

Editorial Board:

Judge Hadassa Ben-Itto
Adv. Itzhak Nener
Adv. Myriam Abitbul
Dan Pattir
Dr. Rahel Rimon
Prof. Amos Shapira
Dr. Mala Tabory
Dr. Yaffa Zilbershats

Editor-In-Chief:

Dan Pattir

Co-ordinating Editor:

Dr. Rahel Rimon

Graphic Design:

Ruth Beth-Or

Cover: Stamp commemorating Israel's 50th Anniversary, depicting "Srulik" (the typical Israeli) by the cartoonist Dosh. Courtesy of Israel's Philatelic Service.

Views of individuals and organizations published in JUSTICE are their own, and inclusion in this publication does not necessarily imply endorsement by the Association.

JUSTICE is published by:

**The International Association
of Jewish Lawyers and Jurists**

10 Daniel Frish St., Tel Aviv 64731, Israel.

Tel: 972-3-691-0673

Fax: 972-3-695-3855

© Copyright (1998) by IAJLJ

ISSN 0793-176X

Printed by Shmuel Press Ltd.

27 Shoken Street, Tel Aviv,

Tel: 972-3-682-2056.

JUSTICE (ISSN 0793-176X) is published 4 times a year for \$50 per year by The International Association of Jewish Lawyers and Jurists. Royal Mail International, c/o Yellowstone International, 87 Burlews Court, Hackensack, NJ 07601. Periodicals Postage Paid at South Hackensack. POSTMASTER: Send address corrections to JUSTICE Royal Mail International, C/O Yellowstone International, 2375 Pratt Boulevard, Elk Grove Village, IL 60007-5937.

TABLE OF CONTENTS

PRESIDENT'S MESSAGE / Hadassa Ben-Itto – 2

FIFTY YEARS OF LAW IN ISRAEL

“The Israeli Legal System is as Solid as a Rock” / Justice Aharon Barak – 3

**“We are Bound to Anchor Decisions in the Values
of a Jewish and Democratic State” / Justice Menachem Elon – 10**

**“Moslem Sharia’a Court Should be Left to
its Own Creative Devices” / Qadi Ahmad H. Natour – 16**

**“Druze Religious Courts do not Intervene in Social Life
but Modernization has its Repercussions” / Qadi Naim Henou – 23**

Lebanon: Security Council Resolution 425 / Ruth Lapidot – 27

The Swiss Special Fund for Holocaust Victims / Rolf Bloch and Marco Sassoli – 30

Social Justice in the Israeli Legal System / Yaffa Zilbershats – 35

**The Economic Relations between Israel
and the Palestinian Authority / Talia Einhorn – 40**

FROM THE SUPREME COURT OF ISRAEL

Sedition and the Stability of the Democratic Regime – 44

PRESIDENT'S MESSAGE



T

his year *JUSTICE* has celebrated Israel's Fiftieth Anniversary with a series of conversations with leading judicial figures in Israel. We have talked with Presidents and Deputy Presidents of Israel's Supreme Court as well as the heads of the Moslem and Druze Religious Courts. Their comments on substantive issues of law, the unique civil and religious structures, the special respect given to Jewish law as part of Israel's national heritage and plans for future reforms and improvements bear undisputed witness to Israel's democratic and pluralistic character. We are proud that Israel's legal system with its strict adherence to the rule of law and championship of social, political and civil rights has achieved a well-earned place in the family of modern and civilized nations.

Yet, despite our satisfaction with these achievements, earned in a short space of time and in the face of external threats to Israel's national security and internal threats to Israel's political stability, we cannot ignore a new threat which is facing Israel's judicial structure and law enforcement agencies, including the prosecution services and senior police officers. Recent months have seen increasingly vitriolic attacks against decisions of the Supreme Court of Israel and even against individual judges. Judges, prosecutors and police officers have received threats of violence. Some of these figures have no choice but to pursue their work with bodyguards protecting their every step. One senior prison service officer has already been murdered, the culprits have yet to be identified. The atmosphere of violence and loosening of restraints is deepening. For the time being most of the attacks are verbal and are being launched by a few extremist elements, however, we cannot escape our responsibility to warn against this new phenomenon by minimizing the scope of the danger. It needs only a spark to set the keg alight.

While some causes of the general increase of violence in Israeli society are rooted in the sharp divisions affecting every aspect of Israeli life and are more amorphous in nature, the background to the attacks against the Supreme Court is clear. The Supreme Court reigns at the top of the pyramid of Israel's legal structure and sees it as its duty to be the guardian of law in all its aspects, whether by protecting human rights, ensuring the reasonableness of administrative decisions, or, most controversially, reviewing the legality of Knesset legislation.

On one hand, the Supreme Court regards the Basic Laws as chapters of Israel's Constitution, but on the other hand, no Knesset legislation has formally empowered the Supreme Court to exercise the jurisdiction which it has taken upon itself. The seeds of the conflict are clear and in a way inevitable. Nevertheless, to date, the Supreme Court has courageously and fearlessly taken on the thankless task of examining and dealing with the difficult and sensitive disputes dividing Israeli society in a multitude of areas of economic, political and social life.

We hope that Israel's judiciary will continue to exercise their independence and act boldly in accordance with their moral convictions and their understanding of the law. We must do our part by identifying the fine line between freedom to criticize judicial decisions and incitement to violence, and speak out loudly and clearly whenever that fine line is crossed.

The atmosphere of violence invading Israeli society can only be lightened by a strong court system and effective legal and law enforcement agencies, which follow the rule of law and in which the public has full confidence. An independent and fearless judiciary is vital to achieving a successful return to the internal calm which the Israeli public so richly deserves.

Hadassa Ben-Zur

Fifty Years of Law in Israel

Celebrating fifty years of law in Israel, *JUSTICE* continues with conversations with leading judicial figures from Israel's secular and religious court system.

“The Israeli Legal System is as Solid as a Rock”

Conversation with Justice Aharon Barak

JUSTICE: With its first 50 years behind it, how do you see the Israeli legal system today, is it stable or vulnerable?

Justice Barak: Solid as a rock. Its place, in terms of normative structure, constitutional structure and social structure is safe. Nevertheless, the constitutional provisions concerning the Court are unsatisfactory, primarily because the Basic Law: Judiciary is not enshrined, though this is a formal problem more than a substantive one. It is true that there is some criticism of the Court, and part of it is correct, for example, that we have too many cases and thus are unable to process them at a speedy rate. Another major problem is the appeals as of right from the District Court to the Supreme Court, which come in their thousands both in criminal and civil cases and impose a heavy burden. Many cases raise questions with which the Supreme Court need not deal and occupy a tremendous amount of its time.

JUSTICE: Do you wish to see a new instance between the District Court and the Supreme Court?

Justice Barak: There should be a system whereby civil and criminal appeals that come to the Supreme Court come not by way of right but by way of leave. We are now in the midst of considering a proposal which the Minister of Justice has

Professor Aharon Barak is President of the Supreme Court of Israel. He has served on the Supreme Court since 1978 and as President of the Supreme Court since 1995. Formerly Israel's Attorney General (1975-1978).

presented to the Knesset, designed to convert the Magistrate's Court into the major trial court and convert the District Court into the major Court of Appeal; automatically, cases will only come to the Supreme Court on a second

appeal. We considered the possibility of inserting a court between the District Court and the Supreme Court, but we found that a small country like Israel does not need a fourth court. This kind of reform will help ease the burden. In this context I would also like to correct a mistake which many people make. Some people argue that the fact that the Supreme Court is overburdened is our own fault as we invite the cases ourselves, particularly the petitions brought to the Supreme Court sitting as a High Court of Justice, and that we have opened the gates to a variety of petitioners who would not have been heard in the past because they had no standing or the issue was not justiciable. The people who raise these arguments do not know the facts. Out of almost 8,000 cases heard by the Supreme Court every year, 2,000 are High Court cases. So our main work is not High



Court cases at all. Furthermore, of these 2,000 cases, not more than 100 are cases where our liberalized attitude to legal standing and justiciability opened the door to petitions which might not have come in under the more conservative approach.

JUSTICE: How do you see the creation of a Constitutional Court to deal with these cases?

Justice Barak: Ninety-nine percent of the High Court cases should be dealt with not by a Constitutional Court but by an Administrative Court. The High Court of Justice is an Administrative Court. Since 1992, when the new Israeli Bill of Rights [Basic Law: Human Dignity and Liberty] was enacted, I estimate that we have had more than 60,000 cases in the Supreme Court. Of these only a handful were true constitutional cases, *i.e.*, cases where the constitutionality of legislation was involved. There is no place to create another court structure. We have performed this work in the past and we have performed it well, there is no reason for a Constitutional Court in Israel. The reasons for establishing a Constitutional Court in the countries of Europe do not apply in Israel. The two main reasons were: a) after the changes in the ex-Communist bloc there was no change in the judiciary, there was no deNazification in Germany, or deCommunism elsewhere, so the judges could not be asked to protect the new Constitutions. The new Constitutions were a reaction to the past and it made no sense to make the Old Guard their new guardians; b) in all these countries there was a traditional legal structure in which there was more than one Supreme Court, for example, in Germany there was a Supreme Administrative Court, a Supreme Labour Court, a Supreme Social Court and a Supreme Civil and Criminal Court. Which of these would deal with Constitutional matters? It was necessary to create a special court. Neither of these reasons apply in Israel: a) there is no need for any ideological cleansing; and b) our structure is an Anglo-Saxon structure in which there is a pyramid, at the top of which there is already a Supreme Court which is supreme in all matters, whether they be civil, criminal, administrative, labour or social. Further, I think it is very healthy for the same judges who deal with torts and contracts to also deal with constitutional matters, and not have separate branches dealing with each. It is important from the point of view of the development of legal thinking. One of the most important aspects of a constitutional judge is his objectivity; the fact that he reflects values which are outside his self. Professional judges

are educated from the first day they step into office to act in that way. It is the professional judge who is really able to internalize these values - to make the Constitution part of his own constitution and deal objectively with it. Those countries with a Constitutional Court have a reputation for having a very political judiciary, and this would also be the case in Israel which is such a political society. I am very much against any attempt to have such a court. There is no need. What we need is the reform of our legal system which I referred to earlier. It will solve all the problems, instead of having 8,000 cases, we will have 2,000 cases, and the burden will be eased.

JUSTICE: In retrospect, are you happy that Israel adopted the English common law system as opposed to the continental legal system?

Justice Barak: Historically, I think, one of the great debts we owe to the British, is that they gave us the common law. If we look at the period of the Mandate, and ask ourselves what are the great things we received from the British, one of the greatest is the common law. This does not mean that we could not have worked with the civil law, but if we were destined to be subject to the Mandate, the common law is one of the greatest contributions they could have made.

JUSTICE: However, today, isn't the Supreme Court looking more towards continental law and America?

Justice Barak: That's right, we are developing our common law into what we call "the Israeli common law". In many areas we are also influenced by civil law. Israel is a mixed jurisdiction, belonging to the family of the Western civilization. Within that family we are closer to common law than to civil law, but we also have strong civil law characteristics.

JUSTICE: Doesn't that lead to a problem of lack of uniformity, as different principles are taken from different systems?

Justice Barak: Well, a mixed jurisdiction is also a jurisdiction. It has its own theory. There are several mixed jurisdictions, Israel is not the only country to apply it. There is South Africa with its application of Roman-Dutch law, Scotland, Louisiana, Sri Lanka, and Cyprus all have mixed jurisdictions. Israel has its

own internal structure. We copy neither from England nor from Europe but are trying to develop our own jurisprudence, and I think we have done it quite well.

JUSTICE: One of the characteristics of a civil law system is that being oriented towards legislation, the discretion of the judges is inevitably limited, how do you see that?

Justice Barak: It is true that one of the characteristics of civil law is that more areas of the law are under statute than under case law. But in England and America too, more and more areas of law are being governed by legislation.

JUSTICE: Yes, but that is because of England's membership of the European Community.

Justice Barak: Yes, but this is also true of America. Once, Justice Frankfurter wrote that "95 percent of all my judicial work is the interpretation of statutes". In terms of how it affects the discretion of the judges: a) I don't think its relevant. I am not in favour of giving a wide discretion to judges. I am in favour of getting a good result, and if the statute provides a good result, there is no problem; b) it depends what the statute says. There are areas in the law where the discretion of the judge under statute is wider than the discretion of a judge under case law, because not every judge under case law may change that case law, and if there is a long line of cases - it may prove difficult to do so. Thus, for example, the American statutes on anti-trust provide for tremendous judicial discretion, or, in Israel - a statute may provide that a matter is subject to the principle of good faith - which also allows for wide discretion. Discretion is not the question. The question is how discretion is used and in which areas. For example, I would not like to give wide discretion in criminal law. I am not in favour of giving wide discretion to judges. Discretion depends on the area and the subject-matter.

JUSTICE: The public perception is that the High Court is almost the last bastion in the face of threats to Israeli democracy. Is the Court as important as it is perceived to be?

Justice Barak: Yes. I think that the High Court of Justice is not just a legal institution but also a social institution. In Israel's society of today - where if something is allowed to be done it will be done, where if something is not done as a social norm, it

almost doesn't exist, a society in which, regardless of what people think, the executive branch is very strong because there were few constitutional restrictions - it is very important to have the High Court of Justice as the guardian of human liberty. Accordingly, I am interested in shifting down civil and criminal cases to the trial courts. I am not talking about a major revolution to be effected now in the jurisdiction of the High Court of Justice. I am talking about establishing an administrative division in the District Court (the Court of Appeal in the new structure). In the long run it may become the High Court of Justice. In the short run we will transfer to it controlled areas which raise issues of more minor importance, *i.e.*, which do not require the involvement of the Supreme Court. Out of the 2,000 cases mentioned before, the new administrative division will deal with about 100-200 cases. These will be cases which raise only individual issues, such as licensing, and not matters of more general importance. Slowly, slowly, we will be able to transfer to it more and more powers. The transfer should be gradual.

JUSTICE: How do you see the Court's testing of the reasonableness of administrative decisions, and don't you think it usurps the powers of elected officials, by judges who are not accountable?

Justice Barak: We operate within the framework of administrative law. Administrative law says (and it is the same in all the countries of the world) that if a decision is unreasonable (common law) or if a decision is non-proportional (civil law) the Court may quash it. Administrative law is about judicial review of administrative action. We did not invent it. If the situation is such that an administrator makes a decision which a reasonable administrator may make, even if I do not like it and would not make it myself, it will be upheld. However, if the decision is one that no reasonable administrator could make, then in every country - such a decision would be quashed. The *Bar-Ilan case* [HCJ 5016/96; 5025/96; 5090/96; 5434/96 *Lior Horev, et al. v. Minister of Transportation, et al.*, see abstract in *JUSTICE* No. 14] is structurally a very simple case in this respect. Administrative law is a set of rules to control the performance of the administration, and this includes unreasonableness. Unreasonableness became a cause of action in England 50 years ago and in Europe 100 years ago. As for non-accountability - that is the major strength of the judiciary. We need judicial review by a body which is not accountable in the political sense,

as otherwise its way of thinking would be the same as that of the administrators. The whole idea is that the actions of the administration be checked by a body which is outside the executive branch, which is independent and which always asks itself - to what extent the decision fits the basic values of society, and does not impose the values of the majority. The idea of constitutional law is that even the legislature is subject to basic values and that even the majority cannot breach some basic values. If the judge were to be elected in the same way as the legislator he would think like the legislator, *i.e.*, in the same terms as the majority. He is not cleverer than the legislator. Thus, for me, non-accountability is not a weakness of the judiciary but a strength.

JUSTICE: If the judge is not cleverer, why should his view of what is reasonable be preferable to that of the elected official?

Justice Barak: Because he sees it from another angle. He does not see it from the angle of expediency or political necessity, but from the angle of legality. The judge is not under the same pressures as the legislator and therefore has a different perspective. This is the meaning of the separation of powers and is why it is important to have independent judges. It does not mean that judges are cleverer. It is an institutional framework in which the question I must ask myself is not whether the decision is viable or not, or, how it will affect my position in Parliament, or, the number of votes which will be cast for me in the next election, but whether the decision is or is not within the framework of the constitution. The questions are different. Therefore, institutionally, legislatures and executives should be accountable, but judges should not. Even in America, where some State judges are elected by the people, the accountability is of a different type. I am very much against such a system for Israel. I think it would be disastrous.

JUSTICE: How do you see the evolution of the Basic Laws in Israel?

Justice Barak: The Basic Law: Human Dignity and Liberty was enacted in 1992. In the 6 years that have elapsed since then the Basic Law has effected a great change in the political life of the country. The change is not reflected by the number of cases where the Supreme Court has held that legislation is not constitutional. The best situation would be if all legislation was constitutional. The real effect of the Basic Law is that it has

converted Israel into a constitutional democracy. It has changed the way of thinking of politicians, lawyers and the public at large. We no longer talk as much of the power of the State but more in the terminology of rights. It is not the power of the State which creates the rights but the rights which create the power of the State. I think the Law will continue to have a great effect, there is much to be done, but my great hope lies in the students in the law schools who are now learning about rights, for whom rights have now become part and parcel of their way of thinking. 'Dignity of the human being' was an expression which had almost never been used in Israel. I researched all our past case law and it appeared in only a handful of cases. Suddenly it has become every day terminology. This indirect cultural effect, this movement into an era of rights and not of powers, is of great significance. Not enough has been done because our Basic Law is limited and has its own problems, but I think that the constitutional revolution which I am talking about has slowly penetrated into not just the letter of the law but into the spirit of the law. It has had an impact on the way lawyers handle cases and the way judges think about legal matters, as well as the way law is taught in the universities. Every subject is now taught in terms of its place within the constitutional structure - the rights structure.

JUSTICE: There are certain rights which aren't entrenched in the Basic Laws, such as freedom of expression and freedom of religion, perhaps these rights should be given a limited interpretation by the Court until the legislature decides that they should be entrenched?

Justice Barak: The best situation of course would be constitutionalization of all the rights. The question we face is what is the scope of existing rights pending further action by the *Knesset* as a constituent assembly. Different judges have different views. My view generally is that a liberal interpretation should be given to existing rights - a purposive interpretation not an historical one. For example, we should ask ourselves: what does dignity say to the Israeli public? How does the Israeli view the concept of dignity? How does dignity express our deep culture? The answer may be a), b) and c) but not d), e) or f), or the answer may be that the issue is not one of dignity but should be dealt with in another manner - this is fine. Some people, for example, say dignity does not include equality. I think that a deep understanding of the Israeli concept of dignity today, does mean that it includes equality. I think the best thing would be if the *Knesset*,

in its constitutional powers, were to enact more human rights, and provide expressly what rights are included. Further, the *Knesset* should enact Basic Law: Legislation providing machinery for enacting the Basic Laws. Today one need not have a special majority to enact Basic Laws. That's wrong. Furthermore, it is advisable to provide in the Basic Law rules about judicial review, namely, providing for its exercise by the Supreme Court or all the Courts - that would be a major step forward. I am not in favour of leaving all these questions to judges to resolve, but I say that if they are left open to the judges - the latter should do something about it.

We are at a very important juncture now in our constitutional development. Great responsibility rests on the shoulders of the judges.

JUSTICE: Do you think the threshold for freedom of speech is too high or too low today?

Justice Barak: Our case law on free speech is basically okay. There are areas in which we can strengthen free speech; prior restraint in Israel is still too loose. We have the same criteria for prior restraint and restraint and a distinction should be drawn between the two. Basically, our free speech case law is as modern and liberal as American and Canadian law - it lies between those two poles. I do not think major changes are needed.

JUSTICE: In Israel's geo-political security situation, how do you see the dividing line between the public's right to know and national security needs?

Justice Barak: Every country has national security problems and no country which has constitutionally protected free speech allows matters of defence to be published indiscriminately. Free speech does not mean telling State secrets. Free speech does not mean publishing pornography. Free speech does not mean uttering libels or slander. One has to distinguish between the scope of free speech and the protection of free speech. The scope of speech is very wide, for example, it includes racist speech, but not everything within the scope of speech is protected.

