Reprinted from **ISRAEL LAW REVIEW,** *Volume 17, Number 3, July 1982*

JURISDICTION AND HOLINESS:

REFLECTIONS ON THE COPTIC-ETHIOPIAN CASE

*By Walter Zander**

Part One: **The Case**

Changing Principles of Jurisdiction

The Coptic-Ethiopian case[1] is the first dispute between Christian Churches over their rights in the Holy Places to come before the Supreme Court of Israel. It concerns only a small area, but the legal issues involved are far-reaching. They deal with the jurisdiction over Holy Sites, and therefore affect potentially all Christian communities which claim rights in the Sanctuaries.

The history of the jurisdiction over the Holy Places is dramatic and rich in contradictions.[2] For many centuries control over the Sanctuaries was in the hands of Moslem rulers who decided disputes according to their discretion. In view of the widespread impact of these decisions on the Christian world as a whole, the tendency gradually developed to avoid all changes, and in 1878 the Treaty of Berlin suspended every jurisdiction by its Art. LXII which prescribed "that no alteration can be made in the *status quo* in the Holy Places".

At the end of the first World War a diametrically opposed tendency gained the upper hand. This approach aimed at a general examination "once and for all of all controversies which have taken place throughout the centuries between the different Christian communities in the Holy Places".[3] The result of these efforts was Article 14 of the Mandate for Palestine: "A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine...". However, no agreement about the composition of this commission could be reached and Art. 14 never became operative.

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1 *The Coptic Patriarchate* v. *The Minister of Police* (1971) (I) 25 P.D. 225; *The Coptic Patriarchate* v. *The Government of Israel* (1979) (I) 33 P.D. 225.

2 See W. Zander,"On the Settlement of Disputes About the Christian Holy Places"(1973) 8 Is.L.R. 331-61.

3 "Memoire des Latins a la Conférence de la Paix (1919)", in W. Zander, *Israel and the Holy Places of Christendom* (London, 1971) 181.

Following the discussions of this issue in the Council of the League of Nations, an unofficial suggestion was made by the Vatican to the British Government that the jurisdiction over disputes concerning the Sanctuaries should be entrusted, instead of to an International Commission, to the local courts, then consisting of British judges. The Foreign Office was interested.[4] But Sir Herbert Samuel, in his capacity as High Commissioner, voiced grave doubts; partly because of the inherent difficulties of the issues involved, partly because of "the deep interest of religious communities throughout the world in any questions concerning the Holy Places in Palestine".[5] In view of these objections the proposal was not taken up. On the contrary, the Government promulgated The Palestine (Holy Places) Order-in-Council of July 25, 1924.[6] This Order became the basic law concerning jurisdiction over the Sanctuaries. It removed the jurisdiction over Holy Places from the courts and authorised the High Commissioner to decide whether a case brought before the court concerned a Holy Place. The relevant articles of the Order read as follows:

> Article 2: Notwithstanding anything to the contrary in the Palestine Order-in-Council 1922 or in any Ordinance or law in Palestine, no cause or matter in connection with the Holy Places or religious buildings or sites in Palestine or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any Court in Palestine.
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> Article 3: If any question arises whether any cause or matter comes within the terms of the preceding article hereof, such question shall, pending the constitution of a Commission charged with jurisdiction over the matters set out in the said article, be referred to the High Commissioner, who shall decide the question after making due enquiry into the matter in accordance with such instructions as be may receive from one of His Majesty's Principal Secretaries of State. The decision of the High Commissioner shall be final and binding on all parties.7

When at the end of the Mandate, control over the area passed to Jordan, the Jordanian Government by Decree of May 24, 1948, determined that "all laws and regulations which were in effect at the end of the Mandate should remain in force ... unless they were incompatible with the Jordanian Defence Law of 1935 or any regulations or orders issued under this law". Accordingly, the Palestine (Holy Places) Order of 1924 was integrated into Jordanian Law.

Similarly Israel, immediately after the establishment of the State, had promulgated the Law and Administration Ordinance, 1948,[8] sec. 11 of which provides:

> The law which existed in Palestine on 5th Iyar (14 May 1948) shall remain in force insofar as there is nothing therein repugnant to this Ordinance or to the other Laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.

4 *Supra* n. 2 at 351 ff.

5 *Ibid*., at 353-54.

6 Drayton, *The Laws of Palestine, III,* (London, rev. ed., 1934) 2625.

7 Loc. *cit*.

8 1 L.S.I. 7.

By Amendment No. 11 of this Ordinance,[9] enacted in 1967, the law, jurisdiction and administration of the State of Israel were extended to the area which in June of that year had come under the control of the State; this area includes the Holy Places here concerned.

As is well known, the Supreme Court in *The Temple Mount Case*,[10] in a majority judgment, decided that the Palestine (Holy Places) Order, 1924, is not repugnant to any law of Israel and accordingly remained in force. The Court, however, held that the prohibition only refers to disputes about substantive rights and that the Order did "assign the handling of these matters" to the executive authority. Accordingly, in Israel Law, jurisdiction over the Holy Places is at present considered to be divided between the courts, which decide on possessory claims, and the Government, for issues of substance.

Mother and Daughter Church

The parties to the dispute are the Orthodox Coptic Archbishop of Jerusalem and the Near East, and the Orthodox Ethiopian Archbishop of Jerusalem, both representing their respective Churches.

Both Churches belong to the same communion. This - in disputes about Sanctuaries - is a rare if not unique phenomenon. Most such disputes have their origin in dogmatic differences; as, for instance, the great controversy between the Latins and the Greeks which sprang from the schism of their Churches in the 11th century. No such schism exists between the Copts and the Ethiopians. Originally the Ethiopian Church was a daughter Church of the Coptic Patriarchate of Alexandria, and their spiritual unity was never broken. Moreover the Head of the Ethiopian Church, the *Abouna*, throughout history was always an Egyptian Coptic ecclesiastic, chosen and ordained by the Coptic Patriarch of Alexandria.

In the Middle Ages both Copts and Ethiopians held important positions in the Church of the Holy Sepulchre. But in the seventeenth century the Ethiopians, in common with other, smaller communities which could not afford the exactions of the Turkish Governor, lost their hold in the Church itself. At that time the Ethiopians moved to the Monastery Deir-al-Sultan. This monastery lies to the east of the Church of the Holy Sepulchre. Partly it is even situated on the roof of one of the Church's chapels (the Chapel of St. Helena), and the roof of this chapel forms the central square of the monastery. Around the square are dwellings for monks. In addition, the monastery comprises two small chapels, the Chapel of the Four Living Creatures and the Chapel of St. Michael. They are approached from a passage which descends from the square of the monastery to the entry of the Church.

In the beginning, the use of the monastery by the Ethiopians does not appear to have created any difficulties. But in course of time a bitter conflict about it developed between the Ethiopian and Coptic communities; the Ethiopians claiming that they had acquired their rights when they were expelled from the Church, and the Copts maintaining that the monastery bad always been theirs and that they had admitted the Ethiopians merely as their guests, for reasons of charity, in their hour of need.

9 22 L.S.I. 75.

10 *Hugim Leumiyim v. Minister of Police* (1970) (II) 24 *P.D.* 141; see generally Klein, "The Temple Mount Case" (1971) 6 Is.L.R. 257.

