The International Association of Jewish Lawyers and Jurists

JUSTICE

No. 15 December 1997

Cover:
Official logo of the 50th Anniversary of the State of Israel Celebrations Association.

JUSTICE is published by:
The International Association of Jewish Lawyers and Jurists
10 Daniel Frish St., Tel Aviv 64731, Israel.
Tel: 972-3-691-0673
Fax: 972-3-695-3855

ISSN 0793-176X

Printed by Shmuel Press Ltd.
27 Shoken Street, Tel Aviv,
Tel: 972-3-682-2056.

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PRESIDENT'S MESSAGE

It is hard to believe that we are compelled to deal again and again with the phenomenon of denial of the Holocaust. Unfortunately, from a strange, fringe-supported lunatic theory, it has achieved growing support in various circles, sometimes even within academe, where one would expect strict adherence to proven facts. Legal restrictions, imposed in some countries, appear to be largely ineffective, as vast quantities of printed material are smuggled across borders; the Internet too, serving as a highly effective vehicle for the distribution of this and similar vitriolic outpourings among millions of users.

Yet, laws are still necessary, and legal proceedings must be encouraged. When a free democratic country enacts a specific law prohibiting denial of the Holocaust, it publicly declares that this particular kind of expression, whether distributed by printed material, electronic devices, or word of mouth, is not within the realm of constitutionally protected speech.

Germany is one of the few countries where such a law exists, and where it is periodically implemented. "Each State", a German court stated recently, "defines the limits of freedom of action differently according to its own standards of tolerance and historical experience". Regrettably, in the current issue of *JUSTICE*, we are only able to publish a much shortened version of this 80-page judgment. The importance of the decision lies in the fact that this time it deals with denial material imported to Germany from the United States, by an American born citizen. We hope it will give constitutional experts and legislators food for thought.

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I would like to use this opportunity to urge our members to participate in the Weekend Seminar in Salonica, Greece, mentioned further in this issue. This will be the first of a series of seminars which form part of a special project to address one aspect of the Holocaust which has not yet been fully exposed.

Jewish lawyers, judges and law professors were very prominent in pre-war Europe, and they contributed significantly to the law in their various home countries. In these weekend seminars, to be held in various European countries, we shall commemorate Jewish jurists who perished in the Holocaust, and describe their contribution to the law of that particular country.

In paying tribute to these colleagues we shall be paying a debt of honour. We usually deal with the problems of current anti-Semitism and denial of the Holocaust in the global sense. These seminars will provide an opportunity to examine and discuss the local situation in each country separately.

Some time ago we established a European Council of the Association. As this is primarily a European project, it will be carried out with the active assistance and collaboration of this Council.

There was a well-established and important Jewish community in Salonica, and it is therefore appropriate to hold our first seminar in this city. It also marks the initiation of a new chapter of the Association in Greece.

The full program of the Salonica Seminar will be published in the next issue of *JUSTICE*.

Hadassa Ben-Itto

Israel's Extradition Law: Suggestions for Reform

Edna Arbel

A recent request for extradition from the United States has generated a good deal of international publicity concerning Israel's Extradition Law. That case involves a request by the United States for the extradition from Israel of a minor who was charged with murder in the United States. The minor has claimed that he is immune from extradition due to his Israeli nationality. While he was born in the United States, he claims that his father is an Israeli national and hence, in accordance with Israel's Nationality Law, he is also an Israeli national. After a thorough check by Israel's Ministry of Justice of the minor's claim to nationality, the Attorney General decided that there are grounds to request the provisional arrest of the minor for the purpose of his extradition. Following the receipt of the formal United States request for his extradition, the Minister of Justice, in accordance with his authority under Section 3 of the Extradition Law, decided that the minor should be brought before the District Court of Jerusalem to determine whether he is extraditable to the United States. The legal and factual issues involved in this case are currently pending before the Israeli courts.

The claim by the minor to immunity from extradition is based on an amendment to Israel's Extradition Law in 1978. This amendment, which added a new Section 1A to the law, provides that Israeli nationals may be extradited to another country only for offenses committed **before** obtaining Israeli nationality, but that they may not be extradited for offenses committed **after** obtaining Israeli nationality.[1]

This article will give a general overview of Israel's Extradition Law, including the implications of the 1978 amendment to that law. The article will also analyze certain serious shortcomings which have come to light from the application of that amendment and will present suggestions for changes to the Extradition Law in order to overcome those shortcomings.

The 1954 Extradition Law: The General Requirements for the Extradition of a Fugitive to a Foreign Country

Israel's present Extradition Law was enacted by the *Knesset* in 1954[2], replacing the Extradition Ordinance which had been in effect since the Mandatory period. This law, as enacted in 1954, provided a number of legal requirements for the extradition of a

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Mrs. Edna Arbel is the State Attorney of the State of Israel. This article was written with the assistance of Mrs. Irit Kohn, the Director of the Department of International Affairs in the Israeli Ministry of Justice, and Mr. Marvin E. Hankin, the Deputy Director of the Department of International Affairs in the Israeli Ministry of Justice.

1 Offenses Committed Abroad (Amendment of Enactments) Law, 5738-1978 (Laws of the State of Israel, Vol. 32, p. 63). Mr. Menachem Begin, who was Prime Minister of Israel at the time, was strongly in favour of such an amendment to the Extradition Law and pressed for the passage of this amendment by the *Knesset*. Consequently, this amendment has come to be known as "the Begin Amendment".

2 Laws of the State of Israel, Vol. 8, p. 144.

fugitive to a requesting country. The following is a summary of the requirements, as set out in that law, for extraditing a fugitive who has been accused or convicted of a criminal offense in a foreign country.

Who may be Extradited - the Nationality of the Fugitive

As originally enacted in 1954, any person present in Israel, whether an Israeli national or not, could be extradited to another country. Section 1 of the law broadly permits the extradition of any person present in Israel. Section 1 states:

> "A person who is in Israel shall not be extradited to another State except under this law."

Prior to the 1978 amendment, there was no limitation to this general authority to extradite any person present in Israel, provided all the conditions set out in the law were fulfilled. The 1978 amendment and the implications of that amendment will be discussed more fully later in this article.

Extradition: At What Stage of the Criminal Proceedings in the Requesting State

Israel's Extradition Law, as well as the extradition treaties to which Israel is a party, provide for two different stages of a criminal proceeding in which a requesting State may request the extradition of a fugitive. Section 2(2) of the Extradition Law provides that a person may be extradited if "he is accused or has been convicted in the requesting State of an offense . . ." Thus, extradition may be requested of a person who is accused of a crime in the requesting State, but who has fled to Israel before he could be brought to trial there. The Supreme Court has interpreted the term "accused" as it appears in Section 2(2) and has held that it is not restricted only to persons against whom an indictment has been filed in the requesting State. The Supreme Court has held that where the requesting State has taken the steps provided for by its laws for bringing the person to trial, even if an indictment has not yet been filed, he will be considered an "accused" for the purpose of Israel's Extradition Law.[3] In addition, the extradition of a fugitive may also be requested if he has already been tried and convicted in the requesting State, but has not served all of the sentence imposed on him before fleeing to Israel. It may be seen from this explanation that the request for the extradition of a fugitive must be either for the purpose of having him stand trial in the requesting State or to have him serve a sentence already imposed in the requesting State. It is not possible to request the extradition of a person for the purpose of enabling the police of the requesting State to question him concerning a crime of which he is suspected.

Irit Kohn

Marvin E. Hankin

What Offenses are Extraditable

Section 2(2) of the Extradition Law provides that a person may be extradited if he has been accused or convicted of an offense in the requesting State which, had it been committed in Israel, would be one of the offenses set out in the "Schedule" at the end of the Law. That Schedule sets out that, with some minor exceptions, all felonies are extraditable. In addition those misdemeanors specifically listed in the Schedule are also extraditable.[4]

Grounds for Not Extraditing a Fugitive

The Extradition Law sets out certain grounds for not extraditing a fugitive to a requesting State. The Schedule at the end of the Law provides that purely military offenses are not extradit-

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3 See: *Merguerian v. State of Israel*, 30(2) P.D. 701 (1976); *Hanauer v. State of Israel*, 33(3) P.D. 113 (1979); *Goldstein et al v. State of Israel*, 39(3) P.D. 281 (1985). [Note: References herein to "P.D." refer to Israel's Supreme Court Case Reporter.]

4 Under Israeli law, "felony" is defined as an offense having a maximum penalty of over three years imprisonment and "misdemeanor" is defined as offense having a maximum penalty of more than three months, but not more than three years imprisonment. See Section 24 of the Penal Law, 5737-1977, as amended.

able. In general, a purely military offense is one for which a soldier may be charged and for which there is no similar counterpart in the civilian penal law.

Section 2(2) of the Extradition Law provides that a person may not be extradited for a "political offense". Section 10(2) of the Extradition Law further provides that a court may not find a person to be extraditable if there are reasonable grounds for believing that the request for his extradition, in fact, aims at punishing him for an offense of a political character, even though on its face the request is not made in connection with such an offense.

Section 10(1) of the Extradition Law provides that a court may not find a person to be extraditable if there are reasonable grounds for believing that the accusation or the request for his extradition arises from racial or religious discrimination.

Section 8 of the Extradition Law sets out certain grounds for which a court must dismiss a petition to declare a fugitive extraditable. These include cases involving double jeopardy where the fugitive has already been tried in Israel for the same offense and has either been acquitted or convicted or where the fugitive has already served his punishment abroad for the same offense. A person may also not be extradited if he has been pardoned or has had his punishment remitted in the requesting State for the same criminal offense. Section 8 also prohibits the extradition of a fugitive if the statute of limitations for the offense has run for the offense, either according to the law of Israel or of the requesting State.

Recently, Israel's Supreme Court has considered the question of whether the list of grounds set out in Section 8 for dismissing an extradition petition is a "closed" list or whether a court hearing an extradition case might find additional grounds, not specifically set out in Section 8, which would justify dismissing an extradition petition. This question has come before the Supreme Court in two recent cases.[5] In both cases, there was a division of opinion between the Judges as to whether this list of grounds in Section 8 is a "closed" list. Among those Judges who held that this list could be open to additional grounds, some stated in their opinion that this should be reserved for rare instances in which a basic or fundamental right of the fugitive would be violated by extraditing him, without specifying what those possible additional grounds might be. Other Judges felt that the question of whether this is a "closed" list needs to be the subject of additional consideration, but this question need not be answered in the specific case before the Court.

Section 16 of the Extradition Law provides that Israel may not extradite a person to a requesting State if he may be subject to the death penalty for the offense for which his extradition is requested, if Israeli law does not provide a death penalty for the same offense.[6] If the law of the requesting State provides a death penalty for the offense for which his extradition is requested, the requesting State must undertake not to impose that penalty or if that penalty is imposed must undertake to commute the sentence.

The Requirement for an Extradition Treaty

While some countries permit the extradition of fugitives on the basis of reciprocity even if there is no extradition treaty in effect between the two countries, Section 2(1) of the Extradition Law provides that a person may be extradited from Israel only if there is an extradition treaty in effect between Israel and the requesting State. Israel is a party to the multi-lateral European Convention on Extradition.[7] In addition, Israel has bilateral extradition treaties with the United States, Canada, South Africa, Australia, Fiji and Swaziland.

Proof Needed to Find the Fugitive Extraditable

Section 9 of the Extradition Law provides that if the extradition of the fugitive is sought for the purpose of trying him for a criminal offense in the requesting State, that State must provide *prima facie* evidence linking the fugitive to the offense for which his extradition is sought. The section provides that it has to be proved to the Court that there is evidence which would be sufficient to commit the fugitive for trial for such an offense in Israel. Israel's Supreme Court has held this to mean "*prima facie*" evidence.[8] The requirement in the Extradition Law for

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5 *Masilati v. State of Israel*, 49 (2) P.D. 343 (1995); *Manning v. Attorney General*, 47(4) P.D. 25 (1993) - a case on additional hearing before the Supreme Court heard before a panel of five judges.

6 The only crimes for which the death penalty may be imposed in Israel are war crimes, crimes against humanity and crimes against the Jewish people under the Nazis and Nazi Collaborators (Punishment) Law of 1950 (Laws of the State of Israel, Vol. 4, p. 154).

7 In addition to Israel, some 33 countries of Europe are parties to this Convention. These include all the countries of Western Europe and many of the countries of Eastern and Central Europe. Russia and the Ukraine have also signed the Convention, but have not yet ratified it.

8 See: *Kamiar v. State of Israel*, 22(2) P.D. 85 (1967), at p. 115; *Attorney General v. Freedman*, 40(4) P.D. 301 (1986), at p. 305; *Goldstein, et al v. State of Israel*, 39(3) P.D. 281 (1985), at p. 290.

prima facie evidence was adopted from the common law of England, where the extradition law (at that time) contained such a requirement in order to find a person extraditable to another country. The European Convention on Extradition to which Israel is a party does not require a showing of *prima facie* evidence in order to extradite a fugitive. However, as this is a requirement in Israel's Extradition Law, Israel had to make a reservation when it joined the European Convention to provide that countries requesting extradition from Israel must include *prima facie* evidence in their formal request for extradition.

Concerning the admissibility of evidence in an extradition hearing, Section 12(2) of the Extradition Law provides that a Court shall accept as evidence documents and testimony which has been designated in an extradition treaty between Israel and the requesting State as admissible in evidence for the purposes of extradition. The treaties to which Israel is a party generally provide that evidence taken in the requesting State before a judge or official of that State will be admitted into evidence at the hearing on the extradition if they have been authenticated by an official seal of that State.

If the extradition of the fugitive is sought in order to require him to serve a sentence already imposed on him in the requesting State, *prima facie* evidence of the offense is not required, and certified copies of his conviction and sentence by the foreign court will usually be sufficient.

The Judicial and Executive Functions in Extradition Proceedings

As in most countries, the functions and responsibilities involved in an extradition proceeding in Israel are divided between the judicial branch and the executive branch.

Fundamentally, extradition is a matter of international relations, and as such it is the executive branch which decides whether to accept a request for extradition from a requesting State and submit it to the courts to determine if the fugitive is extraditable. The executive branch then later decides whether to order the extradition of a fugitive who has been declared extraditable. In the case of Israel, it is the Minister of Justice who is charged with this responsibility. Under Section 3 of the Extradition Law, the Minister of Justice must determine whether a request for extradition should be submitted to a District Court to determine whether the fugitive is "extraditable". The function of the Courts is not to decide whether the fugitive should be extradited, but rather to determine if all requirements of the Extradition Law and of the relevant extradition treaty have been fulfilled. If so, the Court will declare the person extraditable.[9]

After the decision of the Court declaring the fugitive to be extraditable becomes final,[10] Section 18 of the Extradition Law empowers the Minister of Justice to order the extradition of the fugitive. While the language of this section would suggest that the Minister of Justice has a broad discretion on whether or not to order the extradition of a person declared extraditable by the court, the Supreme Court of Israel, sitting as the High Court of Justice, decided that his discretion is, in fact, quite limited.[11] This case involved the extradition of William Nakash to France. The District Court of Jerusalem had found Nakash to be extraditable,[12] and the Supreme Court denied his appeal.[13] Thereupon, the Minister of Justice decided to exercise the discretion which he assumed he had under Section 18 of the Extradition Law and decided not to extradite Nakash to France. Shulamit Aloni, a member of the *Knesset*, and others filed a petition with the High Court of Justice challenging this decision by the Minister of Justice. The Court held that the discretion of the Minister under Section 18 is quite limited. In view of Israel's international obligations under the relevant extradition treaty, the Court held that after the courts have declared a fugitive to be extraditable, the discretion of the Minister not to extradite the fugitive should be limited to exceptional situations only. The Court further held that extradition should be carried out in accordance with the legislative purpose set out in the Extradition Law, and extradition may be refused only in extraordinary circumstances, where a basic principle would be seriously infringed.[14]

The 1978 Amendment to Israel's Extradition Law

Prior to 1978, Israel was one of the few countries of the world

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9 Section 9 of the Extradition Law.

10 In accordance with Section 13 of the Extradition Law, either the fugitive or the Attorney General has the right to appeal within 30 days to the Supreme Court against a decision of the District Court. In accordance with Section 14 of the law, the decision declaring a fugitive to be extraditable becomes final if no appeal is filed within the 30 day period, or if an appeal has been filed and it has been denied by the Court.

11 *Aloni, et al v. Minister of Justice*, et al, 41(2) P.D. 1 (1987).

12 See Reported District Court Decisions, 5745, Vol. 3, p. 482.

13 *Nakash v. Attorney General*, 40(4) P.D. 78 (1986).

14 For a digest of this case see 23 Is. L.R.506 which at p. 508 summarizes the decision of the Supreme Court on the discretion of the Minister of Justice under Section 18 of the Extradition Law.

which extradited its own nationals to other countries. As set out above, Section 1 of the law provides that any person present in Israel may, in accordance with the law, be extradited from Israel, and until 1978 there was no limitation on the extradition of a fugitive based on the fact that he was an Israeli national.

As noted in the treatise *International Judicial Assistance*,[15] most civil law countries refuse to extradite their nationals, while common law countries do agree to extradite their own nationals.[16] As further pointed out by Abbell and Ristau in that treatise, the reason that most civil law countries refuse to extradite their own nationals is that unlike most common law countries, they generally have jurisdiction to try their nationals by reason of their nationality for offenses committed in foreign countries... and they are not bound by the stringent common law evidentiary rules governing confrontation of witnesses. Therefore, the trial of offenses committed in foreign countries is not nearly as impracticable for them as for common law countries".[17]

As pointed out above, in addition to Israel, there are some 33 countries of Europe which are parties to the European Convention on Extradition. Article 6 of that Convention provides that the parties to the Convention "shall have the right to refuse extradition of its own nationals". In fact, most parties to that Convention, outside of the United Kingdom, do refuse to extradite their nationals. Some of the countries, in their reservations and declarations to the Convention, provide that they define a "national" as a person who held citizenship as late as the time of surrender or at the time of the extradition order. Some countries define nationals as not only citizens, but also include foreigners who are integrated into the society of that country, or persons who are settled or domiciled in the country.[18]

A question may arise in the case where there is a contradiction between the terms of an extradition treaty to which a country is a party and the internal laws of that country which prohibit the extradition of its nationals (in some cases, it is the constitution of the country which prohibits the extradition of its nationals[19]. Thus, as Abbell and Ristau point out in their treatise, most common law jurisdictions, other than the United States, follow the rule that domestic internal law takes precedence over an inconsistent treaty provision. This is also the rule in Israel.[20] As they state at page 282: "Thus, for example, even though the 1962 treaty between the United States and Israel clearly calls for both countries to extradite their nationals, subsequent Israeli legislation bars the extradition of persons who were Israeli nationals on the date of the commission of the requested offense. Because that statute takes precedence over the treaty, Israel cannot extradite such a person to the United States."[21]

In order to avoid a situation where the national of a country will succeed in escaping from justice, the rule in international law is *Aut Dedere Aut Judicare* - a country should either extradite its own nationals for trial in the requesting State or try them in its own courts.[22]

In amending the Extradition Law in 1978, the *Knesset*, Israel's parliament, followed this rule. The 1978 amendment amended both the Extradition Law by adding a new Section 1A and amended the Penal Law by adding new Sections 7A and 10A. The new Section 1A added to the Extradition Law provides that Israeli citizens could not be extradited to a requesting State for offenses they committed after acquiring Israeli citizenship. Section 1A states:

> "An Israeli national shall not be extradited except for an offense committed before he became an Israeli national"

In keeping with the rule of *Aut Dedere Aut Judicare*, Section 7A which was added to the Penal Law provides that Israeli courts have the authority to try under Israeli law an Israeli national who committed an act abroad which, had it been committed in Israel, would be one of the extraditable offenses set out in the Schedule to the Extradition Law[23]. Section 10A which was added to the Penal Law provides that where an Israeli national, who has been convicted and sentenced abroad for one of the offenses listed in the Schedule to the Extradition Law,

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15 Abell and Ristau, 4 *International Judicial Assistance*, (1990), 231-232.

16 For an excellent summary of the arguments for and against the extradition of the nationals of a country, see Theodor Meron, "Non-extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306", 13 *Is.L.R.* 215, at pp. 215-218.

17 Abell and Ristau, *supra*, 72.

18 See Jones on Extradition, Sweet & Maxwell, London (1995), p. 131.

19 See Abell and Ristau, *supra,* fn. 1 at p. 289.

20 See Ruth Lapidoth, "International Law within the Israel Legal System", 24 *Is. L.R.* 451 (1990), at pp. 456 *et seq*.

21 See also Abell and Ristau, *supra*, at fn. 7 on p. 291

22 For a thorough discussion of this rule, see Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff, Dordrecht (1995).

23 Following an amendment to the Penal Law in 1994, this provision is now found in Section 15 of the Penal Law.

flees to Israel before serving all of his sentence, the Minister of Justice may order that he must serve the remaining part of his sentence in Israel[24].

The motivations behind these amendments in 1978 were clearly similar to those of the many other countries of the world which prohibit the extradition of their nationals, while at the same time providing for their trial in their own country. However, these amendments must also be viewed from an additional idealistic point of view: that since its establishment in 1948, Israel has existed as the homeland of the Jews of the world. This principle is embedded in Israel's Declaration of Independence of 1948 and in the 1950 Law of Return, which sets out in its very first section that "Every Jew has the right to come to this country as an immigrant". The second section of the Law of Return provides that an immigrant visa must be granted to every Jew who has expressed a desire to settle in Israel. Unlike most countries which provide long waiting periods for a new immigrant to become a citizen, Israel's 1952 Nationality Law provides that every immigrant under the Law of Return shall become an Israeli national.[25] For practical purposes, new immigrants to Israel are able to become nationals automatically and almost immediately.

