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PRESIDENT'S MESSAGE



I

srael is celebrating its 50th Anniversary, and on the eve of the Day of Independence, *JUSTICE* marks the milestones in this young democracy's ongoing effort to maintain the rule of law and establish constitutional norms in the face of wars, terrorism and the internal tension which is inevitable in a unique society evolving a new demographic, social and cultural identity.

Israel today is counted one of the most free and democratic countries in the world. Much of the credit for this achievement in the face of obstacles from both home and abroad is due to the outstanding leaders of the legal community, who have always been and still are at the vanguard of the struggle.

JUSTICE devotes a large part of this issue and forthcoming issues in this jubilee year to a series of conversations with the judicial figures who helped shape Israel's legal system, including former and current heads of Israel's Supreme Court, and the heads of other judicial structures operating in Israel, such as the Druze and Moslem Religious Courts. The reflections of these personalities illustrate the evolution of Israel's dynamic legal system and indicate the places where reform is still needed.

Our Association will celebrate Israel's jubilee at its triannual international congress to be held in Jerusalem on 28-31 December, 1998. The International Presidency which convened in Israel on December 28, 1997, decided that the theme of this special congress will be: "Judaism, Humanism, Democracy and Political Culture". The opening keynote address will mark "Fifty Years of Israel's Independence".

But a congress is not only a time for celebration, and as is our custom, we shall also discuss in depth some of the problems which have recently been the subject of argument and controversy. Thus, one panel will deal with "Pluralism, Religion and State", and the subject of another panel will be "Prosecuting Public Figures". As always, we shall also deal with current financial, business and economical matters.

Unfortunately, one subject is always on our agenda, not to be ignored or omitted even on festive occasions. For two millenia Jews in the Diaspora used to leave one wall unpainted to remind them of the destruction of the Temple in Jerusalem. In the same spirit, we must constantly remind ourselves and others of the various aspects of the Holocaust. Not only is the abhorrent phenomenon of Holocaust Denial spreading in print and on the Web, but new facts are coming to light which reveal the cynical exploitation of the Jewish tragedy by those who filled their coffers with Jewish money and assets. Some Nazi war criminals who for years have enjoyed their freedom, have never been made to pay for the atrocities they committed, their families supported by state funds. Accordingly, in one of the panels we shall discuss "The Responsibility of States for Past Behaviour During the Holocaust and Holocaust Denial Today".

The Presidency has also decided to hold a series of seminars, in various European cities, to commemorate Jewish lawyers and jurists who perished in the Holocaust and describe their contribution to the law in their respective countries. The first of these seminars will be held in Salonika, Greece, on 25-29 June 1998. Details of the programme are included in this issue.

I hope members will feel part of Israel's celebrations through this special issue of *JUSTICE*, and will make every effort to participate in the upcoming events of the Association.

Hadassa Ben-Zur

Fifty Years of Law in Israel

Celebrating fifty years of law in Israel, JUSTICE has held conversations with leading judicial figures in Israel, commencing with three of the Supreme Court judges who first helped shape Israel's legal system

“I do not believe in Judicial Activism”

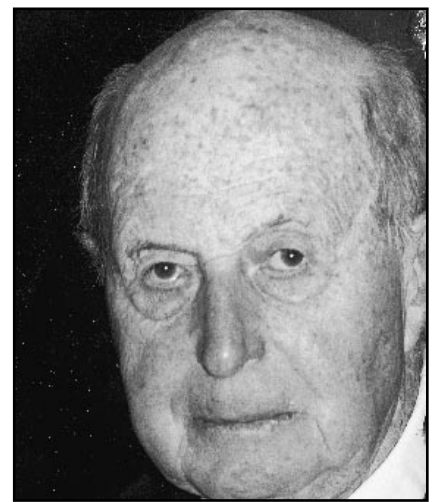
Conversation with Justice Moshe Landau

JUSTICE - Looking back over the last 50 years, which points in the evolution of the legal system in Israel do you regard as particularly significant?

Justice Moshe Landau - The first landmark was, of course, the establishment of the legal system itself. That was a great historical event and whoever lived at the time will remember its emotional impact on all those who had something to do with the law. On 15th May 1948, the legal system mainly comprised the English common law and equity and also remnants of the former Ottoman regime and the decision was to maintain that system subject to changes which would be introduced over the course of time. Law reform indeed followed during these 50 years in a process that still goes on. There was no alternative to this decision. The only alternative would have been to establish an entirely new system, a process which was beyond the capacity of those who had to make these decisions and carry them into effect. The only other alternative would have been to try and accept the *Halacha*, Jewish Law, as the law which would govern the legal system and that was rejected by the great majority of the population of the time because there was no desire on the part of the majority to have a theocracy in Israel. Of course, this problem still exists. The compromise which was reached was to adopt the *status quo ante* and to have matters of personal status, mainly marriage and divorce, governed by the *Halacha* and administered by the Rabbinical Courts.

An event laden with great emotion, was the first session of our Supreme Court which took place on the 15th August 1948.

There was a lot of discussion as to where the Court should sit, as Jerusalem was still a battle field. There were those who thought it should sit on Mount Carmel in Haifa or in Tel Aviv. But it was later decided to seat the Supreme Court in the former Supreme Court building in the Russian Compound in Jerusalem.



My mentor, Dr. Moshe Smoira, who was the first President of our Court, gave an address which he started with the prayer of the *Sheliach Zibur* before the *Musaf* prayer on *Rosh Hashana*, which was very apposite:

“O behold me, destitute of good works, trembling and terrified, in dread of thee, who inhabitest the praises of Israel, standing in thy presence to supplicate thee, for thy people Israel, who have deputed me: although I am not properly qualified for it, yet do I beseech thee, O God of Abraham, Isaac and Jacob, O Lord, merciful and gracious, Almighty and tremendous God, prosper my attempt, in thus standing in thy presence, to seek mercy for myself, and for those who have sent me... O suffer them not to be confounded for my transgressions, nor be ashamed of me, nor I may be ashamed of them. Accept my prayer as the prayer of a grave, venerable and righteous person, whose voice is sweet and acceptable to mankind. Rebuke Satan that he may not accuse us:

Justice Moshe Landau served as the President of the Supreme Court of Israel between 1980 to 1982. He is an Honorary Member of the Presidency of our Association.

and may our assembling be acceptable to thee and in love cover all our transgressions; and turn all our fastings and afflictions, for us and for all Israel, to joy and gladness, life and peace, that they may love truth and peace; and there may be no manner of impediment in my prayer.”

There were five judges in the first Supreme Court: The President, Dr. Moshe Smoira; Justice Itzhak Olshan, both of whom were connected with the *Histadrut* and the Labour Party, but with their appointment to the Court, they severed their political links; two from the Liberal camp, Justices Dunkelblum and Cheshin (whose son is now on the Supreme Court) and Rabbi Assaf who was a great expert on Jewish Law and had no experience of the English system which reigned supreme at the time, although he found his way quickly.

One of the first landmark decisions considered whether the Declaration of Independence, which was proclaimed during the first session of the Provisional Council of State, had the force of a superior law which was to control ordinary legislation by the legislature, on the American model. A promise to establish such a Constitution was contained in the Partition Decision of 29th November 1947, and that appears in the Declaration of Independence. The written Constitution was to be introduced within half a year, by the 15th October 1948 - that promise was not kept. Ben-Gurion did not want at that stage any instrument which would control the legislation, first of the Council of State and later of the *Knesset*. In 1950, the so-called Harari Resolution was passed which was an uneasy compromise, the importance and meaning of it is being debated until this day.

Coming back to the decision itself: President Smoira held that the Declaration of Independence had no formal power of positive law, it was merely the credo of the State. If he had decided otherwise then the promise to have a written Constitution would have had to be carried into effect in order to make it possible for the Court to strike down an ordinary law of the legislature. That discussion, of course, goes on to this very day as an important part of our constitutional debate.

JUSTICE - In retrospect, were you handicapped by not having a Constitution?

Justice Landau - I am one of those who by upbringing believes in the English legal attitude and England to this very day has no written Constitution, although England is now a

member of the European community and subject to community law. Internally, however, this is still the position in the English legal system and I believe an inductive process of reasoning, from case to case, proceeding carefully and with a general attitude of judicial restraint is better for the development of the system. But that is not the case now with our present Supreme Court; there - mine is definitely a minority opinion.

JUSTICE - Making a leap to the present, how do you see the Basic Laws now? Do you see them as having constitutional effect?

Justice Landau - Two years ago I wrote an article about this subject in *Mishpat Umimshal*, the legal journal of Haifa University School of Law - in which I objected very strongly to the landmark decision of our present Supreme Court in 1995¹ which declared that we do have a rigid Constitution on the American model. I argued that there is nothing in these Basic Laws which supports this assumption. I am definitely still of the opinion that it is for the *Knesset*, the representative of the populace, to take upon itself the duty of deciding that we want to have a written Constitution, that we want the Supreme Court or any Court to have judicial supremacy over ordinary laws of the *Knesset*. *Mizrahi Bank* was a very momentous decision and it was promoted by the great protagonist of this idea - Justice Barak. It was made without anyone understanding what was going on, until the Supreme Court proclaimed that we have a written Constitution, relying on the important American constitutional case: *Marbury v. Madison*.² But the question is one of legitimacy - whether the Court was entitled to take this power upon itself.

When, as a result of the Six Day War in 1967, Israel occupied the West Bank, it was decided by the Government - mainly at the initiative of Justice Meir Shamgar who was then the Military Advocate General - that the people in the West Bank and Gaza Strip would also have access to our Supreme Court sitting as the High Court of Justice. Under international law this was not the general rule, but it was, I think, a very wise decision and access was frequently sought by the inhabitants of the administered

1. H.C. 6821/93, 1908/94, 3363/94 *United Mizrahi Bank v. Migdal Cooperative Village*, 49(4) P.D. 221.
2. *Marbury v. Madison* 5 US (1 Cranch) 137 (1803).

areas. One decision which was the result of this attitude was the case of *Elon Moreh*.³ That was a case where private land was expropriated for the purpose of establishing a new settlement in the Nablus area. The Military Government of the Territories asserted that this settlement was necessary for reasons of security. But the Court went into the facts in some detail, something the High Court of Justice does not do very frequently, as it was clear that there was also a dispute within the Government as to whether the settlement was really necessary for security reasons; *prima facie* it was not. The matter was finally clinched by the people who were to settle on that land, *Gush Emunim*, who asked to be joined to the proceedings and who told the Court the truth - that this was a matter of establishing rule, and asserting the heritage of *Eretz Israel*. Their statements completely contradicted the claims relating to security and the Court accordingly rescinded the order confiscating that land and declared that under international law, which was applicable in the Territories, land could only be appropriated for the good of the population of that area or for urgent reasons of security, and as neither was the case the place was to be evacuated. We gave citations from the Bible saying that the 'stranger in our land' had to be given the same rights as the citizen. This was an important decision in which I played some part together with the late Justice Witkon.

There was also the famous *Shalit case*.⁴ Shalit was an army officer who married a non-Jewess who was the daughter of a Scottish Zionist family. The couple had two children. Mrs. Shalit was an agnostic and for reasons of conscience would not ask to convert. The main argument raised in Court was that if a person completely identifies with the State and declares that she feels herself a Jewess, then the children have to be registered as Jewish despite the *Halacha* which said that only the children of a woman who is Jewish or a convert may be considered as Jewish. The Ministry of the Interior had all sorts of regulations: at one point there was a regulation that people had to be registered according to their subjective declaration, then a more right-wing Government came into power and the Ministry of the Interior issued new regulations which more or less followed the *Halacha*. The Shalits applied to the Supreme Court sitting as a High Court of Justice which has jurisdiction over administrative acts. Ben-Gurion tried to delay the decision, or perhaps solve the problem, by applying to 100 authorities on Jewish law. Of course there was an enormous diversity of opinion and nothing at all resulted from this effort. The first application to the Court

was heard by a panel of 9 judges out of the 10 who then sat on the Bench. The result was that a majority of 5 ordered the registration of the children as Jewish. There were two judges who were the traditionalists - Justices Silberg and Kister - who said that it was quite clear that Jewish Law had to be applied and there was much to be said for that. Jewish Law is really not so illogical, as the Latin maxim goes - 'the mother is always clear' - the father not necessarily so. Two other judges - Justice Agranat and myself - held that this was not an issue which was justiciable at all, because by deciding on it the Court was entering into an area which was politically highly explosive - and we were under a duty to exercise judicial self-restraint. The Court is supposed to give expression to a general consensus, if it does not - it becomes politicized itself and therefore some questions are not justiciable. So, had our opinion been adopted, we would have let the matter rest as the administrative authority decided. Actually this would have meant rejecting the petition, which it is true may be an objection to this view.

JUSTICE - In such a case, i.e., if the matter was not justiciable *ab initio*, the issue of the reasonableness of the decision would not have been relevant at all?

Justice Landau - The reasonableness test was only introduced about 10 years ago. Reasonableness is only what I, the judge, regard as reasonable. There is no objective test. Lately, we have another test which says that the decision of the administrative authority has to be proportional to what is required - all this means is that the Court and each of its judges is given the power to decide according to their personally held views. In the *Shalit case*, these two children were registered as Jews. The majority of the *Knesset* was not satisfied with that solution of the Court and they reintroduced the test of the *Halacha* by legislation. This continues to trouble us to this day with the conversion dispute. The *Shalit case* was important because it made evident the division of opinion on the role which the Court may play in political issues.

JUSTICE - So on the whole you do not approve of the increasing interventionism of the Supreme Court over the years?

3. H.C. 390/79 *Dweikat v. Government of Israel*, 34(1) P.D. 1.

4. H.C. 58/68 *Shalit v. Minister of the Interior*, 23(2) P.D. 477.

Justice Landau - I am against the developments which started at the beginning of the 1980s, with the Court which has become increasingly activist, and with judges who believe that they know better and are therefore willing to revise what Parliament decided. But this is a minority view of mine.

JUSTICE - What are your views on punishment in Israel, are you satisfied with the way the legal system deals with it here?

Justice Landau - First of all, don't believe anything you read in the newspapers. If you have a banner headline 'The Court again gave an unreasonably lenient decision, doesn't the Judge know what is going on here', and then when you read the protocol of the decision you find that there were very good reasons, perhaps humanitarian reasons, for the decision. I do not believe that our Courts are over duly lenient or that our criminal legislation is too lenient. But there is one exception, which is not directly concerned with the issue of punishment, and that is the question of civil rights. Civil rights have become central to our legal system and as a result of excessive insistence on them we are educating a young generation of egoists.

JUSTICE - So going back to the issue of punishment you don't believe in minimum and maximum penalties?

Justice Landau - No, I don't. Also I don't believe in a fixed tariff of punishments. 10 years ago that was very fashionable in American jurisprudence: 'we despair of these judges and therefore let us tie them down to a fixed tariff according to the circumstances of the case'. I don't believe in that at all. I think the imposition of punishment is the most difficult part of the job of a judge, but somebody has to do it and all the relevant facts have to be taken into account. Of course, some judges are more compassionate and some insist on the letter of the law, but the maximum penalty is only a maximum, and there is a lot of discretion which the Court should exercise. However, there is one exception and that is the matter of detention until trial. We had a glaring case where the Court went entirely wrong. The case related to an Arab who specialized in stealing cars and whisking them over the Green Line to one of the many car wreckers. He was caught in the act. The judge in the Magistrate's Court very properly decided that this man was a public danger and that the theft of cars had become an epidemic. So he decided to detain him until trial, which actually took place

shortly afterwards, but, the law had been amended - the law on detention was made much more lenient and the power to detain a man was, I think wrongly, very closely circumscribed. It is true that sometimes the individual suffers because he has been unjustly detained, and he can and should be given compensation for that, but there are considerations of the public good which outweigh this suffering. In this case there was an appeal from the decision of the Magistrate to the District Court which affirmed the decision of the Magistrate. It came before the Supreme Court initially, before 3 judges and thereafter, in a Further Hearing, before 7 judges. The man was released.⁵ Quite rightly, jurists have severely criticized this decision. Here is one of the main reasons for that wave of violence which we are witnessing now.

JUSTICE - Do you see the jury system as a viable institution in the Israeli legal system?

Justice Landau - Fortunately, we have never had the jury system and except for some mavericks no one wants the jury system here. The British were the ones who developed it. They did not introduce it here because they realized that in difficult cases between Jews and Arabs it would be impossible to empanel a jury, the decision would depend on the majority of the jurors as it does in some cases in America, where it depends on the proportion of blacks and whites. There was a Jewish American judge, Jerome Frank, who years ago wrote a book tearing down the jury system and actually today even in England there is a movement to do away with the jury system, because there is nothing that a jury can do which a professional judge cannot do much better. With regard to the adversarial system versus the continental system - there are advantages to having lay judges. We have lay judges in our Labour Courts, sometimes this is very important as they represent what is really going on on the ground - but in ordinary civil procedure - please let's forget about it and clearly it is being forgotten.

JUSTICE - How do you think the legal system should deal with the spreading phenomenon of violence in the family?

Justice Landau - There has always been violence in the

5. Cr./App. 537/95 *Ghneimat v. State of Israel*, 49(3) P.D. 355; F/H 2316/95 - 49(4) 589

family, but there is now much more awareness of it, more exposure by the media which is sometimes employed by one of the parties. I am all for the police reacting very strongly. It is necessary to keep our finger on the pulse of what is going on in the family in that regard, and this means a strong police force which can really deal seriously with the problem. The Israel police has its hands full. There should also be much stricter law enforcement in cases which are clear. In rape cases the question has always been should the testimony of the woman - without any real supporting evidence - be accepted against that of the man. The matter bristles with difficulties. I, for one, was always careful before I convicted a man of rape, maybe I committed an injustice in some cases - I don't know to this day - but a general attitude of caution in weighing the evidence is certainly needed in those cases.

JUSTICE - What are your views on granting general clemency as part of the State's 50 Year celebrations?

Justice Landau - First, I follow the Attorney General and the State Attorney in concluding that a general pardon for prisoners is out of the question. It has been our experience that more than a few of those serious offenders who were sentenced to long term imprisonment at once went back to crime after being pardoned. Individual pardons of course are granted all the time and should be granted. Under the Basic Law: the President of the State - the only power of substance which the President has is the power of clemency, applied usually with the cooperation of the Minister of Justice. There is a judgment by Justice Elon in which he said that in some cases a Court in meting out punishment should be entitled to call on the President to consider whether this is a case suitable for pardon and then the power of meting out punishment is divided between the Court and the President. This, in my opinion, is unacceptable. The Court has to impose the punishment which is necessary according to the conditions which exist at the time. If there is a change later in the personal circumstances of the offender, or, really sincere good behaviour and a desire to repent-which is not just faked for this purpose - these factors should be considered. Under the current process, the matter of releasing a prisoner for the last third of the period of imprisonment imposed on him, comes before a statutory committee which hears the opinion of the prison authorities, the State Attorney's representative and the

representative of the defendant and these individual cases go on all the time.

JUSTICE - But in your view it should not be tied to the 50th anniversary of the State?

Justice Landau - After the victory in the Six Day War, a compromise was reached, not a general pardon and not the usual individual pardon, but advisory committees were appointed, presided over by judges, which considered each and every case of imprisonment and then gave its recommendations to the President of the State, who followed those recommendations. This really satisfies nobody. I do not think that an event like 50 or 100 years should be the occasion for letting people out of prison who are dangerous to the public.

