An Analysis of Competing Conceptions of Religion in Israeli Supreme Court Jurisprudence

by

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Abstract

This paper identifies a tension between the liberal conception of religion and many traditional religious viewpoints and uses Israeli Supreme Court jurisprudence as an exemplar of that tension, as it possesses a British common law tradition, but also cites facets of Jewish law in its decisions. The paper sets out the tenets of a liberal view that focuses on belief, autonomy and individuality and an Orthodox Jewish view which defines religion as communal and not based on belief or choice. It then turns to Israeli jurisprudence, arguing that certain legal doctrines find their justification in the Orthodox model. Finally, it analyzes Israeli judgments concerning religious issues, demonstrating that there is discord based on these conflicting conceptions of religion that can play a large role in determining the results of these cases. The paper concludes by asking whether Israel's model would be informative for other liberal democracies dealing with religious issues.

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Introduction

Religious freedom is commonly enshrined as a fundamental right in modern liberal democracies, and has been called the "prototypical human right"[1] and "one of the foundations of a 'democratic society'"[2]. However, the manner in which religion is defined and protected can differ between societies, and the religious adherent may find their own definition and perception out of step with the views of the law and of society at large. There can therefore be a profound disconnection and discord between the legal viewpoint and that of the religion whose freedom it is intended to protect.

The state of Israel has a British common law tradition and quasi-constitutional protection of religious freedom, but also explicitly cites Jewish law and tradition as a source in jurisprudence. As a result, it is often forced to confront this dissonance, as the Jewish sources and underlying perceptions commonly directly conflict with the classical common law consideration of religion. The Israeli courts can have difficulty determining how much weight to give one conception of religion versus another, leading to judicial decisions that can show large amounts of tension as judges try to determine methods to synchronize the viewpoints. This often lead to the development of very different doctrines and results in very different verdicts than one might see in other common law jurisdictions.

By contrast, Canadian law typically operates under a fully liberal framework for religion and religious freedom. Canadian law is a suitable comparator with Israeli law for various reasons. Canada, like Israel, is a former British colony and shares the common law tradition. As well, and more significantly, Canada and Israel have both enshrined freedom of religion in constitutional or quasi-constitutional legislation and jurisprudence within the past few decades. Freedom of religion was

[1] Kevin Hasson, "Religious Liberty and Human Dignity: A Tale of Two Declarations" (Fall 2003) 27:1 Harv JL & Pub Pol'y 81 at 89

[2] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony*] at para 128, citing *Kokkinakis v Greece*, judgment of 25 May 1993, Series A No. 260-A (European Court of Human Rights)

explicitly confirmed as a constitutional right in the *Canadian Charter of Rights and Freedoms* in 1982.[3] Meanwhile, the Israeli *Basic Law: Human Dignity and Liberty*[4], passed in 1992 and elevated to constitutional status shortly thereafter by the Israeli Supreme Court (ISC) [5], does not explicitly guarantee freedom of religion, but the ISC has extrapolated those rights from the right to dignity.[6]

As a result, this paper will begin in Part I by highlighting the underlying or explicit assumptions concerning the nature of religion in a liberal society. It will do so through analysis of Supreme Court of Canada (SCC) decisions dealing with religious freedom. This section will set out a framework of religion as being based on belief, autonomy and individuality. It will then show that many of the assumptions are shared by the high courts of other common law jurisdictions. In addition, it will discuss a number of cases and show how these assumptions have shaped the court's decisions.

In Part II, I will discuss Jewish sources concerning the nature of religion, and show how these perspectives tend to differ from those seen in Canadian jurisprudence, and in fact are often directly opposed. This section will be focusing on Orthodox and traditional Jewish sources, setting out a vision of religion as a communal duty that is not belief-based. This focus is primarily because these are the types of sources utilized by the Israeli Supreme Court when discussing Jewish law in its jurisprudence.[7] As well, the Orthodox perspective tends to be the dominant religious perspective in Israeli society and institutions.[8] I will however touch on sources from Conservative and Reform Judaism as well, to show that much of

[3] *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]

[4] *Basic Law: Human Dignity and Liberty* (1992) SH 1391

[5] *United Mizrahi Bank v Migdal Cooperative Village*, CA 6821/93, 49(4) PD 221, [1995] Isr L Rep 1 [*Mizrahi*]

[6] See, for example, *Manning v Minister of Justice*, HCJ 3261/93, 47(3) PD 282 [*Manning*]

[7] Steven F Freidell, "Some Observations About Jewish Law in Israel's Supreme Court", (Jan 2009) 8:4 Wash U Global Studies L Rev 659

[8] Izhak Englard, "Law and Religion in Israel" (1987) 35:1 Am J Comp L185 at 200

this perspective on religion tends to be shared between the various denominations. This section will also discuss cases where common law courts in Canada and elsewhere have dealt with the Jewish religious perspective, as well as other religious traditions that have shared many of the same viewpoints, and show that courts often come into conflict with this outlook, although more rarely they recognize and validate this religious conception.

In Part III, I will discuss Israeli case law and show that much of the ISC's explicit definition of religion falls within the liberal viewpoint. However, I will demonstrate areas within Israeli case law concerning religious freedom wherein the ISC, while not explicitly adopting the Jewish perspective on religion, seems to have been influenced by it in adopting various norms and tests. This section will then discuss a number of Israeli cases, and showing that this religious perspective has coloured the decisions therein and how the two viewpoints have often competed for dominance. I will conclude this part by showing that Israeli case law continues to struggle to synchronize these two perspectives, but also continues to attempt to do so.

The paper will conclude in Part IV by looking more closely at the tension that arises due to competing religious understandings, and discuss arguments that this definitional discord is more of an interreligious conflict that it seems at first glance, with much of the dispute potentially dating back to the rise of Christianity. Finally, I will explore the idea that certain parts of Israel's model would be useful or helpful for other liberal democracies in dealing with religious issues and religious citizens, with a greater recognition of their religious perspectives conceivably aiding in increasing integration and mutual understanding.

Part I: Canada – A Liberal Conception of Religion

In this section, I will be discussing a liberal view of religion using examples taken from jurisprudence by the Supreme Court of Canada. As shall be seen, this conception of religion is one that is predicated on belief, autonomy and individuality. I will then examine particular cases in more depth to show how these tenets have affected jurisprudence in practice.

A. The Supreme Court of Canada's Conception of Religion

Canada identifies "freedom of conscience and religion" as a fundamental freedom to which everyone has the right in Section 2(a) of the *Canadian Charter of Rights and Freedoms*[9]. There is very little non-human rights legislation that deals with religion.[10] As a result, the SCC has rarely been called upon to define religion per se, but rather has developed or inferred findings about the nature of religion through freedom of religion litigation.

1. Belief

Religion and religious freedom in Canadian courts is based around a freedom of belief. Justice Dickson (as he was then) stated in *R. v. Big M Drug Mart*[11], the first Canadian freedom of religion case decided under the *Charter*, that "[t]he essence of the concept of freedom of religion is the right to entertain such *religious beliefs* as a person chooses".[12] This particular emphasis has been apparent in Canadian jurisprudence since that point. The general test for a religious practice to be protected under the *Charter* states that the practice must be based on a sincere belief.[13] In the same case where that test was clarified,

[9] *Charter* supra note 3

[10] One significant exception is the *Divorce Act*, RSC 1985, c 3 (2nd Supp), which sets out potential penalties if any religious barriers to remarriage are not removed

[11] [1985] 1 SCR 295 [*Big M*]

[12] Ibid at para 94 (emphasis added)

[13] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at 51 [*Amselem*]

Justice Iacobucci took the opportunity to note that "[d]efined broadly, religion typically involves a particular and comprehensive system of faith and worship…[and] also tends to involve the belief in a divine, superhuman or controlling power."[14]

Freedom of religion was recognized in Canada as a fundamental freedom prior to the 1982 passing of the *Charter*, notably in the quasi-constitutional 1960 *Bill of Rights*[15]. The SCC has traced freedom of religion in Canada to a point well prior to Confederation in 1867, stating that since the drafting in 1760 of the treaty setting out the surrender of the French forces holding Montreal to the British Army, "religious freedom has, in our legal system, been recognized as a principle of fundamental character"[16]. This was recognized in the drafting the *Bill of Rights*, which identifies "freedom of religion" as one of the "human rights and fundamental freedoms" "that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex".[17]

The focus on belief can be seen as well in the pre-*Charter* and pre-*Bill of Rights* adjudication. In *Saumur* and in *Chaput v. Romain*[18], two cases dealing with the freedom of Jehovah's Witnesses to gather and proselytize, the SCC adopted views of freedom of religion that focused on "liberty of thought"[19] and "untrammelled affirmations of religious belief and its propagation"[20], stating that the "conscience of each [adherent] is a personal matter"[21].

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[14] Ibid at 39

[15] *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*]

[16] *Saumur v City of Quebec*, [1953] 2 SCR 299 at 327 [*Saumur*]

[17] *Bill of Rights* supra note 15 at s 1

[18] [1955] SCR 834 [*Chaput*]

[19] Ibid at 840

[20] *Saumur* supra note 16 at 327

[21] *Chaput* supra note 18 at 840

These approaches were subsequently quoted and endorsed by the majority decision in *Robertson*[22], a post-*Bill of Rights* case freedom of religion case. The majority there stated that the *Bill of Rights* was only intended to protect existing rights and not to impose new ones[23]. According to this understanding, the approach to religious freedom as a freedom of belief was how matters existed in Canadian common law without taking into account additional constitutional protections.

