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PRESIDENT'S MESSAGE



I

n June 1998 our Association launched its project of commemorating Jewish lawyers and jurists who perished in the Holocaust and marking their contribution to the law of their countries, in an international conference held in Salonika, Greece, under the title "Remember Salonika".

One year later, in June 1999, members from 16 countries convened at the Federal Administrative Court in Berlin for another international conference under the title "Remember Berlin". This time the conference was held under the auspices of the Secretary General of the Council of Europe, who was represented by an envoy from the European Court of Human Rights.

For obvious reasons this conference was of special significance, in a city where close to 2,000 Jewish lawyers and jurists lived and worked in 1933. Their tragic fate during the Nazi regime was described in detail in a series of outstanding lectures,

and a memorial service was held at the abandoned railway station where those who had not escaped were loaded onto cattle trains and deported to various death camps.

We shall publish a full report of the Berlin conference in a special issue of *JUSTICE*.

But as we deal with the painful memories of our own past, 60 years later, we continue to be subjected to scenes of hundreds of thousands of men, women and children driven from their homes, this time in Kosovo, and we are appalled by daily revelations of mass graves which bear witness to terrible atrocities which can hardly be grasped by the normal mind.

And after visiting the sites of Jewish synagogues, which were burnt to the ground 60 years ago on one terrible night known as the *Kristal Nacht*, we learn that three Jewish synagogues were burnt in Sacramento, and precious books and documents have been reduced to ashes.

Keeping the memory alive is therefore not only a debt of honour to the dead; it is also a warning to the living. It is part of our commitment to bring about a better future by constantly combatting any form of evil.

In Israel we are witnessing a dramatic change in the political scene, after the May 17 elections. In a country mostly populated by immigrants from various countries and from different political cultures, solving internal conflicts has as prominent a place on the national agenda as attaining peace with Israel's neighbours. The completion of a workable constitution, the supremacy of secular law, the role of the courts, the relationship between secular and religious segments of society, all these are still subject to much controversy. The political system, which has been heavily criticized in the past, is reflected in a divided and sector-dominated legislature, comprising 15 parties. Most problems facing the new coalition government have legal and constitutional aspects which we shall follow closely in *JUSTICE*. In this issue we chose to address the matter of Israel's constitution, and we do so in an interview with a former Minister of Justice who has made the completion of the constitution his primary aim.

On a more personal note, I wish to send my condolences to Dan Pattir, Editor-in-Chief of *JUSTICE*, on the passing of his mother and hope that the birth of his granddaughter will serve to ease his loss.

Hadassa Ben-Zur

“Zionism and democracy are the only way to rule the country”

Conversation with Dan Meridor

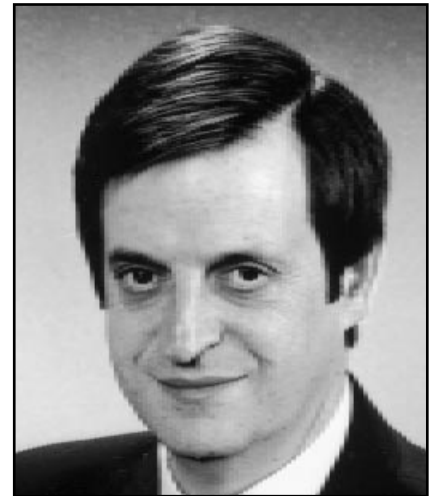
JUSTICE - In your former position as Minister of Justice you were heavily involved in the enactment of the Basic Laws which will eventually make up Israel's Constitution; how does this legislation stand today?

Meridor - When the State of Israel was established 51 years ago, a decision was made by Ben-Gurion not to enact a Constitution, as would have been most natural and simple, and as all States do. This decision was taken for a variety of reasons, one of which may have been the tension between religion and State, and another - the reluctance of Ben-Gurion to come under the supervision or control of anybody else. He also thought that Britain should be the country on which Israel should model itself, without a written document.

In any event, the decision was taken to legislate, one by one, chapters of the Constitution to be named Basic Laws, similar to the German *Grundgesetz*. Over 40 years, from 1949 to 1992, nine Basic Laws were legislated, practically all of which dealt with the institutions of the State. These were: Basic Law: The President; Basic Law: The Judiciary; Basic Law: The *Knesset*; Basic Law: The Government; Basic Law: The Army; Basic Law: Economy of the State; Basic Law: The State Comptroller; Basic Law: Israel Lands and Basic Law: Jerusalem.

One thing was not done. There was no Basic Law dealing with human rights. All the Basic Laws dealt with the State, none with the person. To me this is not only ridiculous but even shameful; after all the heart of every Constitution should be the individual, the person, the citizen, for whom the State is established. Not that we were not a democracy and that human rights were not maintained in Israel, but it was not because of the *Knesset's*

active role - it was in spite of the *Knesset's* passive role. The Supreme Court came in and by a series of very important decisions along the years, in a judicial way enacted human rights in Israel. This should be the role of the *Knesset*. But



some members of the *Knesset*, in the last 10-20 years, especially religious MKs, refrained from dealing with constitutional human rights for a variety of reasons. Some argued that if we have a Constitution, it is only the *Torah*; others claimed that human rights, as they perceived them, contradict various basic commandments of Judaism. To me, this is not only not true but even an offence against Judaism, portraying it as an anti-human rights religion, which is not the case. Others in the religious camp and outside it also rejected the Supreme Court as the interpreter of those rights.

JUSTICE - How did you deal with this attitude?

Meridor - When I came in as Minister of Justice in 1988, I thought it was very important to finalize the Israeli Constitution by enacting the outstanding Basic Laws. Two were missing: human rights - the core of the Constitution, and legislation - *i.e.*, the framework in which all the Basic Laws are put together, where it is said how you enact a Basic Law, how you enact a

Dan Meridor, Member of Knesset since 1984, Cabinet Secretary (1982-1984), Minister of Justice (1988-1992), and Minister of Finance (1996-1997).

regular law, the relationship between them, and that a regular law cannot contradict a Basic Law; all the normative structure of the Basic Laws, laws and regulations. In addition, it will provide that the Supreme Court is the Court to be given the authority of judicial review over the laws of the *Knesset* in the event of infringement of Basic Laws. In very intensive work in the Ministry of Justice between 1989-90, we prepared those two laws and almost got them through the Government. I held 17 meetings of the Ministerial Committee for Legislation (the Committee which discusses and approves Government proposals of legislation to the *Knesset*). There we discussed a Basic Law for human rights and almost concluded it, although some questions remained outstanding. We had a National Unity Government in those days, so we could have passed the legislation despite objections put by the ultra-Orthodox parties. But then Mr. Shimon Peres attempted to topple the Government and bring about a government with the Orthodox *Shas* Party in what Rabin termed the "Stinking Trick". The trick did not work, the Government did fall but Prime Minister Yitzhak Shamir was able to form a new Government without the Labor Party. The important point is that in forming this narrow Government, we were not free to go all the way in respect of the Constitution. The ultra-Orthodox parties on whom we relied for a majority refused, and the process became stuck in 1990. Nonetheless, in cooperation with myself as Minister of Justice, Amnon Rubinstein then of the Shinui Party, took my bill and presented it in the *Knesset*. It passed the first reading with my consent, but then again became stuck. Again with my agreement, he divided it into four pieces of legislation, two of them we were able to pass through the *Knesset*, and that was how in March 1992, the first and so far only two Basic Laws dealing with human rights in Israel (Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation) were enacted.

This legislation listed certain human rights to be protected by the Constitution. We could not get other rights through because of the religious parties, e.g., equality, freedom of speech, freedom of association, freedom of demonstration and freedom of religion or conscience. Nevertheless, a considerable number of basic rights have been constitutionalized, and in fact we revolutionized the Israeli system, by what we called then the "Constitutional Revolution". We allowed the Supreme Court, at least implicitly, to have judicial review over *Knesset* legislation regarding human rights. Previously, it had not been clear that they had this right, in fact it was almost clear that they did not, although in the *Bergman case* in the 60's, the Supreme Court

decided that a law which contradicted a Basic Law was not to be acted upon unless it was enacted with the required special majority. Now, however, we gave the Supreme Court the right to supervise over the *Knesset* legislation in cases of infringement of these basic human rights, if the infringement is done otherwise than for a good cause and in a proportionate way, *i.e.*, proportionate to the interests which are being protected and the infringement being embarked upon. So this was really a revolution, but it was not complete.

JUSTICE - In fact hasn't there only been one case where the Supreme Court made use of this power of judicial review?

Meridor - There has been one case where the law was declared to be unconstitutional. It was not a very important law relating to analysts advising on an investment, but there was a decision in principle that the Court has this right of judicial review in the *Bank Hamizrachi case*. It was not the *ratio decidendi* of the decision but it was an *obiter dictum* given very heavy weight by almost all the judges there and all but one agreed that they had this right, like the *Marlbury v. Maddison* decision by the American Supreme Court in the beginning of the 19th Century.

JUSTICE - What is the effect of the Constitution being incomplete?

Meridor - The Supreme Court has been put in a very difficult position if a case comes before it and it has to decide whether a law to be enacted contradicts a Basic Law. For example, it has to decide whether the term "human dignity" which is now protected by the Israeli law should be construed as relating to equality as well. Can there be human dignity without equality? Should not this question be the province of the *Knesset*? Why leave it to the Supreme Court? If the Supreme Court does involve itself in these issues it is attacked, on the grounds of being over-active. Another question is whether freedom of speech is part of "human dignity"? Can there be human dignity without freedom to say what one thinks? The Supreme Court is put in the very difficult position of having to imply in a very smart way - but for some people in a very controversial way - basic rights which should be enacted by the Parliament.

Secondly, on the merits, I think Israel is now at the stage where the nature of this regime, the culture of the country, and the basic values on which it is based, are being questioned. I

could not have imagined 10, 20, or 30 years ago anybody saying that equality may perhaps not be part of our basic values. Today, some people are saying that men and women may not be equal. It is time to make a decision. Equality before the law is part of our judicial system, part of our legal system, and part of our culture.

JUSTICE - The approach of President Barak so far has been to declare that most issues fall within the definition of "human dignity", isn't this enough?

Meridor - Yes, he takes this approach and a few judges follow him and I agree with him entirely, but I do not think we should leave it to the Supreme Court to do this. They will be attacked by those who object, asking who authorized them and why, if the *Knesset* did not enact these definitions, the Supreme Court should do so instead. I think it is time; it is the role of the *Knesset* to enact.

JUSTICE - So would you say that President Barak is intervening too much?

Meridor - No, I think his interventions are right. Sometimes I would intervene even more than he does. There were cases where he refrained from intervening where I would have intervened, such as in the case of the deportation of hundreds of *Hamas* members to Lebanon which was completely illegal. Had I sat in that Court I would not have refrained from interfering and stopping the deportation. Unfortunately, a Court of 7 judges refused to interfere, I think it was a mistake.

JUSTICE - How do you think human rights legislation can resolve the conflicts in Israeli society today?

Meridor - Israeli society is now at a crossroads where the basic values of the country are at public debate and principles that had been agreed upon by almost everybody in Israel except for a very few fringe groups - such as democracy, equality before the law, freedom of speech, all of which are basic values that you see in every Western Constitution and are kept in every Western country, including Israel - are being questioned by people who say that these values contradict in some way our Jewishness. This is not how I see Judaism. I think it is time to make up our minds and make it in a legislative way in a Constitution. Secondly, a Constitution is the basic document

where the rules of the game are set and learned. What has happened in Israel in recent years is that groups growing in numbers have refused to accept the rules of the game and how decisions are made. They have not argued only the merits of the issues, for or against a particular policy - which would be fine. They have questioned the legitimacy of the decision.

After the Oslo Agreement was signed, and I was one of those who opposed the Agreement, there were people who said that not only was the Oslo Agreement bad - which is a legitimate criticism - but that it was not legitimate. It was 'illegitimate' for two reasons. The primary reason was that there was no Jewish majority - a term which had it been used in any other country, against Jews, would be described as anti-Semitic and racist. Here it was used as if an MK who is not Jewish cannot vote, or his vote counts less, or a Jewish MK's vote counts more - regardless, by the way, whether Druze or Bedouin MKs serve in the Army while some Jews do not, which shows how absurd the argument is. I do not speak of the racist angle of the argument which is abhorrent. I speak of the acceptance of the decision making process. If a decision made this way is not legitimate, then the Army should not follow it, nor should anybody else and society can no longer be held together. This was the reason given by the murderer who took a pistol and killed Rabin, because Rabin had done something which to the killer was not legitimate, and if it was not legitimate - why not stop it?

There is a second argument which is even more worrying and difficult. Some people argued that decisions cannot be made on the boundaries of Israel, because it is against the *Torah*; the *Torah* gave us the Land of Israel and no government regardless of the majority, Jewish or non-Jewish, can detract from it. The result is that you take outside the realm of democracy very political issues like borders, war and peace and assert that it is not a matter for the *Knesset* to vote on, but we must go to the *Halacha* to find an answer; a fundamentalist approach.

It is true that the law or the *Knesset* cannot decide whether one should eat Kosher or lay *tfillin* - but to take from the voters and from their representatives the right to decide on borders, peace, *etc.* is dangerous, not only on the merits of the decision to be made but also in terms of the legitimacy issue. Where a decision made this way is not regarded as legitimate by some people, they may say it should not be followed, and even that it should be stopped by force.

I think that it is time that the rules of the game, who votes, how one votes, and how decisions are made - became part of the Israeli Constitution, a document that everybody adheres to.

These two issues - values and rules - have surfaced now, and should be decided and the Constitution is the right framework, teaching people that democracy is on one hand the rule of the majority, and on the other hand that there are limits on the majority's right to interfere with the individual's life or with minority groups; that there are some areas upon which the majority cannot infringe, those inalienable human rights of which the American Declaration of Independence speaks. People should be educated on this document. The constitutional, legal, political and social elements all play here in our society and it is important that they are put in order. This is the reason we made finalizing the Constitution part of our campaign in the Party of the Center - as did some other parties. Whether we will be able to do it or not is another question because in the coalition now being formed Barak may need those parties which object to the Constitution.

JUSTICE - Don't you think the Constitution should reflect the fact that Israel is a Jewish State?

Meridor - Yes it is a Jewish State but you embark here on a very unique and interesting issue. Israel is a Jewish State so it is said in the Declaration of Independence of Israel, so it was said in the U.N. decision of 29 November 1947, that decided on an Arab State and a Jewish State. What it means to be a Jewish State is a question open to discussion. It is not a Jewish State in the sense that the men of Israel have to wear a *kippah*, or that we all have to abide by the religious laws; and it is not a Jewish State in the sense that the Arabs who live here are not full citizens. To me it is basic that Israel is the State of all its citizens, not only the Jewish citizens. It is not a Jewish State in the sense that the law is not made by the people of Israel but by the Jewish institutions somewhere, somehow. It is a Jewish State in other terms, like Morocco is an Arab State, although Jews live there and are part of Moroccan society. Morocco is an Arab State because the culture of the majority is the culture of the country, more or less.

JUSTICE - But doesn't that reduce the question to one of demographics? What will happen if the Arab population of Israel grows compared to the Jewish population?

Meridor - Then we will have failed. There will be no Jewish State.

JUSTICE - Isn't the law a way of preserving the identity of the Jewish State?

Meridor - No. It is very important that we have and develop our Jewish identity in the State of Israel. This is one of the most exciting challenges of our time. But the law is not the primary means for that. We should do it through our culture, our education and the way we lead our life as an independent Jewish State in a free and modern society. We are forming here and now the modern independent Jew, drawing on our heritage and history and on modern Western culture. The law cannot preserve the majority. You had that situation in South Africa.

But we are not a minority. Zionism made it a goal to have a Jewish majority in the Land of Israel. Why? Because Zionism and democracy are the only way to rule the country. The Land of Israel, as we Zionists see it, belonged to the people of Israel all those years even though we weren't here, but to rule here we need a majority. The land might have been ours but we could not rule it because we were too few people. So the way to build a Jewish State was to bring enough Jews so as to become a majority and we became a majority in 1948 and the majority grew quite substantially. Today we have about 80% Jews in this country. This is a vast majority and I do not see a danger to this majority in the foreseeable future, maybe not at all. *Aliyah* is coming and if the standard of living of the Arabs and Jews come close to each other, the birth rate of the Arab community will go down as it has already done among the Christian Arabs. I think in the long run we will have a country which is substantially Jewish in its population but will have an Arab minority of 20%, maybe less maybe more. Their rights should be preserved in what is a very democratic State. We will not say that as we are Jews we will be the only ones to govern this country or that we have certain rights as persons that the Arabs do not have.

JUSTICE - In what sense then do you regard Israel as unique?

Meridor - One element, for example, is the Law of Return - which states that Jews all over the world have the right to come to the Land of Israel. This right preceded the State of Israel. Jews have the right to this land and therefore they can come here. True, Jews can come here and not others; others can come as ordinary persons and apply for citizenship. But once here, all are totally equal - Jews and non-Jews alike. We have certain phenomena that we want to maintain which have a Jewish aspect

to them e.g. eating only Kosher food in the Israeli Army. Is that compulsion? I do not think so. It is a way to live together. Nobody is forced to eat what he does not want to eat - but people are allowed to eat together. Or, the official rest day is Saturday - why? Because this is a Jewish State, but Moslems and Christians can still rest on their days. We lead here a full Jewish life, because we are the majority. This does not necessitate legal coercion. There are certain elements where the Jewishness of the State is important and even has legal effect, but they are minimal and do not relate to the every day life of people. The fact that we are Jews has a lot to do with the education system and with our values but an almost autonomic education system exists for the non-Jews, for the Arabs, where they do not have to learn Bialik and Czernichovsky, Bible and *Talmud*. They have their own culture which is fine with us.