JUSTICE - And what do you think of capital punishment?

Justice Landau - The situation at present is that there is no capital punishment. It was abolished in 1950 and was commuted by law to life imprisonment. Life imprisonment also does not mean life in prison, there is a practice under which after a certain number of years prisoners and even murderers are considered for release unless they are especially dangerous.

There is capital punishment for crimes of genocide or offences against the Jewish people, under statute. A lot of soul searching took place in the Eichmann case, where I presided in the District Court, and we had no doubt that this was a case for the application of capital punishment, although some very serious people wrote to us imploring us to make an example of the clemency which is characteristic of our people. One of those who wrote to me was Norman Bentwich, who was the Attorney General at the time of the Mandate, the son of a Zionist family and a great believer in human rights. He quoted from the *Mishna* - 'A *Sanhedrin* (the High Court of those times) which imposes a death penalty every 70 years is considered *hablanit*' - a Court of violence. But he did not mention that further on, another Rabbi objected and said - 'But you also multiply bloodshed in Israel'⁶ by your compassionate attitude. Bentwich had the good grace to apologize.

6. Tractate *Makot* 1, 10.

We also have provision for the death penalty under our security legislation. In general I am against imposing the death penalty. One argument which I think cannot be disregarded is that if you have the death penalty you may get judicial murder by sentencing an accused who is innocent. Secondly, it is inappropriate except in extreme cases like the Eichmann case where the offence was genocide against the Jewish people. We said in our judgment that in every train which carried 1000 Jews to the gas chambers, each of these 1000 Jews was murdered by all those who had a hand in carrying out the Final Solution. That was a case where we had no doubt, the Supreme Court approved our decision and President Shazar refused to exercise clemency. But I have my doubts about imposing the death penalty on even the worst terrorists, mainly for utilitarian reasons. It is no deterrent for people who wish to reach Paradise. The death penalty is primarily intended to mete out punishment where it is due and then comes its deterrent effect. That doesn't work in terrorist cases and carrying out capital punishment can also lead to retaliation. It is not a matter of compassion for murderous terrorists.

JUSTICE - What are your views on the Supreme Court considering complex problems such as euthanasia or surrogate parenting?

Justice Landau - I think the Court is at present going into these very difficult, philosophical, ethical questions as an outcome of the general public's expectation that the Court will have the last word. But that is never so - take the *Nachmani case*⁷ about artificial fertilization which continued until the parties settled the matter between themselves. I think the Court is being overburdened or overburdens itself by trying to settle these problems.

JUSTICE - How do you see the function of State Inquiry Commissions as an instrument for resolving matters on the public agenda?

Justice Landau - It is not unnecessary. I was a member of the Agranat Commission after the October 1973 War. For me it was a military academy. We sat there for 14 months, we had two former Chiefs of Staff with us, Agranat presiding, but the experience which we had was deplorable because the Commission was furiously attacked for differentiating between the military and the political levels - between General David Elazar, the

Chief of Staff, and Moshe Dayan who was Minister of Defence. We explained that imposing a sanction on the political level was a matter for politicians and ultimately for the public by popular vote during the elections, and indeed that was what happened in the end. I lived it down eventually, but my colleague Agranat took the experience very badly because, after all, the commission was identified with his name. Nevertheless, I am not against using inquiry commissions in a proper case. A case which I think was not proper was the 1985 Inquiry Commission into the murder of Arlosorov in the year 1933. After the lapse of so many years it should have been left to rest, and the matter was quite clear even without the findings of the Commission. Another example was the Landau Commission on the General Security Services. The GSS was in danger of disintegrating as a result of two scandals - the *Bus 300 Affair* and the *Nafsu case*. In my opinion, the report of the Landau Commission which was in two parts - one secret and the other public - was well balanced. It made the recommendations which are now being proposed by the Government, namely, to introduce more supervision by a ministerial committee and the Parliamentary Sub-Committee on the Secret Services. We said there was too little supervision, the GSS should not be hermetically sealed, it should report from time to time. The ministerial committee was our idea. On the whole I have nothing to regret, this Commission was essential at the time because the security service was being undermined by a practice of lying to the Court and it was vital that a body like this engage in accurate reporting and absolute truthfulness.

One of the side-effects of appointing an inquiry commission is also to dampen down public excitement about a delicate issue.

JUSTICE - How do you see the standards of the present legal system in terms of the quality of the judiciary and the lawyers?

Justice Landau - The justices of the Supreme Court are first rate but are over-working themselves. There was a clear rule in Agranat's time and in my own time that not every busybody or every lawyer who wanted to make a name for himself could apply to the Supreme Court for a minor entrance fee, irrespective of whether he would be thrown out of Court at once, nor could a member of the *Knesset* who had not succeeded in gaining a majority for his opinion, come for a second try with the Supreme

7. F/H 2401/95 *Nachmani v. Nachmani* 50(4) P.D. 661

Court. It is wrong, I think, to open the doors completely for anybody to enter the Court. In my time, the formula was: admission would be granted only to a person who had a personal interest, it did not necessarily have to be a material interest but it had to be a direct interest, greater than that of the general population that the law should be observed. Today, the Courts are overreaching themselves.

JUSTICE - What is your view on the establishment of a Constitutional Court?

Justice Landau - I think it is essential at the present time for these matters to be settled where they should be settled, namely, in the *Knesset*. Substantively, I would like to see judicial supervision of *Knesset* legislation on matters concerning the constitutionality of the various arms of government and the relations between them. At present, in theory, you can have what in England was called the 'Long Parliament' which tried to perpetuate itself. You can have a Long Parliament here. There is nothing in our positive law, including our Basic Laws, which prevents a majority of 2:1 *Knesset* members deciding that this *Knesset* is such a success that it should last for another 4 years and then another 4. Such a piece of legislation should be struck down by a Court and it would be easy to do so because there is no political issue involved. But I am absolutely against judicial

supervision over *Knesset* legislation under a Bill of Rights. These are questions which politicize the Court and which politicize the process of manning the Supreme Court, and then comes the cry: 'Where is the Yemenite representative on the Court?' To make the Court a 'mini-*Knesset*' is wrong. The standards should be professional. Of course, one cannot completely disregard the composition of the population, but it would be nonsense to look for proportional representation on the Court.

Further, although the judges are learned in the law and are accustomed to viewing matters dispassionately, this is the *Knesset* which we have, with all its weaknesses. I quite agree that a vacuum is being created into which the Supreme Court steps, but to thwart the whole constitutional system which we have and which, on the whole, I think is as it should be, because of this consideration, is wrong.

Despite the attacks on the judicial system there is no danger that candidates will be deterred from entering the courts. The tone of the attacks really angers me, but to some extent the Court has invited political opponents to the current judicial approach to speak up. What these opponents don't, but should, say, is that the Court is not the part of legislature, we want to establish a clear-cut solution by *Knesset* vote, or create a constituent assembly which will address the matter. These are problems which can be solved. I have great hopes that in the end reason will prevail. ■



The southern aspect of the Supreme Court building in Jerusalem

“The Time Has Come to Write a Constitution”

Conversation with Justice Haim Cohn

JUSTICE - At the beginning, at the time of the establishment of the State of Israel you were one of the people who first worked on the matter of a Constitution for Israel. What were your views on the need for a Constitution?

Justice Cohn - From the beginning there was a big difference of opinion about whether we should have a Constitution or whether, like the British, we should content ourselves with constitutional conventions. Prime Minister David Ben-Gurion was very much against any Constitution. His argument was that we had 600,000 Jews in the new State of Israel, the next day there would be 1 million, the next year 2 million, in 7 years there would be 7 million Jews. Why should we dictate the details of the Constitution of the State to all those who would come after us. I don't know whether this was really a pretext on the part of Ben-Gurion or whether he really believed in it, at any rate he had reason to be afraid of the Constitution which would require the consent of the orthodox parties. One of the many drafts which was prepared by a committee of the Provisional Council of State provided in the first clause that the religion of the State of Israel would be the Jewish religion. I remember when Ben-Gurion saw this he almost exploded: 'I will have no Constitution!'. When the pressure grew harder over the course of time, he had the brilliant idea of sending his young Attorney-General to Washington D.C., to look at the American Constitution, hear what the Americans had to say, and see what kind of Constitution we should have.

JUSTICE - Ben Gurion's logic could also have been applied by the framers of the American Constitution?

Justice Cohn - It is true that the same arguments could have been raised at the end of the 18th century, but America was not

then regarded as a country of immigration, that came later. I went to Washington D.C.. First, I saw Mr. Justice Hugo Black. He said, 'Young man, I give you one piece of advice, you write a Constitution and make it so stringent that no

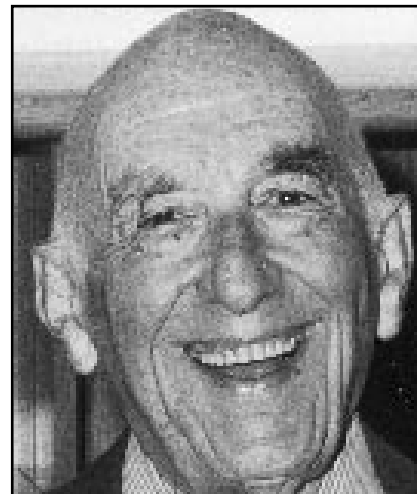
Supreme Court can get around it'. Next, I went to see Mr. Justice Felix Frankfurter, he told me, 'Young man, I give you one piece of advice, never write a Constitution!'. Actually, the British is the greatest democracy in the world, but if you look at the new countries which have beautiful Constitutions, Russia and many African States, how do they look? Its all only on paper. What you need are courageous judges who are determined to stand up against any Government.

When I came back to Israel I reported to the Government. It was decided not to write a Constitution. I thought this was the right choice. I was brought up in English law.

JUSTICE - Looking back 50 years, do you regret it?

Justice Cohn - No, but I do not look back. I look forward. I see the time has come now to write a Constitution. At that time we would never have believed that it would be possible to have a State which is so sold out to the orthodox.

JUSTICE - How do you see the Basic Laws today? Do you regard them as the various chapters of the Constitution?



Justice Haim Cohn served as Israel's Attorney General (1950-1960), Minister of Justice (1952), and Justice of the Supreme Court (1960-1981). Justice Cohn is Honorary President of our Association.

Justice Cohn - Yes, I regard the last two Basic Laws (Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation) as a very great step forward. I hope that the other two Basic Laws which are still on the table of the Knesset, namely, on Legislation and Human Rights, will also be passed in the near future.

JUSTICE - From your perspective, are you satisfied with the way the Supreme Court has developed in Israel?

Justice Cohn - If I were to sit on the Court today, I think that the system of work would be a little different. But as far as the general level is concerned and as far as the integrity and qualifications of the judges are concerned, we can only be proud of the Court as it is today. When I say that I would act differently, I mean that judges nowadays no longer write judgments: they write dissertations, and this is taking up their time to an undue degree. Because they write these long theses (which are good for a professor but not for a judge) they have little time to deal with routine daily matters. So there is a very big delay of justice in this country and any delay of justice is to some extent also a denial of justice. This is something about which I am very much troubled.

JUSTICE - How do you regard the current attitude of increased interventionism on the part of the Supreme Court?

Justice Cohn - I think the Court is right to intervene where it intervenes. The question is always what is the subject-matter, what is the course of action required. In my time, the Court did not intervene so much because it had no need to do so. We heard a minimal part of the petitions which now come before the Court and if a petition comes before the Court and the petitioner is right the Court is under an obligation to give him right. You cannot just throw him out and say we will not hear you. I think it is more correct to say that the general legal and moral standard of Government has deteriorated, and there is now much more need for the Court to intervene than before.

JUSTICE - But alongside this you have the phenomenon where people apply to the High Court of Justice even where they don't have a personal interest in the issue, but merely claim to represent the general public interest. Doesn't this add to the overburdening of the Court?

Justice Cohn - I decided when I was sitting on the Court, that the *locus standi* should be interpreted liberally. I then held that whenever it is shown to the Court that in order to do justice a remedy must be given then the Court should not dismiss the case only because of want of *locus standi*.

JUSTICE - Even when the remedy is only a declaratory judgment?

Justice Cohn - It doesn't matter.

JUSTICE - Taking a panoramic view of the 50 years, could you mention some of the major landmarks in the development of the legal system in Israel?

Justice Cohn - The first landmark was in the early 50s, with the enactment of the Judges Law - 1953, which was followed by the Courts Law - 1957. This was, of course, a very important first step, to create a system ensuring the independence of judges. I was already involved in the work of the judiciary when I was the Attorney-General and these laws had not yet been passed. I was responsible for the passing of these laws, and I know from my own experience how difficult and dangerous it was to operate without these laws, and be subject to the discretion of the Minister of Justice or even of the Government. The second most important event was the increase in the number of Justices. While the first Court had 5 Justices, they soon became 9 and 12. Today there are 14. This leads to an entirely different judiciary. Then, over the course of the years, many very great Constitutional cases came before the Court. I cannot now measure the respective importance of the cases, but the first milestone was the *Kol Ha'am case*,¹ where Justice Agranat laid the foundations for freedom of the press and freedom of expression in Israel. In general, as we have no Constitution and no Bill of Rights, it is for the Court to lay down which human rights are implied in the democracy of the new State, and how these human rights should be applied and enforced. *Kol Ha'am* was the first in a long line of cases in which human rights were judicially established and recognized. I think there remain no important human rights on the books which have not been upheld by the Courts.

1. H.C. 73/53 *Kol Ha'am Ltd. v. Minister of the Interior* 7 P.D. 871

Justice - In view of the fact that the judiciary takes this approach, why enact the human rights within the framework of a Constitution?

Justice Cohn - We need a Constitution not for the Courts but for the legislators, for the people and for the Government. The Courts can do without it.

JUSTICE - What other important cases come to mind over the 50 years?

Justice Cohn - A second important case was the *El Ard* case,² where the question arose whether a political party which proposed the annihilation of the State of Israel could participate in elections to the *Knesset*. The majority of the Court decided that it could not, notwithstanding the provisions of the *Knesset* Election Law. A democracy has the right and duty to defend itself against enemies from within. The third group of cases of major importance were the *Rufeisen*³ and *Shalit* cases,⁴ where the question of who is a Jew and why is somebody a Jew, and how one should determine who is a Jew, were in issue.

JUSTICE - What impact did these cases have?

Justice Cohn - They are regarded as precedents to the present day. The *El Ard* case, for example, repeated itself when Kahane ran for the *Knesset*. Again the question arose whether the Central Election Committee of the *Knesset* could, without statutory authorization, deprive a man of his right to be elected to the *Knesset* on the grounds that he was a Fascist. The Court decided that the *Knesset* could not deprive any man of his right unless by statutory authorization. Accordingly, a law was passed to the effect that any racist party or any party that aspired to deprive Israel of its Jewish character, that is to say render the State of Israel un-Jewish, could not take part in the election.

JUSTICE - How do you view that law?

Justice Cohn - Very positively. In my dissenting opinion in the *El Ard* case I urged that such a law should be passed because in my view without statutory authority the Central Election Committee had no power to deprive a man of his right to stand for election.

JUSTICE - Turning to the Attorney-General, how do you regard his special role within the Israeli legal system?

Justice Cohn - As regards the Attorney-General I think we are almost unique, although not completely - because Canada has a very similar system. When the State was established, we proposed that the office of the Attorney-General should be divided into two: legal advisor to the Government and Solicitor-General, as he is called in America or Director of Public Prosecutions in England, who represents the State before the Courts. However, it was decided to have both these functions



The drum-shaped interior of the Supreme Court Library

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- 2. H.C. 253/64 *Jeryiss v. Haifa District Commissioner* 18(4) P.D. 673
 - 3. H.C. 76/62 *Rufeisen v. Minister of the Interior*, 16 P.D. 2428
 - 4. H.C. 58/68 *Shalit v. Minister of the Interior*, 23(2) P.D. 477

merged into one, mainly for reasons of economy. There were those who thought the Attorney-General was superfluous and to have two Attorney-Generals would be worse. The reason it was regarded as so important to have the institution of Attorney-General as it is now concerned the first Minister of Justice. Pinhas Rosen represented his Progressive Party in the Government. He was a good lawyer, but he refused to give the Government any legal opinion, because he argued that he represented his political party in the Government and a conflict of interest would arise if he had to give a legal opinion to the Government which was independent of his views and political aspirations. The Attorney-General was therefore created to be the independent, apolitical, non-party, legal advisor to the Government, as independent as a judge. I was the second Attorney-General and my main success was due to the fact that I soon conquered the good will and confidence of Ben-Gurion; he reconciled himself to the fact that he was being legally advised.

The Attorney-General in Israel has another function which even the Attorney-General in Canada does not possess. He is the legal draftsman of the Government. He drafts all the laws, or if he does not do so personally - they are drafted by the legal advisors of the various Government offices who are all subordinate to him. This is a very important and fascinating job. I myself came into the Government originally as Director of Legislation. I had been employed as legal counsel of the Jewish Agency from 1947, since the UN resolution on the establishment of the State of Israel, and I was called in because I had the reputation of being an expert on Jewish Law. Everyone took it for granted that in a new Jewish State - neither English nor French nor Ottoman law should apply but of course our ancient, beautiful and sacrosanct Jewish law. I was appointed, first as convener of a Legal Council charged with preparing Basic Laws for the new State about to be established, and then as Director of Legislation in the Ministry of Justice. But I had not officiated more than two weeks, when I was called to the Prime Minister and told that the need had arisen for a Public Prosecutor, that he had heard that I had been a good forensic lawyer, and that from tomorrow I would be Director not of Legislation but of Prosecution. When I protested, he said, we are in a state of war, and everybody is a soldier and has to obey orders. So I assumed the title of State Attorney, an office I held for two years. Overnight I had become an expert in criminal law.

When I became the Attorney-General, the function most near to my heart was the drafting of legislation.

JUSTICE - How do you see the dichotomy between the two roles of the Attorney-General, his function as advisor to the Government and his duty of objectivity.

Justice Cohn - There is no dichotomy whatsoever. On the contrary. What the legal advisor to the Government has to do is inform the Government of the law as it stands. If he gives advice that something is forbidden or allowed, the Government has the responsibility of deciding whether to follow his advice or not, but he has to give his advice neutrally, objectively as to what the law is.

JUSTICE - And assuming the Government decides not to follow his advice, in such a case the Attorney-General obviously cannot represent it.

Justice Cohn - He can but he won't. The art of the advocate is to represent a cause in which he does not believe, but normally in these cases the Attorney-General will not represent the Government, he may send some of his juniors to do so.

JUSTICE - In view of the experience accumulated so far, would you endorse the powerful status possessed by the Attorney-General in Israel today?

Justice Cohn - Yes of course. But I think the more complicated our political life grows to be, the more necessary it is to have a powerful or charismatic Attorney-General, who, by his personal influence, impresses the Government as to how to act. Everything depends on the personality of the Attorney-General, not upon the powers he possesses.

JUSTICE - How do you perceive the role of the High Court of Justice in Israel?