The primacy of belief is not unique to Canadian jurisprudence, and can be seen in other common law jurisdictions as well. For example, the leading case defining religion in Australia[24] concerned whether the payroll taxes were applicable at a church of Scientology. There, the Australian Supreme Court noted, "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint."[25] As well, religion was defined there as "first, belief in a supernatural Being, Thing or Principle" and subsequently "the acceptance of canons of conduct in order to give effect to that belief"[26].

Similarly, in the United Kingdom, the Supreme Court (UKSC) recently dealt with the question of whether a church of Scientology could be considered a "place of worship" such that a marriage could be solemnized there.[27] The UKSC there defined religion as "a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the

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[22] *Robertson and Rosetanni v R*, [1963] SCR 651 [*Robertson*]

[23] Ibid at 654

[24] Bruce Kaye, "Case Note and Commentary: An Australian Definition of Religion" (1991) 14:2 UNSW L J 332; Kathleen McPhillips, "Whose Rights Matter?", in Timothy Stanley, ed, *Religion after Secularization in Australia* (New York: Palgrave Macmillan, 2015)

[25] *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)*, (1983) 154 CLR 120 (Australian Supreme Court) at 130

[26] Ibid at 136

[27] *R (Hodkin) & Anor v Registrar General of Births, Deaths and Marriages*, [2013] UKSC 77

infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system".[28]

The US Supreme Court (USSC), while it has never properly set out a definition of religion, "provided its most extensive discussions of the meaning of religion"[29] when discussing the statutory construction of conscientious objector status. The legislature therein defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation"[30]. The USSC expanded the definition there to include "a given belief that is sincere and meaningful [that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in G-d of one who clearly qualifies for the exemption".[31] Again, we see that the focus of both the courts and the legislature rests on belief.

2. Autonomy

Benjamin Berger, in his book *Law's Religion*[32] identifies autonomy as one of the three core pillars of Canadian law's conception of religion, alongside privacy and individuality[33]. He describes much of the power of religion in the courts as deriving from the concept of autonomy. As he states, "[r]eligion has force in the eyes of the law to the extent that it is aligned with autonomy and choice."[34] Autonomy is a central value within Canadian law that can thereby lend strength to religious claims or weaken them.

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[28] Ibid at para 57

[29] Ben Clements, "Defining Religion in the First Amendment: A Functional Approach" (1989) 74:3 Cornell L R 532 at 537

[30] Chapter 49, *Military Selective Service* (50 USC 3801 et seq), Section 6(j)

[31] *United States v Seeger*, 380 US 163 (1965) (USSC) at 165-166

[32] Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015)

[33] Ibid at 62

[34] Ibid at 90-91

The nature of autonomy involved in freedom of religion cases has been a matter of debate within the SCC jurisprudence. In *B.(R.) v. Children's Aid Society of Metropolitan Toronto*[35], two Jehovah's Witnesses sought to prevent the Children's Aid Society from taking custody of their baby in order to provide it with a blood transfusion. The five-justice majority determined that this was an infringement on religious freedom that was justified due to the goal of saving the child's life.[36] However, four justices argued that there was no infringement on religious freedom in the first place. They emphasized the baby's inability to choose their own religion. As stated by Justices Major and Iacobucci:

> The appellants proceed on the assumption that [their baby] is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, [their baby] has never expressed any agreement with the Jehovah's Witness faith, nor, for the matter, with any religion, assuming any such agreement would be effective. There is thus an impingement upon [their baby]'s freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief.[37]

As a result, they argued that the child's capability to select their religion later in life outweighed the parent's ability to choose to raise their child within their religion, including regarding medical treatment. Berger describes this significant dissent as prioritizing "[r]espect for the child's autonomy"[38] in giving her the opportunity to decide later in life what her religious convictions would be.

In other cases, the SCC has dealt with determining whether an infringement on religious freedom affects what the Court deems to be a core choice of the religion or a matter that is more ancillary. The SCC has recognized the concept of a false choice, wherein a person is forced to decide between following the law or following their religion. It has established that this applies when restrictions on core choices occur, and adjudges whether regulations leave religious practitioners with a "false choice" as a result. For

[35] [1995] 1 SCR 315 [*B(R)*]

[36] Ibid at 391

[37] Ibid at 437

[38] Berger supra note 32 at 90

example, in one case, the SCC determined that a particular restriction "[did] not rise to the level of depriving the…claimants of a meaningful choice as to their religious practice"[39].

Similarly, in *Adler v. Ontario*[40], Jewish and Christian Reformed parents that were sending their children to private denominational schools sued the province of Ontario. Ontario provides funding to Catholic schools due to a constitutional compromise dating back to Confederation[41], but does not provide funding for other religious schools. The parents argued that this was a discriminatory policy and sought funding for their denominational schools as well. The majority judgment dismissed the complaint on constitutional grounds.[42] However, comments by two of the justices there implied that the entire issue was predicated on the choice that the appellants had made to send their children to private school rather than public school.

Justice Sopinka in his concurrence with Justice Major adopts the following statement of Chief Justice Dubin of the Ontario Court of Appeal: "[The appellants] were free to send their children to secular public schools maintained at public expense. Their decision not to do so was solely a response to their religious beliefs and not a result of any government action."[43] Justice Sopinka considers the parents' decision to send their children to religious school as a choice for which they are entirely responsible.[44]

Justice McLachlin also emphasises religion as being a choice in her partial concurrence, stating, "The fact that they may have chosen their religion and with it the need to send their children to religious

[39] *Wilson Colony* supra note 2 at para 96

[40] [1996] 3 SCR 609 [*Adler*]

[41] *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 93, reprinted in RSC 1985, Appendix II, No 5

[42] *Adler* supra note 40 at para 50

[43] Ibid at para 186

[44] MH Ogilvie, "Adler v Ontario: Preconceptions, Myths (or Prejudices) About Religion in the Supreme Court of Canada" (1997-1998) 9 Nat'l J Const L 79 at 87

schools does not negate the discrimination."[45] While she disagrees with Justice Sopinka that religion being a choice makes the issue moot, it still colours her perception of the issue.[46] Justice McLachlin believes, like Justice Sopinka, that "it is simply a burden of their religious beliefs that they are obliged to pay directly for their children's schools"[47].

In *R. v. N.S.*[48], the alleged victim of a sexual assault sought to wear her niqab while testifying, while the defendant argued that this would violate trial fairness, as her facial expression would not be visible and could harm credibility assessments. The SCC's majority decision attempted to strike a balance by allowing testimony while wearing a niqab, but only when there was less concern about "the importance of the evidence".[49] Removal of the niqab would generally be required "where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital".[50] Justice Abella in dissent noted that "religious requirements are experienced as 'obligatory and nonoptional', that is, as not providing a genuine choice to the religious believer".[51] Thus, complainants "will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all"[52]. While the majority judgment attempts to strike a balance, Justice Abella labels the removal of the niqab as a false choice.

Each of these examples show that the SCC assumes that religion is a choice, and one wherein certain aspects can be deemed less fundamental than others.

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[45] *Adler* supra note 40 at para 209

[46] Ogilvie supra note 44 at 84

[47] Ibid at 88

[48] 2012 SCC 72 [*NS*]

[49] Ibid at para 43

[50] Ibid at para 44

[51] Ibid at para 93

[52] Ibid at para 96

3. Individuality

This focus on belief in Canadian law manifests itself specifically as something that is individual and personal. While there is recognition of the communal aspects of religious life in many situations, Berger notes that *Amselem*[53] is where this particular aspect of Canadian jurisprudence was clarified and sharpened.[54] In *Amselem*, there was much discussion in the lower courts concerning whether Jewish law truly required a person to have a personal *succah*[55], with different rabbis being treated as competing experts. The lower courts found that Jewish law did not require a personal *succah* and therefore there was no violation of freedom of religion.[56] The SCC determined that this was an "unduly restrictive" means for determining whether freedom of religion is violated, and that a sincerely held religious belief worthy of protection need not adhere to the accepted tenets of an organized religion.[57] This applies even if the party is arguing that their religious belief or practice is one that falls within that particular religion. As a result, whether Jewish law requires a personal *succah* or not is an irrelevant consideration by the judiciary. Only the sincerity of the belief is assessed by the court, not the validity thereof.

This understanding has carried forward in SCC jurisprudence. One case, for example, involved Catholic parents seeking an exemption for their children from a provincially mandated religion class.[58] The trial judge there found the parents' concerns were unfounded based on an expert opinion from a theologian that the class did not infringe on their beliefs, as well as the fact that the provincial organization

[53] *Amselem* supra note 13

[54] Berger supra note 32 at 97-98

[55] A *succah* is a temporary shelter used for eating during the holiday of *Succoth* (Eng: Feast of Tabernacles). Many also sleep and conduct their daily lives within the *succah.*

[56] *Amselem* supra note 13 at paras 22-23

[57] Ibid at paras 68-70

[58] *SL v Commission scolaire des Chênes*, 2012 SCC 7

of Catholic bishops did not object to the course.[59] The SCC criticized the lower court for this line of reasoning.[60] Similarly, in *N.S.*, discussed above, the Court criticized the trial judge for basing his opinion on the strength of her belief on her testimony about past situations where she had removed her *niqab* and hypothetical situations where she said she would deem it necessary to remove.[61] Because he attempted to determine the sincerity of her belief based on his opinion of how a sincere belief would be manifested, his analysis was found to be fatally flawed.

B. How the SCC's Conception of Religion Has Manifested in Decisions

Court cases dealing with freedom of religion typically fall into two categories, those dealing with the state favouring or imposing a particular religion and those dealing with the state failing to accommodate a particular religion. I have divided those into two categories based on the helpful distinctions used by the USSC[62]: I will be referring to cases where the state is accused of favouring a religion as Establishment cases, and I will be referring to cases where the state is accused of failing to accommodate a religion as freedom of expression cases.