In the light of the background of the special character of Israel as the homeland for the Jews of the world, it may be worth noting that the original proposal to amend the Extradition Law provided that no Israeli national could be extradited to another country, without regard to whether such nationality was obtained before or after the offense was committed abroad.[26] During the debate in the *Knesset* on the proposed amendment, the ease with which Jews from abroad can immigrate to Israel and immediately obtain Israeli nationality was pointed out. In view of this fact, and in order to ensure that Israel would not become a refuge to which Jews from around the world could flee from justice with impunity, the final version of the amendment as adopted by the *Knesset*, as quoted above, provided that the prohibition on extraditing Israeli nationals would only apply to persons who were Israeli nationals at the time the offense was committed. Persons who obtain their Israeli nationality after committing an offense abroad can be, and are, extradited to the requesting State, provided all other provisions of the law and extradition treaty are fulfilled.

Shortcomings of the 1978 Amendment and Suggestions for Reform

Abbell and Ristau give as one of the reasons that most civil law countries do not extradite their own nationals the fact such countries in trying criminals "are not bound by the stringent common law evidentiary rules governing confrontation of witnesses. Therefore, the trial of offenses committed in foreign countries is not nearly as impracticable for them as for common law countries."[27]

Unfortunately, this is not true for Israel. In those cases in which the amendment provides that an Israeli national should be tried in Israel, as an alternative to extraditing him to the requesting State, Israel has ended up with a hybrid system, which has often proved to be unworkable. On the one hand, with the adoption of the 1978 amendment, we have followed the rule in the civil law countries of not extraditing nationals and broadening the extraterritorial jurisdiction of the Courts to permit them to try Israeli nationals for offenses committed abroad. On the other hand, ever since the Mandatory period, Israel has followed the rules of evidence of the common law countries, including those dealing with the confrontation of witnesses. The allegations in the indictment and all elements of the crime must be proven by evidence presented by witnesses in Court. All the usual rules of evidence apply, including the rules of hearsay evidence. The defendant has the right to cross-examine witnesses for the prosecution. Witnesses are often reluctant to testify in criminal cases, and often must be compelled to testify by use of the *subpoena* powers of the court. While the Israeli Courts have been given the authority to try Israeli nationals for offenses committed abroad, the Israeli Courts are not able to compel witnesses from abroad to travel to Israel to testify, even if such witnesses are Israeli nationals. In those cases where witnesses are willing to travel to Israel to testify, the costs involved in bringing such witnesses to Israel, including their

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24 Following the above amendment to the Penal Law in 1994, this provision is now found in Section 10 of the Penal Law. The new Section 10 now provides that in place of the Minister of Justice ordering that the Israeli national must serve the remainder of the sentence in Israel, the Attorney General must now apply to a Court asking that the Court order that the Israeli national will serve the remainder of the sentence in Israel.

25 For a survey of Israel's Nationality Law, see M.D. Gouldman, *Israel Nationality Law*, (1970). For a summary of the Law of Return and the extradition of Israeli nationals, see M.D. Gouldman, "Extradition from Israel", 1983 *Michigan Yearbook of International Legal Studies* 173, at 194 *et seq*.

26 See Proposed Laws, No. 1306, of the Hebrew year 5737, page 258.

27 See Note 15, *supra*.

transportation, housing and other expenses, are often excessive. Where an offense has been committed abroad, it is likely that there may be a number of witnesses who must be brought to Israel to testify - if they are willing.

If the witnesses are not willing to travel to Israel to testify, their evidence may be obtained only by use of a request to the foreign country to take their evidence before a Court there, through a Request for Letters Rogatory. In such a case, the evidence taken abroad must usually be taken pursuant to a treaty with that country for legal assistance. The defendant will have a right to have his counsel present at the hearing in the foreign Court for the purpose of cross-examining the witness. Since it will probably be the responsibility of the State to finance the trip not only for the Israeli prosecutor, but also for the defense counsel (and as there is often more than one defendant in the case, each with his own counsel), this can also be quite costly for the State.

Another disadvantage to having to take the evidence of a witness abroad is that the Judge hearing the case in Israel is not able to observe the witness as he testifies. Consequently, the Judge will not be able to obtain the same impression concerning the trustworthiness of his testimony from reading the transcript of his evidence taken abroad as when the witness testifies before the Court.

The consequence of having to try an Israeli national in Israel, within the constraints of rules of evidence similar to those in common law countries, is that conducting such trials has proven to be extremely costly. There may be cases in which it will be impossible to obtain the testimony of all the witnesses who are abroad and whose testimony is essential to the successful conclusion of the trial. As a result there are cases of Israelis accused of crimes abroad - often serious crimes - who will never be brought to trial.

We have also seen another unexpected result - to the disadvantage of Israelis who have been charged with crimes abroad. There have been cases, especially in the United States, where Israelis have been charged with crimes there, who would normally be released on bail pending their trial. However, as it is known that the accused Israeli could violate the terms of his bail and flee to Israel, from where he cannot be extradited, the Courts have refused his request to be released on bail.

Suggestions for Changes to the 1978 Amendment

It is clear that the *Knesset*, in adopting the 1978 amendment, did not foresee these difficulties in bringing Israelis to trial in Israel for offenses they committed abroad.

The Ministry of Justice has recently been considering suggestions for amendments to the Extradition Law, and during these discussions it was felt that this would be an opportunity to also consider changes to correct the shortcomings of the 1978 amendment. The recent request from the United States for the extradition of a minor who is accused of murder and who claims that as an Israeli he cannot be extradited, has given added impetus to these proposed changes. The proposed changes, if adopted, would serve the interests of justice by assuring that Israelis who have been accused of crimes abroad would be brought to trial there, while at the same time providing that if convicted, such Israelis could serve their sentence in Israel.

It is proposed that Israel's Extradition Law be amended to permit the extradition of an Israeli national to a requesting State, provided that State agrees in advance that if the Israeli is convicted, he will be returned to Israel to serve his sentence, if he so requests.

Such proposed changes are based on the fact that in November, 1996, the *Knesset* adopted the Transfer of Prisoners to Their State of Nationality Law. This law provides for the transfer of foreign prisoners from Israel to their own countries to serve their sentences and for the transfer of Israeli prisoners in foreign countries to Israel to serve their sentences here. Israel has joined the European Convention on the Transfer of Sentenced Persons, to which some 35 other countries, including the United States and Canada, are parties. These include almost all the countries with which Israel has extradition treaties. The idea behind such treaties is the humanitarian concept of permitting a sentenced person to serve his sentence in an environment familiar to him.

It is proposed that Israel's Extradition Law be amended to permit the extradition of an Israeli national to a requesting State, provided that State agrees in advance that if the Israeli is

New Executive Director of the American Section

The Association is pleased to announce the appointment of Mathew A. Kaliff as the new Executive Director of the American Section of the Association. Mr. Kaliff has served as a congressional committee aid and worked as an attorney in private practice, specializing in business litigation. Mr. Kaliff has also served on the board of directors of the American-Jewish Congress - Southwest Region.

The Association is gratified with the decision of the U.S. Postal Service (USPS) to expand its Global Priority Mail service to reach Israel's largest cities - Jerusalem, Tel Aviv and Haifa. Americans and Israelis can now obtain priority handling for their letters and small packages between the two countries at reduced rates. Prior to this decision, USPS did not provide expedited mail service to Israel even though the service is available to over 25 countries around the world, including the Middle East.

The Association, through the American Section and in particular Judge Seymour Fier, brought the issue to the attention of Congressman Ben Gilman (R-NY), who sits on the Postal Service Subcommittee of the House Government Reform and Oversight Committee. Congressman Gilman pursued the matter with the USPS, which officially initiated the new service to Israel in September 1997.

In acknowledging Congressman Gilman's efforts, Neal Sher, President of the American Section, noted that the new U.S. Postal Service policy will not only reduce costs for American consumers and businesses but will also encourage commerce between Israel and the United States.

convicted, he will be returned to Israel to serve his sentence, if he so requests.

It is believed that this proposal will assure a more just trial by holding the trial in the place where the offense is alleged to have been committed and where most witnesses are usually readily available and can be *subpoenaed* to testify. The end result will be that if the Israeli national is convicted, he will be returned to Israel to serve his sentence, if he so requests.

In adopting such a procedure, Israel would be following an example set by the Netherlands. Traditionally, in Holland, prosecuting Dutch nationals in the Netherlands has been preferred to extradition.[28] However, in 1986, an amendment was made to Article 4 of the Extradition Law of the Netherlands to provide that a Dutch national could be extradited for the purpose of standing trial abroad, provided that the other State guaranteed that the person would be returned to the Netherlands to serve his sentence.[29] Article 8 of the Extradition Treaty between the Netherlands and the United States provides for the possibility of the extradition of Dutch nationals to the United States, on the basis that such nationals will be returned to the Netherlands to serve their sentence pursuant to the European Convention on the Transfer of Sentenced Persons.[30]

We have been informed that the operation of this new provision in the Extradition Law of the Netherlands has proven to be successful. It is believed that such provisions may become the trend in countries which do not extradite their own nationals.

Conclusion

The purpose of this article has been to describe the difficulties which have arisen as a result of the 1978 amendment to the Extradition Law and to suggest changes which could solve those difficulties. It should be emphasized that while the proposed changes would permit the extradition of Israeli nationals to a requesting State, such extradition would take place only if that country agrees in advance that the Israeli national, if convicted, will be returned to Israel to serve his sentence. The considerations for requiring that the Israeli national be permitted to serve his sentence in Israel are the same as the considerations which prompted the passage of laws and the signing of treaties providing for the transfer of prisoners to serve their sentences in their own country. Those considerations include permitting a sentenced person to serve his sentence in an environment and culture most familiar to him and in the country where he is most likely to have family who will be able to visit him.

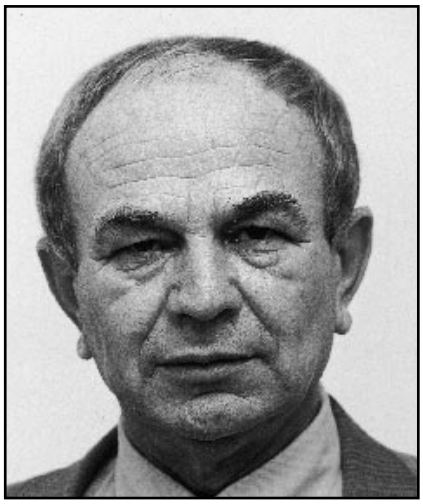
28 Bert Swart, *Extradition*, Max Planck Institut, Freiburg (1997) p. 107.
29 *id*
30 See Abell and Ristau, *supra*, 290 at fn 3.

Who is a Convert?

Asher Maoz

Twice in its history the Supreme Court of Israel openly showed reluctance to deal with issues pending before the Court and referred them to the *Knesset*, Israel's Parliament. Both occasions involved the setting of guidelines for establishing Jewish identity. This fact illustrates best the complexity and sensitivity of the issue which has come to be known as the "Who Is a Jew" controversy. Indeed, this query has given rise to more disputes among Israelis and within the Jewish world than any other subject. More political crises have arisen around this issue and more threats have been posed to the Coalition's existence by this dispute than by any other. Never has Israeli legislation provoked such interest among Jews in the Diaspora as that dealing with the definition of Jews under Israeli law, raising, for the first time in its existence, a doubt over Jewish unconditional commitment to the Jewish State. It is somewhat ironical that the central expression of Jewish unity and sense of belonging to one family - the Law of Return - has become a source of a bitter division within the Jewish nation. The intensity of the preoccupation surrounding the "Who is a Jew" issue is second only to Israel's preoccupation with problems of security and peace. This is unsurprising as both subjects are regarded by many as matters of national survival.

The State's involvement in matters of religious affiliation may seem strange to a student of modern political systems. The unique case of Israel stems from two main sources: One is the Ottoman *millet* system which conferred autonomous jurisdiction in matters of personal status on recognized religious communities. This model was preserved by the Mandate regime in Palestine and was inherited by the State of Israel. Second is the fact that Israel was established as a Jewish State with a deep commitment to the Jewish people all around the globe. This has been complicated by the fact that under Jewish religious law, *Halacha*, there is an identification between the Jewish people and the Jewish religion[1]. The definition of a Jew embraces two situations. A person is Jewish by being born to a Jewish mother or by undergoing conversion.



Conversion is a three phase procedure: circumcision for males, ceremonial immersion and acceptance of religious precepts (*Kabalat Ol Mitzvot*) for both males and females[2]. The *Halachic* definition of Judaism has come under fire since the eighteenth century when the unification of religion and nationality was challenged. Two opposing views were expressed: the first, that Judaism was merely a religion similar to Christianity and Islam; the other, that the Jews were a nation like any other nation without a necessary link to the Jewish religion. According to the latter view the test of belonging to the Jewish people did not necessarily correspond to *Halachic* requirements. The adherents of the former view were divided into two main groups: the Neo-Orthodox, who followed *Halacha* in defining affiliation to the Jewish religion and the Reform Movement, which deviated from it. The gap between Orthodoxy and Reform widened when the Reform Movement abandoned the matrilineal test of Judaism and replaced it with an egalitarian approach which took no account of which of the parents was Jewish.

Dr. Asher Maoz of the Faculty of Law, Tel-Aviv University, is the Head of the Prof. Dr. Raphael Taubenschlog Institute of Criminal Law. He is one of the experts who testified before the Ne'eman Committee regarding the issue of conversion.

1 In the words of Rabbi Sa'adia Gaon: "Our nation is a nation only with our *Torah*"; The Book of Faith and Beliefs, 3.

2 *Shulchan Aruch, Yoreh Deah*, 268:3.

"Who is a Jew" in the Legislation of the State of Israel - A Twofold Definition

Upon the establishment of Israel the founding fathers abstained from defining the term 'Jew' which was used by themselves both in the Declaration of the Establishment of the State of Israel and in its statutory documents. It is obvious that they did so deliberately, as a private bill, submitted by an Orthodox M.K., to enact a clause in the Interpretation Ordinance to the effect that "a 'Jew' - regarding any law: a person who is Jewish according to *Halacha*" was rejected by the *Knesset*[3]. Avoiding the definition of a Jew could hardly be connected to the problem of non-Orthodox conversion. Reform communities had not yet been established and only one Conservative community existed in Haifa. Indeed, it was not until the seventies that a Reform convert petitioned the Supreme Court to recognize her Jewishness. The motive behind this omission must rather be attributed to a desire not to slam the door in face of people who regarded themselves as Jewish yet did not correspond to *Halachic* dictates.

The result of this attitude was a dissonance in the meaning of a Jew in different statutes. Regarding the Rabbinical Courts Jurisdiction Law of 1953, which confers sole jurisdiction on the Rabbinical Courts in matters of marriage and divorce of Jews in Israel, it has never been questioned that this term will be defined according to *Halacha*. This is so since the Rabbinical Courts must apply *Din Torah* in adjudicating these matters, a term which was interpreted as being tantamount to *Halacha*. Furthermore, these Courts are manned by Orthodox rabbis who must be confirmed by the Orthodox Chief Rabbinate. Thus, the Supreme Court approved the Rabbinate's ruling that Ethiopian Jews were doubtful Jews requiring a restrictive conversion (*giyur lechumra*) in order to qualify for marriage[4]. Moreover, when presented with a case of a Reform convert, the late Simon Agranat, President of the Supreme Court declared: "It is appropriate for me to regard the conversion certificate, granted by the Reform rabbi, as proof of the applicant's Jewishness. I should do so without examining whether the conversion has been carried out in accordance with all *Halachic* details"[5]. He nevertheless surrendered to the Rabbinical Court's reservations regarding the validity of the conversion as this was a case of dissolution of marriage to be adjudicated in accordance with religious law. The legal position of non-Orthodox conversions performed in Israel is even more clear. The Religious Community (Change) Act of 1927, which was enacted to solve jurisdictional disputes between religious courts regarding converts, provides: "A person who has changed his religious community and desires legal effect to be given to such change shall obtain from the head of the religious community which he has entered a certificate to the effect that he has been received into such religious community, and shall notify the fact to the District Commissioner", who "shall register the change of community". It was ruled that the Chief Rabbis of Israel are "the head of the (Jewish) religious community". To complete the discussion of the status of non-Orthodox conversion in the area of marriage, one must consider the case of the *Movement for Progressive Judaism*[6]. In that case, the Supreme Court rejected a petition by the Reform Movement to have two of its members recognized as marriage celebrants. The Court sanctioned the process whereby the Minister of Religious Affairs consults with the Chief Rabbinate in appointing the celebrants. The Court stated, moreover, that the Minister would be justified in refusing to appoint celebrants who do not wish to strictly adhere to the *Halacha* in carrying out their duties.

The Supreme Court's Attitude - From *Rufeisen* to *Shalit*

A different attitude was adopted by the Supreme Court in defining Jews in "secular" legislation. Specifically, two sets of laws were considered: one was the Law of Return conferring the right of immigration to Israel and of automatically receiving its citizenship under the Law of Citizenship. The other, was the Population Registry Law, which provides for the registration of religious and ethnic (*Leom*) affiliation of Israeli residents. Regarding these laws the Supreme Court chose a secular test of Judaism. Doubtless, this was because these statutes dealt with civic rather than with religious matters, perhaps also because the

3 *Divrei Haknesset*, vol. 27 (1959) 2823.

4 H.C. 359/66 *Gitiye v. The Chief Rabbinate, Jerusalem*, 22 (1) P.D. 290; abridged in 3 Israel Law Review (1968) 595. The motive behind this ruling was doubts cast as to the validity of divorces in the Ethiopian community which might have led to them being declared to be *mamzerim*. The alternative of requiring them to undergo ritual immersion seemed therefore benevolent to them. Later, the Chief Rabbinate changed its attitude and overcame these difficulties by presuming that the person in question belonged to the majority whose status was unquestionable and by invalidating the marriages; see Elon, M., "The Ethiopian Jews: A case study in the functioning of the Jewish legal system", 198 *N.Y.U. J. Int'l Law and Politics* 535.

5 App. for Diss. of Marriage 1/72 *Holtzman*, 26(2) P.D. 85.

6 H.C. 47/82 *Movement for Progressive Judaism v. Minister for Religious Affairs* 43(2) P.D. 661.

first case to reach the Supreme Court was so unique in character. This was the case of Oswald Rufeisen[7]. Rufeisen, a Jew by birth, converted to Christianity during the Holocaust and entered the priesthood in the Catholic Church, coming to be known as Brother Daniel. He immigrated to Israel to join the Carmelite Order in Haifa. His demand to be registered as being of Jewish nationality and be granted an *Oleh* visa was rejected and he petitioned to the Court. The Supreme Court Justices were faced with an embarrassing situation: if they applied *Halachic* rules, they would have to accept the petition, as Jewish religion does not recognize converting out but affirms that "a Jew, even if he sinned, remains a Jew". The learned Justices found their way out by giving the term "Jew", in those statutes, a secular meaning "as understood by ordinary Jews", thus denying Rufeisen's petition.

The Supreme Court was not a pioneer in adopting a secular definition of the term Jew in those laws. Four years earlier the Israeli Government had adopted the directives issued by the then Minister of the Interior who represented a left-wing party in Ben-Gurion's coalition government. According to these directives, a person *bona fide* declaring himself to be Jewish would be registered as such provided he was not a member of another religion. Children of mixed marriages would be registered as Jews if both parents so wished regardless of which of the parents was Jewish. These directives caused a government crisis. Following the withdrawal of the religious parties from the coalition, the *Knesset* adopted a resolution to present the directives for the scrutiny of "Sages of Israel", both from Israel and from the Diaspora. Out of forty-five Sages who submitted their responses an overwhelming majority of thirty-seven favoured the *Halachic* criteria[8]. Following this poll the old directives were repealed and new ones, corresponding with *Halachic* requirements, were formulated by the new Minister of the Interior who belonged to the National Religious Party. Commentators are in dispute over Ben-Gurion's move. While some regard the results as a blow to him others point to the fact that the composition of the list of the Sages was intended to bring about this very result, thus enabling Ben-Gurion to restore the old coalition while saving face. Moreover, under the coalition agreement, the NRP was assured that the new directives would be enacted as part of the Population Registry Law.

The *Rufeisen* decision turned back the flow of events as it adopted yet again a secular test of Jewishness. Nevertheless, the Court's decision was welcomed by even the very Orthodox circles, as its outcome - divesting an apostate of rights conferred upon Jews, and in particular of the right every Jew has in the Land of Israel - was in line with the provisions of *Halacha*. Yet this attitude proved to be short-sighted. Just eight years later, in the renowned *Shalit* case[9], the Supreme Court ruled that, under the same principle, a man who is a gentile, by *Halachic* definition, may nevertheless be recognized as a Jew, if he *bona fide* claims to be Jewish.

Benjamin Shalit, an officer in the Israeli navy, while studying in Edinburgh, married Ann, a non-Jewish Scotswoman. Ann followed her husband to Israel in 1960 and received a resident's visa. She indicated on her registration form that she had no religion and that her *Leom* was British. In 1964 a son, Oran, and in 1967 a daughter, Gila, were born to the Shalits. Conforming with the Population Registry Law, Shalit wished to register his children. As both children were born in Israel, they automatically received Israeli citizenship. This would also be the result of them being the offspring of an Israeli citizen. Their religion was registered as "none". A problem arose when Shalit wished to register them as Jewish in the entry of "*Leom*". As their mother was not Jewish, Jewish religious law provided that they too did not belong to the Jewish people. The registry, acting under the new directives issued by the Minister of the Interior, refused to register them as Jewish.

