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ARTICLE

# Approaches towards legal protection for holy places: The example of the Alexander Nevsky Church in the Old City of Jerusalem[1]

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## Abstract

Given the varying degrees of importance that a holy place holds for different parties and the variety of laws used to regulate them, laws pertaining to holy places integrate a broad array of legal, political, social, religious, and economic interests. Acknowledging the difficulty of capturing a singular standard of protection merits examining different existing modalities to discern the means of protection for holy places.

A 2022 Israeli District Court case concerning ownership rights over a Russian Orthodox church in the Old City of Jerusalem shall provide the platform for scrutinizing the relevant laws and variety of interests at play for holy places in Israel, providing insights into the importance of accounting for divergent interests in the cultural heritage protection milieu. This article shall highlight the approaches used towards holy place protection in a difficult and complex context, Israel, to better understand heritage protection methods for unique or significant cultural sites in other regions.

**Keywords:** holy places; legal history; religious sects; legal regulation of holy places; Russia; foreign relations; Jerusalem

## Introduction

Holy places such as edifices, sites, or regions of religious significance are ubiquitous around the world. Religious beliefs tend to revere an area or site as maintaining elevated status (oftentimes due to an event associated with the place) or simply harbor the need or desire to designate a place for prayer and reflection. While it is not easy to define a holy place given the wide spectrum of meanings accorded to the term,[2] one recognizes the human need to distinguish a site, practice, or object as uniquely important or sacred, pursuant to heritage or history to superimpose an elevated status on a place.[3]

[1] Some of the research for this article derives from a co-authored book, Breger and Hammer (2023). Where relevant, reference is made to different chapters in the Old City book that expands upon some of the issues or laws discussed in this article.

[2] Walker (1990) at 45.

[3] Durkheim (1995) at 208–231; Wiegers (2004).

Considering the pervasive nature of holy places around the world, one would imagine that the investigation of laws regarding holy places is numerous, and outlining methods of demarcation and forms of protection are required to preserve holy places. Yet, there is a dearth of such analysis despite the importance of holy places in the pantheon of cultural heritage.[4] Part of the reason for the lack of attention might be that such laws are quite scattered, sometimes falling into narrow regulatory frameworks like antiquities protection or unique landmark status. In other instances, protections might be found within the rights of Indigenous Peoples' or minority rights. Furthermore, the legal regulation of holy places is a high-impact affair with broad implications for states, minority groups, Indigenous Peoples, individuals from the region, and those who maintain a link or connection to the site, even if located outside the state (such as an affiliated ethnic group or religious diaspora). Consider the Buddhas of Bamiyan and the ensuing outcry following their destruction,[5] or the uproar over Turkey's move to turn the Hagia Sophia (a protected site under the World Heritage Convention) into a museum.[6]

Oftentimes, the legal protection of holy places concerns older sites or areas subject to local customs over many years, with vestigial laws from prior invading powers whose influence and legal imprimatur endure. In other instances, holy places are not regulated at all given the complexity involved in tackling sites that prove too difficult or controversial. The result is that each legal framework is unique; some are composed of laws that are relics of prior empires, while others are protected through a lens of cultural heritage protection or landmark status and indigenous or ethnic group protections to promote tourism or assert control over natural resources. Yet, the complexity of protecting holy places remains, such that minor legal alterations can create a ripple of change leading to broad and deep impacts on protection methods. Indeed, focusing on the legal regulation of holy places raises to the fore seminal issues pertaining to property interests (and "ownership" rights), cultural heritage protection, religious freedom, minority and Indigenous Peoples' approaches, and environmental and social control. Unpacking how the laws of holy places are applied and interpreted is important for understanding methods of protection and preservation. Such examination assists, especially for controversial holy places.

In the international arena, holy places are often only addressed when destroyed or severely threatened, and even then when finding an intent to target and destroy a particular ethnic group.[7] Other instances of international protection involve the hesitancy of states to account for the interests of Indigenous Peoples,[8] creating clashes with other rights such as natural resources or property rights.[9] Consider a recent report from Christian Solidarity Worldwide asserting the need to connect freedom of religion with the rights of Indigenous Peoples, especially when their land rights are connected to religious practices.[10]

Adding to the rather complex legal fabric of holy places are looming political and social interests that influence the law's foundation and application. Political leveraging, state and

[4] Breger and Hammer (2023) at Ch. VIII.

[5] Francioni and Lenzerini (2003).

[6] Hammer (2021).

[7] Within the International Criminal Court, ICC-01/12-01/15 *The Prosecutor v. Ahmad Al Faqi Al Mahdi* September 27, 2016.

The International Criminal Tribunal for the Former Yugoslavia included discriminatory intent to destroy religious institutions without any military purpose as a form of persecution. *Prosecutor v. Kordić & Cerkez* [2001] ICTY February 26, 2001; *Prosecutor v Krstić* [2001] ICTY August 2, 2001. *See also* GA Resolution, *Promoting a Culture of Peace and Tolerance to Safeguard Religious Sites*, A/75/L.54 (2021); *UN Plan of Action* to Safeguard Religious Sites: In Unity and Solidarity for Safe and Peaceful Worship (2019).

[8] Disko and Dorough (2022); Meskell1and Liuzza (2022)

[9] Barclay and Steele (2021); Halafoff and Clarke (2018); Disko (2010).

[10] CSW and Stefanus Alliance (2022).

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diplomatic concerns, and a variety of different constituents all play a role in regulating the protection of holy places and cultural heritage protection writ large.[11] Laws can stabilize and temper external interests if applied in a fair and equitable manner, especially if their purpose is to prevent undue political or social forces from leveraging a holy place for their own cause or as an extension of statecraft. Granted, this proves difficult when dealing with a flashpoint site given matters such as economic interests (coming at the expense of an indigenous group),[12] political leverage of a specific ethnic or minority group,[13] or reliance on environmental concerns.[14]

Israel serves as an intriguing point to account for holy places' protection given the deep history and broad variety of groups (and states) maintaining an interest and role in holy places throughout the country. For almost any holy place in Israel, one is invariably confronted with not only literal strata of archaeological finds but also layers of historical legal controls, many of which are still in place today. Included in these rather rich and variegated sections are different internal religious factions that experience enduring friction, not only between religious groups but also with political actors that desire to leverage a holy place for political or economic benefits and external actors (including other states) who might harbor a cultural or religious interest or claim ownership of a site. Religious or ethnic groups from around the world often harbor a strong position about a holy place due to pilgrimage or other forms of connection. Because Israel's rich fabric of laws incorporates a broad range of interests (similar to many world cultural heritage sites), the laws and their interpretation highlight a variety of avenues that a state can adopt, and demonstrate how external actors and interests can (or cannot) be incorporated therein.