1. Selected "Establishment" Cases

While Canada has a freedom of religion provision set out in the Charter of Rights and Freedoms, it does not have an Anti-Establishment clause, as the United States does.[63] In fact, religion and the state are linked in Canada through the *Constitution Act, 1867*, wherein provisions for minority religious schools

[59] Ibid at para 51

[60] Ibid at para 52

[61] *NS* supra note 48 at paras 12-13

[62] US jurisprudence, based on the language of the First Amendment, "The Constitution of the United States," Amendment 1.

[63] The First Amendment specifically states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

were enshrined.[64] The SCC has determined that the separate school system is protected constitutionally and cannot be challenged on the basis of Charter provisions like equality rights.[65] Despite this, Canada's courts have long espoused a general policy of state neutrality, and that but for a specific constitutional provision requiring state involvement in religion, the court will rarely protect such conduct.

a. R. v. Edward Books and Art Ltd. [66]

One of the first cases to really delve into the concept of freedom of religion under the *Charter* was *Edward Books*, which dealt with an Ontario Sunday closing law[67]. This same issue had previously been dealt with by the SCC in *Big M*.[68] However, the decisive factor there was the fact that the act enshrining Sunday closing, the *Lord's Day Act*, had a religious purpose and therefore was clearly unconstitutional.[69] In *Edward Books*, the Court was dealing with a Sunday closing law that did not on its face have a religious purpose, and had to delve more deeply into the effects of the law.

The majority decision of the SCC, while finding that this law infringed on religious freedom[70], took care to note that a designated day of rest was a compelling goal of the legislature and that the choice of Sunday did not necessarily have religious overtones.[71] As a result, they allowed the law to stand.[72]

Notably, Justice Beetz in his concurrence argues that no infringement on religious freedom had occurred in the first place. As he states, "The economic harm suffered by a Saturday observer who closes

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[64] *Constitution Act* 1867 supra note 41

[65] *Adler* supra note 40 at para 50

[66] [1986] 2 SCR 713 [*Edward Books*]

[67] *Retail Business Holidays Act*, RSO 1980, c 453

[68] *Big M* supra note 11

[69] Ibid at para 136

[70] *Edward Books* supra note 66 at para 115

[71] Ibid at paras 139-141

[72] Ibid at para 159

shop on Saturdays is not caused by the *Retail Business Holidays Act*...It results from the deliberate choice of a tradesman who gives priority to the tenets of his religion over his financial benefit."[73] We see here again the conception that choice is an inherent part of religion and religious practice.

b. Adler v. Ontario

As noted above, Justice Sopinka's concurrence in *Adler*[74] hits similar themes as Justice Beetz's concurrence in *Edward Books*. There is a sense that the choice made to send children to religious school is what is causing the parents' issue, rather than the province's funding of Catholic schools but not other religious schools.

c. Mouvement laïque québécois v. Saguenay (City) [75]

Most recently, in the case of *Saguenay*, the SCC considered prayer at municipal meetings. The Quebec Court of Appeal in this case had endorsed a policy of "benevolent neutrality".[76] This required that "the state must neither encourage nor discourage any belief or non-belief", but "does not require the state to abstain from involvement in religious matters…Protection of the diversity of beliefs must be reconciled with the cultural reality of society, which includes its religious heritage."[77] The prayer was thereby justified through Quebec's Catholic heritage.[78]

The SCC rejected this conception of state neutrality, holding that the state has a duty of "true neutrality" and "the state must neither encourage nor discourage any form of religious conviction whatsoever".[79] This conception of neutrality, while not found in the *Charter*, is based on an "evolving

[73] Ibid at para 168

[74] *Adler* supra note 40 at para 186

[75] 2015 SCC 16 [*Saguenay*]

[76] Ibid at para 20

[77] Ibid

[78] Ibid at paras 21-22

[79] Ibid at para 78

interpretation of freedom of conscience and religion".[80] The state's duty of religious neutrality thereby has its basis in the individualistic conception of religion as well. This is explicitly noted by the Court when it approvingly quotes Justice Lebel's dissent in *Lafontaine*, wherein he stated, "Although it has not excluded religions and churches from the realm of public debate, [Canada's demographic] evolution has led us to consider the practice of religion and the choices it implies to relate more to individuals' private lives or to voluntary associations".[81]

Similar justification has been used in the United States concerning the Establishment Clause. It has been explained on the basis that "religion must be a private matter for the individual, the family, and the institutions of private choice".[82] However, what differentiates this from the Canadian analysis is that the Anti-Establishment Clause is explicitly part of the First Amendment. The Canadian reasoning has arisen after the fact based purely on the conception of freedom of religion. Jeremy Patrick notes that the language of "freedom of religion", rather than "freedom of religious expression", implies that the freedom contained therein is not simply the equivalent of the American free expression clause, but encompasses aspects of establishment as well. [83]

Significantly, the SCC here overturned precedent concerning public prayer. Lower level courts had previously endorsed non-denominational prayers in municipal meetings or schools, as the issue was deemed to be endorsement of a particular religion, rather than more generic religious content.[84] The Court

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[80] Ibid at para 71

[81] Ibid, quoting *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 67

[82] *Lemon v Kurtzman*, 403 US 602 at 625 (USSC)

[83] Jeremy Patrick, "Church, State and Charter: Canada's Hidden Establishment Clause" (2006) 14:1 Tulsa J Comp & Int'l L 25 at 44

[84] See for example *Freitag v Penetanguishene (Town)* (1999), 47 OR (3d) 301 and *Allen v Renfrew (County)* (2004), 69 OR (3d) 742

here, despite finding that the context of the prayers made it clear they were intended to be Christian in nature, emphasized that any type of prayer can infringe on the freedom of religion of an atheist and is inappropriate in this context.[85]

2. Selected Freedom of Expression Cases

a. Syndicat Northcrest v. Amselem

As noted above, *Amselem* was where the SCC crystalized the conception of individuality in freedom of religion. The Court there determined that a restriction on religious practice, where practical concerns could be met, was unjustifiable even by a private entity.[86] However, the individual nature of religion makes the test somewhat different than the test where the state is involved. The SCC determined that it must "consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals".[87]

b. Alberta v. Hutterian Brethren of Wilson Colony

In *Wilson Colony*, the province of Alberta passed new regulations requiring all drivers' licences to have photos. Members of a religious enclave sought to be able to continue using drivers' licenses without pictures due to their religious beliefs and argued that an inability to drive would harm their community's self-sufficiency, which they contended was integral to their way of life. The SCC found in favour of the province, in part due to the fact that the choice presented by the regulation, whether to continue driving or not, was not seen as infringing on a core aspect of their religious belief.[88]

The majority of the Court assumed that the members of the Colony would subsequently "hire people with driver's licenses" or "arrange third party transport to town for necessary services", and that

[85] *Saguenay* supra note 75 at para 121

[86] *Amselem* supra note 13 at para 63

[87] Ibid at para 62

[88] *Wilson Colony* supra note 2 at para 102

while this would be an additional cost burden on the Colony, "there is no evidence that this would be prohibitive".[89] However, interviews with members of the Colony have shown that the majority of the community have chosen either to drive without licenses, in violation of the law, or to obtain driver's licenses with photos, in violation of their religious convictions.[90] The SCC assumed that the choice of self-sufficiency was not integral to the community, and that it therefore would outweigh the religious objection to photographs. As a result, the Court put the Colony members in a position wherein they perceived their only options to maintain their self-sufficiency to entail violating either provincial law or their religious beliefs.

C. Conclusion

Canada serves as an example of a country where most of the philosophical influence in the judiciary comes from liberal principles. As a result, the SCC has set out its version of a liberal perspective on religion. This perspective is based upon belief, autonomy, and individuality. As has been seen, the focus on autonomy can lead the SCC to determine that a choice made by a religious person is what is truly causing their problem rather than the actions of the state. Additionally, the SCC will often attempt to determine the centrality of a choice to a religion. The Court's perception of the importance of belief can lead it to misunderstand how fundamental the choice faced by a religious person is as well as mistakenly predict the outcomes of restricting that choice. Finally, the focus on the individual nature of religion can liberate individual religious beliefs from having to fit within the boundaries of organized religion and has led the SCC to attempt to develop a stronger sense of state neutrality than may have initially been envisioned upon the passing of the *Charter*.

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[89] Ibid at para 97

[90] Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39 Queen's LJ 175 at 221

Part II: Judaism

A. Jewish Conception of Religion

Determining a Jewish perspective on religion can be fairly difficult, with numerous denominations and geographical traditions existing and a lack of centralized authority. The most prominent denominations include Orthodox, Conservative and Reform Judaism,[91] with Orthodox generally being considered the most traditional and Reform the least. In addition, the denominations differ concerning aspects of religious practice in different locations. As noted above, my focus will be on Orthodox Judaism, although I will touch on other denominations and historical sources. This will be due to the fact that, practically speaking, Judaism in Israel is predominantly of the Orthodox variety, particularly within the state religious establishment and rabbinical courts.[92] Conservative and Reform Judaism, by contrast, have struggled to establish significant footholds in Israeli society. Therefore, Orthodoxy's conception of religion is the one that Israeli courts most often encounter in freedom of religion cases. It should be noted, though, that each denomination shares a number of primary texts, with differing levels of importance placed on them. As well, the relatively recent split of Judaism into denominations leads to a considerable shared philosophical and religious legacy between them.[93]

I have attempted therefore to set out an Orthodox Jewish perspective on religion using both traditional and more modern source texts, as well as secondary critical sources. In so doing, I have inferred perspectives from stories and discussions from the Babylonian Talmud as well as from writings of modern Orthodox rabbis, and have relied on historical analysis from contemporary academics. It is somewhat limited in that much of the material deals with a self-perception of the nature of Judaism rather than a

[91] "A Portrait of Jewish Americans", Pew Research Center (1 October 2013), online: <www.pewforum.org>

[92] Englard supra note 8 at 200

[93] "Jewish Religion: Reform, Conservative and Orthodox", *Haaretz* (1 July 2013), online: <www.haaretz.com>

general perspective on all religions, requiring some extrapolation and assumptions to provide an Orthodox perspective on religions. With all of this in mind, though, the Orthodox Jewish perspective on religion tends to differ significantly from the Canadian perspective as set out above. While Canadian law has developed a view of religion as a right based on autonomy, belief and individuality, the Orthodox perspective tends to be that Judaism is a duty, not based on belief and community-focused. Many aspects of this perspective are shared by other religious groups.

