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Summary

From the late eighteenth century, various Christian denominations began to acquire land throughout Eretz Israel in general, and in Jerusalem in particular.

The political changes that were taking place at the time throughout the Ottoman Empire and the invention of steam ships, which enabled vessels to cross the Mediterranean for the first time without being at the mercy of the wind, brought a period of prosperity and growth for the Christian communities that began to arrive from across Europe.

Numerous churches and monastic orders sent priests and clergy to the Holy Land to function as consultants managing their own autonomous communities. Tens of thousands of pilgrims began to visit the holy places as they toured the country.

As the Jewish community in Jerusalem developed and moved beyond the walls of the Old City, the first new neighborhoods were built amongst the plots acquired by the Greek Orthodox Patriarchate, the Russian religious delegation, various Catholic orders (particularly the Franciscans), the Protestant churches, and other groups.

Later, various churches leased land in long-term contracts, either to the Israel Lands Administration, which manages state land, or to private entrepreneurs.

Today, various church bodies constitute extremely important players in economic terms in the ownership of land in the very heart of the State of Israel.

Introduction

The Land of Israel in general, and Jerusalem in particular, are sacred to the three monotheistic faiths – Judaism, Christianity, and Islam.

According to Jewish tradition, King David reigned in Jerusalem; the two temples were built in the city; and the Third Temple will be established in the city in the future. Christian tradition views Jerusalem as the cradle of Christianity – the city where Jesus lived and worked, and the place where he was crucified and resurrected. Muslims see Jerusalem as their third most holy city; it was from Jerusalem that the Prophet Mohammed ascended to heaven on his horse Al-Buraq.

Accordingly it is evident that Jerusalem is the holiest city in the Jewish and Christian faiths, and the third most holy site in the Muslim faith.

There is probably no city that has seen more wars of a religious and political character than Jerusalem, and no city that is the focus of such global attention.

Yet despite this important status, Jerusalem was a deserted backwater for centuries. At the beginning of the twentieth century, Palestine was a remote province of the Ottoman Empire. Jerusalem itself was a provincial city with a population of just 9,000. There was no paved road to the city providing access in horse-drawn carriages; visitors were obliged to arrive on foot or riding on camels and donkeys.

In 1869, when Emperor Franz Josef visited Palestine, the Turks built the first compacted dirt road to Jerusalem so that the visitor could arrive on a cart.

Jerusalem at the time was confined to the walls of the Old City (the same walls we are all familiar with today). As darkness fell each evening the city gates were closed and locked; anyone left outside was subject to the mercy of the nomadic bandits who controlled the area. Even within the walls, most of the city was piles of garbage and ruins; the residents were huddled in just 20 percent of the area.

Very few churches were active in the city at the time. Small sites within the city and on the Mount of Olives were held by the Greek Orthodox Patriarchate, the Catholic Franciscan Order, and the Ethiopian Church.

In 1832, the Egyptian army under the command of the Egyptian ruler Mohammed Ali conquered Palestine from the Ottomans. Some eight years later, the British helped the Turks to regain Palestine from Mohammed Ali, who retreated back to Egypt. In 1853 the Crimean War erupted between Russia on the one side and the Ottoman Empire on the other, assisted by the European powers such as Britain and France.

In return for the assistance of the European powers in these wars, the Ottoman authorities changed their attitude to the Christian world in general and the Catholic world in particular.

In 1847, the Ottomans permitted the establishment of a Catholic Patriarchate in Jerusalem (alongside the Greek Orthodox Patriarchate, which sees itself as the inheritor of the Byzantine Church). In addition, the Ottomans introduced the “capitulation” system, under which foreign powers received autonomous rights within the territory of the empire and were entitled to send consuls from the European nations. The consuls ran quasi-autonomous communities in Palestine, including the registration of citizenship under the various powers, separate legal systems for these citizens, postal services, and so forth.

All these changes led to considerable development in Palestine, and particularly in Jerusalem.

The consuls sent to Palestine were clergymen – representatives of various Catholic orders from France, Germany, Austria, Italy, and other countries. Delegations from the Anglican Church in England and the Lutheran Church in Germany also came to Palestine, followed later by the American organization YMCA. Only religious figures were interested in coming to such a remote backwater, convinced that this was a religious mission.

All these representatives purchased land inside the Old City and in the surrounding areas with the goal of accommodating tens of thousands of pilgrims who took advantage of the invention of steamships to visit the Holy Land and the tomb of Jesus.

