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Co-ordinating Editor:

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Graphic Design:

Ruth Beth-Or

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Remember Warsaw

**An International Conference to Commemorate Jewish Lawyers and Jurists in Poland
Warsaw, Poland, May 9-13, 2001; Venue: Sheraton Hotel, Warsaw**

Register without delay • See program pages 43-44

PRESIDENT'S MESSAGE



J

USTICE has consistently reported on the legal aspects of all the Peace Accords signed between Israel and the Palestinians in the hope that this process, begun in 1993, will lead to a permanent peace for all the inhabitants of this embattled land. Over the years the Palestinian leadership has done nothing to curb incitement against Israel, indeed, it has even promoted it. Talk of a holy war against Israel is heard not only from political leaders, including Chairman Arafat, but also during public sermons in mosques, which fire the imagination of hundreds of thousands of believers. The official press of the Palestinian Authority, and unfortunately, also of neighbouring countries that have signed Peace Treaties with Israel, have been outspoken in their brutal messages which are not only anti-Israeli but also blatantly anti-Semitic. In published maps of the region, used in schools, Israel

does not appear, and talk of a Jewish conspiracy based on the *Protocols of the Elders of Zion* is routine.

Throughout this time most of the population of Israel has supported peace, even at great cost. The Israeli press and its electronic media is open to both sides of the argument, and almost daily hosts speakers and writers who eloquently present the Palestinian case. This is not reciprocated by the Palestinians whose media not only continues to present one-sided, often false facts, but actually incites anti-Semitism and violence.

Unfortunately, denial of the Holocaust has become a routine component of Arab anti-Israeli propaganda. It is therefore not surprising that the next conference described as an International Conference on "Revisionism and Zionism", will take place in Beirut under the auspices of the Institute for Historical Review (IHR), which boasts that it has spearheaded the international movement "to deny the reality of the Holocaust". This institute distributes a variety of books and propaganda materials saturated with anti-Semitic messages, its professional staffers, even those with academic degrees, have participated extensively in pro-Nazi and anti-Jewish activities.

The conference is organized in cooperation with the Swiss Revisionist Organization, *Verite et Justice*, whose director Jurgen Graf, fled Switzerland after he was sentenced by a Swiss court in 1998 to 15 months imprisonment for Holocaust denial. According to reports, Graf is currently the guest of Iranian scholars.

Another grave phenomenon is the refusal to allow representatives of the international media free access to the territory under Palestinian rule. Since the eruption of violence against Israel, in what is called the "*El-Aqsa Intifada*", foreign correspondents and, even more important, photographers, have been consistently prevented from publishing the true picture of events in areas controlled by the Palestinian Authority. Journalists trying to film the events actually taking place before their eyes, have been threatened, sometimes beaten, their cameras shattered, the film destroyed, and often they have been surrounded by mobs whose message is clear: if you insist on publishing the true facts, you will be barred from working in the area at best, and at worst, you will put your life at risk.

Some courageous journalists have put their life on the line by telling the true story,

but pictures are stronger than words and that is why photographers are the main target. Indeed, the threatening message works. That is why an Italian photographer, the only one who managed to get away with film recording the lynch of two Israeli soldiers in Ramallah, decided to apologize to the Palestinian Authority, an apology for which he was later reprimanded by his editors.

Correspondents and photographers in combat areas serve as the eyes and ears of the world. The picture they present creates world opinion. This is not only a war of bullets, it is a war of images, and in this case the foreign media, mostly the electronic media, has chosen to succumb to threats and continues operating under unwritten but very clear rules set by terrorist groups and wild mobs. The outcome is not only an unbalanced but a very twisted and untrue picture.

World public opinion is an important factor in creating a window for peace in this region. An atmosphere based on false reports and on distorted one-sided images, will seriously damage the hope for peace.

A free, courageous, fair, unbiased media, may play an important and even crucial role in helping to promote peace in the Middle East.