So we are a Jewish State and a democratic State and to call for human rights and equality and freedom of expression is not only very democratic. It is very Jewish. We are now being tested by history or by divine providence or by our own morality. For many years, all over the Diaspora, Jews were the predominant champions of human rights. Everywhere, Jews were in human rights movements. It serves your own interests to be a human rights champion when you are in the minority. The real test of your approach to human rights is when you are in the majority and the minority is among you. How do you treat them? Do you treat them the way you were treated? Or do you treat them the way you wanted to be treated when you were a minority in the Diaspora. To me this is a big test. So when I speak of Western Democratic values such as freedom and equality before the law and non-discrimination, it is because I am Jewish. It is a test of me as a Jew. I think we have done quite well but there is more that we should do in enacting this basic maxim of every civil society which says that all people are created equal.

JUSTICE - How do you see the relationship between Israel's Declaration of Independence and the Constitution?

Meridor - It is referred to already in the two human rights Basic Laws which were passed in a later amendment in 1993-94. The first paragraph in my proposal provided that human rights should be respected with regard to the principles of the Declaration of Independence, and we were able to introduce this paragraph into the Basic Laws. This is the first time that the Declaration of Independence has been put into legislation on a constitutional level. The basic principles which were very demo-

cratic for a Jewish State in those days, listed in the Declaration of Independence, will become part of the Constitution. It will not only serve as an interpretive document as it was until now but as a binding principle against which the *Knesset* cannot enact. I think that it is about time 51 years after the State of Israel was established that we finally have a Constitution.

We may have been the last State on earth that still acted as if Parliament was omnipotent. Britain was another example - but first, Britain has a years-old tradition that some things are never done, whereas here some people think that they can do them; second, the basic values I spoke of earlier such as equality before the law and freedom of speech are so embedded in the tradition of Britain that nobody would ever think to legislate against them; third, Britain is now under the European Human Rights Court of Strasburg, and is therefore bound to some higher authority; and fourth, even Britain is now in the process of enacting human rights laws.

The rest of the world too has its basic documents. Something above the majority. The majority is not justification for everything. There are some basic values of human rights, of rights of the individual, which the majority cannot infringe, at least unless there is a very good reason for doing so. Also, another body - not just the present passing majority - from the outside should have the right to decide if the human rights are being infringed in an improper way. This is the role of the Supreme Court.

We are at a crossroads in our history when these things should be finalized and become part of our public conscience, public education, and public discourse. I do not think this is a panacea for all the ills of Israeli society. I have seen wonderful Constitutions in the Soviet Union and other places as well and I think that, in addition to the Constitution, we need to act in other ways too. The Constitution is important but it is not sufficient. It is necessary to create a society which is more solid, where people will have to adhere to the rules that are contained in the Constitution.

JUSTICE - What are the prospects of it being completed during the term of the 15th Knesset?

Meridor - I would be reluctant to give a precise time table. I thought it could be done. I thought that had Ehud Barak and the One Israel Party insisted on it the result would have been that most of those who objected would have agreed and tried to influence the contents. This was the case when we passed the two Basic Laws in 1992. *Shas*, *Agudat Yisrael* and the National

Religious Party voted for them. They did not like it at first, but when they saw that I was determined to go ahead, they chose to join in and try to influence - and they had some influence. We compromised on many issues and we still need a compromise. We are not going to try and impose a Constitution by 51% against 49%. We need a strong majority and I think there is a strong majority, despite the objections of some groups. But we do need to get these groups on board and convince as many as possible to play a part in forming this Constitution. I am not sure that it has been put that toughly in the coalition negotiations by the Labor Party. This is why it may take longer and if a Constitution is not made a first or second priority of the new government, it may be more difficult to proceed. We need people to go on fighting for it and they will look for the right time and the right spirit to finalize it. If it can be done during this *Knesset* - which I hope it will - I shall be very happy, if not we will have to fight on.

JUSTICE - Completion of the Constitution has historically been the victim of political compromises, so what we need is political stability in terms of the electoral law. What can be done to reform that law?

Meridor - I think the change to the law which was enacted in 1991-92 and which was first implemented in 1996 and now 1999, was a very bad change. We created a system which does not exist anywhere else in the world, whereby the Prime Minister is elected directly but still needs a coalition. We did not go all the way to the American system and introduce a President elected directly, who is the executive branch. We remained with the government which is the executive branch. The Prime Minister has no right to act on his own, he is part of a group. But he is elected separately. This gave the Israeli electorate the option to vote separately, once for a Prime Minister and at the same time for a different party. The result is that the small parties became bigger the big parties became smaller. It reached the abyss which we are in now in 1999 when there are no big parties in Israel at all. There are three medium sized parties - Labor, *Likud* and *Shas* - and 12 small parties from *Meretz* down to *Balad*. This makes life very difficult for those who are to run the country. I know, having been in the recent government as Minister of Finance, where I passed the budget and had seven parties in my coalition. Every party fights for its own agenda, its own sector of the population and many do not care about the rest.

This is part of the fragmentation of Israeli society which is being enhanced. For example, there are now 42 MKs who were elected on an ethnic ticket - 10 Arabs and 32 Jews. Less than two decades ago not even one Jewish party was so sectoral-ethnic. In the 1950's Begin created the *Herut* party which was quite a successful attempt to create an all-Israeli party in which both *Sephardim* and *Ashkenazim*, religious and secular, could feel at home. Hundreds of thousands of people have now left this all-Israeli party for an ethnic party. The all-Israeli party had democratic mechanisms such as primaries, today the Rabbis decide.

A major crisis is occurring in Israeli society, it is being torn apart as many of the small parties say that they only represent their own people and do not care about the rest. A country which still has heavy national challenges facing it, whose Parliament is divided by parties each of which only cares about its own constituency, will find it very difficult to function. I would therefore amend the law again, and go back to what we used to have with some corrections and basically have a Parliamentary system where the Parliament is directly elected by the people, and the Parliament chooses the Prime Minister.

JUSTICE - Would you like to see elections on a national basis or with constituencies?

Meridor - A national system is fine. We are a very small country and I do not think the interests of people living in Jerusalem are very different from those of people living in Tel Aviv or that those living in Be'er Sheba have different views on war and peace, which is still the main issue, to those in Kiryat Shemona. But this is not the main issue. You cannot rule a country in a democratic way in the modern world, when you have direct democracy. In the old Athens of the 5th century B.C.E., in the first democracy we think of - Pericles - people used to convene in the city square and all the citizens voted. The pace of decision making was very slow; there were few citizens. Then the number of people who had the right to vote expanded. Now millions vote, maybe once in 4 or 5 years and then rest, giving a person all the rights and having no checks and balances on him. All that power and the need to make difficult decisions very quickly during these years - is very dangerous. We need checks and balances. A person who is elected directly and does not care about the intermediary - call it Congress, Parliament, or the *Knesset* - has to deal only with his image, not the reality. When the British parliamentary parties elect the Prime Minister

they know him. When millions of people elect him they cannot know him, they know only his image, they know him through the press, so those elected by the masses, without any intermediary, are different people, they are people who invest a lot of time and money thinking about public relations, they have a whole industry of press officers, and image makers. In order to have real democracy the citizens must elect someone who will spend all his time sitting in the *Knesset* representing the people for four years and having the power to supervise or check the person elected as Prime Minister.

JUSTICE - Doesn't election through intermediaries promote corruption?

Meridor - Corruption can exist wherever you have government and power. Power tends to corrupt. You can have corrupt people in power whether they were elected or appointed, in any type of system, unless you have a system of checks and balances. People who are elected and re-elected every 4 years are tried by the public and if you have a good legal system and a good investigative system by the police and courage in the Attorney-General's office - you can fight corruption, but it has nothing to do with the system. A person who rules the country directly, and speaks directly to the masses, is not speaking to those who understand because they have learned. Most people do not have the time, they are given 2 or 3 second sound bites, the candidate creates a good impression and that is it. If the candidate has to talk to people in his party or in the *Knesset*, to people who understand and who have time, the rhetoric and the debate are conducted on a different level altogether. The direct style of leadership does not meet the needs of the modern world where people must be involved in power. Even if the President or Prime Minister have 4 or 5 years in power, people must elect them and supervise over them. Intermediaries are necessary and we have given up on the parties. We directly elect the Prime Minister and what then? So we have a system which is very complex because it is a combination of two systems that do not work together. I would go back to what we had and change it somewhat, for example, by raising the threshold which is the basic figure needed to get into the *Knesset* from 1.5% to 2 or 3%, or, provide that the party which gets the most votes will have its candidate for Prime Minister be the first one to try and form a government. This will give an incentive to people to vote for the big parties and not for the small parties, and thereby build a more stable system in Israel.

JUSTICE - Does this mean that you are also against referenda on the big issues?

Meridor - I cannot say that I am in all cases against referenda. I do not like referenda because one of two situations can arise: if the government loses the referendum - it should go home, if the referendum is against the government how can it follow a different policy to the one on which it was elected? whereas, if there is a majority - who needs the referendum?

JUSTICE - But referenda have been conducted throughout Europe, why not here?

Meridor - I think a referendum can be conducted on very important issues; for example, with regard to peace with Syria where Barak has promised a referendum - I am not against it, but to be frank, a question which requires a 'yes' or 'no' after the deal has already been done, is very different from saying what you think beforehand. The latter is done in the general election. But when you are faced with a done deal, it may be a bad deal but if the alternative is war - what can you do? I am not against referenda but I would not hold them in regular matters, only in very extreme cases. At the end of the day one has to be practical. If a government conducts a referendum and does not receive approval - what is the result? The government cannot follow a policy which is against its ideology.

JUSTICE - How would you answer those who say in relation to the Oslo process that surely a referendum would have been better than the anger in the streets, the tension and the demonstrations?

Meridor - If we had had a referendum we would have been faced with the same thing. The question that people raised, shamefully, saying the Arabs should not vote - would apply to a referendum as well. Who would have accepted the referendum? Those who said that only the Jews should vote would have said it again. So the problem would not have been solved. There is only one way to solve it, and that is to say simply that everybody votes, Jews and Arabs alike. If one says that only Jews should vote then one is no longer in a democracy, one is in the previous South Africa. Why should only Jews vote?

JUSTICE - Doesn't this go back to the question whether Israel

is a Jewish State and whether the Land of Israel is part of the definition of a Jewish State?

Meridor - Yes it is. The Land of Israel belonged to the Jews for thousands of years even before they came here. But we are not speaking of a moral right, we are speaking of a practical question: who rules the country. A democratic country is ruled by the people who live in it. This is basic. Otherwise, you are not a democratic society any more. If we did not have a Jewish majority that would be a failure of Zionism. Here there is a Jewish majority despite the Holocaust. If we lose this majority we do not have a Jewish State, it is very simple, but there is no way we shall lose it.

JUSTICE - *But aren't there two elements here, first that of the Jewish majority as you have explained, and second the concept of the people of Israel living in the Land of Israel, so that the question of land, and therefore borders, is part of the identity of the country?*

Meridor - This is true but Jews cannot decide this alone, and not all the Jews. Why should Jews in Denmark, America or Russia vote on this? That would not be a democratic situation. The right to the Land of Israel is not doubted by me even if the majority, Arab or Jewish, says otherwise. The right is something basic. To me, it is part of my understanding of the world, my beliefs, my understanding of history. Rights in that sense are not a question of voting. But when one has a State, borders and an Army, then one has to make a decision on top of that right. At other times in history King David and King Solomon also made decisions regarding the borders. And for example, the Golan Heights were never on the map drawn by Menachem Begin for the Land of Israel, nevertheless in 1981 he passed the Golan Heights Law. Is it right for the *Knesset* to pass such a law but not to repeal it if it would want to? Although I am not suggesting that it would. Of course it is for the *Knesset* to decide. Is it right for us to demand that the Arabs pay taxes, and even serve in the Army as some do, but not to vote, while some Jews do not pay taxes and do not serve in the Army but do vote? This is a democratic issue. Why should only Jews vote, and why only on the borders and not on other issues? Nobody has the right to rule unless they have a majority. That is Zionism, it is not the Messianic approach. The Messianic approach says you can rule by the word of God, but Zionism is different, it says you need a Jewish majority, and without it you cannot rule. The idea of

Zionism was to bring in as many Jews as possible; one more Jew than the Arabs and there would be a Jewish State. Now we have not one more, but 80% of the country. So this is how we rule - because we believe in the majority and that every person is created equal, Jew and non-Jew alike. It is the Jewish State, the State of Jewish people, and yet at the same time it belongs to all Israelis. If this is not also the State of the Israeli Arabs where is their State? We demand their allegiance, can we do this if the State is not theirs as well?

It is the State of all the citizens who live here and a Jewish State on a different level, and the combination of the two makes the unique Israel. Those Jews who live in the Diaspora and would not come to Israel cannot vote here. Those who live here, Jews and non-Jews alike, if they are citizens of the State, can vote here. We should not be different in this to any other nation. The victory of Zionism is that we have brought so many people here, and are a very solid majority.

JUSTICE - *In going back to the old system of voting with some amendments, how would you minimize the impact of sectoral voting?*

Meridor - There is no guarantee that we can do this, because sectoral voting stems not only from the political system or a certain electorate, but from a basic social crisis. The system today gives an incentive to having more sectoral parties, because one can vote on national issues for the Prime Minister and then turn to one's own separate group, religious, ethnic or other. I think this is wrong. I think that if we remove this incentive, and make people decide which is the more important - the national issue, e.g. the terms of peace, a certain economy or social approach, on one hand, or, voting for one's own ethnic group on the other hand - and if we let people have only one vote, they will group in bigger parties. I think this was proven in the results of the last two elections, and I think we should go back and change some of the mistakes. The old system too was not ideal, but the current one is bad. As we can see Barak was elected but he has no majority and will have to make many compromises. Under the old system in 1981, Begin received 48 seats in the *Knesset*, Peres 47 - together the two parties had 95 seats out of 120 in the *Knesset*; today, Labor and Likud together have 41 seats, a third of the *Knesset*. This is the result of the system which was changed. The decline started earlier but the system collapsed in 1996. We could have gone the whole route to the American system, I was not for it but it had its own logic,

however, to try to combine two systems that do not work together and do not synchronize with each other is a mistake.

JUSTICE - Returning to your comments on the Constitution - do you think the Supreme Court should act as the Constitutional Court or should a new Constitutional Court be created?

Meridor - I think the only Court we need is the Supreme Court of Israel. It is one of the best institutions we have. Looking at the three branches of government, and I have known all three closely, I have no doubt where the quality of people is higher and where decisions are made more on the merits. Why should this be disturbed? Secondly, we need a Supreme Court which is not political - and I think that we have one. I am against politicizing the Supreme Court for constitutional matters. The essence of the Constitution is that it will not be affected by a changing majority but it represents some basic deeper values. We want it to be able to act not just by the passing will of the people. The legal system should work by basic values, not by a changing majority or changing mood of the people.

JUSTICE - Then how do you see the demand for ethnic representation on the Constitutional Court?

Meridor - I do not think we need representation or what is called "reflection", in terms of the number of women on the bench or *Sepharadim* or *Ashkenazim* or anything else. I do not think it is right. We need the best people regardless of their origin. I think we have a Court which is very representative of Israeli society, we do not need the I.Q. spread of the people in the street, we want the higher ones to sit there. We do not need a "religious" judge or an "Arab" judge, we need the best we can get, and if among them there are religious or non-religious judges, Arabs, men or women, that is fine. If every part of society has the same quality, that will be reflected in the Court. I headed the Committee for the Selection of Judges for almost four years as Minister of Justice and I was a member of the Committee for another four years, and I know for myself that I never took into account these considerations. We had to put in the best people.

Even in the rare cases when the judges have to make value judgments, as for example in the US Supreme Court, on questions of abortion and the death penalty - they should look into the basic values of society as they look for other things in their

decision making process, and not impose their own values. This is what judges are trained for.

JUSTICE - But if the judge comes from a particular community won't he have a better understanding of the values of that community?

Meridor - Suppose a value judgment is required and it is influenced by the judge's background, his thinking, what then? Should the Court be a copy of the *Knesset*? We would not need a Supreme Court. I do not think that is right. What some of those people who object want, and not only the religious, is to keep alive the ability - when they are a minority - to manipulate the majority through coalition agreements: I'll vote for what I don't believe in if you vote for what you don't believe in. This is not the way judges should proceed, and if you have a Supreme Court which is reflective and do not have coalition agreements, the result is mostly what you have today.

JUSTICE - Perhaps on a practical level a Constitutional Court would draw some of the opposition away from the Supreme Court?

Meridor - I do not think the opposition is right at all and we should stand up against it. Why do people object? It is a recent phenomenon, it did not exist years ago. The Supreme Court was very active in the 1950s, take for example the *Kol Ha'am* case on freedom of speech, or in the late 1970s the *Elon Moreh* case on removing a settlement. Some people in Israel object not to the Supreme Court but to the values it represents, the democratic values of Western society, with a Jewish flavour to it, which I am all for. Some people do not accept these values. I do not think we should give up on that. This is the fight for the nature of Israeli culture and Israeli society. We should be a democratic society with human rights as central and with the individual as central to society. These are the values on which Israel was established and has acted for many years.

The 11th International Congress

In this issue of *JUSTICE* we continue to report on addresses given during the 11th International Congress of the Association on “Judaism, Humanism, Democracy and Political Culture Towards the 21st Century”, held in Jerusalem in December 1998. This time we present highlights of the Panel on ‘Prosecuting Public Figures’, which was chaired and moderated by Judge David G. Trager, U.S. District Court, Eastern District of New York. Speakers at the Panel were Advocate Edna Arbel, State Attorney of Israel; Mr. Floyd Abrams, Advocate, New York; Mr. Jonathan Goldberg, Q.C. Advocate, London; and Mr. Etienne Jaudel, Advocate, Paris.

“The criteria for accusing officials and other suspects must be equal”

Edna Arbel

This year Israel is celebrating its 50th anniversary, and we are proud of the development of the legal system during this time. We believe that Israel has achieved a well earned place in the family of modern and democratic States. In 1992, the *Knesset* enacted two Basic Laws, the first - the Law of Human Dignity and Liberty, the second - the Law of Freedom of Occupation. By the enactment of these two Basic Laws, our legal system has gone through an important change. These Basic Laws are founded on the fundamental collective principles and beliefs of the nation as reflected in our Declaration of Independence. They have exercised an effect on all branches of law. They also have a direct effect on the subject before us: the investigation and prosecution of public

figures. In the last few years the subject of criminal proceeding against public figures came to the center of public discussion, within and without the legal community. In this brief presentation I will examine the framework of the administrative and criminal law on this issue. I will discuss it in four stages: the first stage - a brief historical review of the subject; second - the decisions of the Supreme Court; third - the policy of the Attorney General; and fourth - the debate over the prosecution’s policy.

