

THE HOLY SEE AND ISRAEL

Protecting human rights by bilateral agreements

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I. INTRODUCTION

On 30 December 1993 a «Fundamental Agreement» was signed between the Holy See and the State of Israel¹. On 29 July 1992 a «Bilateral Permanent working commission» had been established by the parties and the Agreement is the result of its work. Its main purpose is to provide, in the language of the Preamble, «a sound and lasting basis» for the continuing development of the present and future relations between the Vatican State and the State of Israel, against the significant background of the «unique nature of the relationship between the Catholic Church and the Jewish People², and of the historical process of reconciliation and growth in mutual understanding between Catholics and Jews». A major political consequence of the instrument will be the establishment of full diplomatic relations between both States (Article 14.2). In this short remarks I shall

¹ The agreement was ratified by the Government of Israel on 20 February 1994. For its text, *Justice* 1 (Tel Aviv, Winter 1994), pp. 18-20.

² The Basic Law: Human Dignity and Freedom— 1992 describes the State of Israel as «a Jewish and democratic state». This Basic Law was passed by the Knesset on 17 March 1992 and published in *sefer Hachukkim* núm. 1.391 (1992). It has not yet been officially translated into English by the Ministry of Justice: for an unofficial English text, *supra* note 1, at p. 27. There are different views as to the meaning of the word «Jewish» in this context. In the light of the reference in the Agreement to «the Jewish people», it seems superfluous to discuss if the term «Jewish State» has a religious, or a secular, or a combined meaning.

only deal with the human rights provisions incorporated in the Agreement, but it seems unavoidable to mention its far reaching religious and political implications.

A distinguished expert in the field of Christian-Jewish relations, the Associate Director for Ecumenical and Interreligious Affairs of the U.S. National Conference of Bishops, points out that the above quoted language is remarkable for an international document. «It is clearly theological rather than legal or diplomatic». But, he adds, its several articles deal with the resolutions of concerns of principle and practical relations, «but are in no way theological. There was never a theological barrier, although there were and are significant Christian sensitivities regarding the Holy Places and the rights of the Christian communities in what Christians view as the «Holy Land»³. The Fundamental Agreement is thus a complex document and the following observations do not pretend more than examining it from a human rights law approach.

In the nearly five decades elapsed since the creation of the United Nations, a wide spectrum of global and regional instruments intended to protect human rights has been developed. But not all human rights received the same treatment. Religious human rights, or human rights related to religion and beliefs⁴, are among the protected rights, but no global obligatory treaty has been adopted in this sensitive area, the source of so many political struggles, wars, international and domestic, and human sufferance. In the absence of a specific convention, mandatory provisions regarding religious human rights are those contained in the Covenant on Civil and Political Rights, on the worldwide arena, and corresponding provisions in the res-

³ See, EUGENE J. FISHER, «Jewish-Catholic Relations after the Fundamental Agreement» in *Interchange*, 2, 2, Jerusalem (April 1994). For a Protestant comment, in the same issue, Petra Heldt, «The Fundamental Agreement Between the Holy See and the State of Israel. The Challenge for Protestants». Rev. Heldt takes the view that privileges acquired by the Catholic Church will eventually be shared with other churches in Israel.

⁴ The word «belief» follows the word «religion» in several basic human rights instruments to clarify that the respective provisions also cover the right of non-believers such as free-thinkers, atheists or agnostics. See, Natan Lerner, *Group Rights and Discrimination in International Law*, Dordrecht 1991, p. 75 and foll.

pective regional human rights instruments⁵. The Universal Declaration on Human Rights⁶ has been the direct precedent of the Covenant. A major development in this area has been the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed in 1981 by the General Assembly of the United Nations⁷ the implementation of which has already originated considerable work on the part of United Nations bodies and officials⁸. A draft convention is pending before the United Nations bodies, but the prospects of progress regarding its adoption seem weak.

The difference in the approach to religious human rights as compared to other basic freedoms, has induced commentarists and observers to assert that the former had been neglected by the international community. This situation may be the consequence of the basic disagreement on the nature and extent of religious rights and freedoms, or of the circumstances prevailing in this period of history in the United Nations and other international organizations. In any case, alternative ways of action seem to be necessary, and bilateral agreements between some States and the Holy See serve that purpose. Most of them are concordats between the Holy See and some States, but a few cases also refer to the relationship between States and non-Catholic communities. Such are, for instance, the agreements between Italy and the Jewish community⁹ and those concluded between the Spanish government and the Evangelical, Jewish and Islamic communities¹⁰.

⁵ For the Covenants, United Nations, *Human Rights. A Compilation of International instruments*, New York, 1993, pp. 8-41.

⁶ For its text, *ibid.*, p. 1.

⁷ For its text, *ibid.*, p. 122.

⁸ See, Lerner, *supra*, note 4.

⁹ Such are the cases of Italy and Spain. On Italy, Giorgio Sacedoti, «Jewish Rights under a New Italian Concordat», 12 *Patterns of Prejudice* 1 (1978), p. 26, and «New Developments in Group Consciousness and the International Protection of the Rights of Minorities», 13 *Israel Yearbook on Human Rights* (1983), p. 116 and foll.

