevails. See also *Hamilton v. Regents of the University of California*, 293 U.S.245 (1934); *Berinson* (note 20), at p.228.

³³ Penal Law, 5737-1977 (Laws of the State of Israel Special Volume: Penal Law), sections 175-183.

³⁴ See Y. Meron, *Moslem Polygamy and the Constitutionality of its Prohibition*, 3 *Mishpatim* (1972) 515.

³⁵ On the difficulties in the United States over the meaning of separation of Church and State and the difficulties concerning strict neutrality of the State towards the Church, see Shetreet (note 20), at p.198 *et seq.*; W.G. Katz, *Freedom of Religion and State Neutrality*, 20 *U. Chicago L.Rev.* (1953) 426. According to Katz (p.428) "... in many situations ... complete separation of Church and State would operate to restrain religious freedom. Where that is the case, there is no constitutional requirement of separation".

³⁶ See Shetreet (note 20), at pp.205, 206; Rubinstein (note 20).

³⁷ See Shetreet (note 20), at p.204. "The relationship between Church and State has no longer any real effect on the free exercise of religion. The question whether freedom of religion in all its variety is adequately protected should be answered by a careful examination of the relative law and practice of the legal system concerned".

According to Art.I(d) of the Draft International Convention on the Elimination of All Forms of Religious Intolerance, neither the establishment of a religion, nor the separation of Church and State is an interference with the freedom of religion. See 6 J. of the International Commission of Jurists (1965) 298, 312. See also S. Meron, *Freedom of Religion as Distinct from Freedom from Religion in Israel*, 4 *Israel Yearbook on Human Rights* (1974) 219, 223.

assistance or State participation in financing religious services and also in giving official, ceremonial status to religious officials or their religious institutions without harming either freedom of religion or freedom from religion. However, the connection between the Church and the State of Israel is also found on the additional levels of the ceremonial and institutional. The connection also extends to the legislative sphere that coerces norms whose source is religious or that constitute part of the religious law on the population at large³⁸.

The State regulates matters of religion, confers legal authority to religious organs, and gives validity to various religious rules.

Hereinafter I will concentrate solely upon freedom from religion, that is to say, deviations from the principle according to which a person is entitled to act pursuant to his conscience free from restrictions deriving from religion, and to realize his entitlements without being forced to be dependent upon religious norms, to religious authorities, or religious forms of conduct. In these contexts, Israel departs from the ideal model of freedom from religion on the following levels:

A) Religious institutions are granted authority in different contexts and they are appointed by the State itself. Recognition of these institutions, such as the Chief Rabbinate and the Religious Councils, is also provided for by the State³⁹.

B) The State concerns itself with religious education, and provides a network of "State" religious schools alongside the regular State-run school system⁴⁰.

C) The laws of marriage and divorce are adjudicated according to the laws of the various religious communities that are recognized as such in Israel⁴¹. The State recognizes the jurisdiction of religious courts that ren-

³⁸ On the different levels of the connection between Church and State see Rubinstein, note 20; Englar d., note 6; Don-Yehiya/Liebman, note 8.

³⁹ Jewish Religious Services Law (Consolidated Version), 5731-1971 (25 Laws of the State of Israel 125), dealing mainly with the religious Council. Chief Rabbinate of Israel Law, 5740-1980 (35 Laws of the State of Israel 97), regulates the functions of the Council of the Chief Rabbinate of Israel, the composition of the Council and the way of the election of the council and of the two Chief Rabbis of Israel.

⁴⁰ State Education Law, 5713-1953 (7 Laws of the State of Israel 113); State Education Regulations (Religious State Education Council), 5713-1953.

⁴¹ The law applicable to the religious courts is the religious law, see A.C.27/49 *Levanon v. Elmaliach*, 3 P.D.68, 80; H.C.8/48 *Glücksberg v. Director of the Execution Office*, 2 P.D.168, 183; A.C.238/53 *Cohen v. Attorney General*, 8 P.D.436; M. Zilberg, *The Personal Status in Israel* (Jerusalem 1958) 172. In Israel there are 10 religious communities recognized by the government and maintaining religious courts.

der decisions in most matters of marriage and divorce according to religious law⁴². In various matters of personal status, the religious law is also obligatory in the regular (secular) courts⁴³.

D) Laws have been enacted whose source is religious, or require the enforcement of religious norms. These laws deal with maintaining public days of rest (the Jewish Sabbath and Jewish Holidays)⁴⁴. The law forbids employing workers on days of rest without special permission by an authorized authority⁴⁵ or a general dispensation and permission⁴⁶.

Thus, legislation has been enacted with respect to the Jewish dietary laws (ritual lawfulness of food), principally laws that forbid the raising or sale of pig or pork products⁴⁷.

⁴² The jurisdiction of the Moslem and Christian religious courts is set by Arts.52 (Moslem courts), 54 (Christian courts) of the Palestine Order in Council, in matters of personal status as defined in Art.51 of the Order. In part of the personal matters the Christian religious courts have exclusive jurisdiction and in another part they have concurrent jurisdiction. The exclusive jurisdiction of the Moslem court is extended to all the matters of personal status. Matters of personal status of Jews in Israel under certain conditions are within the jurisdiction (exclusive or concurrent depending upon different circumstances) of the Rabbinical courts according to the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (7 Laws of the State of Israel 139). The Druze community has its own religious courts, established under the Druze Religious Courts Law, 5722-1962 (17 Laws of the State of Israel 27).

⁴³ See Art.47 of the Palestine Order in Council.

⁴⁴ Section 18A of the Law and Administration Ordinance, 5708-1948 (1 Laws of the State of Israel 7); Hours of Work and Rest Law, 5711-1951 (5 Laws of the State of Israel 125). - Local authorities have more extensive powers. They may prescribe prohibitions and restrictions as regards the opening of businesses, places of entertainment and the like. See section 249(20) of the Municipalities Ordinance (New Version) (1 Laws of the State of Israel [New Version] 247); section 146(6)-(7) of the Local Councils (A) Order, 5710-1950; section 140A of the Local Council (B) Order, 5713-1953, and section 63(6)-(7) of the Local Councils (District Councils) Order, 5718-1958. See Rubinstein (note 20), at pp.409-411.

⁴⁵ Sec.12 of the Hours of Work and Rest Law empowers the Minister of Labour to permit employment of a worker on a day of rest "if he is satisfied that interruption of work is likely to prejudice the defense of the State or the security of persons or property or seriously to prejudice the economy or a process of work or the supply of services which, in the opinion of the Minister of Labour, are essential to the public or part thereof".

⁴⁶ The granting of a general permission requires a resolution by a committee of Ministers composed of the Prime Minister, the Minister of Religious Affairs and the Minister of Labour.

⁴⁷ Pig Raising Prohibition Law, 5722-1962 (16 Laws of the State of Israel 93). The Local Authorities (Special Enablement) Law, 5717-1957 (11 Laws of the State of Israel 16) empowers every local authority to make by-laws limiting or prohibiting the raising and keeping of pigs and the sale of pork and pork products destined for food. The restriction is geographical and not personal.

E) A military rabbinate was established with authority in the context of the Israel Defense Forces.

F) The State created a government Ministry of Religion.

G) In the framework of administrative arrangements that rest upon coalition agreements rather than on the basis of any guidelines derived from statute, public transportation is not operated on the Sabbath or on Jewish Holidays except for a few isolated places in Israel in which it has been customary to operate public transportation from the early days⁴⁸. Israel's rail line also desists from operating on the aforementioned days. Likewise, the operation of the Israel national airline – El-Al – is stopped on these days. In this connection, the State used its authority as an owner of these assets⁴⁹. The government acts on the principle that only *kasher* food should be provided in all its departments and every place under its auspices where food is prepared should be under the supervision of the Chief Rabbinate⁵⁰. In the past, the Israel Lands Administration was accustomed to conviction lease contracts on the assurance that the lessee obligated himself not to cultivate the leased land on the Sabbath or Holidays⁵¹.

