

Freedom of Religion and Access Control in Israel

Written by Sean Yau Shun Ming

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SEAN YAU SHUN MING, MAR 7 2016

The religious aspect of Israeli-Palestinian conflict remains relatively unexplored. Freedom of religion or belief in Israel is a complex issue, tangled up by factors such as territorial disputes and terrorism. While Israel and Occupied Palestinian Territory (West Bank and Gaza) are home to major holy sites, the Israeli Government has institutionalised restrictions of access to Palestinians who wish to travel to worship, which has been singled out for discussion in this paper, for two reasons: *First*, “national security” defence, frequently raised as a justification, manifests its strongest legal force in administrating restricted access.[1] *Second*, the Israeli Government can easily adopt any restrictions due to the territorial disputes with Palestine peculiar to Jerusalem, Gaza and West Bank which has granted prima facie legitimacy for occupatory access control. Herein, the severity of implicit violations of religious freedom calls for a closer analysis of the Israeli context, and subsequently demands a rejection of any unsubstantiated claims raised against religious minorities.

The first part of the paper offers an overview of the applicable legal framework, and argues that Israeli policies to restrict access to religious sites for Palestinians has substantially violated their religious freedoms (e.g. freedom to worship). In particular, it rejects the “national security” defence against religious minorities. The second part of the paper questions whether the restrictions are explainable by the State-religion relationship in Israel, which has successfully integrated religious values with national identity. It then offers two counter-arguments: it runs the danger of instrumentalising state religion politics; and such model should be re-conceptualised as “recognition” without necessarily infringing upon minority rights.

Restriction of Access Prohibited by Law

Presupposing all rights are equal, this section seeks to prove that the Israeli Government has prima facie breached freedom of religion or belief guaranteed under law by imposing discriminatory access control. It then moves to reject the most-often raised “national security” defence.

Legal framework: Standards under local and international laws

Freedom of religion or belief essentially covers freedom to manifest one’s religion and freedom to worship and practice. Under the Declaration of the Establishment of the State of Israel,[2] it provides that the State of Israel “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 ... it will safeguard the Holy Places of all religions*”. Section 144 of the Penal Law also prohibits incitement of violence on the basis of religion.[3] Such respect for religious freedoms was also demonstrated in past peace treaties.[4] Meanwhile, the Palestinian Basic Law also expressly provides against religion-based discrimination and promotes basic human rights and freedoms, that “freedom of belief, worship and performance of religious rituals are guaranteed... (article 18)”. [5]

International human rights law, *inter alia*, guarantees freedom of religion or belief as well as freedom of movement, as reflected by the non-discrimination principle.[6] In this regard, the Human Rights Committee publicly criticised Israel’s derogations in accordance with article 4(2) of the International Covenant on Civil and Political Rights (“ICCPR”), which confirms the non-derogable nature of religious freedom.[7]

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Access control essentially violates religious freedom

The main concern has surrounded the restricted access to religious sites for worship, as highlighted by the United Nations Special Rapporteur during his visit in 2008.[8] Due to a system institutionalised by the Israeli authorities that include permits, checkpoints and barriers, Muslims and Christians have been impeded from accessing religious sites to worship since 1993.[9] This is illustrated by the daily hardship for Palestinians who attend services at the Al-Aqsa mosque or the Church of the Holy Sepulchre in Jerusalem, the heart of Israel where discrimination and repression is highly concentrated. Same restriction applies to West Bank, concerning access to the Ibrahimi mosque/Yomb in Hebron or the Church of the Nativity in Bethlehem.[10] Ramadan in 2015 specifically underlined the difficulty of Muslims who were blocked from travelling to Jerusalem due to “security concerns”. Whether such defence can amount to a reasonable justification will be examined later.

In relation to Gaza and West Bank as occupied by the Israeli authorities by way of effective control, although it might seem to confer legitimacy for Israel to impose restrictions, Israel as an occupying power still owes obligations to Palestinians to protect their rights and freedoms under international humanitarian law.[11] These protections explicitly include freedom of religion through religious observances, services and rites.[12]

As a result, these systemic and discriminatory measure to restrict religious minorities to physically access religious sites has substantially violated their freedom to manifest one’s religious conviction and freedom to worship. As observed by the U.S. Department of State:

[T]he Israeli government continued to apply travel restrictions that *impeded access to particular places of worship in the West Bank and Jerusalem for Muslims and Christians. The Israeli government’s strict closures, curfews, and permitting system hindered residents from practicing their religions at key religious sites*, such as the Church of the Holy Sepulchre and the al-Aqsa Mosque in Jerusalem, and the Church of the Nativity in Bethlehem.[13]

