



Justice

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THE INTERNATIONAL ASSOCIATION
OF JEWISH LAWYERS AND JURISTS

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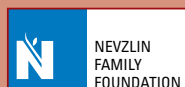
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President's Message

It is a great honor, and an immense pleasure, to write my first President's Message to the members of our Association and to the readers of *JUSTICE*.

I would like to express my heartfelt gratitude to the members of IAJLJ who supported me in my decision to take upon myself this office.

I am well aware of the heavy responsibilities and challenges before me and look forward to working together with you, our members, to advance the goals of the Association.

IAJLJ strives to advance human rights everywhere, and is especially committed to the agenda of the Jewish people. It works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel. If one supposed that from 1969, the year our association was founded, until today, that these problems would be lessened, the opposite is unfortunately true. Recent years have seen a renewal of anti-Semitism and a growth of anti-Israel sentiment.

IAJLJ is a Category Two NGO recognized by the UN. It is represented at the principal UN human rights organs and intervenes by means of written and oral statements on specific agenda items of both the annual sessions of the UN Human Rights Council and its Advisory Committee. In my view, this is an essential activity for fundamental issues of international human rights law.

During a recent trip to Geneva I met with a group of local lawyers, many of whom are in the early stages of their careers, to discuss the Association and to recruit new members. I had a second meeting with lawyers who are members of our organization and lawyers who are active in the local Jewish community. I brought before them the idea of establishing a fund that will enable us to compensate a representative of our organization, knowledgeable in public international law, to the Human Rights Council. The passing of Daniel Lack, our representative of many years' standing, has left us with the difficult task of finding someone to fill his shoes. The fund will be in his memory.

At this writing we are approaching two events that will soon take place at the United Nations. The Palestinians have announced that they are prepared to apply to the United Nations in September to obtain the full membership of an independent state on the territories occupied by Israel since 1967, as the

opportunity to resume peace talks with Israel are nil in their eyes.

A number of states have recently issued statements purporting to recognize a Palestinian state, and others are reportedly considering issuing such statements.

Because of the automatic majority that the Palestinians in all likelihood will receive, I expect that their request to the General Assembly will gain a majority.

The approach of the State of Israel to this move is that while the premature recognition of a Palestinian state may be tempting in light of the many obstacles to peace, such action will not bring an easy or quick-fix solution to the conflict or force the resolution of outstanding issues. Rather, the recognition of an entity that is not ripe for statehood has the potential to deepen the conflict, as it will not change the realities on the ground, and will bring with it new layers of unresolved and complex legal and political quandaries without easy answers or solutions.

The international community has time and again stressed the need for the parties to work jointly to resolve the conflict. For example, both UN Security Council Resolutions 242 of 1967 and 338 of 1973 emphasize that the international community considers mutual negotiations the only avenue for resolving issues in dispute.

Premature recognition threatens to undermine existing and agreed frameworks for Israeli-Palestinian negotiations. All such frameworks are based upon the principle that the parties are to negotiate all outstanding issues with one another and work together towards the creation of the Palestinian state, with which, incidentally, I concur. Unfortunately, Mahmoud Abbas stated explicitly in a 16 May 2011 New York Times op-ed article that he plans to use the unilateral Palestinian declaration as a springboard to "pave the way...to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice." Such a move will only intensify the historic conflict between Israel and the Palestinians. It will not resolve it.

Searching for a positive vein, we should look at the existing agreements concerning security and economic relations between Israel and the Palestinian Authority, which, in fact, are working well. This gives hope to a



negotiated settlement.

On 22 September a second event will take place at the United Nations: Durban III.

The Durban III conference will commemorate the tenth anniversary of the conference held in Durban, South Africa, in September 2001. That event produced the Durban Declaration, which, in a world aflame with human rights abuses, accused only one country, Israel, of racism.

We have to remember that in September the General Assembly Hall will be filled with heads of governments already present for the commencement of the Assembly's annual session; more than a hundred leaders will likely embrace the Durban Declaration and its racist anti-Israel mantra.

Given that the General Assembly elected Iran as a vice president and Qatar as president, each for a year-long term starting in September, and that Iranian President Mahmoud Ahmadinejad will probably speak there, we can anticipate the nature of what will be said.

I refer you to the review in these pages about Durban written by *JUSTICE* Editorial Board member Ambassador Alan Baker.

IAJLJ has decided to co-sponsor with the Hudson Institute a major conference in New York to challenge the UN's Durban III event, a severe measure to label Israel a racist state.

Among the participants will be Nobel Prize laureate Elie Wiesel, former United States ambassador to the UN John Bolton, Harvard University law professor Alan Dershowitz and other distinguished guests.

In this issue of *JUSTICE* you will find details of a number of activities that our association undertook since our last conference in February 2011 at the Dead Sea.

Immediately ahead of us are two Association events. The first will take place in Tel Aviv on 14 September 2011 at Beit Hatfutsot, the Museum of the Jewish

People. Titled "The Exodus of the Jews from the Muslim Countries starting in 1948: Immigrants, Refugees or Internally Displaced Persons?", the event will examine the legal status of the approximately 800,000 Jews who left those lands in the first years after Israel's founding.

On 16 November, in Berlin, IAJLJ will hold a conference titled "Holocaust Denial and Freedom of Speech in the Internet Era." We chose this topic because in recent years hate messages widely published on the Internet have produced a distorted picture of history and often border on incitement. We are witnessing a very great increase in anti-Semitism and hate messages now prevalent on the Internet.

At the conference we hope to propose resolutions on these matters that affirm our aims, that we can adopt as policy and that can have practical effect.

I am pleased to note the great interest in the Berlin conference and that many people have already registered. I hope that many more of you will join us and suggest that to secure your place you register soon.

As I remarked at the Dead Sea conference, we are trying to recruit young lawyers to the organization and to significantly increase our total membership.

Many younger members have stressed that we should be utilizing the Internet much more, especially with respect to social media. The Executive Committee is working to bring this about and I hope that soon we will be able to announce our plans.

We are receiving many suggestions from members about different areas of our activity, all of which we examine closely.

Given the many tasks before us, I welcome the thoughts of all. With your help we will build a better and stronger association.

See you in Berlin!

Irit Kohn
IAJLJ President

IAJLJ 14th Congress

Israel as a Jewish and democratic state

Irit Kohn, formerly deputy president and coordinator with international organizations, was elected president of IAJLJ, as were a new Executive Committee and Board of Governors, at elections held at the Association's 14th Congress at Jerusalem and the Dead Sea 2-5 February 2011. The full roster of board members appears on the inside front cover of this issue of *JUSTICE*.

The Congress' theme was "Israel as a Jewish and Democratic State." With continuing assaults on Israel's legitimacy claiming that a Jewish state and a democratic state are incompatible notions, speakers explored that phrase in substantial depth.

The Congress opened in Jerusalem with greetings from Israeli Minister of Education Gideon Sáar and an address by Israeli Supreme Court President Dorit Beinisch. 2011 Israel Prize laureate Ruth Gavison, Haim H. Cohn Professor of Human Rights at the Hebrew University of Jerusalem, delivered the keynote address.

Convening the next morning at the Dead Sea, presentations were heard from Gideon Sapir, Faculty of Law, Bar-Ilan University; Shlomo Avineri, Hebrew University professor of political science; Fania Oz-Salzberger, professor of Modern Israel Studies at



Israeli Education Minister Gideon Sáar offers greetings



Canadian MP Irwin Cotler and Honorary President Hadassa Ben-Itto



Outgoing President Alex Hertman and new President Irit Kohn

Monash University, Melbourne, and associate professor of history at Haifa University; Yaffa Zilbershats, vice president of IAJLJ and professor of law and deputy president at Bar-Ilan University; Mordechai Kremnitzer, vice president of the Israel Democracy Institute and professor of law at Hebrew University; Alexander Yakobson of Hebrew University's History Department; Rabbi Yuval Cherlow, head of the Petach Tikva Hesder Yeshiva; and Member of Knesset Nachman Shai.

At Thursday evening's Gala Dinner, outgoing IAJLJ President Alex Hertman thanked attending members for the opportunity to lead the Association and for the many warm friendships he made during his term. Former Canadian justice minister and current Member of Parliament Irwin Cotler was invested as a Fellow of the Association and conferred with lifetime membership "in consideration of a lifetime of endeavor on behalf of the Jewish People and the State of Israel and in recognition of ceaseless labors in promoting human rights and human freedom and human dignity and in acknowledgment of an unwavering commitment to the law."

Actualizing the values of a Jewish and democratic state

Address to the 14th Congress by Israel's Chief Justice

Dorit Beinisch

Mr. Hertman, Ms. Kohn, Minister of Education Mr. Gideon Sáar, participants and guests. I am privileged to be here with you today and to welcome you on behalf of our judiciary and my colleagues at the Supreme Court.

Every meeting of this distinguished group of lawyers and jurists is a special event and an opportunity to share our views, our values and our personal and professional commitments. All of us, Jewish lawyers and jurists, have a moral and professional responsibility to take a leading role in the struggle against all manifestations of racial intolerance and anti-Semitism and in promoting human rights. Your meetings and actions assist in furthering that goal.

We are holding this Congress while the area around us is in the midst of a political and social earthquake. First in Tunisia, and now in Egypt, revolutionary calls for reform and democracy are growing louder and louder every day. As we all know, democracy is not a one-dimensional notion. It is a very complex concept whose realization is possible in many different ways. During the last decade or so we witnessed the founding of new democracies in Eastern Europe and Asia. Time will tell whether new democracies will indeed be formed in Arab countries in the area surrounding us. Likely, though, even if democracies will actually be formed, their concept of democracy will not necessarily be similar to our concept of democracy. When we speak of democracy we emphasize certain values. Among the main ones are the rule of the people through their elected representatives, the rule of law, the independence of the judiciary and the importance of separation of powers and the protection of human rights.

Indeed, Israel is a unique democratic state. It managed to maintain the values of democracy while being in a state of war ever since its first years of establishment. Notwithstanding that Israel is surrounded by non-democratic countries, it succeeded in forming a strong democratic state with an independent legal system.



Israel is also unique in that it is not only a democratic state, but also a Jewish state. This duality, as I am sure you will further explore in the next few days, is complex. Hence, there is a constant need to harmonize between the values of the state as a Jewish state and the values of the state as a democratic state. In my belief, these two sets of norms do not stand in contradiction and even complement each other.

For many, the task of harmonization is a theoretical one. Academics in Israel and abroad have written extensively about logical possibilities to synthesize between the Jewish and democratic characteristics of the state. We, as judges, do not have that privilege.

Almost every day we are confronted with real-life cases that oblige us to give actual meaning to the values of the state as a Jewish and democratic state. Almost every day we hear cases in which we need to solve one person's problem – a solution that requires an “on the ground” practical approach. Is a non-Jewish woman who entered Israel after marrying a Jew entitled to enjoy the law of return even if she remarried a non-Jew following the death of her husband? Can a woman enjoy the law of return because her biological father was Jewish even though she was adopted after birth by a non-Jewish family? Can women pray at the Western Wall while wearing the knotted ritual fringes known as tzitzit and reading aloud from the bible? Should the minister of the interior register as Jews people who went through conversion processes in non-Orthodox communities? Does a television network have a right to broadcast on Shabbat an interview with religious people, even if the interviewees object to the broadcast? Are ultra-Orthodox Jews entitled to preserve their unique lifestyle in a gated community? Are “kosher” busses in which men are allowed to sit in the front part of the bus while women are only allowed to sit in the back part of the bus infringing the right of equality? Does a police decision to close a street in Jerusalem during the times of prayer harm secular people's right

See Actualizing the values of a Jewish and democratic state, page 46

‘Jewish’ and ‘democratic’ – Can they coexist?

If we accept the anomaly of ‘Jewish and democratic’ as a special Israeli challenge, the tension may have an ongoing positive influence on both opposing sides, and may even be a blessing

Yuval Cherlow

Introduction

The contradiction between a monotheistic, faith-based worldview and a democratic worldview seems almost irreconcilable. This inherent contradiction comes about for two reasons. The first is the question of authority. A theocentric worldview places God at the center, with God being the source of authority, while a democratic worldview places the people at the center. In a theocentric worldview, the majority may not adopt decisions that are contrary to Jewish law; indeed, the Torah commands us not to follow the majority when the majority is acting inappropriately (Ex. 23:2). If the issue were merely one of how decisions are made and the principle of majority rule, then this problem could be resolved, at least on a practical level. However, there is a more fundamental problem, which is that Western liberal democracy is today characterized by values that the majority categorically cannot annul. This list of values is a statement of those areas in which – notwithstanding the wishes or desires of the majority – the individual cannot be denied his rights. The majority may not limit freedom of speech, of association, of occupation, of religion and so on. These principles are supposed to be protected by a constitution, and by the courts’ interpretation of that constitution. A theocentric worldview, on the other hand, requires that, at times, individual rights be infringed, or posits a different set of rights than those commonly accepted. God’s commandments sometimes require that an individual’s freedom be curtailed, particularly when those commandments are obligatory upon him as a member of the Jewish collective.

The definition of the State of Israel as a Jewish, democratic state thus suffers, ostensibly, from a fundamental contradiction. There are two sources of authority – Judaism and democracy, and two different lists of areas which cannot be reshaped, even by the majority. What makes this conflict more aggravating is the language that is used. Those who

speak for “Judaism” often claim that they cannot use the mediating terminology of democracy, which involves compromise, concession and agreement; they are not presenting their own views, but representing standpoints that derive from a divine source, and which cannot be subject to negotiated agreement or compromise. Those who speak for democracy claim that there can be no authority whatsoever that is entitled to infringe on the rights of the individual.



Attempts to resolve this contradiction

This issue has beset the State of Israel since its inception, and a number of different proposals have been suggested to resolve the contradiction. Some sought to resolve it by demonstrating that Judaism, too, recognizes the power of the majority as the principal tool for determining or resolving disputes. They based themselves on sources that discuss the power of the majority, and on Jewish history, particularly the patterns of Jewish communal life, in which disputes were decided by virtue of the power of the *Kahal* (community), rather than by virtue of religious authority.

Along those lines, there were some who noted that the Torah itself commanded the establishment of a royal regime, “like all the nations around me.” That is: the Torah’s teachings do not intervene in decisions on the appropriate form of government; rather, the Torah recognizes that what is accepted by the enlightened nations of the world is something appropriate for emulation by the Jewish people. The role of the Torah is to shape, in certain areas, whatever governmental framework is chosen, but not to determine the character of that government. In effect, this approach claims that Judaism has no problem with adopting democracy.

As noted above, this attempt seems to indicate a misunderstanding on the part of both extremes – democracy and *Halakha*. On the one hand, modern democracy, in its present form, is not merely a formal tool for ruling on disputes by means of the majority. Rather, it constitutes a broad worldview, one that touches on man’s autonomy and freedom, individual

rights, liberalism and egalitarianism. Democratic man is educated, open, and independent; he enjoys freedom of communication, freedom of association and of expression. All of these are an integral part of democracy, and so it is insufficient to rely only on halakhic sources that discuss the power of the majority. On the other hand, it is also incorrect to say that *Halakha* recognizes man's absolute autonomy, and grants the majority an unfettered right to make determinations. It is precisely the expression that teaches us the power of the majority, *acharei rabim lehatot*, that says exactly the opposite: "and do not respond to a grievance by yielding to the majority to pervert [the law]" (Ex. 23:2).

The strongest proof for my argument regarding the apologetic nature of claims that Judaism accepts democracy is to put the following question to anyone who makes such a claim: What would be the position of "Judaism," should the social structure of the State of Israel change, so that there would be a religious majority and a secular minority? Would *Halakha* recognize the right of the minority to desecrate the Sabbath, to travel in private vehicles in public? Would *Halakha* recognize freedom of expression, allowing even the most severe statements against the Torah, against *Halakha* and against the rabbinate? It should be remembered that this question is not merely hypothetical. If current demographic trends continue, the possibility of a religious majority is quite realistic. It is interesting to note that, as far as I know, not one halakhic discussion has taken place on the issue of halakhic policy in a situation in which a majority loyal to *Halakha* is in power in the State, alongside a minority that is not halakhically observant. This question is exacerbated in light of the ancient Jewish sources that call for criminal sanctions against, for example, those who transgress the Sabbath laws. Once such a discussion develops, we will see the extent to which *Halakha* has adopted democracy in the fullest sense of the word.

Another possibility, this time coming from the opposite direction, is attributed to the former president of the Supreme Court, Justice Aharon Barak. This approach claims that the term "Jewish" is subordinate to "democratic," that is: the State of Israel should adopt only those values from Judaism that are consistent with democratic criteria. This position is more like lip service, since in effect it omits "Judaism" from the fundamental definition of the State of Israel. If every conflict between democracy and Judaism is resolved in favor of democracy, the real outcome is that the State of Israel will become a state that operates solely by virtue of universal values, leaving "Judaism" as mere window dressing for democracy, by offering some appropriate

quotes from Jewish sources.

I would argue that we should call a halt to these attempts to reconcile the contradiction since such a reconciliation is impossible. As I wrote in the introduction to this essay, the contradiction derives from a fundamental polarization, and thus cannot be resolved using customary methods for conflict resolution. There are those who would argue that, once the State of Israel has a constitution, this contradiction will disappear. In response, one would first have to examine the proposed constitution to see if it indeed resolves the contradiction. In my opinion, no potential constitution for the State of Israel will be able to resolve this contradiction. If it is a "minimalist" constitution – without the inclusion of lists of rights and without a formal definition of the State of Israel as a Jewish state – it will not be able to resolve the contradiction. Rather, it will leave the questions to be resolved outside the constitutional framework. If the constitution also includes a list of rights, but not a preamble to the constitution (for example, the Declaration of Independence) – it will thus come down in the "democratic" direction, but it will not be an expression of the will of the absolute majority in the State of Israel, which wants the state to also be defined as a "Jewish" state. And if the constitution includes both a list of rights and the Declaration of Independence as a preamble, then it will have brought the contradiction back inside itself.

Hence, it seems that we need to concentrate our efforts elsewhere. This ongoing conflict between Jewish law and democracy will accompany the State of Israel as long as there are communities within it that oppose each other and which choose one of the two extremes. However, it is within our power to mitigate this conflict. We need to exert our efforts in an attempt to bring the two extremes closer together; even if we know that absolute harmony is impossible, an ongoing mitigation of this tension will allow the State of Israel to continue to exist notwithstanding that tension. Furthermore, it will change that tension from a fundamental problem to an empowering challenge.

Possible methods of mitigation

We would argue that there are three methods that offer the possibility of significantly mitigating the tension.

The first approach is to reexamine some basic assumptions. We would argue that modern democracy does not in fact recognize the absolute sovereignty of the people; this leaves room for the acceptance of ideas from outside the world of man. On the other hand, we would argue that *Halakha* offers room for man's

judicial autonomy in two ways – as a legislator and as an interpreter. Thus, the democratic point of view may accept some of religion's positions, while religion itself will recognize just how great its own human component is, and thus not profess to speak in the name of an uncompromising divine standpoint.

The second approach will examine the conflict between democracy and *Halakha* in the area of their respective standpoints. We would argue that there exists a mutual recognition of democratic values in Judaism, and of national values in democracy. We will argue that the language of human rights is not foreign to Judaism, while the language of nationhood is not foreign in terms of democracy. These voices can thus be empowered to further mitigate the tension.