Justice Cohn - We inherited the High Court's power of adjudicating between the citizen and the Government from the British, there the jurisdiction which we call "Bagaz" is not vested in the highest Court, the House of Lords, but in the lowest strata of the Supreme Court. The idea however is the same. You can apply to the Court against the Government whenever the Government deprives you of a right unlawfully. Now in England, for instance, the Civil Service knows its job, civil servants know the limitations of their power, they know the law

and it is very rare for a citizen to come to the High Court and make a complaint against the Government. I think in England there are 20-30 cases a year. We have 300. The necessity of having "Bagaz" is proved by the fact that it is so heavily resorted to.

JUSTICE - But also because there are no limits on locus standi, on the people who can petition the Court?

Justice Cohn - Well, people do not come in vain, they come because they have a cause. It is now argued even by some judges that not all this jurisdiction should be vested in the High Court. A very big part of the jurisdiction could be vested in the District Court with an appeal to the Supreme Court. The difficulty is not very great but the cost would increase and the duration of the cases would be much longer.

JUSTICE - In the eyes of some observers, "Bagaz" stands today as a last bastion in the face of the collapse of the legislature; how do you regard that view?

Justice Cohn - It is highly exaggerated. There is no collapse of the legislature. All are very aware that where the legislature passes a law it can be attacked or now even invalidated. Normally, the legislature works all right.

JUSTICE - How do you see the political pressure for correct political representation on the bench of the Supreme Court?

Justice Cohn - This is pressure by politicians who do not know what they are talking about. Judges should be selected and appointed only according to their professional, legal and moral qualifications, nothing else. It does not matter whether they are men or women, Ashkenazi or Sephardi, black or white. All this is irrelevant to the appointment of judges. The Court is not like a parliament - a body representing the whole population. The Court does not represent anybody except itself. It would be very bad if judges were chosen in order to represent different strata of the population. The importance of the greater number of Justices today, compared to earlier times, lies in the different expertise of the different judges. The greater the number of Justices the more experts there are in different fields of law.

JUSTICE - What are your views on the Court opening its doors to the Palestinians?

Justice Cohn - In 1967 after we occupied the Territories, the question arose whether we could exercise jurisdiction in the territories under our occupation. The Court held that that was foreign territory, not Israeli territory, and we had no jurisdiction, but so long as the Government of Israel sent its emissaries there in the form of the Israeli military occupation authorities - such emissaries, even if they were outside Israel, remained subject to the jurisdiction of the Israeli Courts. Thus, when any Palestinian had a grievance against the Israeli military authorities, he was free to come and often did come to the Court - and the Court would interfere with the discretion of the military authorities if any unlawful act was committed.

JUSTICE - Do you see this as a landmark in the evolution of the Court, in terms of the expansion of its jurisdiction?

Justice Cohn - I don't think we expanded our jurisdiction. If a consul or an ambassador in a foreign country commits a crime under Israeli law he would be amenable to the Israeli Courts. The same goes for the military authorities in the occupied territories.

JUSTICE - Turning to punishments: is the judiciary too lenient or harsh? Do you favour minimum or maximum punishments in legislation?

Justice Cohn - God Forbid. Punishments cannot be absolutely just, because every punishment is in the discretion of a human being, a judge, and the judge must use his discretion to the best of his own personal conscience. Therefore, it may be that one judge is lenient and another is less lenient. The conscience of one may say to him he must be severe and the conscience of the other that he must be lenient. Both are right, but the press does not understand this. Journalists think that the Courts in general are either too lenient or too severe, whatever the prevailing atmosphere may be.

JUSTICE - This has come to the forefront because of the numerous cases of violence in the family, which may always have been there but has recently been highlighted by the media. How do you see judicial policy in such cases?

Justice Cohn - The papers will report, for example, that a man has received a sentence of only 5 years in prison after

raping his 12 year old daughter. This may seem to the uninformed observer to be either very lenient or very severe or unjust, but the judge who has all the facts before him, who sees the parties and receives an impression of the man and victim involved, must be trusted to do what he can in order to do justice, and I always prefer the justice of a conscientious judge to the judgment of the people or the press or the legislature.

JUSTICE - But if there is a general wave of violence in the community, is it not legitimate for the Knesset to say that minimum punishments are necessary in order to try and stamp out that violence?

Justice Cohn - It is legitimate for the Knesset to make laws. The Knesset may say that one offence carries 10 years imprisonment and another 20 years, but the punishments are maximum punishments, the discretion remains with the judge to say what measure to apply. There are voices calling for minimum punishments but I think it would be the worst thing that could happen if the free discretion of the judge was in any way restricted. The consequences would be like those in jury trials in other countries, where people are acquitted of crimes which they have committed only because they do not want that punishment to be imposed on that nice (white or black, as the case may be) person before them.

In this spirit - we abolished the mandatory sentence of life imprisonment for murder and gave the Court discretion to say that in special cases a man must serve another sentence, that is the way it should be.

JUSTICE - And the abolition of capital punishment - do you have any second thoughts about that?

Justice Cohn - God forbid.

JUSTICE - You once said about Adolf Eichmann that you would not have sentenced him to death. Is that still your opinion?

Justice Cohn - I do not think that the State, or the Court, has the right to deprive any man of his life. Rousseau thought that law is based on a social contract in which every citizen agrees to give the State power to legislate for him. No citizen would ever empower any stranger to take his life. So the State which usurps

the power to kill its own citizens - and it does not matter for what reason - exceeds its power. It is not within the power of the State to kill its citizens.

JUSTICE - But it is a fact that there are countries, or, for example, some states in the United States, where there is a majority opinion favouring capital punishment, so would you say that in those States there is a social consensus that the State does have the power to remove people's lives?

Justice Cohn - They only agree to remove the lives of others, they would never agree to remove their own lives. The whole theory of the social contract is now *passe*, and I give it only as an example. I think the State has no right to murder a person. Apart from that, we say that a murderer is guilty because he took another's life, why shouldn't the State be guilty if it takes a person's life? The murderer may have very good and pure motives for killing another man - still we punish him. Why should the State not be punished for taking life?

JUSTICE - That might be true of crimes in general, but does the same reasoning apply to the Nazi crimes which are in a different league?

Justice Cohn - There are no different leagues. If the Nazis were murderers - why should I become a murderer? I refuse to be identified with them.

JUSTICE - Let us go to the other side of the spectrum: are you for or against clemency as a policy?

Justice Cohn - Totally for. I once wrote in a judgment that no judge could, in clear conscience, send a man to prison unless he knew that there was somebody in the President's mansion who could correct his mistakes. Nothing is more important than the power of pardon. I myself have time and again approached various Presidents and asked for clemency for people I sent to prison, and others too, but I was mainly interested in those I had sent to prison. This was during the time when there was mandatory life imprisonment for murder, or when the murderer had undergone personality changes or a change of circumstances in the family.

The question which is now on the agenda is whether we

should have wholesale clemency or whether it must be applied individually. I am fervently against wholesale clemency - that is not clemency at all. Clemency means that one has compassion for a particular human being. The President is entitled to and even obligated to have compassion, a duty which the Court does not have to the same degree. The President must be independent in the same way as a judge is independent.

JUSTICE - What are your views on euthanasia?

Justice Cohn - My opinion is that everybody is entitled to live and die in dignity. That is proposition No. 1. Proposition No. 2 is that no doctor is entitled to take a man's life even if he is suffering, and even if he has no prospect of living. This comes back to the principle that the State cannot take a man's life. Proposition No. 3 is that the doctor is under no obligation whatsoever to take any steps to prolong the life of the suffering man who has no prospect of being cured. He may be passive. That is his right and the right of the patient. So I think that what we call passive euthanasia is not only allowable but it is also most desirable, whereas active euthanasia should be prohibited.

JUSTICE - So to take the example of a child, whose parents decide he should not undergo a particular operation - do you think that the parents have that right to make that choice?

Justice Cohn - When there is no chance of the life of the child being saved, and he is anyway doomed to die - then one may use passive euthanasia, but where the doctors say there is a chance for him to survive, that he may not die, he will be a cripple, he may suffer, but he won't die - I do not think the doctors can take steps which will lead to his death.

JUSTICE - Going back to more general issues: in hindsight, do you think Israel was right in following the English common law system as opposed to the continental civil law?

Justice Cohn - Our legislative policy from the first was that if we were confronted with any problem which required legislative solution, we would look first to the law as it stood. If the law as it stood was all right and did not need any improvement, we would leave it at that. If the law was not all right we would look at possible solutions. First, we would look to Jewish Law, to see

whether in our own tradition there was a way to solve the problem in a manner which was equitable and feasible. Then we would look to English common law, American law, Swiss law, German law whatever - to see whether there was a pattern for solving that particular problem. Only if we found nothing anywhere would we ourselves invent a solution to try and solve the problem using our own initiative.

JUSTICE - Are you satisfied with the standards, education, and ethics of the judiciary, and how do you see the relationship between the Civil Courts and the Rabbinical Courts?

Justice Cohn - In general I am quite satisfied. Our judges are independent and not corruptible and for the greater part good lawyers. That does not mean they could not be better. With regard to the Rabbinical Courts, for the most part they do not take cognizance of the existence of the secular Courts, they act as if they don't exist. We have no objection. We intervene in matters of the religious Courts only where there is an excess of jurisdiction. We do not intervene in matters of substance. They adjudicate according to ancient Rabbinical law, the *Halacha*, and they are the experts on the *Halacha*, whereas the judges of the Supreme Court, with the exception of a few Justices such as Justice Elon, do not purport or presume to be *Halachic* authorities. But, where they exceed their jurisdiction, the situation is different, for instance, if they proceed contrary to the rules of natural justice. In such cases, the Supreme Court interferes and invalidates the judgments of the Rabbinical Courts, but even if the Court invalidates their judgments, the Rabbinical Courts do not take cognizance. They always think they are right and the Court is wrong. On the other hand the Rabbinical Courts have no influence whatsoever on the secular Courts. In my time the question arose whether the secular Courts were bound by pronouncements of Jewish law of the Rabbinical Courts, for example, if the Rabbinical Courts declared that a woman was validly married to a man and under secular law she was not validly married, or *vice versa*. The majority of the Court held that we were bound because the Rabbinical Courts are the experts on Jewish Law. I dissented, and held that we know Jewish Law as well as the Rabbis do. Jewish Law is not in Heaven but in the books, and we too are capable of opening the books, looking in them and seeing what they say. Thus, even where Jewish Law is applicable in the secular Courts, the latter must determine the law and not follow the rulings of the Rabbinical Courts. ■

“The High Court of Justice is Important for all the People in the Country”

Conversation with Justice Meir Shamgar

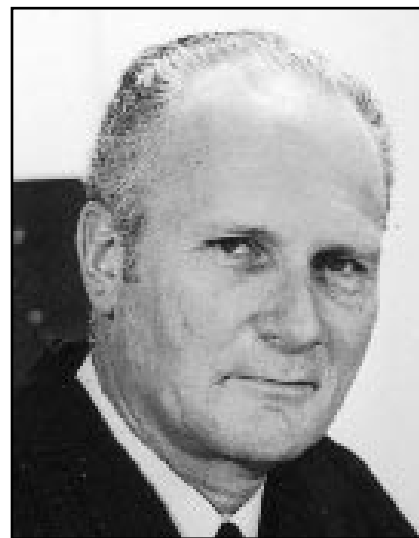
JUSTICE - First, we wish to congratulate you on the new Supreme Court building, credit for which is mainly due to your efforts. How do you see the Supreme Court's role in the Israeli judicial system?

Justice Shamgar - There is a significant aesthetic importance to having a Court house which is functional and beautiful and open to visitors, but our main intention was to make it clear that the judicial branch has its own home at the same level and near to the site where the other governmental authorities are seated. We owe thanks to the Rothschild Family and in particular to the late Dorothy de Rothschild, who enthusiastically adopted the idea of building a home for the Supreme Court, which previously sat at the Russian Monastery Hostel, in the Russian Compound, in a building not adapted to serve as a site for the Supreme Court. Many thanks are due to Jacob Rothschild, who succeeded Dorothy de Rothschild as head of the Rothschild Foundation (known as *Yad Ha'nadiv*) and the two most talented architects who were extremely effective and dedicated to creating this house of justice. The importance of this building lies not in the influence it will have on the written creations of the judges - one can write a just judgment even when sitting in a cellar - but in educating people to respect the law and to regard it as one of the main elements of a democratic society. We have a liberal democracy which is based on respect for the rule of law, for government of man by law, and therefore this building should be like the Statue of Liberty in New York - this should be the Statue of Law, of Justice. This creates a very important

didactic effect which is conducive to creating belief in law, confidence in law. So this building has an educational aspect from the point of view of society in general. From the beginning, we intended to adapt this building for visits by citizens

of all ages, soldiers and tourists, in order to allow them to become acquainted with our system of law. But interest has exceeded our expectations and we have more than 25,000 visitors a month. We have become a central point in Jerusalem. It is the most modern building in Jerusalem but, in terms of the place of the building in our society, it is its meaning which radiates out to the surrounding environment.

I had a certain part in the construction of the building. I approached the late Mrs. De Rothschild for the donation of the money. It took about a year, there was a commission, deliberations, negotiations and some difficulties with the Ministry of Finance, but finally we came to an agreement and the Rothschild Foundation covered everything including the furnishings. There was a certain criticism among some judges, especially my predecessor, President Agranat, who thought it might not be appropriate for the Supreme Court to be built by the donations of a non-Governmental factor. I understood his reservations to the



Justice Meir Shamgar served as I.D.F. Military Advocate-General (1961-1968), Israel's Attorney General (1968-1975) and as the President of the Supreme Court (1983-1995).

effect that the Supreme Court should be built by the nation, however, first, we should remember that under the terms of the Rothschild Foundation there is a specific prohibition on the Rothschild family of England conducting any business in this country. Thus, no cases will be coming before the Court which could create a conflict of interest. Secondly, in a country like Israel, where there is a lot of criticism on the policies of Governmental authorities in matters of welfare and new immigrants, I do not know what attitude would have been taken by the public to the spending of money on the construction of this building. Mrs. De Rothschild understood this problem. She was very pleased that she could give us the means and that we were not forced to take the money from any source which could be claimed to be part of the budget of the country.

The Supreme Court in this country is certainly respected not because of this building, but because of its judgments, because of its leadership in strengthening the rule of law, in fact and not only in theory. The Court has done this for 50 years and has therefore, I venture to say, a stronger position in the framework of the Governmental authorities of this country than most courts in other countries. If I look at the European countries there is no question that the Court in our system is a much stronger entity than in any country on the Continent and if I can use de Gaulle's term - the *presence* of the Supreme Court in Israeli society is much stronger than in other countries. I mention this not because I wish to describe the Court as a strong entity in public life but because this creates the confidence of the ordinary citizen that it is worthwhile to approach the Court; that the Court has the open-mindedness and the readiness to find certain phenomena illegal and unjust.

JUSTICE - How do you regard the prevailing perception of the Court as a bulwark against instability in democratic life?

Justice Shamgar - I would not call it the last bastion. That is too presumptuous. I think one aspect of the existence of a Court in which you can ask for justice is that it opens avenues of approach. One of the side effects is strengthening the other authorities. When we lay down the law, and create this opening for citizens or for people who are not citizens of this country, to fight for their rights, the strength of the other authorities is also increased. Their way of dealing with cases is regarded as being under review and therefore the actions of the authorities also gain in stature and are strengthened by this process of mutual

supervision which exists under our system of separation of powers.

JUSTICE - So do you take the approach that the Supreme Court has the right to exercise judicial review of any matter that is brought before it?

Justice Shamgar - No, I do not take that position. I have written and expressed this view in a number of my judgments, particularly in the *Ressler case*,¹ which dealt with the military service of *Yeshiva* students. There, I voiced my dissatisfaction with the present situation and demanded a new revision every year, which, much to my regret, has not been adopted. There, I think, for the first time, the different positions emerged regarding the justiciability of problems which come before the Court. Justice Barak voiced his opinion that every problem can be adjudicated by the Court, because the Court reviews the reasonableness of the matter at hand. My opinion was (and it was also the majority view) that you don't regard every problem arising in society or in the economy or in any other area as something which is justiciable. There must be a legal element in the case, and certainly there are problems which are mixed problems in which there is a legal factor and an economic factor or other similar factors. In such cases one decides on the justiciability of the matter according to the **dominant** factor. If the dominant factor is the legal factor, the Court may deal with the case, but if the dominant factor is, for example, an economic problem, we should refuse to hear it because we do not deal with economic policies. Whether anti-inflationary measures should or should not be adopted is not a legal decision, it is a decision of policy and in order to have a democratic Government one must leave problems which belong to other arms of Government to them.

JUSTICE - How do you see this in terms of locus standi, the need for people who come before the Court to possess an interest in the matter being adjudicated?

Justice Shamgar - Justiciability and standing (*locus standi*) are two different problems. During my term of office as President of the Court, we were very liberal on questions of standing. In order to try and accord the right definition to each

1. H.C. 910/86 *Ressler v. Minister of Defence*, 42(2) P.D. 441

problem - whether it is justiciable - one must first allow a person to apply to the Court and enable us to decide. We have had cases where people were allowed to present their petitions but then we decided we would not deal with the problem presented to us. One example which comes to mind concerned the settlements. We had a petition to the Supreme Court sitting as the High Court of Justice but we held that establishment of settlements was not a legal problem with which we would deal, but mainly a political problem and that the petitioners should turn to other authorities. I think this point was put to a certain extent rightly many years ago by the British Justice Lord Diplock, when he said: problems of policy are for the Parliament not for the Court, but from the point of view of the supervision of the legality of the actions of Government, the Court is the proper authority. We look at the legal ingredient, at the behaviour according to legal criteria. Policy is for Government, Parliament, the public and the press.

JUSTICE - Don't you think that the liberal policy of locus standi has the unfortunate side-effect of overburdening the system in a country which is in any event litigious in nature?

Justice Shamgar - I think this problem has been exaggerated. I am not against statistics, but the kind of cases which provide an addition to the work of the Court as a result of our liberal approach form a very small percentage. We have large numbers of cases before the Court because we are indeed a litigious society, perhaps immigrant societies generally are more litigious when people become aware of their rights. In this country, people are aware of their rights and that is why we have so much litigation, mainly in the civil area. A large proportion of the cases burdening this Court are civil appeals. These appeals involve questions which are becoming increasingly complicated because of the modern economic reality, reflected, for example, in complex property combination transactions. Problems of civil appeals are more complicated today than they were 30 or 40 years ago. There is also a rise in crime. We must confront the very sorry fact that we have dangerous drugs and murders in this country in growing numbers. Every murder case ends up in this Court on appeal. Thus, for many years, we have promoted the reform of our Court system. Such reform would decrease the number of cases in this Court.

JUSTICE - Would you favour having a separate criminal

court structure alongside the civil court structure, or at least a Criminal Court of Appeal?

Justice Shamgar - No. So far our system has been that the Supreme Court at the top of the pyramid and the lower Courts deal with all matters. As far as I know there is no intention of changing this. In the lower Courts, such as the Magistrate's Court and the District Court, there are divisions. The Family Court, for example, is not a separate Court but is part of the Magistrate's Court and certain judges are allocated to that Court for this duty. Similarly, in the Supreme Court - all the Justices deal with all matters. I would say that this is our strength because all of us are experts on all kinds of cases. Therefore, we also believe that this Court should be the Court dealing with constitutional cases because we have here the highest legal expertise in the country. In order to deal with constitutional matters one should not have to be an expert on constitutional law only. The Constitution comprises different ingredients taken from all areas of law and therefore in this Court we opposed the establishment of a separate Constitutional Court. There is also an apprehension that such a Court could be politicized if composed under a different system to the one currently operating. We have the most advanced system in terms of the appointment of judges.