I will begin with a brief historical review. In the early years of the State, the executive had disproportional power in comparison to the parliament and the judiciary. The law enforcement authorities, headed by the Attorney General, faced from the very beginning difficulties in enforcing the law against prominent public figures. In the 1970’s, the prosecution authorities, headed by two Attorney Generals, the current President of the Supreme Court, Aharon Barak, and his predecessor, Justice Meir



Shamgar, demonstrated a notable level of persistence and consistency in enforcing the law on public officials, under difficult conditions and in the face of strong criticism. Several scandals relating to major political and economic figures resulted in criminal prosecution. For example - the *Ben-Zion case*, in which the Executive Director of Israel-Britannia Bank, was arrested and later prosecuted, convicted and sentenced to 14 years

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imprisonment for theft and fraud. Today it is less likely to happen. In another example, Michael Tsur, the executive director of a huge concern, "The Israel Company", and former Director General of the Ministry of Industry was sentenced to 15 years for similar offences. This growing trend of investigating and prosecuting public figures signaled to the nation that the political elite was equally subject to the rule of law.

What are the standards set by the Supreme Court? The prosecution kept acting professionally and independently of the political establishment. It has always been obliged only to the law and the precedents of the Supreme Court. In the early 1990's, the Supreme Court made a substantial breakthrough when it dealt with the mandatory suspension of high public officials, following an indictment. The Court held that a Minister, Mr. Deri, head of *Shas* party, and a Deputy Minister, Mr. Pinchasi, charged with offences of fraud or bribery, must be removed from office. This decision emphasized the importance of a clean-handed public administration which is necessary to assure the people's trust in the public authorities. These decisions and others establish the high normative standard for the leadership of the State. Moreover, the Supreme Court has held explicitly, that the norms imposed on public figures are stricter than those generally applied. On that basis, the Court justified harsher sentences for public figures. The Court stated that high ranking officials must serve as an example to other civil servants and to the public at large. The Court has not only condemned personal corruption, it has also condemned public corruption, from which a political party gains. The interest

of a political party, cannot be put above the law.

What is the policy of the prosecution regarding public figures? According to our legal system there are two criteria for issuing an indictment. The first is the existence of sufficient evidence; the second is the existence of public interest in the indictment. There are a growing number of cases in which the Supreme Court, sitting as the High Court of Justice, is asked to review decisions of the Attorney General. Only very rarely does the Supreme Court intervene in a decision of the Attorney General and the prosecution, not to prosecute due to lack of sufficient evidence. On the other hand, on the issue of public interest, the Court is somewhat more inclined to review the Attorney General's discretion. In the case of a Minister for Religious Affairs, Mr. Shaki, the High Court held that in principle there is always a public interest in prosecuting public figures for offences which were committed during the course of their duty. Therefore, the Court instructed the prosecution to issue an indictment whenever there is sufficient evidence of administrative corruption. The enforcement of the criminal law in such cases is necessary to defend the public interest effectively. For example, when a long time elapses from the time of the offence, this is a relevant consideration against prosecuting a suspect. However, when the suspect is a public figure, this consideration has much smaller weight. Therefore, in the case of the head of the banking system, the Court overruled the Attorney General's decision not to prosecute the bankers who were suspected of stock market manipulation felonies. The Supreme Court emphasized the importance of the role of

the prosecution in shaping appropriate standards of conduct.

What is the question the prosecution must ask itself when deciding to issue an indictment? The question with regard to the evidence is - whether there is a reasonable possibility for conviction. The principle was established in many cases and reconfirmed in the *Bar-On case*. In that case, senior members of the government, and other public figures, were suspected of breach of trust relating to the appointment of the Attorney General. The Attorney General and I decided that there was not enough evidence to indict most of the suspects in this affair. This decision was challenged in the High Court. The decision not to indict was upheld in this instance. There was a lot of criticism of our decision. In approving the decision on the basis of the principle of reasonable probability for conviction, the Court held that this same principle should be applied to public figures as well as to common people, since all are equal under the law. In the debate over the prosecution's policy in the public arena, and especially within the judicial community, criticism was raised against the prosecution, claiming that we are too harsh on public officials. This criticism followed several acquittals. These critics claim that not every misbehaviour justifies an indictment. They argue that there should be a special forum to deal with such behaviour, for example, a disciplinary court. Above all, they say, that we should adopt a stricter examination of the evidence, and have even more severe criteria in accusing public officials. One of their main arguments is that the damage caused to the public official is irreversible, even if the official has been acquitted. To that we respond: first, that

we believe that the criteria for accusing officials and any other suspects should be equal. Any person is damaged when being indicted in the criminal court, whatever the result might be. Second, in comparison to other offences in the penal law, the offence of breach of trust which often applies to public figures, is rather problematic. The borderline between ethical misconduct and a criminal offence is in many cases vague. The *Bar-On* case can fare as an example of that. This lack of clarity is caused by the vagueness of the element of the felony breach of trust. That is why, when we are convinced that this offence was committed, it is our duty to bring it before the Court. Third, these difficulties in such cases are intensified since the defendant has, in most cases, a very long and positive record of public service and

activity. Because of that, and due to the nature of the offences, the existence of the *mens rea* is sometimes doubted. So, it can be seen, that in most of the recent cases in which public figures have been acquitted, the prosecution succeeded in proving the factual elements of the offence. In these cases the defendants were acquitted since the judges had doubt as to the existence of *mens rea*. Even so, in most cases, the courts criticize the behaviour of the defendant. Furthermore, it is important to emphasize that the prosecution is very careful and cautious before charging anyone, including public officials. Complicated cases are examined by the District Attorney's office, and by the State Attorney's office. There is also a special rule that any indictment against a public official must be confirmed by the

Attorney General. In addition, public officials have the right to a hearing before the final decision made by the Attorney General. Moreover, the Attorney General and the prosecution's decision can be reviewed by the High Court of Justice.

In conclusion, no legal system can be expected to cure all ills of society. The tradition of honest government, culture and education, should also play a role in the struggle against corruption. However, the legal system has a major role in this struggle. The administrative case law emphasizes the need for incorruptibility and good faith in public administration, in order to assure the public's trust in the administrative authorities. The prosecution has a major role in enforcing the appropriate standards through the criminal law. Therefore, the prosecution has to steer its way using its professional knowledge and conscience, maintaining its independence. The struggle against political crime, and for an honest and corruption-free civil service, is a major public goal. We have to face our courts with honesty, integrity and good faith. Our principle aim, as always, is to assure appropriate norms and standards of public administration. When we come across corruption and have sufficient evidence, we will prosecute the suspects no matter who they are. This was our way throughout the years, and this will be our way in the days to come. We have to be guided by our professionalism, independence and impartiality. Only in this way may we gain the public's trust and safeguard the rule of law.



Recent archaeological excavations in the old city of Jerusalem

“The very British way of doing things”

Jonathan Goldberg

When I was asked to speak today on prosecuting public figures in the United Kingdom, I felt I was here in some respects on false pretenses, because there are very few British precedents of such prosecutions. And the question arises - why? It is not, I think, because we have no corruption. Nor is it, I think, because our public figures have not yet been caught, some of them have. Nor is it indeed, due solely to the undoubtedly high standards of British Public Service and the Civil Service. What I am going to suggest, and I am going to say this as a personal opinion, which is possibly controversial, is that the reason is: because there is a particularly British way of doing these things, which comes from historical reasons, it comes from the Empire, it comes from the British class system, and it comes from the fact that there is, and always has been, although less so today, an establishment ruling class in England. And whilst in theory, law is no respecter of persons, and all are equal before the law, to put it in the words of an English 17th century writer, “Be you never so high the

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law is above you” - there is a feeling in my country, that the public interest does not always demand a trial for the fallen leaders or public servants, even where there is evidence that they have committed crime.

I am going to suggest that although at first sight this is a wrong attitude, there is something to be said for it. I say that because a situation like the Clinton situation, that has made America in some ways the laughing stock of the world and has paralyzed the leadership of the world in recent months, could never happen in Britain, because the attitude would be - “there is no need to prosecute him, if he will go quietly”.

Let me speak in general terms of pros-

ecution in my country. First, there is an officially published test, whereby there has to be a 51% probability of conviction, before a prosecution can be brought. That is the test which is applied by the Crown Prosecution Service, which is the centralized body responsible for all criminal prosecutions in England. It is not as it is in Israel, a reasonable chance of success. It has to be a 51% likelihood of conviction before a prosecution will be brought. Additionally, it has to be noted that there is an enormous discretion in the prosecuting authority, whether or not to bring the charge. That has nothing to do with whether or not there is evidence. The fact that there is evidence is only the starting point. The prosecution discretion begins thereafter. It is often thought in my country that there are other and better ways of dealing with the problem. For example, resignation from office, sometimes falsely and diplomatically disguised as for reasons of ill health, or public shame and humiliation in other cases; or the loss of the office itself.

It should also be noted that in England, the decision of the Crown Prosecution Service, which is headed by the Director of Public Prosecutions, will not be judicially reviewed. The DPP, although a civil servant, is himself ultimately responsible to the Attorney General, who is himself responsible directly to Parliament, and always a Member of Parliament. The English courts will never judicially review the prosecuting decision of whether or not to bring charges. Unlike the situation in Israel, the English High Courts have never judicially reviewed such a discretion and have always refused to do so. This is because of the concept that it can often be in the best interest of the public not to pros-

ecute - to put an end to the matter in more diplomatic ways, some would criticize: "to put it under the carpet" or "put it to bed".

There are some examples where that has happened. An interesting place to begin may be a former Director of Public Prosecutions, Sir Allan Green, who unhappily, although a fine man and a much respected prosecutor, was curb-crawling. Extraordinarily, he was chasing prostitutes in the Kings Cross area of London. He resigned, of course, immediately, but he was not prosecuted. It is a minor criminal offense. I am told by those who know there was the evidence, had they chosen to prosecute him, yet I don't think anyone in England would say it was a wrong decision. He suffered enormous indignity, he lost his office, and even the press felt enough was enough.

Let me come to another recent example. We had a judge, Judge Gee, who was accused of a mortgage fraud. Before he became a judge, he was a practising solicitor; one of his clients had made fraudulent applications for loans from a number of different banks and building societies, and it was said the solicitor had assisted the client in this fraud. So this was a "skeleton in his cupboard" that came up to rattle its bones many years later. The judge was put on trial at the Old Bailey, the jury could not agree, after a long trial. This invariably means a re-trial in our system, before a new jury. But here a medical report was produced, which I think everybody takes with a pinch of salt, concerning the tension the judge was under. He made a deal whereby he resigned as a judge, some accommodation was reached about his pension and the State through the

Attorney General announced the decision not to cause him to be retried. There was a lot of press criticism of this decision. It was said, I think rightly, that had his name not been Judge Gee but had he been ordinary Mr. Smith, there would have been a re-trial. But once again, you can argue that enough is enough, that an example has been made by the shaming and public humiliation and loss of office, and it may not be necessary always to extract the last pound of flesh.

Let me take another example. Recently we had a Cabinet Minister, the Secretary for Wales, who went walking late at night on Clapham Common, a rather seedy area of London, much frequented by homosexuals, drug dealers and so forth. He accepted an invitation, as he claimed, to go home for dinner at the house of somebody he had just met on the Common, apparently a man. He was robbed of his wallet and even his car. At first, not surprisingly, he suggested that he had been the victim of a robbery with no sinister surrounding circumstances. Eventually the police exploded the full story, and he was so unlucky they literally caught the robber. The Minister resigned. Once again, there is an offence of wasting police time, which can be considered quite seriously by our courts. He was not prosecuted. There was not even any press criticism of the decision not to prosecute him for wasting police time, and I think everyone generally in the country thought enough is enough, and this was a proper method of using the prosecuting discretion.

More controversially, members of the Royal Family tend to drive their cars far too fast, and to be caught speeding, and many times they have not been prosecuted. Many would ask - why not? But I

think in general, it would be recognized in my country, that the Royal Family will be immune from prosecution for minor offences such as motoring offenses. There was an occasion where Princess Diana was given a parking ticket, and I think it is only the fact that a press photographer happened to be there and photographed it, that allowed that particular prosecution to go ahead.

Sometimes the British attitude has led to public disquiet, and what I think is, frankly, a miscarriage of justice. An example would be the Profumo scandal in the early 60's. The Minister for War, John Profumo, took up with Christine Keeler, a lady of easy virtue, who shared her favours with the Russian naval attache at the same time. Profumo lied to Parliament; he said he had no improper relationship with her, the truth was exploded by the press, he resigned as Minister for War. He was allowed to walk away into obscurity. But Christine Keeler was prosecuted, as was Stephan Ward, a doctor, who had been the procurer. Ward had introduced Christine Keeler to John Profumo, and he was prosecuted for living off immoral earnings, apparently money had changed hands. He committed suicide just before the jury verdict. This is generally recognized today, in my country, as a most appalling example of perversion of justice and class-justice and really persecution rather than prosecution. I would like to think that it could not happen again, and I do think things are moving in a better direction.

Another example is that of former Cabinet Minister, Jonathan Aitkin. He was the Minister in charge of Defence Procurement. The press, in a fine example of investigative journalism,

discovered that he had stayed at the Ritz Hotel in Paris when he was in office, and the bill had been paid by a Saudi arms dealer. Obviously this raised certain questions. He denied it. He said that the bill had been paid by his own wife in cash, and he brought a libel action against the *Guardian* newspaper, in the best British tradition exemplified by Oscar Wilde as a particularly British phenomenon, in which public figures are guilty of the act, but nonetheless bring libel actions in the hope of getting away with it, and sometimes they succeed. But happily not on this occasion. The story was exploded in court, Aitkin had even caused his own wife and daughter to give affidavits of false evidence. He has now been prosecuted for perjury, and his trial is awaited (*note*: Aitkin was recently sentenced to 18 months prison at the Old

Bailey for perjury). But I cannot help feeling that he is a man who has brought prosecution upon himself, by his incredible arrogance. I have a feeling that if he had walked away quietly, nothing more would have been heard.

I personally, prefer the American or the Israeli attitude, which seems to be genuinely: "all men must be treated equally, however high", and they must all be pursued vigorously. In Israel and in America, there seems to be no limit to the vigor with which a prosecution is conducted of public figures. The problem in my country comes at the point of deciding whether to prosecute. One step before the court door, everybody is undoubtedly treated equally, especially in a system of criminal trial by jury. But the problem comes at the point of the decision to prosecute, where there is no

judicial review. It can be said that there is an element of hypocrisy and even of class-justice, historically, in the British attitude. But, equally it can be said that this very British way of doing things, would not lead to the sort of situation we have seen recently in America, and that may be in the public interest. I think things are moving in the right direction. The press, for example, was very angry at the decision not to put Judge Gee on a re-trial, and I do not want to paint too black a picture. But there are cultural differences, which may account for the fact that I cannot give you any very good hard examples of public officers who have been prosecuted for corruption in office.



The panel on Prosecuting Public Figures, from left to right: J. Goldberg (UK), F. Abrams (USA), D. Trager (USA), E. Arbel (Israel), E. Jaudel (France).

“America is way behind Israel”

David G. Trager

Although America is over 222 years old, Israel is far ahead of the United States in dealing with the issue of public corruption in an institutional way. The prosecution of public officials is a phenomenon that in America only dates back to the early 1970's. The reason why America has not been able to deal effectively with the issue of public corruption, is because America has a federal system. The prosecution of political corruption is within the jurisdiction of each of the 50 States, as well as on the national level. The reason that America has been rather ineffective is the balkanized nature of the justice system. Every State prosecutes crime as well as the national government, but, the question is - how are the various States organized to prosecute crime? In the overwhelming majority of States of the United States, prosecutors are elected. They are elected in partisan political elections, and to be elected, they need the support of political parties and fund raising. Inevitably, they are in a situation where the very people who need to be investigated are the people who put them in office. There are some States in which there is essentially an elected State-wide official, who in turn appoints local officials. The situa-



tion in these States is somewhat, but not much, better.

As to the federal level where prosecutors are not elected but appointed - I would say, from George Washington all the way through to Franklin Delano Roosevelt, Eisenhower, John Kennedy and Johnson - local prosecutors as well as the Attorney General were appointed for political reasons and often for political service to the party. Most of the assistants who worked for these attorneys were young lawyers, just out of law school, who obtained their jobs not through their qualifications, their career background, but essentially because a local political leader recommended them for the job. Thus, it is possible to understand why both the breadth of our country and it's institutional arrangements made prosecutions of political corruption a very rare phenomenon. It

usually took the most outrageous kind of case to bring about a public prosecution. Inevitably, the evidence of the corruption was found by the media, never by the prosecutors. The latter would just avert their eyes.

In 1969, ironically, the election of Richard Nixon changed this situation, in part for fairly base motives. He appointed John Mitchell to be the Attorney General. John Mitchell, who was a close friend of Nixon, was angry about the fact that Nixon had not become president in 1961. He thought that Mayor Daly in Chicago had delivered the vote at the last minute which gave John Kennedy the election. He was also angry that many of the major cities, in which a lot of corruption was alleged to have taken place, were in the hands of the Democrats. Thus, rather than appoint the traditional prosecutors who came out of the political organization, he decided to appoint professionals, usually high level partners in major law firms who were Republicans, but who had really made their careers on a professional basis. He made a terrible mistake from his own political point of view, because he proceeded to appoint leaders of the Bar, the most respected lawyers, who behaved in a very professional manner. They proceeded to indict the Mayor of Jersey City, where he later appointed Judge Lacey, who was one of the most respected members of the Bar in Chicago. In New York he appointed

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Mike Seymour. These prosecutors were very professional and not only did they proceed to indict Democrats, they also started to indict Republicans. This in turn, sent an enormous message on two levels: firstly - the press became the allies of these prosecutors, helping them to unravel or find other areas to investigate, and more importantly supporting them in the face of enormous political opposition. Secondly - they began to attract the very best of the young professionals to join the offices, in what was now perceived as a wonderful first step for a young lawyer who was interested in a career in litigation, obtaining experience, interesting cases, and behaving according to the best ideals of their profession.