In 1998 our Association decided to commemorate Jewish lawyers and jurists who perished in Europe and to mark their contribution to the legal systems of their respective countries. Little did we know what an ambitious project we were undertaking. The decision to hold a series of international conferences in major cities in Europe, brought us face to face with an unknown, and as yet untold, chapter in the history of vanished Jewish communities. The scope of pre-war Jewish participation in the legal community in each country was a revelation. These conferences bring to life a chapter in each country's history that should have been told long ago.

The two conferences which we have already held - "Remember Salonika" (in 1998) and "Remember Berlin" (in 1999) - left their mark not only on participants from around the world; they also compelled the local population, particularly the legal community, to face a long forgotten reality, which in our view must be remembered.

For obvious reasons Warsaw was chosen as the site of our next conference, which will be held in May 9-13, 2001.

We are particularly moved and gratified at the readiness of all major legal organizations in Poland to co-sponsor this conference which will raise memories, painful to them and not only to us.

We are going to Warsaw to remember and to tell the story of our colleagues, our brothers.

Hadassa Ben-Yitvo

“Humanitarian Intervention from Outside, in the face of Genocide, is Legitimate only when Undertaken by the Security Council”

Yoram Dinstein

I would like to pay a personal debt of honour to Morris Abram whom I came to know in various capacities from the early 1960s. At the time, Morris Abram represented the US on the UN Commission on Human Rights. This was a difficult period for the US, with unrest in the South following the landmark Supreme Court decision in *Brown v. Board of Education* and the rejection of the “separate but equal” doctrine. Morris Abram, coming as he did from Atlanta, took a daring step: he invited the entire Commission to join him in his home town. This informal on-the-spot visit, entailing a personal introduction to the actual measures being taken at the time to terminate discrimination against Afro-Americans, did more to temper criticism of the US in the Commission than any rhetorical flourish at the UN Headquarters in New York. At a later stage in his life, Morris Abram represented his country as Ambassador to the UN in Geneva, and once more handled his position with elan and success.

Morris Abram served not only as a representative of his country in international forums. He also excelled as a leader of the American Jewish community, ultimately becoming its most prominent spokesman on matters pertaining to Israel, Soviet Jewry, *etc.* Morris Abram had a passionate commitment to Jewish causes. At the same time, he felt at home in the “corridors of power” of Washington. Mentally, he could easily switch between the White House and a session of Jewish leaders, and he enjoyed the respect and admiration of all. He played a major role in the campaign that culminated in rescinding the notorious

UN General Assembly Resolution 3379 of 1975 purporting to equate Zionism with racism. Subsequently, he made many efforts to secure recognition of Magen David Adom as a recognized emblem under the 1949 Geneva Conventions.

While this campaign is far from over, Morris Abram would have been satisfied to know that there is at present a formal proposal to add a new Protocol to the Geneva Conventions with a view to solving the problem.

Despite his unique standing as a leader, a lawyer and a diplomat, and notwithstanding his incontestable expertise in a wide range of complex subjects, Morris Abram never failed to seek the opinions of others. Unlike certain great men who have come to deride the views of lesser mortals, Morris Abram was an attentive listener. He was always prepared to learn, and invariably gave the impression of regarding his collaborators as full partners and co-equals. Perhaps that was the secret of his success as a diplomat.

Morris Abram was a very special person. His passing away has left a gap, which it would prove exceedingly difficult to fill.

I knew from conversations with Morris Abram that Morris had



Highlights from the Morris Abram Memorial Lecture delivered by Professor Yoram Dinstein, former President of Tel-Aviv University, at the Swiss Institute of Comparative Law .

been grappling with the issue of humanitarian intervention for some time. It is, therefore, a fitting theme for the present Memorial Lecture.