Benjamin Shalit applied to the Supreme Court challenging the Minister's approach. He submitted that one's ethnic affiliation was separate and apart from his religious affiliation. He argued that one could be Jewish in terms of his ethnic group without being Jewish by religion. He stated that the test for determining Jewish ethnic affiliation was identification with Jewish - Israeli culture and values. Such identification could be evidenced subjectively and objectively. Subjectively, it was a matter of the individual's feelings, while objectively it should be established by his or her ties with the Jewish community. His children, Shalit said, were entitled to be registered as Jews. He and his wife intended to live in Israel with their family and raise their children in the same Israeli-Jewish spirit in which he had been raised. His children already had a common history, language, customs and values with all their friends. The Supreme Court handed down an *order nisi* demanding that the Minister show

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7 H.C. 76/62 *Rufeisen v. Minister of the Interior*, 16 P.D. 2428; SCJ (Special Vol.) p. 1.

8 The full text of the responses appear in B. Litvin & S. Hoenig, eds., *Jewish Identity - Modern Responsa and Opinions on the Registration of Children of Mixed Marriages*, New York, 1965.

9 H.C. 58/68 *Shalit v. Minister of the Interior*, 23(2) P.D. 477; SCJ (Special Vol.) p. 35.

reason why Shalit's children should not be registered as Jewish under the entry of *Leom*. An unprecedented panel of nine Justices - the largest to be constituted in those days - was composed to deal with the petition. The Justices were most reluctant to deal with the petition. In a move never made before and never repeated since, all nine Justices unanimously applied to the Government urging that the entry of *Leom* be removed from the Population Registry in order to release them from having to rule on the matter. The motive behind the Court's plea may be found in President Agranat's statement: "The problem before us - whether the registration officer must register the petitioners' children as Jewish under the particular of 'Nationality' although their mother is not Jewish - is one that does not admit of a judicial solution but lies entirely in the ideological sphere. Since, in my opinion, profound differences of view exist among members of the Israeli public in this regard, I think that it is not for us to interfere...". The Government turned down the Court's appeal. On January 23, 1970, the Court, with a majority of 5:4, overruled the Minister's decision and ordered him to register the children as Jewish.

A Legislative Change - Amending the Law of Return

Following a public storm over the *Shalit* decision and a threat by the NRP to leave the Coalition, thus causing the Government to lose its Parliamentary majority, both the Law of Return and the Population Registry Law were amended. A new section was introduced defining a Jew, "for the purpose of these Laws" as including "a person who was born to a Jewish mother or has become converted to Judaism and who is not a member of another religion".

Now a novel, more heated controversy came into being. The question was no longer "Who is a Jew" but rather "Who is a convert". To be more precise, the question was not even that, but rather "who is a rabbi". The question left open by the amending law concerned the nature of the conversion which was required in order to meet the statutory definition. On one hand, opinions were expressed that conversion is a religious term which must be interpreted according to *Halacha*. On the other hand, it was impossible to overlook the statement made by the Minister of Justice when presenting the bill to the *Knesset*, that "an immigrant presenting a conversion certificate from any Jewish community in the world will be registered as a Jew and will receive full immigrants' rights". Moreover, continuous efforts to clarify that recognition would only be granted to conversions which met the requirements of *Halacha*, were consistently rejected by the *Knesset*.

"Who is a Convert" in the Supreme Court's Decisions

The first case, involving non-Orthodox conversion, which came before the Supreme Court, did not necessitate judicial intervention in this conflict. In the *Miller* case[10]. Suzan Miller, a young American woman, was converted to Judaism by Rabbi David Klein of the progressive Temple Shalom in Colorado Springs. Following her conversion Suzan, who adopted the Jewish name Shoshana, served as a *Chazanit* (cantor) of the Temple. Some three years later, Shoshana immigrated to Israel and was even granted an *Oleh* visa. Yet, when she approached the Ministry of the Interior to obtain her identity card (*teudath zehut*), Shoshana made a grave mistake. Instead of stopping short after declaring herself to be Jewish, she presented her Reform conversion certificate as proof of her being Jewish. Needless to say, following that event her request to be registered as Jewish was turned down. Instead, she was given a choice of either applying to the Rabbinical Court to examine her conversion or of registering her religion as Christian, or alternatively, of leaving the relevant entry blank. When approaching the Supreme Court, a third alternative solution was raised by the Ministry. The Minister of the Interior, Rabbi Yitzhak Peretz, of the ultra-Orthodox *Shas* party, admitted that he was obliged by law to register the Petitioner as Jewish as the registration officer was not competent to question the validity of the conversion certificate. Nevertheless, in order not to mislead other official authorities, notably the marriage registrar, the Minister wished to indicate, in the registration as well as in the identity card, that the said person was Jewish by virtue of conversion. In this way the marriage registrar and other officials would be warned to make further inquiries about the person's Jewishness. In view of the Minister's position the question presented to the Court was technical rather than substantial. On that issue the Court unanimously held that the population registrar could only include in the registration such entries as were provided for by law and could not make any additions to them. To this Justice Elon added that Rabbi Peretz' suggestion was contrary to *Halacha*, as *Halacha* warned us not to remind a convert of his former status. In view of the Court's ruling, Rabbi Peretz resigned from the Government in order to abstain from carrying out the Court's

10 H.C. 230/86 *Miller v. Minister of the Interior*, 40(4) P.D. 436.

order. Ironically though, Peretz' resignation was in vain: Shoshana rushed back home to the bed of her ailing father and never showed up to obtain her identity card.

The first opportunity the Supreme Court had to directly address the question of non-Orthodox conversion was in the *Shas* case[11]. In this case a group of individuals who had been converted abroad by Reform rabbis, together with the World Union for Progressive Judaism, petitioned the Supreme Court to order the Minister of the Interior to register them as Jews. In response, two Orthodox parties - *Shas* and the NRP - applied to the Court to reject their petitions[12]. In a concise judgment the Court re-affirmed the position expressed by Rabbi Peretz in the *Miller* case. President Shamgar stated: "A declaration by the immigrant, accompanied by a document which proves his conversion by any Jewish community abroad, suffices to assure the registration of a person as a Jew. For this purpose, it makes no difference whether the community is Orthodox, Conservative or Reform". It should be emphasized that the Supreme Court applied its ruling also to conversions which clearly did not conform to the *Halachic* requirements, such as the ritual immersion and the composition of the *Bet-Din*.

Six years passed and the last Orthodox stronghold was about to fall. Alian Pessaro, a Spiritualist from Brazil arrived in Israel as a tourist. There she met a Jew by the name of Goldstein and was married to him by the Brazilian Consul. Before her marriage she was converted to Judaism by the *Bet-Din* of the Council of Progressive Rabbis in Israel. Her application to be registered as a Jew and receive an *Oleh* visa was turned down by the Ministry of the Interior and she applied to the Supreme Court relying on the *Shas* ruling. The Minister argued that the *Shas* decision was limited to conversions performed abroad. As for conversions performed in Israel they had to conform to the requirements of the Mandatory Religious Community (Change) Act. Therefore, no conversion performed in Israel would be recognized unless confirmed by the Chief Rabbinate. The Supreme Court rejected this argument by a majority of 6:1[13]. In detailed opinions the majority Justices explained that the Act applied to personal status matters only.

The result should have been to uphold the petition and order the Ministry to register Mrs. Pessaro as a Jew and grant her an *Oleh* visa. Yet the Court stopped short of doing so. In President Barak's words: "It is appropriate to clarify the content of our decision of today: we decide that the recognition of a conversion performed in Israel, regarding the Law of Return and the Law of Population Registration, is not subject to the requirements of the Mandatory Act. We decide nothing beyond that. We take no stand as to the conversion required for the Law of Return. We therefore express no opinion as to whether any Reform conversion performed in Israel would be recognized for the purpose of the Law of Return". The Court reasoned its decision saying that "this question has not been presented to us at all", as the whole discussion turned around the applicability of the Law of Return. Moreover, the *Knesset* was to be given an opportunity to set the standards for recognizing conversions in this area.

The decision of the Court seems most peculiar. Mrs. Pessaro applied for the recognition of her conversion. The Ministry denied her application since the conversion did not conform to the Religious Community (Change) Act. As the reason given by the Ministry for its refusal was overruled by the Court, it should have granted Mrs. Pessaro the remedy she applied for. Courts do not abstain from granting a remedy just because the respondent might have raised some other objections to the petition. They certainly do not reject a petition in order to enable the legislature to change the legal background so as to make the petition groundless. The Court's attitude brings to mind two former cases: the Court's plea to the Government in the *Shalit* case to repeal the entry of *Leom* in the population registry and the long delays in hearing the *Movement for Progressive Judaism's* petition in order to enable a practical solution to be reached. All these incidents demonstrate that, contrary to common belief, the Supreme Court is extremely cautious in intervening in this area and will do so only if there is no alternative[14].

At the time the decision in the *Pessaro* case was handed down by the Court several other applications were pending before the Supreme Court and the District Court of Jerusalem. Of special interest is the application of Israeli parents who have adopted non-Jewish children from abroad and wish to have them converted to Judaism.

Statutory Amendment or Agreed Solution?

Following the Supreme Court's decision in the *Pessaro* case two steps were taken by the Israeli Government:

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11 H.C. 264/87 *Shas Movement v. Director of Population Registration*, 43 (2) P.D. 727.

12 I find this of interest in view of the fact that recently Rabbi Ovadia Yosef, the spiritual leader of *Shas*, launched an attack on the Supreme Court for intervening in matters of values such as the validity of non-Orthodox conversions.

13 H.C. 1031/93 *Pessaro (Goldstein) v. Minister of the Interior*, 49(4) P.D. 661. [See also p. 43 on this issue of *JUSTICE*, ed.]

14 Another phenomenon which struck at the Movement for Progressive

The Government submitted to the *Knesset* a bill to amend the Rabbinical Court Jurisdiction Act by providing that conversions will be performed in Israel "according to *Din Torah*". The Bill further states: "No legal effect whatsoever will be accorded to a conversion performed in Israel unless the President of the Supreme Rabbinical Court has confirmed that it was performed according to *Din Torah*". This bill closes a circle. It provides for a unified definition of conversion according to *Halacha*. By submitting all conversions for the approval of the President of the Supreme Rabbinical Court[15] the Bill ensures that no conversion will be recognized unless it corresponds to *Halachic* requirements. The Bill also provides for its application in the territories occupied by Israel. It omits conversions which have been performed abroad thus leaving the *Shas* decision untouched[16].

Concurrently with the tabling of the Bill in the *Knesset*, the Prime Minister convened two committees to make recommendations regarding conversions: a general committee headed by Professor Ya'akov Ne'eman, who was later appointed Minister of Finance, and a smaller committee, headed by Rabbi Chaim Drukman, with the task of submitting recommendations regarding the conversion of non-Jewish minors who were adopted by Israeli non-religious couples. The Drukman Committee recently concluded its commission and is about to submit its recommendations. They include the establishment of special rabbinical courts to deal with these conversions with the understanding that they will demonstrate a lenient approach and will enable the speedy conversion of the minors. The task of the Ne'eman Committee is far more complicated. It is supposed to arrive at a solution regarding non-Orthodox converts which will make the amendment of the law unnecessary. The Committee has engaged in extensive deliberations in an effort to achieve an agreed solution. Its term has been extended from two to seven months and is due to terminate by the end of January 1998.

The Challenges Facing the Ne'eman Committee

Before examining the Committee's plans and prospects, a brief survey of the problems involved seems to be in place.

The problem of non-Orthodox conversions cannot be disconnected from the phenomenon of the existence of flourishing non-Orthodox religious communities. It is easier for Orthodox Judaism to deal with secularism or even with heresy than with the offering of religious alternatives to its teachings and practice which challenge the monopoly of Orthodoxy. Beyond the substantial conflict this is a controversy over the very legitimacy of an alternative to Orthodoxy.

If one wished to define in a nutshell the three main streams in contemporary religious Judaism, one might borrow the phrase coined by the late Reform leader, Rabbi Solomon Freehof: While with Orthodoxy *Halacha* has a veto, Reform Judaism merely gives it a vote. The Reform attitude towards *Halacha* and *Mitzvoth* was clearly and authentically stated by Rabbi John Levi of Temple Beth Israel in Melbourne Australia. "To be a liberal Jew", wrote Rabbi Levi, "is to have the intellectual and personal freedom to observe Judaism according to the dictates of our mind and our God-given conscience"[17]. Such an approach to Judaism can hardly be acceptable to an Orthodox rabbi who accepts *Halacha* as binding upon us without any reservation. It is therefore not surprising to find the Orthodox attitude expressed in the following harsh words: "A rabbi who professes reform - stops being a rabbi. It does not mean that he is a Reform rabbi. He is no rabbi at all and therefore his conversion is no conversion and his ruling (*Psak*) is no ruling"[18]. Indeed, even Rabbi Freehof frankly admitted: "It might be too much to expect a strictly Orthodox rabbi to acknowledge the validity of any Reform ceremony which varies from the norm laid down in the *Shulchan Arukh*. A Reform conversion certainly does not conform to that norm"[19].

The Orthodox attitude towards the Conservative Movement seems somewhat more puzzling. Unlike the Reform Movement, the Conservatives accept the Divine authority of the *Torah* (*Torah min Ha'shamayim*). Yet, unlike Orthodox Judaism, they believe in the further development of *Halacha* , and its adaptation to the needs of modern life. All this did not save the Conservative Movement from coming under fire from Orthodox

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Judaism decision was the fact that it was delivered concurrently with the *Shas* decision as if the Court wished to set off the hardships of the former case. The Court combined both decisions although the latter was not "fully baked". In his decision President Shamgar noted that "the detailed reasons for this judgment will be given separately". Since then four out of the five justices who gave the decision have retired from the Court without completing their judgment.

15 The two Chief Rabbis take turns in serving as President of the Supreme Rabbinical Court and President of the Chief Rabbinate Council.

16 It is quite reasonable that the provisions of the Bill will not even apply to conversions performed abroad by Israelis. This conclusion would be in line with the recognition of civil marriages performed abroad by Israelis.

17 See Asher Maoz., "Who is a Jew?", 35 (5) *Midstream* (1989) 11, 12.

18 Menachem M. Shneyorshon (the *Lubavitcher Rebbe*), "On the question: Who is a Jew and on Conversion According to *Halacha*" (*Kefar Chabad*, 1970).

19 Solomon Freehof, *Recent Reform Responsa* (Cincinnati, 1963), 88.

rabbis. On the contrary, Orthodox attacks on the Conservatives are even more intense than on the Reform. This phenomenon might be attributed to the fact that, unlike the Reform way, Conservative teaching purports to pose a challenge to Orthodox "frozen" Judaism.

The struggle over the recognition of non-Orthodox conversions possesses some unique characteristics. In the first place it is an imported issue. The campaign to amend the Law of Return by providing that conversion must be performed according to *Halacha*, was initiated by the *Lubavitcher Rebbe*. No wonder his initiative brought about a massive recruitment of American Reform and Conservative leadership to defeat it, causing Prime Minister Yitzhak Shamir to even speak of "an *Intifada* of American Jewry" launched at the Israeli Government. The recent crisis is also led by Jewish leadership from abroad. It is obvious that beyond the practical implications of the proposed amendment, the campaign centers over the legitimacy of the non-Orthodox streams in Judaism.

This may explain a further seeming puzzle: the registration of religion and nationality is of hardly any practical significance. Section 3 of the Population Registry Law provides that while the registration, and any document issued under that Law, are *prima facie* evidence of the correctness of the details, this is not so with regard to the entries of nationality, religion and personal status. Nevertheless, some of the most bitter battles have taken place over this registration. As for the Law of Return, the introduction of the definition of the term "Jew" was accompanied by an enlargement of the list of persons entitled to the right of return and of automatic citizenship. This now includes children and grandchildren of a Jew and their spouses, even if the Jewish member of the family is not alive or has not immigrated to Israel.

The proposed statutory amendment - the so called "Law of Conversion" - which introduces a distinction between non-Orthodox conversions performed in Israel and abroad, further proves that the controversy is far from being a principled issue. It is rather a power struggle. The Orthodox circles do not hide that, rather than confronting the "who is a Jew" or the "who is a convert" issue, they are struggling to de-legitimize the non-Orthodox streams. The latter too make it clear that their battle over registration is a first step in a long fight to gain full State recognition and equality with the Orthodox stream. This explains the intensity and bitterness of the fight over a rather marginal issue.

I can find no better proof of this point than the twice converted Helen Zeidman. Helen, a member of the secular kibbutz Nahal Oz, was converted to Judaism by the *Bet-Din* of MAMRAM, the Israeli Council of Progressive Rabbis, presided over by Rabbi Moshe Zemer. Helen applied to the Supreme Court against the Population Registrar to have her registered as a Jew following her conversion. As all this took place prior to the 1970 statutory amendment which followed the *Shalit* decision, it was obvious that the Supreme Court was going to rule in her favour. Heavy pressure was exerted on Helen to undergo a second Orthodox conversion. This was performed, on the eve of the Court's hearing, by Chief Rabbi Shlomo Goren, in what came to be known as "a blitz-conversion", no doubt hinting at Goren's military background. Rabbi Zemer reacted in an article bearing the juicy title: "Rabbi Goren Performs Reform Conversion". Indeed, there was hardly any substantial difference between Helen's first conversion, carried out following a period of several months of religious instruction, and the latter, rather instant conversion, but for the complexity of the *Batei Din*.

The Helen Zeidman episode repeated itself almost a quarter of a century later. Anita Lobegren was converted to Judaism by the *Bet Din* of the Rabbinical Assembly of the Conservative movement in Israel after she was turned down by the Rabbinical Court of Jerusalem. Following a refusal by the Population Registrar to recognize her conversion, Anita Lobegren applied to the Supreme Court[20]. Following an *order nisi* issued by the Court and before the hearing took place, Anita was re-converted by the same Orthodox Court which had rejected her prior to her Conservative conversion[21].

What if the "Law of Conversion" Bill Fails to Pass the *Knesset*?

Although the Supreme Court Justices exerted every effort to ensure that, in their decision in the *Pessaro* case, they did not

20 H.C. 2082/91 *Lobegren v. The Minister of the Interior*.

21 In a letter to the *Gerer Rebbe*, written in the midst of yet another campaign to amend the Law of Return by stating that the conversion must be in accordance with *Halacha*, Rabbi Immanuel Jakobovitz, then the Chief Rabbi of the English Commonwealth, expressed his reservations. He reported of "*Batei Din* in Israel (including ultra-Orthodox rabbis) who supposedly convert, according to proper Orthodox standards, tourists who come to Israel for a few weeks or months and then return with certificates of their Jewish status, though they observe nothing in the way of Sabbath, Family Purity, and so on". Rabbi Jakobovitz states that his London *Bet-Din* does not recognize these certificates and expresses concern over the proposed amendment which might bring about a situation where "every Reform convert will be able to authenticate his Jewish status by an immersion 'according to *Halacha*'"; Immanuel Jakobovitz, '*If Only My People…*' - *Zionism in My Life* (London, 1984) 202.

pass a verdict on the validity of Reform conversions, they made equally clear what their judgment might have been had they been forced to make a decision. The Court expressed the view that being a religious term "the conversion must conform with a Jewish concept of the term". Yet, in defining the "Jewish concept", the Court would take into account "the basic values of our system as to equality and freedom of religion and conscience". These values forbid preventing the institutions of non-Orthodox streams from engaging in conversion and from those who wish to join these streams from being converted in accordance with their beliefs and conscience and forcing them to subscribe to an Orthodox way of life, or at least to pledging commitment to such way of life.

It seems clear, from the analysis of the *Pessaro* decision, and also from the Justices *dicta* that should the Supreme Court be called upon to rule on the validity of Conservative and Reform conversions, it will confirm them.

What if the "Law of Conversion" Bill Does Pass the *Knesset* ?

Ironically, even if the proposed legislation is adopted by the *Knesset*, it is doubtful whether it will prevent the recognition of non-Orthodox conversions. The reason for this is that in 1992 the *Knesset* adopted Basic Law: Human Dignity and Freedom. This Basic Law calls for the protection of human dignity and freedom according to "the ethical values of the State of Israel, as a Jewish and democratic state". The Basic Law provides, moreover, that "basic human rights in Israel are founded on the recognition of the worth of the human being, of the sanctity of his life and of the fact that he is free, and they shall be respected in the spirit of the principles enunciated in the Declaration on the Establishment of the State". No law which infringes the rights declared by the Basic Law may be enacted, unless it is "appropriate to the ethical values of the State of Israel… has a valid purpose, and… does not exceed necessity". Though the borders of the rights defended by the Basic Law have not yet been set, it is arguable that a law invalidating non-Orthodox conversion will be declared unconstitutional under the Basic Law.

Is there an Alternative?