A momentum was built up, which lasted through the 1970's, but which, in recent years, has fallen somewhat. It has not reverted back to the old situation, but unfortunately the momentum has not continued in the same way. Thus, institutional problems remain today, although the main source of political corruption investigations is on the Federal level

Illustrating the situation created by John Mitchell - when Judge Lacey in New Jersey was recommended to become a federal judge, he in turn recommended his chief assistant, Herb Stern, to become his successor on a professional basis. John Mitchell, who did not know Stern, wanted to discover his connection to the Republican Party. In fact, none existed. John Mitchell initially refused to accept that appointment. But, because of the pressure of the press and of U.S. Senator Clifford Case, he later agreed. That tradition continues. In New York Senator Daniel Moynihan, who was elected with Carter in 1976, to the benefit

of the public weal, took the position that all sitting prosecutors would complete their terms. That immediately separated the prosecutors from the immediate political process. When their four year terms were up, they selected their successors, and Senator Moynihan, to his credit, selected other professional people to succeed the first group. With the election of Ronald Reagan, and the election of Senator D'Amato, Moynihan had created such a tradition, that essentially Senator D'Amato followed the same path. That is in the nature of the institutional arrangements.

But something else was happening on a broad cultural level, in the late 1960's. With the Civil Rights Movement questions were being asked about the criminal justice system and its racism. There was some truth to this charge, both on the State and even on the Federal level. How does racism enter into this? It is not that only blacks or minorities would be prosecuted because they were black or minority, rather it was a matter of the nature of the cases that were prosecuted. Questions were being asked, why were we prosecuting young blacks who were

breaking into post office boxes to steal social security checks of victims, where the loss was only two or three hundred dollars, and the offenders might go to jail for a year, whereas political, white collar criminals, who stole thousands and millions, were not prosecuted at all! And if they were, it was usually for tax evasion, for which they received a slap on the wrist with probation. These questions were being asked and they were being asked of the prosecutors - who responded. I think it is not insignificant that of the second generation of prosecutors many were Jews, and the notion of public accountability by officialdom, was something that resonated. Most of these prosecutors had parents or grandparents who had come to the United States to find a country in which the law would be applied equally, without regard to a person's religion or race. This cultural change brought about a strengthening of this process of public accountability. Nevertheless, having said that, the fact remains that institutionally America is way behind Israel on this issue.



Participants attending the panel discussions

“Independent Counsel Statute will likely not be renewed at all”

Floyd Abrams



Let me start with the Independent Counsel Statute. The statute seemed like a wonderful idea. It was an innovative solution to a continuing problem: who shall investigate the investigator? In whom can we trust to investigate the government itself? When under President Nixon, issues arose with respect to the Watergate investigations, enormous political pressure on the President led him to appoint an outside lawyer, a professor from Harvard Law School, to look into some of the charges then being made. Archibald Cox came down from Cambridge to Washington and started to oversee a team of bright young investigators, who, as Nixon well understood, tended to hate him, and were amongst the smartest, savviest and strongest prosecutorial team around. One of them was a young woman, named Hillary Rodham Clinton. The investigation proceeded and eventually reached a point where the specially appointed prosecutor, Cox, made certain demands *via* subpoena, of President Nixon, for him to turn over

certain tapes of White House conversations, the existence of which had been revealed. The result was an unforgettable weekend in October - “the Halloween Massacre”, the press immediately called it - where President Nixon directed the Attorney General to fire Cox, the Attorney General refused to do so, his number 2 refused to do so, and only when they reached the number 3 person in the Department of Justice, Robert Bork, was Cox fired as the President had wanted. A new special prosecutor had to be brought in. Leon Jaworsky was chosen, a first rate, serious well-known litigator, who was probably better fitted than Cox in every respect, except his national academic reputation, to proceed as a prosecutor. In the end, the President resigned, having been forced to turn over certain documents, as a result of rulings by the US Supreme Court.

The notion of somehow institutionalizing the process by which an outsider would be brought in to look at potential corruption within the government itself, became “an agenda item” for the Democratic Party, which swept into power in the elections that followed President Nixon’s departure from office. It was, so it seemed, good government. It was also, so it seemed, good politics.

Who could oppose bringing someone in from the outside to sit in judgment on someone on the inside, rather than be in a situation where a government official passes judgment on whether to bring charges against his or her superior, which is always an uncomfortable situation? These thinkers came up with the idea of a new law - The Independent Counsel Statute - a law which would take out of politics, take out of even the potentiality of politics, the process of deciding when to prosecute certain high ranking government officials. Some procedures were laid down. How would the independent prosecutor be chosen? It would be by three judges, already sitting within the system, not by anyone political. What sort of accountability to the political Head of State or the leaders of the government would the Independent Counsel have? None! Even though he was in, as it were, the executive branch of government, he would not report to the Attorney General, that would be inconsistent with the notion of being genuinely independent. How much time would the Independent Counsel have?

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Unlimited. How much money? Unlimited. How many other cases would the Independent Counsel be working on at the same time? None! Or, one or two, if there were other independent counsel like cases, and the Counsel could continue to work if he or she chose, in his private practice. So we had this notion of a person above politics, above political pressure, who would come in from the outside, do a job, was authorized to write a report which would be submitted to a three judge panel, and given the circumstances it would or would not be released to the public. If perchance, hypothetically, one was talking about the President of the United States or the Vice President, and the Independent Counsel came upon information which indicated that there were serious grounds to believe that there were impeachable offenses, then the Independent Counsel would make a report to the House of Representatives.

We started to have Independent Counsel appointed under this statute and under this regime, in 1979. At the beginning it was not very controversial, although the Republicans in particular were wary of it and Democrats in particular thought it was a good idea, not surprisingly because it seemed as if Republicans were being investigated, and Democrats were doing the investigating. And then, as occurs in politics and government, things changed. The White House was in the possession of the Democrats again, the Congress was in the possession of the Republicans again. Eventually, a new Independent Counsel, Robert Fiske, was chosen to look into what was known as Whitewater. The charges made were that President Clinton, before becoming President, and

others around him in Arkansas, engaged in fraud and violation of public trust, which fell within the strictures of the Independent Counsel Statute. An investigation started into the various sub-issues which arose out of that. One issue led to another. Whitewater was never just Whitewater. It immediately became the death of Vincent Foster, a high ranking administration official who committed suicide, and who may or may not have been one of the people who advised the then Governor and Mrs. Clinton, about Whitewater, and who may or may not have had certain papers about Whitewater. The Independent Counsel worked on a report about Foster's suicide, and specifically, whether it was a suicide. Certain charges were made that it was not really a suicide, that it was murder. Eventually, people like Jerry Fallwell and others would accuse President Clinton of direct complicity in the murder of Vincent Foster. The investigation went on and everything went wrong. What was supposed to be protected - independence - seemed to become non-accountability, because they are in a sense the same thing. Independence means one does not have to report to anybody. The other way to say that is, no one can tell you what to do, you do not have to justify what you are doing. The fact that the three-judge court appointed the independent prosecutor, seemed like a good thing at the time, but then Mr. Fiske, who most people greatly respected and who had a high level of credibility, was fired and replaced by a person who had no prosecutorial experience, named Kenneth Starr. This was done after a series of blistering articles in the *Wall Street Journal* attacking Fiske, who was a Republican,

for not being strong enough in his investigation of the Clinton Administration.

Thus, Mr. Starr came to look into one topic after another, as charges were made against President Clinton, beyond Whitewater, to what was called Filegate; charges which, I think, all could have been persuaded, concerned an impeachable offence. That is to say, the charge was made, that the President, or people around the President, made illicit use of the FBI files of former Republican office holders. If true, that would have been a serious breach of privacy. If done at the President's behest, even the strongest defenders of the Presidents would have had difficulty in defending him. There were also charges that President and Mrs. Clinton were involved in firing people in the travel office in the White House, in a way which could have constituted some sort of abuse of power. Those three elements - Whitewater, and everything connected with it, the alleged misuse of White House files, the alleged misuse of power to hire and fire - were the three initial matters before Independent Counsel Starr, and none of them led Mr. Starr to recommend impeachment, and it appears that none of them will lead to charges against the President or Mrs. Clinton, of a criminal nature.

Then Monica Lewinsky came upon the scene, and her activities with the President became known, starting in January 1998. It is noteworthy that the way the Independent Counsel Statute works, is that one strand which is investigated leads to another. Thus the situation developed in which the President's close friend Vernon Jordan was being "looked into", by the independent prosecutor, to see if he had arranged for Webster Hubble, an admin-

istration official, to receive a lot of money for work he was not really doing, for the supposed purpose of keeping him quite about the President. When it emerged that he had helped Monica Lewinsky to obtain a job, that was "A", indeed, that was "THE" basis, for Mr. Starr to investigate Vernon Jordan in



Recent archaeological excavations in Jerusalem

respect of potential misuse of power. The investigation, it seems, came to nothing in terms of prosecuting Mr. Jordan, against whom no charges have ever been filed. Nevertheless, one thing led to another, and after four years and 40 or 50 million dollars, and the President having been cleared - in the sense of no charges of impeachable offenses having been made against him by the special prosecutor - with respect to Whitewater or the files or Travelgate, the Independent Counsel recommended to the House of Representatives that there was substantial evidence upon which it might conclude that the President should be impeached for lying in his deposition in a civil case involving Paula Jones; allegedly obstructing justice and possibly abusing power.

The House Judiciary Committee recommended that the President be impeached on four counts, and he was indeed charged with high crimes and misdemeanors, on the basis that he had lied to the grand jury about his relationship with Monica Lewinsky and obstructed justice.

What will become of the Independent Counsel Statute, after all this? I believe that it is likely that it will not be renewed at all. The Republicans never liked it, the Democrats have suddenly discovered that it was not such a good idea either. When the issue arose of the constitutionality of the Independent Counsel Statute, Anthony Scalia of the U.S. Supreme Court, one of our most conservative members of the Court, raised serious legal issues about the status of a person who is "independent", noting that he has unlimited funds, unlimited time and no institutional constraints whatsoever on his conduct, save only to obey the law.

The issue of whether the Independent Counsel Statute should be renewed is a controversial one. Let us just go back to the old system with all its flaws and all its risks. The risks will always be there - that we may not be able to trust an Attorney General's Office to investigate an Attorney General, or the President who appointed the Attorney General - but those of us who want to get rid of the Statute have to accept that that is a necessary part of our future regime.



Judge David G. Trager, Chairperson and Moderator, concluded with the following remarks:

Just for the sake of a little balance, I think Floyd Abrams is right in his prediction that the Statute will probably lapse, but in my view this will create an institutional *lacuna* that cannot be dealt with effectively, and indeed my position is reflected most accurately in the following words:

"The Independent Counsel Law originally passed in 1978, is a foundation stone for the trust between the government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent non-partisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law".

These words were said by President Clinton, upon the signing into law of the real authorization of the Independent Counsel Act, on June 30th, 1994.

Editor's note: As Adv. Floyd Abrams had anticipated in his remarks delivered in December 1998, on 30 June 1999 the Independent Counsel Statute expired after not being renewed by the U.S. Congress.

The Case of Senator Pinochet

Jonathan Goldberg

The storm of litigation which has erupted in the English Courts over the arrest of Senator Auguste Pinochet-Ugarte and the attempts by Spain to extradite him to face trial there for offences of murder, hostage taking and torture, have raised issues of fundamental importance for the legal community of the entire civilised world. Certainly also it has caused great turmoil in the normally staid procedures of the English House of Lords, the highest appeals tribunal. As is well known, the final decision is that Senator Pinochet has no blanket immunity from the attempt by Spain to extradite him. That said, these are early days. The decision only means that the legal requirements which are a precondition to his extradition are satisfied. A lengthy legal procession through the Magistrates' Court and later no doubt further appeals remain for the future. Moreover it remains within the discretion of the Executive, through the Home Secretary, to decide whether or not to order that Senator Pinochet in fact be extradited to Spain at the very end of the day. It can confidently be predicted that he will remain in England a long time yet before his fate is finally decided. The Home Secretary is entitled to take into account in his sole discretion at the conclusion of all the legal processes the broadest political and humanitarian considerations, which could include for example the advanced age and ill health of Pinochet (who is now 83) the state of British relations with Chile, and even the impassioned pleas by politicians in Chile who claim that their fragile democracy is in danger from the old flames which are being fanned alight by this litigation. Moreover the latest ruling has savagely cut the number of charges which he will face, for reasons which are set out below, such that they now represent just a small fraction of the criminality originally alleged against him by Spain. It would be a brave man at this stage who would bet with any certainty on

the Senator finally facing trial in Spain, let alone conviction.

The background to this extraordinary case is as follows. In September 1973 a military coup of which Senator (then General) Pinochet was the leader, evicted

the left wing regime of President Allende of Chile, in circumstances of great violence. President Pinochet became Head of State, and remained in power until his resignation in March 1990. He eventually permitted democratic elections and a new constitution which handed power to his successor President Aylwin in 1990. However he had first appointed himself a senator for life and had procured for himself complete local immunities. His successor appointed a Truth and Reconciliation Commission which reported in 1991. Despite the undoubted cruelties and repression of his regime, it was a period of great economic prosperity for Chile. As was said earlier of the dictator Mussolini, he certainly made the trains run on time! Whilst it is important to note that no evidence has been placed before the English Courts, and it has been stated by Counsel for the Senator that he denies the charges, and will contest them vigorously, the case advanced by the Spanish Government seems on paper at least strong. It was said that Pinochet personally directed the killings and disappearance of at least 4,000 individuals, through his secret police, the DINA. Whilst he did not kill or torture in person, it was said that he played a "hands-on" role in organising it, and that torture took place on a vast scale with his encouragement. A favourite method of torture



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described by the Spanish extradition request was “the grill”, whereby electrical shocks were applied to the victim, whilst 2 other persons, his friends or relatives, were similarly treated in a metal drawer above and below him, thus intensifying the psychological agony for all. Agents of his regime allegedly travelled abroad to assassinate opponents as far afield as Portugal, Spain and Italy. In collaboration with the military regime in the Argentine, he put into effect “Plan Condor” under which joint efforts were mounted by both Governments to suppress dissent (especially from the left wing) with the greatest cruelty throughout their domains and even beyond in Latin America.

Whilst travelling in England for medical treatment at the London Clinic, Pinochet was unexpectedly arrested on October 23 1998. His lawyers promptly applied to the Divisional Court of the High Court of Justice to quash the provisional arrest warrants issued in response to the Spanish request for extradition. After a 2 day hearing the Lord Chief Justice, Lord Bingham sitting with Collins and Richards JJ. had little difficulty apparently in ordering his release. (*Reported in The Times 3 November 1998*). Whilst the exact facts and legal arguments throughout these proceedings are of great complexity, the essence was this. In addition to certain technical defects in the arrest warrants, the Court held that the General had a valid claim to foreign sovereign immunity. Any sitting Head of State enjoyed absolute immunity from suit in all circumstances. As a former Head of State of Chile throughout the period the alleged events took place Pinochet was immune from both the criminal and civil process of the English Courts in respect of acts done in the exercise of his sovereign power. The Court could not go behind his immunity in order to discriminate between those acts which were part of the proper function of a Head of State and those which were said to be so plainly criminal as to fall outside. Such immunity was a principle of international and English domestic law of great antiquity and importance. It would be unjustifiable in theory and unworkable in practice to impose any restriction on Head of State immunity by reference to the number or gravity of the alleged crimes. The Court said history showed all too many examples where it had been State policy to exterminate or to oppress opposing groups, for this to be a practicable exercise.

Lord Bingham said “A former Head of State is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale

of immunity. If the former sovereign is immune from process in respect of **some** crimes, where does one draw the line?”.

In disagreeing with the reasoning of the Divisional Court, Lord Steyn in the House of Lords was later to criticise it thus. “It follows that when Hitler ordered the final solution his act must be regarded as an official act arising from the exercise of his functions as Head of State. That is where the reasoning of the Divisional Court inexorably leads”.

Thus in the Divisional Court, all 3 Judges were unanimous in upholding the principle of Head of State Immunity as being in effect sacrosanct.

There now began in November 1998 an unprecedented and unforeseeable series of 3 full appeal hearings before the House of Lords. At the end of the day 15 Judges in all (including the 3 in the original Divisional Court decision) were to pronounce on these issues. The final mathematics is that 6 Judges would have upheld his claim to state immunity but 9 others found it not to exist in the particular circumstances, thus permitting the continuation of the extradition process against him.

The first appeal before the House of Lords lasted some 6 days and was heard by Lords Slynn, Lloyd, Nicholls, Steyn and Hoffmann in November 1998. (*Reported at 1998 4 All England 897*). It was a split decision. 2 Law Lords found in favour of Pinochet, but 3 were against him, and they allowed the appeal from the Divisional Court accordingly. Critically, the 3rd Law Lord whose pivotal vote provided the majority was Lord Hoffmann, who did not himself give reasons, but agreed with Lord Nicholls and Lord Steyn in their reasoned Judgements. For this majority a very different approach now prevailed from the Divisional Court. It was said that such alleged acts of torture and hostage taking could never in any circumstances be regarded as a function of a Head of State. International law had moved on rapidly in recent times. The International Convention against the Taking of Hostages of 1979, and the Torture Convention of 1984 gave such activities the status of “International Crimes”, akin to “piracy *jures gentium*” of old. English law had specifically adopted the provisions of these conventions domestically, and local statutes had given the English courts jurisdiction to try the criminal offences of hostage taking and torture committed by a person of **any** nationality, and whether committed by him in the United Kingdom or elsewhere in the world. Whilst the immunity enjoyed by a **servi**ng Head of State was absolute, that of a **former** Head of State was limited to official acts performed in the exercise of his functions as Head of State. However, in

defining what were such official acts and functions, Lord Steyn gave this illustration. If a Head of State kills his gardener in a fit of rage “that could by no stretch of the imagination be described as an act performed in the exercise of his functions as Head of State”. The distinction between official acts and acts not satisfying these requirements, it was held, must depend on the rules of international law. This condemned in particular genocide, torture, hostage taking and crimes against humanity, (during an armed conflict or in peace time) as International Crimes deserving of punishment. To quote Lord Steyn again, “Why should what was allegedly done in secret in the torture chambers of Santiago on the orders of General Pinochet be regarded as official acts?”.