Thus there are various restrictions based on religion that differ in scope and in severity. There does not exist a single form of arrangement or a uniform set of criteria.

IV. The Characterization of the Arrangement

Some of the restrictions deal with only coercion of conscience, while others constitute infringement of the convenience of the public. Some restrictions exist in the public domain only. For example: a person is permitted to eat pork; there is no obligation upon the individual to observe *kashrut*, but as a practical matter it is difficult to obtain such meat because of restrictions regarding the raising of pig. Or, a person is permitted to travel on the Sabbath, but if he does not own a motor vehicle, it is difficult for him to travel because of the absence of public bus transportation.

There is a law designed to ensuring *kashrut* (Jewish dietary laws) in the Israeli army, the K kosher Food for Soldiers Ordinance, 5709–1949 (2 Laws of the State of Israel 37).

⁴⁸ See Rubinstein (note 5), at p.161 *et seq.* The municipalities and the local councils are not empowered to enact a municipal by-law forbidding public transport on the rest day since the laws mentioned in note 44 above confine the power of those entities to regulation of the opening and closing of shops and places of entertainment. See Rubinstein (note 20), at p.410.

⁴⁹ Rubinstein (note 5), at p.161.

⁵⁰ Rubinstein (note 20), at p.412; Shetreet (note 20), at p.206.

⁵¹ Rubinstein (note 5), at p.141.

There are also some severe restrictions regarding the private domain. Most of the restrictions of this kind relate to the right to marriage. Thus, restrictions are imposed upon Jews by religious practice according to which there is a prohibition of intermarriage and a "Kohen" (a member of a priestly family) is forbidden to marry a divorcee. A person who is not part of any religious community has no possibility of marriage in Israel since there is no civil marriage⁵².

In the opinion of scholars, restrictions on marriage are inconsistent with the universal Declaration of Human Rights, 1948, and the International Covenant on Civil and Political Rights, 1966, both of which guarantee the freedom of religion and the right to marriage⁵³. Other scholars compare these religious restrictions to other universal restrictions on marriage and attempt by way of this analogy to resolve the conflict between religious restrictions and the right to marriage provided for in international conventions⁵⁴.

V. The Right to Freedom from Religion and its Infringements – Ways of Reconciliation

A. Introduction

Can one really reconcile the Israeli infringements with the right of freedom from religion? Let us consider this question from two aspects. First, we will examine from several different vantage points the reconciliation of the restrictions whose source lies in religious norms with the principle of freedom from religion. Second, we will examine how the Israeli legal system tackles the restrictions and how the system of Israeli law circumvents the difficulties created as a result of religious norms that constitute part of the law.

As concerns the first aspect, we have already seen that it is difficult to

⁵² See B. Bracha, Personal Status of Persons Belonging to no Recognized Religious Community, 5 Israel Yearbook on Human Rights (1975) 88; M. Shava, The Personal Law in Israel (Tel Aviv, 2nd ed. 1983) 155–169; Vitta, The Conflict of Laws in Matters of Personal Status in Palestine (1947) 238; P. Shifman, Family Law in Israel (Jerusalem 1984) 75–79, 243–245; Zilberg (note 41), at pp. 259–263.

⁵³ A. Rubinstein, The Right to Marriage, 3 Israel Yearbook on Human Rights (1973) 233; *idem* (note 5), at p. 144 *et seq.*; A. Levontin, On Marriages and Divorces Out of the Jurisdiction (Jerusalem 1957) 49.

⁵⁴ I.Z. Blum, Israel Marriage Law and Human Rights, 22 Hapraklit (1965/66) 214, 361.

transmit to another system of law concepts and terms that were developed in the context of a different legal system with respect to freedom from religion. A fledgling country that serves as a refuge for an ancient people, that constitutes a part of the history of the world from the earliest of days, that was established on the basis of a central ethnic identity, that possesses a unique ideology and that is distinctly Jewish and Zionist, is simply unlike a country like the United States, with relatively short history, whose purpose, character and essence are to serve as a melting pot for various ethnic identities, and which was built on the basis of religious neutrality^{55, 56}.

B. The Formal Way

In the absence of a constitution, the arrangement which subordinates laws to a constitution descends one stage in the normative hierarchy. It relates only to secondary legislation *vis-à-vis* unwritten constitutional principles⁵⁷. However, laws are not voidable because they harm one's freedom from religion. Regarding laws that restrict the principle of freedom from religion, there exists a formal normative explanation that satisfies the positivists: primary legislation is not confined to these restrictions and is free to "violate" this principle. However, from the point of view of substance, even these claims are subject to justification⁵⁸.

⁵⁵ See *Segev* (note 16), at p.560; for criticism on this view see Shetreet (note 20), at p.197

⁵⁶ It is worth pointing out that this assertion serves only as a backdrop for more persuasive explanations. This assertion was raised by Judge Kister in the case of *Segev*, at pp.558-560, and in a later case (H.C.51/69 *Rodnitzki v. Rabbinical High Court of Appeal*, 24(1) P.D.704). The assertion, on its own terms, convinced him (in a minority opinion in the later case) when this assertion was used to prevent a couple from circumventing religious restrictions. The majority failed to see in this assertion a sufficient justification to support a deviation from the principle of freedom from religion.

⁵⁷ See text at notes 25-27 above.

⁵⁸ One may attempt to find the justification for deviation from the principle of freedom from religion on a formal level. At this level the predominant consideration would be the normative status of the legal rule. Once it is a piece of primary legislation, no further justification is needed, while secondary legislation requires an explicit authorization in order to deviate from the basic recognized human rights, including the freedom from religion.

However, there is another level of justification, the ideological, substantive, one. According to it even in the absence of a constitution the formal justification should not be taken as a sufficient ground. The legislator should act in compatibility with the basic human rights.

This was the attitude of the Supreme Court of Israel in adopting a rule of interpretation according to which one should assume that the legislator intended in its enactments to follow the basic human rights. The laws which apparently contradict those basic rights must be interpreted in a narrow way to avoid such a contradiction as much as possible. See *Rodnitzki*

Moreover, the formal claim according to which a majority of the Knesset is sufficient in order to satisfy the rules of the game of representative democracy is just not adequate. In order for the aforementioned legislation to satisfy the requirements of the essential principle of the rule of law, whose interpretation prevents arbitrariness by the majority and the assurance of the minority rights, it must provide answers of substance⁵⁹.

The paradox in Israel's situation is that the required protection is that of the popular majority *vis-à-vis* the parliamentary majority, and not the protection of the popular minority against the majority as is generally accepted. The majority in essence (the public) stands *vis-à-vis* the more formal majority (the political majority in the Parliament) on the basis of the claims that a portion of the concessions that are made on behalf of the religious community are made for improper purposes like political pressures and coalition bargaining and the need to guarantee the ruling régime at the expense of the majority of the public.

C. Public's Support

There are those who reason that in certain instances the majority of the population supports the existing arrangements: For example, in the State's providing religious services and financing them, in assuring a State's religious school system, and also with respect to certain modes of religious ceremonies. The common denominator that characterizes these matters is that they all provide a Jewish identity for the State without imposing coercive religious norms on the population⁶⁰. Public support for these arrangements can be based on two alternative arguments; either the

(note 56), at p.712, and text at note 23.