When in the middle of the nineteenth century the principle of the *status quo* was gaining recognition in European policy, the control of the contested area was in the hands of the Copts. They held the keys and regulated access. But the Ethiopians persistently maintained that they had been deprived of their rights.

In detail, the situation appears to have been as follows: the Copts regularly used the passage for their solemn Eastern processions from their own nearby convent, over the central square of Deir-Al-Sultan, and down to the entry of the Church of the Holy Sepulchre. They did not hold any services in either of the two chapels, but one of their members daily lit the oil lamps in them.

The Ethiopians, for their part, held daily services in the Chapel of the Four Living Creatures, but not in that of St. Michael. They conducted their Easter ceremonies in the square of the monastery. Their monks lived in the dwellings round the square, under the supervision of a Coptic guardian who shared the dwellings with them. These complex arrangements show the interconnection between the two communities and at the same time indicate the authority enjoyed by the Mother Church.[11]

The continued conflict between the two Churches was repeatedly brought before the Turkish authorities. Thus an investigation was held in 1863 which confirmed the rights of the Copts. Another took place in 1889. On that occasion, as a result of an altercation, the Copts forbade the Ethiopians their *de antiquo* right of officiating in the Chapel of the Four Living Creatures. This interdict was maintained until the beginning of the present case.

During the British rule the Ethiopians took the matter up again. The Government referred them to Art. 14 of the Mandate and promised that the matter would be brought before the Special Commission envisaged in this Article, as soon as it was established.

At about that time, a movement developed in the Ethiopian Church, which was not linked to the Sanctuaries in Jerusalem, but aimed at ecclesiastical independence. From the early 19th century onwards Serbs, Greeks, Bulgars and other Christian nations of the Balkans, in their fight for national liberation from Turkish rule, had secured emancipation of their Churches from the Orthodox Patriarchate of Constantinople. Similarly, now, the Ethiopians began to strive for emancipation from the Copts. In 1929, the first Ethiopian bishops were consecrated. In 1935, Ethiopia was occupied by the Italians, and the Italian Government, as part of their struggle against Britain, tried to break the links between Ethiopia and the Coptic-Egyptian Church. In 1937, the Italian authorities proclaimed the independence of the Ethiopian Church and appointed an Ethiopian as its head. After the defeat of the Italians and the return of Emperor Haile Selassie, these measures were rescinded. But the Emperor himself took up the cause of independence of the Church. After protracted negotiations a solemn agreement was signed on July 13, 1948, which stipulated that in future “the (Ethiopian) Metropolitan will be chosen... from among the monks of the monasteries or churches from the Ethiopian episcopate”.

11 For further description of the monastery and the conflict between the two communities, see L.G.A. Gust, *The Status Quo in the Holy Places* (H.M. Stationary Office, 1922).

On June 25, 1959, a further agreement was reached by which full independence and equality were granted to the Ethiopian Church with the exception of purely dogmatic issues, which remained within the jurisdiction of the Coptic Patriarchate. On this basis, on June 29 of the same year, the Ethiopian Archbishop Basilieus was enthroned as Patriarch-Catholicos in the presence of Emperor Haile Selassie, the Egyptian Minister for Foreign Affairs and the representatives of other Christian communities. This brought the ecclesiastical conflict between the two Churches to a conclusion, but their dispute over the Holy Places continued unchanged.

After the Holy Places had passed to the control of Jordan, the Ethiopians presented a new petition, and the Government appointed a committee of investigation.

As has been seen, the Palestine (Holy Places) Order, 1924, belonged to those laws of the Mandatory era which had been integrated into the Jordanian legal system. According to Art. 2 of the Order therefore, disputes over the Sanctuaries were withdrawn from the local courts. The Committee, however, held that Art. 3 of the Order had authorised the High Commissioner to decide on substantive rights, and since the functions of the High Commissioner had been transferred to the Jordanian Government, they considered themselves empowered to deal with the matter. Accordingly they decided the issue and based their decision expressly on "the rules of Art. 3 of the Edict of the Holy Land - Palestine, July 1924", They found the Ethiopian claim justified and by a letter[12] from the Governor of East Jerusalem, dated February 22, 1961, the Monastery Deir-Al-Sultan was handed over to the Ethiopians who took possession and conducted their religious services there for some forty days.

On April 1, 1961, the Governor informed the Ethiopians that the previous decision was to be frozen for further investigations. He ordered the Ethiopians, meanwhile, to return the monastery, and they complied. The Government appointed a new committee consisting of the Governor of East Jerusalem, the Jordanian Minister of Justice, and a member of the Court of Cassation. The decision of this committee was handed down on July 7, 1962.

The new committee concentrated entirely on the issue of jurisdiction. It felt that the fundamental assumption of the first committee had been mistaken : Art. 3 of the Palestine (Holy Places) Order had never given the High Commissioner any authority to decide on substantive rights, and no such authority, therefore, could have been passed from him to the Jordanian Government. In these circumstances, the previous decision had been based on a false premise and was without validity

> In reading the English original of Art. 3 of the Palestine (Holy Places) Order, and reading it carefully, it is clear that the authority of the High Commissioner is restricted to the decision on whether or not a place is a Holy Place in the sense of Art. 2 of the Order.
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> There is nothing in the Order from which the Government could derive authority to decide on the substance of the dispute.

Accordingly the committee said there was no other solution than to maintain the *status quo,* as it had been in force since Ottoman days. In conclusion it added the following remarks:

Every attempt to investigate the origins of the dispute and to decide upon the substantive issues, will only open the doors to further controversy, complications and confusion.

Following this decision, the situation was restored to what it had been before the Ethiopians submitted their petition to the Jordanian authorities.

12 (from previous page). The decision read as follows:

"According to the decision of the council of Ministers in its session of February 12, 1961... pertinent to the dispute over the ownership of Deir-Al-Sultan in Jerusalem between the Abyssinian and Coptic communities, I submit herewith the recommendations regarding this matter for their immediate implementation by the above-mentioned communities with the knowledge that this decision is considered final and binding on both parties, who are to carry it out and conform to it in accordance with the rules of Article 3 of the Edict of the Holy Land-Palestine, July 25, 1924 and Article 2 of Regulation No. 28 (1950) and the Royal Decree issued on July 19, 1950:

l. The keys of the north gate shall be retained by the Orthodox Copts and they shall have permission to use it as a gateway to the Church of the Holy Sepulchre across the roof of the convent only during the holidays which are recognised as allowing them such a passage, and these are, The Feast of the Cross and Easter (Holy Saturday) on condition that each time the Government supervises this operation on a fixed time and under no other circumstances may the Copts use it.

2. The removal of the Coptic Monk who stays with the Abyssinians at Deir-Al-Sultan.

3. The declaration of the ownership of the Abyssinian community to Deir-Al-Sultan in its known borders which are located on the pathway to the court of the Church of the Holy Sepulchre, i.e. the Church of the Angel Michael and the Church of the Four Animals.

4. The transfer of the key of the south gate of Deir-Al-Sultan from the Copts to the Abyssinians or its retention by the Government to facilitate the first recommendations mentioned above.

5. The transfer of the key of the Church of the Angel Michael, the door of which is located on the eastern side of the public square outside the Church of the Holy Sepulchre, from the Copts to the Abyssinians.