The third approach comes from the direction of risk management. Even if we assume that the conflict we have described is a fundamental one, one that cannot be resolved through theology or political theory, *Halakha* may still be willing to see democracy as a necessary evil to be accepted, simply because the alternative is worse, and vice versa. This third approach speaks in terms of practicality – the prevention of ongoing conflict by means of practical arrangements that, rather than solve the problem, simply find a way around it.

The first method – a reevaluation of basic assumptions

A reevaluation of the basic assumption underlying the religious position: The claim that *Halakha* views the Master of the Universe as the source of authority is indeed the core of religious belief. At the same time, two key perspectives point to man's autonomy and importance. The first is in the area of interpretation. Although the Torah is perceived as a divine source, it is a principle of *Halakha* that the Torah has been given to man, and it is man who must interpret it. Hence, the claim that *Halakha* represents God's viewpoint inflates the status of the halakhic authorities. Man has enormous room to maneuver and freedom of thought; so those who speak for *Halakha* thus have the ability to engage in negotiation and dialogue over the approach of *Halakha*, rather than suggesting that it is not open to discussion.

The second perspective is in the realm of legislation. There are sources that point to the considerable autonomy given to halakhic authorities, when they function not only as interpreters of the divine texts, but also as legislators of the halakhic approach. Hence, one cannot argue that Judaism is merely a matter of obeying the divine commands alone. The work of the interpreter and of the legislator also brings in their own inner

world, their cultural perspectives and the social milieu within which they live. Recognition of the specifically human components existing within the world of *Halakha* allows a softening of the uncompromising, segregationist position sometimes presented as fundamental to the world of *Halakha*.

A reevaluation of the basic assumption underlying the democratic position: Democracy presents itself as stating that it is the people who are the ultimate sovereign, and that it is the majority of the people that determines democratic behavior. However, a deeper analysis of today's democratic standpoints indicates that not all powers are in the hands of the people, and so it is not the people who should be seen as sovereign. The democracies of today – both on the philosophical level and on the practical, organizational level, as in the European Union – argue that there are universal values of “mankind,” against which even the majority may not act. There is deep division over the source and validity of those values, as well as their scope, but the very recognition that not everything can be determined by the people, and that there are general, universal values that are also binding on the majority is indisputable.

This structure allows one to argue that democracy may also be capable of adopting additional values that are not subject to majority decision, even if it appears that they detract from the principle of majority rule. These values may include religious values, and democracy may view them as a basis for national existence, beyond the principles of democracy. I am not arguing that religion is universal to the same extent as the universal lists of rights that we have discussed. My argument is that, once democracy accepts principles that are not subject solely to majority rule, the way is open for the entry of additional values within this framework.

Narrowing the gap between democracy and Jewish law does not totally eliminate it, nor does it create a system of authority that everyone can live with. There are two reasons for this, stemming from the two perspectives discussed above.

The first comes from the religious direction. Even though there is a greater recognition of man's authority as interpreter and legislator, this does not eliminate the fact that, at its core, it is divine revelation that is the source of authority. Moreover, the man of faith does not see himself as legislating against the will of God, but rather merely as uncovering that will. His whole intent as interpreter is to achieve the most faithful interpretation of those categorical imperatives whose source is external to man. Hence, the freedom that he can take for himself is limited. He must constantly

direct himself toward clarifying the exact requirements of the divine commands.

From a democratic perspective, too, one cannot see the gap being eliminated. Although there are values that are outside the purview of majority decision, these are nevertheless still based on man's determination as sovereign, or on other human determining factors, such as international agreements, etc. It would be difficult to add a religious perspective into this framework.

The second method – bringing Judaism and democracy closer together

The gap between Jewish law and democracy may also be narrowed if we reexamine the possibility that *Halakha* indeed recognizes elements that are fundamental to democracy – the language of rights. This recognition by *Halakha* may come from either of two directions. One direction is the recognition by *Halakha* of the *derech erez* that preceded *Halakha*, while the other possibility is that the foundations of the list of rights can be found within the *Halakha* itself.

The statement that *derech erez* preceded the Torah requires explanation. In using the term *derech erez*, I am not referring to the present-day meaning of good manners, etiquette, and so on. Rather, I am referring to the term's original meaning. In the language of the Sages, the term *derech erez* means the accepted, normal mode of conduct in the world. *Derech erez* is synonymous with earning a living, conjugal relations, and the normal conventions of human behavior. One who adopts a life of *derech erez* is one who follows the way of the world. The Sages often spoke in praise of *derech erez*, and of man's obligation to conduct himself according to those principles.

The statement of the Sages, that *derech erez* preceded the Torah, therefore adopts human interaction within a normal, ordered state as being the norm. When human beings adopt a set of rights, this need not necessarily derive from *Halakha*, but from human determinations as to appropriate, normative behavior. It is this spirit that pervades the words of the prophets. They spoke constantly of man's obligation to act justly and honestly, with fairness and social sensitivity. This is far beyond the strict realm of *Halakha*, and imposes much higher standards than those imposed by the law. When the "Jewish" side of the "Jewish, democratic state" equation sees itself as obligated to the world's universal values, we can see this as mitigating the enormous tension between the two worlds.

Furthermore, the list of rights is integral to the world of *Halakha* itself. What needs to be emphasized is that *Halakha*, in general, does not speak in terms of rights,

but rather in terms of duties. *Halakha* does not say that man has a right to his good name, but it does impose an obligation on others not to slander or embarrass him; it does not relate to the right of the poor to a decent living, but it obligates the community to care for the weaker members of society; it does not deal with the rights of parents over their children, but rather it addresses the obligations of children toward their parents; and so on. Thus, one cannot simply transfer the language of *Halakha* into the language of democracy. However, the very fact that *Halakha* imposes numerous obligations toward the "other" is an indication of the way in which the Jewish aspect of the state can be shaped in this spirit. Furthermore, Judaism is not limited to *Halakha* alone. The words of the prophets, who made the moral framework into the basis for society, and who argued that God measures society primarily through how it treats its weaker members, reinforce further the possibility of bringing the "Jewish" and "democratic" sides closer together.

This would be an opportunity to comment on an important aspect of this issue: in general, when we think of Israel as a "Jewish" state, we tend to look solely at those areas that are between man and God – marriage and divorce, *Kashruth*, Shabbat, and so on. However, the Torah and Jewish tradition also deal at length with questions of social justice, and the prophets made these issues fundamental to the nation's existence. What we need is a significant change in the public's perception of what Judaism is about, with an emphasis on the State of Israel as a state in which justice and welfare are goals common to all parties to this debate. Such a conceptual shift could also play its part in reducing the tensions between the two sides.

Democracy too must play its part in bringing the two sides closer together. While it is essential to ensure that individual rights are protected, it is also important to recognize the rights of the collective to define its own public domain. The democratic idea may thus also be consistent with the idea of the nation state, and with the desire of the broader community to choose its own road in the spirit of its unique communal nature.

As we have mentioned, there is an ongoing debate within the State of Israel in regard to the constitution that is taking shape. One of the issues being debated is whether such a constitution will also include a "preamble," and whether Israel's Declaration of Independence, or some similar document, will thus become an integral part of the constitution. If the State of Israel indeed rejects the radical, Western, liberal model, which denies the right of the national state to exist, and instead adopts a softer democratic approach,

there is a good chance for reducing the tension between state and religion, since the state itself can encompass significant elements of religious, national identity.

The third method – practicality

These two approaches together do not totally eliminate the contradiction. They blur it, and allow the coexistence of various perceptions of the nature of the state. The State of Israel will, nonetheless, need to resolve the gap that remains between democratic life and Judaism through practical means. Most of the Jewish citizens of the State of Israel, who constitute the absolute majority within the state, have a deeply held connection with both democratic ideals and their desire that the State of Israel be a Jewish state, even if they have not defined exactly which Jewish foundations they wish the state to apply. Furthermore, both those who tend toward the “democratic” position and those who lean toward the “Jewish” position recognize that there are those who disagree with their own opinion, and understand that any resolution cannot be imposed coercively.

The recognition that it is not possible to determine the nature of the state merely by means of a chance majority vote in the Knesset, and that this internal debate is deep-seated and may last for many years to come, has led many to abandon any attempt to end the debate through political means. Moreover, that the State of Israel is the only state in the world that is constantly under threat from elements that negate its very existence, reinforces its citizens’ sense that they are in a life or death situation, and their understanding that national unity is more important than resolving questions of religion and state. Most of the state’s citizens understand the need to be practical. Too great a gap between fundamental conceptions or ideology, and any constitution that may be adopted, cannot continue to exist for long, and may even endanger the existence of the State of Israel.

Hence it is possible that the status quo may persist for a long time. I would risk the opinion that the process of adopting a constitution for the State of Israel will be characterized by one of two possibilities. The more likely possibility is that the State of Israel will remain without a constitution, or, at least, without the inclusion of articles in the constitution to regulate the issues of religion and state. The second possibility is that a constitution will be adopted without broad consent; in that case, it will, in effect, not have any real meaning, because of the enormous gap between reality and the text of the constitution. On the other hand, a continuation of the status quo, albeit with mutual

restraint on the part of both sides, appears to be the most reasonable – and perhaps even the most correct – thing to do.

From the side of the supporters of “Judaism,” this restraint will come from two directions. The first is a recognition of the limitations of power, and a recognition that the ideas of man’s freedom and autonomy do not permit broad religious legislation, or allow the imposition of religious principles under the auspices of the law. This fact is beginning to be assimilated within religious society. Religious society has learned that, notwithstanding existing legislation (for example) in the area of family law, many secular couples choose not to establish their homes in the manner that the law attempts to impose on them; on the contrary, they find numerous ways around the law. This is also true of other laws, such as the laws relating to Shabbat rest. A second direction from which restraint will come is internal to the religious community. Religious thought will begin to recognize that too close a connection between the state and religion harms religion itself. This is for various reasons: religious authorities are less than free to rule, because, in effect, religious rulings are subject to the High Court and other state institutions; a religion that depends on the law makes itself distasteful to the community; it is particularly in those observances to which no legislation applies (for example, observance of the Passover Seder, Yom Kippur, circumcision) that the power of religion is greater; and, in general, it is not clear whether there is religious significance to keeping the commandments by virtue of secular legislation, and so religion itself might not be interested in coercive arrangements under the auspices of the law, except to a very limited extent.

From the other side, that of “democracy,” restraint will come from a recognition of the enormous significance that Israeli society attributes to Jewish values. The Supreme Court is ultimately a reflection of the society within which it operates, and it cannot continue making “Judaism” subject solely to democratic values. And if the Court does not do so of its own accord, Knesset legislation may force it to do so; indeed, we already see signs of this in other spheres, for better or for worse. A Supreme Court that restrains itself, while strictly protecting human rights and maintaining limitations on the collective, is a necessary condition for restraint.

I believe that the three approaches to mitigation proposed above will permit coexistence in the State of Israel, and may even be a blessing for the unique, almost untenable, path taken by the “Jewish, democratic state,” which is ultimately an expression of the cultural

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Against all odds: the story of Israeli democracy

No modern free society came into being and was shaped under conditions as adverse to liberal democracy. Precisely because of this Israeli democracy has to date been a tremendous achievement

Alexander Yakobson

In discussing Israeli democracy, the usual procedure is to take for granted the fundamental fact that the political system in Israel is a multi-party parliamentary democracy, and then to point out this democracy's weaknesses and flaws. These flaws are sometimes described as particularly noteworthy "precisely because" Israel is a democracy; or, as some would have it, "for a country that claims to be a democracy" (a neat way of turning the existence of democracy in Israel into a reproach without actually admitting that it exists). And indeed, when it comes to discussing the Israeli democracy's flaws, there is no lack of fruitful themes for discussion. But there has never been anything to be taken for granted about the very existence of democracy in Israel. It emerged and developed under conditions and in an environment about as favorable to liberal democracy as the Dead Sea is to fishing. Nevertheless, Israel over time became more – rather than less, as is often claimed – of a liberal democracy.

I venture to suggest that if ever it comes to awarding a Nobel prize for democratic achievement in recent decades, this prize should go neither to Denmark nor to Norway. With all due respect to these exemplary democracies, no extraordinary achievement is involved in maintaining a liberal democracy in the prosperous and peaceful northwestern corner of Europe where democracy has been deeply rooted for generations and national conflicts are unknown. Praising such countries for their democracy is rather like praising angels for not succumbing to temptation. The Nobel prize for democracy should go to two non-Western countries vastly different from each other, where democracy with many flaws has emerged and flourished under nearly impossible conditions – India and Israel. Saying so is in no way intended to minimize the flaws, or the need to confront and rectify them. An old Israeli joke said that in



Germany there is an economic miracle, and in Israel it's a miracle that there is an economy. The state of Israel's economy has improved since then; so has the state of its democracy. While it is true that in most cases, a democracy (no less than an economy) is better served by pointing out the flaws with a view to correcting them than by celebrating the achievements, nevertheless it is sometimes worth our while to recall what a miracle it is, in this country, that there is a democracy.

No modern free society came into being and was shaped under conditions as adverse to liberal democracy as Israel's. One doubts if any computer, fed with all the relevant data, would return the answer that a country existing under such conditions can maintain a liberal democracy. The first obstacle to liberal democracy in Israel has, naturally, been the Arab-Israeli conflict. It is an understatement to say that Israel has been involved in a violent national conflict since the country's inception more than 60 years ago. In truth, the conflict preceded the establishment of the state by decades. Not merely the state but Jewish-Israeli society itself came into being and took shape during the conflict. This conflict, while falling far short of a permanent war, has meant that Israel never knew a day of peace. It has known ups and downs; few will dispute that the last decade saw it, and its violent aspect, exacerbated.

It is no secret that violent conflicts and grave threats are apt to lower the democratic standards even in long-established and highly developed democracies. A nation under a serious threat invariably deviates, to some extent, from the standard – that is to say, peace-time – liberal-democratic norms. The only real argument – an important argument indeed – is over the extent of the deviation versus the gravity of the threat. What happened in the United States after 9/11 is a case in point. Without going into any of the controversies surrounding Bush's "war on terror," it is clear that this was never only about Bush. The Obama administration has reversed the controversial aspects

of his predecessor's anti-terror and security policy, once strongly criticized by Obama himself, only to a very modest extent, and is now being criticized for this change by some of his liberal supporters. European countries, where today it is fashionable to denounce American brutality and paranoia, have their own record of robust extraordinary measures in times of emergency, including terrorism, not to speak of war. But Israel is not a democratic state that encountered a state of emergency at some point, dealt with it with the help of appropriately strong medicine, and then recovered and went back to normal. Rather, the emergency predated the state itself, and has accompanied it, with various degrees of severity, ever since (which does not of course mean that claims of emergency and security have never been abused in Israel and elsewhere). Whole generations of Israelis were born into the conflict and raised under it.

The conflict, it should be stressed, is not purely external – and not only because it takes place, especially where the Palestinians are concerned, next door rather than beyond the seas. It inevitably casts a shadow over relations between the Jewish majority and the Arab citizens of the state – by far the most significant issue of civil rights in Israel. This is not simply a matter of majority versus minority, which is usually complicated and challenging enough, even without the backdrop of a violent conflict, when the minority is as large, and as culturally distinct, as in this case. The Arab minority considers itself, overwhelmingly, as part of the Palestinian people. Its leaders and spokespersons express not just cultural and ethnic affinity and not just political solidarity with the Palestinians in the territories (and often with neighboring Arab states). They are apt to voice, making use of the Israeli freedom of expression that has expanded over time, more or less explicit support for the other side during actual armed conflict (involving, as it has done especially in the last decade, systematic attacks on the concentrations of Israel's civilian population). This is something which is not always tolerated in other contemporary democracies. In this, the majority in Israel (which is but a tiny minority in the Arab-Muslim Middle East) faces a challenge hardly paralleled in the history of relations between a national minority and a national majority – though it must be stressed that the Arab minority in Israel, for all the provocative rhetoric voiced by its representatives, is also far more peaceful in practice than this rhetoric would imply, and when compared with other minorities stranded in a national conflict. Moreover, polls suggest consistently that its actual attitude to the state is much more positive than the

rhetoric of its leaders.

The composition of Israeli society militates against the development of a liberal democracy no less than the chronic, open-ended state of emergency. The vast majority of Israel's Jewish population hails, originally, from countries without a democratic political culture, and in many cases, with a highly undemocratic one. Roughly half originates in the Arab Muslim countries of the Middle East; the second, "European" half, including, importantly, the country's founders – overwhelmingly, in the non-democratic (and less developed) countries of Eastern Europe (including Czarist Russia and the Soviet Union). This mixture, characterizing Jewish-Israeli society, was basically created during the first several years of Israel's independence after 1948. At that time, some 650,000 Israeli Jews (many of them newcomers themselves, scarcely settled down, and in a country facing huge economic difficulties) received more than a million Jewish immigrants, most of whom came with little or no property. The European equivalent of this would be for Britain or France to receive within the space of a few years, under similar conditions, more than 100 million immigrants, mostly from underdeveloped countries with illiberal political cultures, and integrate them immediately into the political system, with the immigrants receiving citizenship and the vote upon arrival. This would have presented a very considerable challenge to any democracy, however well-established. The large Arab minority in Israel (approaching 20 percent of the population) is without experience of democracy except for Israeli democracy itself, imperfect as it is in this respect. The usual perception of Israel as a "Western" enclave in the Middle East is highly dubious in point of fact; Israel is considered Western because it is a success story, rather than being a success story because it is Western.

It has nowadays become fashionable to stress the highly undemocratic background of Avigdor Lieberman and most of his voters, Russian-speaking immigrants, in explaining the challenge they present to liberal democratic values. There is, no doubt, much truth in this, and it is good to see that political correctness doesn't always stifle free public debate. But this undemocratic background is anything but unprecedented. This has been true for previous waves of mass immigration no less than for the mass immigration from the former Soviet Union in the 90s. Thus challenged, repeatedly and on a massive scale, how could – one asks – any liberal values survive in this country? This, then, is the remarkable story of Israeli democracy: millions came here, overwhelmingly

from non-democratic countries, and built a vibrant democracy – under a chronic state of emergency, in the midst of a nasty national conflict lasting for decades, in the heart of the Middle East.

(Of course, strong electoral support for populist and nationalist right-wing parties, that are not above appealing to less-than-noble sentiments of the public, is a phenomenon well known, nowadays, in several of Europe's long-established, peaceful and prosperous democracies. These do not require masses of Russian-speaking newcomers among their electorate in order to reach this result; though no Muslim member of the Dutch parliament, for example, has ever publicly praised a group firing rockets into Dutch cities.)

The very imperfect democratic system established by the founders in Israel's first years – an extraordinary achievement in the circumstances of that time – included, owing to a complicated mixture of political, social and cultural reasons which merit a discussion going far beyond the scope of this paper, a mechanism for steady improvement. In the early 60s, while David Ben-Gurion was still prime minister, and though his style of leadership was certainly authoritarian by our standards (and also those of many of his contemporaries), the system was already much more liberal than in its first years. By 1977, when Labor was voted out of power, Israel had grown much more liberal than in early 60s. This event was in itself an important milestone in the development of democracy, rather like the first time that the Indian Congress party, similarly identified with the state, lost power – whether or not one feels fully comfortable with either Hindu nationalism or the coalition of right-wing and religious parties that came to power in Israel. Today this country is undoubtedly much more of a liberal democracy than in 1977, though the opposite was confidently predicted by some, and feared by many, when Menachem Begin came to power. Of course, one can argue that there is nothing especially remarkable about this process: the entire Western world has become much more liberal since the 50s. But it is far from trivial that Israel is, politically, part of this world and of this process. Egypt, it should be recalled, was, in early 50s, much more liberal than it has grown to be in recent decades.