This article focuses on a holy place in the Old City of Jerusalem, the Alexander Nevsky Church (hereinafter: ANC), that is subject to a long-standing property ownership dispute between different Russian Orthodox factions. This article shall first provide a historical overview of laws that evolved over the centuries, which are interestingly still in play for holy places. Understanding the meaning and scope of these laws is important as it elucidates the underlying reason(s) for their creation and the contours for legal application. Indeed, a key factor in understanding the law is reference to prior cases ("case law"), looking at judicial decisions involving holy places to determine how courts interpreted the law in different situations. Importantly, examining the myriad of laws and cases offers insights for states, international organizations, and other relevant actors (such as cultural heritage protection groups or religious actors) into the ways and means for regulating a holy place or cultural heritage site.

Acknowledging the significance of case law as an inroad to understanding the law, the article shall examine a 2022 Israel District Court case concerning the ANC property. While the 2022 ANC case reflects the many religious and political interests at play for holy places in Israel, the case merits consideration because the court interpreted a seminal law concerning holy places in a manner that can have broad implications for other holy places in Israel. Interestingly, courts hesitate to become involved with holy places generally, deferring to the interests of the state. For example, Israeli courts intentionally did not decide on a property issue regarding the Deir al-Sultan (located by the Church of the Holy Sepulchre) and hesitated to get involved in matters of prayer between different Jewish factions at the Western Wall.[15] Thus, the broad scope accorded to the law in the 2022 District Court case can inadvertently impact the control over other holy places in Israel. In a manner reflective of

[11] Alamsyah, Nugraheni, Semarang, Prabowo, Hasyim, and Andriani (2022).
[12] The Economist, The Americas (2020); Kassam (2017).
[13] Breger and Hammer (2023) at Ch. VII.
[14] Community opinions on socio-economic, cultural, and ecological status in Ngorongoro (2022) at 41–48.
[15] 3358/95 *Hoffman and others v. Government of Israel and others*, 54(ii) PD 345 (2000) (in Hebrew).

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the topsy-turvy nature of Israeli politics, the District Court's approach can at the same time be said to meet the interests of the state (and even other actors relevant to the site), yet also serve to detract from those interests depending on the decision-making capacities of other bodies (governmental, religious, or otherwise) who maintain a form of control and oversight at other holy sites. The case serves as a telling forewarning to cultural heritage protection actors since, even with a resultant favorable interpretation (as per the desires of the state), an opposite result can ensue in future instances.

The ANC case also incorporated a variety of issues, including foreign affairs (going so far as to impact the Russian treatment of an Israeli citizen who was held in a Russian jail), international relations between Russia and Israel, international recognition of states, the role of the executive and the judiciary in issues pertaining to matters of holy places, state-religion affairs, inter-denominational relations within a religion, relations between and amongst different religious factions, and of course control over and "ownership" of religious property in the Old City of Jerusalem.[16] These political, diplomatic, and international relations matters have been identified simply by gauging the reactions of relevant state and religious actors to ownership decisions surrounding the ANC as evidenced by press releases, official statements, and judicial decisions. It is fascinating to witness the invocation of a holy place like the ANC as part of a diplomatic negotiation concerning the incarceration of a private citizen, reference by judges to the status accorded to post-revolution Russia circa 1917, international recognition of a state as impacting the ownership of a holy place, or broad worldwide reactions by states and religious actors to a change in the property status of a holy place (all discussed *infra*). Indeed, the overall relevance of holy places on international relations and diplomatic discourse has been the subject of much analysis, meriting constant attention given the impact that holy places can have on not only cultural heritage protection but also matters like reducing tensions in the Middle East between warring factions, along with the peace process.[17]

The analysis of Israeli law then highlights the myriad of interests that come into play when regulating holy places and the ensuing complex relationships that impact policy and decision-making. The court decision and the precedent it established serve as a telling lesson to other states and actors interested in establishing modes of holy places protection. Policy and lawmakers should be aware of how to incorporate and allow a role for actors interested in holy places and cultural heritage sites. Interest in holy places runs quite deep, and integrating actors from the social, cultural, and political planes can prove challenging. Taking an approach that shuns a particular branch (such as the judiciary) or shuts out specific actors (such as a religious actor or a foreign state) might be legally required and even necessary but will also undoubtedly provide more capacity to another governmental policy-maker (such as the Executive Branch). For example, a broad-form approach taken in this instance to the meaning of the term "court" under the law (which excludes a variety of judicial actors from being involved in decisions pertaining to holy places) might be desirable because it leaves policy and diplomatic issues in the hands of actual policymakers. Yet the impact of the broad interpretation reverberates for other relevant decision-makers with judicial-like characteristics, such as a tourism board or a municipal body, which might be better positioned to decide on the standing or status of a holy place without the involvement of highly-charged political branches.

The law is a device that establishes parameters and frameworks for action, and it is imperative to tread carefully when creating a law or making decisions that expand or

[16] The matter of the Old City of Jerusalem in its post-1967 status, while important, is not impactful on the issue of property ownership discussed in this article. For further elaboration, Breger and Hammer (2023) at Ch. II.

[17] For an excellent overview of diplomatic concerns, international relations' impacts, and politics concerning holy places in the Old City of Jerusalem, Najem, Molloy, Bell, and Bell (2018).

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contract existing legal contours. As in any decision pertaining to cultural heritage protection, and certainly for holy places revered by a wide spectrum of actors, there is a cautionary tale to be gained in recognizing that laws might become so entrenched over time they become inherently intractable. Altering or expanding their meaning is fraught with implications, sometimes going beyond the perspective of the body charged with interpreting or applying the law. Actors involved in matters of holy places stretch far and wide, with serious implications that can be felt throughout the globe.