Scenarios of large-scale, massive and flagrant violations of human rights have repeatedly presented challenges to the international community. Since 1945, the most important instrument in international law is the UN Charter. Under the law of the Charter, the organ vested with full powers to act in any crisis affecting international peace is the Security Council. There is no doubt that, *inter alia*, the Security Council is empowered to undertake or authorize a forcible humanitarian intervention aimed at terminating massive violations of human rights within the borders of any Member State of the UN. But what happens when the Council is paralyzed by the use or abuse of the veto power of the five Permanent Members, or otherwise fails to take appropriate action? Can a forcible humanitarian intervention be initiated unilaterally, by a single country or a group of countries, without the authorization of the Security Council? This is what

transpired in 1999, when NATO launched an air campaign in order to coerce Yugoslavia to accept a settlement of the conflict in Kosovo. Undeniably, atrocities were committed by the Milosevic regime in Kosovo. The question is whether the NATO air campaign was a proper response from the perspective of international law.

Under contemporary international law, the use of force in international relations is forbidden. This is the norm enshrined in Article 2(4) of the Charter, and, as held by the International Court of Justice, it reflects customary international law. Many people misread Article 2(4), since it refers specifically to the use of force “against the territorial integrity or political independence of any state”. What they gloss over is the sequel: “or in any other manner inconsistent with the Purposes of the United Nations”. The primary purpose of the United Nations (as proclaimed in the Preamble) is “to save succeeding generations from the scourge of war”. The prohibition of the use of inter-State force is therefore comprehensive and all-embracing.

On 8 November 2000, a memorial lecture was held at the Swiss Institute of Comparative Law in Lausanne, in honour of the late Morris Abram (see in *In Memoriam*, *JUSTICE* No. 23) under the joint auspices of the Swiss Section of the IAJLJ and United Nations Watch, of which Morris Abram was its founder and first chairman.

An active member of the Swiss Section and speaker at congresses of the IAJLJ in Jerusalem, Morris Abram had previously delivered an inaugural lecture following the Swiss Section's creation at the Lausanne Institute, describing the work of the UN Watch at the United Nations.

Federal Judge Vera Rothenberg-Liatowitsch, President of the IAJLJ Swiss Section who chaired the proceedings, first introduced Dr. B. Cottier Deputy-Director of the Swiss Institute who welcomed participants and briefly described its extensive work in the preparation of opinions and research in comparative and international law.

Judge Rothenberg-Liatowitsch called on David Harris, who succeeded Morris Abram as UN Watch chairman, to introduce the speaker. In his introductory remarks, David Harris recalled Morris Abram's distinguished career as civil libertarian, prominent lawyer and adviser to successive U.S. Presidents. He

recalled Morris Abram's inspiring autobiography *The Day is Short* in which he also described his courageous struggle in overcoming illness, their collaboration in the Soviet Jewry movement in which Morris Abram's memorable leadership for the liberation of refuseniks played a notable role, and his devoted service as a national Jewish leader, presiding over several prominent organisations, including the American Jewish Committee where he felt privileged to have served with him.

In introducing the principal speaker, Professor Yoram Dinstein, well known to readers of *JUSTICE*, David Harris referred to his noted teaching and scholarship as Professor of International Law at Tel Aviv University, where he had previously served as Dean of the Faculty of Law, Rector and President of the University. Prominent as author of numerous books and articles, as well as Editor of the *Israel Yearbook on Human Rights*, Professor Dinstein is an expert on human rights, protection of minorities, international humanitarian law and law of armed conflict. Currently, he is a Humboldt Fellow at the Max Planck Institute on International Law in Heidelberg (Germany). Last year he held the post of Stockton Professor of International Law at the US Naval War College in Newport (Rhode Island).

There are only two exceptions to the general proscription of the use of inter-State force, and they are both explicitly stipulated in the Charter. The first exception appears in Article 51, and it pertains to “the inherent right of individual or collective self-defence” in response to “an armed attack”. A State invoking self-defence must immediately report its action to the Security Council, and the Council is fully entitled to examine the measures taken and determine in a binding fashion whether they indeed qualify as self-defence (or perhaps represent naked aggression masked as self-defence). But this is an uneasy task - especially when both adversaries invoke self-defence against each other - and the Council usually avoids passing judgment. Pending binding action by the Council, self-defence can be exercised unilaterally. Moreover, Article 51 expressly permits collective self-defence, namely, action taken by any third State coming to the assistance of the victim of an armed attack. This was the lesson learned from World War II: when an aggressor State (like Nazi Germany) is on the warpath, any State may regard an armed attack against another State - even at the other end of the world - as an armed attack against itself. The response constitutes self-defence, because if the prospective victims will not act jointly in time, they are likely to fall prey to the aggressor one after the other.