After a long period of ignoring Orthodox indifference to them, Reform leaders came to re-consider the Movement's attitude towards *Halacha*, which caused a rift within the Jewish people. In an article, published in 1978, Rabbi Richard Hirsh, Executive Director of the World Union for Progressive Judaism, made the following statement:

> "When a progressive rabbi performs a conversion, he, as servant of *Klal Israel*, in effect gives the convert a visa to the Jewish world. Is the progressive rabbi therefore not obliged to make sure that the convert will be eligible to enter as many corners of the Jewish world as possible?"[22]

Similarly, other Reform leaders, such as Rabbi Sydney Bricto, Director of the Union of Liberal and Progressive Synagogues in Britain, called upon the Progressive Movement to abide by the norms of *Halacha* in the area of conversion, marriage and divorce. These declarations present some basic difficulties. The speakers have in mind the insistence on the performance of circumcision and immersion, yet it is the third component of conversion, the acceptance of religious precepts, which poses the major problem. For, as the *Talmud* teaches us: "If a proselyte is prepared to accept the *Torah* bar one religious law, we must not accept him"[23]. Needless to say, no Reform conversion could verbally correspond to this requirement. The solution lies in the function of *Kabalat Ol Mitzvoth* in the conversion process. The question as to the necessity of this component, as well as to its extent and meaning, is subject to conflicting opinions[24]. The proposed solution is based on the assumption that no positive acceptance of all religious precepts is required, but rather their acceptance according to the best of the convert's understanding or, in any event, their non-repudiation is all that is required. If that is the case, Reform conversion could be possible according to *Halacha*.

Indeed, in Denver, Colorado, a unique experience took place in 1978 and lasted for over five years. A Conversion Board was established consisting of rabbis from all three main streams. The Board monitored an educational program for candidates for conversion, recommended by any of the local rabbis. Each of the participating rabbis instructed the whole class and the candidates were prepared for conversion into *Klal Yisrael*, rather than to a certain stream of Judaism. After being approved by the Board the candidates would appear before the Orthodox *Bet-Din*, and the conversion ceremony would take place. This consisted of circumcision, immersion and *Kabalat Ol Mitzvoth*. The latter consisted of a series of general questions, such as whether they were prepared to live as serious Jews; whether they would

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22 Richard G. Hirsh, "The Reform Movement's Zionism: Radical Changes", *Forum* (1978) 74.

23 *Tractate Bekhorot* 30b.

24 For an in-depth analysis see Avi Sagi and Zvi Zohar, *Conversion to Judaism and the Meaning of Jewish Identity* (Jerusalem, 1994) (Heb.).

observe Sabbath, without going into details, so as to enable the candidate to be honest in his or her answers. After the conversion ceremony the candidate would receive a conversion certificate from the *Bet-Din*, as well as from the Conversion Board. The Denver Conversion Program came to an end, after performing about 150 conversions, due to pressure put on the Orthodox members of the Program after the Program became publicly known.

Other efforts at cooperation between the different streams, in *Halachic* matters, took place elsewhere in the United States. Best known is the agreement, reached between Rabbi Joseph Dov Soloveitchik and Professor Saul Lieberman, to establish a joint Orthodox-Conservative *Bet-Din*. This program never materialized. As for the reason for this failure there are conflicting versions: while the Conservatives accuse Rabbi Soloveitchik of succumbing to ultra-Orthodox pressure, the Orthodox version is that the efforts were stopped after Professor Lieberman turned down a demand to disapprove of any rabbi who would not follow the agreement.

The Denver experience was studied by the Ne'eman Committee with the intention of adopting it in some form. Moreover, the Committee is determined to reach an agreement on marriage and divorce as well. The idea is to approve non-Orthodox rabbis as marriage celebrants providing all *Halachic* requirements are met and two *Shomrei Shabbat* witnesses are assigned by the Chief Rabbinate. The Committee's consideration of matters of personal status seems highly important. The problem of the Reform Movement not following *Halacha* regarding *gittin* (divorce) seems to be one of the major problems in American Reform Jewry. An estimate of the number of potential *mamzerim* created by the year 2000, as a result of this attitude, thus banning them from marrying Orthodox Jews, quotes the horrifying number of 100,000-200,000 in the United States alone[25]. To prevent this outcome, the late Rabbi Moshe Feinstein ruled that Reform marriages were invalid since Reform rabbis were invalid rabbis. An additional estimate of 270,00-360,000 Reform converts and 220,000 children of patrilineal descent brings the number of "American Jewry… socially and *Halachically* separated from traditional Jews" to 15%-20%[26].

The Ne'eman Committee is determined to deal with all this, as well as with other matters pertaining to non-Orthodox communities, such as membership in Religious Councils and the prayers at the Wailing Wall. Will it succeed in its ambitious mission? Just one aspect of the Committee's task - solving the "Who is a Jew" problem - was regarded, by Professor Akiva E. Simon, in his response to Ben-Gurion's application to the Sages of Israel, as an attempt at "squaring the circle". Yet, Ne'eman may already claim one major achievement to his credit: he succeeded in bringing together representatives from all three streams of Judaism to discuss matters of national survival. It may be hoped that the relations between Orthodox and non-Orthodox Jews will not be the same after this cooperation, even if adopted by the Orthodox representatives for tactical reasons.

Should the Ne'eman Committee fail in its task it is submitted that the right action to take would be to accept the recommendation of the Supreme Court, at the outset of the *Shalit* hearings, almost three decades ago, and erase the entry of nationality from the Population Registry. Three major reasons have been put forward against such a solution: the registration serves as a rein against Jewish assimilation in the Diaspora; its erasure would be the beginning of an erasure of Jewish identity and it would frustrate Jewish solidarity. Finally, the argument has been made that it is vital for security reasons.

It is hard to be convinced by the ideological justifications of the registration. It seems that excessive importance is being attributed to it. It may be doubted whether Jewish identity and solidarity is so weak that they must lean on the registration. It is a fact, moreover, that the registration has no effect on Jewish assimilation rates, rather it is a source of major dissension among the Jewish people. As for the security argument, it is raised by politicians rather than by security forces. In any case, this argument does not justify drawing a distinction between different converts[27].

When seeking a solution it is appropriate always to remember President Agranat's warning:

> "The miraculous establishment of the State of Israel and the renaissance of the political entity of the Jewish People in their homeland did not come about to divide and splinter the Jewish nation. Such a split, should it, Heaven forbid, ever occur, would be in dire contradiction to the national aspirations for which the State was established, and undermine the unity of the Jewish People as a whole" [28].

25 Irving Greenberg, *Will there be One Jewish People by the Year 2000?* (New-York, 1985)1

26 *id*, at 2.

27 A further solution considered by the Ne'eman Committee is the adoption of a modified version of the *Miller* suggestion: to register all converts as Jews in the identity cards and note the fact that they are Jews by conversion in the central registration only for the benefit of the Marriage Registrar.

28 C.A. 630/70 *Tamarin v. The State of Israel*, 26(1) P.D. 197, 221.

Address to the International Association of Jewish Lawyers and Jurists, South African Chapter, upon presentation to South Africa's Constitutional Court of *The Record of the Trial of Adolph Eichmann*, 26.11.1997

The Short Twentieth Century

Arthur Chaskalson

In *The Age of Extremes*, Erich Hobsbawn writes a history of what he calls "the short twentieth century". It is a monumental work covering the period 1914 to 1991. The period begins in Sarajevo, with the assassination of Arch-Duke Ferdinand - the event which precipitated the First World War, which was the most brutal war that the world had yet witnessed. It ends in Sarajevo with the siege of the city and the genocidal actions euphemistically termed "ethnic cleansing". It is, as Hobsbawn says, a period during which "more human beings had been killed, or allowed to die, by human decision than ever before in history".

Derek Walcott, the Caribbean poet and playwright who was awarded the Nobel prize for literature in 1992, says in relation to his own work:

> "The goal of theatre and poetry must be to explore the origins of aboriginal calamity, but more important than this is to search below these origins for the deeper questions of who we are and what our nature is, what mix of good and evil we are capable of?"

Asked about this he elaborated:

> "If one comes from a history in which the background is genocide and slavery, poverty and colonialism, and one still sees it around, not only residually but almost actively, then you ask, of course, is one race alone capable of genocide, capable of enslaving another? And you know this is not true. Every race is capable and has had slaves and has had tyrants. Now maybe that's just sociological, but the deepest question of the twentieth century has to be the question of the Holocaust. I still think there is no historical event equal to it. I am not talking only about the extermination of the Jews. I am talking about the kind of reasons that scientifically, not ethnically, justifies the experiments of extermination. And whether that is not the depth of corruption of the human mind."

The trial of Adolph Eichmann is an account of that corruption. It records not only events and attitudes which have counterparts in other tyrannical or oppressive orders, but also, events and attitudes which are unique in that they are taken to extremes which even in the short twentieth century - the age of extremes - have no parallel.

The trial record which is presented to the Constitutional Court today contains evidence of events and in terrible detail, accounts of how the Holocaust was implemented. It all began with a series of laws and regulations which were enacted between 1933 and 1935 as a result of which Jews were marginalised, excluded from the civil service and liberal professions, and turned into citizens of inferior status. The judgment makes the point that the Nuremburg citizenship law:

> "served as the main basis for the discriminatory legislation against the Jews which followed afterwards."

The next stage involved steps taken to secure the removal of

Mr Justice Arthur Chaskalson is President of the Constitutional Court of South Africa.

Jews from the Reich territory. Initially this was done according to directives which required:

1 The concentration of Jews in ghettos in the large cities "in order to have better control, and later for evacuation".
2 The setting up of counsels of Jewish elders.
3 The deportation of Jews from the Reich to Poland.

In 1941 a regulation was published which obliged Jews of German nationality to wear the Jewish badge (a star bearing the word "Jew") from the age of 6, and forbade them to leave the district of their residence without special permit.

The process of denationalisation, exclusion from occupations, forced removals, and controls on movements and places of residence and the co-option of victims of oppression to run councils of the oppressed, have a resonance for us in South Africa for these were all techniques used under apartheid.

What happened subsequently in Germany, however, has no parallel. It was as Derek Wolcott has described it to be, "the depth of corruption". According to evidence given at Eichmann's trial, plans for the final solution of the Jewish problem were outlined in a speech made by Heydrich at the Wawnsee Conference in November 1941.

> "Under suitable direction the Jews shall be brought to the East in the course of final solution for use as labour...
> Without doubt a large part of them shall fall away through natural losses. The surviving remnant, surely those with the greatest powers of resistance, will be given special treatment, since if freed, they would constitute the germinal cell for the recreation of Jewry, they being the result of natural selection, as history has proved."

Evidence was also given in regard to the implementation of the final solution. Throughout the occupied territories Jews were thrown into ghettos from whence they were deported to Auschwitz and other camps. There they were put to work until they died or were exterminated. The process probably reached its peak during 1944 when, according to the judgment, in a period of less than two months between May and July 1944 over 400 000 Jews were deported from Hungary to Auswitch. As the judgment says, "the Auschwitz gas chambers were working to full capacity and could hardly cope with the pace of the transports".

The trial record also contains evidence of attempts which were made to cover up the traces of what had happened. A special unit was established to uncover mass graves and to remove the bodies and dispose of them. One of the witnesses describes what happened as follows:

> "We used to uncover all the graves where there were people who had been killed during the past three years, take out the bodies, pile them up in tiers and burn these bodies; grind the bones, take out all the valuables in the ashes, such as gold teeth, rings and so on - separate them - we used to throw the ashes up in the air so they would disappear, replace the earth on the graves and plant seeds so that nobody could recognise that there ever was a grave there."

How could this happen? This is a question that is asked time and again in different parts of the world, as people of a country look back on what has happened when oppressive regimes collapse, as they inevitably do. There is no answer to this question. There are, however, two factors common to such episodes. First, the dehumanising of the victims, so that it becomes possible to treat them as objects rather than human beings of worth, and secondly, the silence of people who stand by and do not raise their voices against the dehumanising process. It is striking that in Denmark, where the population from the King to ordinary people voiced resistance to the deportation of Jews, only 202 Jews of Copenhagen fell into German hands.

The Eichmann trial records what happened during the Holocaust. The Truth and Reconciliation Commission is compiling a record of what happened in our country under apartheid. The compilation of such records, is important for they establish historical facts which become blurred and disputed over time if the testimony of witnesses who have knowledge of the events is not taken scrupulously and contemporaneously.

We need such records, not only to prove what happened, but also to help us to avoid history repeating itself. The Constitutional Court is the guardian of the new Constitution and of the rights enshrined in it. It is appropriate that a record of the trial of Adolph Eichmann should be available in the library of the Court where it will serve to remind us of the corruption of which people are capable and of the need for vigilance in fighting racism and other forms of discrimination when they first occur. What history tells us is that if we do not stamp out such evils when they first occur, it is much more difficult to do so later.

Hobsbawn points to the irony that the century of the greatest destruction and inhumanity has also been the century of the

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Message of the President of the Association, Judge Hadassa Ben-Itto, on the occasion of presentation of the *Eichman Trial Records* to the Constitutional Court of South Africa.

In these times, when denial of the Holocaust has become widespread, the record of the Eichman Trial has become a major historical document. For generations to come people will read the sworn testimony of live witnesses who described in a court of law in Jerusalem what men and women, born in the image of God, as we all are, had done to their fellow human beings. It is therefore of the utmost importance that the record of this trial be distributed as widely as possible, as a reminder and as a warning.

I commend the South African branch of our Association for their initiative in presenting the Eichman record to the judges of the Constitutional Court of South Africa. I wish I could be there with you to share in this important event, and I take this opportunity to greet our members and to pay my respects to the President and to the judges of this illustrious court.

South African courts played an important part in the annals of the struggle against anti-Semitism, and it seems proper to say on this occasion that we have not forgotten.

In the dark days of the early thirties, when Nazi associations were springing up around the world, there were a few attempts to fight them in the courts of various countries. One of the most famous trials took place in Grahamstown, against the leaders of the Nazi group which called itself the "Grey Shirts". They had forged a document, allegedly stolen from a Jewish synagogue, which purported to be a satanic Jewish plan to undermine the legitimate government of South Africa and establish Jewish domination of the country, as part of the Jewish Conspiracy set out in the famous, or should one say infamous, *Protocols of the Elders of Zion*.

The two judges, Judge Graham and Judge Gutsche, ruled against the defendants in the civil trial initiated by the Rabbi of the synagogue. They said that the document had been forged and that the existence of a so-called world plot organized by the Jews, with the object of destroying "the Christian Church and religion generally and Judaizing the civilized world" had not been established.

The leader of the Grey Shirts, Harry Victor Inch, was later tried on criminal charges of forgery and perjury, and sentenced to a long prison term with hard labour. Judge Pittman delivered the sentence:

> "I am bound to say that I regard your offenses in a very serious light. Your conduct in hatching this plot was one that was calculated, I think, to work disaster of the most serious character on the community. You launched your plot with extreme recklessness as to the consequences, and in your furtherance of it you have been guilty of what I can only regard as a most flagrant attempt in this Court to pervert the course of justice... I cannot shut my eyes to the harm you might have brought to a community, and which in some measure you actually did bring about. Other persons who may be disposed to follow in your footsteps...must be warned by the sentence I impose upon you that any such indulgence on their part will meet with the severest retribution".

On October 29, 1934, all three Natal newspapers devoted a large amount of space to reporting a statement issued by the Minister of the Interior, Mr. J.H. Hofmeyr:

> "Unhappily, there is no lie so foolish but some witless folk will be found believing it, and no libel so cruel but eager zealots will give it wider currency once they hear it. People talk about the sacred rights of freedom being in peril, but the sacred right of freedom should not carry with it the license to propagate mass attacks upon communities or sections of a community, or any title to put into circulation statements that can only result in setting race against race, creed against creed or faith against faith. Unhappily it proves too often that those who talk loudest about civil freedom... are those least fitted to enjoy the rights they speak about... it is the business of the government to see at all times that negligible minorities are not permitted to go outside the bounds of legitimate propaganda and let loose such doctrines as are bound to breed counter-activities among people as earnest as they, with the inevitable result that the peace of the land is temporarily endangered".

Almost 60 years later, in 1991, the South African chapter of our Association was party to proceedings before the Publication Appeal Board which stated that the *Protocols of the Elders of Zion* were an "undesirable publication" under the laws of South Africa. In its decision the Board said:

> "South Africa finds itself in a fragile and transitory period where attempts to promote racial and ethnic harmony are of the utmost importance... the Board is convinced that the publication is inundated with material which is likely to offend both Jews and non-Jews. It has great potential for fanning racial tension and in the hands of malicious individuals could be used as a tool to that end... both Jews and non-Jews would be mortified by passages in the publication... the fact that the publication has been proven to be fraudulent but can be applied to reality makes it exceedingly dangerous".

The struggle against intolerance, discrimination and hatred is an ongoing one, and in this struggle, we men and women in the law have an important part to play. We must all stand up and be counted, using our professional expertise, our standing in the community and our dedication to the protection of human rights. The decisions of two South African tribunals should serve as a shining example of what courageous judges in unbiased courts of law can do.

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greatest material progress in which the living conditions of most people in the world have improved. The presentation of the record of the Eichmann trial inevitably strikes a sombre note. But we should also acknowledge and remember the good that has been done during the short twentieth century.

I have no part in the presentations which are to be made tonight, but I would not like to end my remarks without expressing my appreciation to those whose service to the profession is being recognised. Derek Wolcott in his comments about the Holocaust says:

> "But then as profound and as shattering and unanswered as that question is, at the same time that this is happening, there may be a large number of human beings doing good. The ..... doctors or generals smoking behind glass and watching Jews being gassed is not multiplied by every single individual in the world. You can ask how can such a thing have happened. But no question is ever asked about good. Nobody ever asks why do men do good? The act of doing good, of being charitable, does not have a question attached to it".

Hon. Deputy President of the Association, Justice Cecil Margo (right) making the presentation of the *Eichmann Trial Record* to Judge Arthur Chaskalson.

The members of the legal profession who are being recognised tonight have lived through most of the short twentieth century. They have helped keep alive principles of law and standards of ethics which are an important legacy for us who follow after them in the profession. We recognise them for that tonight, thank them for having done so, and hope that they will continue to share their wisdom and experience with us for a long time to come.

I would like to thank you on behalf of the Constitutional Court for these remarkable volumes which will have a place of pride in our library.

New Scottish Branch Inaugurated

The Association is pleased to announce the establishment of a Scottish branch of the Association. The inaugural meeting was held on 30th November, 1997, in Parliament House in Edinburgh, the home of the Scottish Supreme Court.

Participants included lawyers and judges from Edinburgh and Glasgow and a delegation from the English branch, headed by Judge Myrella Cohen QC, Chairman of the English branch.

The participants were welcomed by two Scottish judges, Lord Caplan, an appeal judge in the first division of the Scottish Supreme Court's Inner House, and Lady Cosgrove, a judge of the Supreme Court. Judge Myrella Cohen read a message from the Hon. President of the U.K. branch, the Rt. Hon. Lord Woolf, Master of the Rolls and explained the history and functions of our Association.

Left to right: Sheriff Gerald Gordon, Lady Cosgrove, Judge Myrella Cohen, Mr. Leslie Wolfson, Sir Alexander Stone, Lord Caplan.

Face to Face with His Past

Joseph Roubache

More than 50 years later, the trial of Maurice Papon, the acts of repentance made by the highest French institutional bodies, and the declaration by the President of the Republic, Jacques Chirac, concerning the responsibility of France for the fate of the Jews during the Second World War, have suddenly brought to the surface the painful memory of the acts of the "French State", led by Marshal Petain between 1943 and 1944, a State which is usually referred to as the "Vichy regime."

The Trial of Maurice Papon

Today, Maurice Papon is 87 years old.

He had a brilliant career as a top civil servant. Appointed by General de Gaulle, he was the *Prefet de Police* (Chief of Police) of Paris from 1958 until 1967. Subsequently, he was elected as a Member of the National Assembly. He was then Budget Minister from 1978 to 1981.

After a criminal investigation lasting more than 16 years (an initial investigation was set aside for procedural flaws), Maurice Papon was accused of aiding and abetting "crimes against humanity", for having, in his capacity as General Secretary of the Bordeaux Prefecture (Police Headquarters) from 1942 until 1944, in particular, "actively assisted the German authorities" in organizing 11 convoys or trains taking 1,560 Jews from Bordeaux to Drancy, and then to Auschwitz, where most of them died.

According to the charge:

> "As the Jewish Affairs Department acted under the responsibility of Maurice Papon, and according to his instructions, Maurice Papon fully cooperated with the German authorities in all stages of the operation..."

The charge adds that Maurice Papon:

> "placed at the disposal of the Hitlerian schedule for the extermination of Jews, the logistics of the Police Headquarters' offices, a vital cog in the process of destruction..."

The Progress of the Charge

Begun about a month ago, the trial will go on until next spring, if Maurice Papon's health allows. The private parties to the criminal case are represented by some 20 barristers. Various incidents have already taken place during the trial. The first of these was the fact that Maurice Papon was allowed to remain free - from the moment the trial began. Indeed, by clever arguments, his lawyer convinced the jury that a "fair" trial required that, because of his age, Maurice Papon should be "free", not only physically, but also to prepare his defence with the aid and assistance of his lawyers.

According to a public opinion poll, 70% of people said they were "shocked".

Subsequently, the same people began to feel sorry for this old man, the only Vichy civil servant to be prosecuted for deeds committed when he was in office. These people were certainly influenced by the "personality inquiry" concerning Maurice Papon's life outside the wartime period.

During the inquiry, the jury heard key figures, such as two former Prime Ministers, Raymond Barre and Pierre Messmer, and even the Permanent Secretary of the French Academy, Maurice Druon, a famous symbol of the French Resistance (nephew of Joseph Kessel, and author of *Chant des Partisans*), who all bore witness in his favour, from the point of view of esteem and morality, with respect to the impor-

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M. Joseph Roubache is President of the French Chapter of the Association

tant duties he had carried out under their authority.

However, an unexpected event also shook the prosecuting lawyers, when an historian, who had initiated the charges, changed his position and acknowledged that Maurice Papon could take credit for having played a "double game" and "saved Jews".