Recently, largely because of a series of highly controversial bills sponsored by Avigdor Lieberman's party, Israel Beitenu, and the aggressive rhetoric accompanying them, one often hears – both in Israel and in the Western media – that Israeli democracy is deteriorating and is in a grave danger. It is worth recalling how often, and how confidently, this has been asserted in the past. Since 1977, it has been claimed

repeatedly that Israel's democracy is deteriorating and some form of clerical fascism is emerging. In the aftermath of the 1977 election, a member of the outgoing Labor government burned his papers, fearing what might happen if they fell into the new regime's hands. These fears, then, were not confined to some radical fringe.

In a somewhat less dramatic fashion I shared and voiced them too. These fears seemed reasonable under Begin, whose bombastic nationalistic rhetoric before widely enthusiastic crowds I cannot even now recall without shuddering. While Begin was at once a nationalistic rabble-rouser and a liberal prime minister (who, among other things, did a lot to strengthen the power and prestige of the Israeli judiciary), some of his political allies, both in his own party and among its coalition partners, were quite obviously anything but great liberals. We voiced those fears under Shamir, when we had occasion to miss Begin's pedantic parliamentarism, legalism and firm commitment to liberal democracy (little appreciated by us at the time). I shared these fears well into the 90s. Then, at some point, I started noticing what an abyss had opened between the rhetoric of "democracy is in danger" current in left-liberal circles and the actual reality on the ground. While many among those who strongly opposed the policies of the Israeli Right were constantly speaking of the dangers that threatened Israeli democracy, and taking its deterioration for granted, the country was undergoing a far-reaching and wide-ranging process of liberalization.

As part of this process, it has become much more acceptable to label Israel a fascist (or semi-fascist) state, or at any rate to deny that it is a democracy at all. Today, much more than in 1977, when such views were largely confined to fringe outlets, the mass media is wide open to such a message (which, naturally, is also echoed abroad); every established platform is open to it, often at public expense; from time to time somebody receives an official prize for voicing it. You don't believe that fascism is engulfing us? Why, only the other day I heard it all explained so nicely on Army Radio.

Needless to say, the left has no monopoly on wild rhetorical exaggerations. The Israeli far right, whenever it feels that the state has failed to pamper it sufficiently, immediately proceeds to denounce it, in the same grotesquely self-refuting manner, as a Stalinist dictatorship. The mainstream right, too, is not wholly above deploying such tactics when it happens to find itself in the opposition. Admittedly, a certain overstatement of an existing problem or a looming danger (preferably, without losing all contact with

reality) may sometimes be pardonable, perhaps even useful. But the real question is – in which direction are things moving? How has Israeli democracy fared since it became fashionable to talk about its deterioration and to warn against the danger of its collapse?

Even before 1977, Prof. Yeshayahu Leibovich made his famous prediction that the occupation of the West Bank and Gaza would destroy Israeli democracy. I must admit I found this thesis very convincing when I first heard it. How can a people remain free when they rule another people by force? It turns out they can, sometimes. One might argue that we don't actually deserve to be a democracy, because of the occupation. Perhaps. In order to determine what each side to this conflict deserves, its respective contributions to the conflict (and attitudes to the other side's national rights) need to be impartially examined. I still believe that in the long run, regardless of how one apportions the blame, perpetuating the occupation would doom Israeli democracy because it would doom Israel itself. If the land between the Jordan and the Mediterranean is not partitioned between its two peoples, eventually a single state will emerge – not bi-national, as some delude themselves, but Arab and Muslim. This does not, however, change the fact that Israel today is much more democratic and liberal than it was in the 70s.

Today, unlike before 1977, the ruling party in Israel always knows that the electorate can realistically be expected to vote it out of power. The Knesset is much stronger vis-à-vis the executive. Parliamentary committees exercise a much stronger oversight of ministers' activities and of secondary legislation. Much of the legislation originates now in private members' bills, quite often by opposition deputies – including those from the radical opposition. When Tamar Gozansky, a Communist deputy famous for carrying dozens of bills on social matters (not on vital issues of policy, naturally, but still important enough for those involved), retired from the Knesset several years ago, her accomplishments as a parliamentarian were rightly celebrated. Israeli parliamentarism had a share in the celebration: such a legislative career would have been unthinkable in the good old days of Labor hegemony, when Communist members of the Knesset (and in the 50s, to a large extent, members of the main right-wing opposition too) were shunned and isolated. Nor, indeed, would such a thing be possible today in most countries with a parliamentary system – certainly not in Britain, where a private member's bill may not increase government expenditure.

Israel's political parties, once ruled firmly from atop, have become much more democratically governed

(and, I am afraid, considerably more corrupt as a result). Local self-government is less dependent on the central government. The State Comptroller, once a thoroughly unimportant institution, has grown powerful enough to imperil a prime minister's political survival (as happened to Ehud Olmert). Civil society is much more developed, vibrant and influential. The judiciary has grown much stronger – first and foremost, the High Court of Justice, but also the independent attorney general. Claims of national interest and state security meet a much less deferential response in both the higher and the lower courts. Even military courts are quite capable of overruling the government on matters that it regards as a vital national interest (even when it doesn't overstep any legal boundaries): witness the relatively light prison sentences imposed by military judges (much shorter than what would probably be imposed by American courts in a similar situation) on high-ranking Hamas officials after Gilad Shalit's abduction, frustrating the government's obvious intention to keep those people behind bars long enough to pressure Hamas into releasing the Israeli soldier.

The High Court has grown much more activist and interventionist, much more likely to overrule the government on sensitive issues, including security. The security establishment is under much greater legal, parliamentary and media scrutiny. The media is much more free, aggressive and biting. Military censorship has largely become a joke. Even on strictly operational matters it often finds it difficult to control the flow of information, as was demonstrated during the Second Lebanese War. Today it sounds incredible that yet in the 80s, a national newspaper ("Hadashot") could be shut down by military order for several days because it had defied the army censors on a matter that had nothing to do with military secrecy in any proper sense (by exposing the killing of two captured terrorists).

Rather than the mouths of the opponents of the occupation being shut (as Leibovich predicted), what really happened was that the mouths of the opponents of Zionism were widely opened. Every Zionist sacred cow is today slaughtered with gusto – in the media, in academia, in the arts and in the state-funded cinema industry – incomparably more so than in the 70s. Thanks in large measure to increased judicial activism, the rights of the Arab minority are much better (though still far from perfectly) protected and enforced; the High Court is now, for example, willing to interfere in budgetary allocations in response to claims of discrimination, and even to mandate, in some cases, the appointment of Arab representatives to public bodies. Despite the religious parties' coalition clout, the status

quo on religion and state (still quite unsatisfactory from the liberal standpoint) has been eroded in favor of the secular public in many areas. The country – even Jerusalem, not to speak of Tel Aviv – has been covered with places open on Saturday and offering non-kosher food. Gay pride parades are officially sponsored in Tel Aviv, but they also take place in Jerusalem – a sure sign that we have become, or are fast becoming, a Middle Eastern theocracy. The Israel Defense Forces have long left the Clintonian "don't ask, don't tell" far behind. People praise Tel Aviv as an island of liberalism and tolerance in a sea of clerical fascism – as if such a sea could ever have tolerated such an island in its midst. Most of what Tel Aviv is praised for emerged, or reached its peak, during the decades in question.

None of this is meant to present an idealized picture of the past decades. All the negative phenomena and warning signs that people talk about today were very much in evidence throughout that period. Shrill nationalistic rhetoric abounded; at its worst it was (and is) indeed racist and fascist. Appalling things were said in the name of Judaism. People on the left were routinely accused of disloyalty, quite often of actual betrayal; what they themselves sometimes said about their opponents is beside the point right now. Grave instances of extremist violence occurred, including, on several occasions, murder. Wild illiberal measures were often proposed. On some occasions, undemocratic steps were actually taken by the authorities and draconian laws passed. The Supreme Court turned them into a dead letter. The same court will today deal in the same spirit with any undemocratic bill that is passed – if it passes (for there is often, in such cases, a huge difference between what is originally proposed and what is eventually adopted). Now, however, unlike in the 70s, the Court has the power to actually annul illiberal legislation.

In the 80s, the Knesset passed a law banning political parties that opposed Israel's right to exist as a Jewish state, as well those espousing racism or hostile to democracy, from participating in elections. At the time, the Zionist left voted for the law (rightly expecting that it would lead to the disqualification of Meir Kahane's racist movement). Under today's liberal standards, such a law would have been roundly denounced as draconian and racist. At that time, it was not expected that the law would drive the Arab representatives from the Knesset, because the Communist party, which then received most of the Arab protest vote, and always had Arab deputies, was much more moderate in its rhetoric on this issue, perhaps remembering its support, in accordance with the Soviet line at the

time, for the UN partition plan providing for a "Jewish state" and an "Arab state" in Mandatory Palestine. Since then, the state has become more liberal, while the Arab leadership, which now consists mostly of Arab nationalists and members of the Islamic Movement, has become more radical. But although the Arab parties in the Knesset have turned the rejection of the Jewish state into their most important political banner, the Supreme Court has rejected, and will undoubtedly continue to reject, using its power of interpretation with considerable flexibility and ingenuity, all attempts to disqualify them on the basis of this law.

The so-called "Nakbah bill" has recently been adopted by the Knesset. In its original form, it sought to criminalize the practice of marking Israel's Day of Independence as a day of mourning, on the part of Arab citizens, for the defeat in the 47-48 war and its consequences. Any law adopted in this form would be sure to be annulled by the Supreme Court as violating freedom of expression. The bill was eventually watered down to a partial and qualified ban on government subsidies to any group that practices what it originally tried to criminalize. Why anyone who insists on turning a country's Day of Independence into a day of public mourning should seek government subsidies for this particular act of offence and provocation, rather than doing it at their own expense, is rather a mystery. The law as adopted will probably be pretty meaningless in practice, for it will be anything but easy to prove, to the judges' satisfaction, that what any particular act of mourning referred to was the Day of Independence as such.

That a string of dubious, and sometimes clearly undemocratic, private members' bills is now, regrettably, before the Knesset, does not mean that civil rights in Israel, and in particular freedom of expression, are likely to erode. I venture to predict that Israeli citizens, Jews and Arabs, will continue to enjoy the right not merely to reject the Zionist ideology and narrative, but to express open support for the other side during actual armed conflict. Sometimes it seems that tabling draconian bills is mainly an attempt to score public-opinion points, rather than to bring about the changes these bills notionally promote. Whenever such a move is made, it must of course be strongly opposed – but not necessarily by bemoaning the cruel fate of Israeli democracy, as has become customary on such occasions.

The price of freedom is eternal vigilance, not eternal panic-mongering. Democratic values and norms can

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Democratic first, Jewish second: a rationale

'Jewish State' ought to mean, politically, mainly what it meant for Herzl and Ben-Gurion: the state of the Jewish people, based on a national concept of Jewish. All other meanings should be played out in the public, intellectual and cultural arenas, and not in the constitutional centerfield

Fania Oz-Salzberger

My title might sound somewhat provocative. Of the two adjectives that have become so innate to Israel's self-definition in recent decades, why should democratic come first and Jewish second? Should not both words work on the same level? Why should we attempt to grade them at all? Or, if grade we must, shouldn't Jewish come first and democratic second?

A common error ascribes the epithet for Israel, a 'Jewish and Democratic state', to the Declaration of Independence of 1948. In fact, the term did not surface prominently in the public arena until well into the 1980s, but it has been prevalent in Israeli discourse ever since. I would like to voice my doubts of the usefulness of the compound 'Jewish and democratic' to denote Israel. Rather than clarifying the issues of cultural and political identity, this formula has often served to obfuscate the complex matter of Israeli self-definition.

The debate opened up a cluster of questions: is Israel 'Jewish and democratic'? Can it be both? Does 'Jewish', under any definition, support or undermine 'democratic'? And, when push comes to shove, would 'Jewish' trump 'democratic', or vice versa?

It is a muddy discussion, often simplistic about what democracy means, and conceptually entangled about what 'Jewish' means. It would have been so even had no Palestinians existed in Israel or in its occupied territories. Even if Jews had accomplished a 97 percent majority (akin to modern Greece, following its successful ethnic cleansing), some of the questions would still prevail: Is Judaism a religion, a nation, or both? Should the Jewish state live by ancient Hebraic law, the *Halakha*? If not, in what sense is it Jewish? Who is entitled to citizenship? And who, for heaven's sake, is a Jew?

I submit that 'Jewish and democratic' are neither parallel concepts, nor do they belong on a single conceptual plane. The simplest reason is that

'democracy' is a form of government and 'Jewish' is an appellation for nation, religion, and culture, singly or together. So they are two very different things. They are not a conceptual seesaw, neither dichotomous nor mutually balancing. They belong in different spheres, like different parts of speech.

Of course, if Jewish and democratic function like different parts of speech, they could work quite well together, as nouns and adjectives usually do. We would talk, for instance, about a Jewish democracy. Indeed, every nation-state hinges on the mutually complementary elements of the nation and its form of government. Isn't the Jewish and democratic state the equivalent of the French Republic or the Kingdom of Denmark? Some

people would probably say, very reasonably, that if we understand 'Jewish' as a national appellation, then the Jewish state is no exception to a host of other nation states, many of them good democracies, around the globe.

This could work. But not now, not where we stand today. Rather than clarifying the issues of cultural and political identity, the 'Jewish and democratic' formula has often served to obfuscate the complex matter of Israeli self-definition. And it has given too much license to play down democracy.

Israeli public discourse, ever since it took on the Jewish and democratic formula, has been steadily fattening the concept of Jewish and thinning the concept of democratic. In prevalent political rhetoric, 'Jewish state' has become dangerously overlaid and ambiguous, while 'democratic' has become dangerously simplistic and frail.

The best metaphor I can offer is that Israel's Jewish character looks like seven fat cows, while its democratic character is one very thin cow. Please keep this simile in mind – it's both kosher and Egyptian, so it should be easy to remember.

In the Jewish-democratic sphere of discourse, 'Jewish' is the seven fat cows. It has become, in recent



Israeli discourse, so laden with specific meanings that it cannot stand on par with 'democratic' without threatening to compromise it.

Israel's Jewish character is increasingly seen, in recent years, as amorphously blending nation, religion, culture, and sometimes mystical and meta-historical claims, into a strange and unique concoction of faith and identity. Far more than a simple national claim, it now stands for a series of impassioned, and often mutually incompatible, ideas of the good, of how life should be lived. Several meanings of the Jewish state today straightforwardly contradict democracy. Other meanings stand for particular worldviews that democracy ought to defend, vis-à-vis other legitimate worldviews, while equally sustaining other competing notions of the good. Thus, Jewish supremacist legislation or halakic jurisdiction are patently anti-democratic; but the claims for privileging Jewish holidays and public symbols, or business closure on the Sabbath, or Judaism-oriented school curricula, while obviously controversial, are well within the legitimate democratic interplay of cultural preferences.

It is a staple of the thickened discourse of Jewish national identity among right-of-center Israeli politicians and lawmakers that the line between democratic and anti-democratic claims and proposals has become increasingly blurry. But the line is not difficult to demarcate: it is crossed wherever 'Jewish' is purported to trump 'democratic'.

In an austere little assembly room, almost sixty-three years ago, David Ben-Gurion declared the establishment of the State of Israel. Drafted by a distinguished group of lawyers, some of them sporting a heavy German accent, and ratified by the provisional People's Council on 14 May 1948, the Declaration of Independence was read out by Israel's first prime minister to an audience of 250 people, as many as the quaint Bauhaus building that housed the Tel Aviv Museum could hold. A crowd gathered outside, ready to rejoice but emotional to the point of tears. No one came from Jerusalem: it had been besieged by Palestinian Arab militias immediately after the United Nations General Assembly granted Jews and Arabs their respective sovereign states on 29 November 1947.

Significantly, the term 'democracy' does not appear in Israel's Declaration – known in Hebrew as the Scroll – of Independence. The term 'Jewish' and its derivatives appear 25 times, and the combination 'Jewish state' five times. The reason for this multiplicity of Jewish derivatives is clear enough: here was the groundbreaking novelty of the Scroll of Independence, its tangible edge of historical drama: the near-incredible

formulation 'a state for the Jewish people.'

For many of the actors and listeners in Tel Aviv and across the globe, perhaps even for the majestically confident Ben-Gurion himself, a historical miracle was in the making. That the Jews, whose irreversible loss of political liberty was described by Josephus just after 70 CE, would regain sovereignty and proclaim their independence in revived Hebrew on reclaimed Israelite soil, beggared belief. In the hall and out on the streets many adults were crying openly. Any historian who puts on record, justifiably and rightly, the tears of the Palestinians in their moment of disaster, but fails to note the tears of the Jews, is making a shambles of historical explanation.

But my point is not to dwell on the enormous moral power of the concept of a Jewish state in the late 1940s, but to say that even in the late 1940s the Jewish state came into the world as a democracy. Because the Scroll, in clear and beautiful Hebrew, also speaks to non-Jews, loudly, liberally and humanely. The Declaration of Independence is one of the most democratic documents in Israel's constitutional history, in many ways an admirable text that should have carried far more legal and political weight than it is actually carrying today.

Its famous passage, which ought to become the opening clause of Israel's yet unwritten constitution, says that "the State of Israel will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations."

Intentions are notoriously difficult to fathom, all the more so from historical distance and in the dense fog of domestic and international politics, escalating bloodshed and animated ideological rhetoric. But if Israel's Declaration of Independence, and most (though not all) of its legal history is taken at face value, then the Jewish state has always sustained a strong liberal-democratic intention. From its inception, its democratic record has been different from that of an 'ethnocracy' granting civil liberties to Jews, as recent scholarly critique has it. Israel has yet to succeed in fully implementing its declared intention, but the intention is inscribed on its founding scroll in language crisp and clear: a state for the Jewish people and for all its citizens. A state founded on freedom, equality, justice and civil rights.

Why did the Scroll of Independence not mention the word democracy? Perhaps its authors did not want a Greek term, even the best of Greek terms, in this grand reenactment of Jewish sovereignty. More likely, the founding fathers and mothers took Israel's democratic nature to be self-understood. Democracy was already a done deal, an evident institutional fact, and a granted feature of the Zionist movement. But political freedom for the Jews was anything but a done deal, self-evident or granted. To put it bluntly, for the leaders of the Yishuv (the pre-state Jewish community in Palestine), for Ben-Gurion and Yitzhak Ben-Zvi, for Golda Meir and Zerah Warhaftig, for Pinhas Rosen and Meir Wilner, the democratic nature of the new state was nothing novel. For the delegates of no less than ten political parties, representatives of a dozen pre-statehood institutions and civil society organizations, democracy was no news. But a Jewish state, now that was news.

After all, the Zionist movement had been democratic from its very inception, materializing in a series of congresses where hundreds of elected delegates from numerous Jewish communities deliberated and voted. Ever since the late nineteenth century, the embryonic Jewish polity was based on the principle of equal representation, with both men and women given the vote. Indeed, women had full voting and elective rights at the first Zionist congresses, way before any country in the world legislated female suffrage (the only exceptions: South Australia and New Zealand, then still colonies). Of course, this was a democratic game among Jews. But Theodor Herzl already stipulated, in his *Altneuland* of 1902, that Jews and Arabs, men and women, would all be citizens of equal standing with full voting rights in the Jewish state to come. The Declaration of Independence reiterated and expanded this Herzlian intention.