*JUSTICE: Recently you referred to books such as *Mein Kampf* and the *Protocols of the Elders of Zion*, and commented that in*

retrospect you may have changed your view on the prohibition against publishing them, what is your current view?

Justice Barak: In my opinion, everything should be published, irrespective of content, unless the publication may create a very clear and present danger or very high probability that it will very strongly and adversely affect national security or public order. This is my basic idea. I do not think the publication of *Mein Kampf* in Israel would have this negative affect at all. I do not think the publication of the *Protocols* in Israel leads to a high probability of tremendous damage to public peace and security. It may be different in other countries, where it may create a pogrom, but not in Israel. So I believe they should be allowed to be published.

JUSTICE: "Activism" is a very popular term, what does it stand for in your view?

Justice Barak: It is one of those terms which many people use without defining. I wrote a book in which I included a whole chapter about judicial activism. In many cases, judicial activism is often something you like or don't like. I would like to know first of all how you define this concept before I discuss it. Let's say you have a court which is against any change in the law. The law should be as it was yesterday - is that judicial activism? On the other hand, if activism advocates continually changing existing law - I am against activism because I think that stability in law is a very important element. Law, on the other hand, must change. So there must be a mix. Once, the American jurist Roscoe Pound said: "law must be stable but it can't stand still". Is the American Supreme Court today an activist Court? It is ready and willing to change the liberal cases of the Warren Court. It is treating what was adjudicated in the past by what was then called a liberal activist Court. So how do you define today's Court? On one hand it creates law which is restrained, so it is a conservative Court, but it does so by changing the previous law, making it activist.

*JUSTICE: In the Israeli context an activist Court means the Court replacing the *Knesset* or executive branch's opinion with its own. It means political interventionism.*

Justice Barak: My answer is I am not for full activism, namely, replacing the discretion of the political organs with that

of the judicial organs. Any reasonable decisions of the other branches should stand and I, sitting in the Court, should not ask myself what I would decide if I was the Prime Minister or a Member of Parliament. On the other hand, if the decision is illegal or outside the power which was provided by law, then the decision should be changed, so I am an activist. As far as I am concerned, the concept of activism or self-restraint is a meaningless concept. One should look at specific areas and examine them separately. If the concept of activism means replacing the discretion of the other branches when they act unreasonably and unproportionally, we are all activist because we all do it. The question is how much we do it and in which cases we do it. Activism needs a much more refined definition.

JUSTICE: How do you see the intense political interest in the work of the Supreme Court, and what are your views on changing the composition of the Court bench to reflect different sectors of the public?

Justice Barak: The Court does not choose its cases. In terms of the impact of its decisions on the public, the public is polarised. The decisions of the Court have a strong effect on society. The desire to change the composition of the bench reflects a basic mistake. In a democracy, the executive and the legislative branch should be representative, the judicial branch should not be representative. This comes back to the issue of accountability; the judges are not elected and they don't represent anyone nor should they represent anyone. They should, of course, reflect the deep values of society and therefore we need people who have the intellectual capacity to view and understand and reflect those deep values but this has nothing to do with political views or representation of different sectors of Israeli society. I am opposed to the idea that we should have fixed numbers of religious judges, or Arabs or women. We should have the best people we have in the country, who have the ability to reflect the values of the country and to understand the law and understand the role law plays in society. If we have the best people, ultimately, they will also reflect the different sectors - not because we aim to do so but because talent and deepness and understanding are not the prerogative of any one sector. In the future we will have many more women than we have now, more non-European judges and more Arab judges - not because we pick them but because intellectual capacity is not restricted to any particular group.

JUSTICE: Turning to punishment - do you favour the legislation of minimal punishments in the light of recent criticism of the leniency of some judgments in rape and family violence cases?

Justice Barak: Minimal punishments are highly problematic. I do not say we should not have them, but we should be very cautious about adopting them. All in all, I do not think we are lenient, but I do agree that here and there judges make mistakes, with either too lenient or too heavy sentences. For this one has a Court of Appeal and a Supreme Court. If one takes the sentences which have been imposed, for example, during the last five years in family violence cases, I think we have a very good record. The same is true in drug and rape cases. The lower courts follow our directions, and we are one of the few countries in which there are many judgments issued by the Supreme Court on sentencing. Many countries do not have them. Here, therefore, the lower courts not only have numbers, they have reasons which they follow. Judges, like other human beings, do make mistakes. In terms of the overall picture, however, I do not think the sentencing is overly lenient.

JUSTICE: How do you view capital punishment?

Justice Barak: Capital punishment does exist in certain areas, genocide, army, terrorism, but we don't use it, with one exception, nor do I think we should.

JUSTICE: The other major issue on the public agenda is the Attorney General and the strong position he holds today. He is the arbiter of whether government decisions are lawful - do you think this position is justified?

Justice Barak: I think that in our society, the Attorney General plays a very important role and I am very much against any weakening of his position. On the other hand, because, under my vision of the proper structure, he has so many powers, he should be under judicial review, his discretion should not be left open, as the saying goes: power corrupts and absolute power corrupts absolutely. Accordingly, I am in favour of judicial review of the Attorney General in addition to public review of his actions. This is the reason why the Supreme Court will review not only the reasonableness of the Prime Minister's actions, but also the reasonableness of the Attorney General's actions: it is part of the process of checks and balances.

JUSTICE: What do you think of the possibility of having an elected Attorney General, like in America?

Justice Barak: I am very much against it. This again would politicize the Attorney General's office. It is very important, for example, that he use his criminal power independently.

JUSTICE: However, isn't the Attorney General today a political appointment?

Justice Barak: No. I was not a political appointment, neither were all the other Attorney Generals. Here and there, there are some political considerations but the Attorney General is appointed on the merits.

JUSTICE: The original role of the Attorney General was that of advisor to and legal representative of the Government. Today, is not his role more of a judicial nature? Further, what is your opinion on transferring the Attorney General's function as head of the prosecution to the State Attorney?

Justice Barak: In terms of legal theory, we follow the principles laid down by the Agranat Commission Report, which said that the Attorney General must be independent and that the executive branch must follow his advice. As to the transfer of his prosecution powers - I am against it. As I testified before the Shamgar Commission, I think it would weaken both the Attorney General and the State Attorney.

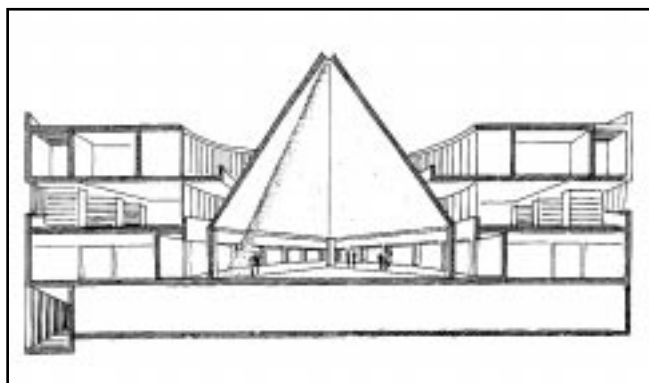
JUSTICE: Looking to the future - how do you see the professional and human qualities of our judges?

Justice Barak: I think we have a good judiciary. The main reason is that the appointment of our judges is not political but is made on the merits. Throughout the country we have about 450 judges. It is a small body of professional judges, admittedly with a few mistakes here and there, but overall it works well. The main problem is that it is too small a body to serve 6 million people, and such a litigious society, where there are more than a million cases filed every year in the courts. On the other hand, we are not in a position to add thousands of additional judges, either in terms of money or in terms of good quality.

JUSTICE: Finally, you once said that our judicial history may

be divided into 4 eras: the first 10 years (from the establishment of the State to the 1950s) in which no major changes took place in the legal infrastructure; the period of the sixties and seventies which saw the major legislative drive in both public and private law; the period of the eighties through to the beginning of the nineties which saw the completion of the codification of laws and the beginning of the enactment of the Basic Laws; and the current period of the nineties which has seen the enactment of Basic Laws, and in particular Basic Law: the Government, which has introduced a new parliamentary regime and created new relations between the legislative and executive branches - how do you see the future developing?

Justice Barak: This division is arbitrary and one of many possibilities. As to Israeli society, we are still only in the beginning of the fourth era. We have converted into a constitutional democracy. We have a Constitution and a Bill of Rights, and we now have to devote a lot of energy, time and thought into how to develop those concepts. I think the coming years will be years of constitutional development in Israel. At the same time we will have to update other areas of the law, because I view it as the role of the Court to try and bridge the gap between law and life. The main future developments, will, however, be in the realm of constitutional law, not so much in terms of deciding whether statutes are unconstitutional - I am sure most legislation is constitutional - but rather a cultural development, moving from a culture of power to a culture of rights, while ensuring at the same time that even the culture of rights is not taken to an extreme, in which everyone is on his own and the community loses its identity.



Architectural sketch of the library at Israel's new Supreme Court building, courtesy of Yad Hanadiv

“We are Bound to Anchor Decisions in the Values of a Jewish and Democratic State”

Conversation with Justice Menachem Elon

JUSTICE: Would you start with a few words on the role of the *Halacha* in the Israeli legal system?

Justice Elon: The role of Jewish law in the State of Israel must be considered from the vantage point of its place in the national heritage. In religious terms, Jewish law was handed down by God; however, without reference to issues of religion, Jewish law is relevant to all fields of law. I applied Jewish law in the vast majority of the cases I heard during my tenure as a judge, whether the issues before me were matters of public law, criminal law, law of torts, or other. The application of this body of law had absolutely nothing to do with religious coercion. I used Jewish law because of its status within the national heritage. Only about 5% of these cases actually involved issues of conversion, marriage, divorce, Shabbat and the like, where Jewish law contains a coercive element and some form of compromise might be needed.

Jewish law originated in the Bible and developed as a living law throughout the generations until the end of the 18th century. Jewish law developed in accordance with prevailing circumstances and adapted to meet new needs. The reasons for this development were twofold: the Jewish people felt obliged to live in accordance with their own legal system, covering not only religious issues but all areas of the law. Until the end of the 18th century the Jewish community had its own judicial autonomy. It was accepted that law was not territorial as it is today, rather, if someone was a Jew, he was subject to his own personal law and his own courts. The Jews, unlike others, were required to pay exorbitant taxes for this privilege. As a result, Jewish law was a living system, and as a living system it was forced to develop. We possess a tremendous culture in which we can find sources dealing with almost every problem in every area of life. There are

Justice Menachem Elon served on Israel's Supreme Court 1977-1994.

many reasons why we call this body of law ‘*Halacha*’. My additional interpretation is ‘*Halacha*’ [walking / going forward] because it ‘goes’ (*holechet*), *i.e.*, if it stays in one place it is not *Halacha*. But, the ‘going’ is as a legal system, and



one cannot discard what one dislikes. A judge is bound by the law, however, he proceeds by interpreting the legal provisions, and in so doing exercises his creativity, even if that was not intended by the legislator. All judges do it, although some overdo it. This form of creativity occurred throughout the ages. There are an estimated 350,000 *responsa*, *i.e.* decisions, in Jewish jurisprudence, 80% of which deal with civil, criminal and public law dating back to the 8th century. In comparison, in Israel's 50 year history, maybe 10,000 Supreme Court judgments were published.

JUSTICE: To what extent can there be uniformity of rulings in such a system?

Justice Elon: In Hebrew, there is a phrase “*dayan shedan din emet le’amito*”, [the truth of the truth], which means that the judge must judge according to the whole truth of the law; there are many interpretations of this phrase. One 17th century interpretation is that “*emet*” [truth] in this case means the law of the *Torah*, and *le’amito* [to its truth] means judgment according to

the time, place and circumstances. The Gaon of Vilna said that *emet* means that the *dayan* must be very knowledgeable in the *Torah* and *le'amito* means that he has to be very wise in the ways of the world. Another interpretation emphasizes that, grammatically, *le'amito* is masculine and therefore cannot refer to the word *emet*, which is feminine. Rather it refers to the inner truth of the *dayan* himself. I believe that judges are human beings, not angels, judges do their utmost to be objective but human beings cannot succeed in completely separating themselves from their world, education, or world outlook, whether they are religious or not.

These two reasons: the obligation of Jews to follow their national heritage and the possibility of having personal as opposed to territorial jurisdiction led to a continuity of development of Jewish law.

It is instructive to note that President Smoira's speech at the opening ceremony of the Supreme Court fifty years ago, dealt with Jewish law in almost 50% of his remarks - regarding appointment of judges, the judicial role, the required attributes of a judge and the revival of Jewish law by the Court.

JUSTICE: How may Jewish law be integrated in the modern State?

Justice Elon: There are two ways: through legislation and decision making by the courts. The most important element though is knowledge of Jewish law. Justices Asaf, Silberg, Kister, and Cohn, studied Jewish law, used it and loved it; not all were necessarily religious. Some of those who did not know Jewish law did not mind, while others made an effort to increasingly reduce its binding effect on them. The latter were afraid that if they would be obligated to Jewish law they would have to know it. I myself wrote about Jewish law and applied its principles wherever possible, with about 400 of my major decisions based on Jewish law. In the majority of these cases, the other judges merely noted that they concurred.

JUSTICE: Historically, there has always been a Jewish scholar on the bench of the Supreme Court, should there be a seat formally reserved for such an expert?

Justice Elon: I am against having quotas in the Court, whether for ethnic groups, women or other sectors. Today, we have 3 women Justices on the bench. In the United States it took years to reach the level of two women on the bench. With regard to

Jewish law, it would also be a mistake to have quotas. On the other hand, the judges must be knowledgeable about Jewish law. I am not saying they should be religious, this has nothing to do with religion, but they should be more and more knowledgeable about Jewish law. Of course, they must be excellent jurists as well. Not everyone who knows Jewish law can be a good judge, they must be good lawyers, and they must be able to write and apply their knowledge. We have not done enough to bring in these type of people. This is important because Jewish law is our heritage. It is also important for the Israeli legal system *per se*. A culture which is not based on the past, used in the present and looks to the future, does not become part of Jewish history. This is true of all our history. Take for example, Hellenism, which was once a flourishing cultural movement. What remains of it in Jewish history? If we want the legal system of our State to be part of the Jewish cultural legal history, it must be based on the past and look to the future.

The life of a decision of the Supreme Court is about 25 years. Some decisions, like *Kol Ha'am*¹ (on freedom of expression) are historical decisions, but relatively few are quoted in the same way. When we consider Jewish law, however, we don't start from today or yesterday. We speak with Rabbi Akiva (2nd century), we hold discussions with the Rambam (12th century), Rabbi Meir of Rotenburg (13th century) and with Solomon Luria (16th century). This is a basic element of Jewish history. We did the same thing with the language. Imagine how the Hebrew language would have been, had it not been based on the past. The language is based on the *Mishna* and the *Talmud*. Incidentally, despite its status as "the Sacred Language", the early Zionists were not deterred from adopting Hebrew. Law is a very important element of the culture - it must start from the past, and go on.

What I am suggesting here is more important for the legal system than for Jewish law. I am not worried about Jewish law. If Jews have studied Jewish law for 3,000 years they will continue to do so. Throughout the world there are hundreds of thousands of Jews who learn *Talmud*.

JUSTICE: How would you compare the development of the law in terms of the time frame, pre-State as against State developments?

Justice Elon: During the pre-State period, the need to use it was felt very strongly. Take the convention held in Moscow in

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

1918, following the Balfour Declaration. 90% of the members were not religious, but they said it would be impossible for the new Jewish State not to be based on Jewish law. Dykan and other law professors in Palestine, who were not religious, wanted to apply Jewish law. When the Law and Administration Ordinance was enacted in 1948, Section 11 provided that the law which existed in Palestine on the eve of independence would remain in force, subject to such modifications as would result from the establishment of the State and its authorities. At that time Dykan wrote an article arguing that Clause 46 of the Palestine Order in Council, 1922 (providing for recourse to English law and equity in the event of a *lacuna*) should be repealed and replaced with a clause providing for recourse to Jewish law, "in accordance with the needs of the time", a concept with which I agree. Unfortunately, these proposals were not accepted. However, recourse to Jewish law was, in fact, later enacted in the Foundations of Law - 1980.

JUSTICE: But the Foundations of Law actually refers to Jewish heritage, not Jewish law?

Justice Elon: That's right. Section 1 of the Law speaks of applying "the principles of justice, equity, freedom and peace of Israel's heritage" in the event of a *lacuna*. This was a compromise, reminiscent of that carried out in relation to the Declaration of Independence. Usually, such Declarations contain grand language. In our case it was proposed that the Declaration end with the words "we trust in God". Aharon Zisling refused to sign this wording, because he did not believe in God. In the end a compromise was reached and they used the wording "Placing our trust in the Almighty" ("*Zur Yisrael*", literally the Rock of Israel), of course the term 'Rock' is a synonym for God in the Bible. Similarly, the term "Israel's heritage" refers to Jewish law as is evident from the Explanatory Notes to the Foundations of Law Bill. I approved of the term "Israel's heritage", because for me Jewish law is not only the *Talmud* but includes Jewish philosophy and everything else connected with Jewish culture.

There is one element of the Foundations of Law - 1980, which does give me great heartache and that is the low use made of it. I have used it often, others less so. This Law is the first time that we have been bound to refer in some way to Jewish heritage in the event of a *lacuna* or where no answer is provided by way of analogy. However, in the leading case of *Jarjevsky*,² the first to consider whether or not political agreements were binding, and where the ordinary principles of contract law were inapplicable

(as they refer to contracts between private individuals or mixed public and private bodies), there was a difference of opinion between myself and Justice Barak. We both came to the same conclusion that the agreement was binding. I looked at Jewish heritage and found that since the 10th century, when democracy started in Jewish life, it has been held that where a promise was made to the public, even if it was not made in writing (which was contrary to the general rule) it had to be fulfilled. The reason was "the public must not be misled". I applied this democratic principle found in our heritage in my judgment in the *Jarjevsky case*. Justice Barak, however, held that there was no *lacuna* in this case, deciding there existed a general principle that one had to behave fairly and with integrity, and hence the agreement was binding. Barak's approach - that there is always a general legal principle - means that there are never any *lacunae*, which turns the Foundation of Law statute into a dead letter. I questioned why he should miss such a wonderful opportunity to base the same decision on Jewish law sources, but I understand his fear that in a different case he would also have to apply Jewish law in the event of a *lacuna*.

JUSTICE: Today we have the Basic Law: Human Dignity and Freedom, how do you regard this law?

Justice Elon: We are in a new situation. It is the first time in the history of the Jewish State that we are bound to use Jewish law not only in Basic Laws, but in every decision. This is because where the common purpose clause of the new Basic Laws enshrines "the values of the State of Israel as a **Jewish and democratic State**" a significant element of the word "Jewish" include Jewish law. Every judge who is faced with a constitutional problem, is now bound to anchor his decision in the values of a Jewish and democratic State, and note that the term 'Jewish' precedes 'democratic'. Of course, the term "Jewish" also includes Zionist values, but one cannot say that it does not include the *Talmud*. That would be nonsense. Regrettably, an opinion was expressed that it only included Jewish values which were accepted by the world. Today it is agreed that Jewish values are not necessarily universal values, but, unfortunately, we still see decisions based on foreign case law and hardly ever on Jewish law. There is too little knowledge of Jewish law and I regret this greatly because the legal system is the culture of a nation.

2. H.C. 1635/90 *Jarjevsky v. Prime Minister, Mr. I. Shamir* 45(1) P.D. 749.

JUSTICE: Looking at the constraints and pressure placed on the Supreme Court, do you think the Court has acted correctly in respect of the major secular/religious divisions facing the country?