1. Choice / Belief

Traditionally, Judaism has treated matrilineal descent as the definitive factor in determining whether a person is Jewish. Some liberal denominations also accept patrilineal descent. Conversion to Judaism is also possible, but Judaism is not typically a proselytizing religion, and in fact traditionally discourages conversion[94]. Indeed, the Babylonian Talmud states that the souls of all Jews, including future converts, were at Mount Sinai for the receiving of the Ten Commandments[95]. This concept is often used to argue that people that convert to Judaism were in fact already destined to be Jewish.[96] Thus, any conception of Judaism being a choice is minimized even for those for whom Judaism could most be considered a choice, those who convert.

The view of religion not being a choice is one that some have traced to pre-Talmudic times, in the beginning of the first millennium of the common era. Daniel Boyarin argues that at the time, Judaism specifically rejected the idea of being a religion that is "understood as a system of beliefs and practices to

[94] Traditionally, converts were discouraged or rejected three times, a practice based on the Book of Ruth 1: 8-18, wherein Ruth's mother-in-law Naomi insists she leave her side three times before allowing her to return to Israel with her

[95] Babylonian Talmud, *Shevuot*, 39A [*Shevuot*]

[96] Elliot R Wolfson, *Open Secret: Postmessianic Messianism and the Mystical Revision of Menahem Mendel Schneerson* (New York: Columbia University Press, 2009) at 261-262

which one adheres voluntarily".[97] The concept that belief is not dispositive of a religion was cemented during this time period as well, as "the very notion of heresy was…rejected [and therefore] [t]here is now virtually no way that a Jew can stop being a Jew."[98]

By contrast, Batnitzky argues that Judaism only started having to consider itself in this fashion once Jewish emancipation began in Christian countries.[99] Specifically, she identifies many arguments regarding Judaism and its religious nature as products of Germany in the 19th and early 20th century, as emancipation in Prussia spurred Jewish thinkers to "[use] German culture to refigure Judaism and Jewish culture in light of the modern era"[100].

Rabbi Samson Raphael Hirsch, a leader of the Orthodox Jewish community in Frankfurt, specifically distinguished Judaism from what he perceived as the existing conception of religion in Germany. He defined Judaism as an all-encompassing endeavour, stating "Judaism is not a mere adjunct to life: it comprises all of life. To be a Jew is not a mere part, it is the sum total of our task in life."[101]

Batnitzky argues that in practice, many of Hirsch's writings generally indicate an internalization of belief requirements in religion. Specifically, she cites Hirsch's emphasis on the "necessity of correct belief"[102] and the idea that "membership in the Jewish congregation is predicated on voluntary belief"[103]. However, it could be argued that Hirsch's approach here was more structured around his personal thoughts

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[97] Daniel Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (Philadelphia: University of Pennsylvania Press, 2004) at 224

[98] Ibid

[99] Leora Batnitzky, *How Judaism Became a Religion* (Princeton: Princeton University Press, 2011) at 5

[100] Ibid at 32

[101] Samson Raphael Hirsch, "Religion Allied to Progress", in *Collected Writings of Rabbi Samson Raphael Hirsch* (New York: Feldheim Publishers, 1995) at 122

[102] Batnitzky supra note 99 at 42

[103] Ibid

or attitude as opposed to what he perceived to be the Jewish religious point of view, as he felt himself to be fighting against Reform's influence in his community.

Rabbi Joseph B. Soloveitchik, the leader of Modern Orthodox Judaism in North America during much of the twentieth century, acted similarly concerning the *Rufeisen* case in Israel[104]. A Jewish convert to Christianity wished to avail himself of Israel's Law of Return, whereby any Jewish person is able to immigrate to Israel and gain citizenship. The Chief Rabbinate took the *halachic*[105] position that he should be able to do so, as conversion to another religion is not deemed to remove a person's Judaism. However, Soloveitchik stated that he believed the Rabbinate should have taken the "emotional" position that he should not be considered a Jew.[106] As he notes, "when someone has turned his back on his people", he would not consider them a Jew from an emotional perspective even though they may remain one *halachically*.[107]

Similarly, some statements of belief have gained common acceptance within the Orthodox community. The most famous of these are Maimonides' Thirteen Principles of Faith, which encompass topics such as belief in G-d's omnipotence and omnipresence, in the Five Books of Moses being Divinely authored, in and the future coming of the Messianic Age.[108] These particular beliefs are therefore commonly seen as integral to Orthodox Judaism. One who does not subscribe to them may no longer be considered Orthodox by others, regardless of their own self-conception. It should be noted, though, that Orthodox Judaism still regards a Jewish person who rejects any of these tenets as being Jewish.

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[104] *Rufeisen v Minister of the Interior,* HCJ 72/62, 16 PD 2428 [1962] [*Rufeisen*]

[105] *Halacha* or *halakha* (literally translated as "the way to walk") refers to Jewish law as set out in the Hebrew Bible, Talmud and various rabbinic writings

[106] Nathaniel Helfgot, ed, *Community, Covenant and Commitment: Selected Letter and Communications of Rabbi Joseph B. Soloveitchik* (Jersey City: Ktav Publishing House, 2005) at 220-221

[107] Ibid at 220

[108] Rabbi Moses Maimonides, Commentary on the *Mishnah*, Tractate *Sanhedrin*, Chapter 10

Batnitzky argues that many of the great early thinkers of some of the more liberal streams of Judaism, specifically Reform Judaism, in fact actively sought to define Judaism as a religion in the contemporary understanding of the time. She cites Abraham Geiger, "the intellectual founder of the reform movement"[109], who she describes as arguing that Judaism is a religion that "ushered the monotheistic worldview into human history".[110] As a result, much of his focus on Judaism is the belief system that it brought into the world.

However, in practice, Reform Judaism has not fully embraced the conception of Judaism being a choice. Within Reform Judaism, the child of two Jewish parents is still considered to be Jewish unconditionally, without any sort of belief requirement or ritual required. Certain authorities within the movement have stipulated that the child of one Jewish parent should be considered Jewish only if they choose to practice Judaism[111], regardless of whether the Jewish parent is their mother or father. However, this stipulation is structured as the child having a "presumption of Jewish descent"[112], and the nature of the Jewish practice is left undefined and to the discretion of congregational rabbis. Conservative Judaism, the other major liberal stream of Judaism in North America, treats matrilineal descent as definitive in the same manner as Orthodox Judaism[113].

[109] Batnitzky supra note 99 at 36

[110] Ibid

[111] Central Conference of American Rabbis, "The Status of Children of Mixed Marriages", adopted March 15, 1983, online: <www.ccarnet.org>

[112] Ibid

[113] Rabbis Joel Roth and Akiba Lubow, "A Standard of Rabbinic Practice Regarding Determination of Jewish Identity" (1988), online: <https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20012004/31.pdf>

2. Community Focus

Judaism tends to treat itself as community-focused rather than individual and personal. Traditional sources set out that "all of Israel are responsible for one another"[114]. As well, *halachically* many prayers and ceremonies require a *minyan*, a quorum of ten adult men[115] and cannot be conducted by an individual. Additionally, as noted above, the Babylonian Talmud states that the souls of all Jews were at Mount Sinai.[116] This passage helps show the importance of community within Judaism. The Talmud emphasizes the idea that only those who were part of this shared experience and are therefore already part of the community are meant to be Jewish.

In a similar vein, Batnitzky cites Heinrich Graetz, commonly considered one of the fathers of modern Conservative Judaism, as one who clearly rejects the conception of Judaism having any connection with the individual: "…Judaism, in the strict sense of the word, is not even a religion – if one understands thereby the relationship of a man to his creator and his hopes for earthly existence – but rather a constitution for a body politic."[117] Graetz understands Judaism to be more concerned with how a community should act than with an individual's relationship with G-d.

B. Court Treatments of Jewish Understanding

1. Conflicts

The traditional Jewish understandings have sometimes come into conflict with the court's understanding of religion. In *Adler*, as mentioned, religion being a choice was deemed integral to the issue

[114] *Shevuot* supra note 95

[115] Liberal streams of Judaism typically include the option of counting women in a *minyan* as well.

[116] *Shevuot* supra note 95

[117] Heinrich Graetz, "The Structure of Jewish History," in *The Structure of Jewish History*, trans Ismar Schorsch (New York: Jewish Theological Seminary of America, 1975) at 70, cited by Batnitzky supra note 99 at 45

in Justice Sopinka's opinion and played a large background role in that of Justice McLachlin. This conception was not shared by the parents. Judaism, as noted, treats lineage as definitive, while the Christian Reformed parents were "traditionally strict and traditional Calvinists, who continue to subscribe to the doctrine of supralapsarian, double predestination"[118]. That is to say, the parties viewed religion "as a condition into which a person is called or born"[119] and would have intensely disagreed with the justices' understanding there.