The second exception to the prohibition of the use of force in international relations is enforcement action undertaken or authorized by the Security Council. Under Article 39 of the Charter, the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”. Of the three phrases, the most significant - and far-reaching - is a “threat to the peace”. A threat to the peace is whatever the Council determines is a threat to the peace. The discretion of the Council is vast, and in the name of a “threat to the peace” it can intervene in the internal affairs of a sovereign State; for instance, when a democratically-elected government is overthrown by a military junta (as happened in Haiti). Once a determination is made that a threat to the peace exists, the Council may undertake or authorize enforcement action, that is, resort to forcible measures.

In applying the general prohibition and the two exceptions to the Kosovo air campaign, I would like to refer to the unfolding situation prior to, during and following the Rambouillet Conference. The Security Council did adopt resolutions (1199 and 1203 of 1998) determining that a threat to the peace existed in Kosovo. However, opinions were divided among the five

Permanent Members as to what action should ensue following the collapse of the Rambouillet negotiations. The US, Britain and France were eager to compel Yugoslavia to accept the Rambouillet formula. Russia and China were not. The Western Powers were not ready to wait, exerting in the meantime pressure on Russia and China to alter their positions. Instead, NATO sprang into armed action without a mandate from the Security Council.

Kosovo must be distinguished from Bosnia. In Bosnia, in 1994-1995, NATO also conducted repeated air strikes against the Serbs. However, there the action was taken on the basis of clear-cut Security Council resolutions (816 and 836 of 1993) authorizing regional organizations to take “all necessary means” (a common euphemism meaning the use of force). In Kosovo, the linchpin of an “all necessary means” resolution was missing.

It is essential to bear in mind that Kosovo constitutes an integral part of Yugoslavia, and the use of force by Yugoslavia against local inhabitants within its territory (albeit a threat to the peace) could not be deemed an armed attack. Hence, NATO could not invoke the right of collective self-defence against Yugoslavia. Again, had NATO waited, the process of “ethnic cleansing” by Yugoslavia of Kosovars (ethnic Albanians) was liable to trigger border incidents with the sovereign State of Albania. Then, any third State could intervene in the name of collective self-defence in response to a Yugoslav armed attack against Albania. However, since NATO was unwilling to await developments, that did not come to pass.

Inasmuch as the NATO air campaign could not qualify as self-defence, what are we left with? The only alternative compatible with the Charter was to act with the authority of the Security Council. The point is made lucidly clear in Article 53, which states that - where appropriate - the Security Council can utilize regional organizations “for enforcement action under its authority”. For the benefit of anyone obtuse enough to misunderstand the thrust of the last few words, Article 53 adds: “But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”. Regrettably, NATO completely ignored this double emphasis of the authority of the Security Council.

When one studies carefully the text of Security Council Resolution 1244 (1999), adopted when the NATO air campaign was over, it becomes plain that in no way can the resolution be construed as a retroactive ratification of the NATO action. In any event, the Security Council’s authorization is required

before - not after - the enforcement action. Otherwise, the situation might become chaotic: recourse to force would be rampant, and everybody's excuse would be that it is anticipating a future retroactive endorsement from the Security Council.

The question is whether this legal analysis is valid even in the face of genocide. I do not believe that the atrocities perpetrated in Kosovo meet the definition of genocide, as incorporated in the Genocide Convention of 1948 (now universally regarded as declaratory of customary international law) formulated against the background of the *Shoah*. Under Article II of the Convention, genocide means a series of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The only case of the genocide satisfying that definition since the *Shoah* was the one that took place in Rwanda in 1994. In Cambodia there was no genocide pursuant to the definition, because nationally, ethnically, racially and religiously, the villains and the victims belonged to the same group: the victims were selected on social or political grounds not covered by the Convention. In Kosovo, the victims did belong to a separate ethnic or religious group, but I do not think that one can prove an intent to destroy that group (the Albanians) as such. This is a very special intent, epitomized by the Nazi "final solution" policy of extermination of European Jewry, and there is no evidence for anything similar in Kosovo.