## Background and interpretation of relevant laws

There are two central laws presently still in effect and governing holy places in Israel; one stemming from the Ottoman Empire, the Status Quo *firman* (defined below), and the other from the British Mandate period, the 1924 Order in Council. Aside from demonstrating the historical depth by which the law of holy places is ensconced into the existing Israeli legal system, these laws are highly relevant given their pivotal role as the fulcrum that affords a legal vantage point from which later laws were passed and judicial decisions made. These pre-State of Israel laws are key referential points for all relevant governmental actors in Israel as they provide a foundational gauge by which to consider the scope of involvement and protection by governmental authorities over holy places in Israel. Thus, it is important to understand what these laws accomplish, the approach taken to these laws, and the interpretation accorded to these laws, especially when factoring in the wide scope of interests that come into play concerning holy places.

## Status Quo firmans[18]

Prior to the British Mandate, the Ottoman Empire controlled important holy places using *firmans*, a written command direct from a sultan, indicating duties and responsibilities to be undertaken in a selected area.[19] The *firmans* focused on seminal Christian holy places and witnessed a variety of iterations through the years, eventually leading to the establishment of what is now called the Status Quo. Applying only to a select few holy places (the Church of the Holy Sepulchre, the Deir al-Sultan, the Church of the Sanctuary of the Ascension, the Tomb of the Virgin, and the Church of the Nativity), the Status Quo is the term given to a body of norms and accepted practices encompassed in the *firmans.* These controls relate to a complex series of custodianship rights, liturgical practices, damage repair, and general internal administration of the holy places in question. They are largely respected by the different Christian denominations subject to these controls.[20] Muslim holy places were protected under Ottoman Law, which was based for the most part on Sharia law.

These Status Quo "norms" have become enshrined wholescale into existing legal lexicons such as to instantly encapsulate all the forms of accepted practice between relevant Christian sects at the sites in question. An example of this utilization and entrenchment of the Status Quo norms into a legal regime is found in international law through the Treaty of Berlin which decreed that "it is well-understood that no alterations can be made in the Status Quo in the holy places."[21] Thus, these norms were respected and upheld by subsequent ruling powers.[22] Further, they proved to be quite impactful in the ensuing practice of removing the judiciary from disputes regarding holy places, specifically because the Status

[18] Cetinkaya (2017).
[19] For further discussion and background regarding the Status Quo, Breger and Hammer (2023) at Ch. IV.
[20] For a detailed elaboration of the norms of the Status Quo and all of its intricacies, see Cust (1929).
[21] *The Treaty of Berlin*, 1878, Article 62, *in* Mowat (1916) at 79–83.
[22] With regard to Israel, Israel State Archives (hereinafter: ISA) 2397/3 – Holy Places (1949).

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Quo provided a great deal of internal autonomy to the relevant Christian denominations who maintained active sovereign-like roles at the Status Quo sites. Thus, the Status Quo *firmans* were the first forms of present-day attempts to regulate holy places that are still applied in the present day.

The approach taken by the Status Quo to provide autonomy to religious factions over the designated holy places carried over into the British mandate, where the latter expanded the Status Quo to include Jewish holy places such as the Western Wall and Rachel's Tomb.[23] Given the burgeoning Jewish population, the mandate incorporated Jewish holy places as it recognized the influence the Status Quo has on legal administration of holy places and desired to delineate it as best it could, the scope of these *firmans*, the British also included additional holy places that impacted the burgeoning Jewish population.

The Status Quo *firmans* continue to serve as a formative template by which a strong hands-off approach to regulating and overseeing holy places was adopted. Governmental authorities recognized the benefit of providing forms of autonomy to religious factions to avoid becoming embroiled in matters that were overly complicated and potentially damaging on many fronts. These included economic impacts on tourism and trade, security control, and the diplomatic fallout upon considering the importance accorded to holy places by other states and religious factions.

## *Order in Council of 1924*

When the Mandate was being crafted by the League of Nations after World War I, Western states recognized that there was a lot more at stake than a number of Status Quo holy places, especially when factoring in the reality that they now had to contend with Muslim sites (that were no longer controlled by an Islamic authority, a dramatic change that had been in effect since at least the 14th century when the Ottoman Empire rose to the fore). Indeed, Italian Prime Minister, Francesco Nitti, proposed during the San Remo negotiations that an international commission under the League of Nations be formed to address holy site issues,[24] leading the British to agree to such a commission – in part, to facilitate League approval of the Mandate.[25]

The notion of an international commission to govern holy places was formalized in Article 95 of the Treaty of Sevres,[26] with a modified version calling for ultimate League approval of the same being reiterated in Article 14 of the Mandate approved by the League, which stated:

> 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.[27]

As the former Chief Justice of Palestine noted, "[i]t seems clear ... that it was the intention to exclude the holy places from the jurisdiction of the Mandatory Government and make them subject to some form of international control under the league."[28] One can thus see the nature by which states continued to approach holy places in the region as reflecting the

[23] Cust (1929) at 46.
[24] Manuel (1955) at 280.
[25] *Eleventh Meeting (Public)* (1922) at 546 and *Twelfth Meeting (Private)* (1922) at 823.
[26] Article 95 of the Treaty of Peace with Turkey, TS 11/Cmd. 964 August 10, 1920 (the Treaty of Sevres). The Commission was never created.
[27] Mandate for Palestine (1922) at Article 14.
[28] Fitzgerald (1950) at 7.

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methodology adopted within the Status Quo *firmans*, that is to limit the ruling authority's control.