The liberal attitude of the Ottoman authorities toward the European powers led to the development of Jerusalem beyond the walls of the Old City. In the 1860s Jewish residents of the city began to construct the first residential neighborhoods outside the walls. Meanwhile, the Christians built hostels to accommodate pilgrims who came to Palestine under the auspices of the consuls from their countries of origin. St. Paul's Hostel was built in Mamilla by the French church; the Ratisbon monastery and hostel were built by the *Pères de Sion*; Terra Santa monastery and hostel were constructed by the Franciscan Order (the area now forms the neighborhood of Rehavia), and so forth.

As Jerusalem expanded over the years, commercial and residential buildings were built alongside the compounds belonging to the different churches. As the city grew, the churches began to lease part of their vast properties for the construction of residential buildings. Today a considerable proportion of the residential buildings in Jerusalem (as well as in Haifa, Jaffa, Ramle, Lod, and other towns) is constructed on land leased from the different churches.

The situation outlined above creates complex issues in the legal, economic, and surveying fields, and no less so in the realms of politics and international relations.

In this article I shall attempt to describe these issues in brief and to delineate the possible solutions.

History of the Churches in the Holy Land

The history of Palestine is dominated by a complex political, religious, and cultural reality. After the Jews were exiled from the Land of Israel, it was controlled by the Romans. During the fourth century CE the Roman Empire adopted Christianity. This marked the beginning of Christian rule in Palestine (the Byzantine period). Palestine was later conquered and held for many years by Muslims (638-1099); was retaken by the Crusaders; and then again by Muslims (1187). The period of Mameluke rule

(1260-1516) continued the Muslim dominance in Palestine, and was followed by the Ottoman period, which lasted for some four centuries through 1917. Palestine then reverted to Christian rule in the form of the British Mandate (1921-1948). After the end of the mandate, Palestine was divided between the Hashemite Kingdom of Jordan, which again brought Jerusalem under Muslim rule, and the State of Israel, which re-established Jewish sovereignty in the country after two thousand years. The Old City was included in the area of the city under Jordanian rule. Since 1967, Jerusalem has been a united city within the borders of the State of Israel.

As is apparent, this small area of land has seen frequent upheaval in terms of the religious identity of the dominant group and has oscillated between Muslim, Christian, and Jewish control.

As if this were not enough, it is also important to appreciate that the Christian communities cannot be regarded as a single entity. In examining the history of the different churches it is important first to examine the different streams of Christianity.

The Christian religion was institutionalized in the year 313 CE, when Constantine was crowned emperor of Rome. Constantine proclaimed Christianity as the official religion, seeing this as a tool for unifying the empire he controlled. During the first few centuries, however, the young religion already fractured into several sects. In 451, during the Council of Chalcedon, Christianity split onto an Eastern wing (comprising 15 autocephalite [independent] churches or district: Greek Orthodox, Russian, Syrian, Armenian, Coptic, Serbian, Polish, Czech, Romanian, Georgian, Albanian, etc.), and a Western wing headed by the Bishop of Rome – the Pope.

Over the 15th and 16th centuries, the Protestant denominations branched off from Catholicism, led by John Wycliffe in England (14th century), the Czech pastor Jan Hus in Prague, and Martin Luther in Germany (1517). Widespread corruption among the bishops and the practice of selling “indulgences” were among the factors that eventually led to the establishment of the Protestant churches.

I believe it is accurate to state that today there is no ecclesiastical body that does not have a foothold in the Holy Land, however modest.

In order to understand the nature of the Christian legal entity as a holder of rights to real estate, we must first identify the stream to which this body belongs and who holds authority and is entitled to decide on matters of real estate in the relevant community.

As will become apparent below, the Greek Orthodox Patriarchate, the Ethiopian Church, and the Catholic Franciscan Order have all held land in the Holy Land for many centuries. Conversely, most of the other Christian streams only began to acquire land in Palestine over the past two hundred years.

Review of Legal Platforms

A key question is the manner in which the legal entity of each religious community was recognized during the era that preceded the invention of the legal fiction of the “legal corporation” (such as the company, association, or trusteeship). How can rights to land be recorded in the name of a body that is not a recognized legal entity?

As early as 1925, the British High Commissioner in Palestine, Herbert Samuel, appointed a commission of inquiry to examine the question of the rights of the various communities. In 1939, a report appeared prepared by Lionel Cust, who was appointed by the Mandate government to investigate the holdings of the different communities in various locations.

The Greek Orthodox Patriarchate held land in Palestine even before 1453 under the basis of Byzantine Law, which was de facto recognized by Sultan Mohammed II. The same was true of the Franciscan Order, which received “firmans” (royal decrees) dating back to the Mameluke period recognizing its right to hold land. This situation was based in part on Catholic canon, which grants this order autonomy in holding real estate.