JUSTICE - How would you then solve the problem of overburdening?

Justice Shamgar - The reform I started in 1984 and which has now been adopted by the Orr Commission is that we increase the powers of jurisdiction of the Magistrate's Court so that a large percentage of all cases - civil and criminal - start in the Magistrate's Court. In 1984, we increased the powers of the Magistrate's Court to offences carrying a penalty of up to 7 years, now they are to be increased to 10 years. We also increased the power of the Magistrate's Court in civil matters to NIS 1 million. We would have been able to act more swiftly had we had the full cooperation of all other factors, which had reservations about this reform. By increasing the powers of the Magistrate's Court, from which appeals go up to the District Court, only a smaller number of appeals reach this Court, since leave to appeal - known in America as *certiorari* - is required on the second appeal. Once the main number of appeals rests with the District Court, a smaller number will reach the Supreme

Court - following the decision on the application for leave to appeal - and this Court will have part of its burden taken away.

JUSTICE - In England, judicial review is handled by the Queen's Bench Division of the High Court - have you considered confining judicial review to lower levels in Israel as well?

Justice Shamgar - Yes, but it has its problems. The direct approach to the Supreme Court in this country, sitting as High Court of Justice, is a historical fact. During the time of the British Mandate, like in most British colonies, only the Supreme Court had the power to deal with prerogative writs, because only in the Supreme Court of these countries was there a majority of British judges. In our Supreme Court, there were 4-5 British judges, 1 Jew and 1 Arab. After the establishment of the State we did not have a written Constitution and the direct supervision by the Supreme Court of Governmental actions was regarded as important in order to establish an efficient rule of law. We are now one of the last countries in the world which only has a number of Basic Laws but no Constitution. Having a prestigious Supreme Court issuing writs to the Governmental authorities is always effective. In all these years, there has not been a single case where an order of the Supreme Court was not immediately respected by the Governmental authorities against which the order was made.

Direct access to the Supreme Court also has another advantage. If you start at the lower Court, there is a right of appeal to the Supreme Court, which may be a time consuming procedure, whereas sometimes one needs immediate decision. There are some matters which we have relegated to the District Court - such as questions of public tenders and zoning which we do not regard as central to constitutional rights but more as administrative matters, and by referring them to the District Court we relieve the pressure on the Supreme Court. Last year the Court heard about 7,000 cases and this was the reason for the increase in the number of Justices some years ago from 12 to 14.

JUSTICE - Do you believe that the composition of the Supreme Court sufficiently reflects the composition of the population?

Justice Shamgar - The Court never represents exactly the composition of the population. Members of the Court are appointed according to a system which is very objective. There is a commission of 9, which in my opinion is much better, from

the point of view of the merits of the decision, than the system of public elections of judges or of appointment by the head of the executive arm, which is always influenced by political decisions. Here there are 9 people, each of whom has his personal opinions, but the appointment is by majority decision. Indirectly, this is a democratic process because this is a commission which comprises two members of the Government, two members of the *Knesset* (one of whom is always from the Opposition), two members of the Bar (which is non-political) and 3 Justices - thus representing all bodies which are interested in an adequate system of justice. It is a merit system which appoints people according to their ability and I think there should be no restrictions on the kind of person appointed in terms of affiliation, ethnic origin or sex.

I am certain that in about 4-5 years the composition of this Court will also change as people retire and others are appointed from the lower Courts. I am happy that we have crossed the barriers we had at the establishment of the State, and we are furthering the proper mixture which will arrive not by political decisions but through a development which is natural, namely, judges rising from the ranks to the Supreme Court. This also applies to Arabs. In my time we increased the number of Arab judges by a large extent; we just need patience, the change will come naturally. Impromptu action such as that demanded by some politicians is perhaps politically correct but it is bad for confidence in the Court. The Courts follow developments in other areas, they don't precede them.

The process of reform of our judicial system by increasing the power of the Courts has also been adopted by other countries, which have a similar system. For example, in England, the power of the County Courts has been increased in order to decrease the pressure on higher courts. In the U.S. too, Magistrates are being used in the lower courts and are allocated cases. This is a natural conclusion to reach if we don't want to add additional courts. Adding an additional court between the District Court and the Supreme Court would only prolong the already lengthy proceedings and make them more difficult and expensive.

JUSTICE - Would you favour the introduction of a legal aid system?

Justice Shamgar - It is entirely a financial question. We already have a public defence system in criminal cases. We are a

welfare society to a certain extent but I don't think we have reached the stage where we can fully supply legal aid, we should start with building houses for the needy, *etc.* which is more important at this point. There has been a failure of all our plans and projects on *pro bono* representation. We tried it several times using different approaches but so far it has not attracted interest except among certain university students. This could be one of the solutions for representation in cases where the parties lack funds.

JUSTICE - Turning to the role of the High Court of Justice, how do you see its place in the Israeli legal system? Is its centrality justified?

Justice Shamgar - Yes, it is a main feature of public life. The assumption by the Governmental authorities that a person aggrieved will approach the High Court of Justice is one of the elements which influences its decision. If the authority is convinced of its conclusions and believes that the person has no

right, it will act as it sees fit, but in cases of doubt it will often concede, if it believes the person will approach the High Court. I don't have statistical proof, but it is my belief that there are more cases where Governmental authorities think that they should accept the demands of a person aggrieved, than cases coming to Court. For example, Tel Aviv University undertook a study on the percentage of success of petitions filed by residents of the Territories who approached the Supreme Court sitting as the High Court of Justice. They counted the decisions but didn't open the files and, for instance, counted the withdrawal of a petition as a rejection. However, in many of the cases, a petitioner retracted his petition after the Court ordered the State Attorney to investigate an allegation of an illegal act against that petitioner and the Government accepted the claim in whole or in part. Such cases should, of course, be seen as successful petitions. Looking at it in this way, a different study has shown about a 60% success rate of petitions.

We are the first and only country which has opened the doors of its Supreme Court sitting as a High Court of Justice to the



One of the five main court rooms in the Supreme Court building

inhabitants of territories under military Government. This has never occurred before either in Europe or in other countries, and this is because as a matter of theory of public international law, such inhabitants do not have the right to approach the Court, being subject to a different sovereign entity. However, when I was Military Advocate General, we did not oppose such applications to the Court. It creates an additional avenue of review of the behaviour of the military authorities. In the *Abu Itta* judgment² we wrote that an Israeli soldier carries with him not only his duties under public international law but also the duties of an Israeli official under Israeli administrative law. He has to behave in the Territories as he behaves here, and if a person has a right to be heard before a decision is made against him here, he possesses the same right there as well.

JUSTICE - What kind of interrelationship should there be between the military and civil judiciaries?

Justice Shamgar - When Israel was established we had our first military code, which did not follow the lines of British law. The military prosecutor had powers of arrest and other powers which should normally be confined to the Court. But our new military law passed in 1955 - which I helped draft - is a very modern advanced law. For example, the rules of procedure of our military law were later copied into our criminal procedural code. The idea was to create a system in which there were experts in law who were in uniform and had an understanding of Army life and Army problems, and were therefore part of the system. Nevertheless, I was dissatisfied with the lack of independence of the military judiciary. Therefore, in the first Shamgar Commission, which concerned military justice, I proposed that military judges be appointed in the same way as their civil counterparts. It took some time because the Minister of Defence, the then Chief of Staff opposed the proposal, but it was adopted in 1977. The commission appointing military judges is now very similar to the civil commission I mentioned earlier, and includes members of the *Knesset* and members of the judiciary and therefore ensures the independence of military judges, although they continue to be part of the Army. The Military Appeals Court is composed of a majority of legally qualified persons, and in the lower Courts there is a legally qualified judge as a presiding judge. This is effective because the professional judges have a better understanding of the problems arising and it has proven itself in practice. The Military

Advocate General supervises the system of prosecution and legal advice (except the courts) and is the legal advisor of the Chief of Staff. He is appointed by a person outside the military hierarchy, namely, the Minister of Defence.

One of the reforms which I introduced in the Shamgar Commission Report was the introduction of an appeal from the Military Court to the Supreme Court; in important legal cases, leave to appeal can therefore be sought from the Supreme Court, thus creating a hierarchy headed by the civil Supreme Court.

JUSTICE - How do you see the role of the State Inquiry Commission?

Justice Shamgar - State Commissions of Inquiry following disasters are nothing unusual in democratic States. I think it is very reasonable to have judges presiding as chairmen of these commissions. In my view, the commissions have not been over-used. The Commission of Inquiry Law is relatively new. It was introduced in 1969, partially as a result of public polemics on the *Lavon Affair*. In that affair which took place in the early 1960s, Ben Gurion had demanded a legal inquiry. The Ministry of Justice proposed this law, which introduced the idea of an independent chairman and of the appointment of the members of the commission by the President of the Supreme Court. I think for inquiries into phenomena such as the murder of the Prime Minister, or the burning of the al-Aqsa Mosque or the massacre in Hebron - this is the most efficient means available. There has been some opposition to having a judge involved in what are claimed to be political matters, but the 1973 War, for example, was not a political matter. It was a matter which needed the decision of a very high ranking judicial authority, in order that his decision be accepted. Imagine what would have been the reaction had only non-judicial public figures been involved.

In most cases, commission recommendations have been adopted. There have been some exceptions, for example, the appointment of an Intelligence Advisor to the Prime Minister, which was one of the conclusions of the Agranat Commission, has not yet been accepted. We repeated this recommendation in the commission dealing with Prime Minister Rabin's murder.

JUSTICE - Can we turn now to the occasional public criticism expressed on the punishments imposed by the Courts?

1. H.C. 69/81 *Abu Itta v. Commander of Judea and Samaria*, 37(2) P.D. 197

Justice Shamgar - Each and every case must be regarded on the merits. The facts of one case are not similar to those of another. I do not favour minimum and maximum penalties, I believe they should be left to the discretion of the judge. Referring to punishments generally, I admit that I favour more severe punishments. I think there are certain types of cases, especially those which involve crimes of violence which are frequent in our daily lives, where we have to adopt a more severe attitude. This was my attitude throughout the years. I think that if suitable punishments are not meted out in certain cases there is a loss of deterrence. Deterrence is based not only on the knowledge that there will be individual consideration of each case but also on the knowledge that in certain cases society will react very strongly against certain phenomena which it will not suffer and this must be expressed in punishment. It cannot be expressed merely through admonitions. Punishment is something people should know about. They should know that if they commit car thefts, burglaries, violence in the family, they will go to prison. I think that without severe punishment in proper cases we are losing our battle against crime.

JUSTICE - Do you see pardon as a vehicle for rehabilitation, and how do you regard the movement to grant a general pardon as part of the 50 Years celebration?

Justice Shamgar - Pardon as an individual means exists all the time. They are individual and are exercised in proper proportions. But a general pardon, I think, will only cause damage, because it means releasing into the streets hundreds of people who have committed offences which will increase the danger to the ordinary citizen. We now have the new Basic Law on Human Dignity and Freedom. This Basic Law is not only aimed at the offender it is also designed for the victim. The human dignity and rights of the victim should also be protected, and if you increase the danger of crime in the streets, violence, sexual crimes, *etc.* by releasing large numbers of criminals, you are simply cleaning up the prisons in order to make it easier for the prison authorities, and give credit to offenders, only because Israel has a birthday. I am against general pardons because I know it will relieve the prisons of pressure and overcrowding, but it will turn out hundreds and perhaps thousands of criminals, who are released not because of personal reasons but because of political reasons, and this I think is a mistake.

JUSTICE - Do you think the abolition of capital punishment in Israel was a mistake in view of the rise in terrorism?

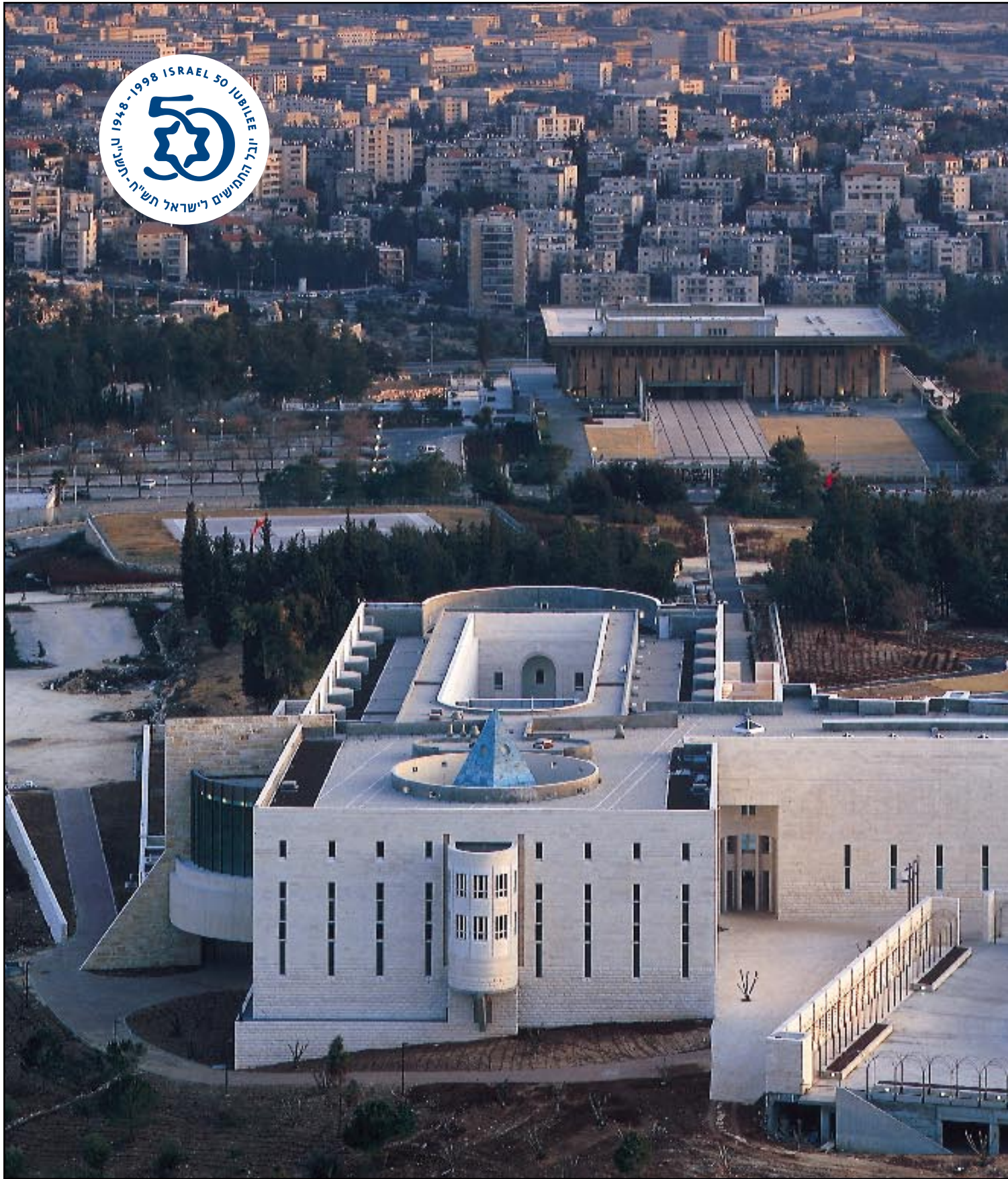
Justice Shamgar - I don't think it was a mistake. These are some of our moral convictions. Putting a person to death by the Government is something which is inhuman and cruel. I think even in relation to terrorist acts - from an optimistic outlook that one day we will have better relations with our neighbours - the fact that we did not carry out executions is something which I hope will assist us. I know there are always cases where the reaction is 'why don't we have the death penalty' - like the Moor murders in England - that is a natural reaction but we should act on the basis of principles, and from a moral point of view. At the same time, I am against the system we have in this country where we release murderers very quickly. The murderer receives imprisonment for life and then the deductions start, and after 9 or 10 years he is out again. I think it is a mistake which devalues the importance of human life, it works comparatively automatically in our system, save for exceptional cases where the President refuses to fix the number of years in prison. The system should be more individualized and there should be more regard to the facts of the case and the behaviour of the person. I do not think people should be kept in prison for 50 years, but that doesn't mean we should go to the other extreme.

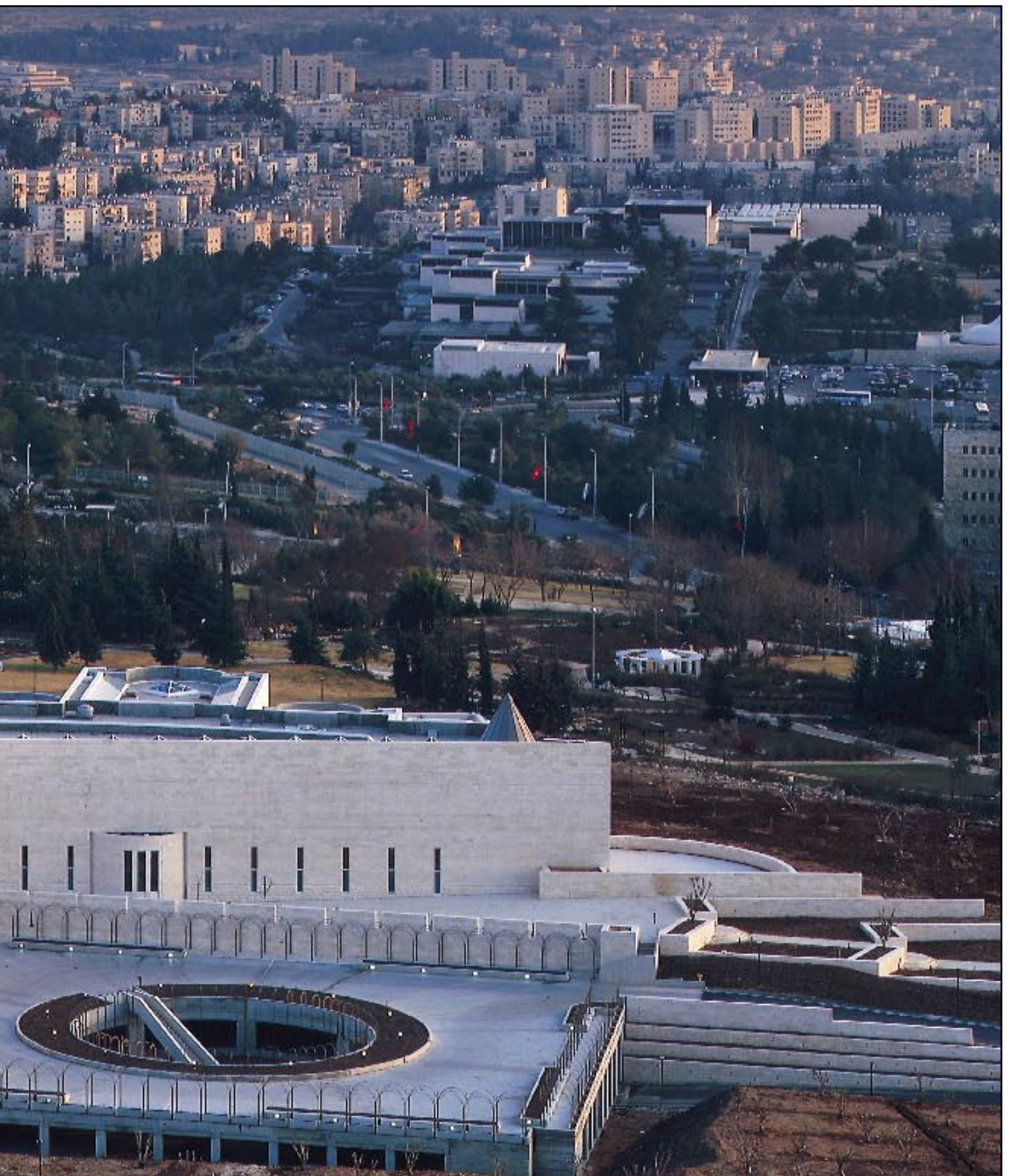
JUSTICE - You fulfilled the function of Attorney-General for 7 years; do you think the perception of its centrality in Israeli life is justified?