While the Mandate relinquished forming a Commission,[29] a system was created whereby disputes "between religious bodies, arousing international interest, should be dealt with by a higher authority than a local court."[30] This was in line with Article 14 of the Mandate,[31] consequently, it was not perceived as a deviation from the League of Nations' policy. Thus, on July 25, 1924, the British used their Mandatory legislative capacities to promulgate an Order in Council, which is an enactment of the King in Privy Council,[32] decreeing that "no cause or matter in connection with holy places or religious buildings or sites, pursuant to a site's historical relevance and the degree of veneration accorded it by humankind in general, shall be heard or determined by any court in Palestine."[33] It referred all matters regarding holy places to the High Commissioner "pending the constitution of a Commission charged with jurisdiction over the matters set out in the said Article."[34] Of note is the contention that the British at that time desired to prevent Russian Orthodox Church claims from being raised in the Palestinian court system.[35]

The British adopted a rather broad understanding of holy places (which implicitly included the Status Quo sites as well), allowing for recognized sites and historically entrenched holy places to fall under legal protection. The issue was deemed more appropriate for Executive policy decisions (the High Commissioner) given the far-flung implications for the people under their administration in the region. For example, in the case of *Keren Kayemeth L'Israel Ltd. V. Custodian of Terra Santa Nazareth*, 7 Palestine Law Reports 291 (1940),[36] Justice Frumkin (dissenting) noted two possibilities regarding the role of the court when confronted with a potentially protected holy place under the Order in Council: either the court is to refuse to entertain the case (lack of jurisdiction) if there is a clear connection to a holy place or the matter be referred to the High Commissioner (the Executive) where a connection with holy places is unclear or disputed.

The Order in Council thus provided protection for unique religious sites above and beyond "standard" places of worship and cemeteries.[37] Indeed, the Mandate even established informal Committees of Enquiry (COE) to make factual determinations regarding the potential "importance" or unique status of a particular site pursuant to its use over time and its overall historical relevance. The committees were usually comprised of the Attorney General, a District Court judge, and the District Commissioner,[38] with the High Commissioner being bound by the findings of these panels.[39] Interestingly, the majority of these COEs held that most sites under discussion were not holy places with unique or universal

[29] *Id. Report by His Britannic Majesty's Government on the Palestine Administration 1923*, December 31, 1923, at Section IX.

[30] Cohen (2008) at 21.

[31] An early British analysis found that the goal of Article 14 was to engage disputes concerning holy places without delving into matters of "ownership". UK Archives CO 733/382/3 – *Partition: Holy Places* (1938). Shabtai Rosenne similarly notes that Article 14 ensured for addressing the claims of different religious communities to use a holy place, but not to issue rulings regarding title. ISA 2397/3 – Holy Places (1949).

[32] Bentwich (1948) at 38.

[33] *The Palestine (Holy Places) Order in Council* July 25, 1924, Article 2, *in* Drayton, Robert Harry (1934) *The Laws of Palestine* 2625 (hereinafter: 1924 Order in Council)

[34] 1924 Order in Council, at Article 3.

[35] Bialer (2005) at 148

[36] *Keren Kayemeth L'Israel Ltd. V. Custodian of Terra Santa Nazareth*, 7 Palestine Law Reports 291 (1940) at 297–298,

[37] Rosenne makes a similar point in ISA 2397/3 – Holy Places (1949).

[38] ISA 30/40 *CSO B/14/44 Procedure in dealing with cases under Palestine (Holy Places) Order in Council 1924.*

[39] Eordegian (2003) at 309.

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characteristics as intended by the Order in Council (including a variety of synagogues and cemeteries, along with the supposed tomb of Mohammed's wet nurse).[40]

Of course, if the COE was addressing a unique site of elevated importance (due to, for example, the site's religious and/or historical standing) then the need for Executive involvement by the High Commissioner removed court jurisdiction over the matter. An example is Mount Tabor, a mountain historically and continuously associated with the Transfiguration, that, given its venerated status, continuous use by the public, and ongoing activity at the site, was placed under the Order in Council and removed from court jurisdiction.[41]

Despite it being a Mandate-period law passed before the State of Israel was established, the Order in Council still applies under Israeli law,[42] as evidenced by several Israeli laws protecting against damage to "holy places as understood under the Order in Council" (without defining the meaning of the term "holy place").[43]

In practice, the 1924 Order in Council clearly applied to a greater number of sites than those listed in the Status Quo.[44] For example, Mandate authorities applied the Order in Council to Christian sites such as the Cenacle, despite the site being in Muslim hands since the 16th century.[45]

### *Holy Places Law in 1967*

An exception to the Order in Council occurs when the Israeli legislature removes the Order in Council's application pursuant to a newly passed law (post-1948). An Israeli court then can entertain a case if the issue being raised in the case pertains to the newly passed law. An important example of a new Israeli law post-1948 is the 1967 Protection of Holy Places Law, which disallows the desecration of a holy site and provides for free access thereto (section 1 of the law, with section 2 making it a criminal violation).[46] Thus, if an issue before the court relates to someone desecrating a holy place, even a Status Quo holy place, the Israeli court may entertain the case. Article 4 of the Holy Places Law further provides:

[40] ISA 30/14 *CSO B/7/42 Old Beth El Synagogue in the Jewish Quarter*; ISA 30/33 *CSO B/7/44 Baruchov v. Baruchov*; ISA 29/23 *CSO B/23/39 Jafar v. el-Shafily*; ISA 30/31 *CSO B/11/38 Trespass on Lands Used as Cemeteries.* 28/1940; *Mudir el Awkaf v. Keren Kayemet of Israel and Others* 7 Palestine Law Reports 242 (1940); *Daumat v. Rabhaui* 3 Collections of Judgements of Palestine (1911–1932) 983 (1932); *Khadra v. Hajjar* 2 Palestine Law Reports 53 (1933); *Tefila-le-Moshe Synagogue v. Hanokh* 2 Palestine Law Reports 247 (1933; 229/1945 *Mudrer El Ankaf El'am v. Palestine* 13 Palestine Law Reports 175 (1945).

[41] *See* ISA 30/3 CSO B/3/41 *Mount Tabor – Settlement of Title.*

[42] *Law and Administration Ordinance 5708–1948* 1 Laws of the State of Israel 7, at Section 11.

[43] This includes Section 70 of the *Water Law* 288 Seifer HaChukim 169 (1959) (in Hebrew), Section 14 of the *Municipal Authority (Sewage)* 376 Seifer HaChukim 96 (1962) (in Hebrew), Section 51 of the *Land Development Law* 467 Seifer HaChukim 307 (1965) (in Hebrew), and Section 22 of the *National Gardens, Nature Reserves, and Sites of National Importance Law* 1666 Seifer HaChukim 202 (1998) (in Hebrew). Section 77(a) of the *Oil Law* 109 Seifer HaChukim 322 (1952) (in Hebrew) provides for protection of holy places through the Minister of Religion but does not refer to the Order in Council.