However the powerful **dissenting** opinions of Lords Slynn and Lloyd in the first appeal and Lord Goff in the final appeal, deserve some mention. They did not detect any general consensus let alone a widely supported convention that all crimes against international law (such as torture) should be triable in national courts on the basis of the universality of jurisdiction. They saw no “*jus cogens*” (peremptory norm) in respect of such breaches of international law requiring that a claim of Head of State Immunity, itself a long established principle of international law should be overridden. Having closely examined the Torture Convention of 1984, and the Taking of Hostages Convention of 1979, they noted the complete absence of any specific provision removing Head of State Immunity. This could not have been mere oversight. It must have been intended that the immunity would prevail. The local English statute being the State Immunity Act 1978, was intended to and did preserve Head of State Immunity in the Courts of England, in both the criminal and civil spheres. There was no room to imply into the International Conventions a term excluding this immunity which the state parties themselves had not seen fit to insert. Furthermore, former Heads of State and Senior Public officials would have to think twice in future about travelling abroad for fear of being the subject of unfounded allegations emanating from States of a different political persuasion. The whole purpose behind the immunity was to restrain one sovereign State from sitting in judgment on the sovereign behaviour of another. Lord Goff indeed made reference to the political situation in Northern Ireland and the campaign by the IRA to overthrow the democratic government there. He pointed out that the IRA attracted a large measure of public support in certain other countries notably even the United States. He said it was

not beyond the bounds of possibility in future that another government might seek to extradite from a third country where he or she happened temporarily to be, a minister of the British Crown or even a humble public official such as a Police Inspector, on the grounds that he or she had taken part in an act of physical or mental torture in Northern Ireland. He held that the 116 States which had signed the torture convention could not have been ignorant of such considerations, and must be taken to have wanted to preserve State and Head of State sovereign immunity.

By contrast, the fact that the Nuremberg Charter, the Statute of the Tribunal for the former Yugoslavia, and the Statute of the Tribunal for Rwanda, all made **explicit** provision for excluding the immunity of a Head of State (both serving and former) strongly argued **against** the implication of any such term into the other conventions which had omitted it.

Based on this majority ruling, the Home Secretary gave his authority for the extradition to proceed through the lower courts some days afterwards. In mid December 1998, however, the case came back before 5 new Judges in the House of Lords, because of an unforeseen and controversial development.

Lord Hoffmann was a Director and Chairman of Amnesty International Charity Limited, a fund-raising arm of Amnesty International, the famous organisation dedicated to the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience throughout the world. Moreover, his wife Lady Hoffmann had worked as an administrator in the Amnesty secretariat since 1977. When the Defence discovered these facts shortly after the conclusion of the first appeal, and partly as a result of an anonymous telephone call, they immediately petitioned the House of Lords to quash their previous ruling and order a complete rehearing. After a 4 day hearing in December, the 5 new Law Lords unanimously agreed. They were Lords Browne-Wilkinson, Goff, Nolan, Hope and Hutton. (*Reported at 1999 1 All England 577*). Public confidence in the integrity of the administration of justice would be shaken they said if Lord Hoffmann’s decision (and hence the entire previous decision of the majority) were allowed to stand. They said it was important to stress that there was no allegation whatever of **actual** bias by Lord Hoffmann. Nonetheless, the famous *dictum* of Lord Chief Justice Hewart in 1923 had to be applied with rigour, “It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”. Amnesty International had been permitted

representation by Counsel to present argument at the previous appeal, and was therefore a party to the action. Without needing to consider the position of his wife at all, the very fact of Lord Hoffmann himself being a director of the charity disqualified him automatically from sitting, because he became a Judge in his own cause, thus offending the most basic principle of natural justice. This principle, it was emphasised, was not restricted to older precedents in which a Judge had a possible financial interest in the outcome of proceedings. A Judge was automatically disqualified also from hearing a case when his decision would lead to the promotion of a cause in which he was involved together with one of the parties.

Undoubtedly, these strong statements by his judicial colleagues must have caused the most acute embarrassment to Lord Hoffmann, a highly respected and distinguished jurist, but he successfully resisted loud calls for his resignation from certain politicians and sections of the press thereafter and he received much support in this decision from Bench and Bar.

Thus, a rehearing in the House of Lords before a full court of 7 Judges (none of whom took part in the 1st Appeal) took place over 13 working days in January and February 1999, with the 7 written judgments finally being delivered on March 24 1999. It may be fairly said that another difficult feature of this whole litigation is the extent to which the 13 Judges who gave their written reasons (of the 15) differed in their detailed analyses and findings. Accordingly only a general summary is possible here. The 7 Judges now were Lords Browne-Wilkinson, Goff (who dissented), Hope, Hutton, Saville, Millett and Phillips (*Reported at 1999, 2 Weekly LR 827*).

A critical new argument came forward for the first time, and was decisive. Torture had only become a crime in English domestic criminal law following the introduction of a local statute on September 29 1988, in compliance with the Government's obligations which it had signed under the Torture Convention of 1984. The well known "double criminality" rule applicable in all cases of extradition demanded that the conduct complained of must amount to a crime under the law **both** of Spain (the requesting State) and the UK (the receiving State). It had been assumed by all the previous courts that the relevant date in this case for the purpose of this rule was when the extradition request was received from Spain, *i.e.* in late 1998. This was wrong. The relevant date was when **the crimes themselves were alleged to have been committed**. Since torture did not become a crime under English municipal law until September

1988, it followed that the great majority of the charges being brought against Pinochet covering as they did dates **prior** to September 1988 but between his accession to power in 1973 and his retirement in 1990, must be dismissed as a matter of basic extradition law. Thus of some 30 original charges, only 3 could now survive. The only country where he could be put on trial for the full range of offences alleged against him by Spain was Chile, it was said by Lord Hope, no doubt more in hope than expectation.

The majority of the Law Lords further ruled that International law had by now evolved to the point where the prohibition of torture had the character of "*jus cogens*" or a peremptory norm. This prohibition was an absolute value from which nobody must deviate. It had become an international crime and there was universal jurisdiction to punish and extradite for this crime. Therefore torture could never again be seen as an official act of a Head of State.

In his leading judgement for the majority, Lord Browne-Wilkinson pointed out that the Torture Convention of 1984 had not created a new international crime. It already was. It was in order to provide an international system under which the international criminal, the torturer, could find no safe haven that the Convention had been signed by 116 states including Spain, Chile and the United Kingdom in 1988. The purpose of the convention was to introduce the principle "*aut dedere aut punire*" (either extradite him or put him on trial, realistically translated). It became the duty of each State signatory to take these steps against any person of whatever nationality found in their territory suspected of such crimes wherever committed in the world. Moreover torture as defined by the Convention could only be committed "by a public official or other person acting in an official capacity". From this definition he drew the inference that no State immunity was intended. The Convention would otherwise be valueless. Whilst it normally was a basic principle of international law that one State would not adjudicate in its courts on the conduct of another, the immunity of a Head of State was absolute when serving (by reason of his person) but only qualified after he left office, being then restricted to acts done in his **official** capacity when in office. Criminal acts could still be done officially, certainly, but could **international crimes** be said to be official acts? Since the Torture Convention provided what was missing previously, namely a worldwide universal jurisdiction, and further required all member states actively to ban and outlaw torture, it could not constitute an official function of a former

Head of State to commit torture. This world-wide universal jurisdiction against torture (and no doubt genocide and hostage taking also, although on the facts here such charges were not found to be made out) displaced the normal principle of Head of State Immunity.

By notable contrast however Pinochet **did** enjoy Head of State immunity for the many specific charges also made by Spain against him of **murder** and **conspiracy to murder**, because these were not elevated to the status of International Crimes by international law. Those charges must be **quashed** accordingly.

Although he went considerably further than the majority in his reasoning, the powerful opinion of Lord Millett (incidentally a Vice President of the UK Branch of the IAJLJ) merits special consideration. He drew heavily and approvingly from the Charter of the Nuremberg Tribunal of 1946 and “the landmark decision” of the Supreme Court of Israel in the *Eichmann case* in 1962. He concluded that war crimes and atrocities of the scale and international character of the Holocaust are crimes of universal jurisdiction under customary international law. The way in which a State treated its own citizens within its own borders had now become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. Such crimes attracted universal jurisdiction if 2 tests were satisfied. First they must be contrary to a “*jus cogens*” (peremptory norm) and secondly they must be so serious and on such a scale that they could fairly be regarded as an attack on the international legal order. Whilst the jurisdiction of the English Criminal Court was usually statutory but was supplemented by the common law, customary international law **was** part of the English common law. Accordingly, he held that the English courts had always had extraterritorial criminal jurisdiction in respect of such crimes of universal jurisdiction under customary international law. He saw no reason (unlike the majority opinion) to hold that this jurisdiction arose **only** after the passing of the English domestic statute against torture in September 1988. The jurisdiction was already there. Thus, he would himself have allowed Spain to extradite for **all** the torture charges including those before September 1988. His *dicta* suggest that he too however would accord absolute immunity to a **servicing** Head of State even in respect of such crimes of universal jurisdiction. He pointed out that the narrower immunity for **former** Heads of State did not just protect them alone, it covered equally lesser officials whose conduct in the exercise of the authority of the State was later called into ques-

tion in a foreign court. It covered for example a military commander, a chief of police, a government minister, or even a subordinate public official. Whilst the immunity was the same whatever the rank of the office holder, it was granted only in respect of government or official acts. These could not be taken to include international crimes under any circumstances. He concluded thus “In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence”.

By way of comment, it is perhaps surprising that no Judge was prepared to contemplate making inroads into the doctrine of State immunity to the extent of excluding immunity for a **currently serving** Head of State in respect of **international crimes**. It is true that such a decision did not directly arise on the present facts, but nonetheless to be noted that their *obiter dicta* were apparently against it. Thus, Hitler in office could escape where a recently retired Hitler could not, paradoxically.

It can thus be seen how strongly this case has divided English judicial opinion. The contrast between the Divisional Court and the majority opinion of the Law Lords on the third appeal is stark. The latter is binding and now stands as the true precedent of course.

For a final and somewhat ironical glimpse of the passions this case has aroused elsewhere also, the writer is indebted to Pinochet’s Solicitor, Michael Caplan, who is also incidentally an IAJLJ officer. He tells me that he has travelled to Chile to consult extensively with its present military, judicial and political leaders in connection with the Pinochet case, and he has had meetings with representatives of the Jewish community there. They told him that there was no anti-Semitism in Chile during the Pinochet regime and that the General was a strong supporter of their community who had attended a celebration in the Synagogue to mark the 30th Anniversary of the State of Israel in 1978. They asked Mr Caplan the rhetorical question “which other Head of State had attended a Synagogue on this particular occasion?”. One sees certain echoes here perhaps of the support which Margaret Thatcher has consistently and publicly given to the General throughout the English proceedings. It seems that in life as in law, nothing is ever entirely clearcut and there is usually another side to the question!

Human Rights, Jewish Women and Jewish Law

Sharon Shenhav

In December 1948, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations and ratified by the nations of the world. Human rights has become the “idea of our time” and there are those who claim that this document “has become the standard by which we judge others, by which others judge us and by which we judge ourselves”.¹

In the last few decades, there has been increased awareness of human rights violations in every country. Evidence shows that women, particularly, have been denied their basic human rights. Often, the denial of women’s human rights is based on religious law. The declaration that “women’s rights are human rights”, adopted by the World Conference on Human Rights in Vienna in 1993 was reconfirmed and emphasized in 1995 at the UN Fourth World

Conference on Women in Beijing.² While the world community is well aware of the violation of women’s human rights based on religious law in Muslim and Catholic countries, this article intends to show that Jewish women are also victims of human rights violations in matters of religious marriage and divorce.

As has been well documented, Jewish women are discriminated against in marriage and divorce under Jewish law.³ While ancient Jewish law was designed to protect and support Jewish women, today that same law is being used by some as a tool to deny their rights to equality in marriage, divorce and the founding of a family. The Jewish community readily admits that the shameful situation of the modern *Agunah*, a woman chained to an unwanted or non-existent marriage who cannot be released without her husband’s consent, is unjust.

Marriage, under Jewish law, is basically a private contract which the parties enter into voluntarily. Similarly, a Jewish divorce occurs only when there is mutual and voluntary consent by both parties to end the marriage. The religious court, or *Beth Din*, does not possess the authority to grant a divorce. Thus if one of the parties refuses to consent to the divorce, the marriage cannot be dissolved.⁴



It is common knowledge that some Jewish husbands withhold their consent to a religious divorce or *Get*, in order to extort exorbitant sums of money from their wives as the “price” for the *Get*.

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1. Professor Nathan Henkin, Columbia University Center for Study of Human Rights and Columbia University Law School. Lecture in June 1998 at Tel Aviv University Law School.
 2. Beijing Platform for Action, September 15, 1995-Chapter IV, paragraphs 210-231.
 3. Menachem Elon, *Jewish Law (Hamishpat Ha-Ivri)*, Volume IV; 1994; Ariel Rosen Zvi, *Israel Family Law - The Sacred and the Secular*, Tel Aviv, 1996.
 4. Ben Zion Shereschewsky, *Dinei Mishpahah (Family Law)*, 3rd ed., 1984.

The parties “negotiate” the terms of the divorce settlement, with the knowledge that if the wife refuses to pay for her *Get* by waiving her rights to a fair division of marital property or transferring to her husband whatever exorbitant sum of money he demands, she will be an *Agunah*, unable to remarry.

Other Jewish husbands, including convicted rapists, child molesters and murderers serving long prison sentences for their crimes, refuse to agree to free their wives from a non-existent marriage out of spite and vindictiveness. Jewish women married to men who are mentally ill, alcoholics, drug addicts, homosexuals or physically abusive find themselves trapped as well if the husband is unwilling or unable to give her a *Get*. In some cases the couple has obtained a civil divorce and the husband has remarried a non-Jewish woman, while refusing to release his Jewish wife by agreeing to a religious divorce.

The husband can remarry Jewishly, however, should the wife refuse to accept the *Get*. Historically, Jewish law provided that a man could have several wives, while a Jewish woman was restricted to one husband. Despite modern legislation criminalizing bigamy, today’s rabbis can and do permit a husband to take a second wife if he claims that his first wife refuses to accept the *Get*.⁵ Furthermore, the offspring of the second wife will carry no religious stigma, unlike the offspring of an *Agunah* who will be *mamzerim* if their father is not her legal husband.⁶

While consensus exists within the Jewish community that injustice and inequality are widespread in Jewish divorce law, the issue of women’s human rights violations has not been raised until

recently. Clearly, the horrors associated with genital mutilation, mass rape and family honour killings as human rights abuses make the *Agunah* issue pale in comparison. Secondly, Jewish women living outside of Israel who cannot remarry in an Orthodox ceremony without a *Get* have an option.⁷ They can leave Orthodoxy and remarry in a Reform, Conservative, Reconstructive or even secular ceremonies. Thirdly, Israel has frequently been targeted unfairly for human rights abuses, while her neighbours have continued their practices without criticism. Lastly, the question is still asked, “Why do we have to wash our dirty laundry in public?”

The recent world celebration of the 50th Anniversary of the ratifying of the Universal Declaration of Human Rights has refocused attention on the provisions of that document and other international human rights conventions of the last few decades. Let us examine these documents in order to determine if Jewish law on marriage and divorce, as applied today, conforms to universal human rights concepts.

I. Universal Declaration of Human Rights

Article 16 (1) of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948 formulates the right to equality as to marriage and provides that “men and women ...without any limitation due to race, nationality or religion, have the right to marry and to found a family. **They are entitled to equal rights as to marriage, during marriage and at its dissolution**”. (Emphasis added).

II. European Convention for the Protection of Human Rights and Fundamental Freedoms

Signed in Rome on November 4, 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms (often called the

- 5 Known as a “*heter meah rabbanim*”, Jewish husbands can obtain such a permit from Orthodox rabbis if the wife refuses to accept the *Get*. A few years ago, an American lawyer and businessman was arrested in Israel where he spent the Succot holidays with his second wife. The first wife, a US citizen and resident of New York, had filed for divorce in the Jerusalem Rabbinical Court and requested that her husband be detained in Israel until he gave her a *Get*. Despite the fact that the couple had obtained a civil divorce, the husband refused to give the first wife a *Get*. In November, 1998 a New York woman filed a claim for damages against a Brooklyn *Beth Din* as well as the individual rabbis who granted her husband a *heter meah rabbanim* despite her willingness to accept the *Get*.
6. The issue of a union between a man and a woman validly married to another man is a *mamzer*. The Bible states: “A *mamzer* shall not enter the congregation of the Lord” (Deuteronomy 23.3) which means that a *mamzer* cannot marry a Jew. A *mamzer* may marry another *mamzer* or a non-Jew. Offspring of a *mamzer* are *mamzerim*. See *Encyclopaedia Judaica*, Volume 11, Jerusalem, 1982 .
7. In Israel, the Orthodox religious establishment has a monopoly on marriage and divorce between Jews and matters of marriage are governed by Jewish law. See Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953. Civil marriage does not exist in Israel and civil divorce between two Jews is not recognized. Only Orthodox rabbis approved by the Chief Rabbinate are authorized to perform Jewish marriages.

“European Convention on Human Rights”) was adopted by the Member States of the Council of Europe to enhance the enforcement of the United Nations Universal Declaration of Human Rights through the creation of its own convention on human rights.