The Ottoman authorities recognized the firmans and the *bara'ath* granted by the Mamelukes to the Greek Orthodox Church as a *fait accompli*. The Ottomans also recognized the independence of the Franciscan Order (in accordance with the Catholic canon or religious law), and the order was allowed to hold real estate.

In effect the Ottomans “froze” the situation on the ground as they inherited it from the Mamelukes. A similar approach would be taken centuries later by the British, during the 1920s, when they inherited the situation left by the Turks.

A further solution for holding land was Article 122 of the Ottoman Land Law of 1857. This article states that land held by an order or ecclesiastical body and formerly owned by monks would be considered to have been recorded in the land registry. This rule enabled Greek Orthodox monks (who were Ottoman subjects) to purchase land and make it available to the church during the period when the Ottoman authorities prohibited the sale of land to any person who was not a subject of the empire. Thus the Greek Orthodox Patriarchate was able to acquire considerable real estate through its monks.

The Ottoman Land Law recognized the fiction of the holding of land through the use of monks who were initially recorded as the owners.

Another solution was the use of the *waqf* mechanism. The *waqf* is a type of trusteeship defined under Muslim religious law (the Shari’a). The law states that any person may relinquish land under his ownership and make it available for a “noble cause.” The Arabic word *waqf* comes from the word “stop” – the ownership of the land is “stopped” and the area is made available for the said cause. The Ottoman authorities recognized such trusteeships even if they were created by foreigners, including Jews and Christians. The *waqf* mechanism may be considered a type of “corporation” during the period preceding the recognition of corporations as perceived in modern times.

Many churches took full advantage of this mechanism. Landowners dedicated their land to the different churches through *waqf* documents. The patriarch of the church, or his deputy or successor, was declared the manager of the trusteeship.

The disadvantage of this mechanism is that *waqf* land cannot be sold, since ownership has been perpetually suspended and the land is no longer negotiable. Accordingly, the solution to this day is the long-term lease of such land, while ownership continues to be held by the *waqf*.

This explains why numerous neighborhoods in downtown Jerusalem, including the land on which the Israeli parliament (the Knesset) is situated, the prime minister's residence, the Israel Museum, and other buildings, are situated on land belonging to the Greek Orthodox Patriarchate and leased to the Israel Lands Administration in 99-year contracts.

Many neighborhoods in downtown Jerusalem are situated on land belonging to various churches and orders that was leased over the years.

A more modern approach to recognizing the legal entity of each particular order is leasing in the de facto status quo.

In a fascinating ruling issued by the Israeli Supreme Court, a form of recognition of ownership was recognized through the establishment of the term "de facto corporation." The court states:

"The recognition by the legislator that a given body may bear rights and obligations need not be granted explicitly; it may also be granted implicitly in various manners... from which it is inferred that such recognition has been granted by the legislator."

Lastly, in 1997 a convention was signed by the State of Israel and the Vatican. In the convention, Israel promised to recognize the Catholic Church as a legal entity, including recognition of church law enabling the various orders to hold autonomous legal rights.

Evaluation of Lease Rights

The evaluation of lease rights for the land described above is influenced by numerous and diverse factors.

Political:

At the beginning of the current century, competition emerged between Israel and the Palestinian Authority as to which side would convince the synod of the Greek

Orthodox Church to lease areas and to extend existing lease contracts. The last patriarch was obliged to resign after being accused of engaging in transactions with Jewish bodies without the approval of the synod.

Economic:

The lease contracts signed during the 1930s and 1950s with various orders and with the Greek Orthodox Church established leases for a period of 99 years. These contracts are now nearing their termination. Uncertainty exists regarding the future rights of tenants who bought or purchased land that may have to be returned to one of the Christian communities.

Clearly, the value of lease rights is influenced at the moment by the prospects for extending the lease agreements with the various ecclesiastical authorities. These prospects are influenced in turn by political, international, historical, and other considerations.

Religious:

The tensions between the three religions naturally play an important part in the considerations applied by all sides.

A further factor is that in order to consider the extension of rights, the surveyor must know the identity of the body empowered to extend the above-mentioned lease agreements.

In the case of the Greek Orthodox Church, for example, the authorized body is the “synod” – a council of bishops that operates alongside the patriarch. In the Catholic Church, each transaction is subject to the approval of the Holy See, without which it is invalid. This situation was recognized in the convention signed by the Vatican and the State of Israel in 1997.

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