Consider the official name the country was given, following some debate. It is 'The State of Israel.' Interestingly, very few countries in the world contain 'State' in their official titles. Israel is in company with the States of Eritrea, Kuwait, Qatar and Vatican City. Two others are officially named 'The Independent State of': Papua New Guinea and Samoa. Two other cases incorporate further elements, 'The Plurinational State of Bolivia,' and even 'State of Brunei, Abode of Peace' (in Malay, Brunei – Negara Brunei Darussalam). In a few instances, the plural form 'states' denotes a federal structure. But most other countries that are not kingdoms, and that added a further tag to their official names, have opted for Republic. Many took their cues from the oldest such entity, La République Française.

The reason why our founders did not call us 'The

Republic of Israel' is, I surmise, twofold: 'Republic' is an alien, more specifically Roman, term; and the republican nature of Israel's regime, like its democratic government form, was deemed self-evident. But why was 'State' inserted at all? Why not just 'Israel'? Again, my explanation is twofold: Ben-Gurion and his counterparts wished to distinguish the modern state of Israel from ancient Israel; and, secondly and perhaps touchingly, they reveled in the miracle of modern Jewish statehood so much, that they wished to engrave this great historical novelty into the name of the newborn country.

But let us get back to democracy: although it went unmentioned, democracy was safer with Israel's Declaration of Independence than it has been with recent Israeli discourse. In the Declaration, its nominal absence derived from its hovering presence. But on today's political stage, some Israeli politicians and intellectuals are happy to quote democracy but mean it not. It is the thin cow democracy they have in mind, the solely procedural notion of democracy that enables the Yisrael Beitenu party to declare itself proudly democratic, and in the same breath offer to ban Arab citizens from publicly observing the Nakba day of mourning. Or the National Union party to duly define Israel in its platform as Jewish and democratic, and a few paragraphs later to promise "to fight anti-Jewish and anti-Zionist trends in the judicial branch."

Let us briefly examine the terms. Democracy, or more precisely modern democracy, is a form of government and a civic state of mind. Democracy depends on two inherent pillars: procedure and essence. Procedure is made of free and fair elections, of majority rule counterbalanced by specific non-majoritarian institutes. The essential pillar of democracy rests soundly upon the rule of law, separation of powers, an independent judiciary and due process, maintaining civil rights that apply equally to all citizens, and safeguarding the human rights of all denizens, citizens and non-citizens alike.

As a form of government, democracy is universally impossible on Israel's citizens, Jews and Arabs. But the state's Jewish character, the privilege of its Jewish majority, historically well-earned and culturally much debated, cannot be forced upon its non-Jewish minority in ways that encroach on their individual liberty.

It is precisely this essential pillar of democracy, if I may insert a current-affairs perspective, that we fear might not materialize in Egypt, as it did not materialize in Iran, in Pakistan and in Gaza. Important as may be the procedural pillar of democracy – majority rule, divorced of essential democracy and its core values

– many observers have pointed out that the West, particularly the United States, erred in pushing for procedural democracy in societies that may not yet be ripe and ready for essential democracy. No democracy can rest on procedure alone. Remove the core values, the essence, and you have no true democracy, just a fake and a phantom.

Indeed, if we consider the essential aspects of modern democracy, we would be bound to call it a liberal democracy, by definition. By ‘liberal’ in this context I don’t mean the thick, ideological liberalism, of the economic brand or even of the political brand. I mean the thin type of liberalism, the rules-of-the-game liberalism that in modern times has proved crucial to securing a fair political order among competing worldviews and political agendas.

The philosopher John Rawls has been one of the most prominent advocates of this sort of liberal democracy. Simply put, in Rawlsian terms, liberal democracy offers the sort of institutional justice requisite for a numerous and variegated citizenry to pursue its plural and diverse notions of the good life. We have many ideas of the good, and some of them are mutually incompatible. Only liberal democracy can handle our disparate notions of the good, allowing us to compromise and to prioritize rather than to clash, to oppress or to be oppressed.

If Israeli public discourse took the essential aspects of democracy as seriously as the procedural aspects, things would have been much easier for the Jewish and democratic formula. It would be clear, for instance, that the state of the Jews must guarantee equal civil and human rights of all its citizens, be they members of the national majority or not. Herzl understood it; a majority of Knesset members today does not.

As for a Jewish state, here we trudge knee-deep in a fascinatingly murky terrain. What, exactly, does this ‘Jewish’ refer to? The nation? The religion? The legal structure? The mores? The mentality? The State of the Jews, as in *Der Judenstaat*? A yiddishes land, as in a yiddishe mama? What is the main business of a Jewish state: granting me, as a Jew, citizenship, or keeping me within the religious fold, or making me chicken soup, or guarding me from the enemies of the Jews, or making sure I marry a Jewish boy? Or, as one might think when monitoring the Knesset these days, a heady mixture of all of the above?

I can say with a huge degree of certainty that I and my namesake Faina Kirshenbaum of Yisrael Beitenu hold the Jewish state to mean two entirely different things. The Knesset contains a dazzling variety of interpretations for the Jewish state as it is or as it ought

to be: a divinely ordained halakhic state, a country sporting Jewish symbols and officiating Jewish holidays, a society bluntly exercising Jewish supremacy, or, less fashionably these days, a country where Jews are at home and free.

The simplest meaning of a Jewish state, which is not by any measure the leading interpretation in Israeli public discourse today, is that this is the state of the Jews (Herzl’s original *Judenstaat*), a national home for the Jews, a haven for every Jew who seeks its citizenship. This definition is about persons, not about laws or symbols or rituals. This is essentially a secular and national definition. It posits Israel as the nation-state for the Jews. Modern nation states, as we know, do not bar minorities hailing from other ethnic groups. Herzl certainly did not intend non-Jewish citizens to be precluded. Nor did Ben-Gurion and the major founding fathers and mothers of Israel.

We Israelis argue incessantly about the meaning of a Jewish state. And so we should. It is a debate of the highest public and cultural order. It is uplifting that a society can uphold such a serious and ongoing public debate about the philosophical core of its existence. It is wonderful that so many disagreements about being a Jew and about being a citizen, about the good state, the good life, the good person, about faith and truth and human nature itself, are acted out so vocally but usually so peacefully.

But here is the paradox: the richer our notion of ‘Jewish’ state, the more it runs on a collision course with ‘democratic.’ Until the day – may it never arrive – that they would stand face to face, and ‘Jewish’ would trump ‘democratic,’ or ‘democratic’ would trump ‘Jewish.’ Until the cows, as in the nightmarish part of Pharaoh’s dream, start eating one another.

If democracy is understood only in its thin cow version, procedural democracy alone, then Israel’s Jewish majority is entitled to play out its advantage against its non-Jewish minority. Here I depart from Pharaoh’s dream: the thin cow cannot eat the seven fat cows; it can only join them by turning against essential democracy – human rights democracy – and devouring it to the bone.

But the fat cows are not so well off, either. Because if we take ‘Jewish’ in any of its thick senses, as a religion, or as a Mosaic-halakhic legal system, or as a unique set of cultural goods, then no possible democratic theory can accommodate Israel’s Jewish character with democracy. Jewish faith, Jewish symbols, halakhic

See Democratic first, Jewish second: a rationale, page 37

Israel as a Jewish state

A disquisition into the state's values, which though they have much in common with the Western tradition, also contain unique elements to help sustain the nation

Mordechai Kremnitzer

I A Jewish State: A National-Cultural Portrait

The State of Israel is a Jewish state. The significance of this declaration lies in the fact that Israel is the state of the Jewish nation and inherently comprises a unique expression of Jewish culture. In this sense, the State of Israel is similar to the rest of the countries in the world, whose political organization, at this time, is national and cultural. In light of Jewish history, it is clear that a Jewish nation state is critical for Jewish existence, both for its physical existence and its unique cultural existence. Therefore, even according to those who oppose nation states, it is justified that the State of Israel be the last, and absolutely the last, in the line of states that part with their nationalistic character. The nationalist and cultural uniqueness of the State of Israel finds expression in a number of ways: in the fact that members of the nationality constitute a majority among its citizens; in the right of return and automatic citizenship granted to Jews and their families; in the array of state symbols (the flag, the anthem, and the state emblem); in the special status granted to the Hebrew language, which in addition to being the official language of the state is also the prevalent language,¹ and which experienced a wondrous rebirth in Israel, the only place in the world where it is in daily use and in which it is continually cultivated (in stark contrast to Arabic, which is also an official language of the state). Israel's national and cultural distinctiveness is also evident in the manner in which Israeli law has been influenced and inspired by Jewish law in its choice of Jewish values that are compatible with the approach of modern values; in its general educational content; in the establishment of the Jewish Sabbath as the weekly day of rest, and in the recognition of the Jewish holidays as official holidays. Its national and cultural uniqueness are to be found in the connection between the State of Israel to the Jewish people throughout the world, expressed by its providing both physical protection (a safe haven) and protection through penal law for Jews worldwide;² in that the Jews of the



Diaspora constitute a factor considered in Israeli policy decisions, including policies relating to the security of Israel (e.g., how to prevent increased danger to Jews throughout the world); and state policies related to minorities within the State;³ and in the influence of Jewish culture on issues in which the doctrine of human rights does not provide one compelling solution (discussed at length below).⁴ It is important to state that in order for the State of Israel to continue to remain a Jewish nation state, it is essential that a significant Jewish majority be maintained within the population. This point must be a guiding factor for the politicians who are charged with setting the borders of the state.

Another point that must also always be in our minds is that only if Israel maintains a model society will it continue to attract Jews throughout the world to come and settle within it. From this perspective, the Zionist enterprise has not reached its conclusion, and still holds promise for the future.

The Jewish character is not an ultranationalist one: The tension between the national-cultural component and the commitment to human rights arises when the national-cultural component is no longer what it purports to be, but turns into an extreme nationalistic one that is based on negation of "the other." When in the name of "nationalism" there are attempts in the State of Israel to prevent the hiring of Arabs, to impose upon them transfer "by choice," to impose collective punishments on the Arab population, to deny citizenship, to destroy houses, then nothing remains of the state's dedication to human rights. Particularly dangerous is religious ultranationalism, i.e., extreme nationalism that receives religious justification and support. I will start out by saying that it would be very easy – perhaps even inevitable – to be drawn to religious ultranationalism were the Jewish component of the State of Israel defined as a religious element, and were the State of Israel a religious state whose laws were those of *Halakhah*. The Jewish tradition preceded the modern democratic state and the notion of individual autonomy that emerged after World War II, and did not internalize it. Rather it is ensconced in approaches

and concepts from a different world of governance.⁵ It is indeed correct that the Jewish cultural heritage, like every worldview or perhaps even to a greater degree, is not homogeneous. At the same time as it contains within it ultranationalist writing that puts to ridicule the obligation to safeguard universal human rights for every human being, it also contains broad and deep humanistic thought that has enriched modern liberal writing. Yet, within the reality of national conflict, it is specifically an extremist nationalism – and not humanism – that is experiencing a revival. The ultranationalist elements in religious thought are more easily and comfortably, and more deeply assimilated. The explanation for this lies in the special power the normative religious system has in the eyes of its followers.⁶ The justification that religion is able to provide for ultranationalist chauvinism is absolute, and nullifies any other possible argument, including the preservation of human rights. Religious justification has another characteristic: it not only provides a basis for agreement with and acceptance of one transgression or another, but also provides the impetus to carry out the deed (sometimes founded on the duty to fulfill a religious commandment). This impulse is especially strong because of the particular role of religion in the lives of believers, since for many, religion comprises an essential part of their identity.⁷ It is therefore easier, appropriate, and even imperative to discriminate among people, to limit freedoms, to impair rights, and even to kill when the permission – or more severely the commandment – to do so draws its validity from what is viewed as uncontested religious authority. It is easier to oppose the sale or rental of land to a non-Jew when such acts are deemed transgressions of Divine law – a transcendental authority that metes out consequences and punishments based on obedience and disobedience.

The Jewish attribute is not a religious one: It is important to clarify that because of the absolute validity of religious commandments, including those commandments that are ultranationalist, and for other reasons to be detailed below, it is inconceivable that the Jewish attribute in the definition of the State of Israel refers to the establishment of a religious state. In addition to the danger that a religious state poses to human rights, it is clear that the intent of the state's founders was not to create such a state. David Ben-Gurion, for example, established that the State of Israel is a "state of law and not a state of *Halakhah*."⁸

The integration of Israel into the western world and the critical support Israel receives from it depend on Israel's being a democracy dedicated to complete equal

rights for all of its citizens. Its economic prosperity is also contingent on this. Therefore, the democratic system is beneficial both for the State of Israel and for its citizenry, religious and secular alike. Furthermore, the passage of laws that impair human rights would likely garner a negative attitude toward Judaism and Jews throughout the world.

II. The General Attitude of Judaism toward Democracy, the Rule of Law, and Human Rights

It is not difficult to find support in Jewish sources for democracy, the rule of law, and human rights. As early as the fifteenth century, we find the following statement by Rabbi Yitzhak Abarbanel:

Look and see the lands that are ruled by kings and you will see their idols and their abominations, each doing as they see fit in their eyes and the land filled with violence before them. [...] And even today the kingdoms of Venice, [...] Florence, [...] and other kingdoms do not have a king, but a government of leaders who are chosen for a specific period of time – and they are the upright kingdoms that have no corruption or crookedness.⁹

Furthermore, Jewish governance in later periods, within the context of Jewish communal organization in the Diaspora, was characterized by clearly democratic administration. Israeli Supreme Court Justice Menachem Elon distinguished these characteristics, which included adoption of the principle of majority rule while concomitantly placing strict limitations on this principle in order to prevent injury to the minority by the power of the majority.¹⁰

Moreover, there are grounds to say that today's democratic rule is not only tolerated in Judaism, but that it is the most appropriate and desired form of government, and perhaps even the only valid form of government in the Land of Israel. According to Rabbi Yoel Bin-Nun, democracy is the most appropriate form of government given that the people of Israel cannot accept a dictatorial government in the Land of Israel, even by popular consent, because of the principle that the Children of Israel must be free people in their inherited land.¹¹

The story of King Yanai recounted in the Talmud tells that the king, who was ordered to give testimony at the trial of his servant who had been charged with committing murder, made his appearance before the tribunal conditional on having all of the members of the

Sanhedrin request that he stand up and testify. At the king's request, the members of the Sanhedrin instead turned their eyes toward the ground. The members of the Sanhedrin were subsequently punished for having surrendered the law in the face of power, government, and kingship, teaching us that the king is subordinate to the rule of law.

Beyond these democratic-structural perspectives, neither are humanistic and liberal foundations foreign to Jewish thought. In the teachings of Rabbi Kook, we find that: "Common courtesy precedes Torah, a temporal compelling precedent for generations. Ethics in its nature, in all the depth of its glory and its firm strength, must be established in the soul and be a platform for the great influences that come from the power of Torah. [...] Natural ethics is the root that precedes fear (of God) and all of its branches."¹² This simple natural ethic – the foundation of Jewish ethics – is, after all, the liberal-democratic ethic: respect for man by virtue of the fact that he is a human being, equality among men, and recognition of the freedom of the individual. Similarly, the basic Jewish idea, "Do not do unto your friend what is hateful to you," is in fact identical with the categorical imperative of Kant. Nevertheless, we cannot disregard what did not develop, or could not develop sufficiently in Jewish culture: a critical and circumspect attitude toward Jewish self-government, and fear of arbitrary behavior by such a government and of its unjustified or disproportionate infringement upon human rights.

III. Specific Human Rights in Judaism

Human dignity

If there is an obvious juncture between the legacy of commitment to human rights and Judaism, it is the principle of human dignity: "The concept of human dignity is derived from the Jewish perception of the creation of man in the image of God (Genesis 1:24). This motif placed human dignity at the center of Jewish ethics."¹³ Rabbi Avraham Gisser demonstrates that respect for the individual in Judaism is almost as important as respect for God, for the soul of man is a divine spark that is deposited in man's hands:

There is a short chapter in Psalms, Chapter 8, that deals with human dignity, at the center of which are the verses: "What is man, that Thou art mindful of him? and the son of man, that Thou think of him? Yet Thou hast made him but little lower than the angels, and hast crowned him with glory and honor." The poet expresses the full force of his awe at the

virtue of "human dignity" which merited the crown of stature of having been made "but little lower than the angels." This is the loftiest expression with which to define the depositing of the living soul, "a Divine element from above," in each and every human being.¹⁴

Equality

Equality derives from the principle of human dignity, and it is based on the recognition of the unique value of every man or woman by virtue of his or her being a human being. Its intent is to the equal rights and responsibilities that are placed on individuals in society, and genuine equality in the opportunity to benefit from those rights (with the indication of their fulfillment consequential).

Finding the juncture between the modern legacy of human rights and Judaism in the matter of equality is not simple. Indeed, one can find in Judaism a striving for equality, but this is not equality in the modern sense. Therefore, reliance on the striving for equality in Judaism in order to justify the modern approach to equality requires a large degree of selectivity, and perhaps even a distortion of the general picture. The starting point must be the assumption that man – every man and woman – was created in the image of God. One can derive the basic equality of all human beings from this foundation. The basic principle must be adopted and broadened that "no pedigree or degree of righteousness can justify discrimination between one person and another. It cannot be claimed that one person's life is more or less valuable than that of another. In the eyes of their creator, it is known to all who were created in his image that that essence and the sanctity of life do not distinguish between one man and another."¹⁵ It must be emphasized that Judaism gives no significance to gender, origin, or status. In principle, the Torah does not find a fundamental difference between one person and another. There is nothing that distinguishes between the value of one person and another other than actions and conduct: "Your actions will draw you near, and your actions will distance you" (Mishnah, Eduyot 5:7). "God returned to appease Moses. He said to him: 'Does anyone find favoritism before me?' Whether a non-Jew or a Jew, a man or a woman, a slave or maidservant – one who performs a precept, receives a reward" (Eliyahu Rabbah 13:14, p. 65).¹⁶

On this issue, it is important to note Judaism's equal treatment of transgressors and of those suspected of transgression. There is no distinction between the poor

and indigent and the rich and influential with regard to incarceration before conviction, to the conduct of the trial, or to punishment after conviction. The value of equality, which stems from the equality implied in human respect, must apply – unconditionally – to women and members of minority groups. From these standpoints, Orthodox Judaism is in need of significant development and progress. In the area of women's equality, a variety of steps have been taken, but many challenges still remain for Orthodox Judaism.

The relationship of the state to non-Jews living within its borders is another highly charged issue. Within Jewish tradition certain problematic attitudes regarding non-Jews do exist, which developed against the background of the Jewish people as a persecuted and maltreated minority that wished to preserve its separate existence and unique culture. These attitudes must be vigorously overturned.