The Supreme Court of Israel has ruled on several occasions in furtherance of such breach. In *Kishawi v Ministry of Interior*,[14] the Court expressly approved a governmental policy that categorically prevents Muslims residing in Gaza from accessing holy sites in Israel and the West Bank. After confirming that religious belief can be used as a criterion in considering requests from Palestinians in Gaza to enter Israel to worship, the Court subsequently found that “*Israel’s obligations are limited to permitting travel in exceptional humanitarian cases* (emphasis added)”. The decision not only endorsed the state violation of freedom of religion, it essentially made an arbitrary and discriminatory distinction on the ground of religions in restricting freedom of movement for the purpose of worship, leaving Palestinian Muslims in legal limbo.[15]

“National security” defence

Is the Israeli Government entitled to raise the defence of “national security” as a justification in imposing these restrictions? We might have expected this claim given the de facto authority of the Hamas, the largest militant Islamist group in Palestine, has created large-scale armed conflicts with the Israeli troops in the past decade.[16] In particular, the Israeli Government interpreted “the restrictions to movement as necessary for security reasons” and claimed that “before you can guarantee quality of life, you have to save lives”, meaning that access control is in fact a measure against terrorism.[17] This claim is not substantiated in two ways: *First*, while freedom of religion or belief is absolute and non-derogable even in wartime, freedom to manifest one’s religion or belief may be limited as are prescribed by law and necessary to protect public safety, order, health or morals or fundamental rights and freedoms of others.[18] This exhausted list does not include “national security” or *ordre public*, unlike articles 12(3) of the ICCPR that governs the right to liberty of movement.

Second, given the grave violation by restricting the physical access of Palestinians, Israel will not be able to satisfy the proportionality test in violating freedom of movement. Subject to the ceasefire agreement following the Operation Protection Edge in 2014, Israeli Government continues to impose physical restrictions. For example, during Jewish holidays in September and October, most Muslims are restricted access; during Ramadan 2015, Gazans were blocked from entering Jerusalem’s al-Aqsa Mosque,[19] and only Muslims aged over 50 are allowed to Temple

Freedom of Religion and Access Control in Israel

Written by Sean Yau Shun Ming

Mount.[20] These measures applied only to non-Jews were overly intrusive and disproportionate to circumstances expected of protecting safety.[21]

Such rejection has also been reinforced by various reports from human rights treaty bodies. During her country visit, the United Nations Special Rapporteur Asma Jahangir refused restrictions to be justified by “terrorism”. She concluded that: “Taking into account the individuals’ freedom of religion or belief and liberty of movement as well as the principles of non-discrimination and international humanitarian law, *the intrusive restrictions seem to be disproportionate to their aim as well as discriminatory and arbitrary in their application* . (emphasis added)”[22] In essence, access to religious sites goes to the central part of Palestinians’ religious practice and worshipping; any restrictions based on substantiated grounds cannot be legitimate.

Alternative Explanation – Conception of a State Religion and Breakdowns of Rhetoric

The restrictions of access to religious sites by the Israeli Government can be alternatively explained by its State-religion model at the level of legal theory. A total of 75% of the population in Israel are Jewish;[23] although there is no formal Israeli constitution, that Israel is a “Jewish state” has been enshrined in its law.[24] In essence, government favouritism arises from the predominant role of a State religion with a special status or privileges,[25] which appears in line with international law such as under the principle of state sovereignty.[26] More specifically for Israel, many scholars have observed that: the Israeli-Palestinian conflict is indeed a conflict over *identity*, with the success of both sides in *infusing the general public with religious values as symbols of their national identity*.[27]

While it presupposes and recognises the necessary limits – with institutionalised restrictions of religious freedom – imposed on the scope for human rights compliance, the justification for restricted access to religious sites runs as follows: Since national identity has been historically crystallised in the State religion as an inseparable component, whereby discrimination is merely inherent, legitimacy derived therefrom helps consolidate national identity and defend itself against threats from Islam.[28] Again, the justifiable link is rather weak and insufficient. There are two conceptual deficiencies in justifying discriminatory access by this theory:

Instrumentalisation of State religions pre-dating violations

In Israel, while 75% of the population are Jewish, there are only 17% Muslims as the largest minority religious group.[29] In addition to the fact that Palestine has not achieved its statehood, denoting that Palestinians are still at an early stage of their identity-building,[30] it is hard to see how access control can, for instance, defend the religion and thus consolidate national identity, absent any rising threat to Israel. Instead, imposing arbitrary controls would lead to social division due to unequal socio-economic statuses, contradicting the very purpose of an established State religion to foster social cohesion. This is particularly true when West Bank contains 98% of Palestinian citizens who are Sunni Muslims and less than 2% of Christians.[31] In general, as the Occupied Palestinian Territory is presently subject to territorial dispute, Israel will not be able to justify its discriminatory access control by way of the State-religion theory, which is largely dependent on the historical context.