Justice Shamgar - Yes. I think we have improved on this institution, because the Attorney-General in other Anglo-Saxon countries (the office doesn't exist in Europe) is a political figure, he is a member of the Government and appointed together with the party which is in power. We have turned it into an office of a public servant. He is the highest ranking civil servant. It started with the Mandatory system, when the Attorney-General was one of the assistants of the High Commissioner. The Attorney-General is a civil servant, who is non-political, independent, and objective and is appointed in order to enforce the rule of law,

continued on p. 26

Jerusalem sunset view of the Supreme Court, with the Knesset and Israel Museum in the background, on the next two pages.





continued from p. 23

subject always to the Courts. It is a very important system. It is a centralized system; we do not have independent District Attorneys, like in the US, but a unified consolidated system, where there is an Attorney-General and a State Attorney and his assistants, who are his aids, and the Assistant Attorney-General who deals with legislation and another who deals with legal advice. It is a centralized system which is very efficient and has been, I think, very helpful to the public and to the authorities, because it tries to channel the conduct of the Governmental authorities into legal avenues. The authorities always have someone to turn to for advice and the public has someone to turn to who is sitting inside the system and is the person heading the prosecution.

JUSTICE - How do you see the interrelation between Rabbinical law and the law of the country?

Justice Shamgar - In general there are peaceful co-relations. The system of having Religious Courts, not only Rabbinical Courts but also Moslem Courts and Christian Courts, did not start in the State of Israel but during the time of the Ottoman Empire. The Christian European nations did not agree that their citizens living in the Middle East be judged in matters of personal status according to Islamic law, which was the law of the State at the time, and therefore they demanded that the Ottoman Port allow the creation of separate autonomous Courts for matters of personal status. During the British Mandate the only change made was the addition of the Sharia Courts because Islamic law was no longer the governing law. We added the Anglican Courts and the Druze Courts and the Bahais also received recognition as a religious faith, although they do not have a separate Court.

JUSTICE - How do you see the problem of exclusive jurisdiction, would you not prefer to see a system of jurisdiction by consent in matters of personal status?

Justice Shamgar - The position taken by the Religious Court is that in order to be recognized by the religious authorities as a member of the Jewish nation we must have, for example, marriage according to Jewish law. It has been claimed that marriage under civil law might lead to the creation of two nations - because of the problem of *mamzerut* (bastardy), or

other problems. There are complicated issues which must be solved one day. Israel cannot be the first country to abolish Moslem Religious Courts, this would lead to international problems.

With regard to the problem of conversion, I hoped the solution proposal by the Ne'eman Commission would be adopted. If an agreement is reached to have an institute in which Judaism is taught and both the Reform and Conservative movements accept that the final arrangements are performed by the Rabbinical Court - as was proposed by Ne'eman - this could be a very important development, because everything accepted by consent is very important. But, much to my regret, I don't see it yet as being promoted and the existing friction is creating unnecessary hardship and leads to much self-questioning: we accept Jewish families into this country, people who are and want to be part of our nation and yet have not found the ways and means to ease the entry into the nation.

JUSTICE - In conclusion, applying a perspective of 50 years, would you say the pressures and danger to the supremacy of the Supreme Court have increased or decreased over the years?

Justice Shamgar - The Supreme Court has now a much stronger position in Israeli society than it had 50 years ago. 50 years ago it was a body which was respected but which was to a very large extent unknown to a large section of the population. It had not yet developed its own jurisdiction to an extent which was enabled by 50 years of activity. Although there is criticism, which is normal in a democratic society, we are in a much stronger position than we were in at the time of the establishment of the State. ■

Books Just Received

The Lie that Wouldn't Die, Judge Hadassa Ben-Itto, (a history of the *Protocols of the Elders of Zion*), Aufbau Verlag, Germany, April 1998 (in German); Zemora Bitan, Israel, April 1998, (in Hebrew).

Israeli Business Law: an Essential Guide, ed.: Alon Kaplan, Kluwer Law International, The Hague.

Brief Encounters of a Legal Kind, Aubrey Rose, Lennard Publishing, England.

First Judicial Precedents Interpreting the New Provisions of the Swiss Penal Code Prohibiting Racial Discrimination

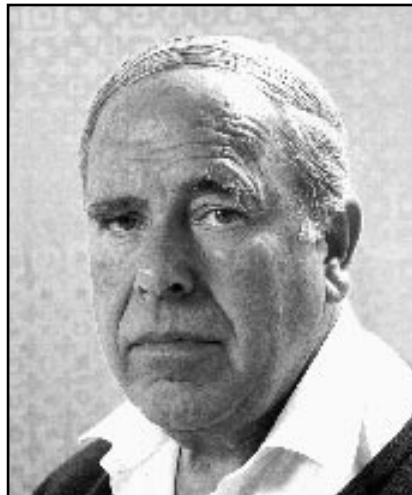
Daniel Lack

Readers of *JUSTICE* will recall that the new provisions of the Swiss Penal Code (Article 261 *bis* PC) and of the Swiss Military Penal Code (Article 171c) entered into effect on 1 January 1995.¹

The new provision of the Swiss Penal Code and the UN Convention on the Elimination of Racial Discrimination

This enactment enabled Switzerland to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) adopted by the United Nations General Assembly on 21 December 1965 and which entered into effect upon ratification of the 27th State on 4 January 1969. By now, with some notable exceptions, it is one of the most widely ratified UN human rights conventions by UN Member States.²

Switzerland has thereby fulfilled the



requirement under Article 4(a) of CERD that it “shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...”.

Innovation of the new Swiss Penal Code Provisions

However, Article 261 *bis* PC, the provision under examination in two

recent decisions, one in the Canton of Vaud by the Vevey District Criminal Court of December 1987³ (“the Vaud decision”) and the other in the Canton of Geneva Police Court of February 1998⁴ (“the Geneva decision”), extends the notion of racial discrimination contained in CERD in two important respects.

Thus, while the definition of racial discrimination in Article 1 of CERD means “any distinction, exclusion, restriction or preference based on race, colour, descent or national and ethnic origin...”, Article 261 *bis* PC prohibits conduct constituting this offence on grounds of “race, ethnic origin and religion”.⁵ Also this provision of the PC

1. See Article in *JUSTICE* No. 4, Winter 1995 by Me Philippe A. Grumbach.
2. Switzerland is still a UN Observer State.
3. Judgment rendered by the Vevey District Criminal Court of 8 December 1997 No. 273/97.
4. Judgment rendered by Geneva Police Court on 23 February 1998 No. P/8882/96.
5. For a penetrating and graphic analysis of the legislative history of CERD, see Professor Nathan Lerner’s study showing the origin of the UN normative dichotomy in the separate

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includes a new concept in the second part of its paragraph 4, by defining as an offence subject to the same penalties of imprisonment or fine, anyone who for the same reasons (*i.e.* on the grounds of race, ethnic origin and religion) denies, grossly minimizes or seeks to justify genocide or other crimes against humanity. It thus introduces the important concept which it defines as an offence, namely, negationism or revisionism which, in the context of these two trials, means denial of the facts of the Holocaust. The first limb of the offence of Article 261 *bis* is to be found in its paragraph 1 defining as guilty of an offence anyone who publicly by speech, writing, image, gesture, acts of violence or in any other way lowers or discriminates in a manner which casts a slur on the human dignity of a person or group of persons, by reason of their race, ethnic origin or religion.

Common features and dissimilarities of the two trials

Both the Vaud and Geneva trials concern an offence committed by a bookseller disseminating by different forms of sale to the public the notoriously anti-Semitic and racist work of Roger Garaudy *The Founding Myths of Israeli Policy*. While the analysis of both presiding judges establishes beyond doubt the visceral anti-Semitic racism of Garaudy's book, it is the conduct of the bookseller in each case which is scrutinized with a view to determining criminal liability for the act of disseminating this publication. Garaudy himself, indicted by a Paris Court as the author and publisher of the book, is not subject to the jurisdiction of the Swiss Courts, as the Vaud Court specifically rules, as a

French national having written and published it in France.

The Vaud judgment makes a more detailed resume of Garaudy's book while the Geneva finding summarizes the offending characteristics more briefly. In each case, however, the Court identifies unmistakable features of denial of the Holocaust and negationism.

In the case of the Vaud bookseller, further publications were seized by the police characterized by the Court as being of a markedly racist and negationist character, such as *The Lie of Ulysses* and *The Drama of European Jews* by Paul Rassinier as well as similar writings published in the Review called *La Vieille Taupe*.

As regards the Geneva bookseller, he was found to have sold essentially the Garaudy book and carried out fewer sales than the Vaud bookseller.

The Vaud bookseller was found to have played a more active role in propagating the sale of the offending books both by means of advertising in which he was personally engaged and by his association and contacts with negationist circles. He had read the book and was in no doubt as to its import

The Geneva bookseller, on the other hand, did not appear to be involved with negationist circles and claimed not to have read Garaudy's book. He asserted that he was principally interested in specializing in works of interest to the Arab world and on the Middles East. He claimed to sell books criticizing both Israel and the Arab States.

Both Courts found that the booksellers were engaged in disseminating publications, including Garaudy's book, and, in the Vaud case, works of additional authors, which as enumerated in the Vaud judgment⁶:

- deny or express doubt about the order of extermination issued by the Nazi leadership;
- deny or cast doubt on the fact that there was a deliberate Nazi plan to exterminate Jews;
- deny or cast doubt on the use of gas chambers to implement the extermination plan;
- deny that the term "final solution" which features in the documentation of the Third Reich was used to describe this genocidal act;
- alleges that the number generally advanced of six million Jewish victims is greatly overestimated;
- asserts that with respect to all these issues the true historical facts were deliberately disguised by Jewish sources so as to exploit them for financial gain (so-called "Shoah Business" in the deliberately defamatory terminology used by Garaudy and the other negationists).

Thus, all the familiar themes of revisionist writing and denial of the Holocaust are to be found in Garaudy's book. The Vaud judgment⁷ finds that these aspects are treated specifically and in great detail. The tenor of the book and its systematic virulence are found to be

treatment of racial and religious discrimination and the reason why it was not possible to include a reference to anti-Semitism in the same way as apartheid when drafting CERD. Both questions relate to the USSR and Arab States' opposition to concepts which might be seen as benefiting Israel in the context of the Middle East conflict.

6. See page 37

7. *Ibid.*

injurious to the Jewish community. The very term “myth” in the phrase “the myth of the six million” in describing the number of Jewish victims in and of itself is a denial and minimization of the genocide of the Jews.

Other significant features of the two judgments

The role played by the “*parties civiles*”⁸ in each case has moral and legal significance. In the Vaud trial, the *parties civiles* were the Association of Sons and Daughters of Jewish Deportees in France, the International League Against Racism and Anti-Semitism (LICRA) and the Swiss Federation of Jewish Communities. In the Geneva case, the *parties civiles* were Gerhard Riegner⁹, and Otto Klein¹⁰. Under the Vaud notion of *parties civiles*, the Court found no difficulty in recognizing the capacity of the associations concerned to be *parties civiles* based on their evident interest in the proceedings. This was not necessarily the case in the proceedings before the Geneva Court, at which the accused bookseller through his counsel objected in principle to the admissibility of the *parties civiles*, particularly with respect to LICRA. The Court had no difficulty in recognizing the admissibility of the two individual *parties civiles* - Messrs. Riegner and Klein. This was evident by virtue of their direct, real and personal interest as specified by the Geneva requirements for acting in this capacity, through the loss of close relatives and their personal familiarity and involvement in the events in question. As concerns LICRA, while the immediate interest in the proceedings was less direct in terms of the Geneva requirements, the Court courageously broke new ground in

the context of the new provisions of the PC by justifying an extension of the notion of *partie civile*, on the basis that at some future time when there would no longer be living survivors of the Holocaust, there would be no individual person able to act in this capacity other than an association of this character.

Both Courts determined that the constitutive elements of the offence of disseminating material, as defined in Article 216 *bis*, had been objectively found to exist as regards the conduct of both booksellers, particularly with respect to the second part of paragraph 4.¹¹ To be guilty of this offence both booksellers had to have committed the offence of dissemination “publicly”. For this purpose both Courts found that it was not necessary to show that the act of disseminating the offending material had reached an indeterminate number of persons. The disseminator could still be guilty of the offence even if the material reached a restricted number of persons. It was only necessary to show that in this instance the booksellers did not have control over the number of persons reached, and that they could and must have foreseen that their actions had the potential of enabling the material to be read by an indeterminate number of readers. How the books were displayed, whether on the shelves in the window of the bookstore, or, held in a drawer, was immaterial. The important element to be retained was that the bookseller in each case was able to provide the purchaser with the books complained of with relative ease, in smaller quantities in the Geneva case and in relatively larger numbers as regards the Vaud bookseller.

As regards the accused bookseller’s motivation, this had little or no conse-

quence as regards the commission of the offence. To require that the offence had to be committed with the intention of committing a racially discriminatory act would be excessively restrictive. Thus, for example, the bookseller would be equally guilty if the publication was sold purely for monetary gain. The offender’s motivation could be more appropriately considered in relation to the punishment of the offence.

Awareness or knowledge by the bookseller of the nature of the publication he was selling would be material. In the case of the Vaud bookseller, there could be scarcely any doubt of his awareness of the nature of the material because of his familiarity with the contents owing to his association with negationist and revisionist circles. Moreover, the character of the publication was self-evident from the title and the listing of the chapters, leaving aside the notoriety given to the work in the press. In the Geneva trial, the accused bookseller admitted that he was aware of the unlawful nature of the book sold and the controversy to which it had given rise, by at one point keeping it hidden in a drawer.

In both cases, counsel for the accused argued extensively that his respective client was innocent of the charge by asserting the applicability by analogy of

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8. Plaintiffs claiming damages in a criminal case, in these proceedings constituted principally by associations having a demonstrated interest in the outcome.
 9. Former Secretary-General of the World Jewish Congress.
 10. Victim of medical experiments of the notorious Dr. Mengele in Auschwitz.
 11. Denying or grossly minimizing the events of the Holocaust.

Article 27 of the PC dealing with criminal liability of members of the press. In the event of an offense committed through the press, only the actual author of the article complained of could be held liable. In the absence of the author, only the publisher or printer could be held guilty in the author's stead but in any event not an independent bookseller. According to some expert opinions, offences under Article 261 *bis* paragraph 4 could be considered as offences committed by members of the press. After considering various other analogies of offences in which a bookseller could only with difficulty be held to be liable of committing the offence complained of, both Courts found that given the desire of the lawmaker to cover all aspects of the offence and the comprehensive definition of the different ways in which it could be committed, what was determining was the intent to prevent dissemination of negationist and revisionist theories. Thus, all actors involved in the chain of dissemination had to be prosecuted from the actual author down to the seller, provided such actors were at least aware of the illegal nature of the texts they were disseminating.¹²

The issue of fundamental freedoms, including freedom of expression, opinion and of the press: neither Court had any difficulty in finding that the type of offence constituted by Article 261 *bis* CP came within the permissible restrictions on these freedoms. The Geneva Court in this context made specific reference to the principles of Article 10 paragraph 2 of the European Convention on Human Rights dealing with certain recognized types of limitations on basic freedoms as being necessary measures in a democratic society.¹³

Finally, the Vaud and Geneva sentencing of the accused found guilty in both cases, reflects the relative degree of criminal liability in each case, namely, the more extensive involvement of the Vaud bookseller in revisionist and negationist activities as compared to the lack of any such association of the bookseller in the Geneva case.

Thus, the lack of remorse and refusal to express regret on the part of the Vaud bookseller contrasted with the protestation of innocence by the Geneva bookseller against whom no accusation of racist or anti-Semitic prejudices was made.

Further, the Vaud accused party was *inter alia* found guilty of racial discrimination and sentenced to four months imprisonment suspended on condition of good conduct for a two year probationary period, whereas the accused Geneva bookseller, also found guilty of racial discrimination, was fined SF 1,000 (the police fine contested by the accused having been reduced from SF 3,500).

In addition, the Vaud accused bookseller paid a symbolic one franc to the Swiss Federation of Jewish Communities for moral prejudice. The Vaud Court further ordered the accused to pay for the costs of the penal proceedings of SF 10,000 each to the Swiss branch of LICRA and the Swiss Federation of Jewish Communities and SF 8,000 to the Sons and Daughters of Jewish Deportees in France, plus SF 15,075 legal costs. The accused Geneva bookseller, in contrast, was ordered to pay SF 595 legal costs including a judgment fee of SF 300. It is believed that both accused are appealing the respective judgments.

In conclusion it may be said that both judgments reflect high judicial standards

in interpreting the application of Article 261 *bis* CP. Both judgments constitute a statement of important principles of considerable educational value in informing future generations of the dangers to democratic society of allowing the unchallenged propagation of negationist and revisionist theories, seeking to annul the collective memory of the martyrdom of many millions of victims of one of the most unspeakable crimes in human history.

Stop press

On 27 February 1998 Roger Garaudy was sentenced to pay a total of FF. 120,000 by the 17th Chamber of the Paris Criminal Court following his prosecution for denying crimes against humanity subsequent to publication of his book *The Founding Myths of Israeli Policy*. Each of the two associations acting as *partie civile* obtained one French franc in symbolic damages, namely, the LICRA and MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples*).¹⁴

12. See Geneva judgment at page 14.

13. See Geneva judgment page 15.

14. See report in *Le Monde* of 28 February /1 March 1998.

Mark Your Calendar

The 11th International Congress of the Association on *Judaism, Humanism, Democracy and Political Culture Towards the 21st Century*, will be held in Jerusalem: 28th -31st December, 1998.
Post Congress: at the Dead Sea, 31st December, 1998 - 3rd January 1999.
Further details in the next issue of *JUSTICE*.

Two of the issues discussed during the World Council Meeting of the Association held in London in July 1997, were Combatting Terrorism and Tax Considerations in International Technology Transfers. Extracts follow:

Combatting Terrorism: Law, Rhetoric and Reality

David Veness



Terrorism is a form of crime and the most grave crime of terrorism is, of course, murder. In the UK, terrorism takes three classic forms:

- 1 It is domestic, within our borders. Here, the main role is that performed by the Provisional IRA (PIRA).
- 2 It is international in its implications. The hands of the States are still to be seen, notably Iran; and we are also afflicted by groups which emanate from Maghreb, the Middle East, and South Asia, including India and Sri Lanka.
- 3 The third form of terrorism is extremism associated with single political or other issues.