6. Should the Copts refuse to comply with this matter, the locks of the north gate, the south gate and the west gate which is the gate of Angel Michael's Church, would be substituted by other locks by the Government and their keys would be given to the Abyssinians; however, the right of passage to the Church of the Holy Sepulchre given to the Copts only on the recognised holy days would continue as mentioned in the first clause above.

7. As for the dome of St. Helen's Church which is located in the center of the yard of Deir-Al-Sultan and around which the Abyssinian procession takes place, it is a possession of the Armenians in their capacity as the proprietors of the Church of St. Helen and they have the right to repair and improve it from the interior i.e. from the Church of St. Helen. As for the exterior, where the dome seems to be in the centre of the yard of Deir-Al-Sultan, the Government would carry out any checks and repairs that may become necessary.

Violence on Easter Night-The First Judgment

In June 1967, control over East Jerusalem passed to Israel. This time the Ethiopians did not submit a petition but took action. On Easter night, April 25, 1970, while the Coptic monks were standing in prayer in the Church of the Holy Sepulchre, the Ethiopians, assembled in the square of Deir-Al-Sultan, changed the locks of the doors to the passage and seized possession. The police, who were present in strength, did not intervene, nor did they permit the Copts, when they had been informed of the event, to approach the contested area. The attempts of the Coptic Archbishop during the night and the next two days to secure police assistance were fruitless and on April 28, three days after the incident, he submitted his first Petition to the Supreme Court. It was directed against the Minister of Police, the Minister of Religious Affairs, and the Ethiopian Archbishop. The main relief was sought against the first Respondent, namely to instruct his subordinates to enable the Petitioner and his representatives to refix the locks and restore the position as it had been on April 25, 1970 at midnight.

The decision of the Court, given on March 16, 1971, was unanimous. The judgment of Agranat P. may be summarised as follows:

> (1) The Court did not go into the question of substantive rights; firstly, because Art. 2 of the Palestine (Holy Places) Order, 1924, precluded such investigation; secondly, because the Petition was soundly based in principle without any regard to these rights. Up to the night of April 25, 1970, the Copts were in *de facto* control of the matter in dispute. When the Ethiopians changed the locks and seized possession they took the law into their own hands. In doing so, they infringed not only "Prior Possession" of the Copts, but, even more important, public order and peace.
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> (2) It was a basic principle of Israel Law that a person, even though he may be the owner, or the person entitled to possession, was prohibited from taking the law into his own hands and obtaining possession of immovable property from the one in actual possession, against the latter's will. If he did, he would be enjoined by a possessory claim to restore the *status quo*. This principle had been affirmed in a series of decisions.[13] The reason for this principle is not so much the protection of the individual concerned, but to uphold public order and to safeguard public peace.
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> (3) It is also established in Israel Law that a person who is threatened with dispossession from immovable property may use a reasonable degree of force to resist or to regain possession, if this is done immediately (self-help). If self-help fails, he may call for police protection and, if the police do not respond, he may appeal to the High Court of Justice which, if the necessary conditions are fulfilled and in particular the Petition has been filed while "the invasion is still fresh", will intervene and order the police to act accordingly.

13 See especially *Beakov v. Herzlia Municipality* (1963) 17 P.D. 1583, 1589, Mani J.: "The rule that no person may take the law into his own hands is one of the basic laws of our legal system."; *Pasternak v. The State of Israel* (1960) 14 P.D. 2293. Landau J.: "The principle which forbids taking the law into one's own hands must be sustained with the utmost strictness."

(4) In the present case, the Ethiopians took the law into their own hands; self-help was of no avail; the attempts to procure police assistance were fruitless, and the Copts presented their Petition immediately. In view of these facts, the Court considered the claim of the Petitioner as justified in principle.

The Court then examined three submissions made by the Respondents: first, that the Palestine (Holy Places) Order excluded the Court's jurisdiction even in merely possessory proceedings; secondly, that according to the principle of justiciability, the matter should be dealt with on the Government level and thirdly, that measures to be taken by the police must be determined by their own discretion. The Court, after consideration, rejected all three submissions.

Lastly, the Court turned to the question whether the procedure concerning the possessory claim and the dispute about the substantive rights could be combined. Because of the central significance of this issue the words of the Court are given in full:

There remains one submission of the State Attorney, the most serious of his submissions, that in view of the complicated, problematic nature of the history surrounding the Holy Places and the confused nature of the dispute between the Copts and the Ethiopians it is *most desirable* that the handling of this substantive dispute that entirely belongs to the domain of the Government, which possesses the necessary means therefore, should not be separated from the possessory dispute to which the Hearings in this trial are confined. For this reason, equity demands that the Court should not now grant the relief prayed for which lies in its discretion. The Government has not indeed embarked on a closely detailed enquiry into the rival substantive claims of these communities, but the reason for that is because the petition was only presented three days after the trespass incident and the Government, therefore, took the position that it must wait until this trial was completed.

On his part, counsel for the third Respondent (the Ethiopian Archbishop) wished to emphasise the said submission by pointing to the pattern described by the legislator in the last part of sec. 19 of the Land Law, 1969, whereunder the Court, having jurisdiction to deal with and decide the possessory claim of the previous occupier and the proprietary claim of the person who took the law into his own hands, may join the two actions and also lay down temporary arrangements for possession that will obtain pending a final decision of the parties' rights. The policy reflected by such arrangement, according to counsel's submission, is most apt in the present instance because of the special extraordinary character of the dispute. But it is impossible to put it into effect if the police are today ordered to assist the Copts to recover possession of the passage to the two chapels.

Furthermore, the third Respondent will be unable to come to Court, in view of the jurisdictional obstacle set up by the Order in Council of 1924, with a proprietary claim to effectuate the substantive rights of the Ethiopians in the said property; he has the option only of asking the Government to ponder the problem and decide between them.

> I see some reason in these objections, but not so far as to conclude that they necessitate a waiver in principle of the application of decided law, the import of which is that no one is to be encouraged to take the law into his own hands and that if an act of trespass is still “fresh” the police must hasten to the assistance of the dispossessed person and help him restore the *status quo*. Along with this, it is essential to make an effort to arrive at a solution that also has regard for all those considerations which were raised in the aforesaid submissions. Let me explain. If after the incident, the Government had decided, in accordance with the powers given to it under sec. 29 of Basic Law: The Government, to deal with the substantive dispute between the two communities in the manner which the Court would act under sec. 19 of the Land Law and for this purpose to make an interim order providing for temporary regulations of possession, then, thereafter, there would have been no room for any interference on the part of the police in the matter, nor would this Court have interfered. Be it noted that the fact alone that in the meantime the petition had been filed would not constitute any barrier to the Government acting in this way while the trial was still pending. Having regard to these matters, the solution which should be adopted in this case is as follows: The Order Nisi will be made absolute against the first Respondent in the sense of the relief claimed against him, the substance of which was set out above. Execution of the Order Absolute will, however, be postponed until April 6, 1971, to enable the Government, if it thinks it right, to exercise the powers - which are always available to it - and deal with the substantive dispute in such a manner as it thinks fit. Clearly, in a case such as the present, the Government can always issue interim orders to the parties for the purpose of regulating possession temporarily until the dispute is decided or composed in some final manner.
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> On the basis of the foregoing it is, in my opinion, right to make the Order Nisi absolute against the first Respondent alone, with the proviso, however, that execution of the Order Absolute be postponed until April 6, 1971, to enable the Government to proceed in accordance with what has been said above.[14]

Accordingly, the Order Nisi was made absolute against the first Respondent, but implementation was postponed until April 6, 1971.