Another unexpected event took place, when it was claimed that a former Ambassador of Israel had given a weapon to Maurice Papon as a token of gratitude for services rendered to the Jewish people, when he was Chief of Police in Constantine in the 1950s.

The person who made this alleged dedication does not remember...

The lawyers acting for the private parties in the criminal case deny that any such dedication was made.

Finally, the U.S. historian, Marcus Paxton joined the proceedings and evoked the Vichy regime's responsibility for the fate of the French Jews during the war.

The facts had not been properly examined, however, when Maurice Papon became ill and was hospitalized.

The trial was suspended but the matter is not yet over.

Reactions

France is highly interested in the Maurice Papon trial. It is important because this will be the first and last trial of a French civil servant, concerning his duties and acts in the persecution of French Jews. Every day the press and television give an account of the trial. In addition, young people are discovering, often to their amazement, the reality of the Vichy regime's dishonest compromises with the German occupying forces.

However, in contrast to these positive aspects, Maurice Papon's trial has given certain people a chance to re-open an argument which people thought was over once and for all, in relation to France's responsibility for deeds committed by the French State under the authority of Marshal Petain.

To understand the background to this argument, it should be remembered that, after the War, General de Gaulle considered the Vichy regime to have been "illegitimate", and that consequently, it could never have represented "France".

The Maurice Papon trial is important because this will be the first and last trial of a French civil servant, concerning his duties and acts in the persecution of French Jews

Only "fighting France", that is, France under his authority and which had carried on the war alongside the Allies, in particular Great Britain and France, had the moral right to personify the real France, the one which obtained the right to be invited to sit at the table of the victors.

This claim was based on the following legal argument: On 10 July 1940, the French Members of the National Assembly delegated their powers to Marshal Petain. However, such a delegation of powers was illegal and of no effect, because the Assembly members were empowered by the people and could only return their powers to the people. Further, such a delegation of powers meant that Marshal Petain was bound to submit a new constitution to the French people for approval. This was not done. Nevertheless, as of 12 July 1940, Petain exercised full powers in the name of the "French State".

Naturally, one may attempt to refute this by saying that, whatever the case, the State called itself "French", and was served by civil servants who had sworn an oath of allegiance to Marshal Petain.

The Anti-Semitic Acts of 9 October 1940 and 2 June 1941 concerning the "aryanisation of Jewish property" were decreed and applied in the name of this French State.

Finally, in both the so-called unoccupied zone, unoccupied until the end of 1942, and in Algeria, a French overseas "department" (county) at the time, these racial laws were applied with rigour, indeed with enthusiasm, although there were no occupying German forces or other presence whatsoever which could have been used as a pretext or an alibi. Moreover, even after the Americans landed in Algeria in November 1942, these racial laws were maintained by the French authorities - through to March 1943. At the time, the Governor of Algeria, Marcel Peyrouton, continued to justify these laws, declaring to a group of well-known Jews that "the Jews had been declared responsible for the War and the defeat and that... Algeria was still France."

The Declarations of President Jacques Chirac

It was in this context that Jacques Chirac, the President of the Republic, stated on 2 November that:

> "Two years ago, I insisted on formally acknowledging the responsibility of the French State in the arrest and deportation of thousands and thousands of Jews.
> Yes, betraying France's values and mission, the Vichy government sometimes zealously aided and abetted the occupying forces."

Hopefully, such a declaration will put an end to the argument about France's responsibility during the Second World War with regard to the Jews.

It also evokes the duty to remember:

> "50 years after, our country must assume its entire history, both the white areas and the gray ones. It must assume the glorious parts, as well as those parts hidden in shadow. In order to build its future on a clearer basis 'our country' is today accomplishing a difficult task of remembrance."

Acts of Repentance

It is a fact that the duty of remembrance is first and foremost a duty towards oneself.

Thus, the Catholic Church of France, in an act of repentance, read out on 1 October 1997, at Drancy, a highly symbolic place, declared that:

> "No society or individual can live at peace with itself, with a repressed or untruthful past."

In its message it added:

> "Confronted with the dimensions of the tragedy and the unspeakable nature of the crime, too many of the Church's clergy, by their silence, offended the Church itself, and its mission.
> Today, we confess that this silence was a fault.
> We also acknowledge that the Church in France thus failed in its mission as educator of consciences, and that, consequently, along with the Christian people, it bears responsibility for not having provided aid and assistance right from the beginning, when protest and protection were still possible, and necessary, even if, subsequently, countless acts of courage were carried out."

This act of repentance made "to God" was "understood" by the Jewish Community of France, as a sign of a truth at last shared, with the feeling that, without wiping out the past or allowing it to be forgotten, the pardon thus asked for would open up the road of dialogue and hope.

Jacques Chirac: "Two years ago, I insisted on formally acknowledging the responsibility of the French State in the arrest and deportation of thousands and thousands of Jews".

Before the Catholic Church of France, other institutional bodies had also made acts of repentance.

Following Robert Badinter's book *Un Antisemitisme Ordinaire, Vichy et les Avocats Juifs 1940/1944* ("Everyday Anti-Semitism, Vichy and Jewish Lawyers 1940/1944") the Association of Barristers of Paris also expressed its contrition and repentance for having kept silent when barristers were forbidden to exercise their profession during this period.

The Medical Association and the French police force followed suit.

These acts of repentance were generally well accepted, in particular, by practicing Catholics, according to opinion polls. On the other hand, there were those who saw in them a sort of masochism, or even a surrender to Jewish demands for vengeance.

Such unhealthy attitudes are dangerous, because they could, once again, stoke up anti-Semitic feelings. This is why any attempt to place these painful events in their proper perspective must be welcomed.

The Tribute to the Righteous of France

On 2 November 1997, in Thonon-les-Bains, the Jewish Community of France, along with *Yad Vashem* took the initiative of paying tribute to some 1700 "righteous" non-Jewish French people, who, often at the risk of their own lives, saved Jews and allowed almost two-thirds of France's Jews to be saved from Nazi barbarity.

For his part, the French Prime Minister, Lionel Jospin, on 28 November, announced the renovation and extension of the contemporary Jewish Documentation Centre and the Jewish Memorial, a place of remembrance and prayer.

More than 50 years later, France is looking back on its past, often with surprise, sometimes with humour and annoyance, but, nevertheless, also with lucidity and courage.

American Nazi Convicted in Germany

Special Report

On the 27th August 1996 L. an American citizen, was found guilty of incitement of the people (*Volksverhetzung*), incitement to racial hatred (*Aufstachlung zum Rassenhaß*), distribution of propaganda (*Verbreitung von Propagandamitteln*) and use of emblems of an unconstitutional organisation (*Verwendung von Kennzeichen einer verfassungswidrigen Organisation*) and sentenced to a prison term of 4 years by the Regional Court (*Landgericht*) of Hamburg.*

The following is a partial translation and summary of the Regional Court's opinion:

Concerning L. himself:

L. was born in 1953 in Milwaukee/Wiskonsin/USA, a town where a lot of Americans of German origin lived. His grandparents, great admirers of Bismarck and the German Empire, emigrated from Germany before the First World War and were keen on maintaining their German national pride in their new home country America. L.'s parents themselves were brought up with these ideas and readily accepted Hitler's National Socialism and the Third Reich as the natural and historical successor of the German Kaiser Reich. As a consequence L. who learned German at his grandparents' home, also received this kind of German nationalist education to the extent that Hitler became a synonym for Germany, his fatherland. In 1964 the family moved to Lincoln/Nebraska. In the new neighbourhood where no people of German origin lived, L. felt lonely and rejected as a "Kraut". This pushed him even more towards national socialist ideas. He attended Lincoln High School, joined a National Socialist movement (*NS-Kampftruppe Horst Wessel*), studied various subjects for two years at Nebraska University and began writing National Socialist pamphlets. At the same time, he was the propagandist of the National Socialist Party of America. In September 1972 he visited Germany for the first time in his life in order to meet with like-minded people. At the age of 19 he founded an organisation called NSDAP/AO in Lincoln, a kind of foreign agency of the former NSDAP with the goal of promoting and strengthening the Neo Nationalist Movement. In a strategy document he expresses his conviction that it is necessary to arouse and strengthen the will of the German people to fight against the imminent decline of the Arian race and its ideology. He also declares that "*Mein Kampf*" is the ideological basis for the NSDAP/AO. "*NS-Kampfruf*" (NSK) was the organ of the NSDAP/AO. It was published irregularly from 1973, quarterly from January 1976 and later every two months. Right from the beginning, L. was the publisher, chief editor and distributor of this newspaper. In 1976 L. was arrested in Germany and sentenced to 6 months detention on probation for illegal entry into Germany and Nazi propaganda. Soon after he was deported.

L.'s criminal activities:

According to L.'s strategy document the most important task of the NSDAP/AO was to provide the NS-movement in Germany with propaganda material. In order not to endanger the distribution of the propaganda and the addressees, L. took several precautions. He did not send the material directly to Germany but first to other towns in the US, and from there to Germany in a way that the sender's address did not appear on the envelopes. Fictitious addresses were used, sometimes even Jewish names like Birnbaum, Finkel and Rosen.

This material was translated and supplied by courtesy of the German Embassy in Tel Aviv. By reason of German law, we are unable to publish the full name of the convicted criminal in this case.

* The decision of the Regional Court was upheld on appeal (which was limited to points of law alone) by the Federal Court of Justice (*Bundesgerichtshof*) on 5th March 1997.

L. also published several other periodicals in different languages, e.g. in English, French, Spanish, and Swedish and distributed them in other European countries. In addition, he distributed other NS-publications and materials, especially former Nazi literature, Nazi badges, Swastika stickers, mini posters, banners, video and audio tapes.

Altogether L. managed to smuggle his NSK-newspaper into Germany for over 20 years.

Although L. distributed his propaganda during a period of about 20 years, due to the legal limitation period only a relatively small part of his criminal acts could be taken into account for the judgement. Therefore the Court only considered the mailing of six editions of the NSK from April 1994 to March 1995, namely editions 107 to 112, of which only a small part was confiscated by the customs authorities.

It was not clear how many copies of each edition were regularly produced. Estimates ranged from 2,000 to 10,000. According to the principle of *in dubio pro reo* the Court assumed 2,000 copies *per* edition.

The Court's opinion included several citations from the contents of editions 107 to 112 of which the following are the most striking:

> From the essay: "Antisemitism? We experience anti-Germanism" by "Germanicus":
> "It seems to be necessary for the Jews and the State of Israel, that the peoples of the world continue to believe in the so-called "*Vergasung*" (gassing) of the Jews during the Holocaust. It has nothing to do with "*Vergangenheitsbewältigung*" if today Germany fights against the Auschwitz lie, the legend of the "*Vergasung*" of the Jews. Peace for Israel and the Jews all over the world is only possible through the recognition of the truth. Are the Jews ready for this? The confession of the Jews that in German concentration camps at no time "*Vergasungen*" of Jews took place, will be one of the conditions for peace with Germany."

A fictitious dialogue between "Mark Edelschwein", director of a Jewish marketing organization, and the film director "Spielhügel" (Spielberg), contained praise for a so-called expert on gas chambers. In this dialogue, "Edelschwein" urged "Spielhügel" to save the lie concerning the "*Vergasung*" by the means of further falsification:

> " ...The Holocaust is beginning to become doubtful. All efforts of scientific investigation were blocked by us, but people no longer believe in the Holocaust. But we need the 6 million ... ! We need a film to change this development." (from: "The making of Schindler's list" by W.)

Edition 109, September/October 1994, The "NS-Boomerang" by L. himself:

> "Especially in this time of the persecution of all national and national socialist forces in the Federal Republic of Germany activists are tempted to think about an armed struggle. Not bombs and rifles, but national socialist propaganda, on a massive scale and conspicuous!
> Shall the countries of Eastern Europe after the Jewish dictatorship of communism be fleeced again by the Jewish dictatorship of Western Liberalism? The decadence spreading in Europe has no future since the peoples are not as stupid as the Wall Street Jews had imagined and hoped. The fight of the Eastern European is also our fight, the fight against Jewry."

It ended with a fictitious newspaper report from the year 1919:

> "Hitler recognized early: the ultimate goal of the Jews is the denationalization, the bastardization of the other peoples, the lowering of racial levels of quality, the domination of this racial mush by means of the extermination of their national intelligentia and its replacement by Jews. The Jews brought and still bring the Niggers to the Rhine. Their goal is to destroy the white race by bastardization, to end their cultural and political supremacy and to become the ruling party. These black parasites methodically rape our inexperienced young blond girls and destroy something which cannot be replaced! It is our task to stop this mortal development".

Edition 110, November/December 1994:

> "The Holocaust lie is a method to make politics; the lie is an alibi for the existing world order, which was built up by the Jews. The Holocaust lie is necessary in order to eliminate National Socialism forever. Hitler knew the enemy: the international Freemason Jewry. This enemy forced him to the war in which National Socialism should have been eliminated. There is not much to say about the so-called destruction of the Jews; this fairy tale which was spread after the war in order to eliminate National Socialism is the biggest fraud in history. The inventors of the 6 million blackmail trick were the secret services of the allied forces who collaborated with the Zionist World Congress."

Edition 111, January/February 1995:

> "People believe more in the prattle of ill minds than in scientific

documentation, facts and evidence. Poor mankind that bursts into tears in the face of Spielberg's trash instead of thinking about the documents of an expert on gas chambers."

Edition 112, March/April 1995:

"Hitler was the greatest of all leaders. His legacy is his concept of world justice which is based on the system of an Arian National Socialism. All whites have to understand that they are brothers and that they have to defend their superiority against the black pestilence which comes from Africa and "niggerizes" the world and against the puppeteers sitting in Israel, in Wall Street and in Bonn holding the strings which will strangle the white peoples."

The edition also contained a fictitious report. A Jew called "Chaim Schweinmann" claims that during the Third Reich he, together with 500,000 others, was held prisoner in a two room apartment which served as a gassing plant. The reporter mocks this Jew:

"A view into the shower arouses a sense of foreboding: the number of people gassed here must have been high. Survivors reported that in this shower up to 30 people were killed simultaneously. One of the survivors starts trembling when he touches the tiled stove. Tears can be seen in his eyes while he states that this stove was the crematorium. By examining this location of horror it can be seen immediately how much pain it must have caused: there is no lift, the deportees had to climb the stairs. Many of them died of exhaustion. The kitchen: a picture of torture. Survivors remember that human beings were slaughtered when the müsli was rationed."

The mailings regularly contained additional propaganda materials such as stickers, badges, brochures, posters and banners. The NSK was the personal work of L. He was responsible for the newspaper, he gathered articles from others and wrote his own articles, he was well-informed on the contents of the editions. He organised the distribution of the paper. Although there was no evidence that he himself cared for the technical side of the distribution, it was proven that his employees followed his directions.

Before considering the legal aspects of L.'s crimes, the Court noted L.'s arrest in Denmark, his extradition to Germany, the development of the NSK after L.'s arrest, the fact that he did not cooperate with the Court out of protest, the Court's consideration of the evidence and the fulfilment of the formal procedural requirements.

Incitement of the people

In respect of L.'s crimes the Court concluded that he was punishable according to § 130 of the *Strafgesetzbuch*, the German Penal Code (GPC), of the version in effect at the time[1]. L. had committed the criminal offence of incitement of the people which reads as follows:

A person is punishable who attacks human dignity in a way which is capable of disturbing public peace and order - by inciting hatred against parts of the population and by insulting them, spitefully making them detestable or slandering them.

L. had fulfilled the prerequisites of § 130 of the GPC by heavily insulting the German Jews and the Jews in Germany and describing them as enemies of the world, the misfortune of mankind, warmongers, bloodsuckers, the ruin of the races, exploiters, notorious hypocrites and liars, blackmailers, and counterfeiters as well as by stating that Hitler was the only person who knew how to cope with the Jews and that Hitler nowadays should be a model for Germany and the world. By speaking in such a way he branded the Jews as vermin and subhuman creatures and attacked their human dignity. This was not only capable of but also intended to endanger public peace and order in Germany.

According to § 3 and § 9 of the GPC, L. could be punished in Germany. According to § 3 of the GPC, the German penal law is applicable to crimes carried out within Germany. According to § 9 crimes are considered to be carried out "within Germany" if the result of the crime happens in Germany or if it was the criminal's intention that it should happen in Germany. L. pumped his propaganda over the ocean into Germany, he never let the stream of mail dry up in order to cause the effect described in § 130 of the GPC. L., who in protest never personally cooperated with the Court, defended himself through his lawyer by saying that he was being judged according to doubtful political laws. In his opinion the application of German penal law to punish an American publisher in Germany for acts which are considered

1 On October 28, 1994 the 23rd amendment to the German Penal Code - which took effect on 1 Dec. 1994 - was approved by the *Bundestag*. *Inter alia*, the Holocaust/Auschwitz lie which was considered a crime accroding to judge-made law under the former version of ß130, is now included in the new ß130 section 3.

legal in America was a violation of international law and human rights. The Court rejected these objections. L. obviously thought that "political" penal law, especially § 130 GPC violated a kind of "*ordre public*" of the Western nations since - in his opinion - it defined activities as a criminal offence which would otherwise be allowed and even protected by countries like America. Every State, however, defines the limits of freedom of action differently according to its own standards of tolerance and historical experience. The German tolerance level and historical experience were especially influenced by the blatant injustice and the mass crimes of the Hitler Regime. The Federal Republic of Germany understood itself right from the beginning as an antitheses to the Third Reich. The German Penal Code therefore contains laws whose purpose it is to prevent the re-emergence of organised National Socialism. § 130 of the GPC is one of them.

Incitement to racial hatred

L. had also committed the crime of incitement to racial hatred according to § 131 of the GPC (former version) which makes it a punishable offence to distribute material which incites racial hatred. The Court referred to the above deliberations concerning the reasons why the NSK was capable of inciting racial hatred.

Distribution of propaganda material

Furthermore the Court found that L. had committed the crime of distribution of propaganda material. According to § 86 section 1 (4) (former version) a person who distributes propaganda which is intended to continue to support the goals of a former National Socialist movement is punishable. L.'s final objectives announced again and again in his NSK, satisfied § 86 GPC.

Use of National Socialist Emblems

L. also violated the ban on distributing national socialist emblems since the editions 107 to 112 were full of national socialist signs and symbols.

The Court considered L.'s criminal actions to be one prolonged action in terms of penal law. This ensued from L.'s continuous assembly-line-like production of propaganda directed to Germany. With this prolonged action L. violated several penal laws. The sentence therefore followed § 52 GPC which provided that the crime in penal law carrying the highest penalty was applicable, in this case § 130 GPC which laid down a penalty of 3 months up to 5 years.

In laying down the length of the sentence the Court took into consideration the following factors amongst others:

- Because of the intensity and the duration of L.'s activities, considered as one action in legal terms, this action carried a heavy weight. Even though there was no evidence that L.'s propaganda actually caused extremist acts of violence, there was no doubt that this propaganda was a real danger.
- L.'s propaganda machine was enormous. For over 20 years he ran an organization producing large amounts of propaganda. Due to the limitation period, however, the Court could punish him only for crimes in connection with the distribution of the aforementioned editions of the NSK which were published within the last two years.
- L.'s biography explained the development of his convictions and showed his extreme fanaticism and aggression. L. had committed his crimes out of conviction.

Mark Your Calendar: Weekend in Salonica, Greece June 25-29, 1998

Please make a note of the first in a series of forthcoming seminars of our Association, in various European capitals, to commemorate the Jewish lawyers and jurists who perished in the Holocaust and their contribution to the law in their country.

The weekend in Salonica will include lectures, discussions, visits to various sights and receptions.

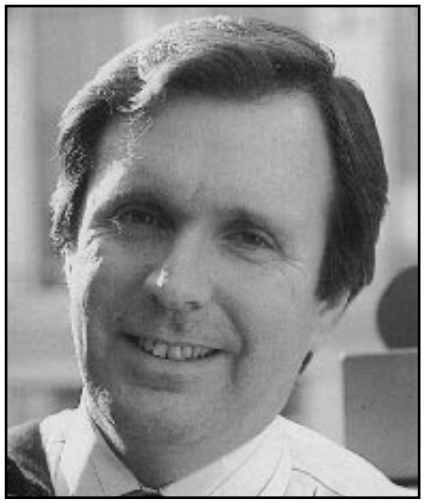
Details to follow.

Preliminary intention form to be completed and returned to our office in Tel Aviv as soon as possible to ensure your participation.

Anti-Semitism and Holocaust Denial in the Internet Era

Neal M. Sher

I would like to focus on the American aspect of Holocaust denial. One of the points users of the Internet may notice is how easy it is to get on line and make use of this form of communication. The potential for positive advancement is obvious and tremendous. The possibilities for evil, for damage to the Jewish people and for spreading hatred is also enormous. It is true that in relative terms the number of people who are spewing this poison is small compared to those who check into Paul Mcartney, want to peek into Buckingham Palace and the like, but anybody who searches the net will notice how easy it is for some of this hatred to pop up on the screen, and unless one is very sophisticated it is sometimes hard to tell the difference between what is true and what is a lie. Unless one knows who Bradley Smith is or Ernst Zundel or the Institute for Historical Review, and merely look at what is on the screen, some of the contents will appear quite professional. From a law enforcement perspective, there are serious doubts whether we can do anything to make a serious dent into the spread of this poison. But as Jews we all recognize, and our history has taught us very painfully, that it takes only a few people or even one person to do a lot of damage. So, the fact that there are relatively speaking so few of these Web sites or relatively few hits on these sites, does not mean that the issue should in anyway be minimized.