The State of Israel is committed to the equality of non-Jews – “[The State of Israel] will uphold the full social and political equality of all its citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions; and will dedicate itself to the principles of the Charter of the United Nations.”¹⁷ This commitment does not derive solely from the assurance stated in the Declaration of Independence; it stems from the force of our history as a persecuted minority, discriminated against, and practically destroyed – the obligation not to do unto others what is hateful to us. Another Jewish religious source for equality is to be found in the Passover *Haggadah*: “In every generation, a person must see himself as if he went out of Egypt.” The Jewish people are enjoined to remember the suffering they experienced because they were a minority in a land not their own, and to refrain from inflicting such suffering when the tables have turned and the minority has become the majority. With regard to the Arab minority, we must be cognizant of the fact that at issue is a native population that was severely hurt by the Zionist movement, the establishment of the State of Israel, and its identification as a Jewish state (mainly the blow to their ability to achieve “self definition,” to purchase and control land, and the damage that resulted from ongoing military rule during the first eighteen years of statehood). As a result of the opposition of its leaders and part of the Arab population itself to the establishment of the State of Israel, they experienced suffering and injustice. We are therefore particularly obligated to treat this minority with equality, justice, decency, and compassion. It is

clear that calls not to sell or rent apartments to Arabs, not to do business with them, and to refrain from every contact with them stand in sharp contradiction to this special obligation.

Freedom

Freedom is a central, and even fundamental, Jewish value. Rabbi Hayim Sabato¹⁸ stated: “It is not coincidental that the liberation from slavery was the birth of the nation. It is clear that the Torah wants us to remember and remind the subsequent generations of the experience of freedom, and to emphasize it strongly.”¹⁹ From this standpoint, Jews cannot desire to rule over the fate of other people, nor can they be indifferent to the Palestinians who live in Judea and Samaria, who find themselves under the control of the Israeli army and lacking basic freedoms.

Individual freedom includes freedom of expression. Freedom of expression has an honored place in Jewish thought. Jewish freedom of expression is broad-based and applies even to one who has abrogated fundamental religious beliefs because it serves the demand for seeking truth (it is worth noting that this is also one of the reasons for freedom of expression in the context of human rights in modern society). Rabbi Judah Loew ben Bezalel, known as the Maharal,²⁰ emphasized: “It is not appropriate to hate his words, but rather only to draw him near for the purpose of creating closeness. [...] Even if his words are against his faith and his religion, he should not say to him, ‘Be silent – don’t speak,’ for if so, there would be no clarification of the religion. On the contrary, in such a situation, he should say, ‘Speak to your heart’s content,’ and he should not say, ‘If I had the opportunity, I would say more,’ for one who does this in order to silence another demonstrates the weakness of his religion.”²¹

Professor Avi Ravitzky explains that even an expression that contradicts *Halakhah* is perceived as contributing to the advancement of Jewish discourse: “Even though the *Halakhah* is not in accordance with his opinion, his comments carry a treasured value and include within them one aspect of the overall truth. For truth is multi-faceted and pluralistic in nature.”²²

IV. Human Rights and Solidarity

The modern doctrine of rights developed simultaneously in the Anglo-American tradition and in the Continental tradition. The liberal Anglo-American tradition established a relatively narrow doctrine of rights, emphasizing the autonomy of the individual and ensuring protection from arbitrary governmental control. Therefore, the values that are protected in



הארגון הבינלאומי של עורכי־דין ומשפטים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

Holocaust Denial and Freedom of Speech in the Internet Era IAJLJ Berlin Conference November 15-19, 2011



Tuesday, November 15, 2011

Four-hour highlight tour of Berlin

Wednesday, November 16, 2011

Full day tour: Jewish and historic sites in Berlin

Opening Ceremony

18:00 -

Moderator: **Ambassador Dr. Meir Rosenne**, Executive Committee, IAJLJ

Opening Address: **Adv. Irit Kohn**, President, International Association of Jewish Lawyers and Jurists

Greetings: **Mr. Frank Spengler**, Deputy Head of the Department for European and International Cooperation of the Konrad Adenauer Stiftung

Prof. Dr. Bernd Heinrich, Dean, Faculty of Law, Humboldt University of Berlin

Ms. Irene Schmid, President, The Berlin Bar Association

Dr. Arnd Haller, Legal Director for Northern and Central Europe, Google Germany GmbH.

Keynote Speaker: **To be announced**

Thursday, November 17, 2011

Overview

Mr. Eli Hacohen, Journalist; Professional Director, Institute for Internet Studies, Tel Aviv University, Israel
Digital Hate: Anti-Semitism on the Internet 1995-2011

Dr. Nimrod Kozlovski, Adv., Faculty of Management, Tel Aviv University, Israel; Founder, InternetLaws.co.il
The Utilization of Hackers by the Proponents of anti-Semitism and Holocaust Denial

Practice in various States

Judge Marcos Arnoldo Grabivker, Federal Economic Crimes Court of Appeals, Argentina;
Adv. Rodrigo S. Luchinsky, AAJRA, Argentina
The Recent Google Case in Argentina

Adv. Marc Levy, France
Holocaust Denial: Is the French Experience a Relevant Model?

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Dr. Sergey Lagodinsky, Non-Resident Fellow, Global Public Policy Institute, Berlin
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Education

Mrs. Shulamit Imber, Pedagogical Director, International School for Holocaust Studies, Yad Vashem, Jerusalem
Education as a Guardian against Holocaust Denial, Trivialization and Distortion

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Prof. Dr. Tatjana Hörnle, Faculty of Law, Humboldt University of Berlin
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Mr. Heinz Fromm, President of the German Federal Office for the Protection of the Constitution
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The Honorable Justice Stephen Rothman, AM, Supreme Court of New South Wales, Australia
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General

Christopher Wolf, Co-Chair, Inter-Parliamentary Coalition Against anti-Semitism (ICCA) Task Force on Internet Hate
The Limits of the Law to Remedy Online Holocaust Denial

Dr. Juliane Wetzel, Senior Researcher, Center for Research on anti-Semitism, Technical University Berlin, Germany
"Soft-denial" and Trivialization of the Holocaust on the Web

Saturday, November 19, 2011

Walking tour

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this context are the various freedoms: freedom of expression, freedom of movement, freedom of religion and conscience, and freedom of vocation.

There is also a different, broader approach in the Continental tradition of human rights that developed in Europe in the nineteenth century:

In the nineteenth century, a new understanding of rights developed, based not on the autonomy of the individual, but of the community. It added to the values of freedom and equality the implication of fraternity. This understanding of the system of the rights of man fosters a broader outlook regarding the obligations of the society to the individual *vis-à-vis* the goals of the government – it not only mandates providing protection for life, liberty, and property, but also providing security for basic human needs – and if necessary, to provide these needs.²³

It seems that it was particularly the Continental approach that was adopted in the Universal Declaration of Human Rights. According to this perspective, society is an organization that, based on the principle of fraternity, has obligations toward the individuals that comprise it. Therefore, society must provide its individual members with the basic conditions needed for their existence. These include not only the conditions needed for physical sustenance (the right to life), but also the basic economic conditions that provide equal opportunity to develop their individuality. This implies that the state is obligated to maintain the economic rights of its citizens and to limit the economic gap between them. In addition, the government must provide a suitable education to all of its citizens, for the exposure to theoretical disciplines and a variety of worldviews enables the development of areas of interest and the formulation of positions. In this domain as well, it is incumbent on the state to invest in education in a differentiated manner so as to advance the weaker members of the society in an attempt to genuinely create equal opportunity and foster social justice. Similarly, the state is required to foster social solidarity. Another important layer of this broad approach to human rights is ensuring social conditions that provide a platform for the development of the individual. This entails the development of a variety of communal frameworks, and ensuring their communal rights as long as they do not conflict with individual rights. This layer is based on the understanding that the community to which an

individual belongs is the central forum that provides his or her basic human needs – identity, meaning, and familial relationships. This leads to a commitment to social rights, a dimension that was neglected in the Anglo-American tradition.

The principles of solidarity are anchored in the teachings of the prophets of Israel and are quite developed in Judaism. It is possible, based on this honored heritage, to adopt the Continental approach in the State of Israel and to create within it the character of a welfare state – a state in which social justice is an important value that leads to concrete action, and not just a principle that is utilized to create an artificial image.

A closing thought

Finally, it would be impossible to describe the contribution of Judaism to our approach to values without mentioning Judaism's relation to peace. It is not by chance that all of its blessings and prayers conclude with the Hebrew word for peace, Shalom: "The only vessel that God could find to contain the blessings of Israel was peace, as it is written: 'God will give strength to His people; God will bless His nation with peace (Psalms 29, 11)'" (Mishnah, Okzin 3, 12).

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Notes:

1. See HCJ 4112/99 Adalah Legal Center for Arab Minority Rights in Israel v Tel Aviv-Jaffa Municipality, PD 56(5) 393 (2002): "Indeed, the Declaration of the Establishment of the State of Israel (hereinafter: "Declaration of Independence") assures freedom of language, education, and culture to all citizens of the state, while it relates to the Hebrew language as an important national value of the Jewish people, with an emphasis on the historical connection of the Jewish people to its land and the recent return of its children to it, with the rebirth of the Hebrew language. By declaring the rebirth of the Hebrew language as one of the characteristics of the reestablishment of the Jewish people in its land on the one hand, and assuring freedom of language, education, and culture to all of its citizens on the other, the Declaration of Independence established the necessary principles for the balance between the status of the two languages – Hebrew and Arabic – demanded in the State of Israel. [...] These

principles, of the primacy of Hebrew and the status of Arabic as an official language, have been realized in practice in a long and consistent line of legislation. (Articles 4 and 5 of the ruling issued by Justice Dorner).

2. For criticism of the defense granted to Jews around the world by means of the punitive law of the State of Israel, see Yoram Shahar, *Ha-Ahrayut Shel 'Kan' Al 'Sham'* (The Responsibility of 'Here' for 'There'), 5 PELILIM 5-64 (1996). For an alternative viewpoint, see S. Z. Feller and Mordechai Kremnitzer, *Teguvah Le-Hibur 'Be-Genut Ha-Tehulah Ha-Natzionalit Shel Dinei Onshin' Mi-Pri Ito Shel Yoram Shahar* (Response to the article 'In Denigration of Taking Advantage of the National Force of Punitive Laws' by Yoram Shahar), *id.*, 65-99).

3. See Yosef Gorni, *Ha-Ahrayut Shel 'Kan' Al 'Sham'* (The Responsibility of 'Here' for 'There'), HAARETZ, 15 May 2002, where Gorni explains: "Among the political, social, and cultural considerations of the State of Israel, it must give weight as well to the question of how it will impact on the Jews in the Diaspora, [...] for the connection between the interests of the Jews in the Diaspora and in the State of Israel will not lessen in the coming years."

4. See also Haim Zadok, *Ha-Markivim Ha-Tzioni'im Be-Hitpathut Ha-Hukatiyut Shel Yisrael* (The Zionist Components in the Development of Israeli Jurisprudence) in LE-YAD ERES HA-MISHPAT: SEFER HAIM ZADOK (THE HAIM J. ZADOK) 326 (Ron Harris ed., 2002).

5. In this regard, I will mention the ruling of the European Court of Human Rights that allowed the nullification of the Turkish Muslim Party. In the ruling with regard to Muslim religious law it was declared that: "The Court considers that Sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it." (para. 72 of the European Court of Human Rights), (*Refah Partisi [The Welfare Party] and others v. Turkey* [Applications nos. 41340/98, 41342/98, [41343/98 and 41344/09]).

6. Or, more precisely, what is perceived as a normative religious system, for there is not a unilateral position regarding Jewish law.

7. These characteristics are not unique to religion in the traditional sense, but are common to any approach that establishes divine authority as a source for norms – whether the divine source is the flesh and blood fascist leader or a transcendental entity. While this is true, we should not ignore the fundamental difference between legislation in the name of a transcendental God – which

places the person in an inferior position *vis-à-vis* the source of the laws, and therefore is not open to change by any particular person – and the legislation of one who considers himself to be the embodiment of God.

8. Asher Maoz, *Erkei Yahadut Ve-Demokratiah* (Jewish and Democratic Values) in DEREKH ERETZ, DAT, U-MEDINAH (WORLDLINESS, RELIGION, AND STATE) 56 (Amihai Berholtz ed., 2001).

9. Commentary of Rabbi Yitzhak Abarbanel to 1 Samuel 8:6, "*Ha-Dibbur Ha-Rishon*." Cited by AVIEZER RAVITZKY, DAT U-MEDINAH BE-MAHSHEVET YISRAEL (RELIGION AND STATE IN JEWISH THOUGHT) 208-209 (Jerusalem: The Israel Democracy Institute, 1998) p. 73.

10. Menachem Alon, "The Rule of Community and Individual-Public Relations in Jewish Law" ("*Shilton Ha-Kehila Ve-Yachasei Yachid Ve-Tzibur Ba-Mishpat Ha-Ivri*"), *Shana BeSha'a* (1978) Part 3 (appears at www.daat.ac.il/daat/kitveyet/shana/elon-4.htm, last visited 6 August 2011).

11. Rabbi Yoel Bin-Nun, *Mishtar Demokrati Al Pi Ha-Torah* (Democratic Government according to the Torah), DEREKH ERETZ, DAT, U-MEDINAH, *supra* note 8, 314.

12. Rabbi A. Y. HaCohen Kook, *OROT HA-TORAH*, Ch. 12, § 2 (Jerusalem, Mossad Harav Kook 1940).

13. Maoz, *supra* note 8, 64. See also Rabbi Yitzhak Horowitz, *Ha-Demokratiah Ha-Yehudit: Ha-Halacha Ve-Ha-Demokratiah* (Jerusalem, Manof Merkaz LeMeida Yehudi, 2001), 91, who states: "The right of the individual to dignity is emphasized greatly in the Torah. Many precepts deal with preserving the dignity of human beings; and the community is even obligated to preserve the dignity of the individual. The *Halakhah* compares demeaning and embarrassing a person to murder. [...] The Sages said: 'Great is respect for all beings for it overrides negative commandments in the Torah.' [...] Many ordinances were decreed based on the consideration of respect for man, not to embarrass a person lacking means and not to embarrass one who has sinned. Even if a person sins, one should not embarrass him and should preserve his dignity."

14. Rabbi Avraham Gisser, *Nishmat Eloha Shokhenet Bo: Al Kavod Ha-Briyot* (The Soul of God Rests on Him: On Respect for Other Beings), DEREKH ERETZ, DAT, U-MEDINAH, *supra* note 8, 165.

15. Haim Cohn, *Ha-Adam Be-Halakhah Ube-Aggadah* (Man in Jewish Law and Lore), in HAIM COHN: MIVHAR MIKHTAVIM (HAIM COHN: SELECTED WRITINGS) 113.

16. Rabbi Yitzhak Horowitz, *Ha-Demokratiah Ha-Yehudit*, *supra* note 13, 92.

17. The Israeli Declaration of Independence, 14 May 1948.

See Israel as a Jewish state, page 34

Return to the State of Israel: Whose right is it?

United Nations resolutions, international law and recent precedent negate Palestinian arguments contending a right of return

Yaffa Zilbershats

Introduction: Return and Return - שיבה ושובות
In Hebrew there are two words describing 'return': שיבה and שבות.

Shvut is the term used when describing the right of Jews to immigrate to the State of Israel. This right, almost absolute according to Israeli law, was enshrined in the Law of Return enacted in 1950.¹ This law provides that "Every Jew has a right to immigrate to Israel." The term used in the Law of Return for "immigrate" is "לעלות" meaning to "climb," to "go up," the same term used when we go to Jerusalem from any part of Israel. You always "go up" to Jerusalem. You never just go. By analogy, Jews don't just come to Israel, they "go up," they "climb" here.

This right is very strong and even though it is not formally enshrined in a Basic Law, it is considered a constitutional right in Israeli law.

The principle of return שבות was expanded to include spouses, children and grandchildren of Jews even if not Jewish. This expansion is debatable but is beyond the scope of this article.

The other term of return, שיבה, is used when describing the alleged Palestinian right to come back to the State of Israel.

The 'right of return' claimed by the Palestinians is an outcome of the Palestinian refugee problem that arose following the War of Independence waged in Palestine from the end of 1947 to the beginning of 1949. On 29 November 1947, the UN General Assembly adopted Resolution 181 regarding the termination of the British Mandate and the partition of Mandatory Palestine into two states – Jewish and Arab – on the basis of the nationality of their populations. The Arab inhabitants of the land and the Arab states, apart from King Abdullah of Jordan, rejected the partition plan. As long as the British Mandate continued, their rejection of the plan was expressed by a violent struggle within

the area of western Palestine. Upon the termination of the Mandate, the leadership of the Jewish Yishuv (the Hebrew term describing the pre-state Jewish community) declared the establishment of the State of Israel, and the armies of the Arab states invaded. These events led to the departure of hundreds of thousands of Arabs from the territory of Mandatory Palestine occupied by the Jews. The UN Relief and Works Agency for Palestine Refugees in the Near East (hereinafter: "UNRWA") has estimated the number of people who left at about 750,000.² Other estimates range from 500,000 to 900,000.

The reasons for the departure of the Palestinian Arab inhabitants of Palestine as described by Benny Morris³ are commonly accepted today, to the effect that some of the refugees fled the area while others were deported, albeit these acts of deportation were not part of a preordained plan.

The Palestinian refugees are not protected by the UN General High Commissioner for Refugees but by UNRWA. UNRWA's role in establishing the Palestinian refugees' problem is immense. This is beyond the scope of this paper, but it should be noted that UNRWA's definition of refugee is far laxer than that of the UN High Commission for Refugees, which deals with all other refugees in the world.

As a result of its lax definition the number of Palestinian refugees registered today with UNRWA is almost 4.8 million.⁴ They all claim a right to return to the State of Israel. In addition, according to UNRWA's commissioner, "The population of four and a half million in UNRWA's records does not account for those refugees within the region but not registered with UNRWA or the estimated five million refugees who have made their homes elsewhere in the world."⁵ The commissioner uses the term refugees for Palestinians living in the world outside the reach of UNRWA and not registered by UNRWA. They might also claim the right to return to Israel.



In the rest of this paper I will explain why I believe Jews have a right to return to the State of Israel while Palestinian refugees do not.

Return - שבות

a) Justifications according to international law

The main argument against the Israeli Law of Return is that it is a discriminatory law. The law refers explicitly to immigration of Jews to Israel while it places many obstacles on the immigration of non-Jews.

We can cope with this allegation in different ways.

The Law of Return does not contradict international law. Current understanding of international law holds that states have a sovereign right to determine whom they will let immigrate. States control their borders; there is no inherent right of every person to enter a state. The various human rights conventions state the right of persons to enter a state of which they are nationals ("No one shall arbitrarily be deprived of the right to enter his own country."⁶). The *travaux préparatoires* of the conventions and the authoritative literature explain that the term "his own country" includes citizens and permanent residents. These are the only categories of people that a sovereign state is obliged to allow entry.⁷ A state also has the discretion to decide when to allow entry.

The Palestinian claim that the Palestinian refugees and their descendents have a right to return, based on this article, relies on two elements: (1) the territory of the State of Israel is "his own country" from the point of view of the refugee and therefore this article vests him with the right to enter it, at his will, creating the 'right' to return; (2) preventing the return of Palestinian refugees (and their descendents) to the State of Israel is an arbitrary deprivation of this right.

The arguments against the Palestinian interpretation of the article are: (1) neither of the statements applies to someone who left the territory of the State of Israel during the war and was not present at the time of the determinative census; (2) the article deals with the rights of individuals but is not intended to apply in cases of the mass displacement of people because of an ethnic conflict; (3) there is no ground for the argument that this article vests a right of return or entry to the descendents of those who left their homes. As we have shown above, most of the Palestinians who demand a return today are the descendents of those who left their homes in the areas within the boundaries of the State of Israel.