On the dichotomy between the legal human rights which are not only recognized but actually protected by the law and the ideal rights in the international bill of rights see R. GAVISON's introduction to the Civil Rights in Israel, Essays in Honour of Haim H. Cohn (Jerusalem 1982) 35.

⁵⁹ On the substantive concept (as against the formal concept) of the rule of law, see RUBINSTEIN (note 5), at pp.163, 171 *et seq.*; R.F.O. HEUSTON, Essays in Constitutional Law (London 1961) 30 *et seq.*

⁶⁰ See SHETREET (note 20), at p.217; DON-YEHIYA/LIEBMAN (note 8), at pp.75-78. According to the authors there is a wide consensus for the support of religious services by the State to the religious population. The explanation given by them for this phenomenon is the tendency in the Israeli cultural climate to present religious services as a matter of the State and the inclusion of these services within the boundaries of the welfare State, which entitles them to public financing. This attitude contradicts the separation of State and Church as it is recognized in the USA.

arrangement was desirable from the outset, in recognition of the Jewish identity of the State, or the arrangement was a compromise in the context of striving for national unity at a reasonable possible social cost. In these instances, therefore, there exists an identity between the will of the formal and substantial majority.

D. Narrow Interpretation of the Principle of Freedom from Religion

It is possible to try to identify a standard by which the *lex ferenda* can be reconciled with the *lex lata* by means of a narrow interpretation of the principle of freedom from religion. It is widely accepted that this freedom extends to freedom in the realm of action, and not merely to freedom of thought and expression⁶¹. However, in certain situations, courts have sought to distinguish between different categories of religious norms in order to avoid infringing upon freedom from religion.

1. The character of coerced religious norms

Thus, there are those who reason that when a norm can be rationally explained, as when the subject of the arrangement is the relationship between a person and his fellow man, even if the source of the arrangement is religious, it does not rise to the level of the religious coercion, as distinct from a norm that is entirely religious and concerns the relationship between a person and his creator⁶². It seems to me that such distinctions (concerning the character of the norms) are not adequate. The character of enforced religious norms may serve as one of the components of a test permitting the coercion of norms such as these; however, it is not sufficient by itself to serve as an independent criteria⁶³. Further, the other attempt, to distinguish coercion in the public domain from coercion in the private domain will not work either. This distinction, based on the scope of infringement upon freedom from religion, serves as a component of a more comprehensive criterion; however, it is not an independent test.

Freedom from religion is no less likely to be infringed in the public domain than in the private domain.

⁶¹ See *Yosifof* (note 18), at p.496.

⁶² See C.A.217/68 *Izramax v. State of Israel*, 22(2) P.D.343, 354; *Rodnitzki* (note 56), at p.712.

⁶³ For criticism on this distinction see *Shetreet* (note 20), at pp.209–210.

2. *The scope of the interference in one's freedom*

Regarding the scope of the interference in one's freedom from religion, courts have tried to remove the statutory prohibition against raising pigs from the realm of infringement upon one's freedom from religion on the basis of the distinction according to which there is no prohibition against eating pork; rather, the difficulty arises from the acquisition of the meat⁶⁴. Also, regarding this effort by the courts to justify the coercion we think that the distinction in itself is not a proper criterion.

One should also reject the general distinction according to which infringement of freedom of conscience and of religion is likely only when there is an order or a prohibition of a certain activity; when, however, the act is merely permitted (but is not required) the restriction does not infringe upon one's freedom of religion⁶⁵. This distinction only applies in the situation in which any exemption based on religious grounds or on the basis of conscience is sought; however, in other circumstances such as freedom from religion, the distinction is not helpful⁶⁶.

E. The Balance of Interests Principle

In the final analysis, the narrow interpretation of freedom from religion is connected with the matter of the balance of interests. Within the framework of such a test, religious coercion can be justified by giving weight to the character of the enforced norms, to the character of the infringement of freedom from religion that derives therefrom, and to the scope, degree and level of the infringement. Likewise, it seems to me that one should also assign weight to the type of infringement (infringement upon conscience only as distinct from infringement also upon the public convenience), to the degree of importance of a protected religious interest or an interest of the religious community *vis-à-vis* the competing values, the degree to which the public is ready to

⁶⁴ H.C. 129/57 *Menashi v. Minister of Interior*, 12 P.D. 209, 217

⁶⁵ See *Yosifof* (note 18), at p.494; H.C. 49/54 *Milchem v. Judge of the Shari'a Court*, 8 P.D. 910, 913; *Rodnitzki* (note 56), at p.712. In support of this distinction see S. Meron (note 37), at pp.224–225. On the distinction see also Berinson (note 20), at p.226.

⁶⁶ For criticism on this distinction see S. Shetreet, *Freedom of Conscience and Religion*, 3 *Mishpatim* (1972) 467 471–473.

accept an arrangement that infringes upon freedom from religion, and to evaluate possible alternatives, such as a compromise solution⁶⁷.

Let us give an example of what we have called the "balance of interests" in the context of infringement upon the freedom of conscience. We recognize that the situation that we will discuss is not pure from the theoretical point of view.

In one decision, Justice Ben-Porat (presiding over the district court in Jerusalem) reasoned that the wedding ceremony, derived from religious practice, did not constitute religious coercion⁶⁸. She held that the non-believer is entitled to treat the ceremony as merely formal in nature and that this does not infringe any of his legitimate interests.

Criticism of this position holds that it does not attribute weight to the legitimacy of conscience objections to religious ceremonies; it is a person's

⁶⁷ The balance of interests test was suggested in the context of freedom of religion by D.A. Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development, Part I – The Religious Liberty Guarantee*, 80 Harv. L. R. (1967) 1381; *Part II – The Non-Establishment Principle*, 81 Harv. L. R. (1968) 513. The test was suggested primarily for granting exemptions on religious basis (implementing the freedom of religion *vis-à-vis* social needs). See also S. Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Kentucky L.J. (1974) 377.

In Israel this test was suggested (in a broader sense – political level of balancing and attaining a compromise) by S. Meron (note 37), at pp.224–225. Shetreet (note 20), at pp.217–218, and *idem* (note 66), at pp.470–471, 490–493; *idem*, *A Rejoinder*, 4 Israel Yearbook on Human Rights (1974) 241, 243, bases the principle of balancing interests on a narrower meaning which justifies taking the legitimate needs or interests of a religious population into consideration "... the justification ... occurs ... from the fact that they fall into a wide category of matters which may properly be given consideration for the purpose of exercising authority" (note 20), at p.218. This attitude is more restricted to the balancing between imposing a restriction upon the individual originating in religion *vis-à-vis* the realization of the freedom of religion for the religious part of the population. For instance, he supports, on the basis of this test, a decision of the Supreme Court (H.C.174/62 *League for Prevention of Religious Coercion v. Jerusalem City Council*, 16 P.D.2665) in which a section of a road adjoining a synagogue has been closed on Sabbath during the hours of prayer. See also *infra* notes 73–76.

For a detailed discussion of the advantages and disadvantages of using the balance of interests test in the context of imposing religious restrictions on the public see S. Shetreet, *Freedom of Conscience and Religion, Theoretical Bases and the Law in Israel* (Jerusalem, thesis 1975) 87–99.

My way of using the balance of interests test is much broader than that and extends over to additional levels, as will be seen in the text.

⁶⁸ C.P. (Jerusalem) 1406/70 *Shtand v. State of Israel*, 78 Pesakin (District Courts Judgments) 6, 11.

prerogative within the framework of freedom from religion not to accept religious ceremony⁶⁹.

The critics equate this coercion to compelling the ceremony of one religious community onto a member of a different religious community against his belief, a result that certainly cannot be justified⁷⁰. On the other hand, one has to put the necessity for the existence of a ceremony in the overall context of the balancing of interests. In any case, some kind of ceremony is required in order to validate the status.