Ministerial Committee—Interim Order

On March 28, 1971, well within the time limit, the Government took up the offer of the Court and resolved to deal with the substance of the dispute. It appointed a ministerial committee[15] for this purpose consisting of the Minister of Justice (Chairman), and the Ministers of the Interior and of Foreign Affairs; and on the same day issued an Interim Order by which the possession in the matter in dispute was left with the Ethiopians but the right of the Copts to proceed at the Easter celebrations through the passage of the monastery to and from the Church of the Holy Sepulchre was preserved.

14 *The Coptic Patriarchate v. The Minister of Police* (1971) (I) 25 P.D. 225.

15 The meetings of the Ministerial Committee are, of course, not open to the public, but the State Attorney authorised that the proceedings, as submitted to the Court, appear on affidavits that record the Committee’s main activities and are part of the Court’s file.

Three days later, the committee heard the heads of the two Churches and asked them to submit their arguments in writing. The next meeting of the committee took place on June 8 of the same year. The matter was discussed and, in conclusion, the chairman appealed to both sides for direct negotiations with a view to reaching an agreed settlement. But, apparently, no further meetings took place during the next few years. After the establishment of the respective governments of Mrs. Meir (March 1974) and Mr. Rabin (June 1974), the ministerial committee was reappointed. The next meeting was held on April 13, 1975. Various proposals were discussed but no decision was reached.

On March 7, 1976, the Court made a proposal for a settlement, according to which the keys were to be handed to the Government.

The ministerial committee, in a meeting of June 8, 1976, suggested arbitration by a Christian priest or any other person agreed upon by the parties, and resolved that if the efforts to reach a settlement had not succeeded within a reasonable time, the committee would itself decide the substantive issue.

None of these suggestions led to success, and the ministerial committee requested the Court, in view of the delicate nature of the matter, to abstain from ordering the Government to decide within a definite time, but to leave to their judgment how to continue their efforts.

Meanwhile the Coptic Archbishop had applied to the Supreme Court for an injunction ordering the Minister of Police to implement the Order Absolute of March 1971. But the application was rejected because the Court held that the Order Absolute, the implementation of which the applicant desired, had lost its validity when the Government decided to deal with the substantive dispute, and was now replaced by the Interim Order of March 28, 1971.

The Government, under Mr. Begin, did not reappoint the ministerial committee, but referred the matter to the Jerusalem Committee of the Cabinet. This committee established a sub-committee for this case known as “The Special Committee” consisting of the Minister of the Interior (Chairman) and the Ministers of Religion and Housing, none of whom had been a member of the ministerial committee before. The Special Committee heard explanations on the political implications of recent developments from the Attorney General on September 7, 1977; from the representative of the Ministry of Foreign Affairs on October 7, 1977 and again on March 21, 1978. It also heard the heads of the two Churches and visited the area in dispute. As a result of these deliberations, it resolved to continue its efforts to bring the parties to an agreed settlement, not to make a decision before the time was right, and to work towards an atmosphere of peace and confidence in which, ultimately, an agreement might be reached.

Altogether, the activities of the ministerial committee, since 1971, have gone through three stages. First it tried to bring the parties to an agreed settlement to be reached between themselves; then it itself made concrete suggestions towards a settlement, indicating that if these negotiations did not reach an agreement within a reasonable time, the Government might decide the issue in substance; lastly it felt that the time was not ripe and that it would be wise, under these conditions, to adjourn *sine die*.

The Second Judgment

In April 1977, the Coptic Archbishop presented a new petition to the Supreme Court.[16] This time it was directed against the Government as a whole, the ministers of Justice, Police, Religious Affairs and Foreign Affairs, besides the Ethiopian Archbishop. It alleged that the Government had in reality never tried to settle the substantive dispute, but only pretended to do so, whilst in fact maintaining the Ethiopian possession which had been secured by a breach of the law.

Judgment was given on January 9, 1979. There were two minority judgments (Landau D.P. and Witkon J.), which differed from each other, and the majority decision by Levin, Bechor, and Asher JJ.

Both Landau D.P. and Witkon J. based their judgments on the resolution of the Government of March 28, 1971, to deal with the substance of the dispute, but they differed in their interpretation of its legal significance. Landau D.P. held, in accordance with the Court's decision in the matter of the injunction,[17] that the original Order Absolute lost its validity when the Government decided to deal with the substantive issue. With this decision, he felt, the responsibility for dealing with the dispute had passed irrevocably to the Government. The Government had been free to accept or to refuse this responsibility, but having accepted it (on the basis of sec. 29, Basic Law: The Government),[18] it was now bound to fulfil it. Indeed, according to sec. 7 of the Courts Law,[19] the Supreme Court was competent "to order State authorities to exercise their functions". He did not overlook that in doing so, the Government had to consider not only legal but also extrajudicial factors, such as political repercussions, both national and international; the Court would not dictate to the Government which decision to make:

> I do not ignore the sensitive and complicated nature of any decision about rights over Holy Places. But no matter what the decision will be and what considerations have influenced it, the parties are entitled to demand that, in absence of a mutual agreement between them, a decision will be given in the end.

It was his view, therefore, that the Government be ordered to continue its deliberations about the petitory and the possessorial claims of the parties in every legal way they considered proper and to decide the issue with reasonable speed, considering both the special character of the dispute and the length of time which had already elapsed since the first judgment in March, 1971.

Witkon J., on the other hand, held, contrary to the judgment in the matter of the Injunction,[20] that the Order Absolute still stood. Only its execution bad been postponed and the postponement was conditional. The condition was that the Government would deal with the substantive dispute between the parties, and only under this condition had the Government been authorised to issue

16 *The Coptic Patriarchate v. The Government of Israel* (1979) (I) 33 P.D. 225.

17 HC 95/76, 499/76 (not published).

18 22 L.S.I. 257.

19 Courts Law, 1957 (11 L.S.I. 157).

20 HC 95/76 (not published)

interim orders, which otherwise belonged exclusively to the sphere of the courts. In March 1971, the Government had resolved to do so, and Witkon J. did not doubt the sincerity of this decision. But now it was evident that the Government did not intend to decide the dispute and its authority to issue interim orders therefore had lapsed. The Court was prevented by the Order-in-Council from dealing with the substantive issue. But the possessory claim arising from the violation of the Coptic possession "was and still is in our authority".

The Interim Order of the ministerial committee did not transform the transgression committed by the Ethiopians into a legal action. "The disposession is still as fresh today as it was; and since the Government now considers it proper not to deal with the matter, the responsibility returns to the Court, and the Copts now, as then, are entitled to the Order Absolute".

Levin J., in the majority judgment, took a very different line. He did not share the view that the Government had failed to carry out the duties it had undertaken but held, on the contrary, that the Government had dealt with the dispute as it was allowed to do. He therefore believed that the Court had no right to intervene. When the Court, in its first judgment in March 1971, suspended the execution of the Order Absolute, it allowed the Government to deal with the substantive dispute in such manner as it thought fit; this the Government had done. The methods which a government has to apply are different from those applied by a court. A government is not a judicial but an executive body, and its actions are determined not only by legal principles but by a large variety of extra-judicial considerations, especially of a political nature. The Court could not interfere in purely political issues. It would not be proper, therefore, to judge the actions of the Government as if it were a court, but it was necessary to see its motives and intentions in their political significance.

