

Introduction

Among liberal circles in Israel, it is common to hear the view that one of the most serious problems of the country is its alliance of state and religion, and that the only solution to this problem is their full separation (hereafter Separation).¹ Such separation would mean the end of what is called “religious coercion” in all its forms. But it would also mean undoing the governmental status conferred on religious bodies such as the Rabbinate, ending government support for religious institutions such as seminaries for the study of *Torah* (*yeshivas*), and terminating state support for religious services such as ritual baths (*mikvas*). From this liberal viewpoint, a state that does not cater to religious needs is more just than a state that does. The controversy between advocates and opponents of Separation is often presented as one between liberals, who are mostly secular, and non-liberals, who are mostly religious.

But it is not only secular liberals who call for a separation between state and religion; the idea is also supported by some people in the

¹ See, e.g., Joseph Agassi, *Between Faith and Nationality: Towards an Israeli National Identity* (Tel-Aviv: Papyrus, Tel-Aviv University, 1984), 159–170 (Heb.); Uri Huppert, *Back to the Ghetto: Zionism in Retreat* (Buffalo, NY: Prometheus Books, 1989), 179–189. Sometimes supporters of Separation in Israel rely on Herzl’s vision as presented in his book, Theodor Herzl, *The Jewish State* (New York: Dover Publications, Inc., 2012), 146 (“Shall we end by having a theocracy? No, indeed. Faith unites us, knowledge gives us freedom. We shall therefore prevent any theocratic tendencies from coming to the fore on the part of our priesthood. We shall keep our priests within the confines of their temples in the same way as we shall keep our professional army within the confines of their barracks. Army and priesthood shall receive honors high as their valuable functions deserve. But they must not interfere in the administration of the State which confers distinction upon them, else they will conjure up difficulties without and within”).

religious community. Its most salient representative was Yeshayahu Leibowitz, who spent years preaching for such a separation.² There is an important difference, however, between the liberal and the religious arguments in favor of Separation. The liberal argument is usually based on values such as freedom, dignity, and fairness, whereas the religious argument is usually based on the benefit to religion by such policy.

Separation does not imply that the government should be completely indifferent to religious interests, in particular, that the right to religious freedom should be abolished.³ Actually, a demand for a strict separation between state and religion is likely to offer a *stronger* support for religious freedom, conceived as a sort of compensation for its removal, so to say, from the public sphere.⁴ The refusal to give religious communities even one cent to fund their houses of prayer might lead to a firmer determination to protect their right to band together and pray according to their religious beliefs.

As that may be, both Separation and the special protection granted to religion under the right to religious freedom seem to single out religion for special treatment. According to Separation, while all other conceptions of the good, or ways of living, are entitled to state support, and religious ones are not. According to the right to religious freedom, religious individuals and institutions are entitled to a wider protection from laws and regulations that conflict with their worldview (mainly in the form of exemptions) than that afforded to nonreligious individuals or institutions. On the face of it, these two moves are inconsistent; the former seems to disadvantage religion by excluding it from the public sphere, while the latter seems to advantage it by granting it special protection. Whether or

² Yeshayahu Leibowitz (1903–1994) was an Israeli Jewish public intellectual, professor of biochemistry, organic chemistry, and neurophysiology at the Hebrew University of Jerusalem, and a polymath known for his outspoken opinions on Judaism, ethics, religion, and politics. Leibowitz was a staunch believer in the separation of state and religion. See Yeshayahu Leibowitz, *Judaism, Human Values, and the Jewish State* (Cambridge, MA: Harvard University Press, 1992), chapters 15–16.

³ This right is recognized in basic international conventions on human rights, as well as in the constitutions of many individual states. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (December 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, E.T.S. 5; Canadian Charter of Rights and Freedoms, § 2, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); GRUNDGESETZ art. 4 (Ger.); C.E., B.O.E. n. 311, Dec. 29, 1978, art. 16; Constitution of Ireland 1937 art. 44.