Significant portions of ceremonial acts have a historical source or religious background which has become part of the cultural landscape of the legal system.

Sometimes, the origin is clear and well-known, while in other instances it is hidden from our sight. A secular person is entitled, and according to his point of view is also able, to judge the required ceremony with a secular outlook as a mere formal expression, or as a cultural identity card thousands of years old. One can therefore view the presence of a priest or a Rabbi as a necessary officer of the authority or a marriage registrar whose identity in this context, from a secular point of view, is irrelevant.

This is also the difference between coercing the ceremony of one religion onto a member of a different religious community, which does constitute religious coercion that infringes upon one's freedom of religion, and between coercion of a ceremony upon the non-religious person even though the origin of the ceremony is rooted in religion or cult. This is a question of degree, but with respect to the balancing of interests the quantitative consideration is relevant. As opposed to the difficulty of such fictitious attitude (by a secular man towards a religious ceremony), the attitude of a large community is to conduct only such a ceremony, which, for it, serves as a minimal common denominator for the entire Jewish community.

In connection with the balance of interests the sacrifice that is required from the freedom of conscience (and without any doubt there is such a

⁶⁹ Gavison (note 58), at pp.35-36. In her opinion the political compromise cannot in any way be reconciled with the basic human right to freedom of conscience. See also Shetreet (note 67) ("A Rejoinder"), at p.243.

⁷⁰ H. Shelach, On the Freedom of Conscience and the Freedom of the Heart, in: *Civil Rights in Israel, Essays in Honour of H.H. Cohn* (Jerusalem 1982) 85, 104. Despite his criticism, he suggests solution which is close to the balance of interests test. According to his attitude we should recognize the legitimacy of the conscience objection to religious ceremony, on the one hand, but we should also disregard this objection on the grounds of public order considerations, on the other hand. Exceptions to the public order consideration would be those religious prohibitions which are non-acceptable to the majority of Israeli society.

sacrifice), is relatively easy in comparison with the contribution of one unified ceremony to the solidarity of the Jewish population within Israel and even in the diaspora.

However, as a matter of principle, infringement upon one's conscience is forbidden even if it is not accompanied by infringement of the convenience of the portion of the population. But the degree of willingness of the majority of the population to reconcile itself with this type of harm, in certain contexts and for certain purposes, is also a factor in the balance of interests, and consideration of the willingness serves to lessen the harm and mitigates its results.

There is legitimacy to an objection based on conscience, but in the above situation social considerations prevail over conscience considerations. A pleading of conscience by its nature is not given to compromise. However, in translating such principles to legal language we operate within the framework of competing values that must be weighed and balanced⁷¹.

Thus, for example, restrictions on licensing the import of meat deriving from rules based on *kashrut* were invalidated because of the improper purpose of the restrictions, namely, enforcement of religious norms without any authority in primary legislation⁷². This is in contrast with the approval by the court of restrictions on the vehicular traffic that followed the closing for several hours on the Sabbath of a portion of a Jerusalem

⁷¹ That was the underlying reason in the High Court's rejection of the attempt to circumvent the religious authorities by conducting a private religious ceremony of marriage on mere ideological reasons (see *Segev*, note 16). A former attempt made by a Kohen and a divorced woman (which are prohibited from marrying each other by the Jewish religious law) succeeded, and the High Court instructed the official of the Registration of the Population in the Ministry of Interior to register this couple as married on the basis of a private religious marriage ceremony (under the religious law although the marriage is forbidden it is valid). (See *Rodnitzki*, note 56).

In the words of Justice Landau in *Segev*, at pp.557–558: "Israel is facing severe problems stemming from the application of religious law on matters of marriage and divorce in Israel. The problem of the petitioners is not one of them. There is no legal impediment to their marriage by the religious authorities. The impediment derives from the petitioner's secular ideology ... The majority of Israeli society does not object to the conducting of marriage in accordance with its ancestor's customs ... contrary to the [Kohen and divorcee couple] the petitioners have no recognized interest in the confirmation of the private ceremony of marriage conducted by them ... The Court should be looking for the solution within the framework of the existing law in order to reach an acceptable *modus vivendi*. We need tolerance from both sections of the Israeli population".

⁷² See *Ratof*, note 25. For the principle of subjecting the secondary legislation to the right to freedom of conscience see *supra* notes 22–27, and the accompanying text.

street that was in the vicinity of a synagogue⁷³. In another case the court declined to involve itself in the situation where a main street populated overwhelmingly by religious persons was closed for the entire Sabbath⁷⁴.

In these two instances, the legitimacy of taking into consideration religious feelings or the needs of the religious community for a place of worship and for Sabbath rest were recognized. In the context of the balance of interests considered by the court, it took into account the balance from among the various facets of the public at large, an examination of the proposed alternatives, and the degree, nature and scope of the infringement on the citizen's freedom of movement with all its ramifications *vis-à-vis* the importance of religious feelings and the needs of the religious community living in the neighborhood⁷⁵.

Just as equality is not a value in and of itself, but rather a means for achieving justice⁷⁶, so too is freedom of conscience and freedom of religion a means that serves social ends. In this context, it finds itself in competition with other values the resolution of which is the result of the balancing of interests^{77, 78}.

⁷³ See *League*, note 67. At p.2668 the court stated as follows: "In attaching some value to the consideration that motor traffic along the roads concerned on a Jewish festival and the Sabbath disturbs worshippers during their prayers in the Synagogue and prevents them from praying in tranquility [the Traffic Controller] gave thought to an interest of a religious character. However, this does not invalidate his decision, just as it would not be invalid had he had in mind some cultural, commercial, health or other like interest".

⁷⁴ See *Baruch*, note 27.

⁷⁵ See also the articles of *Shetreet* mentioned in note 67; *Rubinstein* (note 20), at pp.383-384: "The line separating proper and improper religious considerations is not always clear, but the distinction is between imposing a ban for religious reasons and consideration of a need created by the existence of a religious public".

⁷⁶ See H.C. 141/82 *Rubinstein v. The Speaker (of the Knesset)*, 37(3) P.D.141; H.C. 720/82 *Elitzur v. Municipality of Nabaria*, 37(3) 17.

⁷⁷ See also Judge Berinson's statement in *Izramax* (note 62), at p.362: "As between one way of doing things in disregard of religious considerations and another way having regard for religious considerations but without placing upon the public too heavy a burden, the second is certainly to be preferred".

⁷⁸ For criticism of the test of balance of interests see *Shetreet* (note 67), at pp.97-99; H. Shelaich, *Freedom of Religion and Conscience in Israel Law* (Thesis Jerusalem, 1978) 126-128. They point out the difficulties in reaching general conclusions by applying this test, the inconsistency which stems from the test and the impossibility of stating leading or guiding principles applicable to most of the cases.

F. The Secular Social Purpose

This proposed criterion stands side by side with the central, widely accepted American test that serves to justify deviations from the principle of freedom from religion, namely the standard of societal consent, which is also known as the test of the secular purpose⁷⁹. When the principal purpose of a legal rule is to achieve secular goals which are accompanied by societal approval, the fact is that the religious source of the norm or any other religious factor has no bearing, and one should not invalidate the legality of the action because of some infringement on the principle of freedom from religion.

The classic example of this is the legitimacy that is attributed to "Sunday Acts" namely fixing a weekly day of rest whose origin is religious⁸⁰.