A more obvious conflict manifested itself in a British case before the UKSC, *R (E) v Governing Body of JFS*[120]. The Jewish Free School (JFS) was sued on behalf of the father of a student who claimed that his son had been discriminated against in their admissions policies. The school subscribed to Orthodox Jewish definitions concerning Jewish status and prioritized students that fit these definitions. As the student's mother had converted to Judaism in a non-Orthodox manner, JFS did not recognize him as being Jewish and so did not accept him into the school. Lady Hale, as part of the majority, noted that there was no religious discrimination as the Court would have understood it. Notably, she entirely equated religion with belief, stating:

> "It was not because of his religious beliefs. The school was completely indifferent to these. They admit pupils who practise all denominations of Judaism, or none at all, or even other religions entirely, as long as they are halachically Jewish, descended from the original Jewish people in the matrilineal line."[121]

The majority there found that the rejection did constitute racial discrimination, with concurrences disagreeing as to whether it was direct or indirect discrimination. As a result of the decision, JFS was

[118] Ogilvie supra note 44 at 87

[119] Ibid

[120] [2009] UKSC 15

[121] Ibid at para 66

forced to adopt criteria pertaining to religious practice which included "synagogue attendance, Jewish education and/or family communal activity"[122].

The implications of this line of reasoning were clear to Lord Brown in the dissent. He stated there that he could not agree with "the imposition of a test for admission to an Orthodox Jewish school which is not Judaism's own test and which requires a focus…on outward acts of religious practice and declarations of faith, ignoring whether the child is or is not Jewish as defined by Orthodox Jewish law".[123]

Petty notes that this decision showed that "for a majority of the [UKSC], religion is not just something that can be separated from ethnicity, but also *ought* to be separate from it because religion, properly understood, is an individual matter of faith and faith alone"[124].

2. Compatibility

There have been times, though, where courts have recognized or given credence to these alternative religious understandings. For example, in *Amselem*, despite the SCC's conclusion that individual belief was paramount as part of the sincerity test, as discussed above, there was a recognition by the Court that there were traditional doctrines of Jewish law to consult. Indeed, while the majority does not dwell on it, the fact that a rabbi presented a *halachic* justification for Mr. Amselem's position that he believed he required a personal *succah* despite this not necessarily being the majority position in Jewish law seems to have proven at least somewhat compelling. As Justice Iacobucci stated for the majority:

> As expounded upon by Rabbi Ohana, according to Jewish law the obligation of "dwelling" must be complied with festively and joyously, without causing distress to the individual. Great distress, such as that caused by inclement weather, extreme cold or, in this case, the extreme unpleasantness rendered by forced relocation to a communal succah, with all attendant ramifications, for the entire nine-day period would not only preclude the acknowledged obligation of dwelling in a succah but

[122] Ibid at para 50

[123] Ibid at para 258

[124] Aaron R Petty, "'Faith, However Defined': Reassessing JFS and the Judicial Conception of 'Religion'" (2014) 6 Elon Law Review 117 at 148

> would also render voluntary compliance wrongful and inappropriate, thus necessitating the setting up of a private succah. In light of our test for freedom of religion, such expert testimony, although not required, would in my view certainly support a positive finding of sincerity and honesty of the appellants' belief. As a result, all of the appellants have, in my opinion, successfully implicated freedom of religion.[125]

Courts may also take more stock of a community-focused view of religion when the case does not strictly deal with freedom of religion, but rather looks at the effects of a tort or breach of contract affecting religion. For example, *Bruker v. Marcovitz*[126] involved a husband who had refused to grant his wife a Jewish divorce for fifteen years. In Orthodox Judaism, a woman who does not receive a *halachic* divorce is still deemed married to her husband, and any children she may have would be deemed children of adultery and would have serious stigmas within the religious community.

In *Bruker*, the husband had agreed to appear before a *beis din*[127] to provide the divorce document as part of the parties' separation agreement. As a result, the majority of the justices deemed it appropriate to provide the wife with damages due to his refusal. As well, in assessing the damages, part of their consideration was the problems his refusal had caused her in being unable to remarry or bear children within her religious community. The SCC did discuss public policy considerations as well in encouraging religious divorce when civil divorce has occurred, in order to allow freedom of all citizens to remarry without issue.[128] However, the Court's assessment of the damages, wherein her loss due to her ex-husband's breach is set out as "the ability for 15 years to marry or have children in accordance with her religious beliefs"[129], shows that her damages were seen as purely religious and community-focused in nature.

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[125] *Amselem* supra note 13 at para 73

[126] 2007 SCC 54 [*Bruker*]

[127] Jewish court of law

[128] *Bruker* supra note 126 at para 63

[129] Ibid at para 97

Another example of this sort of approach can be seen in the US Supreme Court's approach in the case of *Wisconsin v. Yoder*[130]. In that case, Old Order Amish parents challenged the state's compulsory education law, wherein students had to remain in school through the age of sixteen. They sought to withdraw their children from public schools prior to high school, arguing that "the values they teach [in high school] are in marked variance with Amish values and the Amish way of life" and that this is a period when "the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife"[131]. The USSC here found in favour of the parents, and deemed the compulsory education law to be a violation of their freedom of religion.

More significantly, though, the USSC here adopted a communitarian view of religion in its findings. The majority called the Old Order Amish way of life "one of deep religious conviction, shared by an organized group, and intimately related to daily living" and that "[t]heir way of life in a church-oriented community, separated from the outside world and 'worldly' influences, their attachment to nature, and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform".[132] As a result, the Court found that the statute had the effect of "undermining the Amish community and religious practice as they exist today" which it termed to be an "objective danger to the free exercise of religion".[133]

This is despite the fact that, as Justice Douglas notes in his dissent, the USSC had dismissed important potential autonomy issues concerning the Amish children. As he states:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred

[130] 406 US 205 (1972) (USSC) [*Yoder*]

[131] Ibid at 211

[132] *Yoder* supra note 130 at 216-217

[133] Ibid at 218

> from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him, and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.[134]

As such, this is a rare occasion where a court subscribed to a definition of religion that fell much closer within the range of the Jewish one, where community takes priority over autonomy.

C. Conclusion

The Orthodox Jewish perspective on religion can be difficult to pin down, but tends to involve a view of religion as a communal duty that is not based on belief. Many aspects of this view are shared by other practitioners of other religions. This perspective often conflicts with judicial understandings of religion, although occasionally there can be harmony, particularly when courts are not specifically dealing with freedom of religion. However, the typical judicial trend seems to be disagreement due to the generally opposing perspective of religion held by the courts.

Part III: Israel

Israel does not have a constitution. However, the Israeli Parliament, the *Knesset*, has passed several laws known as the Basic Laws concerning rights, the composition of various governmental bodies and the like. These Basic Laws, despite requiring only a simple majority vote in the *Knesset* to overturn, have been deemed to have quasi-constitutional status by the Israeli Supreme Court.[135] As noted, while freedom

[134] Ibid at 245-246

[135] *Mizrahi* supra note 5

of religion is not mentioned in any of the Basic Laws, the ISC has derived it from the right to dignity[136], which is set out in the *Basic Law: Human Dignity and Liberty.*[137]

The Israeli court system is structured so that the ISC is the highest appellate court, and also sits as a court of first instance for cases concerning government decisions. It typically operates on the basis of precedent and statutory interpretation similar to other common law courts. However, the *Foundations of Law Act* sets out that "[w]here the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in light of the principles of freedom, justice, equity and peace of Israel's heritage."[138] This section of the *Act* has been interpreted to refer to Jewish law.[139] Similarly, various Basic Laws define Israel as a Jewish and democratic state[140], which phrase is not defined, leaving Israeli courts to grapple with potential contradictory influences. As a result, the importance and use of Jewish law is disputed among Israeli judges.[141]

As noted, Canadian law defines religion on the basis of autonomy, belief and individuality, and many aspects of this definition carry over into other common law regimes. Judaism, by contrast, typically defines religion as a communal duty independent from belief. I would argue that these two influences engage in a tension in Israeli jurisprudence. While the liberal influence often takes precedence, the Jewish influence manifests itself at various stages of the jurisprudence in a number of ways.

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[136] *Manning* supra note 6

[137] *Basic Law* supra note 4

[138] *Foundations of Law*, 5740-1980, 34 LSI 181 (1979–80)

[139] Freidell supra note 7 at 660

[140] See e.g. *Basic Law* supra note 4 at s 1 and *Basic Law: Freedom of Occupation* (1994) 1993-1994 SH 90 at s 2

[141] Freidell supra note 7 at 660

A. Liberal Influence

Aaron Petty has analyzed the question of the ISC's viewpoint on religion using its jurisprudence surrounding the Israeli Law of Return.[142] The Law of Return, originally passed in 1950, allows any Jew to immigrate to Israel and gain citizenship automatically, unless they present a danger to the state.[143] It does not limit itself to the *halachic* definition discussed above, as having any Jewish parent or grandparent allows a person to immigrate under the law, as well being a non-Jewish spouse of anyone defined as Jewish under this law.

In *Rufeisen*[144], a Jewish convert to Christianity named Oswald Rufeisen who had become a Catholic Friar sought to immigrate to Israel through the Law of Return. He argued that his Jewish heritage entitled him to immigrate under the law, but the ISC rejected this argument, finding that the *halachic* definition was irrelevant. Instead, "common understanding" would be most appropriate[145], and Jewish status was held to be incompatible with conversion to Christianity.

As a result, some changes were made to the Law of Return, including the provision that it would not apply to a Jew who had converted to another religion.[146] *Beresford*[147] involved a couple who were born Jewish and subscribed to the Messianic movement, also known as "Jews for Jesus". As a result, the couple engaged in many Jewish religious practices. They did not consider themselves Christians, had never converted and had not been baptized. They sought to immigrate under the Law of Return, arguing that they were considered Jewish under the law.