In religious disputes, especially great patience is required and, above all, an agreed settlement ought, if possible, to be reached. Thus a decision to postpone judgment in the hope for quieter times to come in which agreement might be reached was impossible for a Court of Justice, but it could well be right and wise to adopt for a political body. By taking upon itself to deal with the dispute, the Government did not undertake to act like a court. Moreover, in the beginning the ministerial committee had in fact considered the possibility of deciding itself the substantive dispute, if no agreement was reached within a reasonable time, as could be seen from the meeting on June 8, 1976. But later on the Government had changed its mind on this issue and had reached the conclusion that it would be better to postpone the decision for the time being. As a political body, the Government was entitled to make such changes, and indeed, was bound to do so if circumstances made this politically advisable.

Altogether, he pointed out in words reminiscent of those used by the Second Jordanian Committee,[21] that to decide on the essence of the petitory rights in this case "would be a very difficult task, more suitable for historians or politicians than for lawyers, since there is no clear legal system on which the claims are based and both sides use arguments of the kind of the "Patriarchs' Patrimony".

21 See text at pp. 5-6.

Concerning the decision proposed by Landau D.P., Levin J. felt it would bring no benefit to the petitioner. It was impossible to foretell how the Government might decide. It might well confirm the Interim Order and, in any case, the Government would be free to change even the contents of this decision later on if it considered it right.

He concluded his judgment as follows:

> The conclusion that I have reached is unsatisfactory. Come and see: On 25 April 1970, some people of the Ethiopian Church took the law into their own hands and secured possession of the disputed area, while the Police refused to intervene. According to the basic principles of the rule of law, this Court is authorised to order the Police to prevent "fresh intrusion"; and this was the judgment in High Court 109/70. Had it not been decided there as it was, I would have seriously considered the argument that it is impossible to apply the principle embodied in sec. 19 of the Land Law to actions of a governmental body. Perhaps the High Court in 109/70 implicitly assumed that the Government would deal with the petitory dispute applying judicial criteria because sec. 19 Land Law presupposes that the Court is dealing both with the petitory and possessorial claims of the parties; as for myself, I would think it possible to raise the question whether it was proper to grant to the Government, which acts on the basis of extra-judicial considerations, the authority to issue interim orders; what meaning has the distinction between petitory and possessorial rights to a body of that kind?
>
> Yet in High Court 109/70 it has been ruled that if the Government decides to deal with the substance of the dispute (by authority of sec. 29, Basic Law: The Government) it is also authorised to issue Interim Orders. In fact, on the basis of this decision, the Government issued the Interim Order here under discussion which, as ruled in the matter of the injunction (95/76), has terminated the Order issued by this Court. We cannot now change the decision of the High Court (109/70) which binds the litigants as well as us and was the basis of the Interim Order issued by the Government.

Bechor and Asher JJ., in essence, shared his view. Thus the petition was rejected.

Eighteen months later, in June 1980, the Coptic Archbishop filed a new Petition[22] in which he asked practically for the same redress as in 1977. The Petition was argued before the High Court of Justice on June 28, 1981 (before Landau P., Elon and Moshe Cohen JJ.) and judgment was handed down on July 30th. The petition was dismissed, the main reason being that it hardly differed from that previously[23] decided and that nothing new had happened which could move the Court to depart from the decision it had reached in that case.

During the proceedings, the Government informed the Court that the Minister of Foreign Affairs and the Minister of Justice were considering, after the completion of the case, suggesting to the ministerial committee that an independent negotiator, who was neither a government minister nor an official, be appointed to mediate between the rival communities; the Court in its judgment took note of this intention.

22 HC 410/80 (not published).

23 Supra n. 16.

Part Two: **Reflections**

Preamble

The result of more than ten years of handling of this dispute, both by the Court and by the Government, cannot be considered satisfactory. In the sphere of the Court, the basic principle of Israel Law that no one is entitled to take the law into his own hands has been abandoned. The party which used force to secure possession of the contested area is still enjoying the fruits of its action, and the breach of public order and peace has been perpetuated. In the sphere of the Government, the declared purpose of its intervention, to settle the substantive dispute, failed to materialise, and the conflict about the substantive rights stands today where it stood when the ministerial committee was appointed in 1971. These facts alone require serious thought. But beyond the merits of the concrete dispute before the Court, the case raises the wider and fundamental question of jurisdiction over the Christian Holy Places, and in particular of the position of the Sanctuaries in the system of Israel Law.

What follows is an attempt to investigate some of the issues involved.

The Order Absolute and its Suspension

The starting point of our investigation is the act of force committed on Easter night 1970. This act is the basis of the case. It establishes the jurisdiction of the Court. For whilst disputes about substantive rights in the Sanctuaries are excluded from the courts, this prohibition does not apply to actions which derive from a breach of public order and peace. Moreover, in the matter itself, the act of force is the basis of the possessory action against the third Respondent (the Ethiopian Archbishop) for the return of the contested area; and likewise forms the foundation of the Order Absolute against the first Respondent (the Minister of Police), instructing him to assist the Petitioner to restore the situation which existed before force was applied.

Altogether, the Order Absolute confirms two basic principles of Israel Law: firstly, that nobody is entitled to take the law into his own hands; and secondly, that the Police has to hasten to the assistance of a person who is unlawfully dispossessed of immovable property. The Order Absolute is therefore in full accordance with declared and established law; and if the Order had been allowed to run its course, it would have redeemed the act of force, whilst leaving the Government free to take all measures concerning the substantive dispute which the law permits.

The execution of the Order was, however, suspended by the Supreme Court, and the suspension, in fact, led to the annulment of its content and to a total reversal of its purpose. What are the legal foundations of so dramatic a change?

The first question is whether the issue of the Order Absolute lay in the discretion of the Court or whether it was imposed upon the Court as a legal duty.

In principle, the right of the courts to adjudicate is based upon their duty to do so; this duty is the dominating element. Thus in the words of S.A. de Smith[24] there is

> the elementary proposition that courts and tribunals have a duty to determine cases within their jurisdiction and properly brought before them... Wrongful refusal to exercise jurisdiction... is a breach of duty ... Refusal to adjudicate may be conveyed also ... by sub-delegating the power of decision to another body... everybody entrusted with powers of decision is under a duty to apply the law correctly...

In English law, the Supreme Court of Judicature (Consolidation) Act 1925, sec. 43, re-enacting a similar provision of the Judicature Act 1873, laid down

> The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act, shall in every cause or matter pending before the Court, grant either absolutely or on such terms and conditions as the Court thinks just, all such terms and conditions as the Court thinks just, all such remedies whatsoever any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided.

Similar principles are expressed in the Israel Courts Law, 1957,[25] sec. 7 which provides:

> The Supreme Court sitting as a High Court of Justice shall deal with matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal...

According to the principles described above, the issue of the Order Absolute was based on legal duty.