However, even if genocide were in issue in Kosovo, what are the remedies available to a foreign State (or group of States) desiring to prevent or stop the catastrophe? The Genocide Convention addresses the question in Articles VIII and IX.

Article VIII sets forth: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide". This is a plain *renvoi* to the Charter and to the competent organs of the UN, *i.e.*, the Security Council. What if the Security Council fails to act? Article IX prescribes: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide ..., shall be submitted to the International Court of Justice at the request of any of the parties to the dispute". Thus, the sole alternative to the Security Council is the International Court of Justice. Nowhere does the Genocide Convention authorize the unilateral use of force.

In conclusion, from the standpoint of international law, the position is unequivocal. Humanitarian intervention from the outside, in the face of genocide or any other mass violation of human rights, is legitimate only when undertaken by or under the authority of the Security Council. Consistent with the Charter, the only policeman of the world is the Security Council. No single State or group of States can arrogate to itself that role. Should the Kosovo air campaign prove to be a precedent, it would be a bad precedent. The US itself - the prime mover in the Kosovo air campaign - would be appalled if, say, China were to use force in South-East Asia while hoisting the banner of humanitarian intervention. Kosovo was possibly a hard case, but hard cases make bad law.



Spring in Israel: Almond blossoms in the hills of Jerusalem (photo: Yariv Alhadeif)

THE TORONTO CONFERENCE

The International Conference held by IAJLJ at Toronto (August 13-16, 2000) on “Pursuing Justice in the Global Village”, discussed Jewish Perspectives on Democracy, Human Rights, Media and Commerce. In this issue of *JUSTICE* we continue reporting on the addresses delivered during the Conference (pages 8-25). More reports will follow in the next issue of *JUSTICE*.

The Inter-Operation of Religious and Secular Legal Systems in the Australian Context

Graham Segal

Australia is a country which for centuries was occupied by indigenous people whose land and culture, as occurred in the Canadian and American context, was trampled upon and all but destroyed by the European colonisation of the 18th and 19th centuries. As will be seen, the consequence of this historical fact bears upon the present problem.

Like Canada and the United States, Australia grew out of immigration from, in the main, Europe. That immigration was, at least in part of this country, from England. Because the first English fleet beat Captain La Perouse to Australia and because that Captain did not seek to establish a colony in a different part of



Australia, we did not experience the landing of two European cultures. Captain La Perouse, as it turned out, sighted land at a fairly inhospitable and uninviting point on the Australian coastline. A few miles either north or south would have made an incredible difference to the history of Australia.

One of the major areas of concern within the present topic has been the problem of the *Gett*. The Jewish cultural background to the way in which the Australian legal system might look at this problem is demonstrated by a debate that took place within the *Australian Law Journal* some decades ago concerning that question. The debate was between the then *Av Beth Din*, Rabbi Dr Israel Porush (1973) 47 *ALJ* 53) and a Jewish barrister, Mr Phillip Opes, Q.C. ((1973) 47 *ALJ* 151). Rabbi Porush in his letter to the *Australian Law Journal* simply asked lawyers to keep the problem in mind and indicated the availability of the Rabbinate to assist if problems arose.

Mr Opes, in reply, expressed his surprise that Rabbi Porush's letter was even published. He maintained that marriage was a civil ceremony and the religious aspect a mere addition for the benefit of those parties who wish such matters. Essentially, Mr Opes maintained

Adv. Graham Segal is the head of the New South Wales Society of Jewish Jurists & Lawyers, Australia. This article is based on his presentation at the Toronto Conference, in the panel on Secular Justice and Religious Law.

that the civil process of divorce should take no cognisance of any matter of religion. Without pretending to know the religious views of Mr. Opes these letters reflected a division, still current, between those who were determined to find an answer to the problem consistent with Jewish law and those who felt no such need and indeed found the matter little more than an embarrassment.