The secular purpose test is acceptable to the courts in Israel⁸¹. Since the achievement of religious ends is considered beyond the powers of the executive or local authority⁸² this test may determine whether the secondary legislation or the administrative act is within the powers of the executive or whether it exceeds the powers conferred upon it⁸³. This test may also serve as an indication for a narrow or broad interpretation of a law which originated in religious law or accords with religious demand⁸⁴.

However, one should be careful not to engage in unexamined, over-use of the criterion of the secular purpose, which serves as an exception to the unaccepted "religious coercion" and might justify the "coercion."

It is easy for such an exception to become the rule. What we mean is that if one fills the criterion with broad and general contents (like the purpose of maintaining the nation's unity)⁸⁵ this might turn the criterion into a

⁷⁹ *School District of Abington v. Schempp*, 374 U.S.203 (1963); *McGowan v. Maryland*, 366 U.S.420 (1961); *Two Guys ... v. McGinley*, 366 U.S.582 (1961); see *Shelach*, *ibid.*, at pp.121-124; *Shetreet* (note 20), at pp.214-215; *idem* (note 66), at pp.486-487

⁸⁰ *McGowan*, *ibid.*

⁸¹ See *Izramax* (note 62), at p.353, 362.

⁸² See text above at notes 25-26.

⁸³ It may explain the decision in several cases like the *League*, note 67, and *Baruch*, note 27

⁸⁴ See text above at note 23.

⁸⁵ According to S. Meron (note 37), at p.225 *et seq.*, either the arrangements of the relationship between the secular and the religious people in Israel or the desire for the unity of the nation legitimates any religiously based legislation, because in such a way they turn into social or national needs which are considered as secular purposes. Furthermore, in his view the definition of freedom from religion includes protection only "against compulsory norms and not protection against violation of norms which [the secular people] find desirable, such as freedom in forms of recreation or entertainment". For a rejoinder on these

merely fictitious one. Being fictitious it only serves as a means for justifying or legalizing – in a wholesale fashion – all religious based legislation. In this way one can attribute all coercive religious legislation to the social and economic needs of the public and therefore apparently exclude that legislation from being an infringement of the freedom from religion. Such a broadening of the exceptions will have the effect of including nearly every instance of religious coercion within the framework of the secular purpose, thereby building the generality on the basis of exception. This is a tautological approach. The basis of this alleged broad exception is established exclusively by religious demands and the needs of the religious community. The effect of this on the definition of such needs serves to turn on the necessity for the coercion of religious norms, at least at first glance, to legitimate needs when the goal anyway legitimates the coercion.

Moreover, under the broad, almost unlimited, definition of secular purpose religious conscience is preferable *a priori* to secular conscience, for which no weight is attributed. Granting to this broad and general category of secular purpose a decisive weight in the balance of interests does not leave room for any other considerations.

From the nature of things, it is difficult to compare freedom of religion with freedom from religion because there is no comparison between commands and mere grants of permission⁸⁶.

It is difficult to speak of commands of conscience in the same way we speak about religious orders and prohibitions. For example, permission to travel on the Sabbath is not absolutely comparable to prohibition against

views see Shetreet (note 67) ("A Rejoinder"), at pp.241–244; Rubinstein (note 5), at p.154.

The idea that in comparison with the achievement of the nation's unity, religious coercion should be regarded as a minor sacrifice has accompanied the Zionist movement from its very beginning. It is an old notion which has not lost its vitality to this very day. See Luz (note 9), at p.60.

⁸⁶ See Rubinstein (note 5), at p.141. – The notion of asymmetry between freedom of religion and freedom from religion has its roots in the very beginning of the ideological and political struggle between the religious and non-religious parties in the Zionist movement. According to the religious way of thinking, religious people cannot forgo their principles without hurting their way of life while for the non-religious the observance of Halacha in the public domain does not affect their life. See a letter from the religious Zionist leader Rabbi Eliesberg to one of the Zionist leaders (Pinsker) in Druyanov, Documents, Vol.3, 880–884; Luz, at pp.90–91. This notion disregards the outlook of the secular which cannot accept any religious coercion since it contradicts the secular way of life. Their freedom does not include the right to desecration of the Sabbath or other religious rules but rather the freedom to act without any religious coercion. One should formulate the correct definition in order to avoid misunderstandings.

travelling on the Sabbath. However, these cannot serve as the pretext for a general justification of religious coercion.

Obviously, there are instances in which there will be a justification for imposing national norms which bind Israeli society with its historical values and with its cultural heritage. However, for this purpose, one must find out whether there exists national consensus concerning the national character of the religious norms when they are also examined in the framework of the aforementioned balance of interests. Because of this, for example, one could justify the use of Jewish symbols and of Jewish values by various authorities of the State and the preservation of Jewish values by the country's representatives in the course of the fulfillment of their responsibilities⁸⁷.

G. Coercion of Religious Norms as Means of Protection of the Freedom of Religion

Sometimes, religious coercion is justified by the claim that there are situations in which such a result is the sole way to protect freedom of religion⁸⁸. For example, it is claimed that a "work permit", permitting the operation of business and factories on Sabbath⁸⁹, would adversely affect the ability of observant Jews to obtain work⁹⁰. Failure to maintain the dietary laws within the Israeli army will make it more difficult for those who maintain such religious practices to serve in the army. According to this position, enforcing these religious norms is merely a complete defense of freedom of religion. This claim, which sets sides of the same coin (freedom of religion and freedom from religion) in conflict with each other requires further attention. Here also the balancing of interests comes to our aid. In a portion of these instances, a solution to the problems is found without imposing religious norms on the public at large.

One may prevent discrimination against those who adhere to religious practice and evince consideration for their freedom of religion while also respecting the majority's right to freedom from religion. However, one should reject any attempt to raise this assertion to the level of a principle,

⁸⁷ Shetreet (note 20), at pp.215–217

⁸⁸ See S. Meron (note 37), at pp.226–232.

⁸⁹ See *supra* notes 44–46.

⁹⁰ This argument was raised before the High Court of Justice in the *Meron* case, note 4, and in *H.C. 80/70 Elitzur v. Broadcasting Authority*, 24(2) P.D.649, but the issue remained undetermined; the petition was rejected on the basis of lack of standing; see also S. Meron (note 37), at pp.223, 227 *et seq.*

and to turn it from an exception which can be dealt with by exercising the balancing of interests, to a rule by means of which the coercion of religious norms is virtually without limitations⁹¹. For example, one should reject the claim that freedom of religion for Jews who adhere to religious practice somehow requires the observance of religious commands by all of Israel, because of the religious principle of mutual responsibility of all Jews to each other, and also the observance of religious law in the public domain.

This principled position which is being used as an argument for the enforcement of religious norms is identical in character to the previous attempt to broaden, albeit fictitiously, the secular purpose that was previously rejected.

One can further say in this connection that there are exceptions to freedom of religion such as can be found at the end of section 83 of the Palestine Order in Council. The attempt to dominate the entire realm of freedom from religion and to infringe upon all the secular values by means of the claim of enforcing freedom of religion is certainly an exception of this kind⁹².

VI. Circumvention of Coerced Religious Norms

By means of attempts to distinguish between the legitimate coercion of religious norms and the illegitimate coercion of such norms, and the attempt to find appropriate justifications for deviations from freedom from religion, some of the problems can be solved. However, there are still limitations, principally in the area of the Sabbath, marriage and divorce,

⁹¹ See, for instance, S. Meron's claim according to which the religious norms in matters of marriage and divorce were imposed on the public not for purposes of religious coercion but for the protection of the freedom of religion, namely, personal status of the observant Jews, in conformity with the principle of freedom of religion. "Accepting the contention that there is no difference between direct and indirect impairment of the right to marriage there is no doubt that, from a quantitative standpoint, it is specifically a civil marriage law that will more radically limit that right, by dividing the nation into two camps which will not intermarry ... Lack of consideration for the duty of the observant person towards the commandments of his religion cannot be reconciled with freedom of religion" (note 37 at pp.223-224, and see also p.227). Shetreet (note 67), at p.243 criticizes Meron's attitude.