[44] ISA 2443/9 – *Jerusalem Letter* (1950), where the Foreign Ministry notes the broad language of the Order in Council indicating that the Status Quo "provides a basis which could serve for the determination of holy places of the supreme category."

[45] Israel continues to apply the 1924 Order in Council, thereby removing the jurisdiction of local courts. ISA 2397/3 – Holy Places (1949).

[46] *Protection of Holy Places Law*, 21 Laws of the State of Israel 76 (1967) (hereinafter: Holy Places Law). *See also Military Order 327 – Order Regarding Protection of Holy Places (Judea and Samaria) (No. 327) 1969* Military Order of June 12, 1969, 19 *Compendium of Proclamations Orders and Appointments* 663 (1969) (in Hebrew) that essentially mirrors the Holy Places Law.

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> The Minister of Religious Affairs is charged with the implementation of this Law, and may, after consultation with, or upon the proposal of, representatives of the religions concerned and with the consent of the Minister of Justice make regulations as to any matter relating to such implementation.

In 1981, regulations were passed that focused on the Western Wall to ensure inter alia that there was no desecration of the Sabbath in the area, and limiting other activities such as smoking, sleeping, or engaging in commercial activities (like charging someone to take a picture by the Wall itself).[47] Other sites were folded into the directives of this regulation in Appendix I of the Law and incorporated other holy places (such as the Cave of Simon the Just and the small Sanhedrin Cave in East Jerusalem, the Tomb of Rabbi Ovadiah of Bartenura at the Mount of Olives cemetery, and Zechariah's Tomb and Absalom's Monument in the Kidron Valley).[48]

As noted by Professor Ruth Lapidoth, the practical meaning of these laws is that courts will not rule on questions of substantive rights or claims to holy places or sites, nor adjudicate on matters related to the right to worship, yet courts will address matters mentioned in the Holy Places Law, including protection against desecration or offending the feelings of community members regarding a sacred site, violations of freedom of access, or criminal offenses – especially to preserve the public order.[49]

An important example of a venerated holy place removed from court oversight yet still subject to Israeli court jurisdiction under the Holy Places Law is the *Haram al-Sharif*/Temple Mount. Take for example the case of *Temple Mount Movement v. The State of Israel and others*, where the Israeli Supreme Court found that if a matter before the court relates to holy places access (a right guaranteed under the Holy Places Law), indecent criminal acts in a holy place (such as insulting those who deem the area holy – a violation of Israeli criminal law) or the need to uphold public order and security (pursuant to the directives of the police and military), the court will entertain the matter.[50]

If, however, the issue is not addressed by Israeli legislation (such as property ownership), then the Court will defer to the Executive, as per the Order in Council.[51] Thus, in a 1971 dispute between the Copts and Ethiopians concerning the Deir-al-Sultan Monastery (a Status Quo site), the Supreme Court of Israel decided that it lacked the capacity to decide on the issue, leaving the decision in the hands of the government.[52]

## The Alexander Nevsky Church – Background

With the backing of the Tzar, the Russian Ecclesiastical Mission (hereinafter: Mission) was founded in Jerusalem in 1844[53] and the Orthodox Palestinian Society was founded in 1882 (although it was subsequently renamed in 1889 as the Imperial Orthodox Palestine Society [hereinafter: IOPS]).[54] These organizations acquired a significant amount of property in the

[47] 4252 Kovetz Takanot 1212 (1981) (in Hebrew).

[48] 4252 Kovetz Takanot Appendix 1 *Regulations for Protection of Jewish Holy Places* for a list of the 15 officially regulated sites under the law (includes sites in Haifa, Tiberias, Meron, and Peki'in).

[49] Lapidoth (2003); Lapidoth (1999) (in Hebrew) at 88–91.

[50] 7128/96 *Temple Mount Movement v. State of Israel and others* 51(ii) PD 509 (1997) (in Hebrew) at 514. *Compare* 537/81 *Shtenger v. Government of Israel* 35(iv) PD 673 (1981) (in Hebrew).

[51] 33/92 *Ben Yosef v. Minister of Religion and others* 46(i) PD 855 (1992) (in Hebrew).

[52] 109/70 *Coptic Patriarchate v. Minister of Police*, 25(i) PD 226 (1971) (in Hebrew); 633/05 *Armenian Patriarchy of Jerusalem v. The Government of Israel* (unpublished decision of April 21, 2005, in Hebrew).

[53] Stavrou (1963) at 25–26; Hopwood (1969).

[54] Stavrou (1963) at 57–89, 115–127; Kildani (2010) at 136.

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Holy Land (through the support of the Russian Empire), including hostels, schools, churches, monasteries, consulates, and hospices.[55]

After World War I and the Bolshevik Revolution, assets of the Russian Church were nationalized, including properties in the Holy Land.[56] On January 23, 1918, IOPS was refashioned by the Soviets (hereinafter: Red OPS).[57] The Constitution of the Red OPS refers to itself as the "lawful successor" of the IOPS established in 1882 and that it was an arm of the Russian Federation.[58] Nevertheless, Russian exiles who fled the Soviet Union "renewed" IOPS as the Russian Orthodox Society of the Holy Land registered in Munich (hereinafter: White OPS).[59]

Each of the two Orthodox Societies believes they are the "lawful" successors to the IOPS established in 1882, with each taking control over different properties in the Holy Land. One such property was the ANC in the Christian Quarter of the Old City of Jerusalem, which passed into the hands of the Russian Orthodox Church in Exile and the White OPS.[60]

In the post-Soviet period, Russia attempted to (re)acquire property rights to churches abroad to solidify an image of a unified Russia under one consolidated Orthodox community (the Moscow Patriarchate).[61] As such, the Russian Federation sought the return of the ANC property and in August 2017 filed a request with the Israeli Land Registry pursuant to section 135 of the Land Law of 1969, requesting title transfer of the church to the Red OPS.[62]