¹⁰ On Spain, Ministerio de Justicia, *Libertad Religiosa (normas reguladoras)*. Madrid 1988, and Ministerio de Asuntos Exteriores, *Acuerdos entre España y la Santa Sede (1976-1979)*.

II. HUMAN RIGHTS PROVISIONS IN THE AGREEMENT

In Article 1, paragraphs 1 and 2, both States uphold their commitment «to uphold» the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which they are parties. The State of Israel recalls its Declaration of Independence. The Holy See recalls the Declaration of Religious Freedom of the Second Vatican Council, «*Dignitatis Humanae*». The Holy See also affirms the Catholic Church's respect for other religions and their followers, as stated by the Ecumenical Council in its Declaration on the Relation of the Church to non-Christian religions, «*Nostra Aetate*»¹¹.

Article 2 of the Agreement deals with present manifestations of racism and religious intolerance, including antisemitism. The Holy See and the State of Israel «are committed to appropriate cooperation in combatting» such evils and «in promoting mutual understanding among nations, tolerance among communities and respect for human life and dignity» (paragraph 1). In paragraph 2, the Holy See reiterates «its condemnation of hatred, persecution and all other manifestations of antisemitism directed against the Jewish people and individual Jews «anywhere, at any time and by anyone». In particular the Holy See deplores attacks on Jews and desecration of Jewish synagogues and cemeteries, «acts which offend the memory of the victims of the Holocaust, especially when they occur in the same places which witnessed it».

The use of words such as «intolerance» and «hatred» requires clarification. While discrimination, on grounds of race or religion, is unquestionably prohibited and constitutes a clear legal figure, this is not the case with intolerance and hatred. The inclusion of these words in human rights instruments has created problems. The term «intolerance» is a key word in the 1981 United Nations Declaration on Religion, but its meaning is not clear enough. It describes a sub-

¹¹ See, International Catholic-Jewish Liaison Committee, *Fifteen Years of Catholic-Jewish Dialogue 1970-1985*, Vatican City, 1988.

jective attitude, feelings and emotions and it is not easy to assess its legal implications¹². Similar is the case with «hatred». Recently, legislation and jurisprudence in some countries have dealt with the question, and the notion of «hate crimes» has developed into a special category of offenses affected by certain characteristics of the victim, *inter alia* its religion¹³. Recent outbursts of violence in several countries in Europe have been seen as the result of racism, xenofoby and hatred based on religion. In the Agreement the use of these terms has to be related to the phenomenon of antisemitism.

By Article 3, the State of Israel and the «Church» recognize each other a series of basic religious human rights. As explained in Article 13, the term «Catholic Church» and «Church» include, *inter alia*, the «communities and institutions» that belong to it. The term «communities of the Catholic Church» means the Catholic religious entities «considered by the Holy See as Churches *sui juris* and by the State of Israel as «recognized communities».

Specifically mentioned in Article 3.2 and recognized by the State of Israel, are the rights of the Catholic Church to carry out its religious, moral, educational and charitable functions, to have its own institutions, and to train, appoint and deploy its own personnel in the said institutions or for the said functions to these ends. By Article 4, the State of Israel agrees with the Holy See on «the continuing guarantee of the freedom of Catholic worship». Article 5 recognizes the interest of both parties in favouring Christian pilgrimages to the Holy Land, subjected to consultation and cooperation when coordination is needed.

The right of the Catholic Church «to establish, maintain and direct schools and institutes of study at all levels», exercised «in harmony with the rights of the State in the field of education» is reaffirmed in Article 6. This is a very important provision, to be considered against the background of the international instruments dealing with educational rights, such as the already mentioned 1981

¹² Lerner, *supra*, note 4.

¹³ For a recent U.S. Supreme Court decision in this respect, *Wisconsin v. Mitchell*, 485 N.W.2d 807 (1992), rev'd 113 S.Ct. 2194 (1993).

Declaration, the Universal Declaration, the Covenants, the UNESCO Convention against discrimination in Education and the Declaration and Convention of the Rights of the Child¹⁴.

Article 7 deals with cultural exchanges between Catholic institutions worldwide, and educational, cultural and research institutions in Israel. By Article 8, the State of Israel recognizes the right of the Catholic Church to exercise its freedom of expression also through the Church's own communications media. In Article 9 both parties reaffirm the right of the Catholic Church to carry out its charitable functions through its health care and social welfare institutions, in harmony with the rights of the State in this field. The right of the Catholic Church to property is reaffirmed in Article 10.

All the above mentioned provisions are in accordance with the firmly established principles in the area of religious human rights. They are listed in the 1981 United Nations Declaration, which followed in this respect the principles formulated by Special Rapporteur Arcot Khrishnaswami in his 1958 *Study of Discrimination in the Matter of Religious Rights and Practices*¹⁵. Their enunciation in a bilateral agreement makes them obligatory for the involved parties in their reciprocal relations, beyond the inexistence of mandatory general treaties to which the signatories are parties.