The Convention is applied by the European Court of Human Rights (ECHR). Citizens residing in the 40 Member States of the Council of Europe may bring an action in the ECHR. Several articles of the Convention could support a finding of a violation of the rights of the *Agunah*. Among those relevant articles are the following:

Article 12

“Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.”

Protocol No. 7, Article 5

“Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. ...”

III. International Covenant on Political and Civil Rights

Adopted by the General Assembly of the United Nations on December 6, 1966, The International Covenant on Political and Social Rights contains a number of articles which recognize the rights of men and women to marry and found a family. Furthermore, there is a provision aimed at prohibiting gender discrimination and ensuring the equal right of men and women regardless of religious affiliation.

The United Nations Human Rights Committee has interpreted these provisions

to require States Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution, including legislative and administrative measures.

IV. Convention on the Elimination of all Forms of Discrimination against Women (Cedaw)

Adopted by the General Assembly of the United Nations on December 18, 1979, CEDAW is in essence, the international bill of rights for women. It brings together in a single comprehensive international human rights treaty the provisions of existing UN instruments concerning discrimination on the basis of sex and extends them further, creating a real tool for the elimination of discrimination against women.⁸ Article 16 provides as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - ...
 - (c) The same rights and responsibilities during marriage and at its dissolution;

At its 13th session in 1994, the Committee on the Elimination of Discrimination Against Women issued General Recommendation No. 21 on Equality in Marriage and Family Relations which contains several pertinent statements for *Agunot*, including:

* Whatever the legal system, religion,

custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people (para 13);

- * A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being (para 16);
- * There can be no justification for applying discriminatory laws or customs in the private sphere (para 12);
- * State Parties should resolutely discourage any notions of inequality of women and men which are affirmed by religious law or custom (para 44).

8. On March 12, 1999 the 43rd Session of the Commission on the Status of Women of the United Nations adopted an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. The Protocol contains two procedures: a communications procedure allowing individual women, or groups of women, to submit claims of violations of rights to the CEDAW Committee; and an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights. The Protocol will be submitted to the General Assembly of the UN for adoption in late 1999, and should be open for signature, ratification and accession in 2000. The Protocol will enter into force once 10 State Parties to the Convention have ratified or acceded to it. The Protocol is the result of four years of negotiations by the Open-ended Working Group in which I participated as the Israeli government delegate in 1997 and 1998.

V. Beijing Declaration And Platform For Action

Adopted by the 189 governments participating in the United Nations Fourth World Conference on Women in Beijing on September 15, 1995, the Beijing Declaration and Platform for Action reaffirmed the commitment to the equal rights and inherent human dignity of women and men as enshrined in the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of All Forms of Discrimination against Women.

In Chapter I, the Platform for Action states:

...Equality between women and men is a matter of human rights and a condition for social justice...

In Chapter IV, the Platform for Action "recognizes that women face barriers to full equality and advancement because of such factors as their ...religion..." and calls on governments to:

Review national laws, including customary laws and legal practices in the area of family ...law in order to ensure the implementation of the principles and procedures of all relevant international human rights instruments by means of national legislation, revoke any laws that discriminate on the basis of sex and remove gender bias in the administration of justice. (para. 232 (d))

Conclusion

In reviewing the above international human rights instruments which have been adopted during the last 50 years, it is can be argued that Jewish women who are *Agunot* are victims of human rights

violations in several areas. First, the right to equality in the dissolution of marriage is denied to a Jewish woman today. Unless she accepts her husband's unreasonable and inflated financial demands, she will remain chained to him in an unwanted and often non-existent marriage.

Secondly, the modern *Agunah's* right to equality in remarrying is infringed. Unlike her husband who can take a second wife without obtaining a religious divorce, the Jewish woman is granted no such permit. Without a *Get* she cannot remarry.

Thirdly, the equal right to found a family is also violated. Jewish law declares that the offspring of an *Agunah* are *mamzerim* while legitimizing the offspring of her recalcitrant husband. So long as the husband refuses to give the *Get*, a Jewish woman's right to reproduce is severely infringed.

An increasing number of scholars, rabbis, lawyers, judges and women's rights activists have been searching for solutions to this tragic and shameful situation. At a recent international conference entitled "*Halachic Solutions to the Problem of Agunot*" which was held in Jerusalem, distinguished scholars,

lawyers, judges and rabbis from several countries discussed a number of possible solutions. Throughout history, courageous and creative Jewish religious leaders have used these solutions to free *Agunot*. If applied, these solutions could eliminate the human rights abuses suffered by thousands of Jewish women today who are unable to obtain a religious divorce.⁹ However, until the Orthodox religious establishment in Israel as well as in Jewish communities world wide adopt such solutions, Jewish women seeking to divorce will continue to be victims of human rights violations.

9. Organized by the International Jewish Women's Human Rights Watch on July 5, 1998 in Jerusalem, the seminar's opening speaker was Justice Menachem Elon, Former Deputy President of the Supreme Court of Israel and author of the four volume treatise "*Jewish Law: History, Sources, Principles*" (*Ha-Mishpat Ha-Ivri*). The keynote speaker was Rabbi Emanuel Rackman, Chancellor of Bar Ilan University and founder of the *Beth Din Zedek Libaiyot Agunot* in New York. Proceedings of the seminar will be published soon in book form in both Hebrew and English.

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Assisting the *Agunah* - The South African Experience

Ann Harris

The difficulty of effecting the dissolution of a Jewish marriage where one party is unwilling to enter into *Get* proceedings is sadly common throughout the Jewish world. It is a problem which has occupied the minds of *Rabbanim* for centuries; and in the waning twentieth century, it has been the subject of much debate among Jewish lawyers world wide.

There is no doubt that innovative thinking in the sphere of interpretation of the *Halacha* on the subject has been greatly hampered by the period of religious polarisation in which we now find ourselves. There is a compelling need to balance the competing interests of the preservation of legitimate Jewish status with compassionate application which would alleviate the plight of the *Agunah*. The current raging debate on the annulment issue shows how far apart are the two extreme elements.

For the Jewish communities outside Israel, the problem is complicated by the need for marriages entered into with the sanction of the local civil law to be similarly dissolved by civil process. This has allowed a situation to arise in many cases where civil dissolution has taken place, but for various reasons, *Get* proceedings have not been undertaken. It has created a new generation of *Agunot*, caught between "limping marriages" and "limping divorces", unable to rebuild their lives by a second marriage recognised by Orthodox Jewish law.

In South Africa, where the majority of the Jewish community considers itself bound by Orthodox tradition, particularly in the matter of legal status, the problem is further compounded by two social issues. First, the divorce rate is very high and the number of broken marriages is undoubtedly increased by the incidence

of stress from extraneous pressures under which the community finds itself. Second, South African Jews are notoriously mobile; it is therefore imperative for them that their legal status as Jews be acceptable in all other Jewish communities of the world.



The controversial question of seeking the assistance of civil law to persuade estranged husbands and wives who find themselves in this position to give or receive the *Get* is a topic of furious debate. In England, during the discussions on the amendment to the recent Family Law Act intended to assist with the *Get* issue, the very involvement of civil law was described as a "humiliation" for the Jewish community. Why could not *Rabbanim* resolve the problem themselves? The answer is that ecclesiastical authorities are still far from reaching the necessary consensus to allow them to search for meaningful solutions. In the meantime, communities must grasp every opportunity to alleviate the suffering of *Agunot*. The South African Jewish community took advantage of such an opportunity and has achieved excellent results.

The Divorce Amendment Act 1996

In 1989, in the dying years of the Nationalist government, at the instigation of the then Member of Parliament, Mr. H. H.

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Schwartz, the subject of “Jewish Divorces” was accepted for research by the South African Law Commission.

The then vice-chairman of the Commission, now a judge of the South African Court of Appeal, Mr. Justice P. J. J. Olivier, was appointed chair of the Project Committee. The members of the committee, eight in all, included the Chief Rabbi of South Africa, Rabbi C. K. Harris, the *Rosh Beth Din*, Rabbi M. Kurtstag and its Registrar Rabbi Dr. D. Isaacs together with interested academics, advocates and attorneys. The committee met for discussion on several occasions between 1990 and 1992 and the principal research and drafting was undertaken by Mr. P. A. van Wyk. An interim working paper was published in 1993 and a full report and recommendations in 1994.

From the outset, Judge Olivier showed a remarkable understanding of the problem of the *Agunah*. He noted that in effect the prevailing position “made a mockery” of the civil law. “We grant divorces” he said “and then you people are unable to remarry!” Advocate Ros Rosenberg agreed: “It is a hollow and pyrrhic victory if we conduct litigation and ultimately do not achieve a result beneficial to the client in all respectsthe parties are not free to make new lives for themselves after the divorce”. Judge Olivier was particularly concerned that the terms of the civil divorce order or settlement relating to maintenance, division of assets or custody could be influenced by the husband’s willingness, or absence of it, to give a *Get*.

The original mandate of the Project Committee was to investigate whether South African law should provide for the enforcement of an agreement between spouses in terms of which they had undertaken to dissolve their marriage according to Jewish law either before or after a decree of divorce was granted by South African law. This was extended to consider “any other legislation which would provide a remedy for traditional spouses”.

The Report

The Project Committee’s comprehensive report has been described by Mr. Justice M. W. Friedman, now Judge President of the North West Provincial Division of the South African Supreme Court, in an article in the 1994 *South African Law Journal* as “a model of painstaking and thorough research into a complex and difficult topic”. “The working paper” he continues “evinces an intellectual flexibility and a capacity for viewing the problem through the eyes of rabbis and scholars of other times

.... they have achieved a result that accurately reflects the ideas and principles that they examined”.

The report includes an account of the Jewish legal sources relating to marriage and divorce and explains the participation of *Batei Din* in divorce proceedings. It continues with a comparative survey and evaluation of existing and suggested solutions on the topic from foreign jurisdictions and examines their possible application to South African law.

In its survey of proposals, both historical and geographical, to solve the *Agunah* problem, the report divides them into “solutions” and “inducements”. Solutions try to solve the problem but the changes to *Halacha* which they require are usually unacceptable in Orthodox circles. Inducements are efforts to put pressure on parties to accept the rulings of a *Beth Din*; they do not require changes in *Halacha*.

In Diaspora countries the inducements are usually of a communal or social nature, e.g. the Johannesburg *Beth Din* refused to allow a husband who would not initiate *Get* proceedings to be given an *Aliya le Torah* on the occasion of the *barmitzvah* of his son which took place after he and the boy’s mother had obtained a civil divorce. The sanction had the desired effect. In Israel, where swingeing sanctions are laid down by statute and enforceable in the courts, they are often unevenly applied and not always persuasive, however dire the consequences. It can be said that most inducements hardly enhance the dignity of Jewish law; and more important, they do not really change the situation in that legal power still vests in the husband.

Accordingly, the Project Committee examined two types of solutions; those proposing conditional divorces and those advocating pre-nuptial agreements. It also considered judicial decisions relating to *Get* clauses in divorce settlements and legislation from other countries.

Conditional Gittin

Most authorities lean to the view that the conditional *Get* can only be used in exceptional circumstances for example, in times of persecution and war as a preventative measure against the status of *Agunah*. Their origin dates back to Biblical times when the soldiers of the house of David made conditional *Gittin* before going into battle in case they did not return. This formula was used during the involvement of the South African Defence Forces in Angola in the 1970’s and 80’s when national service was compulsory. Several young Jewish soldiers, already

married, left a Power of Attorney with the *Beth Din* of Johannesburg instructing that, if they were missing for two years or more, their wives could be given a *Get* on their behalf.

It seemed necessary, therefore, to turn to secular solutions.

Pre-Nuptial Agreements

Among the pre-nuptial agreements considered, the Project Committee began with the so-called “conservative *Ketubah*” which provides that when a couple marry they agree that they will submit any dispute concerning their marriage or possible divorce to the *Beth Din* for arbitration. Originally, this formula was not accepted by Orthodox Judaism on the grounds *inter alia* that it cannot be right to anticipate divorce at the time of marriage although the argument was frequently presented that the Orthodox *Ketubah* does in fact allow for such preparation. In the case of *Avitzur v. Avitzur* 459 NYS 572 (1983) 4.12 in the State of New York, the court upheld the validity of the agreement of the husband to appear before the *Beth Din*. It did not resolve the question of whether a *Get* could be compelled. Although the authority of this case is limited, the report suggests that it encourages Jewish parties to approach the civil courts for assistance.

The report goes on to examine several decided cases on the enforceability of similar agreements in various jurisdictions of the United States. The majority upheld the validity of such agreements or granted equitable relief to a disadvantaged spouse. However, the Project Committee was concerned that where the civil courts had ordered the husbands to grant *Gittin* they would not be valid on the grounds of compulsion and because of the erosion of the position of the *Beth Din*.

Subsequently, the Rabbinical Council of America, representative of Orthodox Jewry, has accepted that the concept of a pre-nuptial agreement is an adequate solution; but Israeli Rabbinic authorities still hold that *Gittin* granted in accordance with these documents are invalid on the grounds of coercion, often because of ancillary maintenance agreements imposed if the *Get* is not granted.

In Germany, the religious neutrality of the State prohibited it from using its machinery to attain a religious goal. Consequently its courts have ruled against the specific performance of a husband’s agreement to grant a *Get* and against a wife’s obligation in a settlement agreement to appear before the *Beth Din* to receive a *Get*.

In France civil court orders compelling the delivery of *Gittin*

have been made on pain of financial sanctions on the grounds that the courts do not regard the *Get* procedure as a religious act. *Gittin* granted under these circumstances have not been considered valid in Jewish law since they are ordered by secular courts without the request of a *Beth Din*.

According to English law, the *Maples case* (1987) 2 AER 188 (Fam) referring to Section 16(1) of the Domicile and Matrimonial Proceedings Act 1977 ruled firmly against relying on personal religious law in matters of divorce. Further, until recently, the view of the London *Beth Din* was that it should not entertain *Get* proceedings at all until the civil decree absolute or at the very least the *decree nisi* has been granted. This is no longer considered to be of practical application. In the *Brett case* (1969) AER 1007 (CA) in which the English Court of Appeal made a maintenance award to a wife to induce the husband to initiate *Get* proceedings, Lord Justice Phillimore stated “I have no doubt that (the husband) is seeking to obtain an advantage by bargaining with (the wife)”. Even though this inducement could not be construed as compulsion in English law, it might be interpreted as coercion in Jewish law and would thus render the *Get* executed invalid.

Even the case of *Shahnaz v. Rizwan* (1964) AER 993 (QB) where the English court enforced an agreement for dower in a Muslim marriage might be found to be persuasive in a Jewish context.

The validity of a pre-nuptial agreement has been widely researched and debated in England but has still not been considered by the court. The Project Committee was of the opinion that there was doubt as to whether they would be considered as contracts enforceable by civil law. It offended the doctrine of public policy by forcing a party to submit to religious law. There were strong arguments against the use of penal sanctions and the remedy of specific performance. However, Orthodox leaders in England have accepted the pre-nuptial agreement as a valid solution in *Halacha*. Whether it will be acceptable in Israel is not certain.

In Australian law, the Project Committee studied several cases turning on the State’s competence to interfere in religious issues and the competency of the court to enforce undertakings given during divorce proceedings. The matter was then taken up by the Australian Law Commission which has made proposals for legislation on the lines of the Canadian and South African models.

The question of whether an agreement to grant a *Get* can be

enforced in South African law has been extensively researched by Advocate Nathan Segal of the Johannesburg Bar, a member of the Project Committee, in a learned article in the *South African Law Journal* of 1988. He examines the Zimbabwean case of *Berkowitz v. Berkowitz* (1956) 3SA 522 (SR) where an agreement to give a *Get* was made an Order of Court when the civil divorce was granted, but the husband did not comply with the undertaking. When the wife sought to commit her husband for contempt because of his refusal to honour the undertaking, Chief Justice Murray held that it had been included in the Order *per incuriam*. The grounds for his decision were that the court had no power over Jewish ecclesiastical authorities and that the court could not order specific performance of a personal act not within the type of matter which are the ordinary concern of the court.

In its final report, the Project Committee took notice of the case of *Raik v. Raik* (1993) 2SA 617 WLD in which Mr. Justice Coetzee, finding that the marriage had irretrievably broken down in terms of South African law and the vindictive and spiteful manner of the husband in not granting the *Get*, ordered that the agreement was valid and granted an order of specific performance. This matter however never came to a practical conclusion since the husband took his own life before the order could be enforced or the *Get* given.

Legislation

Among the instruments of legislation examined by the Project Committee, the New York Domestic Relations Law of 1984 was considered to be of a coercive nature. Orthodox Rabbis have been concerned about the subsequent legislation imposing penalties on the distribution of the assets of a marriage.

The Project Committee examined in detail the effect of the Israeli Section 6 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 which compels compliance with a ruling of a *Beth Din* to grant or receive a *Get* by ordering a term of imprisonment. This section implies that compulsion is possible if a *Beth Din* rules that a husband is obliged to give his wife a *Get*. However, it is known that even these sanctions have not always been successful.

In England, a “*Get*” amendment to the most recent Family Law Act has become law but is not yet in use. It gives discretion to the court to withhold the Civil Divorce until the *Get* is executed.

The Project Committee examined the relevant case law and

earlier provincial legislation in Canada before considering the 1990 amendment (Barriers to Religious Marriage) to the Canadian Divorce Act. The amendment gives the court the discretion to refuse to grant a divorce or other relief, for example maintenance or access if one spouse refuses to remove the barrier to the religious remarriage of the other. It goes on to allow an uncooperative spouse to disclose “genuine grounds of a religious or conscientious nature” for refusal to remove the barriers. At first this was considered to be counter-productive to the object of the amendment but it seems that it has not proved to be so. With regard to the possible coercive nature of the amendment, the opinion of the late revered Rabbi Moses Feinstein was one of approval. He did not consider there to be the same element of coercion as there would be with financial or penal sanctions but considered that it was necessary to include the rule that the *Get* must be granted before the civil divorce.