The request languished until 2019, when Naama Issachar, an Israeli tourist, was sentenced to seven-and-a-half years in a Russian prison for carrying a small amount of marijuana when transferring between flights in Moscow. As Russia and Israel began negotiating for her release, there was talk that part of the release deal involved carrying out the 2017 request made by Russia to return the ANC to the Russian Federation.[63] This speculation was heightened due to Russia's involvement in the Syrian civil war and Israel's need to protect its security and prevent an influx of arms and weapons from other actors involved in the conflict (namely, Iran).[64]

While the Land Registry finally commenced a hearing regarding ownership rights of the Church, the then Prime Minister Netanyahu signed an order on October 18, 2020, declaring the ANC a holy site under the 1924 Order in Council.[65] On October 19, 2020, the Land Registry held that the Russian Federation was the proper landowner of the Church.[66]

The Land Registry transferred the property registration of the church to the Red OPS, with the title holder being the present-day Russian Federation, the internationally recognized "successor" to Imperial Russia under international law and by Israel.[67] The Land

[55] Bialer (2005) at 146.

[56] *Id.* at 146–147. For a discussion of the laws and its application within Russia both during and after the Soviet period, Kratova (2020)

[57] Bialer (2005) at 147.

[58] *Constitution of the Imperial Orthodox Palestine Society International Pubic Organization*, Article 1.1.

[59] Bialer (2005) at 147. *Memorandum on the Orthodox Palestine Society and its properties in Palestine – UNCCP's Committee on Jerusalem* COM. Jer./W.23, June 10, 1949 (referred to as the Alexandrovsky Hospice, Old City).

[60] For background history about the ANC, Astafieva (2016) (in French). For a White OPS perspective, Воронцов (2015), and Vorontsov (2015). For a Red OPS perspective, Лисовой (2012) and Lisovoi (2019).

[61] Blitt (2011) at 419.

[62] 8611 Yalkut Hapirsumim 2640 (2019) (in Hebrew).

[63] Hasson (2020).

[64] *Id.*

[65] 1445-12-20 *Orthodox Palestinian Society v Commissioner of Land Registry* (unpublished decision of March 2, 2022, in Hebrew, copy on file with author) (hereinafter: Commissioner (2022)) at para. 3.

[66] *Id.* at para. 4. In July 2021, the then Prime Minister Bennett appointed a ministerial committee to examine the problem. The Committee never met. *Id.* at para. 7.

[67] *Id.* at para. 9.

The December 30 letter by the Office for Registering Land Rights, Ministry of Justice has been photocopied in

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Registry further declared that the title transfer was merely an informal administrative act and not a court decision per se, thus not violating the Order in Council.[68]

## The District Court case

The White OPS filed objections with the Land Registry Commissioner,[69] referring to the surrounding politics involving Naama Issachar and to the fact that the declaration by the Land Registry was a legal decision and not an administrative act (thus engaging the Order in Council and essentially removing the courts and the Land Registry from acting). Coupled with the reality that the White OPS had been holding the property all these years, the latter contended that all indications were that the Red OPS was not the Church's successor. A further contention related to the issue of recognition of a foreign state, which the White OPS contended was not in the hands of the court but one for the Foreign Ministry and Executive branch to make.[70] The Land Registry Commissioner dismissed the appeals, ruling that the Russian Federation was recognized internationally and by the State of Israel as "the successor state" of the Russian Imperial government; therefore, the land should be registered in the name of the Russian Federation.[71]

Note, too, the White OPS' reference to the Kedmon Commission from April 6, 1960, a governmental commission with limited powers to request evidence and hear witnesses. The 1960 Kedmon Commission was specifically established to determine the status of assets claimed by the Soviet Union. It found that the Russian Federation was merely a temporary possessor of disputed property but only until claims were properly resolved. While the Land Registry Commissioner noted that the Kedmon Commission did not possess binding legal power but was solely constituted to provide direction to the state as relations with Russia began to develop, the Commissioner pointed out that the property at issue was not (yet) even a part of the State of Israel as it was a Commission decision from 1960 (thus predating 1967 when Israel achieved sovereign control over the Old City of Jerusalem). Interestingly, the 1960 Kedmon Commission stated that it was only dealing with land previously held by the Imperial Russian Republic (the predecessor to the Soviet Union) and not land held by other bodies like the White OPS. In this instance, the ANC had been held by the Russian Republic until its fall, with the White OPS taking control only after the fall of the Republic.[72] The White OPS then filed an appeal before the Jerusalem District Court following the Land Registry Commissioner's decision of November 2020.

It is important to point out that within the White OPS, there was fierce opposition between several groups claiming to represent the White OPS, another factor reflective of venerated holy places where many factions attempt to assert control. In this instance, the White OPS groups included the Orthodox Palestine Society of Holy Land (Jerusalem and Near East Section), the Alexander Glasunow Foundation, the Palestine Orthodox Union of the Palestine Orthodox Society (Holy Land) Inc., the Orthodox Palestine Society (Holy Land)

Alice Shamir and Anna Raiva Bursky's, *On the Way to the Deal? Israel Transferred to Russia the Court of Alexandra in Jerusalem*, Maariv, June 22, 2020 (in Hebrew).

Issachar was pardoned shortly thereafter and returned to Israel, with both sides denying any connection between these two events. Harkov (2020).

For additional background discussion regarding the surrounding events, Grinzaig (2022); Hasson (2022).

[68] Commissioner (2022) at para. 8.

[69] *Id.*, at para. 2.

[70] *Id.*, at paras 17–19.

[71] ISA-mfa-Minister-000as0t Shabtai Rosenne *Recognition of Governments* Legal Advisor number 15, Foreign Ministry Legal Advisors Office, May 26, 1950.

[72] Commissioner (2022) at para. 12 (c). Nagorsky (2016). For an overview of post-Soviet approaches towards religious heritage in Russia, Diana (2021).