Justice Elon: In the *Ressler case*,³ concerning the enlistment of *Yeshiva* students, Barak adopted the principle that everything is justiciable: “the world is filled with law” (paraphrasing the prayer: “the world is filled with His Glory”). It is as if law has become a new kind of religion. Barak has also used the phrase “the universe of law”. I once wrote in an article that law in the universe is a comma. The universe is philosophy, the universe is the whole world. Barak proclaims that “there is no legal vacuum”, *i.e.*, whatever I do, however mundane, is a legal act because the law does not say that that act is illegal or wrongful, and in principle the Court is competent to judge it and determine whether it is reasonable or not. The test is “extreme unreasonableness”, but where is the limit? Another problem is the issue of standing. I think we are the only place in the world where there is no *locus standi* restriction. Anyone who wants publicity can petition the Court. The old rule that you had to have some interest, not necessarily a material interest, has been removed. Take the *Nakash case*⁴ (involving issues of extradition) where MKs and professors petitioned against the Minister of Justice’s decision not to extradite, after failing to resolve the question in the *Knesset*. Immediately other MKs and professors appeared for the opposite side. The result was a judgment of the High Court of Justice between professors who had no connection to the case. I do not believe we should allow this and it also creates a terrible burden on the Court.

I think we should engage in judicial restraint. There will always be problems but we should minimize them and reduce the interference of the Supreme Court, because the dignity of the Supreme Court is very important. In the past, no-one ever spoke against the Supreme Court even though decisions were delivered against religious issues. The *Horev (Bar Ilan Street) case*⁵ is a good example of where judicial restraint should have been exercised. The petition was brought against the decision of the Minister of Transport to close a section of the road in a religious neighbourhood for a trial period for a number of hours while Shabbat prayers were being conducted. The decision followed recommendations by a committee set up to examine the matter. When the matter reached the Court, an order was immediately issued to suspend the administrative decision. Where was the “extreme unreasonableness”? For nine months the outcry was

terrible. I would never have cancelled such a decision which was reasonable on its face. Moreover, there were two Supreme Court precedents from 20 and 30 years earlier, where, notwithstanding allegations of religious coercion, the Court held that a street could be closed for religious, cultural, medical or other reasons, the matter was within the administrative competence of the Minister of Transport. In one of the cases, President Agranat said expressly that closing a road for a few hours is not religious coercion, but that making a person pray would be. As for the *Horev (Bar Ilan Street) case*, it is most interesting that after nine months, the majority of the Court, which included Barak, decided to accept the decision of the Minister. The only proviso was that a non-religious resident had to be provided access even during prayer hours.

Today there is some indication that the Court is moving towards more judicial restraint, for example, in relation to conversion, which is being left to the *Knesset*.

JUSTICE: What are your views about judicial review of Knesset legislation?

Justice Elon: I am in the centre on this question. Justice Landau is against the whole system. As for me, I do not call it a “constitutional revolution”. It is far from that. If there were revolutionaries in the Supreme Court, they belonged to the first generation. They created something from nothing. Without Basic Laws they decided on freedom of speech, freedom of vocation, *etc.*, while applying “the vision of the Declaration of Independence”. It is important that these principles be anchored not only in case law but also in the Basic Laws. However, it should be noted that these statutory provisions may be overridden by a simple majority in the *Knesset* (*i.e.*, one does not even need 61 MKs to amend or repeal a provision of Basic Law: Human Dignity and Freedom, such a special majority is only needed in respect of Basic Law: Freedom of Occupation). The *Knesset* has the power to override a Basic Law, therefore the Court should act prudently in intervening, lest the *Knesset* respond.

JUSTICE: Can issues of Jewish nationality be separated from religion?

3. H.C. 910/86 *Ressler v. Minister of Defence* 42(2) P.D. 441.
4. Cr. App. 745/85 *Nakash v. State of Israel* 40(4) P.D. 78.
5. H.C. 5016/96 *Lior Horev v. Minister of Transportation* 13.4.97, for an abstract of the judgment, see *JUSTICE* 14.

Justice Elon: No; take the *Shalit case*,⁶ concerning registration of a *Halachically* non-recognized Jew, which is also an example, in my opinion, of justifiable judicial restraint by Justices Agranat and Landau. Justice Cohn held that if a person declared himself to be a Jew, that was sufficient. Four judges, including Agranat and Landau, held that this was not only a technical question, but a decision of wide-ranging impact. Other judges held that the issue at hand was a technical matter of registration. The result of the case was 5-4 in favour of registering the child as a Jew. In reaction, only a short time later, the *Knesset* enacted legislation defining who is a Jew, namely, a person born to a Jewish mother, or who has converted, and does not belong to another faith. In other words, Jewish identity cannot be without religion, one does not have to believe, but one cannot believe in another religion and still be a Jew. I applied this provision in the *Bradford case*⁷ where I held that a member of the South African ‘Messianic Jews’ sect could not enter the country under the Law of Return because they believed in another religion and were therefore not Jews for the purposes of the Law, nor indeed were they Jews as a matter of *Halacha*. Similarly, in the earlier *Rufeisen case*,⁸ the Court held that a Catholic priest could not be regarded as a Jew.

JUSTICE: In the *Temple Mount case*⁹ you held that Jews could not go on the Mount to pray; how do you feel about this decision?

Justice Elon: I held that the Temple Mount is under Israeli sovereignty. I feel extremely distressed that even one Jew is prevented from praying there with his *siddur* [prayer book]. Today, the Temple Mount is double the size of the original Temple. Throughout history, Jews prayed on the Mount although not in the centre which was the site of the Temple itself. When the case came before us, I visited the Mount with Justices Barak and Bach; both concurred with the judgment which I wrote. The decision not to pray there today was based on security concerns. We refused to intervene in a government decision based on security reasons, as we were not experts on such issues, even though I found it heartbreaking.

JUSTICE: What are your views on the performance of the Rabbinical Courts? Their decisions do create some antagonism among certain sectors of the public, for example, with many going abroad to get married.

Justice Elon: I think that matters of marriage and divorce and connected issues such as division of property, which were left to

the jurisdiction of the Rabbinical Courts, should be decided in accordance with Jewish law. My only reason is that if it is not performed in such a way, the nation will be split into two. According to the *Halacha*, even a couple married in a civil marriage ceremony are validly married, but a divorce must be carried out in accordance with the *Halacha*. A civil divorce will not be recognized, with the result that anyone who “remarries” after a civil divorce will not enter into a valid second marriage. Any children of the second marriage will also be bastards (*mamzerim*). The outcome will be the creation of lists of all those people who have not been married and divorced validly or who are *mamzerim*, and this will affect all the generations to come.

There was a period during which the Rabbinical Courts were very active and creative. For example, during the time of the first Chief Rabbi, Rabbi Kook, a Court of Appeal was established. Such a Court never existed before under the *Halacha*. Moreover, in the 1940’s and in the 1950’s, the Council of the Chief Rabbinate often enacted legislation to keep up with the times, such as raising the required age for marriage, and so on.

Unfortunately, this creativity has stopped. I think that the *dayanim* should be more involved in public life. They must know what is going on. A couple coming before them will probably never have been in such an environment before. I think it important that everyone who wishes to sit as a *dayan* in a Rabbinical Court, should go through at least one year of training how to work as a judge in a Court. Not to learn legal theory, but rather to learn certain basic concepts of modern legal systems, to learn how to relate to the parties, ask questions, listen, give judgments, write decisions. *Yeshiva* learning is not enough in this modern world.

JUSTICE: Can you comment on your dispute with President Barak in the important *Babli case*?

Justice Elon: The *Babli case*¹⁰ concerned the division of joint spousal property. Today, where a couple live together there is a presumption under the general law that the property is joint property. The presumption may be displaced by a written agreement.

-
6. H.C. 58/68 *Shalit v. Minister of Interior* 23(2) P.D. 477.
 7. H.C. 265/87 *Bradford v. Minister of Interior* 43(4) P.D. 793.
 8. H.C. 76/62 *Rufeisen v. Minister of the Interior* 16 P.D. 2428.
 9. H.C. 4185/90 *Temple Mount Faithful v. Attorney General and others* 47 (5) P.D. 6, [for abstract, see *JUSTICE* 9].
 10. H.C. 1000/92 *Hava Babli v. Great Rabbinical Court* 48(2) P.D. 221.

After 32 years of marriage, the Babli couple approached the Rabbinical Court for a divorce. The wife asked for her share, namely, half the property. The Rabbinical Court gave a decision in a mere page and a half. It held that according to the *Halacha* the wife was not entitled to half the property. She also asked for her share in the property as compensation in accordance with an important precedent set by the Rabbinical Court some 50 years ago, holding that a woman who is divorced may ask for compensation, even though as a matter of *Halacha* she is only entitled to her *Ketubah* (marriage contract). The Rabbinical Court refused, saying that they were not obliged to follow the Supreme Court ruling that she was a partner with an entitlement to half the property. The wife petitioned the High Court of Justice. Justices Shamgar and Dov Levine held that the Rabbinical Court's decision was contrary to the Women's Equal Rights Law - 1951. Barak agreed with this analysis, which would have been enough to conclude his judgment; nevertheless, he added that even when the Rabbinical Courts have jurisdiction according to the law, and the law says that they have exclusive jurisdiction in matters of marriage and divorce and connected property issues, the Rabbinical Courts have to abide by the general law apart from issues of marriage and divorce *per se* which is judged exclusively according to the *Halacha*. After the establishment of the State until Barak's decision, the rule had always been that the Rabbinical Courts followed the *Halacha*. How could these *dayanim* be expected to learn the whole body of civil law concerning monetary and property matters? Nevertheless, Barak's far-reaching decision was that they had jurisdiction over matters connected with the divorce but that their decisions had to follow general and not *Halachic* law. This decision went against every previous rule and led to a great uproar, particularly in the Rabbinical Courts themselves. The case in the Rabbinical Court remains open to this day. Had the matter been left with the application of the Women's Equal Rights Law, the Rabbinical Courts would have accepted the ruling without protest because that specific law includes a special provision making it applicable to the Rabbinical Courts, and they abide by the special provision. The High Court will set aside a decision which does not conform with that provision. The Rabbinical Courts are even willing to recognize the application of principles of natural justice, but it has always been accepted that the Rabbinical Courts apply Jewish law and one cannot tell them to do otherwise.

It is difficult to hold that Rabbinical Courts in modern Israel should be denied the autonomous jurisdiction they had enjoyed in the Diaspora - especially following the adoption of Basic Laws

speaking of a "Jewish and democratic State". Justice Barak invokes the need to achieve coherence throughout the legal system. I prefer to choose peace in society over any need for theoretical coherence. I also sharply criticized the Rabbinical Court's decision, as they could have divided the property in accordance with Jewish law, based on the presumption that in our times a couple that lives together are partners under Jewish law. There is no need to refer to the Women's Equal Rights Law.

I hope that Barak's opinion will not be accepted because it will divide the Jewish community in the country. Moreover, his opinion would also have repercussions for the Moslem *Sharia's* Courts and Druze Courts, which would also have to apply general law instead of their religious law.

All the above cases have created an uproar, but I want to stress that we have to be very careful to ensure respect for the Supreme Court, because the Court plays a very important role in our lives in Israel. Therefore, the public has to have full respect but the Supreme Court has to help by not providing cause for the attacks against it.

JUSTICE: You say that the dayanim should learn more about the life of the public, but do you not think that equally the Judges in the civil courts should learn more Jewish law?

Justice Elon: Yes! The whole system of the faculties of law should be changed to make literature more accessible. Ways must be found to prepare Jewish law textbooks in a readable way. All Aramaic words must be translated to Hebrew. Both students and judges must learn more and undergo studies in Jewish law. Equality must be created between general law and Jewish law. It is a matter for the whole nation. It has nothing to do with coercion or religion but is part of the culture of the nation. We are in a very difficult situation today, in terms of the clash between religious and secular sectors of the public. Jewish law is a wonderful way to do something in common without religious coercion. We will use the sources, sit together, study, and most importantly speak to each other. We will not be talking about faith and religion but about pure issues of law. We will be talking with our forefathers. The legal profession and the Courts can do a lot about solving the hatred which exists today.

The Supreme Court has played, and continues to play, a prominent role in Israeli society, and, I am certain, shall do so in the future. What is important is to see that it shall be so, that its role will be to serve as a mediator, making peace between the different approaches within Israeli society. ■

“Moslem Sharia’a Court Should be Left to its Own Creative Devices”

Conversation with Qadi Ahmad H. Natour

JUSTICE: How did the Moslem Sharia’a Courts develop in Israel?

Qadi Natour: The Moslem *Sharia’a* Courts as a judicial framework has a long history in the country. During the Ottoman period it was the State Court and had a wide jurisdiction, both in relation to subject-matter and in relation to litigants, including litigants who are were not Moslems. We have records of many disputes of non-Moslem parties who litigated before the *Sharia’a* Courts, and of course also in relation to charities and endowments. During the period of the British Mandate, the jurisdiction of the Moslem *Sharia’a* Courts was anchored in Article 52 of the Palestine Order in Council 1922, which also incorporated jurisdiction by reference to other sections of the Ottoman Procedural Law, which in turn provided a long list of matters of personal status. As a result, the jurisdiction of the Moslem *Sharia’a* Courts during the Mandate was much wider than the jurisdiction of the Courts of the other communities. Chapter 51 of the Ordinance provided for the personal status jurisdiction of the other communities, whereas Chapter 52 was special to the Moslem community.

During the Israeli period, much legislation has been enacted, with the policy of reducing the jurisdiction of the *Sharia’a* Courts, occasionally by removing a matter from the purview of the Court in an absolute manner. One example is that jurisdiction to permit the marriage of a minor female has been removed from the *Sharia’a* Courts and given to the civil Family Court; similarly in criminal cases - *diyya* (ransoms) - has been removed from the jurisdiction of the *Sharia’a* Courts. Occasionally, jurisdiction is modified by removing a matter from the exclusive jurisdiction of the Court and making it a matter of concurrent jurisdiction, in other cases it is made a matter of conditional concurrent jurisdiction. An example of the latter relates to the law of succession.

Qadi Ahmad H. Natour is President of the High Sharia’a Court of Appeal

This law grants primary jurisdiction to the State courts, now the Family Court; it also left jurisdiction to the *Sharia’a* Courts but made it conditional upon all the “relevant parties” giving their consent in writing before the Court. While this provision appears to be

procedural in nature (*i.e.* selection of the forum in which the matter will be heard), in fact it has substantive effect. Thus, for example, in relation to the law of succession - consent is needed “all those concerned” with the dispute, but all those concerned as a matter of civil law may not be those concerned under religious law. Thus, the law may give a veto to someone who is a “stranger”, from the point of view of Moslem religious law, to the succession issue. An example would be an illegitimate child. Under Moslem law he would not be entitled to succeed his biological father and therefore he would not be a party to the dispute, similarly, a common-law wife would not be entitled to succeed. Despite this, both parties have the right to veto the Moslem *Sharia’a* Courts, deny their jurisdiction and drag all those involved before the civil courts. By so doing, all the litigants are forced to abide by civil law as opposed to religious law. This is a form of anti-religious coercion, since the shares are fixed in the *Qura’n* itself - this causes Israeli law to clash with the *Qura’n*.

The policy illustrated in the above example is widening.



Another example relates to criminal law and the prohibition against bigamy. The Penal Law provides sanctions against anyone marrying whilst already married. However, this provision does not invalidate the second marriage, from the religious point of view. On the contrary, the second marriage should be an important element to be proved before the offence is committed. This shows a willingness on the part of the Israeli legislature to intervene in matters which are not only procedural in nature.

JUSTICE: Can you tell us something about the law practised by the Sharia'a Courts?

Qadi Natour: The law practised is the religious *Sharia'a* law. In terms of the development of Moslem *Sharia'a* law, and according to the new judicial Islamic theory, one may identify 4 main sources of the law: The *Qura'n*; The *Sunna*, i.e., the tradition of the Prophet, which itself is made up of three elements - the sayings of the Prophet; his acts; and the things he saw and approved tacitly; *Ijma* - consensus; *Qiyas* - analogical reasoning.

The two latter are accepted as sources by the majority of Islamic sages.

There are another 3 sources with regard to which there is no general consensus, but which are also regarded as important sources of the development of the law: *Istih'san* - preferring one analogy to another; *Urf* - custom and *Maslaha* - public interest.

Every source has its own legal mechanism. The *Qura'n* - the basic norm, the central truth and the very word of God - includes legal rules and principles applicable to every matter of human concern. *Inter alia*, it includes principles of public law, international law, constitutional law, administrative law, criminal law and personal status law, in addition to worship.

The function of the *Sunna* is to interpret the *Qura'n's* rules, explain them and sometimes define them. It is very important to understanding the legal order.

In Islamic law we believe that the Prophet did not speak on his own behalf but did everything under divine inspiration. Accordingly, his words were divinely inspired and cannot be questioned. The problem in this connection is that his words were passed down orally through the generations and therefore, sometimes there is an issue of the credibility of the tradition. Two important scholars did great work in codifying the tradition. One was the great sage - El-Buckhari, and the second - Moslem. They mapped the *Hadith* (tradition of the Prophet), and decided which traditions were authentic and which seemed less authentic. They used particular criteria which helped them decide, such as the chain of narrators (who had passed down the tradition and to

whom); the credibility of these people; whether they had met physically or could have done so, actually or theoretically; and whether they lived during the relevant period and in the right geographical area. They also examined the contents of the text, and to what extent the contents were compatible with other sayings of the Prophet and of course with the *Qura'n*.

The third source - consensus - is the consensus of the sages of the nation. Questions arise as to which generations of sages are relevant; further, should one consider the consensus of all the nation or of a particular geographical area or calendar period, but it is clear that Islamic sages of the level - *Mujtahid* - provides a high level of proof that the person is entitled to derive principles from the primary sources. Thus, the consensus is likely to be the consensus of sages of a given generation.

The *Qiyas* is the individual opinion of a *Mujtahid*, who draws an analogy when he is asked to give an answer to a particular question, there is no direct answer from the primary sources (*Qura'n*, *Sunna* or *Ijma'*) and he is required to derive a new rule based on the existing rules provided by the primary sources. The analogy is characterized by the fact that it is the work of an individual. It does not bind the other sages but it may be accepted by them in practice or tacitly. If they agree with it, it may turn into '*Ijma'*', i.e., consensus. If they remain silent, and do not object to the determination within a reasonable time (without anyone having coerced them) - this is regarded as tacit acceptance. If they object, the determination is regarded as an individual opinion.

JUSTICE: Can you say a few words about the legal theory applicable in the Moslem Sharia'a Courts?

Qadi Natour: The Islamic *Sunni* system has 4 schools of legal theory: *Hanafi*; *Maliki*; *Shafi'i* and *Hanbali* - each of which is named after its respective founder.

All the above belong to the *Sunni* tradition, but each holds different opinions regarding certain issues and indeed, on occasion, scholars of the same school could hold different views on the same issue. This is legitimate so long as they follow the rules of interpretation of the text, and do not clash with the primary rules.

There is also the *Shi'i* trend of thought, which has a number of sects and a theoretical approach which is not necessarily consistent with the *Sunni* legal approach

In Israel all Moslems are *Sunni*, and our courts follow the *Hanafi* school of thought, although the Moslem population primarily follows the *Shafi'i* school of thought.

JUSTICE: Why is there this inconsistency?

Qadi Natour: The Moslem *Sharia'a* Courts, *i.e.*, the State courts during the Ottoman period, followed the school of thought which the Ottoman Sultan accepted. The Ottoman Sultan accepted the *Hanafi'* school of thought, and the *Medjella*, *i.e.*, the code of civil law of the Ottoman Empire, relied totally on the *Hanafi'* approach. Later, the Ottoman Family Law was enacted in 1917, it included some elements of the other schools of law. This broad view is based on the fact that Islamic religious law is tolerant and open in nature and follows a policy of moderation as opposed to severity. Thus, if there was an opinion which improved life for the people - it was adopted in the Ottoman Family Law; for example, if the *Hanbali* school held that in the event that a woman stipulated to her husband that if he married another - she or the other woman would be divorced - such a stipulation was valid. Other schools of thought, including the *Hanafi'*, held that such a stipulation was not valid. The Ottoman legislature preferred the *Hanbali* view and incorporated it into the Family Law, making it binding on all.