The conclusion so far is that, repression of minority religions can only be understood as a political instrument. Similar practices from other countries include the outright discrimination of Rohingya Muslims in Myanmar, or religious persecution in Saudi Arabia, have also been masked in the name of preserving their State religion. Indeed, the United Nations Special Rapporteur in this regard has urged that State religions “should never be instrumentalised for purposes of national identity politics.”[32] Perhaps more importantly, allowing State religions to predate rights violations is dangerous because it potentially gives leeway for state abusive policies to run without the need to provide legal justifications. manipulate religious rights with unequal footings.

Against this conclusion, it might be argued that we have ignored the incompatibility of a State religion in itself with general human rights principles. While it has been generally pointed out that “the notion of State religions is not per se prohibited under international human rights law”,[33] States still have the obligation to prevent de facto discrimination of minority religions.[34] As to date, the Israeli Government has failed to demonstrate the State-religion relationship in a non-discriminatory manner.

Freedom of Religion and Access Control in Israel

Written by Sean Yau Shun Ming

Re-conceptualising minority rights: Recognition-based approach

Having argued that the restrictions are simply manipulative politics under the pretext of national identity, the question of to what extent a State religion can accommodate religious minorities remains unanswered. A classic study by the United Nations early in 1979 has addressed the protection of religious minorities by “recognition”.[35] This symbolises the state duty to protect the identity of minorities, even when “state shape religions as identities of the nation (emphasis added)”.[36] To this end, the Human Rights Committee in the General Comment No. 23 echoes this recognition-oriented protection, stating the “obligation to *ensure existence and exercise of identity rights*, even through positive measures”.[37]

Subsequently, “Recognition” by the state is generally adopted to confer the status of legal personality to religious groups, for their full enjoyment of important communitarian aspects of religious freedom, such as attending services, physical access to religious sites and organising public events, often through a registration procedure.[38] Despite inevitable issues of fairness and transparency of the process, jurisdictions especially from Europe have upheld such approach for State religions to subsist without violating the right of minority religions. European Court of Human Rights in *Vergos v Greece*, for example, decided that legal personality status of any religious community in the registration procedure should not be made dependent on the approval of others.[39]

Taken together, this section has highlighted the political propaganda camouflaged in the State-religion theory, which runs contrary to empirical evidence insofar as it can only justify no more than a symbolic preference for the predominant religion, given that a recognition-based protection can be executed by conferring legal personality to religious minorities.

Final Remarks

Rights are symmetrical. Freedom of all religious practices should be respected and treated equally. Our conclusion is that, none of the above official defences is convincing. Restricted access for Palestinian Muslims and Christians to religious sites continues to amount to a grave breach of their freedoms of religion in terms of, inter alia, observances, services and worship. State religions should not be instrumentalised to exploit the freedom and rights of religious minorities masked by state rhetoric. Although the recent resolution approved by the United Nations, which supported claims of Jerusalem’s Western Wall for Muslims, had de facto recognition of the substantive freedoms of religion for Palestinians,[40] the full enjoyment of minority religions rights, nonetheless, will depend on the future Israeli jurisprudence as well as the international discourse.

References

[1] U.S. Department of State, International Religious Freedom Report for 2014 – Israel, on <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper> [accessed on 22 November 2015].

[2] Enacted in 14 May 1949.

[3] Sections 144D and 144F of the Penal law, the State of Israel.

[4] The peace treaty of 26 October 1994 between Israel and Jordan stipulates that “each party will provide freedom of access to places of religious and historical significance and that “Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem” (article 9).

[5] Articles 9, 10 and 101 of the Palestinian Basic Law.

[6] The International Covenant on Civil and Political Rights (ICCPR) was signed by Israel and subsequently entered into force in 3 January 1992.

Freedom of Religion and Access Control in Israel

Written by Sean Yau Shun Ming

[7] Concluding observations (CCPR/CO/78/ISR, para. 12 and CCPR/C/79/Add. 93, para. 11).

[8] Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, Mission to Israel and the Occupied Palestinian Territory, 12 January 2009, A/HRC/10/8/Add 2, on <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.8.Add.2AEV.pdf> [accessed on 22 November 2015].

[9] Ibid.

[10] Ibid.

[11] Fourth Geneva Convention provides that the protected persons are entitled, in all circumstances, to respect for “their religious convictions, and practices and their manners and customs” (article 27); also see, ICRC Customary International Humanitarian Law, Rule 104. Respect for Convictions and Religious Practices: para 1216.1 provides that “The occupant is obligated to allow freedom of religion in the occupied territory”.