It should be noted that Article 1(3) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CAD")⁸

provides that "Nothing in the Convention may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship or naturalization provided that such provisions do not discriminate against any particular nationality." Questions of citizenship and nationality are the second phase of immigration. First, one immigrates to a state and then asks for citizenship. The Convention against Discrimination provides explicitly that the laws of states that prefer to grant citizenship to certain people or groups are not discriminatory. This means that laws granting the right to immigrate to a state to a certain group but not to others are also not discriminatory.

Article 1(3) of CAD contains one exception: "discrimination against a particular nationality." This being so, the Israeli amendment to the Law of Citizenship and Entry to Israel (Temporary Order) of 2003,⁹ which absolutely prohibited Palestinians from occupied territories, and later also those with citizenship of enemy countries, from entering Israel for family unification purposes was undergoing judicial review. The contention was that this law is unconstitutional since it was discriminatory. The Supreme Court rendered its decision on 14 May 2006, and five judges versus four decided not to invalidate the amendment.¹⁰ The principal argument validating this amendment was security considerations and the fear that the entering population might harm the Israeli population. The counter-argument, (today not prevailing) was that the prohibition should not be all-embracing, and that each case should be examined individually and a person barred entrance only if there were probable cause that he might be a danger to state security.

Noteworthy is that unrestricted family unification immigration might bring into Israel a volume of immigrants liable to hamper the state's Jewish majority. This is dangerous to the existence of Israel as a Jewish state and as a democratic state. This is Israel's national security in the broad sense.

b) Justifications according to theories of justice

Even if by framing such immigration policy Israel is acting according to international law, do the rules of international law reflect basic theories of justice? My answer is positive. I believe that the preference of Jewish immigration to Israel can be based on the principle of affirmative action. The Jews lived in the Diaspora for two thousand years; they were persecuted and could not live freely according to their religion, nationality and culture. The international community has an obligation towards the Jewish people to enable its attempt to restore its national and cultural life and

identity. This argument was proffered by Asa Kasher, who wrote that this is a temporary rationale, since after a certain period, the Jews will establish their national identity and culture, and then there will be no justification for affirmative action. In such a case, another justification for the preference of Jewish immigration to Israel is the inherent right of the Jewish people to national self-determination. This right, enshrined explicitly in Article 1(1) of both 1966 Human Rights Covenants,¹¹ encompasses the right of the Jewish people to strive for a majority within the borders of its state. The existence of a stable majority is the basis for the ability of the Jewish people to create and live by its culture, language, arts and symbols.

That being so, one can agree both with the ideas of the Jewish Return (שבות) and with the restriction of non-Jewish immigration into the state of Israel.

In recent years a major discussion on global vs. local justice has ensued. The argument is that in an open, globalized world we cannot look at justice only from a local perspective; we must examine it globally. This suggests that global justice considerations would impose upon states an obligation to unfetter their immigration policies, opening their borders to more people. Yet global justice considerations do not necessarily impose upon states duties to change their immigration policies.¹²

שיבה - Return

a) Legal arguments against the contended Palestinian “right”

The Palestinians’ contention that international law provides them particularly with a right to return to the State of Israel is based on Resolution 194(III) adopted by the General Assembly on 11 December 1948.¹³

This resolution was adopted following the submission of the Bernadotte Report, an element of the UN attempt to end the fighting between the parties and reach a political solution that would settle the conflict. The resolution deals with a proposal for mediation and conciliation between Jews and Arabs and mentions the issue of the refugees in Article 11. Article 11 is usually quoted alone and out of context. To understand this article it is essential to recall the context and look at the resolution as a whole.

In consequence of this resolution, efforts were indeed directed at mediation and conciliation, but important parts of the resolution were not implemented, such as the demilitarization of Jerusalem, guaranteeing free access to it, and imposition of an international regime there. Notably, Article 11, concerned with the refugee problem, was not implemented. Today, no one

would contemplate continuing the mediation efforts of the Conciliation Commission nor persist in treating Jerusalem as an international city without the consent of both sides. It would seem therefore that Article 11 too should be seen as a part of the resolution that was not implemented and is open for re-examination and not as a declaration that stands alone forever.

However, beyond this critical context, a perusal of Article 11 itself fails to support the argument that the article recognizes the right of the Palestinian refugees to return to their homes.

The first argument supporting the assertion that this resolution does not create a basis for the right to return stems from a scrutiny of the wording of Article 11, which provides that the UN General Assembly:

11. Resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations;

First, Article 11 states that refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so “at the earliest practicable date.” It is important to note that the provision does not use the language of rights, even though Bernadotte’s recommendations included a recommendation to recognize such a right. In other words, there was a clear appreciation of the distinction between the language used by the article and the determination that it was the right of the refugees to return to their homes.

Second, the UN resolution includes a condition whereby only refugees wishing to “live at peace with their neighbors” should be allowed to return to the State of Israel. The Palestinians denied the legitimacy

of Resolution 194(III) for many years because of this condition, on the ground that obligating them to live in peace with the Israelis would also indirectly compel them to recognize the existence of the State of Israel.¹⁴ Israel, for its part, interpreted this condition as releasing it from the duty to allow return of the Palestinian refugees to its territory. In Israel's view, so long as comprehensive peace has not been attained with all the Arab countries in the region, and so long as the return of the Palestinian refugees may endanger its security, the issue of return should not be discussed. The inclusion of this condition in the language of Article 11 greatly weakens the argument that it grants a legal right to return.

Third, the resolution refers to the return of the refugees to their homes. As the Palestinians argue that everyone who has been defined as a refugee by UNRWA is entitled to return, it follows that the majority of Palestinians defined today as "refugees" are not persons who fled from their homes but rather are the descendents of those people. Accordingly, the return of the majority of these refugees cannot meet the condition of "return to their homes" because the persons concerned are not the refugees themselves but their descendents.

Fourth, such an interpretation of Article 11 is consistent with the second part of the article, which deals with the Conciliation Commission's function not only of aiding the return of the refugees but also aiding their resettlement and their social and economic rehabilitation. The goal was to deal appropriately with the refugee problem that had arisen and certainly not to perpetuate the problem in such a way that not a single refugee would be allowed to be absorbed or resettled elsewhere.

The second argument against the assertion that Resolution 194(III) creates a basis for the right to return stems from the manner in which the resolution was perceived at the time it was adopted. We have seen that the Arab states and the Palestinians rejected the resolution because they saw it as a demand to recognize the State of Israel. At the time the resolution was adopted they still pursued the fundamental approach that led them to reject the Partition Plan and launch a war to prevent its implementation. It is not reasonable to isolate the provision in the resolution granting permission to the Palestinian refugees to return to their homes in order to reduce the violence and end the war through the creation of two states, and give that provision a construction that undermines the logic of two states. Similarly, the State of Israel took the view that the resolution was not binding on it when the

resolution was adopted by the General Assembly. It is illogical to argue years later that a resolution that was rejected by the Palestinians and the Israelis when it was adopted is the source of law binding these parties today.

Following the Six Day War, the Security Council took a completely different approach to the issue. Resolution 237 of 14 June 1967 sought to assist in the return of residents who had fled from the area after the outbreak of hostilities. The language of the resolution is therefore soft and refers only to refugees from the West Bank and the Gaza Strip who fled from the region as a result of the Six Day War. The resolution makes no mention of the refugees of 1948. Following Resolution 237, Security Council Resolution 242 was adopted on 22 November 1967. This resolution was again adopted following the Yom Kippur War in Security Council Resolution 338 of 22 October 1973. These resolutions call for the withdrawal of Israel from territories occupied in the conflict, the end of the state of belligerency, respect for the sovereignty of every state in the region (including Israel) and achieving a "just settlement" of the refugee problem. The phrase "just settlement" does not impose any obligation to arrive at a solution based on Resolution 194(III). Accordingly, the emphasis here is on the need to find a practical solution to the problem as part of a comprehensive political package that would ensure the existence of Israel, its recognition and defensible borders.

The issue of the Palestinian refugees arose in the discussions leading to the peace agreements signed by Israel with Egypt, Jordan and the Palestinians. These agreements create binding legal norms. Each contains an agreement regarding the right of the Palestinian refugees who had fled from the West Bank or from the Gaza Strip to return to those areas. There is no agreement in them regarding the return of the refugees of 1948 or 1967 to the territory of the State of Israel.

In the Oslo Accords signed in 1993, the PLO, which was recognized as the representative of the Palestinian people, undertook to adopt Security Council resolutions 242 and 338 and repeal the sections in the Palestinian Charter calling for the destruction of the State of Israel. Resolutions 242 and 338 which, as noted, determine the need for a "just settlement" of the refugee problem but do not mention the right of return of the Palestinian refugees, are the only UN resolutions referred to in the Oslo Accords. Accordingly, only these resolutions, and not Resolution 194(III), create binding legal arrangements between Israel and the Palestinians regarding the refugees.

b) Political precedents regarding return of refugees

Examining some precedents with regard to

resolutions of political and ethnic conflicts in mixed societies will also support our contention that Palestinians bear no right to return to the State of Israel.

When the Palestinian problem arose in 1948, the forcible transfer of populations following political upheavals and agreements between states was not considered illegal under international law. On the contrary, until the end of the Cold War, the solution to ethnic conflicts through the exchange or transfer of populations was regarded as legitimate, just and even preferred. Exchanges of populations that were intended to achieve ethnic homogeneity, by means of agreements following war, were accepted as a means of preventing the renewed eruption of hostilities.

Thus, for example, in the peace agreement signed between Greece and Bulgaria in 1919, it was agreed that there would be an exchange of populations. Some 46,000 Greek citizens of Bulgaria were forced to move to Greece, whereas some 96,000 Bulgarian citizens of Greece were transferred to Bulgaria.¹⁵

The Potsdam Declaration adopted by the Allies in 1945 at the end of the World War II¹⁶ included an agreement to uproot millions of Germans living in Poland, Czechoslovakia and Hungary and transfer them to Germany.

Population exchanges also took place in India. In 1947, India was divided into two states: India and Pakistan. The division was intended to separate Hindus from Muslims so as to prevent violent conflicts between the two groups. This division led to a vast exchange of populations; estimates put the figures at between 12-30 million people.¹⁷

Today, however, the exchange of populations and compulsory transfer, once regarded as desirable and legitimate, is now regarded as 'ethnic cleansing' and is prohibited by international law. However, it should be recalled that in 1948, when the Palestinian refugee problem was created, the exchange of populations was generally regarded as an appropriate solution to ethnic conflicts, and especially so after war. This solution was even more legitimate with respect to the Palestinian refugees. It should be recalled that the Palestinian refugee problem was caused by their flight to nearby Arab countries, primarily Jordan, Syria, Lebanon and the Gaza Strip, because of the war that they and the Arab states had launched to thwart the establishment of the Jewish state. At the same time, masses of Jewish refugees came to Israel from Arab states in numbers similar to those of the Palestinian refugees who left Mandatory Palestine. In retrospect, what took place can be interpreted as an exchange of populations. It might have been expected that this exchange of populations

would help create an appropriate solution to the ethnic conflict in the region. This did not occur because of the asymmetry between the conduct of Israel and that of its neighbors. Israel made enormous efforts to resettle Jewish refugees, whereas the Arab states to which the Palestinian refugees fled generally chose not to follow that course. As noted, their goal was to create pressure on Israel and on the international community in the hope of forcing the return of the refugees and thereby undermining the stability and existence of the Jewish state.

In addition to that solution, after World War II, the Refugees Convention provided for the settling of refugees in the countries they reached as havens. The refugees did not wish at all to return to their former abodes. The Refugees Convention of 1951 does not mention return as a possible solution to the refugee problem.

In the 1990s the dismantling of the Soviet bloc and Yugoslavia caused large streams of refugees to flow from Eastern Europe to the more developed countries of Central and Western Europe. The developed states of Europe were neither prepared nor interested – economically or culturally – in absorbing large numbers of refugees in their territory. The developed and developing states to which the refugees arrived suffered from a severe economic situation which was reflected, *inter alia*, by high levels of unemployment. The refugees were a heavy burden on their economies and therefore they refused to absorb them. Thus, at the beginning of the 1990s a policy favoring the return of refugees to their countries of origin has developed, usually accompanied by a declaration that this is the preferred solution. The right of return of individuals is in fact an insistence on the "duty to return" of the refugees as well to their country of origin.

When the conflict is temporary and superficial, and it is possible to settle it in such a way as to guarantee stability and public order in the country of origin, it is reasonable to assume that people would prefer to return to their homes and culture and not become refugees. However, in regions where there are active ethnic conflicts the desire of the absorbing states to repatriate the refugees is not sufficient. Additional measures are required to stabilize the situation and rehabilitate the refugees.

The case of Bosnia and Herzegovina illustrates how return as a solution to a refugee problem ensuing from ethnic conflict cannot in fact be implemented even though it was agreed to in the Dayton Agreement. The returning refugees suffer from discrimination, their homes have been seized, they cannot find work and

they suffer from numerous acts of reprisal.¹⁸

Another important precedent is Cyprus: A refugee problem was created in Cyprus due to the prolonged conflict between the Muslim Turkish-Cypriots and the Christian Greek-Cypriots that began in 1965. In 1974, Turkey invaded Cyprus and occupied a region in the north of the island. This action led to 200,000 Greek Cypriots living in the north of the island to flee to the southern half in which the Greek majority lived, whereas about 65,000 Turkish-Cypriots who lived in the south left for the north and took over the vacated homes of the Greek-Cypriots. Over three years most of the Greek refugees were rehabilitated, integrated and beginning to contribute to the economic and social life of Greek Cyprus, even though they did not stop regarding themselves as refugees or as entitled to compensation.

On 1 April 2003, Kofi Annan, Secretary General of the UN, published a report regarding his mission to Cyprus.¹⁹ In this report Annan referred to the difference between the refugee issue in Bosnia and Herzegovina and that in Cyprus and explained why repatriation and the restitution of property, which had been suggested as a suitable solution in Bosnia and Herzegovina, were not suitable to resolve the refugee problem in Cyprus.

Annan noted in his report that a distinction had to be drawn between the problem of the refugees in Cyprus and the problem in Bosnia and Herzegovina, stating that it would be inappropriate to apply the solution of sweeping repatriation, adopted in the Dayton Agreement, to Cyprus. Annan explained the difference in identifying the appropriate solution by emphasizing the lapse of time, i.e., the events in Cyprus had taken place 30-40 years previously and that during the interim the displaced persons had rebuilt their homes and become integrated into society and the economy. Accordingly, he asserted, it was impossible to restore the previous situation. Repatriation was only possible where it was proposed in response to a recently generated refugee problem. Annan also called for the creation of two political entities where the governing ethnic groups of each entity would preserve its majority.

It is important to note that the European Court of Human Rights, in a decision adopted 5 March 2010, accepted Annan's approach and rejected the claim of the Greek Cypriots to return to their homes in northern Cyprus.²⁰

Summary

The unequivocal position that Palestinians do not possess a right to return to the State of Israel is based on

three principal grounds. First, the legal analysis we offer proves definitively that international law does not grant the Palestinian refugees a right to compel Israel to allow them to settle in its territory. Second, the experience of other ethnic conflicts, past or present, shows that return to a place where conflicts existed and are not completely resolved is not possible. The Cyprus case is a very strong precedent that explicitly goes against the solution of return when decades have passed since the people who ask for it fled their homes. Third, if we look at the case of the Palestinian refugees, where the entry into Israel of Palestinian refugees and their descendents in large numbers will hamper the continuing existence of a Jewish majority in the state and would be contrary to the right of Jews to self-determination. Nor would the return to the State of Israel be in the best interest of the refugees themselves, since they possess personal and group characteristics that differ significantly from those of the majority population. A political solution of two states for two peoples is needed to enable both the Jewish people and the Palestinians to pursue their right to self-determination. Jews have a right to return to the state of Israel, while Palestinians do not. They will have a right to return to their own state on its establishment.

Yaffa Zilbershats, a professor of international, constitutional and human rights law, is Deputy President of Bar-Ilan University and Vice President of the International Association of Jewish Lawyers and Jurists. This article is based on a presentation made at the IAJLJ Congress, Dead Sea, 2011. This subject is expanded upon in the position paper of the Metzilah Center: The Return of Palestinian Refugees to the State of Israel, available at www.metzilah.org.il.

Notes:

1. Law of Return, 5710-1950, Sefer Hahukim (Statutes of the State of Israel. Hereinafter: "S.H.") (No. 51) 159.
2. See www.unrwa.org/etemplate.php?id=86 (last visited 10 August 2011).
3. BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM 1947-1949 (1991).
4. See www.un.org/unrwa/hebrew/in_numbers/june09.pdf (last visited 10 August 2011).
5. Karen Abu Zayd, PALESTINE REFUGEES: EXILE, ISOLATION AND PROSPECTS, Annual Edward Said Lecture presented at Princeton University (6.5.2008), <http://unispal.un.org/UNISPAL.NSF/0/F854EDE26D1A7CFD8525744F004BA100> (last visited 10 August 2011).
6. Article 12(4) of the International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171.
7. Paul Sieghart, THE LAWFUL RIGHTS OF MANKIND 115 (1985); Jose Ingles, SPECIAL RAPORTEUR: STUDY OF DISCRIMINATION IN RESPECT TO THE RIGHT OF EVERYONE

TO LEAVE ANY COUNTRY, Including His Own and to Return to His Country, UN Pub. Sale no. 64 XIV 2. (first issued as UN Doc. E/CN/4 Sub.2/220/Rev.I)(1963); Manfred Nowak, UN CONVENTION ON CIVIL AND POLITICAL RIGHTS (CCPR), Commentary 219-220 (1993); UN Doc. CCPR/C/21/Rev.1/Add 9, 2.11.1999, at 5-6.

8. 660 U.N.T.S. 195.

9. The Citizenship and Entry into Israel Law (Temporary Provision) 5763-2003, S.H. (1901) 544.

10. High Court of Justice (HCJ) 7052/03 Adala v. Minister of Interior (as yet unpublished, 2006).

11. International Covenant on Civil and Political Rights, *supra* note 6 and International Covenant on Social, Economic and Cultural Rights, 1966, 993 U.N.T.S. 3.

12. Yaffa Zilbershats, *Sovereign States Control of Immigration: A Global Justice Perspective*, 43 Isr. L. Rev. 126 (2010).

13. G.A.Res 194(III), 11 Dec. 1948, un.org/documents/ga/res/3/ares3.htm (last visited 10 August 2011).

14. Yoav Gelber, INDEPENDENCE VERSUS NAKBAH: ISRAEL, THE PALESTINIANS AND THE ARAB

STATES 1948 73 (2004).

15. Treaty of Neuilly, 27.11.1919, www.wi.lib.byu.edu/index.php/Treaty_of_Neuilly (last visited 10 August 2011).

16. See www.avalon.law.yale.edu/20th_century/decade17.asp.

17. Jeffrey Weiss, *India and Pakistan: A Cautionary Tale for Israel and Palestine*, 18 Conn. J. Int'l L. 455, 459-460 (2003).

18. See UNHCR report of 2009 at www.unhcr.org/publ/PUBL/4922d4300.pdf (last visited 10 August 2011).

19. UNSC, S/2003/398, Report of the Secretary General on his mission of good office in Cyprus, at www.un.org/en/peacekeeping/missions/unficyp/rep_mgo.shtml (last visited 10 August 2011).

20. See the judgment at the website of the European Court of Human Rights: <http://cmiskp.echr.coe.int/tkp197.view.asp?action=html&documentId=864000&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 10 August 2011).