JUSTICE: What is your opinion of the Family Law of 1917?

Qadi Natour: The law is a good law but is laconic in nature. It does not provide for custody of children, succession, maintenance of children and the like, and on occasion uses general terminology which today needs interpretation. For example, it refers to dissolution of marriage at the initiative of the wife claiming that the husband is "insane". Such an expression must be given modern interpretation in the light of scientific developments. There are all sorts of mental illnesses which the judge must identify as good grounds for divorce, at the initiative of the wife. Another example is 'absence' of the husband from the family home. Absence is considered in terms of damage. This must be reasoned and evaluated by the judge accordingly.

The difficulty is that today we have a statute which is the final legislation of the last Moslem State in the area - the Ottoman State. This was followed by the Mandatory government - which adopted the approach of not intervening but rather leaving the *status quo* in place in substantive matters. Israeli legislation does intervene in some substantive matters, by claiming that it intends to create norms for the entire population of the State of Israel.

JUSTICE: How do you regard Israeli legislative interventionism?

Qadi Natour: In my opinion the State has to be very careful because we are talking here of a Moslem population which follows a religion different from that of the civil legislature of the Jewish State. Accordingly, greater caution must be exercised when enacting laws which are to apply to the entire population. It is necessary to enable the Moslem legal system to continue to develop as it has done throughout the generations. I believe that the Moslem system of law is dynamic and very efficient and must be left to its own creative devices. There is no need for civil legislation to help the religious law. State intervention is totally rejected because the Moslem family law comes from the *Qura'n*, and the State has no right to force a religious national community to refrain from following its own convictions. In my opinion, this is religious coercion and infringes individual and collective rights of the Moslem community in the context of Basic Law: Human Dignity and Freedom.

We should remember that family law is at the heart of Islamic Law and it governs the life of hundreds of millions of Moslems around the world without even a single Moslem State interfering in it. In Israel, as a self-defined Jewish State, there is a further dimension, namely, that it should not under any circumstances, intervene in the Moslem community's life, especially when it adopts the personal law system for the religious communities.

JUSTICE: What types of legal clashes occur?

Qadi Natour: In succession cases, when everyone is dragged to the civil courts, the distribution of assets to the beneficiaries is quite different than in the Moslem *Sharia'a* Courts. Distribution to the beneficiaries is provided for by the *Qura'n* as the primary source. It is a direct provision of the *Qura'n* not a matter of interpretation. Before the *Qura'n*, a wife could not inherit. She was regarded as property herself. She was not a party to the marriage contract. By virtue of the *Qura'n*, the wife is regarded as an independent party to the marriage contract, exercising her contractual free will (a marriage made under duress is voidable as a matter of Islamic law). The *Qura'n* protected the rights of 12 beneficiaries, 8 of whom are women, by entrenching them, thereby precluding the impairment of their rights at the whim of either a family member or the system.

Thus, in this connection, applying Israeli succession law is a direct violation of a principle of Moslem law. Other violations are the result of different aspects of modern society - such as the common law wife who is regarded as a prostitute in Islamic law. Indeed any full sexual relations between a man and a woman

outside marriage, or at least a voidable marriage, is a very serious sexual offence. Where the man/woman is married, his/her punishment is stoning, where he/she is not married, his/her punishment is whipping. This is an offence committed by both parties if performed intentionally and not under duress.

The inclusion of such elements into the Moslem family, leads to a frontal clash with the express provisions of the *Qura'n* itself. There are many other examples of such clashes, for instance in relation to illegitimate children who were considered "civil sons" by a Supreme Court ruling and the adoption of children, which is forbidden in Islam. Such a child may be supported but cannot be recognized as the son of the family. These are matters which should not be brought into the Moslem family and it would be proper to allow the religious community, which has a substantive law of its own, to follow its own laws of personal status. Each community has its own religion, social and traditional requirements.

Thus, in Israel, we act in accordance with the Ottoman Family Law. Where there is a need for additional provisions, we make use of a book compiled by Mohammad Qadri Pasha in Egypt in the beginning of the century and which is totally based on the *Hanafi* school; there are other books relating to the *Wakf* and charities.

JUSTICE: So how does Moslem law modernize in Israel?

Qadi Natour: There are two possible ways in which the Court can modernize the law. The first is through case law - interpreting rules and expressions in a very active manner, in what is known as judicial activism. An example would be in relation to the term 'the best interest of the child'. For years, during the period of the Mandate and afterwards, and indeed until very recently, the Moslem *Sharia'a* Courts used to rely on rigid statements of jurists for example concerning limitations on minors, or visitation rights in determining to whom custody would be granted. The sages did this by reference to presumptions, *i.e.*, until the age of 7, the child would stay with his mother in order to enjoy the benefit of her care, thereafter he would move to his father in order to be in the company of men. A daughter would stay with her mother until the age of 9 and thereafter would move to her father, in order to allow him to care for her and eventually marry her off. When we considered this matter, we asked ourselves, why the age of 7 years and why was the custodial parent prohibited from taking the child to a place where he might be exposed to a lower standard of living than he was used to? All these provisions were intended to protect the best interest of the child; thus,

instead of us treating them as rules which may not be argued with, we regard them as presumptions which may be controverted. For example, a male child aged 3 or 4 will be presumed to be better off with his mother but the father has the opportunity of proving otherwise. We do not follow the rule rigidly, as this would undermine the spirit of the sages' presumption. Accordingly, we must examine the intention of the sage and why he said something. This is an approach which shakes off the dust from the *Sharia'a* rules and shows the extent to which the *Sharia'a* religious laws are perceptive, far-reaching and also substantive. There are many other examples of actions taken by us in the last 4-5 years in the Moslem *Sharia'a* Courts, to make the approach less formalistic and rigid and mainly just.

Another unique approach in our case law development, relates to guidelines or proclamations (*Marsum*) issued by the President of the *Sharia'a* Court of Appeal to the *Sharia'a* Courts, and after obtaining the *Qadis'* agreement to accept the guidelines. We took issues where we thought there was dust on the manner of implementing the rule or normative arrangement and examined it afresh. We made a short study of each issue, reached conclusions and made proposals. So far we have done this in 3 areas:

- (i) The prohibition on the use of holy places for secular purposes; this was contrary to the prevailing view that one could demolish or build in a cemetery. We came to the conclusion that the sanctity of the dead was eternal, and that accordingly the cemetery is also a sacrosanct place which must be preserved; accordingly, selling lands that were used for cemeteries is totally prohibited;
- (ii) In relation to maintenance. When the *Qadi* heard an alimony suit by the wife and she proved her entitlement, he used to determine how much she would be awarded by obtaining information from two 'assessors/informants'. The assessors would be asked to give their opinion on how much money would be reasonable in the circumstances. We rejected this approach. The Court was the body which heard all the evidence, obtained an impression of the witnesses and was obliged to provide justice before God and the community. This most sensitive issue of the award ought therefore not be left for decision by unknown persons whose ability, qualifications and honesty were an unknown quantity. Such an approach was not only *prima facie* unjust it also did not accord with Moslem law. The wife's right to maintenance arose out of the marriage contract and not because of her need or charity. Her independent wealth was also irrelevant to the issue of her right to maintenance from her husband. Thus, if she requested the minimum maintenance, she did not need to

prove his financial capability and was awarded the amount claimed. But if she claimed a higher sum, and was not able to prove his wealth she could ask the *Qadi* to inquire in the community in relation to the status and wealth of the husband, and this was the path through which these informants came to the judicial process. We concluded that in a modern society this inquiry need no longer be conducted through laymen but the truth could be reached through State institutions, for example to see whether the husband is self-employed and how much he earns. The wife must meet the burden of proof in the same way as in any other case. Accordingly, we annulled the procedure of assessors and left the issue of the award to the discretion of the *Qadi*. Our reasoning was that the provision in the Ottoman Law of Civil Procedure 1917 - which provided that a Court could appoint an informant on behalf of the Court to the extent that it needed help in determining the proper level of maintenance or a worker's wages - was a procedural section which was not obligatory but discretionary.

JUSTICE: What has been the practical effect of this decision?

Qadi Natour: In the past the courts used assessors/informants in every case of maintenance, and a decision was even criticized on appeal if an informant was not used. The result was that the maintenance awarded by the Court was very low and often favoured the husband, particularly if they were his informants. This was contrary to the rules of justice and the Moslem law.

In Jordan and many other countries informants are still being used.

If we compare the level of maintenance awards today, after application of our guidelines, we see that there is a drastic improvement.

JUSTICE: What was the third guideline?

Qadi Natour: The third guideline is in the area of inheritance and concerns the rights of a child to inherit from his/her grandfather, where the child's father/mother is already deceased. Under the ordinary rule the grandchild could not inherit from his/her grandfather because the connection had been severed, and a closer relative would obtain preference (*i.e.*, uncles, aunts, *etc.*). We said that we could not be sure that the deceased parent had not contributed to creating the wealth of the grandfather and naturally that parent could be most in need of the share of his/her father/mother. Accordingly, after examining the history and laws

prevailing in other Arab countries, we held that the right of the deceased parent passed to the son/daughter. Our provision is slightly different from that applying in Egypt and Syria, where the position differs depending on the gender and relationship involved. We said that the same rule applies to all.

These guidelines are followed by all willingly and after consultation. There are many other issues which require renewal. If we continue this way I have great hope of creating a momentum for the development of the existing law as a whole, but from the inside and not because we are influenced by external legal doctrines or secular legal learning. The *Sharia'a* provides the tools for its own development and because of this I am of the opinion that there is no room at all for intervention by the secular legislature. Opportunity must be given to the religious legal system to develop by itself.

JUSTICE: How are the Sharia'a Religious Courts structured?

Qadi Natour: There are 7 regional courts in the country, in Acre, Nazareth, Jaffa, Tibeh, Haifa, Be'er Sheva and West Jerusalem. One *Qadi* sits in every Court. 3 judges sit in the *Sharia'a* High Court of Appeal. The latter Court has been sitting in Jerusalem since the time of the Mandate. Every case may be appealed to the Appeal Court. The decision on appeal is final. On occasion, applicants petition the Israeli Supreme Court sitting as the High Court of Justice against a decision of the Moslem *Sharia'a* Courts, but this may only be done in two cases: a) where there is a breach of the rules of natural justice; and b) where there is an act which is *ultra vires*.

Lack of resources mean that we have two regional *Qadis* missing. Today if a judge is absent by reason of illness or death there is no one to replace him and the parties have to travel to another region where there is a judge available.

From a logistical point of view, the system is not structured well and is not maintained well. It belongs to the Ministry of Religion and not to the Ministry of Justice, and I demand, not just think, that it should be considered as an independent and totally separated judicial branch and not be embedded so deeply within the executive branch. Unlike relations between the civil courts and the Ministry of Justice, or the Rabbinical Court's relations with the Ministry of Religion (where it is a separate division, with its own manpower and bursary) we do not have separate administration. This state of affairs is very unsatisfactory.

JUSTICE: How many cases are heard by the Sharia'a Courts?

continued on p. 22



The impressive chiselled white stones of the new Supreme Court building in Jerusalem. Photo: Richard Bryant / Arcaid, courtesy of Yad Hanadiv

continued from p. 20

Qadi Natour: About 10,000 per year. All these cases involve intimate and sensitive matters. If we do not have the tools to handle the cases, for example, enough social workers, everyone is damaged. We need professional help to support the proceedings. These are not land deals but matters on which the life of the family depends. In addition, the confidence of the public in the justice provided by the system, is what gives it its power. It seems to me that the way in which the judicial system is perceived is not only an issue of image but also of public confidence.

JUSTICE: Are there those who prefer the civil court system?

Qadi Natour: There are voices today, particularly women's groups, calling for litigants to apply to the Family Court. There is even a proposal to amend the Family Courts Law so as to transfer the bulk of the jurisdiction of the Religious Courts to the Family Court. There is both opposition and support for this proposal. My personal opinion is that it is a big mistake of almost historical proportions. We are not considering a social group but a religious nationalist group with its own history and traditions. Most important, the personal law is structured on the *Qura'n* and not on the personal opinion of one jurist or another from any particular historical period. *Sharia'a* for Moslems is a part of their identity.

I also think that the claim that a woman can obtain more justice in the Family Court is unfounded. Our *Qadis* receive training together with the judges of the Family Court. They exchange views. A case before a *Sharia'a Qadi* takes a lot less time than before the Family Court (8 months at least until you get to the first session), it is less expensive, less difficult and more accessible. The Family Court judge is not a Moslem and not even an Arab, he is not an expert in Moslem law and if he has to judge according to Moslem law he has to bring the *Sharia'a Qadi* as an expert. If he acts according to civil law, he is applying foreign norms which directly contradict the *Qura'n* itself, not to mention that a woman could receive less maintenance there because her income will be set off from the amount of the judgement and she could be ordered to maintain her husband or his children, something that would never happen in Islam.

Another question which must be asked is to what extent the civil system is ready to absorb such large numbers of litigants. There is not even one Arab judge in the Family Court.

JUSTICE: What is the general community view of the Moslem Sharia'a Courts?

Qadi Natour: If there is criticism it was justified in the past, when there was a rigid understanding and application of the rules. I think that the problems suffered by the Moslem *Sharia'a* Courts are largely institutional in nature and are connected to the Ministry of Religion. I think the judicial system must be independent. Control may be exercised over the Courts in an indirect and passive manner, through staffing and budget decisions. Our personnel are employees of the Ministry and our budget is an inseparable part of the budget of the Ministry. Yet the Moslem Court is a very central institution in the community's life and it is the only one that has remained in the country after the foundation of the State.

JUSTICE: How do you see the Qadi Law 1961, providing for the qualifications of judges?

Qadi Natour: This is a very bad law. *Qadis* should possess appropriate knowledge of *Sharia'a* law, and I would set minimum religious and legal qualifications. Possibly, when this law was enacted, there were no formal university *Sharia'a* studies in which Moslem law was taught. In any event, today this law must be amended. The make up of the appointment committee must also be amended. Currently it consists of 9 members, chaired by the Minister of Religions; the other members are another minister, 3 Members of the *Knesset* (of whom at least 2 are Muslims - the third is usually not a Muslim), 2 lawyers (of whom 1 must be a Moslem), and 2 *Qadis*. Theoretically, there may be a situation where the majority of the members are not Moslem (e.g. if 3 of the Moslem appointees are absent). I personally would be ashamed to sit on a committee which appoints *dayanim* for the Rabbinical Courts or Christian judges and would refuse to take part. So, a Moslem judge must be appointed by Moslems, this is not only an ethical matter but it is a real Moslem constitutional question.

I do not think the law can continue in its present form. There are many further reasons why the system cannot work in the way expected of it. One major problem is that the people turn to the *Qadis* on religious questions not only in relation to their legal disputes. This too requires re-examination. I would question why there is not a structure similar to that existing in all the Islamic countries and even in Israel, distinguishing between the Rabbinate and *dayanim*, i.e., separating the legal system from the religious responding institution (*Ifta*).

“Druze Religious Courts do not Intervene in Social Life but Modernization has its Repercussions”

Conversation with Qadi Naim Henou

JUSTICE: Before we start can you say a few words about the Druze religion?

Qadi Henou: The Druze religion developed in the beginning of the 11th century in Egypt. From there it spread to other countries. For the first 25 years, missionaries brought people into the faith, then the gates closed and believers were no longer accepted. There is no conversion to the Druze religion, one must be born Druze. Today, there are about 90,000 members of the Druze community in Israel.

JUSTICE: How is the Druze legal system constructed in Israel?

Qadi Henou: The legal system is made up of two instances. Formally, at first instance the bench comprises 3 judges, although today, because of deaths and retirements, only one judge sits. Like the Moslem *Sharia*'s Courts and Rabbinical Courts, the Druze Religious Court deals with matters of personal status, for example, marriage, divorce, maintenance, custody of children, paternity, guardianship, wills, and succession. The Druze Religious Court sits in Acre and in the Golan Heights. The Druze Court of Appeal sits with 3 judges, and litigants also occasionally apply to the Israeli Supreme Court sitting as the High Court of Justice.

JUSTICE: How has Druze law developed in the State of Israel?

Qadi Henou: The personal status law relating to the Druze

Community is a relatively new law. It originated in Lebanon, where a group of lawyers, sheikhs, *Qadis*, and members of parliament together drafted this law which was enacted by the Lebanese Parliament on 24th February, 1948.

In 1962, the Druze Religious Council and the Israeli *Qadi Madhhab* “adopted” this law, and made it compatible with Israeli law. Thus, for example, under the original law, a *Qadi* had discretion to marry a girl under the age of 17, but who had reached the age of 15. This provision was repealed. In addition, under the original law in the event of a *lacuna*, for instance in relation to the law of succession, the *Qadi* could apply the judicial approach represented by the Moslem *Hannabi* school of thought. This was changed to bring the statute into line with Israeli law. On occasion, the Religious Courts also make use of the legal writings of the well-known Lebanese Druze religious leader - Sheikh el-Almiri Saib Abdalla el-Tanuhi - who wrote a number of books, *inter alia* on Druze religious law. Tradition and custom also play a role and a system of precedents operates. Some litigants employ lawyers, others appear on their own behalf.



Sheikh Naim Hinu is the head of the Druze Religious Courts in Israel.

JUSTICE: What is the precise jurisdiction of the Druze Religious Court?

Qadi Henou: According to Section 4 of the Druze Religious Courts Law - 1962, the Druze Religious Courts have exclusive jurisdiction in relation to matters of marriage and divorce of Druze in Israel who are nationals or residents of the State, as well as the creation or internal management of a religious trust (charity) established before a Court under Druze religious law. Under Section 5, other matters require the consent of the parties to the jurisdiction of the Courts. In the absence of consent the parties may apply either to the Druze Courts or to the civil courts.

JUSTICE: Are Druze citizens, who sometimes require the services of the Druze Religious Court and sometimes those of the Israeli civil courts, ever faced with a conflict of laws?

Qadi Henou: On occasion there is a conflict of laws, but only in relation to matters of property relations between spouses. The Druze Religious Court began to operate in 1973, and the personal status law became applicable at that time. One provision of this law provides that if a woman is divorced against her will and without justification the *Qadi* may award her compensation, in the form of either money or property. The Spouses (Property Relations) Law - 1973 allows the couple to divorce without establishing grounds, in such a case each of the couple receives half of the property which was acquired during the course of the marriage. Under Druze religious law, division was not only made of property acquired during the marriage but also of property which had been acquired by the husband by right of succession or purchase prior to the marriage. Thus, if the wife was divorced against her will she received half this property too. However, if the wife initiated the divorce proceedings, on unjustified grounds, she had to transfer half her assets to the husband.

Apart from this provision there is no clash with the civil law.

JUSTICE: May a person apply to the civil court, for example, in relation to a property matter, if he has first tried the Druze Court?

Qadi Henou: No, if the two parties gave their consent to the Druze Religious Court in relation to their joint property or financial affairs, they may not afterwards apply to the civil courts, and

the only recourse of the losing party is to appeal to the Druze Religious Court of Appeal. If, however, a party has not given his consent to the Court to consider these matters, but the Court nevertheless does give judgment in relation to them, he may appeal and possibly also apply to the civil courts.

JUSTICE: Does the Druze community prefer applying to the Druze Court or does it prefer the civil courts?

Qadi Henou: Generally, the community will approach the Religious Courts even over matters outside their exclusive jurisdiction (marriage, divorce and charities). Some litigants, of course, open two fronts, dealing with the divorce in the Religious Court and their property dispute in the civil court.

JUSTICE: How does Druze law differ from Moslem religious law?