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LTD., and The Russian Religious Society That is Outside of Russia, all of which claimed before the District Court that they were sides to the issue and should be joined in the case given their claim to be the rightful owners/possessors of the Church.[73] The court, however, removed these additional factions because they had not taken part in the earlier motions that were made before the Land Registry Commissioner and were not part of the challenges raised by the White OPS.[74]

On March 2, 2022, the District Court ordered the Land Registry to suspend the property transfer to the Russian Federation,[75] reverting the issue to the Executive branch pursuant to a broad understanding of the 1924 Order in Council. The Court held that the Order in Council's use of the term "court" should not be understood solely in a literal sense as the term applies, not just to courts per se but also to administrative bodies such as the Land Registrar.[76] The Court held that anybody who has the power to settle a dispute between the parties falls within the purview of a court.[77]

The Court referenced other administrative bodies that maintain judicial-like decisional powers that were deemed to be courts under the law.[78] The court also found that case law supports a broad meaning of the term "court" as being a body authorized under the law to issue a deciding determination of a dispute between different sides.[79] Thus, while the Land Registry indeed played an administrative role, it can also play a court-like role depending on the activities being undertaken.[80] Interestingly, the Land Registry Commissioner is appointed using the same criterion and evaluations as a Magistrate Court Judge; the Land Registry Commissioner can decide a variety of legal disputes (such as joint housing disputes, levying fines for delayed payments, and deciding ownership rights prior to registering a property's owner).[81]

The Court also referred to the historical basis of the Order in Council to remove holy places issues from the court,[82] especially given the broad interests of holy places to actors that impact inter-state and inter-denominational relations, incorporating issues of social, cultural, and religious importance that demand a diplomatic approach.[83] The court also noted that one of the reasons for moving executive decisions regarding holy places from the Ministry of Religion to the Prime Minister's office in 2004 was due to the need for higher-level executive officials to be involved in these matters.[84]

## Potential implications

The implication of the case for Israeli jurisprudence and the protection of holy places would at first glance appear negligible. For example, upon appeal of the decision by the state

[73] 5206/05/20 *The Orthodox Palestine Section, Holy Land Society v. Land Registry Commissioner of Jerusalem and others*, Jerusalem District Court, Decision of June 22, 2020 (hereinafter: June 2020 case) at paras 2–3.

[74] 13153/12/20 *The Orthodox Palestine Section, Holy Land Society and others v. State of Israel and others* District Court Decision of February 25, 2021

[75] The decision was made a week or so after the Ukraine war started. When Israel condemned Russia for the invasion, Vladimir Putin wrote a personal letter to the then Prime Minister Bennett demanding the return of the Church. Itamar Eichner, *Putin Demands Ownership of Jerusalem Landmark in Angry Letter to Bennett*, Ynet, April 18, 2022.

[76] Commissioner (2022) at para. 70.

[77] *Id.*, at paras 74 and 88, referring to 6650/04 *Plonit v. Regional Rabbinical Court of Netanya* 61(i) P.D. 581.

[78] Commissioner (2022) at para. 74(e).

[79] *Id.*, at para. 75.

[80] *Id.*, at para. 76 and at para. 90, referring to 1062/85 *Waqf Hassan Al-Husseini v. Husseini* 5752(i) 467 (1991).

[81] Commissioner (2022) at para. 77 and para. 79, referring to 1772/95 *Cohen v. Paz Gas Company* 5756(ii) 353 (1995).

[82] *Id.*, at paras 83–84.

[83] *Id.*, at para. 85.

[84] *Id.*, at para. 86; 5266 Yalkut Hapirsumim 1642 (2004).

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(or more exactly, the Land Registry) to the Israel Supreme Court, the parties eventually agreed to remove the appeal as long as the White OPS stated that the decision of the District Court applied solely to the facts and situation of the case before it.[85] Indeed, one can contend that while the White OPS might have emerged victorious in the District Court case as the land transfer to the Red OPS was suspended, the matter was still deemed to be a decision for the Executive branch under the Order in Council. The Executive could now decree that the Church property was to be transferred over to the Red OPS (read: the Russian Federation).

Future cases involving holy places under the Order in Council will be inclined to accord a broad understanding of what is a court under the law, creating a domino effect on other important holy sites that involve a binding legal decision by an administrative body. Property disputes abound regarding important holy places like the Cenacle and important holy places falling under the Abandoned Property Laws.[86] For example, the Cenacle is beset by property issues regarding the control of the different sites in the immediate area, including a synagogue, mosque, and, of course, the Chapel commemorating the Last Supper. The site itself has been under Muslim control since the 16th sixteenth century, with the Dajani family asserting control over the site (and turning to the Supreme Islamic Authority of East Jerusalem as well as the *waqf* in Jordan to assist in maintaining their "ownership" of the site).[87] Additional attempts to wrest control of the area have occurred throughout the years,[88] and Israel has continuously grappled with the site. Israel recognizes the site as falling under the Order in Council, but it also has made attempts to govern the area in view of Christian attempts to expand their prayer rights in the area and the potential connection of the site to King David and his tomb (an important reason behind the pre-1967 bevy of Jewish activity at the site given its proximity to the Temple Mount).[89] Recognizing the various authorities involved with decision-making capacity could further complicate ensuing decisions if they are deemed judicial bodies (including the Supreme Islamic Authority). Removing that aspect of external involvement will not only undermine the autonomy of religious bodies the Order in Council intended to create, but also further extend the reach of an ever-expanding Executive branch in Israel, particularly when accounting for the power accorded to the Prime Minister's Office.[90]

Additionally, there are a host of issues regarding religious property (including Status Quo sites such as the Holy Sepulchre) that raise the question of the payment by religious properties of their water bills and municipal taxes.[91] Indeed, these matters came to a head a few years ago over old water bills and the Jerusalem municipality's desire to collect back taxes from religious properties (including Status Quo sites and other important holy places in Jerusalem that could fall under the Order in Council).[92] While the legal opinion of the Jerusalem Municipality was that Church property should be subject to taxation (save for

[85] 3061/22 *Land Registry v. OPS and others* (unpublished decision of February 26, 2023), at para. 1.

[86] *Absentees' Property Law*, 1950 Seifer HaChukim 86 (1950) (in Hebrew).

[87] Minutes of the Knesset Committee of Interior and of Environmental Protection (2014) (in Hebrew); Ghandour (1990); Peled (2009).

[88] For example, the Italian government made such an attempt at the end of World War I. Minerbi (1980).