⁴ See Roger Trigg, *Religion in Public Life: Must Faith Be Privatized?* (Oxford: Oxford University Press, 2007), 68, who claims that a major justification for granting religion special protection is its absence from the public space.

not these attitudes are inconsistent and whether, in general, religion should be seen as “unique,” are among the questions that will be discussed in Part I of this book.⁵

The question regarding the role of religion in liberal states takes a special form in Israel because of the close connection in Judaism between its religious and its national elements. Judaism is a religion, to be sure, with its holy texts, rituals, customs, and beliefs, but it is also a nation, or a people.⁶ Most Jews today don't practice their religion and don't subscribe to traditional Jewish beliefs, but nonetheless regard themselves, and are regarded by others, as part of the Jewish people. Some liberals in Israel react to this dual character of Jewishness by calling for an end to the Jewish character of the state, both on the religious level – by supporting Separation – and on the national level – by turning Israel into what is often referred to as “a state of all its citizens.”⁷ Others react by trying to

⁵ The question regarding the uniqueness of religion has received increasing attention in the last decade. See especially Micah Schwartzman, “What If Religion Is Not Special?” *University of Chicago Law Review* 79, (2013), 1351–1427; Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge, MA: Harvard University Press, 2013), and the exchange between Noah Feldman and Michael McConnell, in a 2011 symposium on “What's So Special about Religious Freedom?” available at: <https://s3.amazonaws.com/berkeley-center/120901RFPWhatsSoSpecialReligiousFreedomSymposiumReport.pdf>.

⁶ In the last decade or so, especially in nonreligious circles, there has been a shift from talking about Jewish nationhood to talking about Jewish peoplehood. Accordingly, educational programs have been developed to research and to strengthen Jewish peoplehood, for instance <http://jpeoplehood.org/>. This led to the creation of a new term in Hebrew, *amiyyut* (derived from *am*, people), which was supposed to create a different set of connotations to the traditional term *leumiyyut* (derived from *leum*, nation). However, in our view, the difference between these two terms is exaggerated. We follow Azar Gat, *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism* (Cambridge: Cambridge University Press, 2013), in assuming that “to be categorized as a people, an ethnos should have a sense of common identity, history and fate,” (22) and a people can be regarded as a nation “if it possesses elements of political self-determination and self-government, or actively strives to achieve them” (23). On this understanding, at least in the Israeli context, the distinction between a Jewish people and a Jewish nation makes no real difference. It might, however, help to prevent confusing nationality in the sense of being a member of a people (with a sense of common identity, history and fate) and nationality in the sense of being a citizen of a particular country. All Israelis, Jewish and Arab alike, have Israeli nationality, but while Jews are members of the Jewish people/nation, Arabs belong to the Palestinian people/nation.

⁷ “A state of all its citizens” has become a technical expression in Israeli political discourse for a view that requires neutrality of the state between different nationalities, cultures, or religions. It is often referred to as an accepted category in political science, and taught as such in schools alongside the categories of a nation state, a multicultural democracy, and so on. The truth, however, is that this expression is hardly known outside Israel and is definitely not an accepted category in the field. A quick search in Google Scholar will

base their objection to Separation on national justifications; if the *Sabbath* is not only a holy day but is also one central to the life of any Jewish community then some restrictions on trade on the *Sabbath* might be justified. In any case, the dual nature of Judaism often blurs the distinction between questions regarding state and religion and those regarding state and nationhood (or peoplehood).

When we set out to write this book, we intended to start with a brief summary of the main doctrines in political philosophy regarding the relation between state and religion and then dive into the complex dilemmas in this field that have been under constant dispute in Israel from the moment of its inception. But very soon it turned out that a much wider exploration of the philosophical issues was needed to create the required tools for a critical analysis of the Israeli case. In the end, what was planned to be a short introductory chapter turned out to occupy half the book and to make its own contribution – or so we hope – to the lively philosophical debate about the role of religion in liberal states. In Part II, we use the theoretical insights of Part I to discuss critically some of the central issues in Israel 2018 in the area of religion and the state. Thus, Part I presents the theoretical underpinnings of our argument, while Part II applies them to the case of Israel.

reveal that the overwhelming majority of its uses are in the context of Israel. Indeed, the idea that a state could have no national-cultural character is absurd, as is the idea that its national-cultural character can equally represent all groups residing in it.

PART I

THEORY

INTRODUCTION

The philosophical and legal discussion on the relation between state and religion revolves around two main questions: first, whether religion should be separated from the state and, if so, what such separation would look like; and second, whether religion is entitled to special protection and, if it is, in what form and in what areas. These two questions are logically independent. One can support Separation together with a strong protection of religion, just as one can support Separation while denying the right of religious groups to special protection.

The questions addressed in Part I are roughly divided into these two categories: those dealing with Separation (Chapters 1–4) and those dealing with the special protection of religion (hereafter: “Protection”) (Chapters 5 and 6). Chapters 7 and 8 then examine the possibility that the secular community too should be granted special protection from public moves based on religion.