Qadi Henou: The personal status law is one of the most progressive laws in all the States in the Middle East. It confers on Druze women an exclusive right. No other woman has an equal right to divorce her husband. She may obtain a divorce from her husband for any reason, whether justified or not. She may apply to the *Qadi*, claim she is bored with her marriage and the *Qadi* will grant her a divorce. Thus we have no "divorce refuseniks" and we have no "*agunot*". Moreover, the woman has the right to distribute her property under a will. There is complete testimonial freedom. She may bequeath property to a person entitled to succeed her or to a stranger. She may also leave her property to charity or to a public institution. In addition, there is no bigamy. According to religious law, a Druze man may not marry more than one wife. If he divorces his wife he may not thereafter remarry her. In contrast, a Moslem man may marry up to 4 wives, and may divorce the same wife up to 3 times, *i.e.*, he may divorce her, take her back and again divorce her during the following three month "probation" period, for a maximum of three times. He may not receive her back the third time unless in the meantime she has married another man who has also divorced her. Once a Druze man has divorced his wife finally he may not remarry her or indeed even sit under the same roof as her.

There is another difference between Druze and Moslems in relation to intermarriage. A Druze man may not marry a non-Druze woman and *vice versa*. In the event that a man goes

through a marriage ceremony with a non-Druze woman, the marriage will be invalid, and any children will not be regarded as Druze. Such children will therefore themselves not be permitted to marry Druze. Further, a person who marries a non-Druze woman will not be permitted to live in his old village. If he later wishes to return, he must do so in the same way as he left, *i.e.*, leaving his wife and children behind.

There are those who convert to Judaism, Christianity or Islam. Formally, they may do so, but as a matter of religious law they remain Druze. A person who is born to a Druze couple will remain Druze all his life.

JUSTICE: Have there been other major development in Druze law since 1973?

Qadi Henou: There has been no additional legislation. As I mentioned, the original law was Lebanese, and the Lebanese Druze community also follows it in their courts - apart from the two sections mentioned above concerning the jurisdiction of the *Qadi* to marry minor women, and where there is a *lacuna* in the law. In such a case, the Druze Religious Courts in Lebanon apply Moslem religious law or other law; in Israel the Druze Religious Court will apply the laws of the country, for example, the Israeli Succession Law.

JUSTICE: Who is entitled to be a Druze Qadi (judge)?

Qadi Henou: Any Druze who is a citizen of the State of Israel, possesses the necessary religious qualifications, is or has been married and is over the age of 30, and whose way of life and character befit the status of a *Qadi*, is entitled to be a judge.

In Lebanon there is also a condition that the *Qadi* must have legal qualifications, in Israel there is no such requirement for either the first or second instance. I would also like this precondition to apply in Israel. A *Qadi* who has legal academic qualifications will be able to deal with problems more easily. Today, the problems of the Druze community are different from those prevailing in the past. There are problems of drugs as well as various social problems. A *Qadi* with an education, which is not only a religious education, would cope better with these problems.

JUSTICE: What religious qualifications does a Druze judge need?

Qadi Henou: Druze are not categorized as secular or religious. There are those who are religious and those at a lower level who are entitled to read the Druze religious writings but may not read the holy books or pray with those at the higher level. However, any religious person may be a judge, and he is regarded as religious if he meets the criteria established by the sages, professes that he is religious and is qualified to sit as a judge and is recognized as such by the Druze community

JUSTICE: How many cases do the Druze Religious Courts hear every year?

Qadi Henou: The Religious Court in Acre hears about 360 cases a year, the court in the Golan Heights hears another 50-60. The amount of time devoted to each case is lengthy. For example, the Court does not merely confirm a divorce but in each case tries to reconcile the parties, and give them the oppor-



The northern facade of the new Supreme Court building in Jerusalem. Photo: Richard Bryant / Arcaid, courtesy of Yad Hanadiv

tunity to reconsider. We occasionally involve the parents or elders of the community, and make our first priority the care of the children, if there are any. We do our utmost to bring about peaceful relations and draw the family together again. Only if all attempts fail do we grant the divorce.

JUSTICE: What happens to the children?

Qadi Henou: Boys up to the age of 7 and girls up to the age of 9 are delivered into the mother's custody. After these ages, custody is transferred to the father. Generally, the Court is also assisted by a social worker, who will provide a report on the best interest of the children. My chief concern is always the welfare of the children. If I reach the conclusion that the father is not fit to obtain custody, I will not transfer them unless the mother has waived custody or she has remarried a person who is a stranger to the children. I would not transfer the children to a person who is unfit because he is a criminal or drug addict.

JUSTICE: What happens where the husband disappears for a lengthy period of time?

Qadi Henou: Where the husband has died - the woman may remarry. If he disappears for 3 years, without paying maintenance to the woman, that is grounds for divorce and she may remarry. If he pays maintenance and then disappears for 5 years that will also provide grounds for divorce. There are many grounds for divorce, for example, if the husband is physically or mentally violent, is a drug addict, an alcoholic or an adulterer, or is sentenced to 5 or more years imprisonment. We do not have 'agunot' in our society; and the wife may remarry without anyone's consent. As noted, the wife may also divorce without grounds, but this will have an impact on her property rights. If she does not have grounds for a divorce, she must compensate her husband; similarly, if he has no grounds for a divorce, he must compensate her - there is absolute equality in this matter.

JUSTICE: Is a distinction drawn for any purpose between Druze of different nationalities - for example those from Israel, Lebanon, or the Golan Heights?

Qadi Henou: No, for example, in relation to marriage and divorce, Israeli Druze may marry Lebanese Druze and often do, there is also marriage between Druze from the Golan Heights and Syrian Druze as well as those from the Druze community in

Jordan. Nationality is irrelevant, the only condition is that all the parents are Druze.

JUSTICE: The Druze religious laws are fixed, but to what extent do the Religious Courts take into account changes in society?

Qadi Henou: The Druze Religious Courts will not intervene in social life, but modernization has repercussions, it has not bypassed the Druze community in the same way as it has not bypassed any other community in Israel. Modernization has its good and ugly sides; for example, drug use is a new phenomenon which has affected Israeli society as a whole, including the Druze community. There have been many families which have been destroyed by drug use and many cases have come before me in the Courts, where the grounds for divorce are drugs. Today, the Druze community is open, the young men serve in the Army, people leave the villages, traditional farming or small businesses to work in the cities, and are influenced by Israeli society. However, where there is religious education about values, and in particular family values, it helps our people withstand the temptations and pressures of modernization.

JUSTICE: Has the education system undermined traditional Druze society?

Qadi Henou: No. The general community is built around the family nucleus. Education is not learnt at school but in the family, and we ensure that there is education of values which can help our youngsters. Further, I believe in education for women and encourage girls to study, and a large proportion of girls do go for higher education. There are those who say differently, but I personally do not see a clash between an educated woman and a religious woman. On the contrary, an educated woman will not only be a good mother but will also be able to make a contribution to society, and understand the foundations of her faith. Our faith is philosophical, a person has to be educated to understand its depths.

JUSTICE: Is there any religious fanaticism in the Druze community?

Qadi Henou: No, we have a very tolerant religion. We love all people. Our motto is love thy neighbour like thyself. We protect human rights, human dignity and freedom. ■

Lebanon: Security Council Resolution 425

Ruth Lapidot

In recent months we have heard time and again that Israel is ready to implement Security Council Resolution 425¹ and to withdraw from the security zone in Southern Lebanon under certain conditions. That resolution was adopted in 1978, in the wake of the Litani operation which had been undertaken against terrorist bases located in Southern Lebanon. The new Israeli initiative raises several legal questions, in particular: Was this resolution binding? What does it mean? Why does Israel refer to a resolution adopted in 1978, and not to one of those adopted after the 1982 war (at the time called “Peace for the Galilee Operation”)?

The Historical Background

In 1948, when the State of Israel was established, there was no conflict of interests between Lebanon and Israel. Nevertheless, Lebanon joined in the war against Israel. This war ended with the conclusion of four armistice agreements. The Israel-Lebanon armistice was concluded on 23 March 1949.²

It stipulated that “[t]he Armistice

Bessie and Michael Greenblatt Professor of International Law at the Hebrew University in Jerusalem. The author wishes to express her warm thanks to Mr. Alan Baker, the Legal Adviser of Israel’s Ministry of Foreign Affairs, and to Professor Bar-Yaacov for their most helpful remarks and comments.



Demarcation Line shall follow the international boundary between the Lebanon and Palestine” (Article V(1)).

The border was relatively quiet and peaceful until terrorist groups established their bases in Southern Lebanon, after their expulsion from Jordan (1970). The situation worsened in 1975, when Lebanon was engulfed in a bloody civil war.

In response to an increase in violent acts against Israel from Lebanese territory, the Israel Defence Forces in 1978 temporarily occupied the area north of the Israeli border up to the Litani river, in order to clean the area of terrorist bases. The legal justification for this operation was based on the right to self defence in case a country is unable and/or unwilling to prevent hostile violent attacks from its territory into the other country. It is in the context of this operation that the

Security Council adopted Resolution 425 to be analyzed below.

In the early eighties the situation in Lebanon deteriorated and Syria increased its involvement. In 1982, due to the considerable reinforcement and war preparations by the terrorist groups and by Syria, and in response to a murderous attack on Israel’s Ambassador in London, Mr. Shlomo Argov, Israel again invaded Lebanon. This time the I.D.F went beyond the Litani river, up to Beirut, since the headquarters of the terrorists was located in that city. The Security Council, in Resolution 509 (1982), demanded “that Israel withdraw all its military forces forthwith and unconditionally to the internationally recognized boundaries of Lebanon”.³ Other, similar resolutions followed.⁴

With the help of mediation efforts by

-
1. Security Council Official Records, 33rd year, 1978, Resolutions, p.5. The resolution was adopted by 12 votes to none, with 2 abstentions (Czechoslovakia and the Soviet Union). One member (China) did not participate in the vote. Text of the resolution reproduced below, at p. 29.
 2. 42 U.N. Treaty Series, no. 655, pp. 288-298.
 3. Security Council Resolution 509 (1982), S.C.O.R 37th year, Resolutions and Decisions, p. 5 The resolution was adopted unanimously at the 2375th meeting.
 4. E.g. 520 (1982). Interestingly, in the preamble to the last mentioned resolution the Council takes note “of the determination of Lebanon to ensure the withdrawal of all non-Lebanese forces from Lebanon...”.

the United States, Israel and Lebanon reached in 1983 an agreement providing for the ending of the state of war between them and for the establishment of peaceful relations.⁵ Israel committed herself to withdraw from Lebanon. However, due to pressure by Syria, Lebanon did not ratify the agreement.

Later in 1984, the UN Secretary General convened Israeli and Lebanese representatives in a military committee in order to reach agreement on the implementation of the above resolutions, but this initiative too failed.

In 1985, Israel gradually withdrew from most of the territory of Lebanon occupied in 1982, but remained, together with a friendly local force, in a narrow strip in the south, in order to prevent attacks against northern Israel. Nevertheless, the attacks have intensified considerably due to the deployment of *Hizbullah*, a terrorist group supported by Syria and Iran.

The civil war in Lebanon ended in 1989, with the approval of the "Lebanese National Accord" by the Lebanese deputies who had assembled in al-Tai'f, Saudi Arabia.⁶ Under this text, the ethnic composition of Lebanon's governmental bodies was adapted to the composition of the population - a composition which had changed considerably, and Lebanon practically agreed to Syrian control of the country. Interestingly, the al-Tai'f text, in its chapter on "Lberating Lebanon from the Israeli Occupation", refers to Security Council Resolution 425 (1978), and not to the later ones.

Is 425 a Binding Decision?

Members of the United Nations have, by the Charter of the U.N., authorized the Security Council to adopt recommenda-

tions as well as binding decisions. Most of its resolutions are in the nature of recommendations. Among the binding decisions most are taken under Chapter VII of the Charter, the chapter that deals with the more serious situations, namely, "Threats to the Peace, Breaches of the Peace and Acts of Aggression". In order to find whether the Council adopted a recommendation or a binding decision, one has to look at "the terms of the resolution..., the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council".⁷ For instance, in 1992, when the Council resolved to apply sanctions to Libya for not extraditing the individuals suspected of having caused the Pan-Am plane explosion over Lockerbie, Scotland, it used the following language: "The Security Council... Acting under Chapter VII of the Charter: 1. Decides that the Libyan government must now comply... 2. Decides that on 15 April 1992, all States shall adopt the measures set out below which shall apply until the Security Council decides that the Libyan government has complied..."⁸

Resolution 425 does not include any similar language. In its operative paragraphs 1 and 2, it "calls for..." and "calls upon..." - terms usually used in recommendations. Only in paragraph 3, which is practically addressed to the Council itself, namely, the decision to establish the U.N. Interim Force in Lebanon (UNIFIL), it used the term "decides". Moreover, there is no reference to Chapter VII of the UN Charter.

It thus follows that, as far as its call to Israel is concerned, Resolution 425 is a mere recommendation.

The Meaning of the Resolution

The resolution contains four operative paragraphs. The last is addressed to the Secretary General and requests him to report on the implementation of the resolution. The first paragraph calls "for strict respect for the territorial integrity, sovereignty and political independence of Lebanon within its internationally recognized boundaries". This provision is not addressed to any particular country, and therefore applies to all States, including Syria and Israel.

The second paragraph is expressly designed for Israel, calling upon it "immediately to cease its military action against Lebanese territorial integrity and withdraw forthwith its forces from all Lebanese territory".

The third paragraph deals with the establishment of UNIFIL. The force is given three tasks: "confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the government of Lebanon in ensuring the return of its effective authority in the area...". The functions

5. Lapidoth and Hirsch, eds., *The Arab-Israeli Conflict and its Resolution: Selected Documents* (Dordrecht, Nijhoff, 1992), pp. 299-303.
6. International Affairs, FBIS-NES-89-204, of 24 October 1989.
7. Legal Consequences for States of the Continued Presence of South Africa in Namibia..., I.C.J., Reports 1971, p. 53.
8. Resolution 748 (1992), see Y. Zilbershats, "Combatting International Terrorism through the U.N. Security Council: The Libyan Case", *International Association of Jewish Lawyers and Jurists Newsletter* (1992), pp. 12-17.

and rules of operation of UNIFIL have been further defined by the U.N. Secretary General in his report which was approved by the Security Council.⁹

The question arises, how should the call to Israel be interpreted. According to one interpretation, favoured by Arab States, the provision is clear and unambiguous, namely, Israel should withdraw without any qualifications.¹⁰

On the other hand, it is a well established principle that a document should be interpreted in a way that promises coordination and compatibility among its various provisions. Hence, Israel's withdrawal should be linked to the reestablishment of Lebanon's territorial integrity (paragraph 1), the restoration of its effective authority in Southern Lebanon and the establishment of international peace (paragraph 3). This interpretation would also lead to a result which may enable Lebanon to fulfil its obligation under international law to prevent the perpetration of acts of

violence from its territory against another State.

Resolution 425 and Later Security Council Resolutions

As mentioned, Resolution 425 was adopted in 1978 in the wake of the Litani operation. Nevertheless, all those concerned continue to rely on this text, either exclusively or in conjunction with the later resolutions. Even the Security Council itself, in its periodic resolutions on the extension of the mandate of UNIFIL, relies on both Resolution 425 and later ones.

The reason is probably that 425 was the first and most comprehensive resolution on the matter.

Conclusion

Resolution 425 recommended that Israel withdraw from all Lebanese territory. This recommendation was linked to the establishment of UNIFIL whose function would be to confirm Israel's

withdrawal, to restore international peace, and to assist the government of Lebanon to restore its effective authority in the area.

Until recently, Israel agreed to implement this recommendation only on condition that international peace be established, but according to recent statements, it would make withdrawal conditional only upon the establishment of security arrangements. Negotiations on the matter are taking place through the intermediary of the U.N. Secretary General, in accordance with the Report approved in 1978 by the Security Council.¹¹

9. U.N. Doc. S/12611, of 19 March 1978, approved by Security Council Resolution 426 (1978), of 19 March 1978, S.C.O.R. 33rd Year, Resolutions, p.5

10. This interpretation finds some support in the above Report of the Secretary General.

11. *ibid.*

Resolution 425 (1978) of 19 March 1978

The Security Council,

Taking note of the letters from the Permanent Representative of Lebanon and from the Permanent Representative of Israel,

Having heard the statements of the Permanent Representatives of Lebanon and Israel,

Gravely concerned at the deterioration of the situation in the Middle East and its consequences to the maintenance of international peace,

Convinced that the present situation impedes the achievement of a just peace in the Middle East,

1. *Calls* for strict respect for the territorial integrity, sovereignty and political independence of Lebanon within its internationally recognized boundaries;

2. *Calls* upon Israel immediately to cease its military action against Lebanese territorial integrity and withdraw forthwith its forces from all Lebanese territory;

3. *Decides*, in the light of the request of the Government of Lebanon, to establish immediately under its authority a United Nations interim force for Southern Lebanon for the purpose of confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area, the force to be composed of personnel drawn from Member States;

4. *Requests* the Secretary-General to report to the Council within twenty-four hours on the implementation of the present resolution.

The first of a series of articles specially written for *JUSTICE* by senior Swiss officials dealing with the manner in which Switzerland is handling the repercussions of the Second World War.

The Swiss Special Fund for Holocaust Victims

Rolf Bloch and Marco Sassoli

The Swiss “Fund for Needy Victims of the Holocaust/*Shoa*” (Special Fund) was established by the Swiss government on 26th February 1997.¹ It was endowed with capital of 273 million Swiss Francs donated by Swiss business circles and the Swiss National Bank. The concept of this Fund was laid down in agreement with those donors and with organisations representing Holocaust victims. Its establishment is one of the steps initiated by Switzerland in order to cope with controversies concerning the role of Switzerland during the Second World War. It is also meant to express the country’s gratitude for having been spared by that catastrophe of human



history. As a humanitarian gesture in line with Switzerland’s humanitarian tradition evidenced, e.g., by the Red Cross, it is meant to compliment efforts to restore assets and to clarify history.

The Fund organs administering the Fund under supervision by the Swiss government comprise as many Swiss members as persons recommended by the World Jewish Restitution Organization (WJRO), and are presided over by the first author of these lines,

who is also the President of the Swiss Federation of Jewish Communities. An 18-member Fund Council has advisory functions, while the 7-member Fund Executive decides on criteria, applications and distributions.

Dr. Rolf Bloch (photo on the left) is President of the Swiss Fund for Needy Victims of the Holocaust/*Shoa*,

Dr. Marco Sassoli (photo on the right) is Secretary-General of the Fund. The opinions expressed in this article are exclusively those of the authors.

¹ By an Executive Ordinance of the Swiss Federal Council, dated 26 February 1997, and taking effect on 1st March 1997, cf. Systematic Collection of Swiss Laws, 611.024.

As we will explain below, individuals may not directly ask for support from the Fund; only organisations may apply for it.

After encountering some difficulties in constituting the Fund organs, the Fund Executive met for the first time on 7th July 1997, at which time the Fund activities and decision making procedures were established and 88% of the Fund's resources were reserved for Jewish and 12% reserved for non-Jewish victims. The Executive also decided to provide priority assistance to "double victims", *i.e.* needy Holocaust survivors living in Eastern Europe and the former Soviet Union, who have not yet received any assistance or compensation. It earmarked an initial sum of 17 million Swiss Francs to be distributed to these victims in a rapid distribution procedure.

No final decisions were taken during the meetings of the Fund organs on 15th September, as the members recommended by WJRO of both organs did not participate. Nevertheless, in the following weeks, the Fund organs started to take decisions by means of a written circulation procedure. The first meeting of the plenary Fund Council took place on 20th January 1998, and a meeting of the Executive was held on 21st January.

Despite initial difficulties in identifying the victims - especially non-Jewish ones - and in taking decisions, the Fund has already begun supporting the first needy Holocaust victims. Admittedly, this has happened at a later stage and in smaller dimensions than was hoped, but the Fund is dependent on applications by organisations. The first application was submitted on 14th October 1997 by the WJRO in the form of a distribution plan for Eastern Europe.