III. HOLY PLACES

The issue of holy places for the different religions is an important ingredient in the spectrum of religious human rights. History is rich in examples of affronts against the holiness of sacred sites. Fortunately, this was not the case regarding the Muslim and Christian Holy Places in the State of Israel, carefully respected on the whole, beyond some isolated incidentes.

¹⁴ For all those instruments, *Human Rights...*, *supra*, note 5.

¹⁵ United Nations, Sales No. 60.XIV.2. See, also, Article 6 of the 1981 U.N. Declaration, listing, together with its Article 1, the basic catalogue of religious human rights.

The subject has many implications, not only of a religious nature. On the territory of the State of Israel there are many sites holy for the different religions. Most of them are in Jerusalem but there are others outside the city. They include places for Christians, Muslims, Jews and other religious groups. Already in 1949, the United Nations compiled a list of Holy Places, limited only to Jerusalem and its surroundings. In 1967, the Knesset passed the *Protection of Holy Places Law*¹⁶, according to which «The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places».

Article 4 of the Agreement deals with the issue, carefully avoiding any reference to the complex political problems involved in it, the discussion of which is beyond the scope of these observations.

The State of Israel affirms its continuing commitment to maintain and respect the «status quo» of the Christian holy places and the respective rights of the Christian communities thereunder. The Holy See, on its part, affirms the Catholic Church's commitment to respect the aforementioned «status quo» and rights (paragraph 1). In view of some misunderstandings and conflicts involving different Christian churches with regard to the Holy Places in Israel, this paragraph has special interest. It is also significant against the background of some Catholic criticism voiced in the past against the «status quo»¹⁷. Against this background, as Dr. Fisher points out, though «Israel has always honored the principle of religious freedom in practice, a written commitment gives some surety for the future beyond present

¹⁶ For the English text of the Law, passed on 27 June 1967 and published in *Sefer Hachukkim* n.º 499 (1967), p. 75, see *Laws of the State of Israel*, vol. 21 (1966/67), p. 76. On the legal status of the Holy Places in Israel, see several articles in *The Arab-Israeli Conflict* (ed. John Norton Moore), vol. I, Princeton 1974, pp. 915-1062.

¹⁷ See, *Religious Liberty and the Law*, Proceedings of symposia sponsored by the Israeli Interfaith Committee, the American Jewish Committee and the United Christian Council in Israel, Jerusalem, 1980, *inter alia* Father Joseph Stiasny's advocacy of «a radical change of the status quo» (p. 46).

political exigency. It may also have some precedent making value within the larger context of the Middle East»¹⁸.

By paragraph 3, the State of Israel agrees with the Holy See on the obligation of continuing respect for, and protection of, the character proper to Catholic sacred places, such as churches, monasteries, convents, cemeteries and their like. The State also agrees with the Holy See on the continuing guarantee of the freedom of Catholic worship (paragraph 4). Although there is nothing new in the reaffirmation of the freedom of worship—one of the basic religious human rights since it deals with the manifestation or expression of freedom of religion—the specific reference to it may reflect the desire of the Catholic Church to ensure cooperation of the State in preventing any violation of that freedom.

IV. EVALUATION

When these remarks will be published, full diplomatic relations between the signatories of the commented Agreement will most probably be a reality. As stated by Israeli Deputy Foreign Minister Yossi Beilin¹⁹, in a formal sense at issue is an agreement «between... a small State and an even smaller one. But its impact reaches beyond... geographic boundaries, and touches the hearts of millions of Jews and more than a billion Christians throughout the world». «Behind the agreement there are thousands of years of history, full of hatred, of fear and ignorance with a few islands of understanding, cooperation and a dialogue». On its part, Msgr. Claudio Maria Celli, the Vatican under-Secretary for Foreign Affairs, speaking on the same occasion, pointed out that, while clearly distinguishing between the political and the religious aspects of the signing of the document, the Holy See is convinced that the «dialogue and respectful cooperation between Catholic and Jews will now be given new impetus and energy».

¹⁸ *Supra*, note 3.

¹⁹ See, joint press conference following the signing of the Basic Agreement, Jerusalem, 30 December 1993, disseminated by the Ministry of Foreign Affairs.

In addition to its historical, political and religious dimensions, the Agreement also contains a concrete and clear human rights element. It lists a series of rights of churches and their members, generally acknowledged today but not specifically listed in obligatory positive international law. In the absence of detailed convention on religious human rights —and such a convention does not seem to be in the making, soon at least— it is important that States, particularly perhaps a state without a written Constitution and of a very special character, such as the Jewish State of Israel, on the one hand, and, on the other, entities like the Catholic Church, playing such a major role in the Christian world, conclude agreements defining and clarifying their reciprocal interests and rights, inclusive the wide spectrum of rights belonging to the category of religious human rights, or rights related to religion if the interests of secular non-religious persons are also taken into consideration.

In this respect, the December Fundamental Agreement between the Holy See and the State of Israel is a highly significant development likely to play a role in the universal protection of human rights in the sensitive field of religion and beliefs.