This is illustrated in the United States by the Timothy McVeigh Trial, which concerned the Oklahoma City bombing, the worst disaster in US history in terms of a terrorist act, in which only two or three people were involved. Much of the information which the White Supremists such as McVeigh, and the militia group of which he was a part, and to which he was sympathetic, used, came from specialist book shops, but that information is also much more easily available on the Web. The damage which may be caused by a few people cannot be underestimated. We, as Jews with our history and legitimate concerns, can never look the other way or say that it is not such a serious problem. It is true that if one reads the latest ADL Annual Report on what are characterized as anti-Semitic incidents, there is a reported decrease of 7% in the incidence of anti-Semitic incidents in the US in 1996, in other words, just over 1700 incidents were reported to various authorities. This is encouraging news, but the ADL like the Wiesenthal Centre, have begun to focus on the potential problems relating to the Internet. There, there has been an explosion of Holocaust denial and it should not be a surprise to us that all the anti-Semites, whether in the Middle East or elsewhere, use Holocaust denial as one of their essential threads, because they understand as we understand - the centrality of the Holocaust to the Jews as a people. That is why those who do not wish the Jews well, harp on the theme that the

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Mr. Neal Sher is President of the American Section, and former Director of the Office of Special Investigations (OSI) in the United States Department of Justice.
In December 1997 he was appointed advisor to Canada's War Crime Investigation Unit.
This article is based on Mr. Sher's presentation to the Association's World Council, in London July 1997.

Holocaust was a myth, a fiction in order to engender artificial support for the creation and now the continuing support for the State of Israel. Holocaust denial cuts to the heart of the Jewish people.

The question of what to do about it has no quick answers and no easy fixes. I am not optimistic that we can control it, and certainly not in the United States. The First Amendment is so broad, so encompassing, that while certain acts may be outlawed, and some dents can be made, in realistic terms we are acting on the fringes of the problem. There are debates in the US relating to the Telecommunications Act and First Amendment advocates, many of whom are Jewish, are extremely uncomfortable in imposing laws which they believe infringe upon the sacred First Amendment rights which America enjoys and which are the founding principles of the country. I do not see much hope in dealing with the problem through government regulation in the US.

Illustrative, is the difficulty we see in trying to curb pornography, and in particular child pornography, on the Web - a subject which is the focus of great interest in the US. Similarly, we have seen this problem in connection with Bradley Smith, who has specialized in operating on university campuses - where he discusses Holocaust denial in the name of free speech. In one instance Smith wished to publish an anti-Semitic advertisement in the daily newspaper issued by Cornell University, a sophisticated Ivy League institution. That advertisement was allowed in the name of free speech. Sadly, some of the members of the editorial board who voted to approve the advertisement were Jews. The issue of political correctness had come to the fore and in a reverse way was discriminating against the Jews, while one could not say anything negative about any other group of individuals or people of ethnic backgrounds or ways of life, one certainly could say something if it was packaged in a delicate or clever way which was highly offensive to the Jewish people. While this has little to do with cyberspace it highlights the fact that we have been dealing with the issue of Holocaust denial for many years and will continue to deal with it for many years to come.

The answer I believe has to be extra-legal. Sometimes we have to act more as Jewish activists and not so much as lawyers or jurists. In the US the way to deal with Holocaust denial is through education. Needless to say we have to encourage the Web sites which accurately depict, document and highlight the Holocaust and there are marvelous resources already in existence, for example, the site offered by the US Holocaust Memorial Museum in Washington DC. As to the museum itself, there were many people who doubted the importance or advisability of creating on the mall in the centre of our nation's capital, this huge structure dedicated to the remembrance of the Holocaust. Many Jewish leaders questioned it at the time. Now it is an ongoing operation. What is extraordinary is not only the powerful nature of the exhibits and displays but that over 70% of the visitors are not Jewish but come from all ethnic backgrounds, walks of life and ages. The Museum is on the official tour of all major tour operators; everyone sees it.

So while I am pessimistic as to what one can do in terms of law enforcement, it is evident when one looks at what is happening at the Holocaust Memorial Museum, that we can get to people's minds if we are smart, diligent, and if we do not let up. Politically, in the US at least, it is important that Holocaust remembrance be on the agenda. How extraordinary to see Senator Alphonse D'Almato of New York convene a hearing of the Senate Banking Committee, one of the most powerful committees in the US Congress, and bring before it leaders of the Swiss banking association and Swiss government officials, press them with question after question and admonish them about the way in which they were dealing with a whole range of Holocaust issues. This came about because of extra-legal political pressure applied by Edgar Bronfman and his colleagues at the World Jewish Congress. They went right to the heart of the matter. Even the Clinton Administration said that D'Almato, who is a Republican, was doing the Lord's work. Legal enforcement was not involved, but the case illustrates what impact political activism can have.

In terms of Holocaust denial, one of the biggest concerns is that it is a crime against Jewish memory, and the Jews are a people of memory, as Eli Wiesel so frequently points out. Thus, for example, I am very concerned with the likes of a man who is extremely well-known and accepted in many segments of the US, a man who - if one turns on CNN - one will see almost every night, a man who is seen on the network talk shows and who did fairly well in seeking his political party's presidential nomination, a man who writes a column and a man who is clearly an anti-Semite, traffics in Holocaust denial and who, by so doing,

continued on p. 37

The Internal Judicial System of the United Nations

Jerome Ackerman and Meir Gabay

In sharp contrast to somewhat controversial and well publicized *ad hoc* tribunals, such as those recently created by the United Nations to deal with war crimes in the former Yugoslavia and in central Africa. The United Nations Administrative Tribunal (UNAT) has functioned quietly and effectively within the Organization for almost 50 years. What it does, how it does it, and why it was created is largely unknown among the general public, as is the fact of its existence. Indeed, until lately there has not been a high level of media interest in the internal administration of the UN. That seems to be changing because of the UN's severe ongoing financial problems which threaten its viability. With this has come heightened outside media interest in uncovering cases of alleged incompetence, corruption and inefficiency, as well as in major organizational reforms. The UN is, of course, taking measures to deal with these issues. Inevitably, these lead to disputes between the Organization and its staff. This is where UNAT comes into the picture.

When the UN was established, it was recognized that provisions would have to be made for the resolution of employment-related and financial disputes between staff members and the UN administration. Concern for the morale of the staff and the efficient functioning of the organization obviously required that disputes not be permitted to fester and interfere with the performance of staff duties, or impede the UN in discharging its world-wide responsibilities. Initially, the means chosen for dispute resolution was a so-called Joint Appeals Board structure. This was a tripartite body in non-disciplinary cases consisting of one member designated by the staff, one member designated by the administration, and one member selected from a list agreed upon by the staff and the administration. A similar structure for disciplinary cases called the Joint Disciplinary Committee was also established. The Board or Committee was not permanent in the sense that the identical members considered every dispute. Each was made up of a varied group of staff members or officials of the organization who served as volunteers.

The Board or Committee, after considering the submissions by the staff member and the representative of the Secretary-General, would prepare a report explaining the facts of the case, the arguments of the parties, and a proposed resolution of the disputed issues. This would be submitted to the Secretary-General along with a non-binding recommendation as to how the

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Jerome Ackerman (top) is a retired partner of the Washington, DC, law firm of Covington & Burling and, between 1987-1995, was a judge on the United Nations Administrative Tribunal. Meir Gabay (bottom) is a former Director General of the Israeli Ministry of Justice who presently serves as a judge on the UN Administrative Tribunal. He was recently appointed Vice-President of the Tribunal. He is also the chairman of the Association's Council.

dispute should be resolved. It was then up to the Secretary-General either to accept the recommendation in whole or in part, or to reject it and resolve the matter in some other fashion. There was no appeal from the decision of the Secretary-General. As the UN was immune from suit in the courts, aggrieved staff members might often be left with the sense that these procedures were merely cosmetic, and did not provide a real solution for staff grievances. This fundamental problem led to the creation of the Tribunal.

In 1949, the General Assembly enacted a statute which established UNAT. The previously existing Joint Appeals Board and Joint Disciplinary Committee structures were retained, but the Tribunal was empowered to decide appeals by UN staff members[1] challenging administrative decisions adopted by the Secretary-General. However, the decision challenged had to be one that affected the staff member personally. Thus, the key to UNAT jurisdiction is a timely allegation by a staff member that a decision of the Secretary-General constitutes non-observance of his/her contract of employment or terms of appointment, including all pertinent regulations and rules. In addition, UNAT's jurisdiction embraces disputes between the UN staff and the Joint Staff Pension Fund, as well as pension fund disputes involving the staff members of all other UN agencies which participate in the UN Joint Staff Pension Fund. Although the statute provides that UNAT's determinations as to whether an appeal is within its jurisdiction are conclusive, until recently jurisdictional determinations by UNAT were, at least theoretically, subject to review by the International Court of Justice.

UNAT consists of seven members appointed by the General Assembly for three-year terms, which are staggered. Each year the term of two or three members expires. Not surprisingly, political affiliation, as well as qualifications, may influence nominations to UNAT by member states. No two members may be nationals of the same member state but unlimited reappointment is possible. There is normally representation on the Tribunal from the United States, the United Kingdom (including Ireland) and France as well as from elsewhere in Europe, Asia, Latin America or Africa. A few years ago Judge Meir Gabay, of Israel, was elected to the Tribunal by a significant majority of the General Assembly, and has since been reappointed for a second term.

UNAT members have varied backgrounds. Some have served as, or are concurrently judges in their home countries. Some members of the Tribunal have been lawyers with academic credentials or have been in government service; some have been in private law practice; and some have had diplomatic backgrounds.

The Tribunal normally holds two sessions a year, one in New York and one in Geneva. Cases are decided by differently constituted panels of three judges. Dissenting or separate opinions are relatively infrequent. Although the Tribunal must necessarily examine the facts in each case carefully, proceedings before the Tribunal are essentially appellate in nature. Most cases are decided on the basis of briefs submitted by the parties and the document dossiers, which are reviewed by the judges in advance of or during the sessions. Staff members may, if they wish, be represented by lawyers from outside the UN, by a staff member of the Organization, who is not necessarily an attorney,[2] or, with the permission of the Tribunal, by a retired staff member. The Respondent in each case, either the Secretary-General or the UN Joint Staff Pension Fund, is represented by the UN Office of Legal Affairs, or Pension Fund counsel, respectively. Occasionally, oral hearings are held during which the Tribunal may hear the testimony of witnesses in addition to oral arguments.

When UNAT finds that the Secretary-General's decision is flawed by (a) arbitrariness, (b) mistake of fact, (c) error of law, (d) bias, (e) extraneous factors, (f) violation of principles of due process, or (g) is otherwise unlawful, it may order the rescinding of the decision, or specific performance of an obligation invoked. If UNAT does so, it is required, at the same time, to fix the amount of compensation to be paid to a successful applicant for the injuries sustained should the Secretary-General decide in the interest of the UN, that the applicant should be compensated, without any further action being taken. Such compensation may not exceed two years' net base salary unless UNAT sets forth reasons for finding the case exceptional and justifying a higher indemnity. In practice, UNAT frequently orders the payment of compensation, without ordering rescission or specific perfor-

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1 UNAT also has jurisdiction over appeals by staff members of the UN Relief Works Agency, and of the specialized agencies within the common UN system that have agreed to the jurisdiction of UNAT. At present these are the International Civil Aviation Organization and the International Maritime Organization.

2 Within the UN, a panel of such staff members has been established. They act as unpaid volunteer counsel to staff members who wish to avail themselves of their services.

mance. It may simply find that an applicant has been injured by improper action of the administration.

The jurisprudence developed by UNAT since its creation in 1949 is published by the UN. It rests to a large extent on the hierarchy of norms within the UN system in which the UN Charter is foremost. After that come the promulgations in various forms of the General Assembly. Then follow those of the Secretary-General or his delegates, which are ordinarily issued only after consultation with staff representatives. Contracts with individual staff members are, of course, respected, as are agreements between the UN and other entities which do not conflict with higher norms. With rare exceptions, UNAT adheres to the precedents established in its jurisprudence. General principles of law applied by UNAT are not derived from the legal system of any single member state, but are rather a kind of international amalgam drawn from or consistent with most, if not all, civilized legal systems. The concept of due process, for example, a keystone of the Tribunal's jurisprudence, is essentially one calling for basic fairness in the procedures followed by the UN administration before it reaches a decision adversely affecting a staff member.

UNAT's statute originally did not provide for review of its judgments by the International Court of Justice. This was introduced by a 1955 amendment. It was prompted in part by the dissatisfaction of some member states, initially the United States, with the inability of the General Assembly to overrule retroactively UNAT decisions with which it disagreed. In 1954, in response to a request by the General Assembly for an advisory opinion, the International Court of Justice had confirmed that, being a judicial body, UNAT's judgments could not be nullified retroactively by a political body such as the General Assembly. The 1955 amendment of UNAT's statute provided for review of UNAT judgments by the International Court of Justice. But such review was limited to cases in which: (1) UNAT exceeded its jurisdiction; (2) UNAT failed to exercise jurisdiction; (3) UNAT erred on a question of law relating to the provisions of the UN Charter; or (4) UNAT committed a fundamental error in procedure which occasioned a failure of justice. Applications for review of UNAT judgments on any of these grounds could be made by the Secretary-General, by individual member states, or by staff members. However, before a request for review could be submitted to the International Court of Justice, it had to be approved by a General Assembly Committee. The latter decided, in the first instance, whether any of the four criteria for review had been met, and there was no appeal from an adverse decision by the Committee.

Actual recourse to the International Court of Justice over the following decades proved to be quite limited. Only three UNAT judgments were considered by the International Court of Justice in response to requests for advisory opinions. In all three, UNAT was affirmed. In contrast, quite a large number of unsuccessful attempts were made by dissatisfied staff members to persuade the General Assembly Committee that grounds existed for an advisory opinion.

Because of undesirable aspects of the procedure for obtaining review by the International Court of Justice, including the disproportionate amount of time and money spent by the Committee examining the many unmeritorious cases, the behind-the-scenes political maneuvering to gain Committee votes, and an apparent growing acceptance of the quality of UNAT decisions, the General Assembly decided to abolish the procedure for review of UNAT judgments by the International Court of Justice. This was carried out by an amendment of UNAT's statute, effective 1 January 1996.[3]

Close to 900 published judgments have been issued by UNAT. Although opinions are written and agreed upon before the close of each session, judgments are not actually released until the completion of a careful process of verifying factual content and ensuring that grammatical, spelling and language usage are clear and correct.

UNAT's function and its goal is the fair and reasonable resolution, within the framework of governing norms and general legal principles, of the disputes coming before it. With relatively few exceptions, the Tribunal achieves its goal. It has afforded the staff and the Administration an effective and impartial forum for settlement of their disagreements through recourse to the rule of law.

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3 See General Assembly Resolution 50/154 (1995). In an article written in 1993 by a former judge of both the Court of Justice of the European Communities and the International Labour Organization Administrative Tribunal, the author discussed the three opinions of the International Court of Justice in cases involving UNAT and one opinion involving the Administrative Tribunal of the International Labour Organization. He appears to have concluded that the Court's disinclination to involve itself in serious analysis of international administrative law issues made it ill suited to review the judgments of international administrative tribunals. See, Pescatore, *Two Tribunals and One Court, Essays in Honor of Henry G. Schermer*, Vol. 1 Dordrecht: Nijhoff, pp. 217-237.

As in the case of almost all judicial bodies, UNAT relies heavily on the briefs of the parties to inform it of significant issues, applicable rules and pertinent precedents and to discuss them adequately. Unlike most other judicial bodies, the Tribunal essentially serves on a part-time basis, at least as far as its members are concerned. This means that within a fairly short time frame, members must study and absorb the often voluminous files in the cases assigned to them. Since the Tribunal's secretariat is small and its work load large, it is unable to provide much research assistance. Tribunal members must, therefore, do such research as is feasible. A considerable amount of time during each session is devoted to drafting opinions as well as to the study of submissions and to panel deliberations, and little time is left for further research during that period.

Decisions of the Tribunal have dealt with a broad range of subjects. These include employee benefits, secondment to the UN from government service and its consequences with regard to long-term UN employment, promotion, affirmative action, sexual harassment, termination and other disciplinary action, maladministration, involvement of members states in UN employment matters, performance evaluation, renewal of fixed-term UN appointments, job classification, pensions, various procedural questions and a wide miscellany of other issues.

UNAT decisions occasionally attract outside media interest. For example, in 1993, UNAT decided a highly publicized case involving Chinese nationals who had been employed by the UN as translators, and who were thought by the UN and the People's Republic of China to have been on secondment from China. The translators sought extensions of their fixed-term appointments or consideration for career UN appointments. Their government voiced objections to both and sought their return to China. They had apparently incurred its displeasure because of protests they had made regarding alleged wrongful appropriation of most of their salaries by their government and because they had also advocated restraint with respect to the student protests leading to events at Tianamen Square. The UN had acceded to China's wishes by denying further appointments to the translators, but had also refrained from measures that might have forced their return to China.

In its decision, the Tribunal found that the UN and the People's Republic of China had failed to establish that the arrangement under which the translators had been employed was a valid secondment; it was not a tripartite agreement which included the translators as parties. In addition, there was no evidence that its terms conformed to the requirements for a valid secondment prescribed in earlier UNAT jurisprudence. In the absence of a valid secondment, it was impermissible for the Secretary-General to simply accede to the wishes of the Chinese government without fairly considering the merits of the translators' requests, and UNAT concluded that this was what had occurred. UNAT ordered *inter alia* that the translators receive the full and fair consideration for career appointments to which they were entitled under the UN Staff Regulations.

This decision caused the Secretary-General to undertake a comprehensive review of "secondment" practices and to reevaluate the status of staff members who were ostensibly on secondment. As to those who were not found to have been employed under valid secondment arrangements, the wishes of their governments regarding contract extensions or career appointments could no longer be considered binding upon the UN.

More recently, Tribunal decisions attracting media attention included cases dealing with sexual harassment, affirmative action, an unfortunate incident involving the theft of $4 million from a UN office in Somalia, and a case involving claims of favouritism in the award of large UN contracts for air transportation service. One of the sexual harassment cases ultimately led to the resignation of a high level UN official and a subsequent settlement between the UN and the complaining female staff member, reportedly including a large payment to her by the UN. In connection with claims of sexual harassment, the Tribunal has repeatedly stressed the importance of prompt and thorough investigation by the UN administration and firm disciplinary action against staff members or officials engaging in such misconduct. In cases involving affirmative action, the Tribunal has upheld policies declared by the General Assembly and the Secretary-General aimed at improving the status of women in the UN, *i.e.*, to proper levels of representation in higher grade positions, by according them preferential treatment in promotions where their qualifications equal or exceed those of competing males. In the cases involving allegations of staff culpability for the Somalia theft, and the alleged favouritism in the award of air transportation contracts, the Tribunal found that the accused staff members had not been accorded due process by the administration, that the decisions finding them culpable were seriously flawed, and that they had been unjustly penalized.

Although the Tribunal decisions receiving outside publicity happened to involve successful appeals by the staff members

concerned, this does not signify that staff members routinely prevail before the Tribunal. Because of the breadth of the Secretary-General's discretion in employment matters and the specificity of the comprehensive Staff Rules governing the employment relationship, many decisions by the administration are sustained by the Tribunal as complying with the applicable rules or as being within the reasonable bounds of the Secretary-General's discretion.

While it is impossible to predict with precision the nature or the number of future cases that will come before the Tribunal, it may reasonably be expected that the UN staff will be affected significantly by the restructuring of the UN secretariat insisted upon by major contributors to the UN budget and mandated by the UN General Assembly. At the very least, measures such as downsizing and redistribution of staff functions are apt to add to the volume of work of the Tribunal. This may lead to extending the length or increasing the frequency of its sessions or even expansion of its membership. Indeed, the Tribunal may be confronted with novel problems calling for innovative and creative solutions to assure justice to all concerned.

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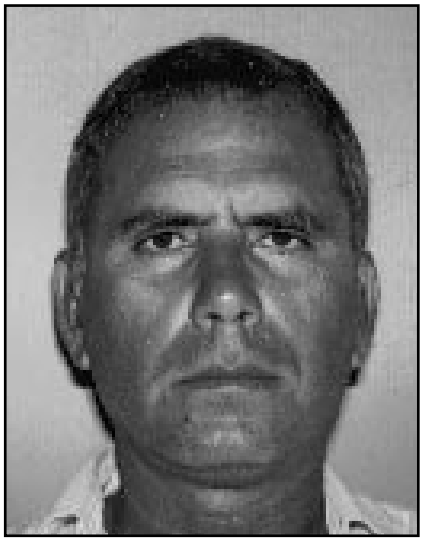
legitimizes a lot of the Holocaust denial material we see. I am of course referring to Patrick J. Buchanan.

I predict that Buchanan will be back in the year 2000 after having performed much better than anybody expected in 1996 in trying to gain the Republican party nomination, and having won some key victories and influenced his party to some degree. It is very enlightening that this is a man who uses Holocaust denial material - such as that supplied by Hans Schmidt of the German American Association, who denies the 6 million deaths - as a source of information when he writes about the Holocaust. In his column, Buchanan has, for example, written that all the Holocaust survivors suffer from a psychological syndrome which means that one cannot believe them. They are pathological liars. Coming from Buchanan who has written so extensively in the newspapers, who is on TV, and who one sees treated as a comrade by other nationally and world-known figures, to me is frightening. He has written many articles condemning the prosecution of Nazi war criminals, praising Kurt Waldheim, praising Klaus Barbie, and defending Ivan Demanjuk.