[89] Bar (2019); Mizrachi and Weider (2014) (in Hebrew).

[90] Pfeffer (2018).

[91] Breger and Hammer (2023) at Ch. IV discussing matters confronting religious property and national and municipal authorities.

[92] Section 2 of the *Arrangements in the State Economy Law* (Legislative amendments to Secure the Budget Objectives and Economic Policies for Financial Year 2003) 1882 Seifer HaChukim 150 (2002) (in Hebrew) removing municipal tax exemptions for church properties.

The Jerusalem municipality at one time claimed it was owed $186 million from both church and UN properties. Hasson (2018); Caballero (2018); Yalon (2019).

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areas used for holy purposes such as prayer) and was enforceable under the law,[93] the actual collection and execution of a judgment against the Church and its property might fall under the guise of a judicial act, such as to move the issue to the Executive. Thus, issues of building codes, payment for water and collection services,[94] and other modes of enforcement, might now fall under the purview of the Executive for holy places that are within the framework of the Order in Council.

A recent case exemplifying the problem and tension between municipalities and their relations with religious bodies (the latter of whom maintain some form of control over holy places in their jurisdiction) is the 2023 matter of the Baha'i Gardens in Acre. While lesser known than the larger Baha'i Gardens in Haifa, the Acre Baha'i Gardens are of greater religious significance (given that it houses the tomb of the Baha'i religion's founder); both are listed as protected UNESCO sites under the World Heritage Convention since 2008.[95]

While the Acre holy place has long maintained tax-exempt status as an important religious site, the municipal authority of Acre recently reclassified the area as a tourist site, and not a religious holy place, as an inroad towards levying municipal taxes on the site. This led the Baha'i authorities to close the site to the public.[96] Being a difficult move in its own right to redesignate a holy place as a tourist site, the 2022 District Court decision could impact the action of the municipality depending on the judicial "capacity" of the municipality and its directives. If the municipality is deemed to be some form of a judicial body, the Baha'i authorities can challenge the reclassification of the site by having the Executive intervene on their behalf (but then fall subject to the actions and interests of the Executive branch). If the municipality is not acting as a judicial body per se, it will be interesting to see who can make decisions regarding the classification of a site as being of religious value or for the benefit of tourists, and how the municipality might go about executing its decision (presumably being a body with judicial authority).

## Conclusion

Legal protection for holy places can derive from several vantage points. States might desire to place them within the umbrella of landmark status, protect a site under local religious laws, accord a site autonomous status under Indigenous Peoples' law, or elevate a holy place by protecting it under the World Heritage Convention, to name but a few. All these different avenues result in varying degrees of protective frameworks, fluctuating levels of authority and control, and the involvement of an assortment of interested actors. Whatever direction a state might take, the resultant reaction from organizations, states, and interested communities will emerge given their perceived stake in the site. Because holy places (and many cultural heritage sites) are beset by a host of influences, a careful approach is required in dealing with matters like ownership, property control, and protection. While the legal protective framework will impact the role and influence of internal and external actors, the myriad of actors interested in holy places runs so deep that a cacophony of voices will be raised and asserted.

Granted, some holy places might not entail such deep history as those found in the Old City of Jerusalem, while other places might not have internal discord among religious factions. The interests of foreign agents might be minimal or non-existent, or arise only after laws come into play calling attention to a holy place. In the Israeli context, the

[93] Pursuant to a legal opinion of Prof. Gabirel Halevy from 2018 (in Hebrew, on file with the author)

[94] *Jerusalem Holy Site May Shut Over Water Bill* (2012); *Holy Sepulchre's bank account blocked in dispute over water bill* (2012).

[95] UNESCO *Bahá'i Holy Places in Haifa and the Western Galilee.*

[96] Heruti-Sover (2023).

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integration of older, pre-State laws are telling regarding the reverence accorded to holy places and the impact of legal control. During the Ottoman period, the approach to holy places had been cautious with an attempt to create autonomy for existing religious factions at important sites. Such an approach has partially echoed to the present, with judicial authorities (and to some extent governmental branches) generally hesitating to get involved in holy places, even one important to the state's majority religion.[97] Referencing the Israeli legal model for holy places protection, this article is intended to shed light on how an approach towards legal protection might ensue, and account for impacts on other holy places and cultural heritage sites.

From a more critical perspective, given the importance of many holy places, any law or judicial decision to alter their status merits a measured approach, one that keeps intact the underlying intentions of the laws that protect holy places. Thus, the 2022 District Court case on the ANC merits consideration not only for the immediate impact on the Church but for the potential effect the decision might have on other important holy sites in Israel. Discounting bodies with the authority to make integral decisions on the status of a holy place will not only undermine the feeling of autonomy that minority religions might need in Israel but also deviate from the intention of the law that desired to provide a form of autonomy and *laissez-faire* approach by governing bodies. Further, as municipal bodies in Israel become more assertive and try to reclassify a holy site to wrest control of the area from religious authorities, make claims to back taxes, or focus on other needs, such as environmental protection for instance, it is almost inevitable that the Executive will intervene pursuant to the existing legal protective framework. However, such an intervention might not guarantee adequate protection for a site nor allow for the autonomy of affected religious factions. The ANC case can lead to an already overly assertive Executive branch of the Israeli government becoming unduly involved in decisions pertaining to holy places at the expense of religious factions (and other relevant actors) for whom the place and site itself are central to their belief system.

For other states and actors interested in creating legal frameworks for cultural heritage protection or for holy places, it merits accounting for the actors involved, the degree of interest and involvement by different factions, the centrality of the site in question, and the attachment other states might harbor for the site. As memorialization efforts grow and develop around the world, states and participant actors will be beset by a variety of factions for whom a site will prove to be important. It is not always easy to incorporate all the relevant voices (even if it is imperative to do so). As witnessed in the Israeli context, attempts to disassociate governmental bodies from being overly involved in decisions concerning holy places can have a boomerang effect, leading to greater involvement of one branch that might be particularly politicized or (worse) not adequately consider all the actors and interests associated with an important site in question.

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[97] Breger and Hammer (2023) at Ch. VII regarding the Temple Mount/*Haram al-Sharif.*

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