What then were the legal reasons for the suspension of the Order Absolute? The reasons given by the Court are sparse. Having devoted about nine-tenths of the judgment to the main argument leading to the Order Absolute, the Court gave comparatively little space to the suspension. In essence, the Court confined itself in this respect to quoting three submissions of the Respondents which might be summarised as follows: Firstly, it would be “desirable in view of the complicated history of the Holy Places that the handling of the substantive dispute should not be separated from that of the possessory”; secondly, “equity demands that the Court should not now grant the relief prayed for”; lastly, “the Government had not been able to embark upon a closely detailed enquiry into the rival substantive claims, since only three days had been available between the events on Easter night and the filing of the petition by the Copts”. None of these submissions by themselves can be considered as very convincing, and it is essential to note that the Court, although it expressed some sympathy

24 S.A. de Smith, *Judicial Review of Administrative Acts* (4th ed., 1980) 543-44.

25 *Supra* n. 19.

with the arguments, did not accept their validity. “I see some reason”, says Agranat P., “in these objections, but not so far as to conclude that they necessitate a waiver of the application of decided law”. The sympathy is therefore qualified by a warning that basic principles of law have to be maintained. The submissions by themselves, therefore, cannot justify the suspension.

The purpose of the suspension, as expressed in the judgment, was to enable the Government, if it thought it right, to deal with the substantive dispute. The suspension accordingly intended to link the petitionary and possessory aspects of the case. The alleged power of the Government to deal with both is derived first and foremost from sec. 29, Basic Law: The Government,[26] which reads as follows:

> The Government is empowered to do in the name of the State,subject to any law, every act the doing of which is not enjoined by law upon another authority.

Leaving aside at this stage whether the section can be applied at all to judicial proceedings as distinct from executive measures - an issue to which we return below the first question is whether the section, by its own terms, does not rule out any application to the present case. The powers granted to the Government by the section are limited by one basic exception: they do not include any act which “by law is enjoined upon another authority”. The act here at stake is the suspension of an Order Absolute. This Order belongs to the possessory sphere of the dispute. It is therefore enjoined by law upon the Court in whose exclusive jurisdiction it lies, and cannot be reached by the powers granted to the Government by virtue of sec. 29.

As for the Minister of Police, against whom the Order is directed, the competence of the Court - quite apart from the general principles mentioned above - is explicitly rooted in sec. 7 of the Courts Law, which provides that the power to give orders to State authorities is vested in and therefore enjoined upon, the Supreme Court. Accordingly neither the possessory action nor the mandatory Order can be affected by sec. 29.

As for disputes about substantive rights the situation is, of course, different. These disputes were withdrawn from the courts by the Palestine (Holy Places) Order, 1924. They are not enjoined upon any other authority, and the Government is free to use in this sphere all the powers provided for by sec. 29. These powers, however, do not extend to the possessory issues of the Order Absolute, and there is no statute that bridges the gulf.

In these circumstances, the Court considered it right to apply - if not the section itself - the pattern prescribed in sec. 19 of the Land Law, 1969,[27] and visualised that on this basis the Government would be able to do what is not permitted to the Court, namely, to deal with both aspects of the case simultaneously, to decide the case in its totality and, thus, to restore, as it were, a divided jurisdiction. Can this view be sustained?

26 *Supra* n. 18.

27 23 L.S.1 283.

Sec. 19 of the Land Law authorises a court which is seised of both the petitionary and the possessory aspects of a dispute over immovable property to deal with both issues simultaneously. It reads as follows:

> A person who takes any immovable property from the possessor thereof otherwise than as specified in sec. 18(b) shall return it to the possessor. However, this provision shall not derogate from the power of the Court to deal with the rights of both parties simultaneously, and the Court may regulate possession as it may deem just and on such conditions as it may think fit, pending a decision as to such rights [28]

However, the situation to which this section refers is very different from that prevailing in the Coptic-Ethiopian conflict, and the application of the section to the case is open to grave doubts. Firstly, sec. 19 presupposes that one and the same authority is empowered to deal with both the possessory and the petitionary aspect of a dispute. This is a matter of paramount importance for it guarantees the same evaluation of facts and principles in both sectors of the dispute by the authority in charge. In the Coptic-Ethiopian case on the other hand, we are dealing with two different authorities - the Court and the Government - who naturally may hold divergent and even contradictory views on facts and law. The precondition upon which sec. 19 rests, the identity of the authority in charge of both aspects of the dispute, is therefore missing. This, by itself, should make an application of sec. 19 impossible. Secondly, and even more important, the authority to which sec. 19 of the Land Law refers, is a *court of justice*, whilst the authority in sec. 29, Basic Law: The Government, is the Government. It is impossible to transfer the powers which the legislator gave to a court of justice to a non-judicial executive body even if it is the Government itself. For an executive body is not bound by such basic principles as the duty to adjudicate in accordance with the law and to observe the rules of procedure, including especially those regarding publicity, evidence, appeal, and finality of judgment. Nor have the rules concerning the training, appointment and independence of the judges any parallel in the sphere of the Government. The application of sec. 19, Land Law - whether direct or indirect - to the present case is therefore unacceptable. Levin J. apparently expressed the same view when he said:

> Had it not been decided there (HC 109/70) as it was, I would have seriously considered the argument that it is impossible to apply the principle embodied in sec. 19 of the Land Law to actions of a governmental body.

He then continued:

> Perhaps the High Court implicitly assumed that the Government would deal with the petitory dispute applying judicial criteria because sec. 19, Land Law presupposes that the Court is dealing both with the petitory and possessorial claims of the parties.

This implicit assumption is indeed a key to the understanding of the Court's reasoning, and it is certainly justified. Landau D.P. and Witkon J., who took part in both trials, obviously assumed at the

28 *Ibid*., at 285

time of the first judgment that the Government would act like a court, and their judgments in the second trial were based on the conviction that the Government should have done so. In addition Landau D.P.'s dictum in the second trial;

> No matter what the decision will be ... the parties are entitled to demand that in absence of a mutual agreement between them a decision will be given at the end...

although addressed to the Government, expressed the basic principle of jurisdiction: the duty of the Court to adjudicate. Agranat P. went even further and made the implicit assumption explicit:

> If after the incident the Government had decided, in accordance with the powers given to it under sec. 29, Basic Law: The Government, to deal with the substantive dispute between the two communities *in the manner which the Court would act under sec. 19 of the Land Law ...* this Court would not have interfered ....

All three judges therefore assumed that the Government would act in the manner of a court, and since no different view was recorded by any other judge, this assumption was obviously shared by the whole court. But the assumption is untenable and the application of sec. 19 of the Land Law to a non-judicial body is impossible.

The assumption that the Government would act "in the manner of a court" also explains why in the whole 1971 judgment[29] not one word was devoted to the fundamental difference between the judgment of a court and an act of the Government; a difference that took up almost the whole of the majority-judgment in the second case[30] Likewise it makes understandable why the judgment did not raise the question of what would happen to the suspension if the Government should fail to deal effectively with the substantive dispute; a problem on which Landau D.P. and Witkon J. were to hold contradictory views in the second case.

Summing up the above arguments, we have reached the conclusion that the suspension of the Order Absolute lacks legal foundation. It can he based neither on the discretion of the Court, nor on the submissions of the Respondents; neither on sec. 29, Basic Law: The Government, nor on sec. 19 of the Land Law. In fact, the suspension amounts to a refusal of the Court to adjudicate upon a petition property (sic) presented.