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[142] Aaron R Petty, "The Concept of "Religion" in the Supreme Court of Israel", (2015) 26:2 Yale J of L and Humanities 211

[143] *Law of Return*, 1950, SH 159

[144] *Rufeisen* supra note 104

[145] Petty supra note 142 at 237

[146] *Law of Return* (Amendment No 2), 5730-1970, 24 LSI 28 (1969-1970)

[147] *Beresford v Minister of the Interior*, HCJ 265/87, 43(4) PD 793 [1987] [*Beresford*]

The ISC rejected their argument in two different ways. Firstly, one opinion found that belief in Jesus's divinity precluded membership in the Jewish religion despite the Beresfords' claims.[148] In addition, another opinion found that the common understanding of membership in "another religion" would include Messianic Jews.[149] The Court stated there, "The controlling factor is the current secular conception of what it means to be a member of another religion, not whether the petitioners are apostates under Jewish law, or whether they have been formally accepted into another religion according to the norms of the other religion."[150]

These cases seem to present a situation where, as Petty puts it, the ISC ""defin[ed] membership largely, if not exclusively, on the content of beliefs, and assuming that religion and nationality are separable."[151] As well, there is a basic assumption of autonomy involved, in that a person born Jewish who converts does not qualify under the Law of Return despite *halacha* seeing them as Jewish without reservation. Thus, just as one can choose to become a Jew, one can choose to leave Judaism, despite the religious attitude to the contrary.

The Jewish understanding seems to play little part in these cases. The ISC may have been more likely to use liberally-based principles in its considerations of a seemingly illiberal law, in that it appears to favour people of a particular ethnic or religious group. As the Law of Return is somewhat fundamental to the concept of Zionism and of Israel being the Jewish state, the Court may have been inclined to try to lend it as much outside legitimacy as possible by relying on these liberal definitions of religion.

[148] Petty supra note 142 at 250

[149] Ibid at 252

[150] Ibid

[151] Ibid at 253

B. Jewish Influence

In other cases where the ISC is not specifically attempting to define religion, the Court still generally attempts to approach matters from a liberal point of view. However, the Orthodox viewpoint influences Israeli law and the ISC's freedom of religion jurisprudence in several key ways.

1. Communal Understanding of Religion

The communal understanding of religion manifests itself in various ways in the Israeli legislature and judiciary. The most obvious space where this has been documented is in the realm of family law. Israel has maintained the millet system of the Ottoman Empire from its pre-World War I status as an Ottoman territory.[152] Within the millet system, recognized religious communities have jurisdiction over certain areas of law within their communities. At minimum, the religious courts and ministries have jurisdiction over matters of family law, such as marriage and divorce, while certain religious courts also have jurisdiction over other matters. Because of this, there is no civil marriage or divorce in Israel. As a result, freedom from religion can be difficult to obtain. One is typically unable to easily leave one's religious community, and there is no option to be part of none of them. This system's continued persistence is often seen as a legacy of compromises reached upon the founding of the State of Israel, wherein the first Prime Minister, David Ben-Gurion, promised the Orthodox Jewish community jurisdiction over these matters to gain their support for the state.[153]

As well, the *Knesset* is a unicameral parliament that does not operate on a geographical system, but rather on national proportional representation. There was traditionally a very small threshold of voting percentage necessary for party status in the *Knesset*, 2% or below until 2014, and 3.25% since.[154] As a

[152] Englard supra note 8 at 196

[153] Martin Edelman, "The Rabbinical Courts in the Evolving Political Culture of Israel" (Oct 1980) 16:3 Middle Eastern Studies 145 at 147

[154] Jonathan Lis, "Israel Raises Electoral Threshold to 3.25 Percent", *Haaretz* (12 Mar 2014), online: <www.haaretz.com>

result, no party has ever held the majority of seats in the *Knesset* at once, and smaller parties often have outsize power as a result. This has historically allowed the religious Jewish community to retain this system due to the ruling party's common need to include religious parties in governing coalitions.[155]

However, there is another significant consideration within Israeli society that helps to maintain this status quo despite the restrictions on religious freedom. As discussed above in relation to *Bruker*, within Jewish law, when a married Jewish woman has a child with a Jewish man that is not her husband, the child has a stigma. They are known as a *mamzer*[156], commonly translated as "bastard". The *mamzer* is not allowed to marry into the Jewish community aside from other *mamzerim*, and future generations maintain the same stigma. As well, if a married woman does not have a religious divorce but rather only a civil divorce, she is still considered married *halachically* and her future children would be considered *mamzerim*.

There is a concern therefore that if civil divorce is allowed in Israel, the Orthodox community will no longer marry anyone from the non-Orthodox community for fear of violating the prohibition against marrying a *mamzer*. As a result, there would be the creation of essentially two separate Jewish communities and the unity of the Jewish people would suffer.

Englard notes that "[t]his argument has proven to be politically quite effective, since national unity is a rational, if not utilitarian, objective on which a large consensus exists among the parties."[157] For example, regarding one proposed bill concerning civil marriage, "Prime Minister Golda Meir explicitly raised the spectre of the permanent division of Israeli Jews. The measure, she said, would tend to create two kinds of Jewish citizens – one religious, one non-religious – while the goal of the state must always

[155] Ibid

[156] Hebrew, plural *mamzerim*

[157] Englard supra note 8 at 202

be the unity of the Jewish people."[158] This is a clear situation within Israeli society wherein the Jewish view of religion being communal and obligatory affects the policies of the state.

The millet system is also indicative of another aspect of a communal understanding of religion that arises within the ISC's jurisprudence. The Court has a history of deeming laws to be constitutional even if they treat members of different religious groups differently, as long as there are not differences in treatment within the religious group in ways that would violate equality measures. An early example of this can be seen in the case of *Yosifof v. Attorney-General*[159]. The *Knesset* had passed a law prohibiting polygamy among Jewish citizens of Israel, while allowing Muslim citizens to practice it. This law was challenged on the basis of equality. The Court there stated, "We must ask ourselves whether the men and women of the same community regarded as one unit are discriminated against"[160] and determined that this was not the case.

An additional example of this is can be seen in *Design 22*[161], wherein a law concerning days off for workers that distinguished between workers of different religions was challenged as unconstitutional. Again, the ISC found that distinguishing between different religions was not problematic.[162] This case will be discussed in greater detail below.

2. Religious Feelings

There is a general doctrine surrounding the importance of the feelings of religious people in matters of freedom of religion or freedom from religion.[163] This doctrine is connected with the communal

[158] Edelman supra note 153 at 158, citing former Prime Minister Golda Meir (1969-1974)

[159] Cr A 112/50, found in *Selected Judgments of the Supreme Court of Israel*, Vol. 1, 1948-1953, ed by E David Goitein (Jerusalem: The Ministry of Justice, 1962) at 174

[160] Ibid at para 18

[161] *Design 22 Shark Deluxe Furniture Ltd v Rosenzweig*, HCJ 5026/04, [2005] (1) Isr L Rep 340

[162] Ibid at 358-361

[163] *Horev v Minister of Transportation*, HCJ 5016/96, [1997] Isr L Rep 149 at 186 [*Horev*]

understanding of religion, as well as with the concept that religion is a duty. As a result, one common consideration during freedom of religion cases is the offence that will be taken by the religious community if a thing is allowed or prohibited. The ISC has stated, for example, that placing a cross on a gravestone in a Jewish cemetery would be offensive and unjustifiable, despite this being a limitation on religious expression by the deceased.[164] As well, in cases where the rights of the secular are sought to be limited by religious considerations, the feelings of religious people are part of the balancing act. Religion is thus deemed to fall not only within the individual purview, but rather to affect and be affected by non-practitioners as well. There also appears to be an understanding of religious feelings as being involuntary and therefore requiring consideration by others.

The ISC, in setting out the concept of protection of religious feelings, discussed a number of cases where offences to religious sensibilities were relevant considerations in either administrative decisions or in limiting freedoms like freedom of expression. These were justified on the basis of tolerance in a multicultural and diverse society, or based on pragmatic concerns of "public security".[165] While emphasising that "religious coercion" was inappropriate,[166] accounting for religious feelings and considerations was found to be justified under a number of circumstances. Religious sensibilities are regarded as a relevant part of the "balancing" conducted by the ISC, although they are officially considered on a lower level than human rights. As the ISC puts it, religious feelings are to be "balanced 'horizontally' against other values that also constitute a public interest and balanced 'vertically' against other human rights".[167]

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[164] *Shavit v Rishon Letzion Jewish Burial Society*, (1999) CA 6024/97, [1998-9] Isr L Rep 259 at 270 [*Shavit*]

[165] *Horev* supra note 163 at 185

[166] Ibid at 183

[167] Ibid at 189

However, it appears that a sufficiently strong offence to religious feelings will be enough to offset a limitation on a human right if the offence to that right is deemed sufficiently minor. For example, the ISC considers freedom of movement to be "a basic right" and a constitutional right that is derived from the right to dignity.[168] Even so, "safeguarding religious feelings and the observant lifestyle constitutes a proper purpose"[169] to limit freedom of movement, particularly when the offence to religious feelings is "severe, grave and serious".[170]

The ISC has specified that when it comes to the protection of feelings, "religious feelings are given the relatively broadest protection in view of the special status of the freedom of religion".[171] This is in contrast to other offences to feelings. As the Court states:

"[A]n injury to feelings, even if it is acute and painful, which derives from a distorted or even untruthful depiction of events that occurred, is not given strong protection, since the basic values of our legal system require the development of tolerance and being able to stand firm against opposing and even untruthful views."[172]

3. Use of Traditional Jewish Sources

The ISC has attempted to use traditional sources in order to give decisions concerning Jewish law some manner of rabbinic imprimatur, even if the decisions were opposed by the Israeli rabbinical establishment. For example, *Raskin v. Religious Council of Jerusalem*[173], a belly dancer sued the

[168] Ibid at 212

[169] Ibid at 227

[170] Ibid at 203

[171] *SHIN v Council for Cable TV and Satellite Broadcasting*, HCJ 5432/03, [2004] Isr L Rep 20 at 38

[172] Ibid

[173] (1990) HCJ 465/89 [*Raskin*], online: <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Raskin%20v.%20Religious%20Council%20of%20Jerusalem.pdf>

Religious Council because she discovered that institutions refused to have her perform at events for fear that the Council would revoke their *kosher* certification due to her "immodest" performances.[174] The Court found in favour of the plaintiff, determining that the Council had overstepped its boundaries.[175] One concurrence, though, also made a point of quoting contemporary Orthodox rabbis (describing one, for example, as "one of the great deciders of Jewish law in our generation"[176]) to justify the ISC's decision. Despite the ISC's assertion that "this consideration is brought forth as an afterthought, as our decision is binding by the force of judicial exegesis"[177], there is still an attempt to justify the decision using *halacha*.