A first amount of 15 million Swiss francs was transferred on 10 November to WJRO in order to implement this plan. Out of this money, the first 80 Holocaust survivors in Riga, Latvia, received an allocation of US \$400 each on 18th November 1997, and 20,000 Holocaust survivors in Hungary followed in the beginning of 1998. A first payment to non-Jewish victims was made on 18th December 1997 in Tirana, Albania, to 23 Holocaust survivors who had been persecuted on political grounds. Presently, payments to Jewish victims on a country-by-country basis continue, through WJRO, while non-Jewish victims are assisted in a less organised way: they receive assistance as soon as one of the many organisations devoted to their interests submits an application for the benefit of a given group of victims.

It is not the purpose of this article to describe the activities of the Fund nor the many practical difficulties that distributing organisations like WJRO encounter every day in their noble task. It also cannot tell the untold tragedies behind the life of every applicant, each of which is worthy of a book.² It only aims to explain some aspects of the Fund which may be of special interest to the Jewish lawyer.

Definition of the beneficiaries

Under Art. 2 of the Fund Ordinance:

[t]he object of the Fund is to support persons in need who were persecuted for reasons of their race, religion or political views or for other reasons, or otherwise were victims of the Holocaust/*Shoa*, as well as to support their descendants in need.

The fact that only victims in need may

be supported is in line with the humanitarian nature of the Fund. This fact is, however, difficult to accept for Holocaust victims who are presently not in need but who suffered no less than their needy comrades. Nevertheless, this limitation should not be seen as denying the former the status of Holocaust victims nor as turning the Holocaust into a purely material relief problem. Its purpose is simply to concentrate the assistance given to those who need it most and for whom the sum of about 1,000 US Dollars is not an offence - as it would be for a wealthy survivor - but means the possibility of heating an apartment for two winters or buying the first washing machine of their life, as it does for survivors in Latvia, Hungary or Belarus.

Without prejudice to important discussions among historians, the Fund Ordinance makes clear that the term "Holocaust", as is used there, is not limited to the *Shoa* of the Jewish people. The Fund organs have clarified the term as covering any persecution by the Nazi regime, under Nazi occupation or a regime collaborating with the Nazis, because of belonging to a group, when the aim was to exterminate members of that group. While this clarifies the case of Jews, gypsies and Sinti, mentally handicapped people and probably homo-

2 Future historians will read with interest the many letters to the Fund Secretariat from individuals who ignore that applications by individuals cannot be treated (*cf. infra*, 4) and who tell us the full tragedy of their life. It is the aim of the Secretariat to answer those letters worthy of the greatest writers in a not too standardised way.

sexuals, whom the Nazis wished to exterminate as such, it leaves open the question who are the victims of the Holocaust "for reasons of their political views". Political opinions *per se* are an individual attribute, but the Fund Ordinance implies that they could turn a person into a Holocaust victim. Theoretically, historians could certainly define certain categories of persons whom the Nazi wished to exterminate because they belonged to a certain politically defined group (such as the political commissioners of the Red Army)³ and not simply because of their individual political opinions, speeches or acts. However, it remains to be seen whether such criteria can be applied in practice - whether victims' organisations can identify those falling under these categories - or whether, from a pragmatic point of view, it is not preferable to consider all those who were actually in an extermination camp as entitled to benefit from a presumption that the Nazis victimised them under the Holocaust.

Nature of the Fund

From a legal point of view, the Fund is based on a provision in the Swiss Federal finance law, enabling donors to give means to the State for a specific purpose.⁴ When the competent Federal authorities accept such a donation, a "special fund" is established and administered separately from the general accounting of the State. Such a Fund has no legal personality of its own. However, our Fund organs, once appointed by the State, are completely independent in fulfilling their task. Like all private foundations, the Fund is simply subject to monitoring supervision by the Federal Department of the Interior. As far as our

Fund Secretariat is concerned, it is also administratively assigned to the Federal Department of Finance, which pays the administrative costs, including the salaries of the Secretariat's 6-member staff.

This solution not only has the advantage of avoiding new legislation by Parliament, but also correctly reflects the reality of the legal construction, *i.e.* that the distributed funds are private funds, but that their distribution is one measure taken by Switzerland (and not only by some Swiss individuals) to cope with its responsibility for its actions and omissions during the Second World War.

The support paid out by the Fund is clearly in the nature of humanitarian assistance and is not reparation, restitution, compensation or atonement. Apart from the fundamental impossibility of "repairing" the Holocaust or any individual suffering it has provoked, reparations would have, first, to be paid by Germany and other countries, which were directly responsible for the atrocities. Second, humanitarian assistance treats all those in need equally, while reparations must differentiate according to the suffering. Third, such reparations paid by Switzerland would, in each case, have to take into account the degree of responsibility of Switzerland and, for example, be much higher to those who became victims of the Holocaust because they were sent back to Nazi-controlled Europe by the Swiss authorities or to those not accepted as refugees, than to those who never came into any contact with Switzerland. Fourth, those who ask for reparations would have to prove their suffering and their damage (and that Swiss behaviour was contrary to international law as it stood at the time)⁵, while humanitarian assistance may be

given - as it is by the Swiss Fund - on the basis of a self-declaration by the victim and out of a feeling of moral responsibility for the victims' suffering as well as gratitude that Switzerland was spared from Nazi occupation and therefore from the Holocaust.

Procedures for Applications to the Fund

Victims may not apply directly to the Fund. Only organisations may do so for them.⁶ Every day, the Secretariat receives letters from victims objecting to this rule or enquiring about organizations which they may turn to in order to have their case processed.

The rule, however, makes sense. First, assistance from the Fund is not an individual compensation. Second, if some 200,000 individual requests had to be screened by the Secretariat, a huge bureaucracy would have to be built up. As far as Jewish victims are concerned, this bureaucracy would also parallel existing experienced organisations having the trust of the victims.

- 3 The famous *Kommissarbefehl* by Hitler of 6 June 1941 ordered that when surrendering they should immediately be executed, *cf. The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting in Nuremberg, Germany*, HMSO, 1947, Part 6, 315/316, Part 7, 15, and Part 22, 493.
- 4 See Article 12, para. 2 of the Federal Law of 6 October 1989 on the Federal Budget, Systematic Collection of Swiss Laws, 611.0.
- 5 On this see Detlev Vagts, "Switzerland, International Law and World War II", *American Journal of International Law*, 91 (1977), 471/472.
- 6 *Cf.* Art. 7 (2) of the Fund Ordinance.

Furthermore, individual applications could only be processed by the Fund if it either established a capillary network of field representatives where the victims live or if it requested detailed documentation from the victims as proof of their victimisation and need. The former would be a disproportionate investment paralleling existing organisations, and the latter would be incompatible with the idea of a humanitarian gesture and the aim of helping precisely those who did not receive any compensation from Germany because they did not possess sufficient documentation. Thus, Switzerland has learned from the past errors of its banks which asked Holocaust survivors or their descendants for standard documentation about their deposits or inherited title.

It is therefore the victims' organisations which screen individual cases, submit applications and distribute the Fund's support to the victims in need. They request from the victims the documentation and information they deem reasonable. They do not have to submit any documentation with their application to the Fund. They have simply to explain their criteria and take responsibility for the victims whom they will support actually falling within those criteria. The organisations also suggest the form of assistance - one-time or repeated, in cash, kind or as services. They either submit a list of the suggested beneficiaries with their application, or they provide the Fund with the data on the beneficiaries once distribution is completed. The Fund Auditor, ATAG, Ernst & Young, a well established international auditing firm, ensures the necessary auditing and monitoring of distributions.

This description makes it clear that the

victims' organisations have the most important role in this system. In order to fulfil it, they incur costs, which cannot be borne by the Fund, as its assets have to be entirely given to the victims. The Fund is therefore fortunate that the three major Swiss banks have been willing to grant an additional 15 million Swiss Francs for the distribution costs of those organisations. As noted, the costs of the Secretariat itself and of the Fund organs are paid by the Swiss government.

The Role of the World Jewish Restitution Organization

As the preamble of the Fund Ordinance states: "the World Jewish Restitution Organization (WJRO) [is] in special association with the State of Israel ... [the] umbrella Organization to represent the Jewish people in matters of restitution". It has nine member organisations: the World Jewish Congress, the Agudath Israel World Organization, the American Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Joint Distribution Committee, B'nai Brith International, the Center of Organizations of Holocaust Survivors in Israel, the Conference of Jewish Material Claims against Germany, the Jewish Agency for Israel and the World Zionist Organization.

Lawyers will distinguish two fundamentally different roles which WJRO plays for the Fund, which, in practice, are not always easy to separate. On one hand WJRO recommends members of the Fund organs who take decisions on applications and criteria, on the other, WJRO is the main organization which submits applications to the Fund and distributes its assistance.

Under the first aspect, three out of

seven members of the Executive and nine of the eighteen members of the Fund Council are appointed by the Swiss Federal Council on recommendation by the WJRO.⁷ While the Fund Ordinance states that Council members are "representatives of [...] organizations [...] serving the interests of the beneficiaries",⁸ it is clear that all members of the Fund organs serve in their personal capacity, may not receive binding instructions and are under an obligation to treat all victims and all organizations fairly and equally. As the Fund organs have a humanitarian and political task, members who are recommended by WJRO may participate in decisions on applications that are submitted by WJRO. The nine Council members recommended by WJRO form the Council's Sub-group I, which is competent to give advice on all applications for Jewish victims, *i.e.* those submitted by WJRO. While this would be unacceptable for a judicial body, here it permits advantage to be taken of the extensive know-how of WJRO and its member organisations in matters of restitution to, compensation for and assistance to Jewish victims. Furthermore, such involvement of representatives of those concerned in the advice-giving and decision-making process corresponds to Swiss tradition and results in efficient, acceptable and pragmatic decisions.

As an applying Organization, WJRO does not simply submit applications for a determined number of victims listed in

7 Cf. Arts. 4 (1) and 5 (2) of the Fund Ordinance.

8 Cf. Art. 5 (1) of the Fund Ordinance.

an annex to the application, as do organizations for non-Jewish victims. Rather, in each country where Jewish Holocaust survivors live, WJRO sets up a system to screen all cases of Jewish victims and to provide them with assistance from the Fund. In each country, this system involves local Jewish communities and survivors' organisations. In order to ensure that the criteria applied, the amount paid out and the time of payment is the same for all needy Jewish victims living in the same country, the Fund organs have accepted the principle that all cases of Jewish victims have to be handled simultaneously in the same country and that they will all be assisted through the described WJRO system. It is the very essence of the idea of establishing such a system that applications by other, smaller organisations for Jewish victims cannot be treated directly by the Fund organs,⁹ but that their cases have to be integrated into the national systems. Such a *de facto* monopoly of WJRO for Jewish victims puts a great burden on WJRO, including the obligation to treat all cases of Jewish victims fairly and equally. This obligation has been accepted by WJRO. The Fund organs, including the independent Fund Auditor, will monitor how it is respected.

Conclusion

The Fund helps to build up a worldwide system to collect applications by needy victims of the Holocaust, through their organisations, and to distribute support by the Fund to victims, through these organisations. Such a system has not existed before and it takes some time and much effort in organisation and coordination until it is operational everywhere. Time, however, is pressing,

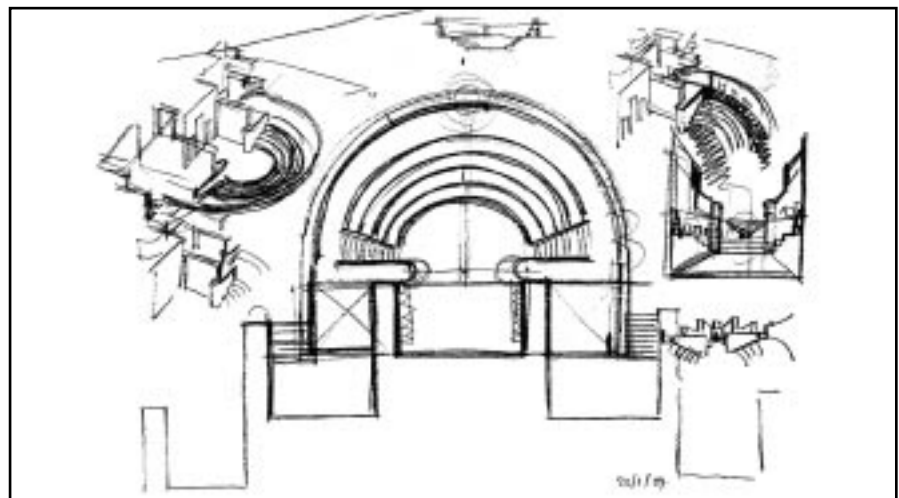
because Holocaust victims, 54 years after the fall of the Nazis, can no longer wait.

Against this background, at a legal level, the solutions found by Switzerland in establishing the Special Fund are *sui generis* in all respects: it is private in its resources, public in its nature; it is co-administered and implemented by organisations representing the victims, but run under the constraints and guarantees of Swiss public law; it is run jointly and with a common aim by representatives of two sides which were and, unfortunately, continue to be on other issues counterparts in controversies; its procedures did not exist - as a lawyer would have wished - before first applications could be treated, and they have had to be established, refined and changed "on the job", while the first victims were paid out, because otherwise, many victims would have died before the Fund became operational; it assists people in need, not as would normally be the case through projects, but through individual payments, which is justified, because only those who lived nearly 55 years ago,

during the unimaginable Holocaust, are assisted; finally, it provides humanitarian assistance, but not charity, because the very limited amount given, which would be an offence as compensation, is not only meaningful help for those who will be able, e.g., to heat their apartments or buy medicine during the last years of their life in Hungary, but this assistance is also an expression of deep respect for those who survived the Holocaust and a way of honouring of the memory of the millions who perished.

For this, all the efforts of the Fund organs, who would never have thought how difficult it is to distribute money, and of the implementing organisations who knew it and now face it, are worth undertaking.

9 Although Art. 7 (2) of the Fund Ordinance states: "Any organization devoted to the purposes of the Fund [...] can apply to the mechanisms of the Fund". One can, however, argue that the systems established by WJRO are "the mechanisms of the Fund".



Architectural sketches of the court rooms in Israel's new Supreme Court building, courtesy of Yad Hanadiv

Social Justice in the Israeli Legal System

Yaffa Zilbershats

The issue of social justice in Israeli law is examined in this article in terms of the relationship between the individual or a group of individuals and the State; it does not consider the issue of social justice in the relations between individuals themselves.

Social justice is achieved in law in two interweaving ways. The first is by means of conferring rights, which are customarily categorized as social rights, on the individual, the second is by implementing the principle of equality.

Social Justice and Social Human Rights

By as early as 1948, international law established the list of basic human rights in the Universal Declaration of Human Rights. This Declaration included a list of human rights of a political character (freedom of expression, freedom of association and organization, freedom of movement, trial rights, *etc.*) and additional rights of a social character (the right to national insurance, the right to choose work and fair work conditions, the right to reasonable living conditions, including housing, clothing, medical health, and the like).

In 1966, the Universal Declaration led to two central human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (hereinafter: the Social Treaty).

Israel ratified these two treaties in 1991. The Social Treaty determined the social rights in the areas of labour, national insurance, food, clothing, housing, health, education and culture, and provided for the extent of the State's obligations to provide the same to persons located within its jurisdiction.

The legal defence of political rights is different in substance from the legal defence of social rights. The main difference is that, generally, in order to protect political rights the State is not obliged to be active, it is not



required to take action in order to ensure the implementation of the rights. The State is also not required to allocate financial resources in order to protect political rights. The legal defence of these rights is regulated by way of directions to the authorities to refrain from restricting these rights, save if the restriction is intended for a proper purpose and does not exceed what is necessary.

In contrast, in order to protect social rights, the State must, in most cases, be active and, principally, allocate financial resources. This fact has very significant legal consequences:

Countries such as the United States and Canada have refrained from including social rights in their constitutions. The issue of allocating resources is perceived as an economic issue which must not be fixed in too rigid a form in the constitution and the legislative branch must be left to determine its framework and the executive branch to implement it operatively.

These countries feared that a framework requiring the allocation of resources would create a socialist economy to which they

Dr. Yaffa Zilbershats is a senior lecturer in law at Bar-Ilan University, Israel. She specializes in International and Constitutional Law.

objected in the name of free trade. In consequence of their fear of creating a rigid economic framework, the social rights were not entrenched in the constitutions of the U.S. and Canada.

In Israeli law there is partial legislation relating to human rights. In 1992, two Basic Laws were enacted, which comprise chapters of Israel's constitution, and which include partial regulation of human rights: Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation. Basic Law: Social Rights has not yet been legislated in Israel. Various draft bills have been initiated and are currently being studied in this matter. Before the legal system in Israel starts considering the details of the proposals, it must decide in principle whether it is interested in **constitutional** arrangements in relation to social rights *per se*, or whether there is too great a fear that these would have the effect of rigidly binding the State by adopting the economic policies of a welfare state.

Within the framework of the discussion in Israel regarding the constitutional status of social rights, one must anticipate the argument that social rights are already entrenched in the Basic Law: Human Dignity and Freedom, within the provisions protecting human rights. In the light of the interpretation which has been given to the term 'human dignity' in other contexts in legal literature and case law, it does not appear that the Court would uphold this argument. Turning social rights into constitutional rights in the State of Israel would require separate, express and basic legislation.

The legislature is the central factor in the determination of the budgetary framework, and the government is the body responsible for its implementation. In order to ensure that the legislature allocates money for purposes which realize social human rights, it is necessary to ensure that it enacts laws in relation to social issues, with reference to which it desires to allocate monies. In my view, Israeli law is fairly progressive in this regard. There is legislation in relation to guaranteeing education, national insurance, health, minimum wages (for labour), equal work opportunities, equal wages for women and for female employees. Of course, each of these laws may be criticized in terms of the scope of the protection it affords to the individual, and it is not possible, within the confines of this short article, to examine each of the laws; however, it is possible to state generally that fairly wide reaching social legislation exists in Israel.

The legislative and executive branches must allocate financial resources for the implementation of these social rights provisions.

A further legal aspect of the fact that social rights are rights which require the government to allocate resources, is the fact that the Court will play a less active role in shaping and implementing these rights than in shaping and implementing political rights.

In matters of budget, the Court leaves it to the legislature to determine the budgetary framework. Implementation in practice is carried out by the executive branch and the Court leaves it a wide margin of discretion as to the manner in which it will disburse the monies allocated to it. The judicial policy of refraining from intervening in the allocation of resources means that we see less intervention by the Court in relation to social rights than in relation to political rights, since, as noted, the implementation of social rights requires the allocation of resources.

Social Justice and Equality

The Issue

So far we have considered social justice in Israeli law from the vantage point of the social rights which the State must grant to every individual. This is, of course, the first mode of examining the issue and it is of central importance but it cannot be exclusive. Intertwined with it is the principle of equality.

Thus, for example, with regard to the right to education, the Supreme Court of Israel recently considered the decision of the Ministry of Education to cancel the budget for an existing program for the encouragement and development of infants (aged 0-3) in distressed communities. First, the Court stated that it could not enforce the continuation of the program initiated by the Ministry of Education as it was not anchored in legislation. There was no law requiring the education of infants. This illustrates the point that where it is desired to promote a certain interest and ensure its implementation, it must be anchored in statute, particularly if the right is not expressly entrenched in the constitution.

Secondly, the Court stated that reference was to budget allocation, a matter in relation to which the Court tried not to intervene but preferred to leave to the discretion of the executive branch.

Third, the Court noted that this was a program which dealt with fifty children only, whereas the target population which required aid in this connection was much larger and stood at 5% of the entire infant population in the country. Stopping the program would perhaps impair the right to education of fifty children but would also encourage the establishment of an alter-

native program which would be nationwide and which would therefore provide the necessary aid to a wider proportion of the target population.