Mr. David Veness, Q.P.M. (Queen's Police Medal) is the Assistant Commissioner, Special Operations of the Metropolitan Police, London, England

The current high threats to the UK are along two broad strands: (a) Irish Republican terrorism and (b) those who would seek to reject the peace process within the Middle East. We had a shocking reminder of the latter in July 1994, with the attack on the Israeli Embassy. An activity which may be described as "semi-detached terrorism", by a sub-group associated with a major group, the PLFP, but perhaps self-motivated and to a degree self-standing. That was followed in the early hours of the next morning with an attack on a community centre in north London.

Turning from international terrorism to Irish terrorism, we have the scene at South Quay in London's Docklands on the 9th February 1996. The relevance of this date is that it concluded the "cease-fire", but the preparation to end the cease-fire with this massive bomb had begun many weeks before. Thus, we in

the security forces regard cease-fires as periods of terrorist preparation. PIRA has a significant armament reserve provided by Qaddafi of Libya, amongst others. PIRA is a classic example of cross-border crime. In this case, across the border of two European Union nations - the Republic of Ireland and the UK. PIRA has logistic, financial and engineering support in the Republic of Ireland and commits murder in Ulster, Great Britain and on the Continent of Europe, aimed primarily at military targets.

Currently, PIRA is following a triple track policy on the mainland. The first two tracks (sometimes called 'binary terrorism' by my colleagues) follow the route of disruption, that is, the alternate

use of attacks and hoaxes (and because the cost of a telephone call in London is 10 pence, it is also called "10 pence terrorism"). But the third and more worrying strand which is always present is the threat of different forms of attack, and that different form makes up the triple track strategy which we confront at the moment. Over a month before the General Election which was held on 1st May 1997, we had 43 threat calls from terrorists, 4 real incidents on 4 separate days, 7 bombs and 8 days in totality of disruption to our transport infrastructure and indeed a major sporting event. The authorities seek to respond by a strategic plan which itself follows three strands: the first is prevention, accompanied by disruption leading to detection. We seek to interdict at the recognizance and preparatory stages as well as at the moment of attack and at the moment most important to the terrorist - his escape. The second strand is intelligence driven pro-active operations; while the third, is highly effective post-event activity. The key for leadership in the security forces is to balance these strands of the overall strategy, a balance which requires a very heavy investment in preventive activity and intelligence.

With regard to PIRA, for example, we seek to impact upon its logistics in Great Britain. The organization needs people, it needs kit, it needs accommodation, it needs storage for its terrorist paraphernalia, it needs means of finance and it needs transport. A terrorist operating away from his logistic support is vulnerable and the activities of the security forces in Great Britain are devoted to exploiting that vulnerability. Obviously, the approach must be national and not parochial. We need to defend the targets

but we need to do so by rings of security, and we have various rings of security beginning with the shores of the UK, shading into one another to produce what we call "the penumbral effect". Indeed, our strategy is to combat PIRA in Great Britain and the island of Ireland. It is an international endeavour. Looking to the future and the task of containment - marginalization of the violent Republican tradition can perhaps only ever be achieved by the security forces in all of Ireland. We have a clear duty to support Irish endeavour, while we can harden targets on the mainland by building up in depth defences.

Turning to international terrorism - London will always be a terrorist venue. It is a world city, a capital, royal, political and parliamentary, also for military and security reasons. It is a financial centre and a massive media centre. Both the finance and the media centre reflect its extremely effective communications. It is an odd fact that this city contains the largest Middle East press presence outside the Middle East itself. Within the UK there is a tradition of asylum, tolerance, a forum for radical debate. London is also marked by its size, and the diversity of its ethnic groupings. It is a centre of arts, involving a large international transient student population. It is an inevitable transport crossroads, a major diplomatic centre. All that adds up to massive vulnerability of the infrastructure.

This may be illustrated by a tale of two cities. I refer to 6 bombs in London between 9th February 1996 and the end of April 1996 and similar number of attacks in Paris between July and October. Six attacks - 3 dead in London and 67 wounded; 8 dead and 160

wounded in Paris. Not an enormous variation in the casualties but an enormous difference in the impact on the life of the two cities. Indeed, those attacks continued in December 1996, with the attack upon Port Royal in Paris, and the threat of terrorist activity connected with the Maghreb continues throughout Western Europe. The difference in my tale of two cities is that Algerian terrorism, like most Maghreb or Middle East terrorism, does not involve warnings of bombings of any kind. This was also the case in Tokyo in March 1995 and in Oklahoma in April 1995. The bombs in Paris were deliberately aimed at crowded public places, markets and metros. They were unequivocally intended to cause fear and to sustain terror. The response was inevitably massive and intrusive security which adversely affected the quality of life.

As regards the nature of contemporary terrorism, some would claim that there are significant developments in recent years. Our analysis at Scotland Yard is that there are some continuing trends but certainly greater diversity and an increase in the significance of religion as a terrorist label. The impact of Islamist terrorism in Western Europe is already a reality, especially in France. When terrorism has such a religious label, it may emanate from unexpected quarters beyond the conventional coverage of intelligence services. I am thinking particularly of what we now refer to as the "new religious movements", some of which are associated with an apocalyptic vision of the millennium. Here, there is a need for a breadth of knowledge beyond the conventional resources.

Let me turn briefly by way of illustration to kidnap and extortion. It is a

growing challenge to law enforcement. National victims at home and overseas commonly require an international response. It is a crime on the move. There are indications that the crime is following criminal mobility and that criminals are exploiting that greater mobility. We encounter cross border demands. Victims held in one jurisdiction, demands made in another, or, indeed demands relating to yet a third country. Payment trails may stretch across borders, especially electronic fund transfers. It is a crime which is commonplace in the territory of the former Soviet Union. With regard to its growth, it is difficult to be arithmetically certain, but academic studies indicate a global growth in the terrorist categories since 1990. Practitioners report increases in both government and private security sectors. There are indeed dwindling boundaries between terrorism and other crimes, with various practical implications. Some criminals are now using resources which have hitherto been regarded as terrorist or even State preserves - I am referring to weaponry and communications. Some terrorists in declining movements are privatizing their skills, raising the unwelcome concept of the degenerate guerrilla, a product of the ideological terrorist movements of the 1970s, now approaching middle age. Indeed, all the genies are now out of the bottle in relation to the threats; none can be safely ignored.

There are lawless zones around the globe - both within borders and embracing whole countries. Lawless zones offer the opportunity for profit without the fear of prosecution and they provide operating areas devoid of conventional law enforcement. In rela-

tion to kidnap, the relevant features are: does the government have real jurisdiction and control, what is its real competence and capability, does it enjoy wide popular support, what are the challenges in enforcement terms of terrain and climate. This form of terrorism is taking place against a background of an expansion of travel. Victims are more routinely taken into lawless zones and other risk areas, this is underpinned by an expansion of altruistic and recreational travel within the lawless zones, a combination of aid and relief agencies, environmental exploration, adventure travels and large numbers of the relatively unworldly in vulnerable locations.

If I can draw together these trends, and I do so in the context of siege, kidnap and extortion, we see offenders who are established, but also amateur, drawn from the criminal world and the degenerate guerrillas. We see motivation which is political, religious, extremist and even millenarian. All drawn by a murderous intent. The opportunities arise from existing strife, new conflicts - particularly in the former Republic of Yugoslavia - and the lawless zones. The means of terrorism are expanding, helped by the availability of weaponry, notably here in Western Europe, technology and new forms of terror, including chemical and biological threats.

I would like to close with the concept of community bridge building and my submission that the Jewish faith is a vital contributor to international counter terrorism. There is no doubt that those who commit terrorist acts in the name of Islam represent a long term menace to Western Europe. The overwhelming need is for effective community linkages between Muslims and other commu-

nities. These linkages are currently not strong. Indeed, the debate about Islamic extremism often deteriorates into demonization in the media. My suggestion is that while much has already been done, much remains to be done across a whole range of community and other contexts. Faith has a particularly valuable and informed role to play in developing and enhancing the necessary bridges. It is always easier to build community linkages and develop a sense of partnership when a community sees clear evidence that it itself may be the victim. Allowing for this reservation, I think that the UK provides an interesting example of that partnership in action: communities defeating terrorism. The leadership of the Board of Deputies of British Jews supported by the endeavours of the Community Security Trust, as an example, has created and sustained an atmosphere where communication is effective, awareness and education is achieved, response is swift and appropriate, and when an emergency happens, as inevitably it must, the Jewish community in the United Kingdom stands shoulder to shoulder with the security forces and our common energies are directed at countering terrorism.

I have been privileged, particularly in the last two years, to see this climate of care develop, especially since the atrocity at the Israeli embassy and in north London, and I commend it to you as an example.

Tax Considerations in Advising Clients on International Technology Transfers

Eric Tomsett



The principal taxation objectives in relation to international technology transfers are the following;

- Maximising the tax relief available for the costs of the technology;
- Minimising taxes arising on the cross-border transfers;
- Avoiding withholding taxes on international royalty flows;
- Maximising any potential flow of income into low tax jurisdictions;
- Minimising the impact of any anti-tax avoidance provisions which may apply to such transactions.

There are 4 crucial issues to be consid-

ered in seeking to maximise the tax relief for the costs of technology:

1. *What tax relief is available under a country's tax system for expenditure on the particular technology?* Different reliefs may be available for original research, development costs, patented technology and general know-how. It is important to ensure that technology expenditure is incurred in countries which have favourable reliefs for the particular types of expenditures;
2. *What is the tax rate in the country where the technology costs are incurred?* It will, of course, be advantageous to be able to offset technology costs in countries where the tax rates are highest, provided that favourable reliefs are given for technology expenditure;
3. *Does the group have other taxable profits in the country where the technology expenditure will be incurred so that effective tax shelter for the technology costs can be achieved?* There will be no benefit to locating technology expenditure in a country

with favourable reliefs and a high tax rate if there are no profits available in the country to utilise the tax shelter. If there is a significant lead time between incurring the expenditure and generating income from the technology, it will be necessary to plan so that there is other income available in the country where the expenditure is being incurred to utilise the tax shelter created by the expenditure;

4. *Is maximising the tax relief for the costs of the technology consistent with overall group planning?* Locating technology expenditure in a high tax country may also mean that future income arises in that country. This may mean that there is short term gain in respect of relief for the expenditure, but a long term disadvantage in taxing future income arising from the technology at high rates.

The accounting policy adopted in relation to technology expenditure may have important tax implications. A company may wish to capitalise technology costs

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in order to minimise the current impact on profits. However, this may result in a deferral of tax relief and in some countries may result in the expenditure no longer qualifying for any tax relief at all if it represents a capital cost for which no allowance is available for taxation purposes.

Some countries grant special reliefs for technology expenditure and it is important for a multinational group to take full advantage of them.

Another vital issue in relation to international technology transfers will be whether such a transfer should be effected by a sale or through a licence. For the vendor a sale will potentially give rise to a capital gain. In some countries this may qualify for a favourable tax treatment or they may be capital losses available to shelter the tax charge. A licence will usually produce royalty income, which, in most countries, will be fully taxable on the recipient.

With respect to the purchaser an outright sale is likely to result in capital expenditure with tax relief only available by amortisation over future periods, or possibly no relief at all. A licence will, however, involve royalty payments which will usually be currently deductible, provided they represent an arm's length charge.

Most countries impose heavy withholding taxes on cross border royalties. Planning to minimise the taxes on such royalty will be a major part of tax efficient arrangements for international technology transfers.

Where the international technology transfer is between connected parties, transfer pricing rules will be a major issue. Tax authorities tend to be particularly suspicious of international

technology transfers and cross border royalties payments owing to the ease with which intangible property can be transferred within a group. It will be essential to ensure that the prices for technology transfers and the rates of royalties charged between connected companies can be justified as strictly on an arms length basis. This is often a difficult area and may require collecting information about comparable rates/charges applied between connected companies. It will often be particularly difficult to value technology at an early stage in its development.

Royalty and Licensing Arrangements for Intangibles

Objectives of International Licensing Structures

Tax planning objectives of international licensing are typically threefold:

- To obtain corporate tax relief for royalties or other licensing payments;
- To enable royalties/licensing payments to be made without suffering withholding taxes or subject to the minimum possible withholding tax rates;
- To receive and accumulate royalties/licensing payments in a company where such income will be effectively taxed at only a low rate.

There are, however, major taxation constraints on the effective use of international licensing structures.

Usually, intangibles will initially be owned by the group parent company or other group companies in high tax countries. A transfer of the intangibles to an offshore licensing company will be

regarded as giving rise to a taxable gain calculated on the basis of the market price of the intangible. If the transferring company is a US corporation, even more stringent provisions will apply as US transfer pricing law requires the taxable income in respect of the transfer to be commensurate with the income attributable to the intangible transferred. This potentially allows the US Internal Revenue Service to make periodic adjustments to the taxable income reported in the light of actual circumstances in the year subsequent to the transfer of the intangible, rather than just determining the arm's length price at the time of transfer:

1. The offshore licensing company must be managed and controlled outside of normal taxing jurisdictions which have a corporate residence law based upon location of management and control.
2. The income of an offshore royalty company could be taxed on a parent company under controlled foreign company provisions.

Offshore centres typically have few double tax treaties to reduce royalty withholding tax rates. Additionally, treaties which may be available are increasingly becoming subject to stringent anti-abuse provisions, especially with respect to US double taxation treaties.

Alternatives for Minimising Withholding Taxes on Royalties

The main alternatives for minimising withholding taxes on royalties is through the use of appropriate double taxation treaties which either eliminate or substantially reduce the withholding tax applicable to royalties.

It is important to note, however, that certain types of royalties will not necessarily be subject to withholding taxes.

If intangible property is sold for a capital sum, it may also not be treated as a royalty for tax purposes, depending on the law of the country concerned.

Additionally, where capital sums rather than royalties are received in respect of intangible property there may be a more favourable position under the terms of an applicable double taxation treaty. Paragraphs 15 and 16 of the commentary to Article 12 of the OECD Model Convention states the following in relation to computer software:

“The second situation is where the payments are made as consideration for the alienation of rights attaching to the software. It is clear that where consideration is paid for the transfer of the full ownership, the payment cannot represent a royalty and the provisions of the Article are not applicable. Difficulties can arise where there are extensive but partial alienation of rights involving:

- exclusive right of use during a specific period or in a limited geographical area;
- additional consideration related to usage;
- consideration in the form of a substantial lump sum payment.

Each case will depend on its particular facts but in general such payments are likely to be commercial income within Article 7 or 14 or a capital gains matter within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated in full or in part, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that

the payments are related to a contingency.”

What this means in terms of withholding taxes is that a payment for full or partial alienation of rights will often fall outside of the royalty article of a double taxation treaty and instead come within the business profits or capital gains article. The difference in some double taxation treaties will be that an item coming within the business profits article will always qualify for full exemption in the source country if the recipient company in the other treaty country has no permanent establishment there. The position will frequently be the same for capital gains. The royalties article of a treaty may, however, not reduce the source country tax on a royalty to nil, but only provide for a reduced rate.

Examples of Licensing Structures

The cross border licensing of technology provides opportunities for tax savings as well as the creation of taxation problems. Intellectual property is by its nature conceptually easy to move from country to country thereby giving substantial flexibility in planning licensing structures.

Where technology is licensed to external licensees potential tax savings will clearly be possible if the income derived from the licensing can be flowed into a company located in a territory which will impose the minimum rate of taxation on the royalty income. Additionally, the licensing of technology within a multinational group may give opportunities for profits to be concentrated in countries where the least taxation will be imposed thereon.

The above objectives are typically achieved by arranging the ownership of

the licences in a company located in a territory where there is either no taxation on income or taxation is imposed at only a low rate.

It is not, however, adequate for a tax efficient licensing structure to be based simply on a company situated in a territory where local taxes on royalty income are nil or a low rate. In the absence of relief under a double taxation treaty, very substantial withholding taxes will often be imposed on royalties flowing across national borders in the country from which they are derived.

Accordingly, it is normally essential in any tax efficient licensing structure for it to be possible to take advantage of a favourable network of double taxation treaties to eliminate or reduce as far as possible the withholding taxes on royalty income flows. Those countries which have a favourable network of double taxation treaties for reducing royalty withholding taxes are countries which will normally themselves impose corporate income taxes at substantial rates on foreign source royalty income.

A tax efficient licensing structure will normally, therefore, involve one or other of the following elements:

- a combination of licensing and sub-licensing companies in a low or no tax territory and a territory with a favourable network of double taxation treaties;
- the use of a single licensing company in a country with a favourable network of double taxation treaties, but utilising some technique to minimise the corporate income tax on the royalty income in that territory.

The following are examples of the types of structure which are utilised to achieve tax efficient licensing:

The Royalty Conduit

This basically requires a company established in a low or no tax territory to own the ultimate licence rights which it then sub-licences to a second licensing company located in a territory with a favourable network of double taxation treaties.

The second licensing company is then responsible for the exploitation of the rights. The second licensing company located in the territory with a favourable network of tax treaties would earn only a small margin on the royalties (which would be subject to local corporate income tax), the balance being paid on to the ultimate licensor.

Sale and Amortisation

This approach involves the sale of the patents, licences, know-how *etc.* to a company located in a territory with a favourable network of double taxation treaties.

Whilst the royalty income is fully taxable in this company, an offset will be available for amortisation of the cost of the rights together with interest charged on loans to the company to finance the acquisition. Typically the purchase consideration on the acquisition of the rights will be left as outstanding debt due to the seller and carrying a full market rate of interest. This therefore creates further tax shelter through the interest deductions available.

The problem with this approach is that the initial transfer of the rights for a high value may itself create tax problems in the countries involved (*i.e.* potential taxable gains and stamp and transfer duties).

Joint Ventures and Partnerships

This approach involves a company

located in a territory with a favourable network of double taxation treaties being in partnership with a company in a low or nil tax territory. This structure depends on the partnership being entitled to the benefit of the reduction of royalty withholding taxes under the appropriate double taxation treaty with the major part of the income going to the partner located in the low or nil tax territory.

Branch

This involves a company resident in a country which has a favourable network of double taxation treaties holding the licences *etc.*, but arranging that the royalty income is received in a permanent establishment of the licence owning company located in a territory such that the branch profits will be exempted from tax in the country where the corporation is established.

Anti-Abuse Provisions

There are, however, many obstacles to be overcome in achieving a tax efficient licensing structure. Two particular ways in which the benefits of such a structure may be negated are as follows:

- The income of the licensing company may be attributed for taxation purposes back to its parent company under controlled foreign company provisions.
- The benefits of favourable double taxation treaties may be denied. This could be because of specific anti-abuse provisions in the appropriate double taxation treaties which are designed to prevent structures such as licensing structures taking advantage of the treaty or restrictive interpretations of the treaty as in US Internal Revenue Service rulings

where, for example, in a conduit structure the intermediary sub-licensing company may be held not to ever really own the royalties paid on to the licensing company in the tax haven, and accordingly, not be entitled to treaty benefits. The US also now has "anti - conduit" regulations under which the IRS can further challenge such structures.