Similarly, in *The Conservative Movement v. Beer Sheva Religious Council*[178], the ISC denied the Religious Council the ability to prevent non-Orthodox converts from using the *mikvah*[179]. The ISC discussed pluralism within Judaism using Orthodox Jewish sources in an attempt to show that Jewish law would not be in favour of "uniformity of thought".[180] One justice noted that the Talmudic statement that "'[t]he opinions of the individual were only recorded among those of the majority because the time may come when they may be needed and they will be relied upon,'…preceded John Stuart Mill's 'marketplace of ideas' (On Liberty (1859)) as a means for seeking the truth by nearly two-thousand years."[181] This is a clear attempt to connect Talmudic thought to modern liberal thought. We see here that the Court will

[174] Ibid (judgment of Tal-Or J) at para 3

[175] Ibid (judgment of Tal-Or J) at para 18

[176] Ibid (concurrence of Bach J) at para 3

[177] Ibid

[178] A *mikvah* is a ritual bath; traditionally, converts to Judaism immerse in one as one of the final steps of the conversion, and it also plays a role in family life

[179] (2016) AAA 5875/10, online: <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/The%20Conservative%20Movement%20v.%20Be%27er%20Sheva%20Religious%20Council.pdf> [*Conservative Movement*]

[180] Ibid (Judgment of Rubinstein J) at para U

[181] Ibid

attempt to justify "liberal" decisions that are pluralistic or limit religious discretion with traditional Jewish sources while at the same time trying to correlate the sources with liberal concepts.

C. How the ISC's Conception of Religion Has Manifested in Decisions

Because of the existence of the state religious infrastructure, the ISC tends to consider more "Establishment" cases than freedom of expression cases. The influence of the Orthodox conception of religion typically means that local communal factors have a far greater influence on the ISC's decisions than one sees from the SCC. As well, the state's duty of neutrality appears to be correspondingly lessened under many circumstances.

1. Selected "Establishment" Cases

a. Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig

In *Design 22*[182], the *Hours of Work and Rest Law*[183] was challenged as unconstitutional. The law, with some exceptions, required employers to give Jewish workers the Sabbath as a day off, while non-Jewish workers could choose "the Sabbath or Sunday or Friday, all of which in accordance with what is acceptable to him as his day of weekly rest".[184] The ISC accepted the argument by the respondent ministry that the law served a social purpose. Importantly, the ministry also argued that the law served a "national religious purpose", and the Court accepted that this was a proper purpose for the law as well.[185] The ISC stated, "[This law] is mindful of the feelings of the religious public in Israel. It gives expression to the national ties that bind us together as one people."[186]

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[182] *Design 22* supra note 161

[183] *Hours of Work and Rest Law, 5711-1951*, 5 LSI 125 (1950-1951)

[184] Ibid at s 7(b)

[185] *Design 22* supra note 161 at 362

[186] Ibid at 364

Interestingly, the ISC draws a parallel to the Canadian *Edward Books* case[187], wherein, as noted above, an Ontario law setting out Sunday as an official day of rest for workers was held to be constitutional by the Supreme Court of Canada. There are some significant distinctions that one can draw between the two cases, however. For one thing, in *Edward Books* the finding was that the social benefit outweighed the religious issue, while the ISC here found that the social and national-religious aspects of the law combined to give it a greater purpose.[188] As well, the Ontario law set out one particular day as the day of rest, not differentiating between different ethnicities or religions. The ISC in *Design 22* does acknowledge the potential issue of religious coercion of Jews who cannot decide under the law to have their day of rest fall on a different day than the Sabbath. However, it dismisses this argument, stating that this law "is an expression of the values of the State of Israel as a Jewish state".[189]

Despite finding that the national-religious purpose is proper, the ISC does attempt to justify its decision using liberal principles as well. One concurrence describes the Sabbath as "a national treasure of the Jewish people that should be observed in the Jewish community", emphasizing that "the law leaves the social aspect of the day of rest open to be shaped in accordance with the variety of different lifestyles and tastes in the many sectors of Israeli society".[190] This is essentially a corollary to *Raskin* and *Conservative Movement* discussed previously. Even in a situation where the Jewish religious outlook is found to hold sway, some acknowledgment of liberal attitudes is seen as necessary.

[187] *Edward Books* supra note 66

[188] *Design 22* supra note 161 at 363

[189] Ibid at 365

[190] Ibid at 372

b. Horev v. Minister of Transportation

In *Horev*[191], the Minister of Transportation determined that a part of Bar-Ilan Street in Jerusalem should be closed during "prayer times" on the Sabbath and during Jewish festivals. The neighbourhood was primarily Orthodox or ultra-Orthodox, and several side streets within the neighbourhood were already closed to traffic, although Bar-Ilan Street is deemed a major arterial road. Driving on the Sabbath or festivals is typically not allowed in the Orthodox community, with some exceptions for emergencies and the like. However, a petition was brought by several secular residents of the neighbourhood that the closure negatively affected their freedom of movement.

The ISC ultimately determined that the decision should be struck down and reconsidered by the Minister, mostly because there was no evidence that the Minister had considered the concerns of the local secular population.[192] Significantly though, the ISC did not determine that closing streets would never be justified, despite the potential issue of an imposition of religious behaviour on secular residents. The Court found that the community's needs were a very significant factor, and noted that it would have allowed the street's closing on the Sabbath without question had there been evidence that the needs of secular residents had been considered. This was because "severe, grave and serious harm to a religious Jew observing the Sabbath ensues upon encountering traffic on one's way to synagogue or to a Torah institute"[193]. Local conditions were integral to the ISC's considerations, as "the excessive harm to religious feelings here is a result of the fact that Bar-Ilan Street is situated in the heart of the Ultra-Orthodox neighborhoods"[194].

There was a strong dissent as well by one justice, Justice Tzvi Tal, who would have extended the ban on driving on that section of road to the entirety of the Sabbath and festivals. To him, the feelings of

[191] *Horev* supra note 163

[192] Ibid at 246-247

[193] Ibid at 225

[194] Ibid

the religious residents were paramount and far outweighed the concerns of any secular residents. Parts of his judgment structure religious obligations in a fairly universal manner, befitting the Orthodox Jewish viewpoint. He describes the Sabbath as being "an almost absolute obligation upon the Jewish people" and calls the case a "confrontation…between a slight impingement upon the freedom of movement and that of a mortal wounding of the feelings and way of life of the local population".[195]

While the ISC in *Horev* did not side with the local religious population, it made clear that local feelings were a significant factor in these sorts of decisions. Notably, as the Court emphasizes, "[u]nder these circumstances, the partial closure of the street during prayer times on the Sabbath, as per the Minister's decision, strikes an appropriate balance between freedom of movement and the Ultra-Orthodox local residents' religious sensibilities and observant lifestyle."[196] The offence against religious feelings was deemed to be very severe, while the restriction on freedom of movement was deemed to be very minor, requiring a simple two-minute detour.[197] Practically speaking, the Court's decision confirmed the importance of religious feelings to a remarkable extent. In its final decision though, the ISC attempted to strike a compromise between the liberal and Jewish understandings, allowing communal considerations to outweigh a fundamental freedom, but only at the most religiously oriented times.

c. Solodkin v. Beit Shemesh Municipality

In *Solodkin*[198], petitioners challenged local by-laws prohibiting the sale of pork outside of designated areas of municipalities. The constitutionality of these types of by-laws was challenged on the basis of potential financial hardship as well as religious coercion. In this case, like in *Horev*, the ISC held that municipal laws restricting the sale of pork would be appropriate if the local authorities properly

[195] Ibid at 378

[196] Ibid at 246

[197] Ibid at 172

[198] *Solodkin v Beit Shemesh Municipality*, HCJ 953/01, [2004] Isr L Rep 232

balanced the competing interests within their municipalities and could show that they had done so. Similar to *Design* 22, the restriction on pork was also given a national purpose, which the Court describes as "arising from the traumatic events in Jewish history connected with pigs, which have made it a kind of symbol".[199] Thus, a religious restriction was given a more over-arching communal purview.