Against all odds: the story of Israeli democracy, from page 15

never be taken for granted. To some extent they are always in danger – liable to be infringed even when democracy is in no danger at all. The 60s in America saw, overall, a great improvement in civil rights; democracy was never in danger. This does not mean that democratic norms were never violated. Certainly, there are illiberal and undemocratic phenomena and forces in Israel; lately, it seems that in Europe, too, the sky is not entirely cloudless in this respect. Such forces and tendencies need to be vigorously confronted. In

the meantime, it is also worth pointing out, from time to time, especially since the very opposite is so often and so loudly maintained, that the story of Israeli democracy has to date been a tremendous achievement.

Alexander Yakobson is a senior lecturer at the Department of History at the Hebrew University of Jerusalem. Together with law professor Amnon Rubinstein, he authored Israel and the Family of Nations: The Jewish Nation-State and Human Rights, published in July 2008 by Routledge. This article is based on a presentation made at the IAJLJ Congress, Dead Sea, 2011.

Israel as a Jewish state, from page 27

18. Rabbi Hayim Sabato, born in 1952 in Cairo, is an orthodox Rabbi, the founder of a yeshiva and a prize-winning Hebrew novelist.

19. Rabbi Hayim Sabato, *Ha-Herut Ve-Ol Ha-Mitzvot: Iyun Be-Mekorot (Freedom and the Yoke of the Commandments: A Study of the Sources)*, DEREKH ERETZ, DAT, U-MEDINAH, *supra* note 8, 233.

20. The “Maharal of Prague” was a Talmudic scholar, Jewish mystic and philosopher who served as a leading rabbi in Prague in the second half of the sixteenth century.

21. Rabbi Judah Loew ben Bezalel (Maharal), *Sefer Beer Ha-Golah*, § 7, 152; cited by Horowitz, *supra* note 13, 104.

22. AVIEZER RAVITZKY, DAT U-MEDINAH BE-MAHSHEVET YISRAEL (RELIGION AND STATE IN JEWISH THOUGHT) 208-209 (Jerusalem: The Israel Democracy Institute, 1998).

23. LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHTER AND DAVID W. LEEBORN, HUMAN RIGHTS 280 (New York, Foundation Press, 1999).

Jonathan Pollard

At its Dead Sea congress, IAJLJ resolved to call upon United States President Barack Obama to release Jonathan Pollard. The resolution was drafted by IAJLJ Fellow and Member of Parliament of Canada Irwin Cotler and sent to the White House

Resolution Concerning Jonathan Pollard

WHEREAS, Jonathan Pollard unlawfully disclosed classified information of the United States to its principal ally in the Middle East, Israel, for which offense he was sentenced to life in prison in breach of a plea bargain; and

WHEREAS, Mr. Pollard expressed remorse for his actions and cooperated with the United States government, as did the government of Israel; and

WHEREAS, he has been incarcerated in federal penitentiaries since 1985; and

WHEREAS, he has now served longer than any other person ever convicted of an espionage offense (which Mr. Pollard was not convicted of), against the United States and 6 to 12 times the median sentence for this offense (2-4 years); and

WHEREAS, this constitutes a denial of equal protection of the laws and fundamental due process,

WHEREAS, the disproportionate sentence received by Jonathan Pollard has been noted in many requests for clemency – most recently by various current

See Jonathan Pollard, page 46



הארגון הבינלאומי של עורכי־דין ומשפטים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

Mr. Barack Obama
President of the United States of America
The White House
Washington, D.C.
U.S.A.

March 17, 2011

By the the U.S. Embassy, Israel

Dear President Obama:

We respectfully request your consideration of a resolution that was adopted at the 14th Congress of The International Association of Jewish Lawyers and Jurists (IAJLJ), concerning Mr. Jonathan Pollard.

Respectfully submitted,

Adv. Irit Kohn
President

רחוב דניאל פריש 10, תל-אביב 64731, Tel Aviv 64731 Frisch Street, 10
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Goldstone revisited

*IAJLJ facilitates a video conference between Sderot victims
and the UN Committee of Independent Experts*

Calev Myers

The frequent investigations faced by Israel by so-called international human rights bodies constitute a new form of sophisticated anti-Semitic propaganda that must be taken seriously. Although Israel is the only viable democracy in the Middle East, well over forty percent of all resolutions of the UN Human Rights Council (hereinafter: “UNHRC”) have been made against Israel, which clearly reveals its flagrant political character.

One of the major problems with investigations carried out by such bodies is that Israel itself does not have a fair chance to participate or present the objective facts on the ground. Consequently, accurate information never reaches the eyes and ears of decision makers, leaving a void inevitably filled with inaccurate anti-Israeli rhetoric. As in the case of the Goldstone Report, the result can be devastating. In the words of Edmund Burke, “All that is necessary for the triumph of evil is for good men to do nothing,” or in this case, to say nothing.

Therefore, the important role that the International Association of Jewish Lawyers and Jurists and other similar NGOs play in the international human rights community cannot be overstated. Several weeks prior to Judge Richard Goldstone’s retraction of key findings in his infamous report, I was asked by my dear friend and IAJLJ President, Irit Kohn, to moderate a video conference between the UN Committee of Independent Experts (hereinafter: “UNCIE”) and Israeli victims of Hamas rocket attacks during the Gaza conflict. UNCIE, chaired by Judge Mary McGowan Davis, and otherwise known as the Davis Committee, was appointed by the UNHRC to monitor and assess all proceedings undertaken by Israel and the Palestinian Authority regarding alleged war crimes and violations of international law during the Gaza conflict pursuant to the original Goldstone Report.

After several appeals to UNCIE to investigate the rocket attacks on Israeli civilians and to assess proceedings undertaken by Hamas and the Palestinian Authority, IAJLJ succeeded in facilitating a video

conference that enabled Israeli victims to testify before the Davis Committee. Israeli victims of rocket attacks were thus given the opportunity to present evidence of terrorism and war crimes committed by Hamas against

Israel that had been largely disregarded by the UNHRC and the international community. I was honored to have been asked by IAJLJ to represent the Israeli victims and supervise the dialogue between the victims and the Davis Committee. The video conference took place on 9 March 2011 in the office of David Buskila, mayor of Sderot, who was also one of the victims interviewed by UNCIE.

In our opening statements before the Davis Committee, we spoke on behalf of kidnapped Israeli soldier Gilad Shalit, emphasizing that Shalit has been held in illegal captivity and isolation for over 1,718 days (at that time) while being denied access to family members, government representatives and even the Red Cross.

Several of the victims, as well as Israeli journalists present at the video conference, expressed scepticism regarding the likely effectiveness and outcome of the initiative. I explained that we can only hope that the voice of the victims will be heard; our efforts are to simply make that a possibility.

The UNCIE findings were published and submitted to the UNHRC in a final report on 18 March 2011. Contrary to the original Goldstone Report, which unequivocally accused Israel of war crimes and included little reference to Hamas’ human rights violations, the UNCIE findings contained unprecedented statements concerning these violations: “... The Committee remains concerned that no investigations have been carried out into the launching of rocket attacks against Israel. It considers that the de facto authorities [Hamas] should make genuine efforts to conduct criminal inquiries and to hold accountable those who have allegedly engaged in serious violations of international humanitarian law by firing those rockets...” (article 63).

References were also made regarding the prolonged captivity of Gilad Shalit and the recent offenses against Israeli civilians, including the latest barrage of rocket fire into southern Israel and the brutal murder of the



Fogel family in the West Bank. Moreover, the findings included direct testimonies from Israeli victims of Hamas rocket attacks submitted during the UNCIE video conference: "... One Israeli victim of rocket attacks expressed her frustration at the lack of justice and said, 'I have no court, no one to represent me, no one to sue. Is that real justice?' She also articulated her disappointment with the international community: 'I was disappointed [by the Fact Finding Mission] and found myself feeling more humiliated than ever before in my life because it seemed to me there was no mention of Israeli victims who, like me, have suffered for more than eight years from rockets and mortars. It seemed to me that no one wanted to issue a strong condemnation of terror coming from Gaza. Since that time I have lost faith in the international committees, especially the UN, as it seems no one is asking if I have the right to life'..." (article 72).

Several weeks following the UNCIE report's publication, Judge Goldstone expressed regret over his original conclusions and made references to UNCIE's latest findings in a column published in the Washington Post on April 1 entitled, "Reconsidering the Goldstone Report on Israel and War Crimes." He wrote, "If I had known then what I know now, the Goldstone Report would have been a different document."

Furthermore, Judge Goldstone called upon the UNHRC to condemn the continuous terrorist attacks against Israel. "Hundreds more rockets and mortar rounds have been directed at civilian targets in southern Israel," Goldstone wrote. "That comparatively few Israelis have been killed by the unlawful rocket and mortar attacks from Gaza in no way minimizes the criminality. The UN Human Rights Council should condemn these heinous acts in the strongest terms... So, too, the Human Rights Council should condemn the inexcusable and cold-blooded recent slaughter of a young Israeli couple and three of their small children in their beds."

Although many have concluded that Judge Goldstone's regret over his post-Gaza war findings was "too little, too late," I believe that it did have value. I also believe that we can attribute his retraction, at least in part, to the video conference held between UNCIE and Israeli victims of Hamas rocket attacks. As Israel continues to fight a battle of isolation and censure from the international human rights community, IAJLJ's commitment to advocating on behalf of her legitimate existence is more critical than ever. IAJLJ's Davis Committee initiative proves that with a little creativity and persistence, we really can make a difference.

Calev Myers is a partner at Jerusalem law firm Yehuda Raveh & Co.

Democratic first, Jewish second: a rationale, from page 19

law, all these can only represent certain forms of the good life – perhaps good and respectable forms, but still particular forms – which ought to compete freely with other faiths, symbols, and legal cultures under the neutral guidance of democracy. Any prior claim to superiority would be plainly un-democratic.

It is in such a state, and I think we are nearing such a phase, that 'democratic' must trump 'Jewish:' that is, if 'Jewish' is more than a national appellation for the State of Israel, if it makes religious or legal or cultural claims, then these claims must be subjected to the democratic process, in the full meaning of democracy, and fairly compete with other claims. They must also pass the test of non-interference with everyone's civil and human rights.

The only viable way to keep both 'Jewish' and 'democratic' on par, to keep the 'Jewish and democratic' formula in working order, is therefore to fatten one cow and slim down the other. Israelis must look far deeper into the concept of democracy, recalling its essential component and understanding its implications for the procedural, majoritarian component. And 'Jewish

State' ought to mean, in the political field, mainly what it meant for Herzl and Ben-Gurion, the state of the Jewish people, based on a national concept of Jewish. All other meanings might be valuable and interesting, but they should be played out in the public, intellectual and cultural arenas, where they belong, and not in the constitutional centerfield.

Israeli democracy is frail and flawed, but it is still a democracy. Its best chance to survive and thrive is for Israelis to understand it far better. As to Israel's Jewish character, it will not be impoverished by deflating the constitutional nature of the Jewish state to its basic national meaning. Beyond that, in the thriving arena of public debate, let a thousand cows bloom.

Fania Oz-Salzberger is Professor and Leon Liberman Chair of Modern Israel Studies at Monash University, Melbourne, and Associate Professor of History at the University of Haifa, where she is the Founding Director of the Posen Research Forum for Jewish European and Israeli Political Thought at the Faculty of Law. This article is based on a presentation made at the IAJLJ Congress, Dead Sea, 2011.

Israel's refugee policy: morality, compassion and law

A panel of distinguished guests discussed Israel's refugee policy at a gathering convened on 13 June 2011 by IAJLJ at the American Jewish Committee offices in Jerusalem. The panel was moderated by Israeli journalist Boaz Bismuth, international news editor at Israel Hayom newspaper. Greetings were proffered by Dr. Edward Rettig, director of the Israel/Middle East Office of the American Jewish Committee.

Historian and Israel Prize laureate Yehuda Bauer, a professor of Holocaust Studies at the Avraham Harman Institute of Contemporary Jewry at the Hebrew University of Jerusalem, distinguished between economic migrants and refugees escaping persecution. He noted that economic migration was an ancient phenomenon, while the latter arose only in the 19th century. Bauer said that the 30,000-35,000 refugees in Israel, who are mainly from Eritrea and Sudan, are about the maximum that Israel can permit itself to absorb.

William Tall, the UN High Commissioner for Refugees representative to Israel, commended Israel for recently undertaking the task of determining who is a refugee according to the United Nations' 1951 Convention Relating to the Status of Refugees, and for building quarters for them in the Negev. Further, he said, although the refugees are granted only temporary stays in Israel, the steps taken thus far are correct.

Daniel Solomon, legal adviser to Israel's Population,

Immigration and Border Administration Authority, and Deputy Attorney General Malkiel Balas explained the legal difficulties in dealing with these refugees. Israel, a haven for illegal work migrants from Africa, Asia and Eastern Europe, cannot absorb too many foreigners without losing its character as a Jewish state. Yet a moral dilemma ensues, especially for the Jewish people, who for centuries were persecuted and had nowhere to hide. The problem then is to determine who is a refugee.

All speakers agreed that 85 percent of those seeking asylum in Israel have been granted a visa enabling them to stay here legally, though it does not grant the social benefits given to citizens and permanent residents. Of the remainder, Anat Ben-Dor, a lawyer who heads the Refugees Rights Clinic at Tel Aviv University's Buchman Faculty of Law, complained about the hardships placed before people trying to establish their right to refugee status.

Charmaine Hedding, national director for Israel of Operation Blessing International, told of her organization's efforts to teach refugees a trade, and to help them resettle in South Sudan – now newly independent – and then attending to their safety for nine months after returning to their countries of origin. A few hundred people have already participated in this program.

IAJLJ thanks Edward Rettig for the use of its premises.

**'Jewish' and 'Democratic' – Can they coexist?,
from page 10**

uniqueness of the State of Israel. I believe that if we give up our pretensions of being able to solve the problem in absolute terms, and accept the anomaly of "Jewish and democratic" as a special Israeli challenge, different from those faced by other countries, this tension may have an ongoing positive influence on both opposing sides, and we will all ultimately benefit.

Rabbi Yuval Cherlow is Rosh Yeshiva of Yeshivat Hesder Petach Tikva, Israel. He is a graduate of Yeshivat Har Etzion, ordained by

the Israeli Chief Rabbinate, a retired major in the Israel Defense Forces, and a founding member of Tzohar, a rabbinical organization. Rabbi Cherlow has published many books and articles dealing with Halakha, Biblical exegesis, modern Jewish philosophy and contemporary questions. He is a member of several Israeli governmental ethical committees, among them the Ministry of Health's National Committee for Human Medical Research. He is also a member of the Presidential Press Council of Israel. This article is based on a presentation made at the IAJLJ Congress, Dead Sea, 2011. Translated from the Hebrew by Perry Zamek.

Tarabin trial update

UN High Commissioner for Human Rights responds to IAJLJ

Israeli teenager Ouda Tarabin was accused by Egypt in 2000 of spying for Israel and sentenced to 15 years in prison. As reported earlier in *JUSTICE*, the Israeli Ministry of Foreign Affairs and Tarabin's lawyer Izhak Melzer have been provided with no evidence of legal proceedings leading to Tarabin's incarceration. IAJLJ protested this

miscarriage of justice in a May 2010 letter to then-President of Egypt Hosny Mubarak that went unanswered. IAJLJ subsequently wrote to UN High Commissioner for Human Rights Navanethem Pillay, and on 1 September 2011, received a response to its letter, reproduced on this page. IAJLJ will continue its interventions on Tarabin's behalf.

NATIONS UNIES
HAUT COMMISSARIAT DROITS DE L'HOMME



UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS



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26 August 2011

Dear Ms. Kohn,

I write with reference to your letter to the High Commissioner dated 19 June 2011, which concerns the detention of Mr. Ouda Tarabin in Egypt.

Thank you for bringing Mr. Tarabin's situation to the attention of the High Commissioner, especially the fact that it is addressed in Amnesty International's report. This information has been conveyed to the United Nations Working Group on Arbitrary Detention for its consideration.

The Working Group on Arbitrary Detention has a mandate from the Human Rights Council to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in relevant international legal instruments accepted by the State concerned. Thus, this Working Group is the principal United Nations mechanism for following up on cases such as Mr. Tarabin's. More information, including contact information for the secretariat, is available at <http://www2.ohchr.org/english/issues/detention/index.htm>.

I wish you much resolve for your challenging and important work..

Yours sincerely,

A handwritten signature in black ink, which appears to be 'Frej Fenniche', is placed over the typed name.

Frej Fenniche
Chief, Middle East and North Africa Section

Ms. Irit Kohn
President
The International Association of Jewish Lawyers and Jurists
10, Daniel Frisch Street
Tel Aviv, Israel

The Durban III Conference

Will anything positive come from this September 2011 event?

Alan Baker

The necessity to fight racism, racial discrimination, xenophobia and intolerance is one of the major challenges of the international community. It has been a central and principal aim of the United Nations, as enunciated in the first article of the UN Charter: “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

However, one of the most regrettable and damaging phenomena of the first decade of the third millennium has been the utter failure of the international community, and the United Nations in particular, to deal seriously with the evils of racism.

Durban I

The 2001 Durban Conference,¹ whose original purpose was ostensibly to deal with racism in a substantive and serious manner, became nothing more than a by-word for intolerance, hatred, anti-Semitism and Israel-bashing. Ironically and tragically, this first diplomatic conference of the new millennium – held in Africa, a continent that had suffered so acutely from slavery and racism – became indelibly tarnished because of the combined irrepressible actions of Arab and Moslem states, Iran, the PLO, and a covey of anti-Israel NGOs. These set out to hijack the conference and turn it into an anti-Israel and anti-Semitic hate-fest at the expense of the substantive agenda items.

The documentation² negotiated prior to the conference contained a series of bracketed paragraphs. These referred to “Zionist racist practices against Semitism”; described Israel as a “racist, apartheid state”; accused Israel of “ethnic cleansing of the Arab population in historic Palestine”; called for revoking legislation in Israel “based on racial or religious discrimination, such as the Law of Return”; and degraded the term “Holocaust” with multiple references to “holocausts” suffered by other peoples, including the Palestinians. The Draft Program of Action called to end “foreign occupation of Jerusalem by Israel,

together with all its racist practices” and urged states to refrain from recognizing Jerusalem as the capital of Israel.

The opening statements of several world leaders added to the anti-Israel ambiance. Yasser Arafat, appearing as “President of the State of Palestine” and President of the Palestine “National” Authority (in violation of the terms of the 1995 Israel-Palestinian Interim Agreement and the UN resolution on the Status of the PLO delegation to the UN) used hostile and demagogic terms, describing Israel as “a racist colonialist conspiracy of aggression, forced eviction, usurpation of land and infringement upon Christian and Islamic holy places...”, and a “colonialist

challenge against international legitimacy”, “moved by a mentality of superiority that practices racial discrimination, that adopts ethnic cleansing and transfer.”³

Similar “paragons of international virtue,” such as Cuba’s Fidel Castro, Iran’s then-foreign minister Kamal Kharrazi, and Amr Moussa, Secretary-General of the Arab League, added their own bitter incitement.

Following extensive criticism of the inflammatory nature of the texts, and the departure of the Israel and U.S. delegations, the organizers of the conference decided to redraft the documentation so as to prevent utter failure of the conference and ensure a positive outcome.