In the midst of the Demjankuk appeal, Buchanan wrote a column in which he said that it was impossible that the Jews at Treblinka had been murdered in the way claimed by the survivors because carbon-monoxide could not kill in such quantity, and he cited as an example the fact that about two years earlier a train had stranded in a Washington DC subway, carbon-monoxide fumes had spilled out over a period of two-three hours and the people who were treated there suffered merely minor injuries; therefore, carbon-monoxide could not kill. Buchanan obtained this information from one of the Holocaust deniers and legitimized it by publishing it in mainstream newspapers throughout the US. Upon meeting Buchanan, I asked him, whether he had doubts that Treblinka, where 800,000 - 900,000 Jews had perished in less than a year, was a death camp. He looked me straight in the eye and said "you're right. I have got doubts. I think that thousands died there as a transit camp". Since Buchanan made his run for the presidency he has toned down his statements but what he said is on the record.

If such a man who is embraced by so many people who are viewed as legitimate, including Jews who for many years would not denounce people like that, what are people going to be saying 50 years from now, or 100 years from now when survivors are no longer going to be around? It is of concern. That is why I think it is up to us - not as Jewish lawyers and jurists - but perhaps because we are Jewish lawyers and jurists and are therefore involved in so many other spheres of activity and influence - that we must go beyond the technical legal system to prevent these crimes against Jewish memory and Jewish history and make sure that there is not only a counter effort to deal with Holocaust deniers but affirmatively to deal with institutions such as school boards. Sadly, but realistically, our legal system cannot cure every evil that we are confronted with but bodies such as this Association and activists and committed people dedicated to the Jewish people everywhere and dedicated to strengthening the State of Israel can understand that our responsibilities go well beyond the courts and that we can and should take a leading role in confronting Holocaust deniers.

Humour as a Device for Solving Problems



David Lipshitz

The *Talmud*, in contrast to a legal codex as it is customarily defined, is a record of discussions and disputes held in various *betei midrash* (houses of learning) during the 3-5th centuries CE. The *Talmudic* norms emerge from these spirited and dynamic discussions, in which the conflicting opinions, arguments, efforts at persuasion, stubbornness and doubts of the opposing parties are open to public view. Similarly, on occasion, the Rabbinical tribunals, in which the legal questions are considered and the rule of law implemented, act as a meeting place, or more precisely, an arena in which the litigants wrestle with each other or with the *dayanim* (judges). It is natural, therefore, that both the *betei midrash* and the Rabbinical tribunals (the distinction between the two is not always clear in the *Talmud*) provide scope for a variety of different forms of humour.

Talmudic humour ranges over almost every genre known to us from literature, and it includes both comic creations, such as comedies, parodies, farce and the like; joyful humour emerging from satisfaction; and critical humour in the form of irony, sarcasm, caricatures, the grotesque, the macabre, and the like. Talmudic humour is shaped by an assembly of recognized literary tools - rhymes, quotations, popular expressions, word games, dialogues, parables and stories. It should be noted that identifying humorous extracts occasionally requires an in depth study of the issue in question, as the humour and the topic as a whole often appear in ambiguous terms, or content themselves with subtle hints, and, therefore, a fine eye is sometimes needed to discern the humour within the body of the text.

The comments of A. Kestel in the *Encyclopaedia Brittanica*, referring to the term 'humour' are apposite here: "An analysis of the term humour is an almost impossible, sensitive and complex task, similar to an analysis of the ingredients of perfume, some of which cannot be distinguished individually, and some of which, if smelled individually, would repel us."

In this article, the attribution of humoristic intent to the various extracts is based on my own aesthetic sense and the compatibility of the text with criteria acknowledged in studies on humour, and therefore I cannot describe the following as the *Talmud's* attitude to humour. It should be emphasized that I found almost no empirical evidence that the compilers of the *Talmud* wished to entertain or invoke laughter. The humour emerges primarily through the subject-matter of the text itself.

Below, I shall illustrate how humour is used to deal with legal conundrums in the area of pleadings and arguments, legitimate stratagems, suspicious legal maneouverings, imaginary and non-justicable problems, the *dayan's* didactic use of humour, the reversal of roles between the *dayan* and the defendant, and the logical and ethical twistings of the case law.

Incompatibility between judgments dealing with the same situation

The opening illustration was selected because it contains two extreme and contradictory judgments bearing on the same situation. The first judgment, most favourable to the litigants, was exclusively intended to please them, whereas the second judgment was completely contrary in nature. It was arbitrary,

This article is based on a doctoral thesis entitled *The Characteristics and Function of Humour in the Talmud*, under the guidance of Prof. Y. Friedlander, of the Department of Israeli Literature, Bar-Ilan University. The work was undertaken with the assistance of the New York and the Sepharadi Federation Memorial Fund.

disregarded the parties and was designed to please the *dayan* himself. The feature common to both judgments is that neither is based on legal principles.

The humoristic element is found in the arguments of the parties, and in the difference of approach of the two *dayanim*, as well as in the outcome of the case.

> Alexander of Macedon went to the king of Qasya [who resides behind the Dark Mountains]. He showed him that he had a great deal of gold and silver. [Alexander] said to him, "I don't need your gold and your silver. I came only to see your customs, how you distribute [alms], how you judge [cases]."
> While he was chatting with him, someone came with a case against his fellow. He had bought a piece of a field with its rubbish dump, and he had found a trove of money in it.
> The one who had bought the property said, "I bought a junk pile; a trove I didn't buy."
> The one who had sold the property said, "A junk pile and everything in it is what I sold you."
> While they were arguing with one another, the king said to one of them, "Do you have a male child?"
> He said to him, "Yes".
> He said to his fellow, "Do you have a female child?"
> He said to him, "Yes".
> He said to them, "Let this one marry that one, and let the treasure-trove belong to the two of them."
> [Alexander] began to laugh.
> He said to him, "Now why are you laughing, didn't I judge the case properly?"
> He said to him, "If such a case came before you, how would you have judged it?"
> He said to him, "We should have killed both this one and that one, and kept the treasure for the king."
> He said to him, "Do you people love gold all that much?"
> He made a banquet for him and laid out before him gold loaves and gold chickens.
> [Alexander] said to him, "Can I eat the gold?"
> He said to him, "May that man's soul be struck down. You don't eat gold? Then why do you love it so much?"
> [The King of Qasya] said to him, "Does the sun shine in your land?"
> [Alexander] said to him, "Yes."
> "Does it rain in your land?"
> He said to him, "Yes".
> "He said to him, "In your town is there some sort of small beast?"
> He said to him, "Yes".
> "Then may the soul of that man be smitten! You live only by the merit of that small beast, since it is written, '*Man and beast do you save, O Lord*" (*Ps. 36:6*).
> (*Yerushalmi, Baba Metzia, Chapter B, E*).

The opposing tension between the two judgments, that of the king and that of the guest king, are compatible with the unexpected contrariness of the contentions. The judgment of the king is characterized by adroitness, good heartedness, love of man, and the search for a "happy conclusion", whereas the judgment of the guest, is tinged with wickedness, cruelty based on greed, and the provision of a macabre solution to the problem under discussion.

As the purpose of this story in the *Talmud* is to illustrate the negative aspects of greed, greed which not only prevents adhering to the commandment of returning that which is lost, but also leads to bloodshed, the *Talmud* continues the story by presenting a scene which is so grotesque as to be almost absurd: here the important guest is invited to a royal feast, and the delicacies offered to him are in their entirety fashioned out of pure gold - the peak of the guest's greed. Thus, all the gold on offer is not enough to satisfy the basic needs of human kind.

In the third scene, the host continues with his educational caprice: the artless questions about the shining sun and the pouring rain lead to the question about the existence of the small animal; all these fall on the guest like the preliminary strikes of an experienced boxer, and indeed in the end comes the knock-out blow: "You live only by the merit of that small beast", making the justification for the existence of man - the crown of creation - inferior to that of the animal, and man looses his moral justification for existing.

From a literary point of view, this may be seen as a story with a lesson, which, in retrospect, highlights the significance of this legal case in the form of a moral message. The question arises: why does the *Talmud* conclude the message with the verse "Man and beast do you save, O Lord"? As a 'man' such as Alexander of Macedonia, who is assimilated as if by mistake within the verse, is not worthy to be saved by the Lord.

The answer, as noted, is given by way of reverse application. The 'man' in the verse is, of course, the moral man, and therefore by linking this verse with a man such as Alexander of Macedonia, the message is transmitted in an ironic way.

Artifice

In the previous example, the gap between two decisions relating to the same circumstances was illustrated by widening that gap to cosmic proportions (shining sun and pouring rain), through the application of a rhetoric device which helps lead to a victory in the dispute between the two positions presented.

Following are a number of cases involving humour in a tale or factual situation, containing an element of legal artifice, duplicity or the misleading of one of the parties or even the *dayan* himself - the purpose of each which is to reach the desired legal solution.

It should be noted that there is artifice which is both legitimate and permissible, in relation to which Justice Zilberg said: "The law is evaded by use of the law itself. The law does not deem a consummate stratagem such as this to be an offence, for the law itself is the "guilty" party."

1. In the following example the Court is presented with a deed, which bears the forged signature of the *dayan* himself:

> A certain deed bore the signatures of Raba and R. Aha b. Adda. He came before Raba [who] said to him, '[this] signature is mine; never, however, have I signed before R. Aha b. Adda!' He was placed under arrest and he confessed. Said [Raba] to him, 'I can well understand how you forged my [signature], but how [could] you manage [that] of R. Aha b. Adda whose hand trembles?' 'I put my hand' the other replied, 'on a rope-bridge'. Others say [that] he stood on a hose and wrote.
> (*Baba Batra, 167*)

The act of the swindler, his resourcefulness, and the comic situation thereby created, lead to the entertaining effect.

2. Whereas in the previous situation what led to the downfall of the swindler was his audacity in attempting to cheat the *dayan* himself, in the following case, it was the contention *per se* which raised the suspicions of the Rabbinical tribunal.

> b. Gamliel says: The *Ketubah* of a widow is not from the words of the *Torah* but from the words of the *Soferim*.
> Someone came before R. Nahman [and] said to him: I have found an opening. R. Nahman answered: Lash him with palm switches: harlots lie prostrate before him.
> (*Kethubot, 10*)

Following his wedding night, the plaintiff hurried to the Rabbinical tribunal and demanded a divorce from his wife and a release from paying the sum set out in the *Ketubah*. The grounds for his petition were that his bride had not been a virgin. R. Nahman held that the plaintiff should be whipped because he was clearly experienced in this matter, apparently with the help of the harlots of the city.

The claim that the bride was not a virgin, made by a new bridegroom who had been a bachelor (as appears from the following verses) raised suspicion. The husband applied his legal skills and raised an effective and potent argument, anchored in the *Halacha*, nonetheless, the *dayan*, impressed as he was by the man's past experience, did not believe him.

The result is a brief and succinct judgment, formulated as a rhetorical and derisory question which places the image of the sexually inexperienced scholar in conflict with a vivid description of wild and grotesque sexuality. The factual result, which contradicts the allegation of the husband against the wife, contributes to the humorous, ironic aspect of the situation.

3. Often the court room resembles a wrestling arena in which the litigants struggle against each other and on occasion against the *dayan*.

The nature of the struggle is that each party attempts to overcome and deceive the other, and on occasion the Court too finds itself participating in the mental battle, and even engage in a variety of stratagems.

To clarify the following example, one must explain the terms "*yibbum*" (levirate marriage) and "*halizah*". A widow without children, is required to marry the brother of the deceased husband. The widow is termed a "*yebamah*", the brother "*yabam*" and the marriage "*yebum*". In the alternative, in the event of a refusal to enter into this arrangement, the parties must under go the process of "*halizah*", in which the *yebamah* "*holetzet*" (unties) the shoe of the brother. In the absence of *yibbum* or *halizah*, the *yebamah* may not marry another person.

> A case came before R. Hiyya bar Ba, and he said to him, "My son, this woman does not want to be married to you through a levirate marriage but perform the rite of *halizah* with her, and so remove your connection from her, and then she will be married to you through a normal marriage."
> After he had performed the rite of *halizah* for her, he said to him, "If Moses and Samuel should come, she will not be permitted to you."
> Concerning [Hiyya, the man] recited this verse, "*They are skilled in doing evil but how to do good they know not*" (*Jer, 4:22*).
> (*Yerushalmi, Yebamot, Chapter 12, Rule 6*).

Halizah which is carried out by one of the two parties for mistaken reasons or motives, is valid, and after the *halizah*, the parties may not marry each other.

The purpose of the hearing was to cause the *yabam* to release the woman. As he refused, the *dayan* was forced to engage in a stratagem, taking advantage of the ignorance of the man and misleading him into thinking that if engaged in the rite of

halizah he would afterwards be able to marry the woman. In his response, the disappointed *yabam* recited a verse taken from the prophecies of rebuke relating to national crises. The humorous elements of this passage are (a) the reverse ruse engaged in by R. Hiyya; and (b) the sarcastic tone of the *yabam*, using the verse for his own purpose while reversing its moral meaning.

4. The following passage is also based on stratagems and artifice:

> A certain man heard his wife say to her daughter: Why do you not observe more secrecy in your amours? I have ten children and only one is from your father. When [the man was] on his deathbed he said, I leave all my property to one son. They had no idea which of them he meant, so they consulted R. Bana'ah. He said to them: Go and knock at the grave of your father, until he gets up and tells you which one of you [he has made his heir]. So they all went to do so. The one who was really his son, however, did not go. R. Bana'ah thereupon said: All the estate belongs to this one.
> (*Baba Batra, 57*)

Contrary to what might be expected, the mother is not disturbed by the unchaste conduct of the daughter. Her concern revolves around the need for caution, or more precisely the daughter's lack of cleverness in concealing her activities. The explanation for the "educational approach" of the mother is immediately made clear to the reader, namely, that the daughter is following in the footsteps of the mother. Additional humorous elements are provided by the exaggerated number of bastards resulting from her misdeeds (the number ten, like the number 7, 70 and 100 - are routinely used numbers), and in the acumen revealed by the judgment (like the judgment of Solomon where the biological mother was identified by her display of compassion for her son, here the biological son was identified by his display of sensitivity and respect for his father) and finally, as already noted, the daughter who follows in the footsteps of her mother.

It should be emphasized that this judgment does not rely on legal evidence in its customary sense, but amounts to a free-wheeling judgment of the *dayan*; as such it is not surprising that it is ingenious in nature.

The following case describes how even the heavenly court is capable of using ruses, although this is not the situation of a judgment of a tribunal but rather a moral teaching which is presented in a legalistic literary style:

> Antoninus said to Rabbi: "The body and the soul can both free themselves from judgment. Thus the body can plead: 'The soul has sinned, [the proof being] that from the day it left me I lie like a dumb stone in the grave [powerless to do aught].' Whilst the soul can say: 'The body has sinned, [the proof being] that from the day I departed from it I fly about in the air like a bird [and commit no sin]'". He replied, "I will tell thee a parable. To what may this be compared? To a human king who owned a beautiful orchard which contained splendid figs. Now, he appointed two watchmen therein, one lame and the other blind. [One day] the lame man said to the blind, 'I see beautiful figs in the orchard. Come and take me upon thy shoulder, that we may procure and eat them.' So the lame bestrode the blind, procured and ate them. Some time after, the owner of the orchard came and inquired of them, 'Where are those beautiful figs?' The lame man replied, 'Have I then eyes to see with?' What did he do? He placed the lame upon the blind and judged them together. So will the Holy One, blessed be He, bring the soul, [re]place it in the body, and judge them together, as it is written. *He shall call to the heavens from above, and to the earth, that he may judge his people*. He shall call to the heavens from above - this refers to the soul; and to the earth, that he may judge his people - to the body."
> (*Sanhedrin, 91*)

The rhetorical question posed by Antoninus, as well as the example given, provide an ironic illustration of the mutual responsibility for sin, which persists despite a variety of witty pretexts. This presentation of a comic situation is also a means of transmitting an educational-didactic message which is easily understood by the reader.

5. In the next example the ruse may be found on the technical legal level:

> Moses bar Azri was guarantor for the *Ketubah* of his daughter-in-law. Now his son, R. Huna was a scholar but in poor circumstances. Said Abaye: "Is there no one who would go and advise R. Huna to divorce his wife, so that she might go and collect her *Ketubah* from his father, and then re-marry her?" "But", said Raba to him, "have we [not] learned that [the husband] must vow to derive no [further] benefit from her?" "Does everyone who divorces [his wife]" said Abaye to him, "do it at a court of law?" Finally, [however], it was discovered that he was a priest. "This is just what people say", exclaimed Abaye, "poverty follows the poor".
> (*Baba Batra, 174*)

The sting lies in the cynical remark ridiculing the way of the world: poverty and distress pursue the husband like predestined fate, and undermine any solution, including a potential legal

solution, even when the solution carries a heavy price such as divorce (albeit a formal divorce) and the taking of money by trickery from a relative.

It should be emphasized that the moral problem which arises in this case is solved by the *Talmud* by assuming that the father will be appeased in the end, as the issue relates to his son who devotes his time to studying the *Torah*.

It seems to me that this is a form of "Jewish humour" which borders on the macabre; it is directed against the cruelty of fate, and so helps the 'victim' to cope mentally with an unbearable situation.

6. In the following case, it is the *dayan* who escapes for fear of the law.

One of the focuses of the struggle between the Jewish population in Eretz Israel and the Jewish population in Babylon during the period of the *Talmud*, concerned family ancestry. In the following instance, the sage R. Phineas wished to state that Babylon was 'impure' compared to Palestine, in other words that it contained families which had intermarried, and among which were those who were barred from Jewish marriage, analogous to dough made up of mixed flour.

> In the days of R. Phineas it was desired to declare Babylon as dough *vis à vis* Palestine. Said he to his slaves. "When I have made two statements in the *Beth Hamidrash*, take me up in my litter and flee." When he entered he said to them, "A fowl does not require slaughter by Biblical law." Whilst they were sitting and meditating thereon, he said to them, "All countries are as dough in comparison with Palestine, and Palestine is as dough relative to Babylon." [Thereupon] they [his slaves] took him up in his litter and fled. They ran after but could not overtake him. Then they sat and examined [their genealogies] until they came to danger, so they refrained.
> (*Kidushin, 71*)

In this case R. Phineas found himself facing a dilemma. The judgment was indeed provocative, and concerned an issue of explosive social importance. As a scholar of his standing he had the duty of transmitting the *Halacha* as he understood it to his students in the *Beit Midrash*. On the other hand, he anticipated the danger posed to him by the families of those barred from marriage, who were afraid of falling into disrepute. He therefore found a solution which unwittingly created a macbre but at the same time comic situation - imagine an aged rabbi fleeing on a litter from the *Beit Midrash*, chased by a members of his congregation.

Humour is also supplied by the clever stratagem, whereby first a surprising but neutral judgment was delivered (slaughter of a fowl) - which acted as bait and a means of diverting attention in order to provide time for the escape.

7. Finally, a contradiction between two *Halachic* rules is settled by means of an original-comic solution.

> The widow of R. Huna had a case before R. Nahman. He said [to himself]: "What shall I do? If I should rise before her, the plea of her opponent will be stopped up; if I should not rise before her [I should be doing wrong, for] the wife of a scholar is like a scholar." So he said to his attendant: "Go and make a duck fly over me, and urge it towards me, so that I will rise."
> (*Shevuot, 30*)

Nahman was faced with two contradictory rules. On one hand, as a *dayan* he could not discriminate between two litigants; moreover, he had to preserve the required distance between a *dayan* and those litigating before him. On the other hand, he had the duty to honour the wife of his fellow scholar and teacher R. Huna (as injury to the wife of a friend (scholar) is like an injury to her husband) and rise before her. The comic and unusual contrivance therefore supplied the efficient solution.

It should be emphasized, that it is the significance of the issue from the point of view of the reader, which gives it its comic aspect, even if from a factual - historic point of view, it is not clear whether R. Nachman intended to be humorous or not.

By analogy to another passage in the *Talmud* in which a comparison was made between a woman and a duck (See *Brachot*, 20), it may be that R. Nachman wished to hint to the wife of R. Huna, that while she was indeed to be honoured in view of the respect due to her husband, in his eyes - at least from the point of view of her standing in the litigation - she also resembled a duck; particularly, as according to the interpretation given in the *Tosephot*, the woman understood that the act was performed for her benefit.

New Board for the Brazilian Section

The Association of Lawyers and Jurists Brazil-Israel has elected a new Board of Directors for the 1997-1999 term of office.

The new directors are: President - Dr. Carlos Roberto Schlesinger; First Vice-President - Dr. Jacksohn Grossman; First Secretary - Dr. Alexandre Wrobel; Second Secretary - Dr. Bernado Marcelo Kelner.

Non-Orthodox Conversions in Israel

HCJ 1031/93
Alian (Hava) Pessaro (Goldstein) and The Movement for Reform Judaism in Israel v. The Minister of the Interior and The Director of Population Registry.
Before President Meir Shamgar, President Aharon Barak, Justices Eliahu Matza, Mishael Cheshin, Tova Strasburg-Cohen, Zvi Tal, Dalia Dorner.
Delivered on 12.11.1995

Precis

This case considered two main issues: (a) which provisions of the law apply to the registration in the Population Registry of particulars of religion and nationality of a person who has converted in Israel; and (b) whether, for the purposes of the Population Registration Law - 1965, and particularly Section 1 thereof, the term "convert" only includes a person whose conversion has been confirmed according to the provisions of the Religious Community (Change) Ordinance, which was enacted during the Mandate period. The Court concluded that for the purpose of laws which do not govern personal status, there is no obligation to follow the procedures set out in the Mandatory Ordinance. In view of the facts of the particular case, the Court refused to consider whether a person undergoing a non-Orthodox conversion is entitled to be registered as a Jew by reason of the Law of Return - 1950.