Undoubtedly the Court had hoped that the suspension of the Order would open the way for an integrated solution of all parts of the controversy, and the hope that the Government might be able to bring about a reconciliation of the parties still persists. But it is submitted that it was the duty of the Court to refrain from a suspension and to maintain the Order Absolute in accordance with the law.

29 *Supra* n. 14.

30 *Supra* n. 16.

The Government as Court of Justice-Jurisdiction over Substantive Rights

Up until now we have assumed, in accordance with general opinion, that jurisdiction over substantive rights in the Christian Sanctuaries rests with the Government. This view has been based in the course of time on various assumptions. First, it was expressed in the wake of the Palestine (Holy Places) Order, 1924, when Art. 3 of the Order was mistakenly interpreted in some quarters as authorising the High Commissioner to adjudicate upon those "causes and matters" that Art. 2 had withdrawn from the local courts. This opinion was held, by amongst others, the United Nations Special Committee on Palestine (UNSCOP),[31] by a number of writers[32] (including at one time the present one), and more recently by the first Jordanian Committee on the Coptic-Ethiopian dispute.[33] Today the view that the jurisdiction of the Government could be based upon Art. 3 of the Order is no longer being maintained.

Another assumption was that although the Order did not explicitly establish the jurisdiction of the Government, it implicitly transferred the power of jurisdiction to it. Thus Agranat P. in *The Temple Mount Case*[34] stated "that in excluding matters concerning the Holy Places, the Order-in-Council assigned the handling of these matters to the executive authority, the British Government and the High Commissioner acting under its direction". Since this statement was made, the facts concerning the origin and purpose of the Order, with all relevant documents, have been published.[35] We therefore now know that no such assignment was ever intended. On the contrary, before the promulgation of the Palestine (Holy Places) Order, 1924, detailed arrangements were made between the Foreign Office and the Colonial Office that

> in the event of any case arising which may call for urgent settlement and which would be dealt with by the Holy Places Commission, if that Commission were in existence, a special commission of enquiry composed of British judges not resident in Palestine be appointed *ad hoc* in accordance with Art. 13 of the Mandate [36]

Their findings were to be referred to the Council of the League of Nations, which retained the ultimate power of decision.

At no time, therefore, did Britain assign judicial powers over the Sanctuaries to the executive authorities. At present, the view that the Government has jurisdiction over substantive disputes relating to the Sanctuaries is derived from sec. 29, Basic Law: The Government. We have already argued that this section cannot affect the duty of the Court to maintain the Order Absolute in accordance with the law. We now submit that neither can it establish any jurisdiction of the Government.

31 UNSCOP Report 1947, ch. 3, sec. 6.

32 J. Stoyanowski. *The Mandate for Palestine* (London, 1928) 302; B. Collin, *Le Problème Juridique des Lieux Saints* (Paris, 1956) 98; and see W. Zander, *supra* n. 3 at 70.

33 See text at p. 250.

34 *Supra* n. 10.

35 Zander, *supra* n. 2.

36 Ibid at 355, 363.

Firstly, the section has to be read in the context of the whole law and especially sec. 1 to which, in the original Bill, it formed para. 2. According to sec. 1 “the Government is the executive authority of the State”. It must be doubted therefore whether the Basic Law: The Government can be applied to non-executive activities such as legislative and judicial functions.

Secondly, the section empowers the Government to do certain acts. It grants *rights*, but does not impose *obligations*. Jurisdiction, however, is not only a right but essentially a duty; the duty to adjudicate in accordance with the law upon all matters properly submitted. It is this duty that distinguishes jurisdiction from arbitrariness and establishes the right of the citizen to justice. No such duties are imposed by sec. 29. The Government is free to choose whether or not to deal with a matter brought before it. It is under no obligation to “declare the law” (*dicere jus*), nor to apply the law. It may deal with a case “in such manner as it thinks fit”. It may give or refrain from giving a decision; and it is even entitled to change its own decision if circumstances make this advisable. It is impossible to describe such a state of affairs as jurisdiction.

Lastly, the transactions involved here, by their nature and content, do not lend themselves to judicial investigations. Rights in the Sanctuaries cannot be acquired, like private property, by transfer of title-deeds or other conveyancing transaction [37] They are derived, in the overwhelming majority of all cases, from decrees of the Sultan (Firmans) instructing the Grand Vizier or local officials about the use, and, possibly, the possession of the Sanctuaries in question. Mostly they were given without prejudice to similar rights granted to other communities. Most importantly, the Firmans were revocable;[38] and throughout history they were frequently changed, sometimes out of arbitrary whim of the ruler;[39] more often as an adjustment to changing conditions in the country or in its international relations. It is hardly possible to subject these actions of the Sultans to legal investigations (which, incidentally, would in any event have to be conducted according to Islamic law).

Sir Harry Luke, in his introductory note to L.C.A. Cust’s confidential memorandum, *The Status Quo in the Holy Places,*[40] described the development as follows:

> As the several ecclesiastical communities represented in the Holy Places waxed or waned in influence or even (as in the case of the Georgians) lost all representation in the Holy Land, so their shares in the Sanctuaries fluctuated and their boundaries within the shrines tended to depend upon the numbers, wealth, and even strong right arm, of the parties concerned and upon the favour of the Sultan.

37 On the acquisition of rights in the Holy Places by purchase, Firmans, and international treaties, see Zander, *supra* n. 3 at 164 ff.

38 This was expressed rather sharply in 1757 by the Grand Vizier to the French Ambassador who protested against a change in the Sanctuaries: "These places, Sir, belong to the Sultan and he gives them to whom he pleases; it may well be possible that they always were in the hands of the Franks, but today His Highness wishes that they belong to the Greeks". (B. Collin, *Le Problème Juridique des Lieux Saints* (Paris, 1956) 38.

39 Between the years 1630-37 control of the Sanctuaries changed hands no less than six times (B. Collin, *Les Lieux Saints* (Paris, 1948) 74 ff).

40 *Supra* n. 11.

Summing up the situation, he describes the existing rulings on the Holy Places as “one of the most fluid and imprecise codes in the world”.

Levin. J. went even further and doubted whether the issue belonged to the sphere of law or to that of history.

> To decide upon the substantive rights of the case would be a very difficult task, more suitable for historians or politicians than for lawyers, for there is no clear legal system on which the claims can be based.

The present writer has reached the conclusion that no jurisdiction over substantive rights in the Holy Places exists at present. The maintenance of possessory rights and the preservation of public order and peace are in the hands of the courts. But an attempt to adjudicate on the substantive issues is like trying to ascertain whether the map of Europe, as shaped over the centuries, conforms to the law.

Res Divini Juris

The conclusion that no jurisdiction over substantive rights in the Sanctuaries exists at present, would be unacceptable if it concerned ordinary objects. Holy Places, however, are of a special character, and this special character is of legal significance. As far as a Sanctuary is a place, it may be defined as “immovable property” in the sense of the Land Law[41] with its categories of ownership and possession. But the element of “holiness” is bound to qualify this definition.

Hitherto, the Court has refrained from defining “holiness” in the context of Christian Sanctuaries, and the different statements made during the trials confined themselves to stressing the delicate and complicated nature of the object.

> Disputes about Sanctuaries are of a special and extraordinary character;
>
> Any decision about rights over Holy Places is of a sensitive and complicated nature;
>
> The Holy Places are surrounded by a most complicated history.