Use of Licensing Structures for International Technology Transfers to and from Israel

Where international licensing structures involve Israel, a number of alternatives are available which may be useful in particular situations.

Where technology is transferred to an Israeli company, there are several planning alternatives which may be useful. A number of countries have concluded double taxation treaties with Israel which reduce the withholding tax on royalties to nil in some circumstances. The UK, for example, may be useful here and a nil rate applies to royalty payments through a UK resident company from Israeli sources, except in the case of royalties for cinematographic or television films. As the UK fully taxes royalty income it may be appropriate to consider structures which then flow the royalties on in tax deductible form to a favourable location.

A Singapore company represents another opportunity. Under the double tax treaty between Singapore and Israel the withholding tax on royalties is reduced to nil and the tax on such royalties in Singapore is also limited to 15%.

Where technology is transferred from Israel interesting opportunities arise in relation to Netherlands companies. A particular advantage of such companies

for an Israeli parent company is that under the double tax treaty between Israel and the Netherlands, dividends from a Netherlands company are exempt from Israeli tax.

Cost Sharing Arrangement as an Alternative to Licensing

Under the cost sharing arrangement a number of companies agree to share the cost of a development programme in specified proportions on the basis that all the companies which are party to the cost sharing arrangement will be entitled to the intangibles which arise from the development programme.

The use of cost sharing arrangements will alter the tax consequences for a group as compared to the same situation where all intangibles are owned by one company, which then enters into appropriate licensing arrangements with other user companies.

The principal differences between cost sharing arrangements and the licensing of intangibles from a taxation viewpoint are as follows:

- *Withholding tax* - whereas cross border licensing involves royalties which will typically be subject to withholding taxes in the source country, payments under a cost sharing arrangement will not generally be considered as royalties for tax purposes but rather as fees for an intercompany service. Typically a cost sharing payment may not be subject to withholding tax in many situations where a royalty would be. However, this will vary from country to country and some countries will impose withholding taxes on cross border service

payments as well. Another advantage of cost sharing arrangements in relation to withholding tax is that all companies which are party to the cost sharing arrangement will be entitled to the intangibles arising and therefore available to licence out the resulting intangibles. Accordingly, a group may be able to single out the most beneficial jurisdiction for each particular licensing.

- *Corporate income tax* - whereas both royalties for cross border licensing and costs sharing payments which relate to *bona fide* commercial licensing structures or cost sharing arrangements will be deductible for corporate tax purposes to the payer, there may nevertheless be significant differences between the overall corporate tax implications of a cost sharing arrangement and the alternative of licensing the intangibles. Generally, the royalty for an intangible resulting from a successful development effort will be higher than the cost of development itself. Accordingly, the licensees may bear a higher cost than where they share in a cost sharing arrangement. The implications for a group will then depend upon relative tax rates in the countries concerned.
- *Failure of development* - cost sharing arrangements will also result in different tax implications where development efforts fail. Under a cost sharing arrangement such failure costs will be allocated amongst the parties to the agreement. Where licensing is used, however, no licence payments could be made for failed technology so that the cost of failure may be concentrated in the company which would otherwise have owned the intangibles, had the project been

successful.

- *Transfer pricing* - although cost sharing arrangements may involve less transfer pricing problems than licensing agreements, there will still be important transfer pricing issues, the most important of which will be the basis for allocating the cost of the development programme between the participating companies. Tax authorities will scrutinise such arrangements very closely to ensure that the allocation method is fair.
- *Financing* - a development cost sharing arrangement will have different financing implications in relation to the development programme compared to where a licensing structure is used. Initial funding costs may be spread amongst a number of companies in a cost sharing arrangement, whereas a licensing structure will usually concentrate the initial financing costs in the company which will licence the intangibles.

In the US, under the regulations to section 482 of the Internal Revenue Code (transfer pricing), research and development cost sharing arrangements will be acceptable only where the participants share in the cost of developing all related intangibles, each participant's share in the cost is proportionate to its share of the income attributable to developed intangibles and each participant has a reasonable expectation of using the developed intangible in its active trade or business.

Meta - Halacha Values

Emanuel Rackman



No one familiar with *Talmudic* literature can help but marvel at the ingenuity, nay, the audacity, of the creators of that literature to modify G-d's word. Indeed, though they were collaborators with G-d in interpreting and applying His revelations - His *Torah* - it would appear that they were not junior partners. Often they found an irrelevant text to support their deed but, more often than not, they relied upon the values system of the traditions and sometimes they went beyond that and embraced values of their own and of the world about them. I call these meta-*Halachic*.

The *Chazon Ish* once resorted to a meta-*Halachic* value in resolving a religious question. It illustrates how resourceful a rabbi can be in going beyond sacred texts and traditions to find the answer.

He was asked to rule on the blessing that one should utter when eating eggplant. Is it a vegetable or a fruit? In our liturgy there are separate blessings for each. A tree is generally one that yields its fruit every year for many years. He was told that the eggplant grows on trees which survive for only three years. However, what grows is only edible for humans for less time than that. Therefore, he reasoned that it must be a vegetable. If it were the fruit of a tree then Jews could never eat it because Jews can only eat the fruit of trees after three years. Why then did G-d create the eggplant? Therefore it must be deemed a vegetable and the blessing over vegetables is applicable!

Whence did the learned rabbi derive the non-*Halachic* premise that G-d created only for the consumption of Jews! This is about as bold a departure from sources as one can visualize. Did G-d's concern not extend to all that live? Yet, the decisor's boldness helped Jews in Israel to nourish themselves to their palates' delight.

Whether or not Jews may eat eggplant is not an important problem. But the well known contemporary of the *Chazon Ish*,

Chief Rabbi Abraham Isaac Kook, was confronted with a major challenge to make a revolutionary change in Rabbinical Court procedure.

Jewish Law did not provide generally for an appellate process from the decisions of Rabbinical Courts. The decisions of these Courts were irreversible, except in rare cases. A litigant may, in certain instances, sue a judge for a serious mistake in the litigation before him but, as a rule, the rulings were *res adjudicata*.

Rabbi Kook wanted to institute an appellate process. Whether he sought this because of his familiarity with courts in European countries or because Britain, the Mandatory country, sought it, I do not know.

But he overcame the expected resistance of the Rabbinical Courts by telling them that unless they accepted the change Britain would cease to grant them exclusive jurisdiction over the personal status of Jews. The resistance collapsed.

At least as vital is the problem that arose with regard to medical education in Israeli universities, the standard of treatment in its hospitals, the certifying of qualified physicians for all the world, and the participation of the State of Israel in the international advancement of health. According to Jewish Law, all of this would be problematic if the Jewish Law pertaining to autopsies were not liberalized. The circumstances which justified an autopsy according to Jewish Law were few and from the point of view of medical progress totally inadequate.

One must bear in mind how severe is the prohibition of Jewish Law against any benefit whatever from any part of a cadaver. Even in life the human body is God's. After death it is His alone.

Needless to say, not all rabbis fathomed the problem and its dire consequences for the future of Israeli medicine. One rabbi -

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Rabbi Yechiel Weinberg of Montrieux - a courageous one in many other areas - came to the rescue. And the basis was not historical or meta-historical. Simply the inescapable need of the hour - the ability of Israel, its physicians and its hospitals - to maintain modern standards. This was a decision of major importance.

When it became necessary to save Israel's status and not permit it to forfeit its position in world medicine, the health of its own citizens, the excellence of its hospitals and medical schools, the rabbis found a way. And the text of the decision was exclusively one devoted to the need and challenge of current conditions.

An equally courageous decision was rendered by Rabbi Soloveitchik at a critical point in American Jewish history.

Should *Yeshiva* University subject its rabbinical students to a draft to serve in the army, navy and air force of the United States in the Korean War?

There was such a draft during World War II. However, Jews were not as enthusiastic about the Korean War as they were about the war against Hitler. Then, there were rabbis - of all the persuasions - who volunteered. And even *Yeshiva* University instituted the draft as the other seminaries had done earlier.

During the Korean War there was greater student resistance. Especially the orthodox hesitated. Apart from the dangers associated with all wars, orthodox chaplains encounter many other problems - Sabbath observance, dietary needs, the absence of Jewish communities in the war zones to help serve the military, and the exposure of *Kohanim* to cadavers. The students raised the *Halachic* issue: Did their teachers have the right to expose them to these difficulties - especially the challenge that they would have to be less observant of the *Torah's* demands?

I had to preside over the convention which was to adopt the draft and the final decision - the *Halachic* one - was submitted to our final authority - Rabbi Soloveitchik himself.

For the budding jurist that I was, it was an eye-opener to see that our teacher did not hesitate to say that while every *Halachic* decision must be objective, he could not claim that he was objective on this issue. He wanted in advance to arrive at his conclusion. Few decisors have been as honest as he. (I must add here to the credit of Rabbi Feinstein's glorious memory that he too was impeccably honest in this connection - with no pretensions and no denials of personal preferences and prejudices). In any event, the draft was approved.

But it is the basis of the decision that was revolutionary.

Fortunately, the question was asked when the separatists in the orthodox community were few and relatively silent. Their resurgence came only a few years later. But Rabbi Soloveitchik pondered the role of public relations: What would be the image of orthodoxy if *Yeshiva* students did not do their part in their country's war effort? How would non-orthodox Jewry look upon orthodoxy's non-participation with them in the matter of appointments to the military chaplaincy? How would the American government view it? He found a way to justify exposing the orthodox chaplains to risks that they may have to violate laws of the *Torah*. And with his usually brilliant analysis of the *Halachic* sources he came to a conclusion that he subjectively wanted before he had made the analysis. Yet, his concern with the problem of public relations was certainly a major factor in the decision.

A greater challenge came after the State of Israel was established. And in this matter it was Chief Rabbi Herzog who ruled that when the State enters into treaties with other powers and/or the United Nations it is bound to fulfill them even if to do so it must violate many specific commandments of the Pentateuch - such as surrendering land to erstwhile enemies and favouring them with full political and civil rights. He so ruled in the face of the resistance of many who did not agree that mandates of the *Torah* can be superseded by agreements voluntarily consummated by the State and its duly constituted agencies. It is tragic that many orthodox Jews either were oblivious of Rabbi Herzog's ruling or chose to ignore it. Some tragedies that marked the peace process might have been avoided.

Chief Rabbi Herzog's peer, *Rishon L'Zion* Amiel was also exceedingly realistic. Indeed, some years before the establishment of the State he wrote a very bold *responsum* on women's suffrage but feared to publish it. This was done posthumously. Generally, what was expected of a modern State was legitimized *Halachically*. And the extremist orthodox parties also rejoiced with the decision. The votes of their women helped increase the chances of these parties for greater representation in the *Knesset*. The magnitude of this ruling can only be appreciated if one takes into account how great were the disabilities of women especially in the political sphere! This was the area of their maximum exclusion!

The State also extradites non-Israeli Jews who seek asylum in Israel after committing crimes in foreign States. A Biblical prohibition against such a procedure was held to be irrelevant and with *Halachic* approval the State behaved as one would

have expected a State to do when committed to international peace and order in a hostile world. One of the great moments in Jewish history that made possible the survival of the Jewish people was that made by the *Halachic* authorities more than 2000 years ago. Jews were permitted to fight on the Sabbath in wars against them. Otherwise the enemy would always attack and win on the Sabbath day. The pragmatism of that decision was characteristic of so many others that followed.

The security of Israel and its status in the new world were values with which the rabbis reckoned. But there were other values as well.

In one way, the full participation of the Jewish State in the international legal order was anticipated by the writings of Rabbi Menachem Mendel Kasher with respect to the international date-line. Few items in the thought and practice of Judaism have enjoyed such inflexibility as the date of the Sabbath. Yet Rabbi Kasher was of the opinion that Jews should accept the international dateline; many other rabbis were opposed to it. According to the presently effective international covenant, when it is the Sabbath in Israel, it is Sunday in certain parts of the Pacific. Now when shall Jews in the Pacific Islands observe the Sabbath? On the seventh day by their local calendar, or on their Sunday? Was it G-d's intent that the Sabbath day fall with an eye on Jerusalem as the center of time? Rabbi Kasher resorted to meta-*Halacha*. He argued, for example, that if the nations of the world, in years gone by, used their own capitals for the purpose of measuring time, and this reflected their concern for national pride and honour, then Jews should join them when there is a universal effort for a more reasonable result.

Rabbi Herzog accepted Rabbi Kasher's view and most Jews in the world have accepted it. But the rabbis dared to tamper with even more than the date of Sabbath.

I cite two examples not often mentioned in literature on the history of Jewish Law. Both involve the suspension of what on their faces were Biblical mandates.

Five women succeeded in getting from Moses a divine ruling that in the absence of sons, daughters would inherit from their father. However, leaders of the tribe of which their father was a constituent, complained that one day these daughters might become wedded to men of other tribes and their sons would inherit from them and thus their tribe would have its territory enlarged while the area assigned to the tribe of their maternal grandfathers would be reduced. Their complaint was not only respected.

The daughters were ordered to marry within their father's tribe. If this law would have remained in force forever, national unity would have been hard to achieve. This would frustrate the kings. Unity was also G-d's wish for the Jews. The Oral Law limited the disability of the daughters to marry men of tribes other than their father's, to them alone and their generation. The limitation came to an end in the cause of national consolidation. A special festival was established to celebrate the result - the 15th of the month of Av. It was a triumph for a nationalist goal.

Equally important for demographic growth was another ruling that involved converts. What is generally known is that to be converted to Judaism, males must be circumcised and immersed in a *mikvah* while from women only the latter ritual was required. But all were expected to commit themselves to the observance of the entire *Torah*. Yet, there was fourth requirement - the bringing of an animal offering. With the destruction of the Temple this could not be done. The rabbis suspended the requirement. It was regarded not as a condition for conversion but rather as a ritual that would qualify the convert to eat the flesh of animal offerings when there would be a Temple. A brilliant legal decision that made possible the acceptance of converts unto eternity! One word in the Bible was used to prove that the acceptance of converts was, indeed, to be forever!

Much has been written recently to prove that the requirement that converts commit themselves to the total *Torah* has been radically modified. In some countries the letter of the law is binding. In others the authorities have been less demanding and more realistic. In Israel, the rabbinate is much more lenient than most tribunals in the Diaspora. That is understandable. In Israel, the convert can and does lead a more Jewish life than in the Diaspora. Especially his or her children will grow up in a Jewish environment with weaker forces around them to make for alienation and intermarriage. In the Diaspora this does not exist. But again one sees how circumstances affect either the relaxation of requirements or their rigid fulfillment. The decisors again prove how realistic they are.

The most radical position of Chief Rabbi Unterman shocked many a rabbi in the Diaspora. He accepted the conversion of Russian Jewish immigrants who settled in non-orthodox kibbutzim where neither Sabbath nor dietary laws were observed. Consequently, they could not possibly be practicing Jews. The only condition imposed was that the children should receive a Jewish religious education. Also to reclaim Karaites and Falashas many concessions were made. Indeed, some

orthodox rabbis in the Diaspora threatened not to recognize the conversions of Israel's Chief Rabbi! So liberal and generous was the accommodation.

Rabbi Joseph B. Soloveitchik - in coping with some problems of Jewish family law - resorted to history in fulfillment of its commitment to the equality of husbands and wives in the marital relationship. Over a period of thousands of years, the rabbis did much to equalize the status of men and women in creating and dissolving the marital relationship. When they approved of a corrective which would benefit only husbands he declined to participate in its use. He would have approved of change if it could help when "the shoe was on the other foot". Yet, since the value of equality was flouted in this change, and the unmistakably historical process was shunned, he refused to take advantage of it. He was also famous for his commitment to the equality of women in the area of Jewish studies.

It should be of interest that in the first case - involving a procedure enabling a husband to remarry when no such exit from the marriage was available to the wife - he was reacting as a modern and took a step forward in the historical process making for equality of the sexes. Many rabbis could hardly believe that he took that position until it was ascertained that his lecture on the matter was taped. But when I favoured the recommendations of Rabbi Professor Justice Menachem Elon of Israel's Supreme Court to liberalize the use of the annulment of marriages he was angry. Although he knew that the use of the annulment procedure was very common all over the world and that *Talmudic* giants until today use it, he said to me, **"You may be right and I may be wrong. You always see matters historically and I see them meta-historically"**. (This conversation was reported in his lifetime in "*Shma*" and was never challenged.) Even England's Chief Rabbi Sachs did not realize that Judge Elon was not only the source for the proposal to which Rabbi Soloveitchik objected but that it is very much alive and resorted to in many situations today despite the meta-historical ideal that marriage should be forever as husbands and wives **"cleave"** to each other and **"become one flesh"**. It is a pity that the name of Rabbi Soloveitchik is associated with opposition to the annulment of Jewish marriage because his opposition was, in his own words, on a meta-historical foundation - G-d's idea for monogamous, eternal, unions, as suggested in Genesis. It became the ideal for Christianity but Judaism was realistic and realism explains why the *Torah* provided the "way out" from unfortunate marriages. Many rabbis were shocked that Rabbi

Soloveitchik said what he said about Professor Elon's proposal which I advocated but did not originate. Yet, I subjected him to minimum embarrassment for his apology to me and gave it minimum publicity. However, again one sees how values - totally non-*Halachic* and existing only in an ideal realm - affect the decision making of the famous decisors for or against a *Halachic* position.

Yet all of this serves to prove that in connection with Jewish family law there is ferment and creativity. No one questions the availability of the power to cope with the pressures of the modern world. They only differ as to which might be the best route to take.

As much as I complain about the need for speedier action, I must admit that most rabbis are becoming more courageous and resourceful to solve problems. The best evidence for that is the speed with which the rabbinical world reacted to the benighted effort of some rabbis to revive child marriages and give that power once again to the girl's father. There were some who said, and still say, that this power of the father is warranted by Scriptures. Notwithstanding such an impressive source, it is being ignored or subverted in many ways. All of which proves how correct Blu Greenberg is when she said, "Where there is a rabbinical will, there is a rabbinical way".

Perhaps with broader experience the rabbis will be more responsive to the human condition.

Nothing proves this better than Rabbi Soloveitchik's reaction when he was told that one rabbi refused to grant permission to abort a fetus with Tay-Sachs disease, "He has never seen an infant thus afflicted."

The most solid basis for this liberal, progressive approach to Jewish Law is the Biblical command "to live by the Law" and the *Talmudic* addendum, "and not die by it".

The highest value is the life of the individual, the life of the people, the life of the community, the life of the State, and the life of humanity.

Generally speaking, it can be said that in the first fifty years of modern Israel's history, the rabbinate acted in a manner that was to its credit. However, in the face of the recent rise of religious fundamentalism in Israeli society, one may wonder whether this will be the situation in Israel's second fifty years. One hopes that at least there will be no change for the worse.

The Equality of Human Life

Application for Leave to Appeal 5587/97

The Attorney-General of Israel v. Ben Achar (a minor)

**Before Justices Theodor Or, Tova Strasberg-Cohen,
Y. Goldberg**

**Judgment delivered on 24.9.1997, reasons delivered on
9.11.1997**

Precis

This judgment was given in an application for leave to appeal against a decision of the District Court of Tel Aviv-Jaffa, which had prohibited the medical team treating the Respondent, Ben Achar ("the minor"), from providing the minor with dialysis without the consent of his parents, except for replacing temporary catheters as the need arose. In this judgment, the District Court had upheld the appeal of the minor against the decision of the Family Court of the District of Tel Aviv which had given the medical team permission to perform this procedure. The minor, a child of eight suffering cerebral palsy from birth, also developed a severe disease of the kidneys. The question under consideration was whether the doctors should be permitted to provide him with medical treatment necessary to prevent his death from kidney failure despite the refusal of the child's parents to consent to the treatment. The Supreme Court overturned the judgment of the District Court and held that the best interests of the child required that the treatment be given.