Ultimately, in the Durban Declaration and Program of Action,⁴ all references to Zionism, degrading of the Holocaust, and other anti-Semitic and anti-Israel elements were removed, despite opposition from Iran, Syria and others which succeeded in including one provision clearly directed against Israel:

We are concerned about the plight of the Palestinian people under foreign occupation. We recognize the inalienable right of the Palestinian people to self-determination and to the establishment of an independent State and we recognize the right to security for all States in the region, including Israel...⁵



Canada and others disassociated themselves from all texts directly or indirectly relating to the situation in the Middle East, viewing them as *ultra vires*, outside the jurisdiction and mandate of the conference.

Regrettably, the NGO forum that took place parallel to Durban I was replete with Israel-baiting in and around the conference halls (including violent anti-Israel demonstrations on the streets of Durban). This forum approved a declaration and program of action viewing Israel as a “colonial military occupant”, “racist and apartheid state”, guilty of “racist crimes including war crimes, acts of genocide and ethnic cleansing.” Its Program of Action called for implementing measures against Israel like those employed against the South African apartheid regime; deploying an international protection force; reinstating the UN Zionism=Racism resolution; repeal by Israel of its Law of Return; establishing a special UN committee to deal with Israeli apartheid and racist crimes; launching an international anti-Israel apartheid movement; and urging the international community to isolate Israel.⁶

Although these documents were not accepted by the organizers of the diplomatic conference and were criticized by the UN Secretary General and the High Commissioner for Human Rights, they remain one of the main components of Durban I.

Durban II

In an attempt to revitalize the “Durban process” and rescue it from its negative connotation, the General Assembly decided in 2006 to convene a “Durban Review Conference” in Geneva (2009); and it elected the Libyan representative to chair the Preparatory Committee, assisted by Iran and Cuba.

By early 2008, it was evident that several states intended to boycott this review conference on the strength of the blemished reputation of Durban I.

Canada stated:

We withdrew from a process that sees Iran sitting on the organizing committee, a country whose president has repeatedly engaged in inciting genocide against the Jewish nation, a conference in which Libya plays a central role on the organizing committee, a conference where many of the key organizing meetings were set, no doubt coincidentally, on Jewish high holidays to diminish the participation of Israeli and Jewish delegates, a process which re-invited to participate all of the NGOs that turned the original Durban

conference into the notorious hate-fest, including those responsible for circulating copies of the Chronicles of the Elders of Zion and organisations which outside the conference venue held up portraits of Adolf Hitler, and a conference which as well re-invited those NGOs made it difficult or impossible for Jewish NGOs to come as observers.⁷

The United Kingdom also boycotted the session, based on “the degree of anti-Semitism that was disgracefully on view on the previous occasion.”⁸ Israel, the United States, Australia, Poland, New Zealand, the Netherlands, the Czech Republic, Germany and Italy all followed suit.

True to expectations, and unable to shed the negative reputation that had been built up in Durban, the Durban II conference rapidly descended into a mode of utter hostility *vis-à-vis* Israel and anti-Zionism, with the overall thrust of the formal opening address by Iranian President Ahmadinejad being a call for the eradication of Zionism, attributing all the ills of the world to Zionism and Israel. “The word Zionism personifies racism that falsely resorts to religion and abuses religious sentiments to hide their hatred and ugly faces,” he said.⁹ This outrageous spectacle prompted many delegations to leave the room during the Iranian statement.

While a final document was approved by the conference without offensive references or specific singling out of Israel as such, the reaffirmation of the original Durban Declaration and Program of Action by Durban II was nevertheless understood by all as a reaffirmation and re-legitimization of the singling out of Israel.

Durban III

In 2010 the UN General Assembly¹⁰ decided to schedule for 22 September 2011 a one-day event in which heads of state and government would convene to commemorate the tenth anniversary of the 2001 Durban conference.

While the political statement due to emerge from this session deals with racism, and despite efforts by the UN High Commissioner for Human Rights (a native of Durban) to rescue the name of Durban and re-legitimize the Durban declaration, a number of states have already announced their intention not to participate.

Canada called upon the UN High Commissioner for Human Rights to “stop the process and realize that the poison at Durban I has placed the entire process

under a permanent cloud.”¹¹

The US has declared that it “will not participate in the Durban Commemoration...because the Durban process included ugly displays of intolerance and anti-Semitism, and we did not want to see that commemorated.”¹²

Likewise, the Czech Republic announced that “Prague is dissatisfied with the Durban process as it has been often abused for a number of unacceptable statements with anti-Jewish connotations.”¹³

Similar decisions to boycott Durban III have been made so far by Italy, the Netherlands, Australia and Israel.¹⁴

Conclusion

Whether coincidentally or not, it appears that the Durban III meeting will occur at the same time as the Palestinian attempt to seek recognition and acknowledgement by the UN of a Palestinian state “within the 1967 borders.”

Perhaps this ominous juncture of events is all the more indicative of the damage generated by Durban I as the precursor of the widespread attempts to delegitimize Israel and its rights as a nation state in the international community.

By adopting the Durban I declaration at an international conference purportedly devoted to the blight of racism, and by singling out Israel among all nations of the world, the international community cannot deny its own contribution to the indelible pollution and soiling of the Durban process, and to subsequent attempts to delegitimize Israel.

As long as the international community, and the UN High Commissioner for Human Rights in particular, continue to seek reinstatement and re-legitimization of the forever-stained “Durban process,” whether by review conferences or by anniversary commemoration, the genuine struggle against racism will suffer. The damage cannot be repaired.

Durban must be set aside and forgotten, and the international community must set about dealing with racism, racial discrimination and xenophobia in a genuinely serious and non-hypocritical manner, far from Durban.

Alan Baker is the former Legal Adviser of Israel’s foreign ministry and ambassador to Canada. He is presently Director of the Institute for Contemporary Affairs at the Jerusalem Center for Public Affairs,

and a partner in Tel Aviv law firm MBKB & Co. Ambassador Baker participated as Deputy Head of Israel’s delegation to Durban I. This article is an abridgement of a study written by him and published by the Jerusalem Center for Public Affairs, available at www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=1.

Notes:

1. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, 31 August-8 September 2001.
2. Draft Declaration, A/CONF.189/4 and Draft Program of Action A/CONF.189/5, dated 20 August 2001.
3. For the full text of Yasser Arafat’s address see www.pac-usa.org/documents/yasser_arafat_durban.htm (last visited 29 August 2011).
4. See A/CONF.189/12 and Corr. 1 of 8 September 2001.
5. *Id.* at para. 63.
6. For the full text of the NGO declaration and Program of Action, see www.adl.org/durban/durban_ngo.asp (last visited 15 August 2011).
7. See <http://network.nationalpost.com/np/blogs/fullcomment/archive/2009/02/18/241984.aspx> (last visited 15 August 2011).
8. See <http://www.eyeontheun.org/durban.asp> (last visited 29 August 2011).
9. See <http://webcast.un.org/ramgen/ondemand/conferences/DurbanConference/2009/durban090420pm1-eng.rm?start=00:05:30&end=00:39:30> (last visited 29 August 2011). See also www.jpost.com/servlet/Satellite?cid=1239710821252&pagename=JPost%2FJPArticle%2FShowFull (last visited 29 August 2011).
10. Resolution 65/240 dated 24 December 2010.
11. See <http://network.nationalpost.com/np/blogs/fullcomment/archive/2009/02/18/241984.aspx> (last visited 29 August 2011).
12. See www.jta.org/news/article/2011/06/01/3087972/us-wont-participate-in-durban-iii-state-dept-says (last visited 29 August 2011).
13. See <http://praguemonitor.com/2011/07/22/%C4%8Dr-intends-ignore-un-session-durban-declaration> (last visited 29 August 2011).
14. See www.heraldsun.com.au/news/breaking-news/australia-pulls-out-of-durban-conference/story-e6frf7jx-1226120720430 (last visited 29 August 2011) and www.israelnationalnews.com/News/News.aspx/145999 (last visited 29 August 2011).

Non-observant home no bar to pupils in religious schools

*The Supreme Court of Israel chose to deal with this case as one of principle
'so that it may have practical influence in respect of reality'*

Robbie Sabel

appropriately implemented in practice.

HCJ 7426/08

Tebeka Advocacy for Equality and Justice for Ethiopian
Israelis v. Minister of Education et al¹

The Israel Supreme Court, sitting as a High Court of Justice, issued a ruling that should be of interest to lawyers following human rights issues.

The gist of the dilemma facing the Court was whether Jewish religious schools could apply an admission quota for Ethiopian students on the grounds that these students came from non-observant backgrounds and the school administrators wished to preserve a strongly religious atmosphere at their schools.

An interesting preliminary procedural aspect of the case was that the children in question had already been placed in schools by the time the Court heard the petition. Thus there was no real dispute before the Court. Nevertheless, the Court decided that:

Since we realize that the phenomenon of non-admission of immigrant children to educational frameworks in the city recurs, we decided, with the agreement of the parties, that in view of the theoretical and practical importance of this issue, it is appropriate to render a principled decision in the issues raised in this Petition, so that it may have practical influence in respect of reality, each year prior to the beginning of the academic year.

Recurrence of this phenomenon, year after year, emphasizes the need to clarify the normative infrastructure concerning equality in education, inter alia regarding the admission and enrolment for studies, so that the rules in this matter are publicly clear and



It is a rule that the Court does not normally deal with theoretical issues and does not rule in an academic matter where no decision is required in a concrete one. This rule has an exception – when we are concerned with an essential, important issue which, by nature, may reoccur, and due to circumstances of time and constraints there is a difficulty in making a principled judicial decision in proximity to the event itself, and prior to the resolution thereof.

It is important to render a principled decision in order to prevent future breach of the law.

This author has doubts whether the Court should be issuing judgments that deal with future theoretical problems however important the issue. The Israeli High Court is not a *Conseil d'État* and is already subject to criticism for judicial activism. It might be wiser for the Court in the future to stay closer to the traditional role of courts in the Common Law tradition.

On the substance of the issue involved, the schools argued that in order to preserve the religious character and atmosphere of the school they had to maintain a numerical majority of students with an orthodox Jewish background. The Court rejected the school's submission but did so without actually examining the veracity or otherwise of the school's contention. This refrain perhaps may be attributed to the fact that the issue of particular students was not before the Court. The Court chose to deal with the issue as one of principle. The Court's judgment is a resounding clarion call against discrimination and a demand for equality in education. The Court quoted extensively from international human rights documents and quoted with approval the 1954 landmark American

case of *Brown v. Board of Education* where the U.S. Supreme Court, by a unanimous decision, ruled that “separate educational facilities are inherently unequal” and a violation of the constitution. This decision effectively ended racial segregation in American schools.²

Justice Ayala Procaccia, who wrote the Court’s decision, phrased it as follows:

The legal system in Israel acknowledges the right of the various population sectors to maintain their uniqueness and cultural style as part of the multi-cultural nature of Israeli society, which honors variance and uniqueness and gives them a place in the lives of ethnic groups and communities.

The recognized right to unique education as part of personal autonomy is known in the democratic system, but it is not of an absolute nature. It is subject to the duty of the various educational institutions, and to the duty of the state as the supervising body, to ensure that unique education shall not compromise the overall social purpose, which requires the creation of a common denominator of basic educational values for all sectors.

Alongside honoring that which is different and unique, the constitutional method obligates all social sectors, without distinction, to honor the basic principles of democratic regime which are at the very core of the state.

The right to equality is intertwined with human dignity in the areas in which it touches upon human dignity, and the phenomenon of discrimination in the realization of the right to education indeed touches upon the very core of human dignity and the dignity of the child as a human being. Unacceptable discrimination in admitting students to an educational institution based on ethnic origin or affiliation is in contrast to said values of human rights and is unsuitable in the democratic-constitutional regime prevailing in Israel.

The refusal of any educational institution – regardless of its status in the education system – to admit students due to considerations of origin or ethnic affiliation is in contrast to the principles and basic values of the constitutional-democratic system in Israel, which are binding to all citizens, without exception.

Prohibition on discrimination in education, which anchors the duty to equality in education, directly interfaces with the constitutional right to human dignity. It does not merely touch upon the margin of human dignity, but rather touches upon the core thereof.

The Court quoted with approval Lord Phillips’ judgment in the Jewish Free School Case (R. v. JFS [2009] UKSC 15). After setting out the rules against discrimination the Court summarized its judgment by stating that: “Sectoralism and uniqueness are not grounds for breaching these basic values.” The Court ordered the government and municipal authorities to take administrative and financial steps against any school continuing to exercise discrimination against Ethiopian children. Justice Elyakim Rubinstein, himself an observant Jew, rendered a separate opinion in which he agreed with Justice Procaccia’s judgment and reinforced its reasoning with numerous citations from Jewish legal sources.

I do not know whether we have here a new *Brown v. Board of Education* but the decision will certainly serve as a landmark for the application of human rights in Israel. It might, however, have been more useful for future case law had the Court devoted more effort to confronting the arguments submitted by the schools and not just setting out the rule against discrimination.

The petitioners in the case were represented *pro bono* by Ram Caspi, one of Israel’s best-known lawyers.

Robbie Sabel, PhD, is a visiting professor of international law at the Hebrew University of Jerusalem and a member of the JUSTICE Editorial Board. Translations from the decision were made by Adv. Yoel Levy, a member of Tebeka Advocacy for Equality and Justice for Ethiopian Israelis.

Notes:

1. 2010 (137) Dinim-Elyon 1002
2. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Passages

*IAJLJ mourns the passing of three long-serving members,
and the spouse of a long-serving member, and extends condolences to their families*

Justice Moshe Landau, 1912-2011

Justice Moshe Landau, fifth president of the Supreme Court of Israel and 1991 Israel Prize laureate, died on 1 May 2011, the eve of Holocaust Remembrance Day. He was 99. His decisions influenced many aspects of Israeli law, especially with respect to human rights and the rights of the accused in criminal court. Landau was president of the Jerusalem District Court when that court tried Adolf Eichmann in 1961.

A critic of judicial activism, Landau was born on 29 April 1912, in Danzig, Germany (now Gdansk, Poland). After completing his law studies in 1933 at the University of London, he and his family made Aliyah to Palestine. He practiced law until 1940, when he was appointed by the British mandatory authorities to the Haifa Magistrates Court. In 1948, upon the establishment of the state, Landau was appointed to the District Court, and in 1953 he was appointed to the Supreme Court. He served as the Court's president, i.e., chief justice, from

1980 until 1982.

Landau was the first chairman of the Commission for the Designation of the Righteous, established by Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority, to honor gentiles who saved Jews during the Holocaust. He served in this capacity until 1970. Landau was also a member of the Agranat Commission, established in the aftermath of the Yom Kippur War, and in 1987 chaired the commission that examined the procedural work of the General Security Service (commonly known as the Shin Bet and today called the Israel Security Agency), and which allowed the application of moderate physical pressure during interrogations. Landau was also a member of the Permanent Court of Arbitration in The Hague.



GPO/Chanania Herman

Ivan Levy, 1938-2011

Ivan Stanley Levy, an IAJLJ board member and chairman of IAJLJ's South African chapter, died on 5 February 2011. He was 72.

Levy began practicing law in 1961 at Johannesburg law firm Feinsteins, becoming its youngest partner at 21 and from 1978 the firm's chief executive officer. He had many community interests, serving as a director of such organizations as the South African Jewish Board of Deputies, where he had been national vice chairman, the South African Jewish Orphanage in Arcadia and Operation Hunger (at one time the country's largest local poverty alleviation association). Among other groups, Levy also served as honorary legal adviser to MaAfrika-Tikkun and the Chief Rabbi Cyril Harris Community Center.

Levy was a ferocious combatant against anti-Semitism. The Protocols of the Elders of Zion was banned in South Africa largely through his efforts.



Aliza Ben-Artzi, 1925-2011

Aliza Ben-Artzi, an Israeli lawyer in private practice and an IAJLJ board member for more than 30 years, died on 5 April 2011. She was 85. She completed her legal studies in 1952, and served on many Israel Bar Association committees, including the committee on the status of women and the committee on inheritance law.

Ben-Artzi was also a member of several international organizations and in 1969 participated as the sole Israeli representative to a conference in Iran, where she was received by Shah Mohammad Reza Pahlavi.



Blanca Nener, 1919-2011

IAJLJ joins in mourning the passing of Blanca Nener, late wife of IAJLJ Honorary Deputy President and long-time active member Itzhak Nener.

Jonathan Pollard, from page 35

members of Congress, as well as by former federal government officials (including Senator and Chairman of the Senate Intelligence Committee Dennis DeConcini, Congressman and Homeland Security Advisor Lee Hamilton, Deputy Attorney General and Harvard Law Professor Philip Heymann, Assistant Secretary of Defense Lawrence Korb, Attorney General Michael Mukasey, White House Counsel Bernard Nussbaum, Senator Arlen Specter, Vice President Dan Quayle, Secretary of State George Schultz, and CIA Director James Woolsey);

WHEREAS, many representatives of the faith community (including Father Robert Drinan, Father Theodore Hesburgh of Notre Dame, Cardinal Bernard Law of Boston; and Archbishop John Quinn of San

Francisco; all major Catholic, Jewish, and Protestant organizations) and leading civic figures (including New York City Mayors David Dinkins and Rudolph Giuliani, NAACP Executive Director Benjamin Hooks, American Bar Association President Jerome Shestack, and Nobel Laureate Elie Wiesel) have likewise called for clemency and reduction of Jonathan Pollard's sentence to time served; and

WHEREAS, the European Parliament, as early as 1993, issued a similar resolution urging clemency,

NOW, THEREFORE, this 1st day of March, 2011, the International Association of Jewish Lawyers and Jurists calls upon President Barack Obama to commute Mr. Pollard's sentence to time served and to order his release.

Actualizing the values of a Jewish and democratic state, from page 5

of movement? Can a small community refuse to accept Arabs in their community? Can a private person refuse to rent his apartment to Arabs? Is the state obliged to support in equal measure Jewish and Arab communities? Is there a duty upon the government to subsidize in equal measure different Jewish communities such as Orthodox, Conservative and Reform ones?

These are but a fraction of the questions the Court is faced with. In all of these cases the Court has to apply substance to the concept of Israel as a Jewish and democratic state. We do so taking into account our long-standing Jewish tradition, alongside our obligation to preserve our basic democratic values.

Harmonizing between the Jewish and the democratic nature of the state and applying meaning to the Jewish and democratic values of the state are not within the sole responsibility of the Supreme Court of Israel. Neither is it the sole responsibility of people living in Israel. All of us: Jews and jurists – Jewish and non-Jewish, in Israel and abroad, share that obligation. Your experience as Jews living in countries other than Israel can provide a useful outlook as to your ability to maintain your Jewish identity and follow a traditional lifestyle alongside your national and civil obligations. I hope that the discussions you undertake in this congress will provide a useful platform for a dialogue between us. I therefore welcome you to Israel and wish you a fruitful and productive congress.

*Our campaigns for human rights, our battles against anti-Semitism, our fight against terror and our struggles against delegitimization of the Jewish state are more important than ever.
IAJLJ cannot continue its vitally important work without your help.*

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ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** *šdq* (= reliability, virtue), **ARABIC:** *šadaqa* (= he spoke the truth), **ETHIOPIC:** *šadaqa* (= he was just, righteous)] Derivatives: צדקה **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** צדקתה (= justice). **PALMYRENE** צדקתה (= it is right). צדק 1. just, righteous. 2. pious.

After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

Justice is one of the goals of the International Association of Jewish Lawyers and Jurists. Thus, the Association works to advance human rights everywhere, addressing in particular issues of concern to the Jewish people through its commitment to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel.

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