The report came to the conclusion succinctly summarised by Judge Friedman that in order for legislation to comply with the *Halacha*, the following principles of Jewish law must be satisfied:

1. The circumstances of the case are such that a *Beth Din* would be entitled to compel a divorce.
2. Only a *Beth Din* is entitled to compel a divorce.
3. A secular court is only entitled to compel the parties to a divorce and to comply with the command of a *Beth Din* and it may not order the execution of a *Get*.

Recommendations

The Project Committee then applied itself to possible solutions to the problem in South Africa. It came to the conclusion that pre-nuptial agreements would be unenforceable on the grounds of the court’s unwillingness to order specific performance to enforce personal contracts, or to order criminal sanctions to enforce civil law. Further, it is still subject to question whether a *Get* obtained in this way is valid according to *Halacha*.

Finally, it considered the proposal by the Orthodox community of South Africa for legislation which would amend the Divorce Act of 1979 by giving a discretionary power to the court to refuse to grant a dissolution of a marriage entered into in accordance with Orthodox Jewish law if a Jewish spouse refuses to give or receive a *Get*.

Rabbi Moshe Kurtstag, *Rosh Beth Din* of Johannesburg explained that the proposal, influenced by the Canadian legisla-

tion, was acceptable to the South African Orthodox community because it eliminated the stumbling block of coercion. The *Get* would be granted prior to obtaining the civil divorce, so that the husband could not claim that he wanted the civil divorce but not the religious one. In the words of Mr. Justice D.A. Melamet, formerly of the Gauteng Provincial Division of the Supreme Court supporting the proposal: "It is difficult to see how a person can claim that there is a dichotomy in their marriage relationship and that the civil marriage has irretrievably broken down but persist that the religious marriage still exists". A mandatory provision was considered inappropriate in that it would not provide relief to a spouse who wanted a religious divorce if one spouse refused both a civil and religious divorce.

Two members of the Project Committee objected to this proposal of legislation. Rabbi A. E. Assabi, Senior Rabbi of the now defunct Imanu-Shalom congregation, objected that legislation referring specifically to Orthodox Jewish marriages was not acceptable to Progressive Jews.

Professor June Sinclair, then Vice-Chancellor the University of the Witwatersrand and formerly Dean of the Faculty of Law, opposed the recommended amendment totally on the grounds that she did not consider it the province of the South African legislature to intervene to produce fairness among adherents of a particular religious faith. "If the Jewish law produces unfairness, the Jewish law must be changed the religion denigrates and discriminates against women. It is up to the rabbis to examine the justice of their faith and to put their house in order rather than to seek out a solution from the legislature".

Hard words indeed; and many would agree. But they show a lack of understanding of the nature and source of Jewish law. However, note was taken of her comments and the final recommendation was drafted in terms which did not apply to any particular religion.

Finally, the Law Commission made a provisional recommendation for reform by amending the Divorce Act No. 70 of 1979 with a clause which would give the courts power to refuse the grant of divorce if a religious barrier to remarriage still remained.

The working paper was published by the Law Commission in January 1993 and was distributed to all interested parties including judges, legal practitioners, academics, professional, religious and women's groups. Among the minority dissenters, Mr. S. M. Kessler, a Cape Town attorney, expressed his preference that the proposed legislation should be limited to the

enforcement of specific agreements to dissolve the marriage according to the requirements of religious law.

The Act

As a result of recommendation of the Law Commission, the Divorce Amendment Act No. 95 of 1996 inserting the following clause as number 5A in the Divorce Act No. 70 of 1979 was signed into law on November 22, 1996 by the President of the Republic of South Africa, Nelson Mandela. The text reads :

Refusal to grant divorce

5A. If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just".

Public Relations

With the assistance of the South African Chapter of the International Association of Jewish Lawyers and Jurists, the Chief Rabbinate and the *Beth Din* made a determined effort to publicise the amendment and to explain its importance and effect to lawyers and laymen. In addition to press releases to the lay press, the Act was given publicity in the official journal of the Law Society of South Africa.

Seminars were held in both Johannesburg and Cape Town to which advocates and attorneys, Jewish and non-Jewish, were invited at which the importance of bringing the Act to the notice of their Jewish clients and an explanation of its procedures could be made. In Cape Town the seminar was under the chairmanship of the then Judge President of the Cape Provincial Division of the Supreme Court, Mr. Justice G. Friedman. In Johannesburg, the practical application of the Act was explained by Rabbi Kurtstag and by specialist practitioners Advocates Nathan Segal and Ros Rosenberg and Attorney Billy Gundelfinger, President of the Association of Family Lawyers.

Mr. Gundelfinger outlined the required procedure. In cases in which the Act is to be invoked, the religious status of the parties

is included in a clause in the Particulars of Claim and a sub-clause requesting the appropriate relief in terms of Section 5A is inserted in the Prayer. He stressed that before the enactment of the amendment, a clause was frequently inserted into a divorce settlement in which the parties agreed to do all things reasonably necessary to ensure the granting of a *Get* in accordance with Jewish law. Often, a presiding judge would strike out such a clause before making the settlement an Order of Court. This was no longer the case.

Advocate Segal is of the opinion that the real reason for the practice of striking out was a question of policy on two issues, the principle of freedom of religion and the exclusivity of civil law. Whatever the reasons, the obstacle seems to have been removed.

One of the most heartening aspects of the appearance of the Act on to the Statute Book, in a country crowded with religious minorities, has been its acceptance by other religious groups who have also found it beneficial in their difficult cases. These include Moslem, Hindu, Roman Catholic, Greek Orthodox and Pre-Reformation Christian.

An article in *De Rebus* in 1997 by Candidate Attorney Ashraf Mohammed outlines the benefits. He maintains that the concept of doctrinal entanglement, the mixing of secular law with religious doctrine is tolerated by the new South African Constitution, unlike its counterpart in the United States. South Africa is a semi-secular country and many practical considerations arise from this position.

He submits that the Act “disempowers manipulative parties from using inequitable and patriarchal precepts of their religions to deny innocent parties, mainly women, their freedom and rights”. Mr. Mohammed confirms the view of the *Beth Din* that the new procedure allows much more scope for divorce mediation with its benefits of economy in its quest for fair settlements. He describes the Act as “a significant piece of social legislation geared towards creating a harmonious co-existence between secular laws and religious and cultural affiliations”.

The *Beth Din* is also encouraged by the increased use of divorce mediation and in its view, this should be developed further to assist in persuading couples to reach satisfactory agreements.

All the divorce practitioners who took part in the seminars and who have used the machinery testify to the fact that since the passing of the Act they have not had one instance of refusal to grant a *Get*. The *Beth Din* of Johannesburg confirms that the

number of hard cases has dropped significantly. Those which do arise often do so because a spouse has agreed to a civil divorce without requesting a *Get*; the request for the *Get* after the civil divorce is then refused.

In conclusion, it must be said that while the arguments against the use of civil law to assist the *Agunah* have to be given credence, the necessity to assist the unfortunate surely outweighs them.

In an ideal world, the *Rabbanim* of Israel and of the major Diaspora communities would come to a consensus of agreement as to how the *Halacha* can be interpreted to solve the problem. But we do not live in such a world. So there is little alternative but to seek the assistance of civil law; and the instrument of civil law which appears to be the most acceptable is legislation.

So far the opportunity to test the working of the Act in court has not arisen. That is not to say that at some time in the future, a spouse will deny totally the irretrievable breakdown of a marriage and will not consent to either a civil or religious divorce; or that a party will challenge the validity of the Act on the grounds of infringement of freedom of religion, a right originally upheld by Roman-Dutch law and now enshrined in the South African Constitution. If that does happen, the argument that the legislation has already assisted in many divorce actions involving a religious element will be a strong one.

In the South African experience in the words of Rabbi Kurtstag, “Since the passing of the Act there has been much more awareness of the importance of *Get* and we are able to help a recalcitrant husband to do what he really wishes to do”.

“Political Strikes... are Illegitimate Strikes”

High Court of Justice 1074/93

The Attorney-General and Bezeq Israel Communications Corporation Ltd. v. The National Labour Court and Others Before Justices Dov Levin, Mishael Cheshin, Zvi Tal Judgment delivered 10.4.95; 49 (2) P.D. 485

Precis

Bezeq Israel Communications Corporation Ltd., operates under a license which grants it exclusivity in certain sectors. At a certain time the government decided to limit the scope of the license and enable other companies to compete in providing telecommunication services. The General Labour Federation and Bezeq Corporation employees opposed these changes on the grounds that cancellation of Bezeq's monopoly would impair the conditions of the workers' employment and would lead to large scale redundancies. Work stoppages were initiated. Bezeq Corporation applied to the Regional Labour Court and was granted an interim and permanent injunction ending the stoppages. The Regional Labour Court held that the workers' strike was illegitimate. The National Labour Court upheld an appeal filed by the General Labour Federation and held that the action was not a "political strike" and that not every strike which was directed against the government, as opposed to an employer, would be deemed to be a "political strike". On appeal, the Supreme Court sitting as the High Court of Justice unanimously decided to reinstate the decision of the Regional Labour Court. The Court considered freedom to strike and various aspects of political strikes and whether strikes are now protected by the Basic Law: Human Dignity and Liberty. The judgment also considers issues of civil procedure and the competence of the High Court of Justice to overturn the decision of the National Labour Court. The leading judgment was given by Justice Dov Levin.

Justice Dov Levin:

Freedom to Strike

Justice Levin held that in order to decide whether the work

stoppages carried out by the employees in the instant case should be deemed to be a "strike" within the definition of this term in labour law, the Court first had to consider the status of the strike institution.

According to Justice Levin, there is no longer room for uncertainty about the exalted and protected status of the freedom to strike. The Court has repeatedly emphasized that "the right to strike has achieved a solid position in Israeli legislation and case law" (Civil Appeal 593/81 *Ashdod Vehicle Operators Ltd. and Others v. Chisick (Deceased) and Others* 41(3) P.D. 169 at p. 190) and in the lucid language of Justice Haim Cohn in Civil Appeal 25/71 *Feinstein and Others v. Association of High School Teachers and Others* 25(1) P.D. 129 at p. 131:

"It is unnecessary to state that there is nothing further from the Israeli legislature than the desire to eliminate the strike institution - if one of the judges in England in a recent judgment described the strike as 'a holy cow' here we must see it at least as a sacred tradition to the extent that doubt can no longer be cast upon it."

Justice Levin held that in an era where we are guided both in legislation and in case law by the Basic Law: Human Dignity and Liberty, its statutory values and principles, it would appear that the "strike" - which has always been presumed to be included within the fundamental freedoms which are unwritten and which have been said "to belong in substance not within the arena of 'rights' but within the arena of 'freedoms' or 'liberties' which are subject to binding reservations..." (Labour Tribunal 37/3-4 *Kaza Workers Committee and Others v. Kaza Company Ltd.* (8 Lab. Judgments 421) - will from now on be protected by the principle of 'human dignity' which is anchored in this Basic Law (Sections 1, 2 and 4 of the Basic Law: Human Dignity and Liberty; for a more in depth review see Prof. A. Barak (then Deputy President) "*Interpretation of Law*", Vol. C, "*Statutory Interpretation*", Nevo, 1994) as well as the article by Prof. Barak, "Human Dignity as a Statutory Right" 41 *Hapraklit* (1993-94) 271, 279.

Thus, at the heart of the discussion there is a freedom having the status of a constitutional right which is well entrenched in various areas of Israeli law - a status which is becoming increasingly strong. Concurrently, and precisely because of this, when the Court comes to decide which acts of protest taken by workers in their struggle, will be covered by the protected "strike" principle, the Court must consider the various aspects of the definition of a "strike".

Definition of "Strike" - The Status of a Strike against the Sovereign Power

In the petition at hand the representatives of Bezeq and the Attorney-General reiterated their principal contention, which had also been raised before the National Tribunal, to the effect that it was an incontrovertible condition for an organized labour action to be recognized as a "strike" for the purpose of labour law, that it be declared within the framework of the struggle to make an employer meet the workers' demands - in connection with their employment conditions. The Petitioners contended that this condition had not been fulfilled in the instant case, where the demands of Bezeq employees were not directed at the employer (Bezeq Corporation) at all, but at the government. Consequently, in their opinion, the measures taken did not come within the framework of the definition of a "strike", and *a fortiori*, these measures could not be granted legitimacy.

Indeed, as the President of the National Labour Tribunal had noted in his judgment:

"On more than a few occasions, the tribunals made statements from which it could be learned that only a strike against an 'employer', in matters which are subject to collective negotiations and agreements, is a 'strike' within the meaning of labour law." *ibid.* at page 376).

Justice Levin noted that the reason why the Court has repeatedly to inquire into the nature of "strikes" - once it has recognized the traditional characteristics of the definition of strikes, namely, that it is exclusively directed at the employer, whereas in the instant case the action was directed at the government - is that such an examination has a real purpose as the judges sit among their people and are required to look at the modern, often changing and varied reality of life through a modern perspective, including in the area of work relations. It is not without reason that the legislature chose not to define the term "strike", except in Chapter 4 of the Labour Settlement of

Disputes Law. By this, the legislature clearly expressed its view that:

"... The term 'strike' is not one which has a single meaning, which is appropriate at all times, for every purpose and in every development of labour relations and labour law."

Labour Judgments 36/4-5 *Ginstaller and Others v. State of Israel* 8 App. Dec. 3 at page 27).

Further, as Judge Goldberg (President of the National Labour Tribunal) stated in one of his articles:

"... Possibly it is good that this matter has been left to the discretion of the Courts on the grounds that the needs and situations in the area of labour relations and labour law are variable and dynamic, and a statutory definition, which by its nature is strict, does not vary with the changing times, and may pose difficulties when the Court is required to implement the law..." (M. Goldberg, "Strikes in Statute, Collective Agreements and Case Law", *Hapraklit Special edition celebrating 50 years of the Chamber of Advocates*, 1987, 51-52).

Justice Levin noted that we must not ignore the changes which the labour relations structure in the Israeli economy has been undergoing over a long period of time. It is apparent that the government is an active and influential factor in the labour relations structure and in negotiations on labour agreements. The reasons for this intervention are diverse, and beyond it being one of the largest employers in the economy, the State intervenes in labour relations as an active and highly influential agent in "package deals", in wages, taxes and prices policy.

Justice Levin commented that in this connection, the following statements which reflect a recognized reality, are relevant:

"... The fact that the government has become an active participant in negotiations on work conditions, justifies the expansion of the workers' basis of protest, so that it may also be directed against the policy of the additional partner to the negotiations and not only against the employer as was the case in the past, and conformed to reality as it prevailed in the past". (Prof. R. Ben-Israel, "The Political Strike", *Junei Mishpat*, 1986-1987).

Thus, it is proper for the Court to consider this development when it considers the modern approach which must be taken on these issues.

Political Strike - Classification and Status

Justice Levin held that at the basis of the petition before the Court was the Attorney-General's contention that the strike was directed against a specific provision in the Telecommunications Law, which granted Bezeq Corporation a monopoly in certain sectors. The policy adopted by the State in tabling the above bill to correct the situation, was intended to bring about a certain change in an undesirable monopolistic reality, and provide for the possibility of free competition within the international telephone services and mobile telephone services sector.

According to Justice Levin, opposition to this policy, while in the process of undergoing legislation in the *Knesset*, is, in the eyes of the State, a clearly political strike, and is perceived by Israeli law as a strike which undermines the democratic processes in Israel's system, and as such it must be deemed to be an illegitimate strike. This perception, in so far as it relies on an appropriate factual structure, has support in Israeli case law, and for this Justice Levin referred to the comments of President Shamgar in the *Hativ case* for his view to the effect that:

"The political strike which is designed to force on governmental authorities an act or omission which they would not have been prepared to perform in the absence of the strike - raises numerous legislative and social problems: a democratic regime has the capability of creating an opening for imposing the wishes of the strikers on the elected democratic institutions and to direct processes on the basis of the coercive power of extra-governmental bodies and even of minority groups having actual coercive power. Possibly, there are countries in which a general stoppage of electricity, including electricity flowing to hospitals and nurseries, may cause the legislature to enact any legislation required of it, however, there is no doubt that together with the moral collapse, the mode of action of democracy as such, is most significantly impaired." *Ibid.* at pages 703-704).

Justice Levin emphasized that this issue is very sensitive and highly significant in labour relations and labour law, as these have developed in the countries of the democratic world. The distinction between a pure political strike which is deemed to be illegitimate and an economic strike which is recognized as a legitimate strike is recognized and accepted in the various legal systems, except that with time the two polarized forms of strike, have been joined by an additional form of workers' protest which is primarily directed against the sovereign, namely, a quasi-political strike.

Comparative Law - Conceptual Distinctions

The law of the international democratic community, which has

a long tradition in labour relations, generally draws a distinction between the "economic strike", which is intended to achieve goals in collective negotiations in connection with work conditions, and the "pure political strike" which is directed against the government with the purpose of achieving political aims. This conceptual distinction is crude, as in discussing questions concerning "political strikes", community law has generally evinced willingness to occasionally recognize the "strike against the sovereign" as an "economic strike". Thus, where workers have taken strike action against the sovereign - government and legislature alike - it targets the direct intervention of this sovereign in their work conditions and immediate rights, such as freezing their wages (*Holland - Re Keijzer v. Peters N.V.* 3 I.L.L.R. 306 (1977)); or reducing their wages (*Holland - N. v. Dutch Railways v. Transport Unions FNV, FSV and CNV* 6 I.L.L.R 3 at page 8 (1986), their strike was recognized as an economic strike, even though, as noted, it was directed against the sovereign. On the other hand, where the strike is directed against the sovereign and it targets policy aimed at fundamental structural change such as tax reform (*Finland - Metal Industry Employers' Federation v. Metal Workers Union* 9 I.L.L.R. 522 (1988) or privatization processes (*England - Mercury Communications v. Scott-Garner* [1984] Ch. 37 (C.A.)) the claim that the strike was economic and not political was discussed.