But there are no dicta on the issue of “holiness” itself. The word “holy” is defined in the Oxford Dictionary as:

> Kept or regarded as inviolate from ordinary use and set apart for religious use or observance.

This double definition of “being set apart from ordinary use and dedicated to religious purposes” does indeed express the essentials, and already in classical Roman Law it formed the concept of

41 Land Law, 1969 (23 L.S.I. 283) sec. 1: "In this Law-'immovable property' or `property' means land, everything built or planted on land and every other thing permanently fixed to land, except severable fixtures;"

res divini juris.[42] Among these the most important group were the *res sacrae* which included temples, churches and their contents.

The first characteristic of *res divini juris* was their withdrawal from the sphere of private law. They belonged to nobody (res nullius). They were *extra patrimonium* and *extra commercium*; and no *jus humanum* could be established on *res divini juris*.

Their second characteristic was dedication to a higher purpose. According to Gaius they were devoted to *di superi;* according to Justinian they belonged to God. In post-classical Byzantine days the concept of divine ownership was transformed into a trust-like relationship in favour of individual churches.

Today the same two principles prevail. The Sanctuaries are set apart from ordinary objects, as shown in the exclusion of substantive disputes from the courts. In addition they are devoted to religious service. In this respect there is probably general agreement that they are dedicated not to individual churches or groups, but to Christendom as a whole. This does not mean the acceptance of claims for territorial rights or the establishment of a *corpus separatum*, as requested sometimes in the past. It is the recognition of the religious significance of the Sanctuaries for the communities for whom they are holy.

The duties of Israel concerning the Holy Places were laid down as early as in the Proclamation of Independence which declared that "the State of Israel will safeguard the Holy Places of all religions" [43] This duty of safeguarding the Holy Places far transcends the normal obligations of a government to maintain law and order. For what is at stake here is not only law, but a guardianship based upon respect for religious values.

In detail this involves firstly the protection of the Sanctuaries from any desecration, as undertaken by the Protection of Holy Places Law, 1967;[44] secondly, the prevention - under the supervision of the courts - of altercations and violence; and lastly, it is submitted, the voluntary abstention from jurisdiction over substantive rights. This abstention is justified not only because of the uncertainty of the law, but as an expression of respect for the profound religious interest in the Sanctuaries throughout the world; a respect similar to that granted to foreign states by international law and the principles of international courtesy.

There always remains, of course, the right of the Government, in case of need, to act on the basis of sec. 29, Basic Law: The Government. [45] But such acts should be of a temporary nature, for the

42 Out of the large literature on *Res Divini Juris,* reference is here made to W.W. Buckland, *A Manual of Roman Private Law* (1939) 108; R. Sohm, *Institutionen des Roemischen Reclus* (1911) 370; M. Kaser, *Das Roemische Privatrecht,* I, (Munich, 1955) 320 ff.

43 Declaration of the Establishment of the State of Israel (1 L.S.I. 3) at 4.

44 21 L.S.I.76.

45 *Supra* n. I8.

ultimate settlement of disputes about substantive rights in the Holy Places must be reached by the religious communities themselves.

Towards a Solution

On the basis of the foregoing I venture to submit the following thoughts towards a solution of the conflict.

The present situation is essentially based on the Government's Order of March 28, 1971. This Order was explicitly described as an "Interim Order". It cannot be inappropriate, therefore, to suggest that the Order be reconsidered now with a view to amending it. The Government, through the Order, took a decisive part in establishing the present position by, in effect, reversing the judgment of the Supreme Court concerning the possession of the contested area. This involves a heavy responsibility on the Government and now requires a fresh initiative.

It is not suggested, of course, that the Government should replace the Interim Order by a Permanent Order. For in the view of this writer, as explained above, a permanent settlement can only be achieved by the religious communities themselves. But it is suggested that the contents of the Interim Order should be amended. If possible, the adjustment should be made in consultation with the parties, and the mere indication that the Government will amend the Order might increase their willingness to come to terms. But if no agreement is reached with the parties, the Government should now amend the Order in the interest of justice.

The dispute comprises a number of issues of various importance and urgency, such as the use of the passage, the daily religious services in the Chapel of the Four Living Creatures, the lighting of the oil lamps in both chapels, and the presence of a Coptic guardian in the dwellings of the Ethiopian monks. There is no need for all these issues to be decided at the same time and in the same way, and as soon as a beginning has been made, every item settled will enhance the prospect of further understanding.

The outstanding event of the case was the use of force by members of the Ethiopian community on Easter night, 1970. By changing the locks of the doors of the passage they violated a basic principle of Israel law. It is surely inconceivable that the State can permanently tolerate such a breach of public order and peace. The act of force has to be redeemed. It is suggested, therefore, as the first and most essential measure, that the Order be amended in such a way that the locks fixed by the Ethiopians be removed, that they be replaced by new locks on both sides of the passage, and that the keys be handed to each of the two communities. This would restore the right of the Copts to move freely through the passage as before the incident, without being dependent on the consent or cooperation of the Ethiopians; a right which had never been taken from them throughout history

This, in my view, is imperative. It should not be possible to say that in Israel a person may take the law into his own hands, use force under the eyes of the Police, and be rewarded by an Order of the Government which leaves to the trespasser the fruits of his action.

The second proposal concerns the two chapels. Apparently neither has ever been used by the Copts for their own services, although one of their members used to light the oil-lamps in them daily. For the Ethiopians, however, the upper chapel (The Chapel of the Four Living Creatures) had been the place of their daily worship since the 17th century, when they were unable to meet the exactions of the Turkish Governor and therefore lost their right to officiate in the Church of the Holy Sepulchre itself. This usage by the Ethiopians came to an end in 1889 when the Copts, because of an altercation, refused to continue it. Since then the Ethiopians have had no place in the Sanctuaries for their daily services.

Considering that the Copts never held services of their own in the Chapel and that they have their own place of worship in the Church of the Holy Sepulchre itself, it cannot be an unbearable hardship to them if the use of the Chapel is restored to the Ethiopians to be used as it had been for centuries. To the Ethiopians, on the other hand, the restoration of their daily services in the Chapel must be a matter of supreme importance. It is suggested, therefore, that the Interim Order should be further amended in such a way that the use of the Chapel by the Ethiopians, as it was until 1889, be confirmed. As mentioned above, these arrangements would be of a temporary nature again, leaving to the parties at all times the possibility of agreeing on such changes as they see fit. It may be hoped that with the keys to the passage given to both parties and the use of the Chapel confirmed to the Ethiopians, the parties will have no difficulty in guaranteeing free passage for the Copts and undisturbed services in the Chapel for the Ethiopians, particularly since the Government may consider further amendments to the Order in case of need.

Compared with these two major issues, the lighting of the lamps and the supervision of the Ethiopian monks by a Coptic guardian will probably present less difficulty. Today, after the grant of full ecclesiastical autocephaly to the Ethiopian Church by the agreement of June 25, 1959, both parties may feel that these issues have been overtaken by events.

The question of the lower chapel (the Chapel of St. Michael) would still remain. Would it be inappropriate to express the thought that this chapel might be used for the time being as a meeting place for representatives of both Churches to consider their ultimate complete reconciliation?

Article originally published in **The Israel Law Review of the Hebrew University of Jerusalem** *and reprinted with their permission*