[12] This is notwithstanding the Israeli Disengagement Plan in 2004 which many legal scholars criticised as being insufficient because the Israeli authority is still in control over most internal affairs including airspace, tax collection and restricted transport. *See eg*, Centre for the Defence of the Individual, “Legal Aspects of Israel’s Disengagement Plan under International Humanitarian Law”, 22 November 2009.

[13] Religious Freedom Report, see fn 1; also see, OCHA, Closure Update, May 2008; Working Group on the Universal Periodic Review, compilation of information contained in the reports of treaty bodies and special procedures, September 2008 (A/HRC/WG6/3/ISR/2); Report of the Working Group on the Universal Periodic Review, Israel, January 2009 (A/HRC/10/76).

[14] (AdmPet 11268-02-11), 7 August 2012.

[15] As regards the critique by scholars, *see eg*, Adalah’s Report to: The United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict, 31 January 2015, on http://www.adalah.org/uploads/2_Adalah-Submission-UN-COI-Gaza-2015.pdf.

[16] Amnesty International, Israel/Gaza – Operation “Cast Lead”: 22 days of death and destruction, 2 July 2009, MDE 15/015/2009, available at: <http://www.refworld.org/docid/4a4db45a2.html> [accessed 24 November 2015].

[17] Jahangir, see fn 8.

[18] Office of the High Commissioner for Human Rights, General Comment No 22: The right to freedom of thought, conscience and religion (Art 18), 30/07/1993, para 8.

[19] International Business Times, 24 June 2015, on <http://www.ibtimes.com/ramadan-2015-israel-blocks-gazans-traveling-jerusalem-holy-month-prayers-after-rocket-1981676>.

[20] Religious Freedom Report, see fn 1.

[21] These restrictions have been documented in the High Commissioner’s report on the implementation of Human Rights Council resolution 6/19 (see A/HRC/8/18, paras. 14-39).

[22] Jahangir, see fn 8.

[23] Israel Central Bureau of Statistics, “Population, by Religion”, 11 September 2012.

[24] The Basic laws and the Declaration of Independence designate Israel as a “Jewish and democratic state”. Note

Freedom of Religion and Access Control in Israel

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that there have been opposing view arguing that Israel is not a per se Jewish state, see eg, Jeroen Temperman, State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance, p 25. However, for the purpose of this paper, Israel is understood as a “Jewish state” in the sense of the majority of populations being Jewish, the prescription by law, and government favouritism towards the Jewish community.

[25] Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study of discrimination in the matter of religious rights and practices”, 1960, p 46.

[26] Marshall J Breger, Sacred Space in Israel and Palestine: Religion and Politics (2013), p 258.

[27] Dr Yehudith Auerbach, Barriers to Peace in the Israeli-Palestinian Conflict, ed Yaacov Bar-Simon-Tov (2011), Chapter 6.

[28] Auerbach, Chapter 3.

[29] Bureau of Statistics, see fn 23.

[30] UN News Centre, 30 December 2014, on <http://www.un.org/apps/news/story.asp?NewsID=49709#.VIRFc98rJE4>.

[31] Bureau of Statistics, see fn 23.

[32] Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, A/HRC/19/60f, 22 December 2011, on http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-60_en.pdf [accessed on 22 November 2015].

[33] See eg, Silvio Ferrari, Routledge Handbook of Law and Religion (2015), p 189.

[34] Bielefeldt, see fn 32, para 64.

[35] Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Human Rights Study Series No. 5 (1979), reprinted in 1991.

[36] Ibid; also see Kamran Hashemi, Religious Legal Traditions, International Human Rights Law and Muslim States, BRILL, 25 July 2008, p 158. In particular, Hashemi commented that protecting the identity of religious minorities represents the “*preservation and natural development of the identity of minorities*”.

[37] General Comment 23, paras 6.1-6.2: “*Positive measures by states may also be necessary to protect the identity of a minority and the rights of this members to enjoy and develop their culture and to practice their religion, in community with the other members of the group.*”; however, Hashemi (fn 36) argues that a “recognition” approach will discourage states as it embodies the idea that “*a coherent set of rights, connected with principle of protecting the identity of minorities, is granted to members of such minorities.*” Rather, states would wish to confer only specific rights without any overall plan.

[38] Bielefeldt, see fn 32.

[39] 24 June 2004, No. 65501/01, para 34.

[40] Reuters, “UNESCO condemns Israel for limits on al-Aqsa mosque access”, 21 October 2015, on <http://www.reuters.com/article/2015/10/21/us-israel-palestinians-unesco-idUSKCN0SF1RI20151021#8fgupyyz6OxKx1Gg.97>.

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