⁹² An attempt to establish a narrow or strict definition of the freedom of religion has been made by Shelach (note 78), at p.38 *et seq.* (p.VIII of the English abstract). "Only an activity which for [the believer] symbolizes a connection with what is high absolute value, will be guaranteed by the freedom, provided that this activity is not directed toward others and that its value and consequences for him are only spiritual".

for which no appropriate justification can be found. Here, it is necessary to move to the second aspect mentioned above. We need to view at this stage how Israeli law tackles the legal situation of religious coercion in which no adequate legal and social justifications are found.

A. Restriction on Secondary Legislation and Executive Acts

We have already seen the principle according to which only the Parliament (Knesset) is responsible for imposing limitations due to religion or establishing norms derived from religious law or desirable from the religious point of view or whose historic origin is religious. This principle leaves the executive with a limited power to manipulate. It effectively establishes that restrictions upon the freedom of and from religion is a general, national, problem that does not allow an independent local solution or any *praeter legem* regulations by the executive in this field⁹³.

In the absence of any authorizing act this principle also turns religious considerations into irrelevant considerations that invalidate acts of administrative authorities⁹⁴.

B. Ways of Interpretation

If we add to this the fact that freedom of religion and conscience is a fundamental unwritten constitutional right and every legal act interprets itself in light thereof⁹⁵, we can find a partial basis for defending freedom from religion. However, this basis, as we have already seen, is not sufficient. The compromise between different views imposes legal arrangements that do not fully bring to realization the right to freedom from religion and freedom of conscience. This compromise is based on avoiding principled decisions in favor of stop-gap arrangements⁹⁶.

⁹³ See *supra* notes 24–27 and accompanying text.

⁹⁴ See *supra* note 24.

⁹⁵ See *supra* notes 21–23 and accompanying text.

⁹⁶ See *Shelach* (note 70), at p.115; *idem* (note 78), at pp.456, 457 (p. XII of the English abstract). See also the attitude of the High Court of Justice in *Segev* (note 16), at pp.557–558, in comparison with the *Rodnitzki* case, note 56 (see *supra* note 71).

C. "Cooperation"
between the Legislature and the Judiciary

In order to soften as much as possible the severity resulting from the infringement of such rights, and without harming the compromise arrangements that were reached, the legislature joined with the judicial system, that had already done most of the work in this regard, and to which the executive also joined. Together, all of these authorities, by means of various techniques and by various indirect measures and through cooperation with each other, created solutions for difficult situations.

For example, in the field of family law, the Knesset promulgated a long list of laws that conferred numerous rights for cohabitants (known as reputed spouses), principally rights regarding third parties⁹⁷ and in the event of the death of one of the parties⁹⁸. These laws, together with judicial recognition of contractual obligations between the cohabitants⁹⁹, have created a legal institution whose likeness to the institution of marriage likely constitutes an inducement among some to serve as a substitute to marriage. Only recently has Israeli case-law followed this approach by broadening the rights of cohabitants by holding that property rights between such partners will be virtually identical to the rights of married couples¹⁰⁰ (if they were married before January 1, 1974)¹⁰¹.

⁹⁷ Among others, see Invalids (Pensions and Rehabilitation) Law (Consolidated Version), 5719-1959 (13 Laws of the State of Israel 315); Fallen Soldier's Families (Pensions and Rehabilitation) Law, 5710-1950 (4 Laws of the State of Israel 115); Invalids (War Against the Nazis) Law, 5714-1954 (8 Laws of the State of Israel 63); Border Victims (Benefits) Law, 5716-1956 (11 Laws of the State of Israel 19); Severance Pay Law, 5723-1963 (17 Laws of the State of Israel 161); Tenant's Protection Law (Consolidated Version), 5732-1972 (26 Laws of the State of Israel 204); Names Law, 5716-1956 (10 Laws of the State of Israel 95).

⁹⁸ Succession Law, 5725-1965 (19 Laws of the State of Israel 58), section 55.

⁹⁹ C.A. 563/65 *Yeger v. Plevitz*, 20(3) P.D.244; C.A. 805/82 *Veresano v. Cohen*, 37(1) P.D.529.

¹⁰⁰ C.A. 52/80 *Shachar v. Friedman*, 38(1) P.D.449.

¹⁰¹ See Spouses (Property Relations) Law, 5733-1973 (27 Laws of the State of Israel 313).

We would like to point out the paradox according to which in a society whose laws of marriage are based on religious precepts and against a backdrop of an extremely conservative outlook, a safety valve has been created that permits side-stepping the institution of marriage by means of a liberal recognition in personal relations that stands in absolute contradiction to religious perception and sensibilities¹⁰². According to Friedmann, this teaches that when a significant portion of the public is unwilling to reconcile itself to restrictions and prohibitions in the area of marriage and divorce, an informal institution of marriage competing with the formal institution of marriage, will develop¹⁰³.

According to Rubinstein¹⁰⁴, by virtue of the broad recognition of cohabitants, the institution of marriage has lost its monopoly and preferred status that it enjoys in other legal systems. Rubinstein further points out¹⁰⁵ the paradox of limiting the right to marriage on religious grounds on the one hand, while at the same time circumventing these restrictions by means of diminishing the value of the institution of marriage.

Such is the fate of an institution to which religious law ascribed an honored role as it is undermined in response to an attempt to impose norms of religious conduct that are not accepted by the majority. In such a way, limits are set with respect to the ability of the law to intervene in family law¹⁰⁶.

The cooperation between the legislator and the courts have yielded further techniques (to whose development courts have diligently applied themselves throughout the years) that have succeeded in certain areas in closing the gap between permissive conduct and secular ideology and between coercive religion. For example, the Israeli Supreme Court gave its approval to a stratagem intended to bypass religious law when it recog-

¹⁰² See D. Friedmann, The "Unmarried Wife" in Israeli Law, 2 Israel Yearbook on Human Rights (1972) 287. On the subject of the reputed wife see also M. Shava, The "Unmarried Wife" in Israel Law, 3 Tel Aviv Univ. L. R. (1973) 484; H. Shelach, The Reputed Spouse, 6 Mishpatim (1975) 119; Rubinstein (note 5), at pp.151-155; M. Elon, Religious Legislation (Tel Aviv 1968) 119-154; Shifman (note 52), at pp.115-120.

¹⁰³ Friedmann, *ibid.*, at p.314.

¹⁰⁴ Rubinstein (note 5), at p.153.

¹⁰⁵ *Ibid.*

¹⁰⁶ Friedmann (note 102), at p.314.

nized the validity of "forbidden marriages" between a Kohen and a divorcee conducted in a private ceremony despite the fact that the religious court refused to confirm their status on the basis of public policy¹⁰⁷. The court responded by disputable answers to weighty legal problems¹⁰⁸, and preferred to give expression to legal policy that deals in a negative fashion with the issues of the coercion of norms of religious practice with respect to which the majority of the population neither identifies nor has accepted¹⁰⁹. Daring case rulings have turned down a portion of the wall of prohibition

¹⁰⁷ See *Gurfinkel*, note 16; *Rodnitzki*, note 56; H.C.275/71 *Kohen v. The Rabbinical Court*, 26(1) P.D.227; H.C.29/71 *Keidar v. The Rabbinical Court*, 26(1) P.D.607.