In other words, the allocation of resources for social purposes had to be implemented in such a way as to realize the principle of equality. The principle of equality was the additional aspect intertwined with the implementation of social rights. Their joint realization was, in practice, the way to achieve social justice.

Above, we considered the legal sources of social rights and their general framework. We turn now to an examination whether, how and to what extent the principle of equality is anchored and implemented in Israeli law.

Anchoring the Principle of Equality in Israeli Law

On the pure constitutional level, it is not clear to what extent the principle of equality is anchored in the Basic Laws dealing with human rights. The principle is not stated expressly therein. Section 1 of the Basic Law: Human Dignity and Freedom, provides:

Fundamental Principle

Basic human rights in Israel are founded on the recognition of the worth of the human being, of the sanctity of his life and of the fact that he is free, and they shall be respected in the spirit of the principles enunciated in the Declaration on the Establishment of the State.

There is a school of thought which holds that Section 1, which refers to the Declaration of Independence, has made that document an integral part of the Basic Law. The Declaration of Independence refers expressly to the conferral of social and political equality on every citizen of the State. Under this approach, equality is anchored in the basic legislation of Israel.

A different approach regards the phrase: "...and they shall be respected in the spirit of the principles enunciated in the Declaration on the Establishment of the State", in Section 1 above, as an interpretive guideline only and not a positive provision which turns the Declaration of Independence into a binding constitutional document. According to this approach, equality is not part of the Basic Law and is not anchored on a constitutional level in Israel.

This debate has not yet been resolved in case law.

At the same time, from the inception of the State of Israel, the

Supreme Court has recognized, in a continuous and consistent line of cases, that equality is a fundamental principle of the Israeli legal system. This determination created a commitment on the part of the executive branch to implement the principle of equality, and obliged the Courts to interpret statutes with the policy of implementing equality in so far as that policy did not clash with the language or express purpose of the statute.

The legal significance of the fact that equality is not a constitutional principle established in the Basic Laws but a fundamental principle established by case law, is that the Court is not competent to annul laws which infringe the principle of equality.

Accordingly, the optimal implementation of social justice may be carried out at this stage of the development of law in Israel only if the legislature possesses sufficient self-control to enact social legislation while concurrently implementing the principle of equality, and the Court supervises and ensures that the executive branch acts in such a way as to guarantee the principle of equality.

Implementation of the Principle of Equality

The recent examination of State legislation regarding social rights, conducted within the framework of the official Report on the Implementation of the Social Treaty, which Israel must soon present to the UN, reveals that in Israel, legislation on social matters (*i.e.*, education, health, national insurance and labour) provides equality. It is possible to find legislative examples of individual arrangements which are not equal in nature, for example, the non-insurance of a house wife under national insurance, or the allocation of increased child benefits to relatives of ex-army personnel only and not to the general population. The legislative attitude to these exceptions has led, in most cases, to their amendment, in such a way as to ensure that the rights are implemented in an equal manner. Thus, the National Insurance Law has been amended so as to include insurance for house wives; it has also repealed the preferential child benefits given to those connected with ex-army personnel.

One may conclude that legislation in Israel which ensures suitable living conditions deserves commendation, and in terms of this legislation the State is obliged to supply minimum living conditions in a universal manner to all the residents of the State.

Based on the Report about to be presented to the UN, greater difficulties are found in connection with the practical implementation of the principle of equality by the executive branch. The difficulties exist on two planes:

- a) On the level of the promulgation of regulations and the establishment of an overall policy, for example, making various rights in relation to housing assistance conditional upon the location of the residential area where the right will be implemented, for example, where the rights are granted to Jewish settlements but not to Arab settlements.
- b) In practical discrimination between Arab settlements and Jewish settlements, for example, in relation to the allocation of municipal resources for infrastructure.

Close judicial supervision of the equal allocation of resources by the executive branch may improve this state of affairs. The Court must leave a wide margin of discretion to the executive branch in relation to the distribution of resources, but only if the distribution is actually carried out equally. In other words, the Court is not a body which should decide whether to operate one program or another, or to express a preference for the allocation of resources to one needy group as opposed to another. The Court is, however, competent to scrutinize the program in terms of whether it realizes the principle of equality and is operated in an equal manner in respect of all strata of the population.

Conclusion

In conclusion, it is necessary to examine whether the adoption of a Basic Law which would have the effect of turning social rights into constitutional rights, would promote social justice in Israeli society.

I believe this question may be answered affirmatively. The *Knesset* does not need to fear that the adoption of social rights as constitutional rights will require the State to establish an economy which is not a market economy. A welfare state is not a socialist state. The constitution of South Africa provides for a free market alongside social justice, and indeed the language of the obligations in the proposed Basic Law: Social Rights, is: "The State of Israel will be diligent in promoting and developing the conditions to ensure that its residents live in human dignity, including in the areas of work, education, health, housing, social welfare and environment". This is 'soft' language, it is unlike the entrenchment of rights in the Basic Law: Human Dignity and Freedom, where the obligatory language is much firmer, for example: "Every person is entitled to privacy" or "every person is entitled to leave Israel". When reference is to social rights, the State is not obliged to enable every person to enjoy the maximum opportunities for education, and is also not required to

provide him with maximum housing or full welfare. The State undertakes to exercise diligence to promote and develop conditions in which he can live with dignity, be educated, and the like, in other words, it must attempt to grant the minimum needed to meet the basic social rights of every person.

This is indeed an economic burden on the State, and a responsibility which ensures its transformation into a welfare state, although not into a socialist state in which the State would be required to ensure the maximum welfare of the individual.

Entrenching the social rights in a constitution will ensure that all future legislation of the *Knesset*, will implement these principles, as statutes which are in conflict with the constitution, will be annulled. Similarly, entrenchment of the social rights in a constitution will ensure that the already existing prolific social legislation will remain in effect and will not be subject to easy amendment.

Anchoring the social rights in a constitution will place them on the same level of importance as political rights. In the event of a conflict of rights as a result of their implementation, the social rights will receive the recognition due to their status. For example, concern for the housing and educational needs of the residents of the State on occasion requires an infringement of property rights, such as confiscation of land in order to build houses or schools. Legislation in relation to labour relations and the environment may infringe the right to freedom of occupation of employers and factory owners. It is clear that even without a Basic Law, environmental matters, education and housing are proper purposes which may justifiably limit political rights. However, in order to preclude the impression that in the clash between various human rights preference is given to rights which have obtained express constitutional recognition, such as property or occupation, it is important to entrench the social rights in a Basic Law.

Similarly, it is important to note that, more than of operative significance, a constitution has educational importance. In the United States, every child knows that the First Amendment to the Constitution confers freedom of expression and freedom of religion. It would also be right for him to know that every person has the right to food, housing, education, national insurance and health insurance. Even though these rights are not absent from United State's law, since they are anchored in legislation, they do not possess the same level of importance and fundamental value as freedom of speech and freedom of religion which are entrenched in the Constitution.

This state of affairs should not be imitated in Israel. It would be right and educational to include the social rights alongside political human rights within the Israeli constitution. However, attention should be paid to the fact that every basic law concerning social rights must include express reference to the principle of equality in order to ensure the existence of an optimal normative framework in which social justice may be attained.

One must give effect to the principle of equality within the Basic Law: Social Rights. Moreover, one must draft this principle in such a way as to make it clear that the legislature is not only referring to equality on the narrow technical level but to

equality on the substantive level, taking into account the inferiority of certain sectors of the population and enabling the allocation to them of a greater proportion of the resources and opportunities, so as to allow them to gain actual equality with the more developed and progressive sectors of the population.

The Basic Law: Social Rights will contribute greatly to the awareness and implementation of social rights, if alongside the social rights conferred by it on the individual it will also construe and provide for the principle of substantive equality. The result will be that the legislative and executive authorities will be obliged to implement social rights in an equal manner.

“The Lie That Wouldn’t Die”

The legal community pays tribute to a new book by the President of the Association

Right: Judge H. Ben-Itto; Adv. I. Nener; Prof. Y. Dinstein; Justice M. Bejski.
Bottom: Justice M. Shamgar; Judge H. Ben-Itto; Justice A. Barak.



The publication of Judge Hadassa Ben-Itto’s book “*The Lie That Wouldn’t Die*” (Hebrew and German editions) on the *Protocols of the Elders of Zion*, was marked at two events organized by our Association.

The events were held in May 1998 at the premises of the Israel Bar Association in Jerusalem and Tel Aviv respectively, and were attended by prominent members of Israel’s legal community. Speakers included President of the Supreme Court Justice Aharon Barak, former member of the Supreme Court Justice Moshe Bejski, President of Tel Aviv University Professor Yoram Dinstein and Professor of History Israel Guttman of the Hebrew University and Yad Vashem. First Deputy President of the Association Adv. Itzhak Nener chaired both meetings.

The Economic Relations between Israel and the Palestinian Authority

Talia Einhorn



My general conclusion regarding the Protocol on Economic Relations (Annex V of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip) is that the provisions of this Protocol are not conducive to economic cooperation. Furthermore, its implementation so far raises serious doubts regarding its viability.

This statement requires explanation, especially in view of the Preamble to the Protocol, which states:

“The two parties view the economic domain as one of the cornerstones in their mutual relations with a view to enhance ... a just, lasting and comprehensive peace. Both parties shall

cooperate in this field in order to establish a sound economic base for these relations, which will be governed ... by the principles of respect of each other's economic interests, reciprocity, equity and fairness.”

The provisions of the Protocol treat institutional, substantive and procedural issues relating to import taxes and import policy; direct and indirect taxation; monetary and financial issues; rules regarding Palestinian workers in Israel; free movement of industrial goods and agricultural produce; and the regulation and coordination of tourism and insurance.

This article first highlights the positive aspects of a customs union, were it properly implemented, and then explains why the Protocol, as drafted and implemented, cannot bring about the very noble aims set out in the Preamble.

The Establishment of an Israeli-Palestinian Customs Union

Whereas no express mention is made

of the type of arrangement chosen, the Protocol provisions make it clear that this is a customs union. A customs union entails a common level of external tariffs and the application of the same regulations of commerce to substantially all imports from non-members, combined with elimination of all duties and other restrictive regulations of commerce with respect to substantially all imports from members. Indeed, according to the Protocol, the Israeli customs rates, purchase tax, levies, excises and other charges and the Israeli rules of importation (standards, licensing, valuations for customs purposes *etc.*) apply to most goods imported into Israel and the Palestinian Authority (PA). It further provides for free movement of industrial goods, free of any restrictions between Israel and the PA.

A variety of options were available, namely a free trade area, a customs union, a common market and separate markets. Of these, the customs union is indeed the preferable solution. It does not entail the burdensome, costly, and indeed impractical, administrative measures

Dr. Talia Einhorn is a Senior Lecturer-in-Law at The Israeli Centre for Academic Studies, affiliated with the University of Manchester. This article is based on her testimony prepared for the U.S. Joint Economic Committee of the United States Senate and the United State House of Representatives October 21, 1997 Hearing on the Economic Relations between Israel and the Palestinian Authority

needed to monitor the origin of goods in a free trade area. The need of the Palestinian economy to have access to an advanced economy may be satisfied. In the long run this is the most important factor for Palestinian economic development.

This conclusion is supported by the economic development of the West Bank and Gaza in past decades. When fragmented and disconnected as they were before the Israeli occupation in 1967, and as they have become again since the *Intifada*, they are stricken by poverty and economic distress. Thus, before 1967, the economy was underdeveloped; agriculture, the main economic activity, was carried out by primitive methods; and only one modern factory existed in the whole area of both territories. The labour force in Gaza was estimated at 19% of the total population, and in the West Bank - at less than 50% of the labour force. The closure and separation policy that followed the terror attacks that took place during the *Intifada* and following the signing of the Interim Agreement, made the four years 1992-1995 the worst in recent history. GNP *per capita* declined by 36% and unemployment again reached pre-1967 levels.

It was only through market integration that a positive change could be brought about. This is evidenced by the 20 years prior to the *Intifada*, which were characterized by the trade of Palestinian labour for Israeli goods. In 1987 almost 40% of the Palestinian labour force was employed in Israel, creating a significant improvement in the Palestinians' standard of living. Private consumption *per capita* rose at an overall rate of 5% *per annum*. There was an increase in birth rate, a decline in child mortality, and life

expectancy increased by a decade. Education developed significantly. Access to the Israeli market was of special importance to the Palestinians. From the Israeli point of view, the importance of the economic connection was much smaller, as the Palestinians comprised only 7% of the total labour force.

Currently, freedom of movement of persons cannot be upheld due to security reasons. This makes access to the Israeli market, through the creation of a customs union, the best possible option.

The Required Domestic Law Rules

The successful establishment of a customs union depends upon the implementation of an economic order based upon open markets and undistorted competition. However, attaining free trade requires not only cooperation on the international level, but also the implementation of domestic rules which make the authorities support the rules. Only through such rules are citizens free to enjoy their rights to pursue international trade activities. Whereas the establishment of a customs union is a matter of public law, its functioning has to be guaranteed by the commitment to private law rules of competition mandated by an open market economy. Private sector initiative requires legal rules that govern property rights, their transfer and the settlement of disputes. The rules should be transparent, stable and enforceable in a fair and efficient manner.

Upon taking office, Mr. Arafat reinstated the Egyptian law prevailing in the Gaza Strip before 1967 and the Jordanian law prevailing in the West Bank. The legal system in the West Bank is based

mostly on the continental system with Jordanian influence, whereas in Gaza it is based more on common law from the time of the British Mandate. In most business areas there are separate laws in force in each of these Territories. This makes the legal system unsatisfactory, complex, uncertain and leads to high transaction costs. There is need to enact laws regarding, *inter alia*, unfair competition, monopolistic and oligopolistic behaviour, safety, and consumer protection. Some of the areas for review and revision include the commercial code, company law, bankruptcy law, securities and intellectual property. According to the World Bank Report, the system of taxation lacks transparency and due process and is administered unevenly.

Economic activity and investment necessitate a strong, independent and effective judiciary. At present there is a lack of coordination between the two court systems in the West Bank and Gaza. The rules of procedure are antiquated. There is also no legal way to enforce the payment of debts owed by Palestinians. Debts incurred by public authorities to the Israeli public utilities companies may only be collected through deductions by the Israeli Government from payments due to the PA. As a result of the insufficiency of the legal system, Palestinians usually use mediation, informal arbitration, and self-help to enforce their rights. Foreigners face even greater difficulties.

The Need for Accountability and Transparency

The objectives of a customs union can be achieved only when supported by a legal system that ensures transparent rules, observed by private citizens and

public authorities alike. Mr. Arafat's style of governance has so far been characterized by lack of transparency and lack of accountability. According to a report of the Budget Committee of the Palestinian Legislative Council (May 1997), funds from foreign donors were channeled through personal accounts of Palestinian officials. Members of the Palestinian Legislative Council claimed that 37% of the PA's annual budget was wasted or misused by ministries during the past year, and that taxpayers' money was used for private purposes of ministers and officials.

As a precondition to accountability, the legal system must protect individual rights and subject its authorities to open criticism. In the Interim Agreement the parties pledged to "exercise their powers and responsibilities ... with due regard to internationally-accepted norms and principles of human rights and the rule of law". Human Rights Watch and Amnesty International have both been very critical of the PA's approach to human rights. Human Rights activists and journalists were arrested for criticizing the PA. Dr. Iyad al-Sarraj, the Commissioner of Human Rights, and Bassem Eid, head of the Jerusalem-based Palestinian Human Rights Monitoring Group, have been arrested and threatened to cease their activities. Daoud Kuttab, a well-known Palestinian journalist and broadcaster, winner of the 1996 International Press Freedom Award of the Committee to Protect Journalists, was arrested for broadcasting sessions of the Palestinian Legislative Council. A Palestinian human rights group charged that Mr. Arafat's security forces systematically tortured and mutilated detainees. It has also been charged that the Chief of the

Preventive Security Service has exercised censorship over the *Al-Quds* newspaper through almost daily contact with the managing editor, who seeks approval for all articles critical of the PA.

Curtailed freedom of expression and freedom of the press may allow the PA to create distortions that frustrate the very basic tenets of a free market and avoid public criticism, yet the defiance of accountability precludes a customs union from being viable.

Finally: Why is this Customs Union Different from all other Customs Unions?

The Economic Protocol has created a customs union, the objectives of which are frustrated by its own provisions. Two aspects are especially troublesome: the competition between the parties over import revenues and the absence of rules prohibiting unfair competition.

(1) The import revenues: a Palestinian-Israeli zero-sum game

The Protocol provides that the clearance of revenues from all import taxes and levies, between Israel and the PA, will be based on the principle of place of final destination. Tax revenues are allocated to the PA if the final destination **stated in the import documentation** is in the territories under PA jurisdiction. There is no need for the goods to be sold there. In fact, they need not reach their Palestinian destination at all. Following clearance by the customs authority, they may lawfully reach the Israeli market directly. If the import documents state a destination in Israel, Israel collects the customs and purchase tax.

This means that Israel and the PA are

competing for the revenues from imports. The gain of one is the immediate loss of the other. The method adopted by the European Community, when faced with the same problem, is instructive. Following the completion of the customs union in 1968, customs duties were designated as a source of Community revenue. This is logical since the goods are imported into the customs union rather than into any of its members. Whatever their port of entry, the goods are then in free circulation throughout the customs union. The import duties are transferred by the Member States to the Community budget, less 10% allowed to cover collection costs by the national administrative authorities.

Complaints that diversion of trade is in fact taking place have already been sounded by the Israeli Ministry of Trade and Industry, the Association of the Chambers of Commerce and the Association of Manufacturers. The US Embassy Economic Department in Israel has reported that, "both PA and GOI [Government of Israel] Ministry of Finance have revealed to us that statistics on customs and VAT clearances ... confirm the counter-intuitive conclusions...: imports [to the PA] are indeed on the rise in spite of the very real economic woes ... imports rose across the board in all categories ... except in building materials". This increase has taken place despite the repeated closures imposed on the Territories and despite the economic depression and a diminishing real GNP.

(2) The absence of rules regarding competition and its impact

(a) The need to prohibit anti-competitive practices

The second fault is due to the absence of any rules regarding competition. Agreements that provide for the free movement of goods must take into account the inseparability of "domestic" anti-competitive behaviour from international trade policy. Therefore, customs union agreements, and even free trade area agreements, include provisions prohibiting anti-competitive behaviour.

Being aware that Member States may insulate public undertakings from market forces, finance them out of taxes, protect them from domestic or foreign competition, and favour their interests over those of consumers, the EC Treaty provides that special and exclusive rights, granted by Member States to public undertakings, must be abolished if incompatible with the free movement of goods and services. EC law could thus develop a level playing field for private and public undertakings and implement an economic order based upon open markets and undistorted competition. Such provisions are missing from the Protocol.

(b) The regulation of distribution in the Palestinian Territories through "direct agents"

The impact of the absence of competition rules was soon learnt by Israel. The PA has set up its own agencies, or monopolies, to import goods from Israel as well as from third countries. Reportedly, more than 100 exclusive importing agencies have been created. These are controlled by persons with close contacts to the PA Chairman, some of them serving simultaneously as officials of the PA. The monopolies enhance the trade with Israeli and foreign manufacturers linked to them. Others have been excluded from the Palestinian market. Israeli importers have been

excluded altogether. Whereas goods imported by the monopolies are freely sold on the Israeli market, a *de facto* boycott exists on importation of goods, especially those subject to high import taxes, from Israel.

The structure of the monopolies, controlled by senior PA officials, enables the PA to share with them some of the tax revenues that it collects from Israel upon clearance of the goods. Some of the taxes may even be passed on to the Israeli consumer, thus giving these imports a competitive edge. Independent Palestinian entrepreneurs lost a substantial share of their Palestinian market. Furthermore, The PA-controlled monopolies have served to transfer income from the poorer classes to a new economic class, causing a substantial rise in prices, more significant in Gaza than in the West Bank due to the tight closure there.