Justice Theodor Or

The Facts: Justice Or commenced his judgment by setting out the facts. The child was born with cerebral palsy. He was severely retarded, unable to control his motor functions and could only communicate with his surroundings in a limited fashion. He could smile and make eye contact or cry when he wanted something. According to the medical experts there was no hope that his condition could be improved, the only treatment which could be offered to him was nursing care and physiotherapy. Until 1996, the child lived with his parents who provided him with devoted care. In 1996, the child's father became ill and the child was placed in an institute for the rehabilitation of retarded and sick children. The child continued to receive regular visits by his parents. In addition to his mental

and motor disabilities, the child also developed a kidney disease which was diagnosed when the child was aged 3. This disease worsened and in August 1997 the child was hospitalized with general kidney failure. A number of options were available to the doctors ranging from no treatment at all - which would result in the child dying in a slow and painful manner - to peritoneal dialysis, which would require initial insertion of a catheter under a general anaesthetic. The doctors elected the latter treatment, the parents refused to give their consent. Consequently, in accordance with his powers under the Capacity and Guardianship Law - 1962, the Attorney-General applied to the Family Court for an order requiring the performance of the operation, and the Court indeed granted the order "in order to protect the life and well-being of the minor".

The Family Court: The Family Court held that its decision accorded with Section 68(b) of the Capacity and Guardianship Law, under which the Court would not give a direction "to perform surgery or to take any other medical measures... unless it [was] satisfied, on the basis of a medical opinion, that the measure [was] necessary to protect the physical or mental well-being of the minor."

The Family Court referred to the decision given by the Supreme Court in C/A 506/88 *Shefer v. The State of Israel* 48(1) P.D. 87, where it was held that only where reference was to a man who was in a fatal, vegetable like, condition and suffering unbearable agony, might the Court refuse to permit medical measures from being taken to artificially prolong his life. In that case, the Deputy President of the Supreme Court, Justice Elon, also held that where the candle of a person's life still burned, the sanctity of life was the exclusive determinative factor and the Court would not permit any intervention or harm to that life.

Following the Family Court's decision, a temporary catheter was inserted into the child's body, in order to allow the child's condition to stabilize before inserting a permanent catheter.

The District Court: The child's parents thereafter appealed to the District Court and asked for a stay of the decision requiring performance of the full surgical procedure. After receiving testimony from a Court appointed expert, the District Court decided to allow the parents' appeal. The District Court noted that the treatment being offered would not lead to a cure for the patient's illness, but would only "prolong the life of the patient in an arti-

ficial manner, thereby postponing the decision on his fate.” The District Court regarded the decision of the Family Court, and the decision of the doctors as “the easier decision in the circumstances of the case, and a shedding of responsibility on the question of ethics and conscience arising in the case.” After describing the parents’ devotion to the child, the Court also stated that they were the ones “truly competent to examine the needs of the minor.” Being persuaded that the parents’ decision was based on the child’s interests, in bringing an end to his suffering, the Court held that it would not replace their discretion with its own, particularly as their position was not contrary to the position of the Court or to the considerations set out in the expert opinion.

The Attorney-General appealed against this decision to the Supreme Court. The Supreme Court upheld the appeal.

Jurisdiction

Section 13 of the newly enacted Rights of the Patient Law - 1996, set out the general principle that medical treatment would not be carried out on a person who informedly refused it. As an exception to this rule, Section 15(2) provided that where there was a “serious risk” to the patient, and he opposed medical treatment, which in the circumstances had to be provided urgently, such treatment could be given even against the wishes of the patient where the ethical committee operating under the terms of the Law, authorized the grant of treatment.

Justice Or rejected the Respondent’s claim that Section 15(2) had the effect of tacitly annulling Section 68 of the Capacity and Guardianship Law. Accordingly, the Family Court retained jurisdiction to look after the welfare of minors, and gave the Attorney-General legal standing to institute legal proceedings where the welfare of the minor demanded it.

The Normative Framework - Medical Treatment of Minors

The biological parents are the natural guardians of the child. Guardianship includes the right and the duty to care for the needs of the minor, including the medical needs of the minor. According to Section 17 of the Guardianship Law, as guardians of the minor the parents must act in the best interests of the minor in the same way as devoted parents would act in the circumstances of the case. They are not entitled to refuse treatment which is in his best interest.

According to Section 26 of the Law, where a parent neglects

his duties towards his child, the Court may order that certain provisions apply to him and may make orders in the best interest of the child even without a preliminary determination that the child has been neglected. An example of such an order is found in Section 68 of the Law. In C/A 1354/92 *The Attorney-General v. Anon.* 48(1) P.D. 711, it was held that in making a determination in accordance with Section 68(b) the Court had to weigh the benefits of providing the treatment against the possible damage arising therefrom. The treatment is “necessary”, within the meaning of the Section, if the benefit outweighs the damage.

Thus, the test is one of “consequential-benefit” under which one must choose the action, the result of which will provide for the greater welfare of the minor. Within the framework of this test one must examine whether the treatment is “proportional” - in other words, whether it will improve the condition of the patient sufficiently to warrant it being taken, particularly in the light of all the damage or burdens which it is likely to cause, and that it is also better than other feasible alternatives.

By nature, the guidelines embraced by this test are limited. Like the test relating to the best interests of the minor, this test is “flexible, broad and undefined, which is given meaning by the Court in accordance with the evidence before it and on the basis of its judicial discretion” (C/A 2266/93 *Anon. v. Anon.* 49(1) P.D. 221 at 268). This test *per se* does not assist the Court to determine whether and to what extent a particular result of a treatment being offered is of benefit or will cause damage. This test presupposes a prior identification of benefit and damage. Implementation of the process requires that the Court identifies the rights and interests of the minor which may be influenced by each of the decisions which may be reached. The Court must give the appropriate weight to each of these rights and interests and by so doing the Court reflects the fact that “the term ‘the best interests of the child’ embraces, at least on the theoretical level, the values of society, and within that context one must take into account the ways and perceptions of society.” (C/A 2266/93 at p. 250).

The basic values of society which guide the Court in identifying the benefit and burdens involved in providing particular medical treatment are not the conclusive factors in determining whether medical treatment is “necessary” in order to ensure the welfare of the minor. The Court must translate this perception, in each and every case, and apply them to the facts of the case. The Court is not dealing with a theoretical child but with a real child, and it must examine the advantages and disadvantages to him in giving or refraining from giving treatment.

Justice Or then examined which rights and interests were relevant to the case before him.

The purpose of the treatment being considered was to save the life of the child who would have died within a few days in the absence of treatment. Thus, first and foremost, one had to take into account the right of the child to life. This is a basic constitutional right, given to every person in Israel. It is entrenched in Section 1 of the Basic Law: Human Dignity and Freedom, which states that "The basic rights of a person in Israel are based on recognition of the worth of man, the sanctity of his life and his being a free person." This right is also recognized in Section 2 which states that "No injury may be caused to the life, person or dignity of a human being as a human being." Section 4 states that "Every person has the right to protection of his life, his person or his dignity." This right is given to every person, including, of course, to minors.

Even before the enactment of the Basic Law: Human Dignity and Freedom, the principle of the sanctity of life was embedded in the Israeli legal system, which absorbed it from the fundamental values of Judaism.

From the point of view of this principle, the treatment, being offered to the minor had great value, and according to expert opinion would resolve his problems for a period of about 2 years. After that period, treatment was available which would allow his life to be prolonged further.

In addition to the advantages of the treatment the Court considered the risks of treatment in terms of welfare, functioning and side-effects. Here, there was no evidence that the treatment involved real dangers or risks of complications.

Justice Or then considered whether the minor was a terminal patient, as had been held by the District Court. The judge held that according to Jewish law, medical treatment should be given even if it would prolong the life of a person for a very short period of time, but that medical treatment should not be given to a terminal patient, if the extended life would be subject to enormous suffering (C/A 506/88 *Shefer v. State of Israel, supra*). In contrast, in American legislation and case law there is an approach which allows doctors to refrain from giving medical treatment to a terminal patient, even if it is not proved that the patient is suffering unbearable pain (see e.g. *In Re C.A. 603 N.E. 2d* (Ill Applicant. 1 Dist. 1992) 1171.).

In the instant case the Court held that this issue did not arise. On the facts, the minor was not a terminal patient. According to the *Shefer case*, a patient would be regarded as being a terminal patient where the doctors despaired of his life and he was

certainly about to die. In the instant case the medical evidence showed that the patient's kidneys could not be cured but his general condition could be remedied. He was not in an irreversible condition. The medical treatment could prolong his life without impairing his life expectancy.

With regard to the issue of quality of life, Justice Or accepted that the minor suffered from serious neural and motor damage, but, from a legal point of view, there was no difference between the life of a healthy person and that of a person who was born or suffered from any impediment, including serious functional impediments. The minor's life was not worth less than that of a healthy person. The Court would not examine the benefit of medical treatment, which had the effect of extending a person's life, on the basis of the Court's judgment of the quality of that life or that person's value to society, and the Court quoted the Supreme Court of New Jersey in: *In Re Conroy* 486 A 2d. 1209 (N.J. 1985):

"We do not believe that it would be appropriate for a Court to designate an authority to determine that someone's life is not worth living simply because, to that person, the patient's 'quality of life' or value to society seems negligible. The mere fact that a patient's functioning is limited or his prognosis dim does not mean that he is not enjoying what remains of his life or that it is in his best interest to die."

The Court considered the risks involved in subjective assessments of the quality of life of patients, even in democratic societies. Here, the problem was even more serious as the age and physical and mental condition of the patient precluded the Court from determining his subjective desires, even if those desired carried some weight. In such cases particular caution had to be exercised, as giving weight to societal considerations relating to quality of life, could pose an intolerable risk to the lives of defenceless people, suffering from serious mental or physical disabilities, particularly, as often these people are regarded as an unjustified burden on society.

Accordingly, the Court held that it should refrain from coming to a decision on the quality of life of the minor, but it had to focus on the good of the minor from his point of view, and on the basis that his disabilities were all he knew and that no other life was possible for him. Such a life should not be defended less than the life of a healthy child who had developed normally. In this case, the minor's life could not be said not to be a life and accordingly he could expect to receive a clear and real benefit from the performance of the proposed medical proceeding.

Accordingly the test to be applied was - would the medical proceeding be for the good of the child - would it promote his physical or mental well being - and the Court would examine whether the proposed proceeding involved burdens which were so heavy, as to clearly outweigh the expected benefit from it. Prolonging someone's life did not necessarily mean improving the quality of that life. In cases where prolonging life meant prolonging physical and mental suffering, there might be such a severe impingement on the rights and interests of the patient - led by his constitutional right to respect - that there would be justification for refraining from giving him medical treatment.

The Court considered a line of American cases which discussed the nature of the suffering which might be caused to the patient by the proposed treatment, including mental suffering, but, concluded that in the instant case the Court would not state its own position on these issues as no foundation had been laid to show that the minor would be caused such suffering by the proposed treatment as to warrant it being withheld - under any of the possible legal approaches to this issue. On the other hand, stopping the treatment might cause him significant suffering and possibly even death.

The Court held that although it could give weight to the desires of the patient himself, it would not apply this consideration in the same way where the patient was incompetent, and cited with approval the article by Buchanan, "The Limits of Proxy Decision-making for Incompetents" 29 *UCLA Law Review* 386 (1981):

"The very notions of self-determination, and hence a right of self-determination, only apply to a being who possesses, or has the potential for developing, certain complex cognitive functions, including the ability to conceive of the future, discern alternative courses of action, and make judgments about his own good. Most importantly, we can only coherently ascribe a right of self-determination to a being who is capable of conceiving himself as an agent - a being distinct from and capable of changing his environment".

Thus, the subjective desires or assumed desires of the minor were not in issue, as he never had and could never express them, and Justice Or commented that he could not understand on what basis the District Court felt able to determine the nature of his desires. Often these types of cases involved patients whose cognitive functions were severely impaired and therefore it was difficult to know to what extent they suffered pain. In view of the importance of the principle of the sanctity of life, and in the

absence of concrete evidence regarding the pain and suffering caused to the patient, the Court would normally conclude that the doctors should not refrain from providing medical treatment which would prolong the patient's life. The result of an error in an assessment which might lead to medical treatment being withheld - could be irreversible. Before such a conclusion could be reached, the Court had to be convinced that the balance between the expected benefit from the treatment and the suffering and burdens caused by that treatment, were such that treatment should not be ordered. In such cases it was better to err in favour of preserving life.

Interfering in the Decision of the Parents

Justice Or held that parents have a fundamental right to autonomy in decisions relating to the raising of their children. Parents have direct responsibility for their children, by reason of their status as natural guardians. Underpinning this status are a number of considerations: *first*, the assumption that the parents, being responsible for the family cell and intimately aware of all sides of a problem - will reach the best decision for their children; *second*, the Courts are not always the best bodies to supervise over complex and delicate decisions between parent and child; *third*, often the questions at issue are not the subject of societal consensus; *fourth*, the parents will be the ones who will ultimately have to cope in daily life with the practical significance of the decision whether or not to give treatment.

Nevertheless, this autonomy is not complete. The Court has power to intervene in the decision of the parents where the welfare of the child so demands. The right and duty of the State to protect the interests of those who are defenceless, has been anchored in the statutory provisions referred to previously.

Justice Goldberg and **Justice Strasberg-Cohen** agreed, the latter emphasizing that in questions of life and death, the parents could not be the sole decision-makers regarding their child, even where there was absolutely no doubt as to their sincerity and honest belief that they were acting in the best interest of their child.

This matter has been referred to a Further Hearing by an extended bench of the Supreme Court. JUSTICE will report on the resulting decision in due course.

Abstract prepared by Dr. Rahel Rimón, Adv.

Report of the International Presidency of the Association

On 28th December, 1997, the International Presidency of the Association met in Israel.

Judge Hadassa Ben-Itto, President of the Association, reported on current activities and outlined plans for the future.

Delegates from country chapters reported on activities of chapters.

Judge Myrella Cohen reported on the initiation of a new chapter in Scotland. *Marc Schaner* reported that the Swiss Section is working with the Volcker Committee on dormant accounts and heirless assets. *Joseph Roubache* reported on pending court cases concerning hate speech. *Itzhak Nener* reported on a new section established in the Philippines. *Alberto Aronovitz* reported on the Internet site established by the Swiss Section and offered to publish on it material supplied by the Association (headquarters and chapters), and select articles from *JUSTICE*. *George Ban* reported that an effort is being made to establish the Hungarian Section and to reach all Jewish lawyers in Hungary. A report in writing was received from the American Section with details about new chapters established in various cities and increased activities in the U.S.A.

Three upcoming international events of the Association were discussed, and the following resolutions were passed:

- ◆ *The Triannual International Congress*: to be held in Jerusalem on "Judaism, Humanism, Democracy and Political Culture Towards the 21st Century", 28th -31st December, 1998, (see details in President's Message).
- ◆ *Subject of the Public Trial*: "Political

Violence - The Limits of Legitimate Political Expression".

- ◆ *Justice Gabriel Bach* will preside and heads of Sections will suggest to the organizing committee names of judges to be included in the panel.
- ◆ *Advocate Jonathan Goldberg*, who has participated in former trials with great success has agreed to plead at the trial.

The Thessaloniki Seminar

The Presidency approved the project suggested by *Judge Ben-Itto*, to hold a series of weekend seminars in various European cities, to commemorate Jewish lawyers and jurists who perished in the Holocaust, and their contribution to the law in their countries.

The first seminar will be held in Thessaloniki, Greece, on 25th - 28th June, 1998. *Manon Maissa* will be responsible

for local arrangements and contacts. The committee responsible for preparations: *Adv. Manon Maissa*, *Adv. Joseph Roubache*, *Adv. Ettya Simcha* and *Adv. Shimon Tzur*.

Toronto Conference in the Year 2000

Adv. Igor Ellyn from Toronto, Canada, who offered to activate the Chapter in Toronto and to organize a conference in the year 2000, was invited to the meeting of the Presidency and presented his detailed plan, which was approved in broad lines. The Presidency welcomed the efforts of *Adv. Ellyn* and decided that further plans should be fully coordinated with the head office and presented for approval at future meetings of the Presidency.

It was decided that what was previously "Meetings of the International Council" will now be called "International Conference".

At the suggestion of *Adv. Nener*, it was decided to seek new ways of combatting the growing phenomenon of Holocaust denial.



Hanukkah reception held during the Presidency meeting in Tel Aviv (Photo: Israel Hadari)

Remember Salonika

Thessaloniki (Salonika) Greece, June 26-28, 1998

An international conference to commemorate the Jewish community of Salonika which was almost totally wiped out in the Holocaust and to mark the contribution of Jewish lawyers, jurists and prominent intellectuals to Greek law

Programme of Seminar Sunday, June 28, 1998

9:00 - 11:15 Opening Session

Chairperson: Mrs. **Manon Maissa**, Advocate; President of the Greek Section of the Association

Greetings:

1. Minister of Justice or Minister of Culture of Greece
2. President of the Bar Association of Thessaloniki

Addresses:

1. **Opening Remarks**
Judge **Hadassa Ben-Itto**, President of the Association
2. **History of the Jewish Community in Thessaloniki**
Speaker: Mr. **Alberto Nar**, writer and historian
3. **Portraits of Famous Jewish Lawyers and Jurists**
Speaker: Mrs. **Stella Salem**, Advocate and Assistant Professor, Aristotle University of Thessaloniki
4. **Family Law of Greek Jews: Transition from Jewish Law to the Greek Civil Code**
Speaker: Dr. **Theofano Papazissi**, Advocate and Professor, University of Thessaloniki

11:30-13:00 Second Session:

Jewish Presence in Greek Law and Constitution

For full details of conference (June 26-28, 1998)
see enclosed programme

Chairperson: Mrs. **Stella Salem**, Advocate

1. **Laws concerning Jewish Communities in Greece**
Speaker: Mr. **Telis Nahmias**, Advocate
2. **"Hazaka" (Right of Possession) from 1500 to the Period of Emmanuel Salem, 1900**
Speaker: Dr. **Evangelos Hekimoglou**, Aristotle University of Thessaloniki
3. **Ben Aroya and the Socialist Federation of Thessaloniki**
Speaker: Dr. **Spiros Marketos**, Advocate, University of Athens

14:30-17:00 Third Session

Round Table: Antisemitism and Holocaust Denial towards the 21st Century

Chairperson: Mr. **Itzhak Nener**, Advocate, First Deputy President of the Association, Israel

Speakers: Mr. **Serge Klarsfeld**, Advocate, France
Prof. Dr. **Michael Brocke**, Professor of Jewish Studies, Duisburg University, Germany
Dr. **George Margaritis**, Professor of History and Archaeology, University of Crete, Greece
Judge **Hadassa Ben-Itto**, Israel

General Discussion

Conference Sponsored by
The Rich Foundation (Switzerland)