In H.C.80/63, *Gurfinkel* the majority judge (Justice Landau) says (at p.2068): "I see no reason for indignation at the conduct of the petitioners on account of the stratagem which they used in arranging that 'private' marriage. Our State assures all its citizens of freedom of conscience. The petitioners do not observe the commandments of religion, and by the law of the State they are free to do so. They wish to live as a family and to have children free of the stigma of being born out of wedlock. They find themselves confronted with a prohibition which is entirely religious ritualistic, being based on ancient concepts with regard to the pre-eminence of the priest in holy rituals. To impose such a prohibition on a non-believer is hardly compatible with freedom of conscience and with the concomitant freedom of action. They find that the religious law itself provides them with a way out of their embarrassment. Why should they be condemned if they extricate themselves by such means?". Justice Silberg in his minority opinion says (at pp.2060, 2061): "This court sits not on Olympus but in the midst of its people. We are fully aware of this struggle going on in Israel between the champions of religious marriage and those of civil marriage, and we do not shut our eyes or close our ears to the complaints of both camps against each other. But the problem is far too solemn, too delicate and too multifarious, and colour-blind Daltonists who see everything in 'black and white' - or in 'white and black' - will never solve it. For in the realm of this problem, just as in the case of all the great social problems of our young State and old nation, there operates a variety of factors: considerations of religion, ethics, culture, manners, world reputation; international solidarity and national responsibility; tradition and progress, nation and State, diaspora and Homeland - all these are raw values and only an omniscient legislator can mould them into legal form. In any case, the problem will never be solved by under-cover means, and the fateful difficulties involved will never be disposed of by tactics of outwitting ... If the citizen, by his behavior, endangers the clear aim which the legislator has adopted, this court does not furnish him with the necessary instruments".

¹⁰⁸ See S. E t t i n g e r, *The High Court of Justice - A Retreat for Captives of Marriage*, 4 *Mishpatim* (1972) 428.

¹⁰⁹ Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (7 Laws of the State of Israel 139), which states that "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law" was interpreted narrowly as incorporating only the religious legal results rather than religious prohibitions (for the justification of such an interpretation see the text next to note 23 and *supra* the third paragraph of note 58. See also *supra* note 71).

by which religious law limits the right to marriage^{110, 111}.

The laws of marriage are a clear example of the especially severe limitations that are imposed by religion. One should not be surprised that courts have received numerous requests to be heard on this area of the law, thereby increasing heavy pressure on the judicial system that has devoted much attention to the area. Thus, civil courts have recognized in certain situations the validity of civil marriages conducted outside of Israel by means of an interpretation that subordinates religious law to the principles of private international law. By means of the court, alternative means have been requested for the recognition of marital status outside the religious context that at first glance was the only way to create such a status¹¹².

One can say that during the years, courts have created in various areas of family law a civil system parallel to religious law. Among other things, it was held that the religious public policy is not obligatory on the courts¹¹³ and that freedom of conscience permits a narrow interpretation of the Act that confers an obligation to apply religious law¹¹⁴. Far-reaching interpretation of the law requiring application of religious law in marriage and divorce led the courts to hold that the obligation is limited to the adoption

¹¹⁰ Justice Sussman in *Segev* (note 16), at p.555, explicitly admitted that "a secular authority [the court] should come to the assistance of those whose conscience led them to the desecration of religious rules [in the field of marriage prohibition]". – In *Rodnitzki* (note 56), at p.712, Justice Landau indicated: "The Court must take a way of interpretation of the Rabbinical Courts Jurisdiction ... Law which should not contradict the basic principles of the State of Israel" [the freedom of conscience].

¹¹¹ The minority of the Supreme Court had condemned the device of private marriage ceremonies and refused to recognize the validity of the private act; see Justice Zilberg in *Gurfinkel* (note 16), at p.2060 (*supra* note 107); Justice Kister in *Segev*, note 16, and *Rodnitzki*, note 56.

¹¹² See C.A.191/51 *Skornik v. Skornik*, 8 P.D.141; C.A.778/77 *Farkash v. Farkash* 33(2) P.D.460; Levontin, note 53; *Shava* (note 52), at pp.78–81, 144 *et seq.*; Shifman (note 52), at pp.249–265. According to the scholars (Levontin, at p.13; Shifman, at p.253) the obligatory religious norm which provides an exclusive way of marriage, the only mandatory one in the Israeli law, has become only one alternative among other means of getting married. The recognition of the circumvention of the religious rules has turned the law of marriage into a "statement and its contradiction". Shifman also believes that recognition had its own dynamics and paved the way for the recognition of other circumventions of the law of marriage (see *ibid.*).

¹¹³ A.C.258/53 *Cohen v. The Attorney General*, 8 P.D.4; *Rodnitzki*, note 56; *Segev*, note 16; I. England, *The Place of the Religious Law in the Legal System of Israel* (Part III), 4 *Mishpatim* (1972) 31, 34 *et seq.*, 56 *et seq.* See also *idem*, *Religious Law in the Israel Legal System* (Jerusalem 1975) 139 *et seq.*, 168 *et seq.*

¹¹⁴ See *supra* note 23.

of legal consequences according to religious law, but does not include religious prohibitions that are not binding on Israeli courts¹¹⁵.

1. *Narrow interpretation of religious norms*

In this area, as in other aspects of the issue of religious coercion, courts have utilized an additional technique. They have interpreted narrowly the provisions in the law imposing limitations or authorizing restrictions based on religion while in contrast to this, they have interpreted broadly the exceptions that have enabled deviations from religious restrictions¹¹⁶.

For example, by means of interpretation the court has limited the kinds of activities and businesses that local authorities are empowered to restrict on the Sabbath and holidays, in such a way as to exclude gas station from the aforementioned limitations¹¹⁷.

2. *Broad interpretation of the power of secular authorities*

On the other hand, the authority of the public official empowered to grant a permit to work on the Sabbath has been interpreted broadly¹¹⁸.

By such means, the system has sought to side-step religious restrictions.

A court has applied broadly the Standard Contracts Law¹¹⁹ and the public policy to invalidate a contractual provision contained in the lease contracts with the Israel Lands Administration which had limited the freedom of the lessee to perform work on the land during the Sabbath and holidays. The court held that the provision was inconsistent with the freedom of religion and conscience that prevails in Israel¹²⁰.

3. *Broad judicial review over religious institutions*

A further legal technique taken by the court is giving a broad interpretation of the judicial review over religious institutions, including rabbinical courts. While the Council of the Chief Rabbinate of Israel views itself as an

¹¹⁵ See *supra* note 109.

¹¹⁶ See A. Maoz, *The Policy of the Intervention of Civil Courts in Rabbinical Jurisdiction and its Impact on Family Law in Israel* (thesis Tel-Aviv 1985) 117 *et seq.*

¹¹⁷ See *Izramax*, note 62.

¹¹⁸ See Rubinstein (note 5), at pp.156–158; H.C.171/78 *Eshkar Ltd. v. Minister of Labour and Welfare Affairs*, 36(3) P.D.141.

¹¹⁹ Standard Contracts Law, 5724–1964 (18 Laws of the State of Israel 51).

¹²⁰ C.A. (Jerusalem) 545/67 *Ornan v. Israel Lands Administration*, 67 Pesakim 284.

autonomous body parallel to the High Court of Justice, and therefore free from all secular supervision, the court has treated this religious institution in the framework of administrative authorities subject to the supervision of the High Court of Justice¹²¹. In this way, the courts have drastically narrowed the autonomy of this religious institution and have placed it under broad and effective supervision, ignoring the religious origin on which the authority based its jurisdiction and mandate for its activities¹²².

Courts have also given a secular interpretation to religious functions¹²³, and secular validity to religious authority¹²⁴ while in a parallel fashion widening the secular judicial review (supervision) of these functions and these powers.