The conclusion which follows by way of analogy, is that the dichotomical distinction between a "pure political strike" on one hand and an "economic strike" on the other, is no longer applied in international community law, and *a fortiori*, it cannot provide suitable solutions to the diverse labour disputes of a developing economy such as that of the State of Israel. Justice Levin noted that we can see the great weight ascribed to the purpose of the strike and the great weight attributed to the objectives which the strikes is designed to attain. Accordingly, the observer must seek the purpose and goals of the strike, and after determining its purpose establish his position regarding the legitimacy of that strike, even if it is directly aimed against the sovereign.

In this context, one had to consider the important comments of Judge Adler, who was in the minority in the decision forming the subject of the petition in the instant case, namely that:

"... An additional tool for defining the scope of the strike within the framework of labour law is the 'principle purpose of the strike' [or] - 'the predominant purpose of the dispute'".

Strike and Quasi-Political Strike

Thus, Justice Levin held that in the reality existing in Israel, one could distinguish between three strikes which differ in substance, significance and binding legal consequences. One strike is that defined as an economic strike; it is a strike which is generally directed against an employer who seeks to impair the rights of the workers or refuses to improve their work conditions. It is a strike which may also be directed against the sovereign, when the latter acts in the capacity of an employer or desires to intervene, using its sovereign powers, to change existing arrangements in the work relations between the workers and employers or to prevent such arrangements. Such a strike is recognized as a legitimate strike.

The second, is the pure political strike, which is directed against the sovereign other than in its capacity as an employer, but as the body responsible for determining overall economic policy which is unacceptable to a workers group - in the light of the workers' belief that such a policy would restrict them and impair their ability to confront determinations of their rights as workers. This is a strike which is regarded as illegitimate, as it is intended to undermine the power of the sovereign to set economic policy applying broad considerations of the good of the general public and to force it to submit to the demands of the workers; this is a strike which is designed to intervene in legitimate legislative processes of the parliament within the framework of its powers - not by means of persuasion which are accepted in our democratic system, but by brutal intervention which hopes to coerce upon the legislature matters which are unsuitable in its view. This strike is not legitimate, and there is justification for preventing it.

Third is the quasi-strike located in the mid-point between the two extremes referred to above. In such cases, which fall within the area described above, the test of **"the dominant purpose"** becomes more important, as these are cases where the workers strike over a matter which is not directly connected to their work conditions in a narrow sense, but affect them directly. Thus, when the proposed test indicates that there is indeed a direct effect on the rights of the workers, even when they strike against the sovereign, the labour law will term their strike as a "quasi-political strike", which will confer on the petitioners the right to engage in a short protest strike only, without the same being classified as one of the polar extremes.

In this connection, Justice Levin thought it right to adopt the comments of Prof. P. Radai, in her article, "Political Strikes and

Fundamental Change in the Economic Structure of the Work Place", *Hamishpat* (1995) 159 at page 163, namely:

"The right to strike on matters which are not connected with work conditions in the narrow meaning, is completely different from the right of economic strike. It is not possible to regard it as an economic means of pressure in the conduct of collective negotiations, because it confers validity on strikes against the employer or against the sovereign in relation to matters which are not subject to collective negotiation. It should be seen as the right of the civilian to freedom of speech and demonstration. Therefore it is limited to protest strikes only - to a short action, which is not intended to place economic pressure on the employer. It is possible to see this right to a protest strike in relation to broad socio-economic matters which directly affect the public of workers, as the creation of a concept of a right to a quasi-political strike, which enables a protest only."

Justice Levin also referred to the comments of Prof. Ben-Israel, in her above mentioned article, at page 621:

"... The standard suggested is on one hand that reference should be to government policy which has an influence on the workers, however, in this connection the influence must be direct, indirect influence is not sufficient. An additional constraint arises from the case law of the Committee of the International Labour Organization, and that is that reference is to a strike which is intended to express protest only and is not intended to breach the peace."

From the General to the Particular

Justice Levin asked whether it was proper that the strike before the Court should be classified as an economic strike, which was entitled to the protection of labour law, as the National Labour Court had indeed held? In his opinion, it was not, and he rejected the conclusion of the National Labour Court for the following reasons:

In relation to the classification of the strike - if the General Labour Union wished to make use of the economic strike to argue that the strike before the Court was in the same nature, and asked to implement the protections given to such a strike, it had the task, as the representative of the striking workers, of persuading the Court that the policy according to which different fields in the telecommunications services would be opened to competition, as expressed in the legislative proposal made by the government, was capable of directly injuring the workers and their work conditions. In Justice Levin's opinion, no convincing

evidence that restriction of the monopoly of Bezeq would cause direct and immediate harm to Bezeq employees was ever presented, either before the National Labour Court or before the High Court. Accordingly, he was willing to accede to the finding of Deputy President Adler, when he indicated that:

“The facts which were brought... did not point to clear, certain or immediate influence which the new law will have on their conditions of work, wages or duration of employment of the ‘Bezeq’ employees. It is possible that they will be injured, however, it is also possible that they will gain from the competition, if ‘Bezeq’ meets it successfully... the influence of the legislative proposal on the Bezeq employees is not certain or tangible, as there is no direct threat to the places of work of the ‘Bezeq’ employees, there is no direct intention to change their work conditions, and there is no threat to reduce manpower in the company. The opposite is true - Bezeq employees enjoy labour security by virtue of the law and by virtue of collective agreements which apply to them”.

Accordingly, the inescapable conclusion was that the correct classification of the strike at hand, on the basis of its objectives and background, was at the most, a “quasi-political” strike, which only justified demonstration of protest which could be expressed, as noted, in a demonstrative strike of short duration.

Justice Levin emphasized the words ‘at the most’, because were it not for the expectation of the Bezeq employees to exclusivity and to a permanent and unchangeable monopoly, expectations which derived from the provisions of Sections 50, 51 and 60 of the Telecommunications Law, he would have had grave doubt if it was possible at all to deem an amendment to the law, even *prima facie*, as direct and substantive influence on the work conditions of the employees. From a review of the facts of the matter and the provisions of the said law, he determined that these expectations and feelings of the employees were unfounded. However, he was willing to accept that when the hopes of the employees were disappointed, even if those hopes were mistaken, they had a real fear that an amendment to the law would somehow impair their work conditions. For this reason he was willing to settle this strike within the framework of a quasi-political strike, with the consequences referred to above.

According to Justice Levin Section 37A of the Settlement of Labour Disputes Law also led to the same conclusion regarding the character of the strike before the Court and its correct classification. The term “strike or unprotected strike” is defined in Section 37A of the Settlement of Labour Disputes Law, as follows:

“‘Strike or unprotected strike’ - means each of the following:

(1) Strike or stoppage by employees in public service at a time when they are subject to a collective agreement, save for a strike which is not connected to wages or social conditions and where the central national institution of the competent workers union declared or authorized it;

In the case at hand, where ‘Bezeq’ is a public service, within the meaning of the Settlement of Labour Disputes Law, one had to consider the construction of the words “save for a strike which is not connected to wages or social conditions”. In relation to the interpretation of this phrase, Prof. Ben-Israel expressed her opinion to the effect that:

“It is possible to validate by means of an exception (which is not connected to wages or social conditions - D.L.) strikes of two types:

(a) sympathy strikes...

(b) strikes having a certain political flavour...” (Prof. R. Ben-Israel, *The Strike*, (Sadan, 1987) 194).

Justice Levin held that even if the Court adopted this interpretation, which he did not reject, the Court would still find itself bound by the spirit of Section 37A which seeks to ensure the orderly provision of essential public services. Accordingly, he felt that in providing for the exception to “unprotected strikes”, the legislature was willing to recognize the quasi-political strike only, the protest, and protect it within its narrow confines. As the protest of the Bezeq employees wore the garb of a general, continuous strike, it significantly exceeded a quasi-political strike in terms of its scope and objectives, and it became a political strike within the full meaning of the word, and accordingly it was illegitimate and not protected, contrary to the approach of the National Labour Court.

Summary

Justice Levin noted that essence of the strike at hand was the protest of Bezeq employees against a global socio-economic policy, at the basis of which was the opening of the Israeli economy to competition and privatization. This policy was legitimate and even desirable. It did not amount to direct intervention in the freedom of negotiation or the work conditions of the employees and it was faithful to the good of the public as a whole.

Where the sovereign sees that social and economic conditions justify changes in economic policy, whether by way of privatiza-

tion of public services or by removing the monopoly from bodies which have enjoyed a monopoly, it is necessary to recognize its right and power to implement such a policy. The strike of the employees who dispute this policy by reason of an unfounded fear that their rights as employees will be impaired, may at the most be confined within the framework of protest strikes, of a quasi-political nature, the duration of which is short, but not more than that.

Accordingly, Justice Levin held that the petition was proper had to be upheld. The *order nisi* was made absolute, in the sense that the Court reinstated the result reached by the Regional Labour Court in its judgment, but for the above reasons.

Justice Mishael Cheshin:

Justice Cheshin agreed but added two points:

Classification

Justice Cheshin noted that the needs of society and the manner of governing the modern State - whether in the relations between the State and the individuals therein, or in the relations of individuals *inter se* - establish social and economic structures which are attempting to squeeze into legal patterns of the past. Models which were used in the past to determine legal disputes can no longer be implemented as they stand, and legal classifications which were once all-embracing are collapsing. This phenomenon is encountered in every branch of the law.

An example of this may be found in the classic distinction between private law and public law. This distinction is now being seriously blurred. In certain legal issues, it has diminished and its power has weakened. In the words of Judge H. Cohn in H.C.J. 262/62 *Peretz and Others v. Cfar Shmaryahu Local Council* 16 P.D. 2101:

“In the State and public economy of today, there is no longer any practical utility in the accepted distinction between commercial or civilian activities of any State authority or local authority, and their governmental or public activities.”

This is also the position in the matter at hand, namely, in the dichotomous classification of a strike in its classic meaning - “economic strike”, within the narrow scope of employer-employee relations - and “political strike” (if it is a “strike”). For reasons which Justice Cheshin did not want to go into (among them, the increasing intervention of the State in social structures

in the economy, and the greater awareness of civil rights), he felt that the courts, scholars and those dealing in social sciences have found that the traditional classifications do not have the power to provide appropriate solutions to social and economic strictures which life and the development of the law in the modern State have placed before us. The discomfort with the accepted models has led to the need to attempt to find new models, whether by means of elaborating the existing models or by establishing models which are new and conform to the needs of the hour. Justice Cheshin held that we are currently in a period of change from the model of the past to the model of the present. This is what gives rise to the different variations suggested for the new (or rejuvenated) models, and what gives rise to the disputes between scholars and decision makers. So long as we are in the thick of the generally accepted classification, the solution of issues may be seen as simple and clear, and the settlement of a dispute may be seen as a routine act (even if it is not so). However, in the shift from period to period, nerves are exposed, the search for the meta-legal creative elements becomes urgent and vexing, and disputes between different world views become ever more apparent.

Justice Cheshin referred to Justice Levin’s suggestion that the Court adopt the comments of Professor Radai and Professor Ben-Israel in relation to ‘quasi-political’ strikes. He thought that the comments of both these authoritative figures - each in her own way - were appropriate as models for examination, however, the Court had to shield itself from the adoption of one model only, a model which could provide an appropriate solution for one set of facts, but would be ineffective in the context of another set of facts (e.g. a ‘quasi-political’ strike, as defined, is not supposed to express rights to work and livelihood (only), but (primarily) to civil rights). In the case at hand, Justice Cheshin did not have the slightest doubt that the strike of the employees exceeded the framework of a strike which should be recognized as a legitimate strike. A strike of this type is capable of fundamentally injuring the infrastructure of a democratic society, it eradicates fundamental values in social morals, and destroys norms of life together. Its beginning is known but not its end.

Right (or Freedom) to Strike and Human Dignity

Justice Cheshin noted Justice Levin’s finding that since the Basic Law: Human Dignity and Freedom, the right (or freedom) to strike “will from now on be protected by the principle of

‘human dignity’ which is anchored in this Basic Law”, and that “at the heart of the discussion there is a freedom having the status of a constitutional right which is well entrenched in various sectors of Israeli law - a status which is becoming increasingly strong.” Justice Cheshin accepted that no one would dispute that the freedom to strike is one of the inalienable rights in the Israeli legal system, and also agreed that freedom to strike and its status are of a superior, statutory character. At the same time, he would not say as an incontrovertible fact that freedom to strike is derived from “human dignity” in the Basic Law: Human Dignity and Freedom, and that its status today is that of a constitutional right. In H.C.J. 453, 454/94 *Women’s Lobby in Israel v. Government of Israel and Others* 48(5) P.D. 501, Justice Zamir stated as follows at page 536:

“In the case law following the Basic Law: Human Dignity and Freedom, there are a number of *obiter dicta* which find much expression in the Basic Law. This is primarily true of the right to dignity. It is also the case in legal literature. There are some who find in human dignity the principle of equality, there are some who discover freedom of speech in it, and some who hang on it other basic rights which are not mentioned in the Basic Law. A person collecting these comments could obtain the impression that human dignity is, so-to-speak, the entire law on one foot, and that it is possible to say of it that it is all-embracing.

However, I would like to caution, in this context, against *obiter dicta* which find their way between the lines of the judgments, in such a crucial and fundamental matter, without an in-depth discussion on the merits as a binding part of the judgment. I am of the opinion that if there is no need for it, and until such need arises, it would be better not to bind oneself in the sense that one should cross the bridge only when one comes to it.”

In that case, the Court was considering the principle of equality, and Justice Zamir was of the opinion that it was possible to decide the dispute which had arisen between the litigants without also determining that “the principle of equality is in the nature of a basic right which is entrenched in the Basic Law: Human Dignity and Freedom, as part of the right to dignity, and that it has, therefore, a supra-statutory status” (*ibid*). This is the case in relation to the principle of equality, and according to Justice Cheshin, this is also the case in relation to the issue of freedom to strike.

Justice Z. A. Tal

Justice Tal agreed with the judgment of Justice D. Levin and

with the judgment of Justice Cheshin. He also emphasized the injury to the pillars of democracy resulting from a strike which is not an economic strike against an employer, by means of which a group of workers wishes to defeat the legislature through the use of force. Justice Tal left open the question whether the right to strike is now entrenched in a Basic Law.

Abstract prepared by Dr. Rahel Rimon, Adv.

Errata

JUSTICE regrets that a number of errors occurred in the report of Rabbi David Rosen’s remarks made during the panel on “Pluralism, Religion and State” (*JUSTICE* 20, pp. 20-22).

The correct text should read as follows:

Page 20, column 1: I am sure that many of you will be familiar with the writings of Philo who defines the system of the *Torah*, of Judaism, as democracy. He asserts that Judaism is a democracy because it “honours equality and has law and justice for its rulers as for its citizens”.

Page 20, column 1: The democratic principle was perceived by traditional Rabbinic Judaism as already rooted in the initial workings of communal life, and of course, the *Talmud* teaches in tractate “*Brachot*”, 55A, that no public appointee may be appointed without public approval.

Page 20, column 2: ...as the *Talmud* indicates in the famous quotation in “*Sanhedrin*” 44 A, that even the sinner, in Jewish perception, is part of the community, and therefore has a role as part and parcel of such.

Page 21, column 2: I was Chief Rabbi in Ireland. In my time in Ireland, it was the democratic choice of the majority not to allow divorce in Ireland. Yet not everybody was happy with their partners in Ireland. So what happened? Every year, thousands of people would take a boat trip or a plane trip over to England, get divorced in England, and come back to Ireland, and live with another partner as bigamists. Irish law turned a blind eye to bigamy, as long as one did not get divorced!! This was what they called “an Irish solution to an Irish problem” and it just made a mockery of the system. Similarly, the situation at the moment in Israel makes a mockery of the democratic rule of law and therefore of the rights and facilities available to people.

Adv. David Rotlevy (1930-1999)

What else can I say about a friend who has passed away, without repeating what has already been said? A brilliant jurist, a clever man, a congenial and friendly personality - it has all been said.

All that is left is to talk about the friend I had - who is no more.

We met many years ago at the beginning of the 40s at the 'Tachkemani' school in little Tel Aviv. We all knew each other as we went about our daily lives, on Saturdays and holidays and at the synagogue.

Tel Aviv was small - very small - and the largest business deals made there were also small. We knew that David came from a family rooted in the textile industry. "Rotex" was considered an enormous company and ten year-old David seemed to us to be both an industrialist and a financier. In this capacity, he gave us our initial instructions on how to make money. He organized us into a group which

sold newspapers and as our "Chief", he introduced us to casual work at the "Egged" central bus station in Rothschild Boulevard, close to our school.

We grew up. Many childhood friends moved away. David and I remained both friends and colleagues. His success was meteoric. He was a partner in the prestigious legal firm of Zeligman, Kritzman and Rotlevy. He was a brilliant advocate in the Kfar Kassem trial and the Jewish Underground of the 50's. The brilliance of his performance transformed him into an arbitrator, accepted by all his colleagues - and his decisions - both judicial and financial - were based on his wisdom and humanity.

His activities in the public sphere were extensive. He was a member of the Tel-Aviv committee of the Israel Bar Association and was later elected as its Chairman. In addition he was a member of the Tel Aviv Municipal Council and served as Israel's Economic Attache in New York.

With the passing of David Rotlevy



from the judicial and financial landscape of Israel, he leaves behind a mourning family: his wife - District Court Judge Saviona Rotlevy, his children, his brother and other loving relatives.

An empty space has been left in the top echelons of Israeli jurisprudence.

Adv. Abe Neeman

Member of the Presidency & Treasurer of IAJLI



Remember Berlin

The Berlin Conference, to commemorate the Jewish lawyers and jurists in Germany who perished in the Holocaust and their contribution to the law, was held on June 3-8, 1999, by the IAJLI jointly with the Berlin Bar Association and the German-Israeli Jurists Association.

The next issue of *JUSTICE* (Autumn 1999) will be devoted to this remarkable event and the deliberations held there.

Left: Participants of the Berlin Conference laid a wreath on the railway lines of the Grünwald-Berlin Station from where Jew were deported to the extermination camps.