According to an IMF Report (February 1997), the PA has undertaken to dismantle import monopolies by the end of 1998, and to bring all revenues and expenditures, including revenues from PA commercial activities (particularly import monopolies) under the control of the Ministry of Finance by March 1, 1997. According to that report about one-fourth of domestic revenues were being diverted to accounts outside the Ministry of Finance.

Peace Through Trade: Conditions For a Viable Customs Union

The Economic Protocol was a step in the right direction on the road to peace. In creating a customs union it made the best institutional choice of the available options. Unfortunately, the results have been disappointing. A main obstacle has

been the deterioration of the state of security after the signing of the Agreement, manifesting the interdependence between economic cooperation and peaceful coexistence. Apart from the overriding security aspects, other obstacles exist. The Interim Agreement did not provide the conditions necessary for a rule-oriented customs union. A mode of sharing the revenues from imports has to be determined rather than have Israel and the Palestinians compete for them. The monopolies must likewise be dismantled and State intervention in the economy minimized.

A legal environment has to be created that will support a private sector operating in an undistorted market. There is a need for legal rules that govern commercial transactions and the settlement of disputes. The rules should be transparent, ascertainable and enforceable in a fair and efficient manner. Anti-competitive behaviour should be forbidden. The objectives of a customs union can be achieved only when the legal system is observed by private persons and public authorities alike. This requires a system that protects individual rights and subjects its authorities to open criticism.

In the absence of any of the above conditions, Israel and the Palestinians may feel obliged to separate their economies. The results of such a separation would be bad for all. On the other hand, the agreements already entered into have opened the way to a better future. Should the necessary rules be made and the parties truly committed to peaceful coexistence, then it would be exciting to know that good economics combined with an appropriate legal order could contribute to the peace process and - so it must be hoped - to the success of peace. ■

Sedition and the Stability of the Democratic Regime

Criminal Appeal 6696/96

Benjamin Kahana v. State of Israel

Before President Aharon Barak, Justice Eliezer Goldberg and Justice Eliahu Matza

Judgement given on 2.3.1998

Precis

This case concerned allegations of sedition brought against the Appellant in relation to a flyer held and disseminated by the Appellant during an election campaign, in which he called upon the Government of Israel to bomb Arab villages in retaliation for terrorist attacks against Israeli citizens. The Supreme Court by a majority (Justice Matza dissenting) upheld the Appellant's appeal against the decision of the District Court of Jerusalem, overturning the decision of the Magistrate's Court of Jerusalem to acquit the Appellant of sedition, and restored his acquittal. Following are the highlights of Justice Goldberg's judgment, and some of the points raised in the dissent and in Justice Barak's opinion. Justice Barak agreed with Justice Goldberg's conclusion on the basis of his own analysis of the relevant sections of the Penal Law - 1977.

Justice Eliezer Goldberg:

The Facts

The "*Kahana Chai*" Movement wished to participate in the elections to the thirteenth *Knesset*, however, its candidates list was invalidated. Prior to the list being invalidated, the Movement engaged in an election campaign, during the course of which the Appellant disseminated a flyer, stating as follows:

"Bomb Um el-Fahm! Why, when Arabs came from Um el-Fahm and slaughtered three soldiers - did the Government order the bombing of the Hizbullah in Lebanon instead of bombing the Um el-Fahm hornet's nest!

Why, every time a Jew is murdered, is Lebanon shelled and not the hostile villages within the State of Israel?

For every attack in Israel - bomb an Arab village - a nest of

murderers in the State of Israel!

Only Kahana Chai has the courage to tell the truth!

Give Kahana power, he will deal with them".

The Appellant was charged with seditious acts, an offence under Section 133 of the Penal Law - 1977 ("the Law") and seditious publications, contrary to Section 134(c) of the Law.

Section 133 states:

Any person who does or attempts to do or, or makes any preparations to do, or conspires with any person to do, any act with a seditious intention is liable to imprisonment for five years.

Section 134(c) states:

Any person who without lawful excuse is in possession of a publication of a seditious nature is liable to imprisonment for one year and the publication shall be forfeited.

Sedition is defined in **Section 136** of the law, as follows:

For the purposes of this article, 'sedition' means -

1. to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities, or
2. to incite or excite inhabitants of Israel to attempt to procure the alteration otherwise than by lawful means of any matter by law established, or
3. to raise discontentment or resentment amongst inhabitants of Israel, or
4. to promote feelings of ill-will and enmity between different sections of the population.

Magistrate's Court

The Magistrate's Court acquitted the Appellant of both offences. According to the judge, the offence under Section 133 is a "behavioural offence" and therefore it is not necessary that the act actually incite; it suffices that the act is capable of achieving that result. According to the judge, the section creates a criminal prohibition which tends to restrict the supreme prin-

ciple of freedom of expression. In order not to strangle every public and political debate which contains the seeds of strife between various sectors of the population “there is no option but to add an additional element, which is not expressly mentioned in the statutory sections, which will create a sort of ‘normative umbrella’ in relation to the aforesaid offences, namely, that these acts of sedition (set out in Section 136 of the Law) be acts which are capable of endangering the public peace in such a way as to also pose a risk to proper governmental order.”

The judge held that there was no near certainty that the flyer would lead to hostile acts between different sectors of the public. There was no evidence to show that the flyers were distributed among the Arab public; they were directed at the supporters of the Movement and contained a rhetorical question, *prima facie*, directed at the Government of Israel. According to the judge, the flyer did not incite the public to commit a breach of the peace, as the call to bomb Arab villages was directed at the Government and not at particular sectors of the public.

The judge also held that while the flyer was an extremist statement, and possibly incited to racism, this *per se* did not make its contents seditious.

The State appealed against the acquittal to the District Court.

The District Court

The District Court unanimously upheld the appeal.

According to the District Court the first three alternatives set out in Section 136 prohibit acts directed against the regime, *i.e.*, governmental authorities; whereas the fourth alternative, which is the one relevant to the case at hand, deals with a prohibition against injuring other sections of the population by reason of any distinction whatsoever: national, religious, ethnic, ideological, gender, *etc.*, regardless of any connection to injury to the Government. The Court held that the offence of sedition does not make the offence of racism under Section 144A superfluous, as the latter section is broader in terms of the extent of the prohibited acts. After analyzing the sections, the Court concluded that the purpose of the offence under Section 136(4) is, *inter alia* “to prevent injury to a national minority by means of racist acts which include incitement to racism, notwithstanding that the racist acts do not also include injury to the Government and proper governmental order.” Similarly, the purpose of Section 133 is to prohibit any act committed with the intention of causing enmity and strife against any particular sector of the population, by reason of any distinction, where in

the instant case the distinction is national. According to the Court’s interpretation of Section 136(4), the purpose of Section 133, is, therefore, to prohibit the commission of acts intended to incite to racism.

The District Court considered the relationship between the offence of sedition and freedom of expression which has to be protected by the Court, and also held that it is not enough that the publication has the potential to incite, a probabilities test must be met in combination with the appropriate mental element. The Court rejected the Magistrate Court’s test of ‘near certainty’ and said that ‘a reasonable certainty’ of injury was enough.

The District Court held that on the facts there was a reasonable likelihood that the distribution of the flyers would lead to incitement to racism. In terms of the mental element, the Appellant was aware of the racist character of the flyer, and the attempt to camouflage its racist contents by an indirect formulation, calling upon the Government to carry out retaliation, showed that the Appellant was aware of its racist character and was attempting to prevent his *Knesset* list from being invalidated on grounds of racism. Additionally, there was a near certainty that dissemination of the flyer would lead to strife based on nationalism. Strife was a natural consequence of distribution of the flyer and therefore this had to be presumed to be the intention of the Appellant.

As a result of the State’s appeal being upheld, the case was returned to the Magistrate’s Court which sentenced the Appellant to 16 months imprisonment, 12 of them suspended.

The Appellant appealed to the Supreme Court.

Principles of Interpretation in Criminal Law

Justice Goldberg held that principles of interpretation in criminal law require that where a number of interpretations conform to the purpose of the section, the interpretation which lessens the criminal liability of the accused must be preferred. The general purpose of criminal law, which establishes a set of specific prohibiting norms, is to protect the values essential to the proper functioning of society. This general purpose is achieved by setting limits on the freedom of the individual by means of a specific prohibiting norm. The protected social value is an aid to interpreting the criminal norm, as it expresses the purpose of the criminal prohibition. After identifying the value, it is then necessary to examine the extent of the protection which it is desired to confer upon it. The extent of the protection reflects judicial

policy, which balances the weight of the protected social value against the weight of the restricted freedom. The point at which the interests balance is not frozen, but may change with the times and in that way the compatibility of criminal law with the needs of society is guaranteed.

Locating the Protected Social Value in Sedition Offences

Prima facie, the offence of sedition is an offence of a political character. Literally, sedition means rising up against a governmental authority. In Cr.App. 745/85 *Nakash v. State of Israel* 40 (4) P.D. 78, the Court considered Section 2 of the Extradition Law - 1954, which enables the extradition of a person accused of a 'non-political offence'. In that case, the Court drew a distinction between 'pure political offences', namely, offences committed against the State and which generally do not contain elements of common criminal offences, such as sedition, treason and espionage, and 'relative political offences', where common criminal offences are so intertwined with political motives, that they take on a political character.

There are two dangers which can waylay the State. One is external (such as war), which may even endanger the continued existence of the State; the other is from home, which may undermine the governmental structure and harm its character. The offence of sedition is among the offences intended to prevent this danger.

In a democratic regime, such as Israel's, democracy is characterized first and foremost by structural arrangements which provide an institutional framework for making political and social decisions (*inter alia*, a representative government, which is elected in free elections which occur on a regular basis). Alongside this characteristic, there is a substantive-value characteristic, which includes basic values.

On the assumption that the offence of sedition is intended to protect the structural characteristic only, only actions aimed at dismantling the existing organizational framework, will pose a threat to democratic government in terms of this offence. If the protection afforded by the offence also relates to the substantive values, then threats against basic democratic values will also be threats against the democratic regime. The question, therefore, is, what is the characteristic protected by the offence of sedition, and which injury is it intended to prevent.

Unlike the Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation, which provide protection for the **values** of the State of Israel as a Jewish and **democratic** State,

the Penal Law does not state which of the two elements it is intended to protect.

Justice Goldberg concluded that legislative history supported the opinion that the offence of sedition is intended to protect the structure of the regime and not its values. Further, Section 136, defining sedition, does not define the abstract value protected by the offence, as this value is not included in the 'formal' elements of the offence, but is part of the 'spirit' of the criminal legislation.

Even Section 144(b) of the Law (incitement to racism), which is expressly intended to prevent a violation of basic values inherent to a democratic regime, allows an interpretation that self-defence of these values is different from the protected value entailed in the offence of sedition.

Relating the offence of sedition to one protected value, which is defined from the point of view of the ways of violating it, contributes to the clarification of the prohibiting norm, and is thereby compatible with the logic of the principle of legality. The claim that the basic values of the democratic regime, which are abstract values, are protected by means of the offence of sedition, turns the offence into a sort of 'framework offence', which is very nebulous; the law however, must be accessible (in terms of understanding it) and also certain (in the scope of its application).

Counsel for the State did not dispute that the offence of sedition is intended to protect the stability of the State, but stated that that stability is bound up with basic values (in particular, equality) which characterize the regime. Justice Goldberg held that the contention that every challenge to basic values, **necessarily** endangers the stability of a democratic regime, which upholds freedom of expression, is too far reaching. This extreme position is incompatible with the perception that "the test of truth does not lie in the governmental power accompanying it but in its internal power to persuade. The way to cope with lies is not by silencing them but by explanations and education. The failure of the lie comes through its exposure and not by suppressing it" (H.C.J. 399/85 *Kahana v. Managing Committee of the Broadcasting Authority* 41(3) P.D. 255). Similarly, this approach does not give proper weight to "the stabilizing social effect" of freedom of expression.

Justice Goldberg also rejected the more qualified contention that every call for different treatment based on the difference of a group (gender, religious or racist) **necessarily** endangers the stability of the regime. Such a call could indeed undermine

public order and cause dissatisfaction within a group which sees itself as injured, and even endanger the stability of the organizational framework; however, this is not inevitable, and depends on the stability of the organizational framework, and the extent to which the principle of equality has been embedded in society, and the depth of the social conflicts. A challenge to the principle of equality may be dealt with by specific offences (such as incitement to racism), and the offence of sedition need not necessarily be applied. Such an application is only justified where the violation of the principle of equality merges with harm to the stability of the regime.

Level of Protection Afforded to the Stability of the Regime

Granting absolute protection to the stability of the regime means an appreciable derogation from the freedom of action and freedom of expression of the individual. Accordingly, it is necessary to determine the “level of tolerance” of the public interest in the stability of the regime. The level of protection given is in adverse proportion to the strength of the regime. When the foundations of the regime are weak, the “level of tolerance” of the public interest in the stability of the regime is low, and *vice versa*. The “level of tolerance” at a given time is also a function of the weight of the freedom being restricted. A general restriction on an action will not be treated in the same way as a restriction on the freedom of expression. This principle also finds expression in the Penal Law, in so far as Section 133 provides for a general restriction of action, whereas Section 134 provides for a separate restriction on the freedom of speech. An offence under the latter section is narrower on a factual level than under Section 133 of the Law, and the publication is restricted to that which is ‘seditious in nature’, whereas Section 133 does not contain an express restriction relating to the nature of the behaviour. In contrast, the offence under Section 133 is narrower than Section 134 on a mental level, as it is dependent upon a special mental element, namely, the intention to commit sedition.

The Scope of the Offences

The Appellant was convicted of holding the flyers, an offence under Section 134(c) of the Law, and disseminating the flyers an offence under Section 133. Whereas possessing the flyers could appropriately be charged under Section 134(c), dissemination is not an offence under Section 133 - which does not include the act of publication, but comes more appropriately under Section

134(a): “Any person who publishes any words or prints or publishes or reproduces any publication of a seditious nature is liable to imprisonment...”. This distinction is not only necessary for legislative harmony but the elements of the offences provide the means for regulating its effect and distinguishing between prohibited general actions and prohibited speech.

Section 134 - Publication of Sedition

An offence under Section 134(a) contains two factual elements: the behavioural element ‘publication’, and the circumstantial element - ‘publication of a seditious nature’. The mental element is a criminal intent, *i.e.*, awareness of the physical nature of the behaviour and awareness of the circumstantial element.

Not every distribution amounts to publication, only publication “among people” does. The behavioural element is therefore limited to a publication having a public impact, and for this purpose it is irrelevant in which sector it is published. As to the circumstantial element, the publication must be such as to lead to “ill-will and enmity” between different sections of the public. As the structural stability of the democratic regime is the value being protected by the offence of sedition, Section 136(4) must be interpreted as referring to a publication which is likely to lead to a **deep** social rift between **broad** sectors of the population.

Differences of opinion on political or social matters, however sharp, are not caught in the net of sedition. Limitation of freedom of political action is what undermines the structure of the democratic regime (subject to the provisions of Section 7A of Basic Law: The *Knesset*).

Where a special mental element is required this narrows the factual requirements; however, this does not justify deviation from the principle that there is no offence without minimal danger to the public, and therefore it is not a **complete replacement** for objective danger.

The definition of objective danger may be established by a description of its characteristics or potential harm contained in it.

As a result of the determination relating to the high level of tolerance of the public interest in the stability of the regime, the ‘threshold’ must be raised in respect of measuring the potential harm of sedition. Thus, only a publication which has a real potential to cause disaffection will be prohibited. As the criminal proceeding takes place retroactively, and the publication is in the possession of the Court, the Court does not require external tests of probability and it may determine the potential harm in the publication for itself.

From the General to the Particular

In the instant case, the flyer slanders the Arab sector in Israel. However, there is a wide gap between this determination and holding that this infantile publication has a real potential to excite disaffection, *i.e.*, that it give rise to a real danger to the structure of the democratic regime. The baseless words of the flyer are not worthy of being accorded weight sufficient to pose a doubt as to the soundness of the democratic regime in Israel.

Accordingly Justice Goldberg upheld the appeal and acquitted the Appellant.

Justice Matza (dissenting):

Justice Matza disagreed with Justice Goldberg's view that the offence of an act of sedition under Section 133, does not apply to the publication of sedition. Instead he concluded that by holding and disseminating the flyers, the Appellant breached the prohibition on sedition under Section 133. Judge Matza did agree with Justice Goldberg's interpretation of the term 'publication likely to excite disaffection', underlying the offence in Section 134.

Following a very lengthy analysis of the sections of the Law and the nature of the values being protected, Justice Matza concluded that the Appellant had disseminated racist hate literature against the Arab sector in Israel. On the basis of its contents, it is true it was no more than "an infantile flyer", but Justice Matza feared that this was the usual nature of the contents of racist hate literature; as, had their writers and distributors possessed intellectual maturity and clarity of thought, they would not have written or distributed them. Justice Matza held that such malicious racist writing, however mediocre, injured the basic values of our society. They continuously aim to sew hatred and cause ill-will between Jews and Arabs, and undermine the basis of the social consensus on which our governmental regime is based. The prohibition on sedition, within the meaning of Section 136(4) of the Penal Law, is intended to protect the values of democracy against such injury. By his actions the Appellant committed the offences with which he was charged and accordingly Justice Matza would have dismissed the appeal and upheld the District Court's decision.

President Barak:

President Barak agreed with Justice Goldberg that the appeal had to be upheld. He did not, however, take any stand on the difference of opinion between Justice Goldberg and Justice Matza as to whether publications of sedition were covered by the

offence of an act of sedition, as in his opinion the Appellant should be acquitted of both offences.

Justice Barak held that not every publication, whatever its contents, accompanied by the requisite criminal intent, was sufficient to establish the factual element of the offence under Section 134(c). Only a publication which excited disaffection, in view of its context, satisfied the factual element. As to whether the disaffection would actually take place, a test of probabilities had to be adopted, namely, whether the matters published had sufficient weight to influence the creation of disaffection. Justice Barak analyzed the possible tests to be applied in balancing the values being protected by the offence and freedom of expression, and concluded that the test of "reasonable probability" was to be preferred to that of "near certainty" as the sedition was aimed at the democratic structure of the regime. Justice Barak was able to adopt this test because he was prepared to give a narrow construction of the term 'sedition', namely, danger to the regime injuring the stability of the regime (like Justice Goldberg) as opposed to the wider definition offered by Justice Matza.

In the instant case, Justice Barak held that the Appellant did not create a reasonable probability of exciting disaffection, nor did 'holding' the flyers lead to disaffection. Accordingly, he did not have to hold whether the publication was capable of exciting disaffection, although he supported the view taken in the Magistrate Court and by Justice Goldberg that sedition under Section 136(3) only occurs where "the dissatisfaction or ill-will among the residents of Israel... amounts to a danger to proper government order" and "danger to the stability of the legal and legitimate regime."

Justice Barak also took the opportunity to call upon the *Knesset* to consider repealing the offence of sedition, and replacing it with an offence more suitable to the regime in Israel. Justice Barak noted that the offence as currently drafted is too broad in scope, is undemocratic in nature (being more suitable to a Mandatory government) and does not give sufficient weight to freedom of expression.

Abstract prepared by Dr. Rahel Rimon, Adv.

Please Mark Your Calendar

**The 11th International Congress of Jewish Lawyers
and Jurists will be held in Jerusalem,
at the Hyatt Hotel**

December 28 - 30, 1998

On

**“Judaism, Humanism, Democracy
and Political Culture
Towards the 21st Century”**

**The Congress will be followed by an optional tour to the Dead Sea,
December 31, 1998 - January 3, 1999**

Tentative Programme

Keynote Address: “Israel: Fifty Years of Independence”

Public Trial: “The Limits of Political Expression”

Panels:

- **Pluralism, Religion and State**
- **Prosecuting Public Figures**
- **States' Responsibility Today for their Conduct During the Holocaust**
- **Privatization - A Comparative View - Israel and Other Countries**

Further information and detailed programme including registration fees will follow soon.