Indeed, secular supervision of this religious institution has been implemented with care, but merely establishing broad jurisdiction and the readiness to use this jurisdiction has obligated the religious institutions to act with caution in exercising their authority.

4. Narrow judicial review over acts of secular authorities

From one vantage point, courts have demonstrated a deep involvement, while on the other hand they demonstrated a lack of readiness for judicial involvement in those instances where they were asked to enforce the limitations on freedom from religion.

For example, when the court was asked to examine the legality of a certain arrangement that apparently was not consistent with legal regulations, and whose purpose was the enforcement of a religious restriction

¹²¹ *Streit*, note 20; F.D.10/69 *Boronovsky v. Chief Rabbis*, 25(1) P.D.7; H.C.277/66 *The Southern Company Ltd. v. The Chief Rabbinate of Tel-Aviv*, 20(4) 297; H.C.359/66 *Gitiyee v. The Council of the Chief Rabbinate of Israel*, 22(1) P.D.290.

¹²² For criticism on the attitude of the High Court see I. Englard, *Chief Rabbinate and High Court of Justice*, 22 *Hapraklit* (1965/66) 68. On the dispute concerning the status and autonomy of the religious institutions which are recognized by the State *vis-à-vis* the authority and legitimacy of imposing secular supervision on them, see Don-Yehiya/Liebman (note 8), at pp.74-75.

¹²³ For example, the Chief Rabbis' authority to grant a permit to remarry and its utilization as a defence against the bigamy offence under section 179 of the Penal Law, 5737-1977 (Laws of the State of Israel Special Volume: Penal Law) was considered as a secular function; see *Streit*, note 20; *Boronovsky*, note 121. Section 179 was amended in 1980 by section 27 of the Chief Rabbinate of Israel Law, 5740-1980 (34 Laws of the State of Israel 97) and the authority of the Chief Rabbis was replaced by the authority of the President of the Rabbinical Grand Court who is one of the Chief Rabbis of Israel acting as President.

¹²⁴ This was the attitude towards the Chief Rabbinate, see *supra* note 121 and accompanying text.

(the legality of a permit to work on the Sabbath was challenged by the petitioner), the court held that it would not put to the test the legality of the arrangement that provided a service to the public and which had operated for years to the convenience of a portion of the public (broadcasting on Sabbath). In this instance¹²⁵, the court's discretion was exercised in a manner that limited its involvement by means of a refusal to grant relief when, in its opinion, under the circumstances, justice did not require it to do so.

The court also restricted the right of standing for applicants whose claim touched on the lack of enforcement of enactments that impose religious restrictions. The court held that injury to one's ideological or religious outlook or deriving from a life style, without any substantial personal injury, does not impart a right of standing¹²⁶.

This ruling opened the way for cooperation on the part of the executive in bypassing religious limitations without leaving itself open to attack in the courts¹²⁷.

D. Circumvention by the Executive- "Cooperation" with the Judiciary

This issue brings us to the circumvention activities by executive authorities regarding administrative arrangements (that were mentioned at the outset of this paper) by means of which enforcement of religious limitations is restricted. The approach that administrative authorities have taken, namely selective enforcement of religious laws, is an administrative solution *contra legem*. This technique is sometimes based on a silent agreement by religious factions. Another tactic on the part of the executive authority is the generous grant of permission to side-step religious restrictions when the executive authorities have the power to grant such permission.

When one adds to these measures a policy of non-intervention by the judicial authorities¹²⁸, the restriction of the right of standing¹²⁹ and benevolent interpretation in favor of the executive while acting by virtue of

¹²⁵ *Elitzur* (note 90), at p.656.

¹²⁶ See *supra* notes 3-4; see also Rubinstein (note 5), at p.159.

¹²⁷ Parenthetically, one may point out that this approach also serves another purpose, namely preventing interference in the enforcement of administrative exemptions on account of freedom of religion. This is because the right of standing of an applicant who challenged the legality of the aforementioned administrative exemption was not recognized. See *Becker*, note 4; H.C. 179/82 *Resler v. Minister of Defense*, 36(4) P.D. 421.

¹²⁸ See *supra* note 125 and accompanying text.

¹²⁹ See *supra* notes 3-4, 126 and accompanying text.

an enactment conferring upon it an authority to alleviate religious limitations¹³⁰, effective results can be obtained.

The cooperation between the judiciary and the executive begets an efficient circumvention of religious norms. Without the cooperation of the courts the measures which had been taken by the executive could not have succeeded.

The cooperation between these authorities together with the aforementioned cooperation between the legislature and the judiciary demonstrate not only the crucial role of the judiciary, but also the significance of the cooperation between the different authorities, in the process of effectuating the right to freedom from religion.

The liberal atmosphere of the public has led the courts and executive authorities to devise circumventive means when the legislature is reluctant to intervene¹³¹. The legislator's reluctance is due to the fear of harming what seems to him a delicate balance between the religious and the secular communities, and especially due to the fear of endangering the stability of the ruling governmental coalition in which the religious parties held the balance-of power.

In truth, the legislator would prefer the courts to do the difficult work and it gives to the courts its tacit blessing. Despite the heavy pressures executed by the religious parties, the legislator has not seen fit to repair loopholes utilized by the courts, on the ground that the legislator seeks to preserve the honour of the court.

Moreover, because the judicial erosion that has undermined certain of the religious restrictions has been gradual and not systematic, it has not been accorded the same degree of attention that characterizes debate in the Knesset. In this manner courts were able to act without pressure being exerted on the system.

These circumventive measures provide merely partial solutions. A part of the problem still remains.

Further, these solutions are sporadic rather than systematic and depend on the factual situations that are brought before the court. Case-law ignores, sometime intentionally, problems of principle in favour of reaching pragmatic solutions. For solutions such as this, the price is not cheap. Either they are too narrow or too broad or they confront the legal system

¹³⁰ See *supra* notes 116, 118.

¹³¹ On the subject of circumvention see also Rubinstein (note 5), at pp.147-155; Shelach, note 70; Shifman, note 52; Englard (note 6), at p.266 *et seq.*

with ideological or pragmatic difficulties¹³². The necessity for this should not be condemned. This is an additional compromise along the path of compromise that was chosen from the beginning.

VII. Concluding Remarks

In conclusion, harsh criticism has been levelled against the arrangement reached in Israel. Both the religious and secular communities have participated in this act of criticism and the source of criticism is both secular and religious in nature¹³³. From the point of view of religion, it is doubtful if religion or the religious community has benefited¹³⁴.

At the beginning of the era in which ideas of freedom from religion first surfaced, the French observer, Alexis de Tocqueville, noted in his book *De la démocratie en Amérique* (1835) that the status of religion had risen in America. He ascribed this to the separation of Church and State that elevated the position of religion:

"I saw among us how the spirit of religion and the spirit of freedom clash before one another ... However, in America I found them to be intertwined and jointly rule the land".

Several decades afterwards, Carl Jacob Burckhardt in dealing with the problems of separation of State and Church wrote as follows in his book *Weltgeschichtliche Betrachtungen*:

"In future times the church will forgo willingly its close relation or attachment to the state as did the state toward the church ... then the church will become once again a foundation of freedom and worthy of it".

¹³² See Gavison (note 58), at p.36.

¹³³ Rubinstein (note 5), at pp.134 *et seq.*, 144 *et seq.*; England (note 6), at p.266 *et seq.*; Shelach, note 70; Leibovitz, note 10; Shetreet (note 66), at p.475 *et seq.*

¹³⁴ Don-Yehiya/Liebman (note 8), at pp.82-83.