Chapter 1 presents two main arguments against support for religion by the state. According to the first, complete neutrality of the state conceptions of the good is a necessary condition for social order and peace. According to the second, support for religion violates the conscience of nonbelievers who, through their taxes, are forced to support belief systems and ways of living to which they are strongly opposed. We reject both arguments.

Chapter 2 then examines arguments aimed at showing that although the state is allowed to support conceptions of the good, including the religious one, it must offer this support equally. The arguments aimed at

grounding this conclusion are based on values fundamental to liberal theory – on the importance of dignity, autonomy, equality, tolerance, pluralism, and fairness. We show that none of these arguments is strong enough to justify a sweeping prohibition against the state advancing the conception of good to which it adheres, though they do impose constraints on how this may be done.

While the first two chapters discuss the general idea of state neutrality, with no special reference to religion, Chapter 3 investigates arguments for Separation based on the assumed threat posed by religion to society or to democratic values. We examine the evidence for this threat and we try to balance it by looking at some opposing evidence, namely evidence for the positive contribution of religion to both individual well-being and to the flourishing of society.

In Chapter 4, we turn to deal with religious arguments for Separation. According to these arguments, for the sake of its own purity, autonomy, and success, religion ought to give up any material or other benefit from the state. We concede that some risk to religion is indeed part of such association, but we believe that it is overstated. To entirely give up state support, especially in the domain of education, would have detrimental results for the survival and flourishing of religion.

In Chapter 5, we begin our discussion of the protections afforded to religion. We argue that if religious practices merit special protection, it is mainly because forcing believers to act against their religious commitments is an attack on their conscience. This leads to a limited conception of religious freedom that covers only cases in which there is a clear conflict between the law or the instruction of some public authority and religious requirements. However, we acknowledge another ground for religious freedom based on the right to culture. When religion is a comprehensive way of life for a group, the group should enjoy the same rights in its regard as those granted to other cultural groups in multicultural societies.

Religious individuals and groups often complain about their feelings being hurt. They argue that even when they have no right to religious freedom in the strict sense of the word, their religious sensibilities must be given due weight in the public sphere. In Chapter 6 we evaluate the force of such arguments. We conclude that claims about hurt religious feelings should play a much lesser role than they currently do in public and legal discourse. Only when the expression of disrespect to religion is intentional and significant might those offended by it have a moral claim for protection and, in rather rare cases, a legal right as well.

It is often assumed that the right to freedom of religion entails or includes the right to freedom from religion. In Chapter 7 we discuss the latter. We argue that not every limitation on liberty based on religious reasons is for that reason a violation of the right to freedom from religion. We propose that this right is violated only when nonbelievers are forced to take active part in religious rituals. In such cases, the secular conscience is under attack, which is analogous to the attack on the religious conscience in typical violations of religious freedom.

Chapter 8, which concludes Part I, discusses the question of whether religious arguments may be relied on in public decisions. According to a well-known doctrine – that of “public reason” – the answer is in the negative. We reject this doctrine and contend that although respect for one’s fellow citizens requires that one make an effort to find arguments that would be accessible to them, if such arguments cannot be found, one is nonetheless allowed to advance laws and policies on the basis of considerations that one regards as valid. There is therefore nothing a priori wrong in relying on religious considerations in public decisions.

I

Liberalism and Neutrality (I)*Arguments against Support*

I.1 INTRODUCTION

Although the idea of Separation is prevalent in liberal discourse, it suffers from conceptual vagueness. In particular, there is ambivalence between two major versions of the notion: Separation in the sense of withdrawing any support for religion (the “nonsupport version”) and Separation in the sense of refraining from any preference to religion (the “non-preference version”). These two versions are the central axis of the discussion in Chapters 1 and 2. Let us elaborate on them.