The respective judgments are very long and therefore only highlights from the leading judgments of President Shamgar and President Barak, and the dissenting judgment of Justice Tal, are cited. For the position of the *Pessaro* case within the context of the controversies concerning conversions, see the article "Who is a Convert" on page 11 of this issue of *JUSTICE*.

President (Ret.) Meir Shamgar

President Shamgar was of the opinion that for the purpose of laws which are not concerned with personal status, such as the Population Registration Law - 1965 (hereinafter: "the Law") and the Law of Return, there is no obligation to fulfill the confirmation and certification procedures established by the Religious Community (Change) Ordinance (hereinafter: "the Ordinance"). Notwithstanding this, in the case at hand, there was insufficient data to enable a decision to be made with regard to the registration of the Petitioner; in other words, there was no legal possibility of concluding the issue of her registration, even if one confined the entire dispute to that limited issue.

Facts

The Petitioner was born in Brazil and belonged to the Spiritualist faith. In 1990 she arrived in Israel and applied to the Council of Progressive Rabbis in Israel to convert. The conversion process ended in October 1991, at which time the members of the Council signed the conversion certificate. In the interim period the Petitioner married a Jewish Israeli in a consulate marriage. The registration of the marriage in the Population Registry was the subject of a hearing in the High Court of Justice in HCJ 2888/92 (unpublished), in which it was held that the registration officer was required to register the Petitioner as married, although the issue of the validity of the marriage was left open. In 1992, the Petitioner applied to the Population Registry and Ministry of the Interior for Israeli citizenship and to be registered as a Jewess. This application was left open although the Ministry agreed to change the Petitioner's status from a tourist to a temporary resident. The Petitioner continued to insist on her right to be registered as a Jew and requested the opinion of the Attorney-General as to the status of a non-Orthodox conversion in Israel. On failing to receive a reply she petitioned the High Court of Justice.

Opinion

President Shamgar noted that before the amendment to the Law of Return in 1970 the Courts had held that the term "Jew" in the Law of Return and in the Population Registration Law had to be given a secular interpretation and not a *Halachic* interpretation. Here the question was how the term should be interpreted for the purpose of the Population Registration Law. President Shamgar noted that the only difference between the facts of this case and the facts of HCJ 230/86 *Miller v. Minister of the Interior* (40(4) P.D. 436) and HCJ 264/87 *Shas Movement v. Director of Population Registration* (43(2) P.D. 727) was that the non-Orthodox conversion in the instant case had been performed in Israel as opposed to being performed abroad. The

main obstacle to registering such a conversion was to be found in the provisions of the Religious Communities (Change) Ordinance and to determine its legitimacy one needed only to construe the provisions of the Population Registration Law. The latter Law distinguished between an initial registration and registration of a subsequent change in particulars. The registration officer had differing powers to demand proof of the truth of the particulars, depending on the nature of the registration. As part of the process of registration, the officer could refuse to register a particular solely on the basis of a person's own notification of conversion, if he had reasonable grounds for believing that the notification was not true. In the *Miller* case it had been held that the opposite was also true - if the officer had no reasonable grounds for believing that the notification was not true - he was prohibited from refusing to make a registration in accordance with that notification. In contrast, where reference was to a change in an existing entry, the officer could not enter the change in particulars exclusively on the basis of the applicant's own notification, but the latter was required to present a public certificate as proof of the change. In the absence of such a certificate the Court could refuse to confirm a change in the entry of nationality (*Leom*) of the petitioner from "Jewish" to "Israeli" (ALA 630/70 *Tamrin v. The State of Israel* (26(1) P.D. 197)).

On the facts of the case at hand, reference was *prima facie* to the easier situation of a "first registration".

Positions of the Parties

The Petitioner claimed that the rules laid down in the *Shas* decision should also apply to non-Orthodox conversions carried out in Israel. The *Shas* decision had held that the conversion of an *Oleh* would be registered in the Population Register on the basis of the applicant's own declaration accompanied by any document evidencing that such a conversion had been performed within any Jewish community abroad, without need for a public certificate. In such a case it was immaterial whether the community was Orthodox, Conservative or Reform. Further, the registration officer could not inquire into the validity of the conversion, and could only refuse to make the entry where he had reasonable grounds for believing that the declaration was not true - a declaration which was not true was a declaration which included a lie (such as where there was an act of fraud or where there was evidence of the applicant belonging to another religion).

The Respondents claimed that these principles were not applicable to conversions conducted in Israel, and that by virtue of the aforementioned Ordinance, the applicant had to present a certificate of conversion, issued under the terms of the Ordinance, to the registration officer. The Respondents did not seek to overturn the *Shas* ruling, nor did they claim that the definition of the term "Jew" differed depending on the place of conversion, nor, indeed, that the conversion process was carried out in Israel differently from the way it was performed abroad. They claimed that a non-Orthodox conversion carried out in Israel, while possibly having *de facto* religious validity, did not conform with the civil laws of the State, if it was performed outside the exclusive framework of the Ordinance.

The Queries

According to President Shamgar, the questions raised by this case were many: how was it possible to justify the Respondents' position whereby a non-Orthodox conversion conducted abroad was valid for the purpose of the registration, whereas a conversion carried out by the same Movement in Israel was not valid for this purpose? Did not the principle of equality require the application of the same law in both cases in such an important and fundamental matter? If the registration officer was not entitled to examine the validity of a conversion carried out abroad, what was the source of his power to examine the validity of conversions carried out in Israel?

The Religious Communities (Change) Ordinance

Section 2 of the Ordinance establishes the procedure for conversion. The section requires every convert wishing to gain legal recognition of his conversion to obtain from the head of his religious community (or the latter's representative) a certificate of confirmation, evidencing that he has been accepted by that religious community; he must notify the fact of the conversion to the District Commissioner (today the relevant official in the Ministry of Religious Affairs) and present him with the certificate. Upon doing so, the District Commissioner will register the conversion and provide the convert with a certificate of registration, copies of which are also sent to the head of the religious community which the applicant has joined, as well as to the head of the religious community to which he previously belonged.

The act of registration has been interpreted as being constitutive for the purpose of the conversion, and in the absence of registration, the conversion will not be granted civil law recognition of validity.

Nevertheless, President Shamgar held that reference here was not to general civil law recognition of validity for every purpose. Rather, the law provided for recognition of validity for the purposes of personal status alone.

Israeli law does not provide a uniform definition of the term "Jew". Accordingly, a person may be regarded as a "Jew" for the purposes of one law but not for the purposes of another. In some cases the legislature may have in mind a *Halachic*-religious definition, in others - a secular-civil definition. The provisions of the Ordinance do not require that it be regarded as being of general application, *i.e*., applying to all legislation. The Ordinance is not intended to regulate the validity of the conversion from the point of view of the religious laws of the religion to which the applicant wishes to convert, that validity as well as the abandonment of the previous religion are determined by the rules of the respective religions concerned. Thus, a distinction must be drawn between conversion in accordance with religious law, and a valid conversion for the purpose of civil law. The case law, to date, does not hold that conversions carried out outside the framework of the Ordinance are invalid for the purposes of the Law of Return and the Law of Population Registration.

According to President Shamgar, the root of the conflict lay in the fact that the purpose of the Ordinance was not clear from its language. The Respondents had not succeeded in showing why the Ordinance should apply outside the framework of personal status, and why the legislature should intervene in a multi-faceted issue, in respect of which the governmental authorities had not taken any position. The Respondents' position was incompatible with the construction of the Ordinance, in the light of Israel's basic ideals, rejecting unnecessary intervention in the choices of the individual, including his choice of affiliation to a particular religion. The registration was only a formal expression of a factual situation which was chosen by the individual. It was not designed to intervene in the internal affairs of the communities and religions. The Ordinance was intended to regulate matters relating to personal status and not to civil-registrations. In the words of the preamble: "Whereas, in order to determine questions of jurisdiction in matters of personal status of a person who changes his religious community, it is desirable to provide for the notification of such changes...".

The real question according to President Shamgar, was, therefore, to what extent the executive authority should have control over the issue of religious conversion.

Freedom of religion and conscience is a basic principle of our system. This freedom has formed one of components of the normative principles underlying our system since the establishment of the State of Israel. Freedom to convert is protected within the framework of freedom of religion and conscience. Thus, a reasonable interpretation of the existing legal situation reveals that the various authorities will not intervene in this area of the autonomy of the individual, and that the decision of the resident or citizen to convert, on one hand, and the religion's decision to admit a prospective convert into its precincts, on the other hand, will be free from intervention and regulation by the State. Conversion is the concern of the individual alone. In a free society any person may convert if he so wishes.

For this purpose a person does not need any formal State permit. The need for a permit arises only in so far as relates to jurisdiction in matters of personal status. This is the situation in most countries which have similar regimes to Israel. If one confines the issue to matters of personal status, the Respondents are right in their contention that there must be control and supervision of conversion, in order to ensure centralization. The further one moves from issues of personal status the more reasonable it is that the extent of control and supervision, as well as the body placed in charge of these matters, be civil in nature.

This does not mean that there is no room at all for regulating the area of conversion for the purposes of civil law, such as the Law of Return and the Population Registration Law, as opposed to laws dealing with personal status. Even in such areas, the State may be able to point to a legitimate interest which justifies supervision or regulation of the area. In principle, it is possible to justify limited and defined supervisory mechanisms in relation to conversions: jurisdiction in relation to personal status is currently conferred on the religious Courts. The determination of the Jewishness of a person claiming to have converted, when considering matters of personal status, is within the jurisdiction of the religious Courts.

However, in relation to other matters, it is difficult to see why the determination must be given to the religious authorities. Conversion, *per se*, is not an issue which legislation regards as a matter of personal status. The test is one which must be determined within, and as a matter of, the limits of the law, and by whoever is empowered to do so by that law, and in the case of the Population Registration Law - the Minister of the Interior.

The Population Registration Law

The Population Registration Law itself does not require a

conversion to be carried out in accordance with the Ordinance. The law is a civilian law, the purpose of which is to collect factual data, including statistics. The Law enables the Minister of the Interior or his officials to register entries in accordance with the declaration of the resident, within the framework of the limitations on the official's discretion as established by the case law. The law does not require the official to approach any religious-*Halachic* instance or body for the purpose of determining the validity of the conversion of the person before him. The case law too, does not require this. According to the *Shas* decision, when reference is to a "first" registration, the official is not entitled to examine the validity of the conversion.

A construction of the provisions of this Law shows that only when a conversion is registered in accordance with the Ordinance, is a certificate required in accordance with that Ordinance. It does not state that a certificate, issued in accordance with the Ordinance, is required in all cases of conversion.

With regard to the instant case, President Shamgar held that the question of changes in existing registrations, *i.e*. "second" registrations, with all its ramifications, fell outside the framework of the petition, and was therefore to be left open.

Accordingly, the interpretation of the Ordinance offered by the Petitioner regarding the extent of the Ordinance's application, was the reasonable interpretation. This interpretation conformed with the language of the Ordinance, with its legislative purpose and with the legislative framework as a whole, when considering the relationship between the Ordinance and the Population Registration Law. This interpretation preserved the basic values of the system with regard to equality and freedom of religion and conscience. It also conformed with public order and with the internal logic and rationale of the Population Registration Law. In a phrase: conversion, *per se*, was not an act which had to be carried out in a process which accorded with the Ordinance, but when one was considering issues of personal status, a certificate was needed in accordance with the Ordinance.

As the Ordinance did not govern issues of registration, it was not a precondition that the "head of the community" provide a confirmation of conversion, in order that it be granted "legal validity".

President Aharon Barak

President Barak agreed that the Religious Communities (Change) Ordinance did not apply to the validity of a conversion, in respect of the term "someone who has converted" in Section 4(b) of the Law of Return. This approach was required by the interpretation of the Ordinance in the light of its purpose. This purpose is to regulate "questions of jurisdiction in matters of personal status, which arise as a result of the change of religious community by a couple or one of the spouses." Even this limited application raises significant difficulties. In the past, there was doubt whether it applied to Jews and Muslims. These doubts have since been lifted and it has been held that the Ordinance does apply to members of these faiths. Doubts still exist as to whether it applies to the Druze community, although apparently it does. Beyond this, the Ordinance cannot be severed from the problem of the jurisdiction of the religious Courts in relation to personal status.

The Ordinance has an important but limited function. It relates to issues of jurisdiction of the religious Courts. There it plays a central role. Despite its laconic provisions and unclear application, the Courts have done everything possible to make it forceful and effective. At the same time there is no possibility of applying the Ordinance beyond its natural scope. The Ordinance has nothing to do with the question of conversion requirements for the purposes of the Law of Return.

It has always been accepted by the legal community that the Ordinance does not apply to conversions which have been carried out outside Israel.

President Barak emphasized very forcefully the need to make clear the contents of the decision at hand: we decide that recognition of a conversion which has been carried out in Israel for the purposes of the Law of Return and the Population Registration Law is not dependant upon fulfillment of the requirements of the Ordinance. We are not deciding anything beyond this. We are not taking any position on the question as to which conversion in Israel is a conversion for the purposes of the Law of Return, and in any event we take no stand on the question whether every Reform conversion conducted in Israel will be recognized as a conversion for the purpose of the Law of Return. This question was not presented to us and we state no opinion with regard to it. We have been given no details as to the substance of a Reform conversion and to the basic assumptions which underlie it, and whether it may be regarded as a conversion for the purposes of the Law of Return. Accordingly, no order is granted recognizing the Petitioner as a Jewess for the purpose of the Law of Return, and we have not ordered her to be registered as a Jewess in the Population Register.

President Barak referred to Justice Zvi Tal's dissenting opinion to the effect that the non-application of the Ordinance would create a vacuum, which would prevent public supervision of conversions, and enable every private body to carry out conversions as it saw fit. According to Justice Tal, this result would be unconscionable as conversion is not only a private act but also a public act. According to President Barak, these were indeed pertinent considerations, but the issue fell within the province of the Israeli legislature, which had to consider the requirements which were to be imposed before recognition would be granted to conversions conducted in Israel, for the purposes of the Law of Return and the Population Registration Law. Nevertheless, President Barak held, pending such provision, it could not be said that there was a vacuum which left the determination of the question to the autonomy of the individual's will, whereby every man could make a declaration as to his own conversion or as to the conversion of another. "Our decision today does not entail such anarchy at all. The non-application of the Ordinance does not create a vacuum, and there is no *lacuna* which requires to be filled in by means of analogy or in any other way." In the breach stood the Law of Return. There was, therefore, legislation which governed the issue. Interpretation of the provisions of the Law of Return would determine the validity of the conversion which was carried out in Israel. It was true that the interpretation of the words "who has converted" in the Law of Return, was not free of doubt, but its examination was outside the scope of the petition at hand. Nevertheless, President Barak noted: even at this stage - on the basis of the decisions of this Court in the past - one can say: first, that conversion, for the purpose of the Law of Return is not only a private act between a person and his Creator; and secondly, it is not only a private act of a number of people who wish to convert others.

Conversion, for the purpose of the Law of Return, is an act by virtue of which a person joins the people of Israel. It has public ramifications in relation to return and citizenship. It is only natural that a conversion which is valid for the purpose of the Law of Return is a conversion which is recognized by the Jewish community in Israel. This has been held in relation to conversions which have been carried out outside Israel and of course must also be the case in relation to conversions which are carried out within Israel. Of course, important questions are: what is that Jewish community, what are its characteristics, how many members does it have and what are its traits. We have not heard any arguments in respect of these matters, and we shall not make determinations in respect of them. Secondly, the term "conversion" is first and foremost a religious term, which has been employed by the secular legislature.

The act of conversion - whatever its content - must conform with the Jewish perception of this term. Within the framework of this petition, we take no stand on the question whether this Jewish perception attracts recognition of every Reform conversion as a valid conversion for the purposes of the Law of Return. With regard to the Population Registration Law, we wish to emphasize that the definition of the term "Jew" is identical to that found in the Law of Return.

Justice Zvi Tal

Justice Zvi Tal dissented in a lengthy and tightly reasoned judgment.

Justice Tal held that the *Shas* decision was not determinative of the case at hand. Naturally, in so far as one was dealing with conversions carried out outside the sovereign territory of the State of Israel, there was no independent body which was exclusively empowered by Israeli law to perform conversions which were valid for the purposes of registration and return. From this point of view the *Shas* decision held that one also had to recognize conversions carried out abroad (but, only for the purpose of registration and not in relation to the right to immigrate in accordance with the Law of Return). In contrast, in the instant case, reference was to conversions carried out **in** Israel. In so far as this was concerned, a preliminary question arose which was not connected with the nature and substance of the conversion, namely, the jurisdiction of the body which performs the conversion. If the said body lacks jurisdiction, and the body which has jurisdiction does not recognize them, even retroactively, such conversions lack validity according to the laws of the State, irrespective of their nature and content.

Justice Tal's conclusions were as follows: the powers of the registration official in relation to proceedings and certificates executed in Israel were not the same as in relation to a certificate of conversion issued abroad. With regard to the latter certificates, the official could not be expected to examine the nature and composition of the bodies which issued the documents, or their powers under the laws of their respective countries. Thus, in the *Shas* decision the Court required the official to accept such a certificate for the limited purpose of registration for statistical purposes. Such a registration was not evidence of the validity of the personal status stated in the certificate, and the registration

did not confer on the holder of the certificate any substantive rights. This was completely different from the case of a certificate issued in respect of a ceremony conducted in Israel. Here, he could and was even obliged to examine if the certificate was issued lawfully and could refuse to register any notification based on a certificate which was issued unlawfully.

Further, conversion, as granting an automatic right of immigration to the State of Israel had to be governed by competent State authorities. Justice Tal held that the petition was not concerned at all with the personal aspect of conversion. There was no obstacle preventing a person who was not a Jew from undergoing a private conversion in Israel in the same way as there was no such obstacle in the United States. The Petitioner was attempting to force the State authorities to recognize her conversion for the purpose of immigration, nationalization and registration as a Jew in the Population Registry. Both immigration and registration in the Population Registry were patently issues falling within the public sphere. The petition therefore did not focus on the question which conversions could be performed in Israel, but whether one could enforce recognition of private conversions for the purpose of immigration, or, whether the State has the right to recognize only those conversions which are performed by the competent authorities. This question had absolutely nothing to do with the principle of equality. Everyone has equal rights to change their religion as they see fit, and in any process they see fit. But not everyone has equal rights to force the State to recognize their conversion, and this does not amount to an infringement of equality. An authority may state: this conversion process is recognized by me, for good reasons, such as that it is organized, universally recognized, prevents anarchy, is subject to supervision, *etc*., and that another process is not recognized by me because it is the opposite of all this.

Justice Tal held that every effort should be made to prevent the situation where a person is regarded as a Jew for the purposes of registration and return, but not for the purposes of personal status. Apart from the confusion and unhappiness which this may cause that person and his family, such a state of affairs has the effect of misleading the public. Accordingly, the body which is empowered to determine the Jewishness of a person in respect of his personal status, namely, the Chief Rabbinate, is the body which should supervise the conversion process. The legal basis of the Chief Rabbinate's jurisdiction is twofold: the Ordinance and the legislative history of the Population Registration Law and the Law of Return.

Justice Tal denied that there was any connection between conversions carried out abroad and those conducted in Israel. Conversions carried out abroad were not necessarily performed so as to allow a person to immigrate to Israel but rather to allow him to join the local Jewish community. Israel was not in a position to supervise such conversions. This was not the case in respect of conversions performed in Israel, under the sovereignty of the State, and in order to gain the benefit of fundamental rights in the State.

Justice Tal held that the fact that the religious authorities in Israel are *Halachic*, does not entail any infringement in the rights of any religious movement. The Chief Rabbinate is elected by a body made up of representatives of the Jewish faith, on one hand, and representatives of the various political parties, on the other, with the latter having a guaranteed majority. The members of the Chief Rabbinate are elected democratically and there is no place for alleging discrimination. The fact that the Chief Rabbinate represents an *Halachic* stream and not the Reform Movement, ensues, *inter alia*, from numerical supremacy.

According to Justice Tal, underlying the Petitioner's claim, was the perception that denying the right to convert was tantamount to deligitimizing the Reform Movement and would impair the Movement's ability to establish itself in the State of Israel. Nevertheless, a clear distinction had to be drawn between the right of Reform Jews to immigrate to Israel and the right of gentiles who underwent a private conversion to immigrate. Israel is open members of all movements and sects in accordance with the Law of Return, to be registered as Jews, however the petition at hand was concerned with the Jewishness of a gentile who had undergone a private conversion. This petition did not give rise at all to the question of the Jewishness of Reform Jews.

For these and many additional reasons, Justice Tal recommended that the petition be dismissed. He noted that the Petitioner could undergo a conversion process which would be recognized by the competent Rabbinate, or, alternatively, she could apply for citizenship in accordance with Section 9 of the Nationality Law. Accordingly, his findings did not close the door before the Petitioner, and she could immigrate to Israel, provided she did so in accordance with the law and the procedures established by it.

Justices Cheshin, Matza, Strasburg-Cohen, and Dorner agreed with the judgments of President Shamgar and President Barak.

Abstract prepared by **Dr. Rahel Rimon** Adv**.**