The examples of events from Jewish history which the ISC uses to illustrate this point are clearly religious in nature. To wit, the Court describes the Talmudic account of the siege of Jerusalem by the Romans. The besieged defenders of the city would lower money in a basket each day, and the Romans would send up a kosher animal in the basket for the daily Temple sacrifice. One day, the Roman decided to send up a pig instead, and in the Talmudic language, "[w]hen it reached halfway up the wall, it dug its hooves into the wall, and the land of Israel trembled over an area of four hundred parasangs by four hundred parasangs".[200]

The ISC also discusses accounts of people refusing to consume pork and being put to death as a result, such as the story of Hannah and her sons from the book of *Maccabees 2.*[201] The Court notes that "enemies of the Jewish people throughout the generations made use of the pig as a part of the persecutions and humiliations of Jews"[202]. The pig is therefore "closely connected with the Roman conquest and the loss of independence" "the disgust at the consumption of pig meat is engraved deep in the national consciousness of the Jewish people".[203] Importantly though, each of these examples is based on religious practices. If pigs were used to persecute the Jews, the examples given show this was only due to the religious prohibition against consumption. Nevertheless, the Court ultimately emphasised that these laws

[199] Ibid at 241

[200] Ibid at 245 citing Babylonian Talmud, *Menahot*, 64b

[201] Ibid at 245

[202] Ibid

[203] Ibid

took into account "religious and national sensibilities"[204], despite the two being seemingly one and the same in this case. Despite the explicitly religious nature of these by-laws, they are assumed to be proper if the local community feelings outweigh the potential economic or violations of freedom of occupation.

Horev and *Solodkin* both show the ISC's recognition of the religious feelings of a community as a significant factor in cases dealing with freedom of religion. Yishai Blank notes that municipalities in Israel have significant powers in restricting or allowing religious or secular conduct, like determining where stores can be open on the Sabbath or the examples above. He describes this as a localization of religion[205]. This appears to reflect a juridical and legislative understanding that religious attitudes are not as simple as individual choice and that community attitudes and strictures play a larger role.

d. Shavit v. Rishon Letzion Jewish Burial Society

In *Shavit*[206], a Jewish municipal burial society refused a request to include English dates on a gravestone alongside Jewish dates. A panel of three justices of the ISC heard the case. Two of the justices found in favour of the petitioners and ordered the society to allow the English dates on the basis that refusing it constituted "religious coercion"[207]. The dissenting justice, by contrast, emphasized the local nature of the conflict, as "the Jewish burial society must act according to Jewish law as ruled by the local rabbinic authority" and that "forcing the body to transgress religious law cannot be the correct solution in a democratic country that respects freedom of religion."[208] In this case, a conception of religion as a choice prevailed over the conception of religion as a duty. The personal nature of the request seems to have

[204] Ibid at 247

[205] Yishai Blank, "Localizing Religion in a Jewish State" (2012) 45 Isr L Rev 291

[206] *Shavit* supra note 164

[207] Ibid at 327

[208] Ibid at 318

played a significant role for the majority, lending it more towards the liberal understanding than an Orthodox one.

The language used by both sides, though, is quite heated. The dissenting justice discusses the Talmudic discussion of giving up one's life to avoid violating certain commandments to emphasize the strong feelings involved in this sort of issue[209], and decries the situation when conflicts in Israeli society cannot at least be set aside upon death.[210] Meanwhile one of the justices of the majority stated, "I would be surprised if there is another nation or language that occupies itself so passionately and intensively with the issue of what should be inscribed on gravestones; occupies itself continuously, and yet cannot settle on a standard."[211]

As a side point, the dissent here touches on one other assumption previously seen in the SCC's decision in *Wilson Colony*, that certain choices in religion are more or less fundamental than others. It notes that while there are situations where compromise is possible, the Babylonian Talmud states that there are certain situations where the command to violate a precept as minor as changing the way one ties one's shoes can require a person to be killed rather than violate it[212]. Religious viewpoints often maintain a sense of the centrality of an issue that profoundly disagrees with the impressions of an outsider.

2. Selected Freedom of Religion Case

a. Sela v. Yehieli

Sela v. Yehieli[213] is a rare Israeli case that deals with a limitation on religious practice by a local government. In this case, the local council had previously agreed to build a *mikvah*, a ritual bath, in the

[209] Ibid at 301

[210] Ibid at 300

[211] Ibid at 264

[212] Ibid at 301, citing Babylonia Talmud, *Sanhedrin*, 74a-b

[213] AAA 662/11 (2014), online: <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Sela%20v.%20Yehieli_0.pdf>

community, but later determined it was a low priority and would not set land aside for it. The ISC found that the council's method of decision was improper. It deemed the budgetary considerations to be minor and determined that the council had not taken into account the significant difficulties this decision would have upon the religiously observant women in the community.[214] The Court found that there would be significant harm to the religiously observant women who needed to use the *mikvah* during the Sabbath or festivals, as they would be unable to do so.[215]

Significantly, the ISC here did not seem to take local considerations into account to a great degree. Indeed, it seems that a local council attempting to "[preserve] the secular character of the town"[216] would be deemed improper. The council denied the charge that this was their intention and the Court declined to consider this issue. However, the language that the Court uses would seem to indicate a displeasure with the idea that was not seen concerning religious communities. To wit, the ISC states that assuming the council was not trying to preserve the secular character is "to the Respondent's benefit"[217], implying that an intention to do so would be to the detriment of the council's case. It appears that while religious feelings are a relevant concern, secular feelings do not rise to that level in the ISC's jurisprudence. Religious practice may be seen as a communal concern, while lack of religion is seen in the liberal sense as an individual concern.

D. Conclusion

. The tension between the two conceptions of religion that influence the ISC can lead to fairly unique jurisprudence. Genuinely attempting to make synthesis between an Orthodox viewpoint and a liberal

[214] Ibid at para 21

[215] Ibid at para 28

[216] Ibid at para 31

[217] Ibid

viewpoint leads to doctrines like the consideration of religious feelings and localization of religion. It can also lead to a form of lip service towards one viewpoint while favouring the other, as often occurs when the Court attempts to justify liberal decisions with Jewish sources or the reverse. As well, judges may end up harshly disagreeing over which conception of religion should be emphasized in a particular case.

Part IV: Conclusion

As has been seen, the Israeli Supreme Court sometimes struggles for a consistent understanding of religion in its jurisprudence. Aspects of the liberal understanding often win out, although the Jewish understanding commonly manifests itself in decisions regardless. This is accomplished through doctrinal consideration like the importance of the feelings of religious practitioners or in localizing conflicts. Alternatively, the Orthodox understanding can be displayed quite prominently in dissenting judgments. It can be difficult to form a fully coherent understanding of the Court's vision for freedom of religion as a result. A distaste towards religious coercion and yet strong consideration for religious feelings makes it difficult to guess which direction the ISC may lean in any given judgment.

A: Liberal View of Religion's Religious Sources

Why does this tension between the understandings of religion exist in the first place? Berger notes in his discussion of the Canadian courts' perspective that the liberal understanding is one that "has deep sympathies with certain Protestant understandings".[218] While Berger discusses the influence of Protestantism in the Canadian context, similar arguments have been made by others concerning Christianity in general in many other contexts[219]. The individualized understanding of religion as a system

[218] Berger supra note 32 at 101

[219] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993)

of belief, and the resulting separation of religion into its own sphere in most Western societies, are contended to be connected inextricably with Christianity. Beamon notes assertions that "the very concept of religion is embedded in Western and Christian ideas about the possibility of separating everyday belief/action as an analytical and conceptual category"[220]. As Talal Asad states, "[i]t is preeminently the Christian church that has occupied itself with identifying, cultivating and testing belief as a verbalizable inner condition of true religion"[221].

Boyarin traces this definition back to the same point where he argues that the Jewish approach to religion came into focus, around the beginning of the first millennium of the Common Era when Christianity and Rabbinic Judaism were determining their boundaries and differences[222]. Batnitzky focuses on the Protestant approach specifically, wherein "religion denotes a spehere of life separate and distinct from all others, and that this sphere is largely private and not public, voluntary and not compulsory"[223]. Whether the approach by the courts has its roots in more general Christianity or in more specific Protestantism, it is important to approach and acknowledge these origins to understand why some religions and practices come into conflict with the law more than others.

If this is the case, then Israel, which identifies itself as a Jewish country and has a significant Muslim minority population, would end up facing considerably more religious views in tension with this liberal understanding than would a country like Canada, where most of the population identifies as either Christian or non-religious. Israel may therefore have a considerable motivation to attempt a greater synthesis between these views so that the citizenry does not feel alienated from the law and courts.

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[220] Lori G. Beamon, "Defining Religion: The Promise and the Peril of Legal Interpretation", in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 192 at 196

[221] Asad supra note 219 at 48

[222] Boyarin supra note 97 at 224-225

[223] Batnitzky supra note 99 at 13

B. Can Other Countries Take Lessons from the Israeli Experience?

There may be aspects of Israeli jurisprudence that can therefore inform other countries as to methods by which they too can approach religious understandings. While the concept of communal considerations may go too far in limiting freedom from religion for most liberal democracies, it could for example could be used to better inform jurisprudence concerning religious enclaves. A case like *Wilson Colony* would have been decided differently had the SCC actually fully taken into account the nature of the issue of photography for the Hutterian Brethren. Similarly, consideration of religious feelings, if put at a much lower level of balancing than exists in Israeli jurisprudence, could at least give religious complainants a sense that their concerns are being acknowledged by the courts.

In the end, avoiding alienation of religious views while also maintaining state neutrality and eschewing religious coercion can be a difficult needle to thread, and as a result, countries like Canada under most circumstances embrace the liberal conception of religion. Israeli jurisprudence is at least attempting to address these difficulties, imperfectly though it may be. While a true synthesis of the two understandings of religion may be ultimately impossible due to their contradictory nature, there may be areas where they can find agreement and allow religious citizens to be better accommodated by secular culture.