The nonsupport version claims that the state must not support religion; it must not fund religious education, houses of worship, *mikvas*, or religious officials. Citizens who want such religious services have to fund them by themselves.¹ Other types of support are also prohibited, including giving official status to representatives of religion, such as chief rabbis, *Qadis*, and the like, and acts providing symbolic support for religion, such as placing religious symbols in government areas, including religious elements in state ceremonies (swearing on the Bible, lighting *Hanukkah*

¹ This position was adopted by the United States Supreme Court in *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947) (hereafter: *Everson*): “no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” In *Lemon*, the court decided that the law compensating Catholic schools for paying teachers of secular subjects violated the non-establishment clause. In recent years this position has been attacked by some of the Justices of the Supreme Court, who claim that this interpretation of the First Amendment discriminates against religion. See the discussion in Kent Greenawalt, *Religion and the Constitution: Establishment & Fairness*, vol. 2 (Princeton, NJ: Princeton University Press, 2008), chapters 18–19.

candles at government sessions). Some claim that the government should not support religion even indirectly, for example, by funding remedial classes in religious schools.² Arguably, the very transfer of public money to religious schools expresses support for it and is, therefore, ruled out. To be sure, even the most enthusiastic advocates of Separation do not claim that the state should avoid *any* contact with religion. It is inconceivable that firefighters would not come to the rescue of a church in which a fire had broken out, even if there were no danger to human life or nearby structures, or that the police would not intervene in cases such as embezzlement of the funds of a religious institution, or of sexual abuse in a church. As Eisgruber and Sager put it, “the notion of literally separating the modern state and the modern church is implausible in the extreme.”³

The non-preference version claims that although the state is allowed to support religion, it must not give religious options any preference over nonreligious ones. For example, the state may display religious symbols in public, even in government areas, but it must not give preference to these symbols over the symbols of nonreligious movements, organizations, or traditions. Similarly, the state may provide funds for religious school systems, but it may not give these systems more support than nonreligious ones.

The non-preference version has an impact not only on the relation between religious and other conceptions of the good but also on the relation among religions and among streams of the same religion. If the state supports one religion or one stream of a particular religion, it must also support other religions and other streams. For example, if Israel supports Judaism, it must also support Christianity and Islam, and if it supports the Orthodox stream of Judaism, it must support other religious streams of Judaism as well.

The nonsupport version is more extreme than the non-preference version. It prohibits the state from offering any support to religion, even if this support is weaker than that given to other groups or other conceptions of the good. The nonsupport version logically entails the non-preference one, but not the other way round.

² See *Aguilar v. Felton*, 473 U.S. 402 (1985), which was overturned in *Agostini v. Felton*, 521 U.S. 203 (1997).

³ Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), 6.

Supporters of Separation in Israel often rely on what they see as the American model, that of a “Wall of Separation.”⁴ This wall is thought to be anchored in the First Amendment, which states: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” But this reliance ignores the complexity of American legal history. For about a century, the amendment was applied only to the federal government, not to the states, most of whom maintained a tight connection with Christianity, as embodied in religious laws and in the specification of Christianity as the state religion.⁵ Some commentators believe that the establishment clause never meant to rule out an alliance between religion and the state at the state level, but rather to set the proper standard for it. According to this interpretation, the ban on the establishment of religion was part of the federal principle of division of authority between the central government and the states.⁶

After the Civil War, the ban on the establishment of religion was extended to the states as well,⁷ but even then it did not occur to anyone to adopt the nonsupport version and suggest absolute separation between state and religion, on either the federal or the state level. On the contrary, almost everyone believed that the nation’s religious, or, more precisely, Christian character was an essential part of American identity.⁸ A Supreme Court decision in the 1930s stated explicitly, “We are a Christian people.”⁹ It took 150 years for the metaphor “Wall of Separation” to be adopted by Justice Hugo Black of the Supreme Court, in 1947,¹⁰ and even then there was no

⁴ The expression first appeared in a letter Jefferson sent to the Baptist congregation in Danbury. See Jefferson’s Wall of Separation Letter, U.S. Constitution Website, accessed December 24, 2017, www.usconstitution.net/jeffwall.html.

⁵ At the time when the Bill of Rights was formulated, seven of the thirteen original states granted preferable status to Christianity and none of the states’ constitutions prohibited the establishment of religion. See Greenawalt, *Religion and the Constitution*, vol. 2, 23.

⁶ See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998), 34; Wilber Katz, *Religion and American Constitutions* (Evanston, IL: Northwestern University Press, 1964), 8–10.

⁷ The Bill of Rights was not applied to the states in a single court decision, but a bit at a time. Even at present, a minority of the Supreme Court judges oppose this move, believing that the ban should be restricted to the federal government. See Judge Thomas’s opinion in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, (2004) (hereafter: *Elk Grove*) and his decision in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

⁸ See Daniel O. Conkle, “The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future,” *Indiana Law Journal* 75 (2000), 22.

⁹ *United States v. Macintosh*, 283 U.S. 605 (1931). ¹⁰ *Everson*, 330 U.S.