The National Council of Jewish Women in submissions made to the Australian Law Reform Commission on the Law and Multiculturalism opposed legislative intervention because observant Jews were in a minority.

That debate was in its time representative of the phases through which Australian society has passed.

With the broadening of the immigration base from other areas beyond England and indeed beyond Europe, Australia is faced with an influx of different cultures. As the conscience of the Australian community has grown so as to acknowledge the existence of Aborigines as human beings (Aborigines were not counted in the Census until 1971) and has developed a consciousness of Aboriginal culture and religious beliefs as having a legitimate place in Australian society, that society has become more able and willing to entertain the existence of different cultural norms.

In Australia, as indeed in many other places, this concept is now referred to as multiculturalism. It stands in sharp contrast to the United States concept, current at least some time ago, of the 'melting pot' and it stands also in sharp contrast to the notion of complete assimilation which one suspects lay behind the type of attitude expressed in the articles by Mr Opes to which I have referred.

The matter is not, however, by any means a closed chapter.

Multiculturalism is defined by the National Agenda for a multicultural Australia as a policy for "managing the consequence of cultural diversity in the interests of the individual and society as a whole". There is certainly antagonism within sections of the Australian community towards this multicultural concept and indeed towards cultures other than the WASP culture. In recent years, there was a rise of a well supported but minority party called the One Nation Party. This party, led by a rather inarticulate fish & chip vendor from Queensland in Australia, managed to achieve a million votes in the last Federal election but one. Fortunately, that party is now almost a thing of the past. The fact that so many people were willing to support this party is of course the recognition that the process to which I have referred is by no means concluded. Some resistance to the recognition of the value of other cultures still exists.

It would be fair to say that a good proportion of the Jewish population still, in one respect or another, seek to assimilate. These forces are, of course, still at work and probably, to some extent or another will always remain at work.

Accordingly, there is often resistance within the Jewish community towards steps that somehow seek to reinforce the Jewishness of Australian Jewish life. An interesting example of this occurred recently when one of the local municipal authorities had to consider an application for the building of an *Eruv*. There were some Jews, thankfully a very small number, who felt so embarrassed by the notion of an *Eruv* that they supported some local opposition on the part of non-

Jews. Both groups of opposition were fortunately only a very small minority and the measure passed. Needless to say, the *Eruv* will be constructed in a manner that will be hardly noticeable, if at all, to anybody but the closest observer.

I have dwelt on these matters because they impinge significantly on attempts to develop regimes to deal with the questions under consideration.

However, by and large, the forces of multiculturalism have not only assisted in general societal acceptance of cultural differences but have also assisted the more assimilated Jew to accept some of the interventions to which I will refer.

I shall refer to just two specific instances of the problem namely, the *Gett* and post mortem examinations.

The Gett

Within Jewish law a person, whether male or female, is not free to remarry unless there has been a dissolution of the first marriage. It is said that there is an exception for males. However, that exception is so difficult to achieve that it can be almost put aside as a consideration.

The Jewish way of divorce as spelt forth in the *Torah* is by the delivery of a bill of divorcement from the husband to the wife. Jewish law holds that this process must be consensual on both sides. Marriage, in Jewish law, is essentially a consensual arrangement between the parties with Rabbis having essentially a supervisory role in the marriage ceremony. It is the parties who marry each other not the Rabbi who marries the parties. Similarly, in the case of divorce, the Rabbis again exercise what is essentially a supervisory role (although, when the Rabbis are called upon to require a

party to act appropriately, a different function is being undertaken).

Within Jewish law there is, however, a different meaning of duress and free will to that which we, as practicing lawyers, understand. Maimonides sums up the essence of how this concept relates to the use of the courts of the Diaspora as follows:

“Whenever the law requires that a husband be ordered to divorce his wife and he refuses to do so, the *Beth Din* imposes corporal punishment upon him until he says “I am willing” and the *Gett* is valid. This is so even if he is thus compelled by a non-Jewish Court that orders him to act as demanded by the *Beth Din* and the Jews are putting pressure on him through the Gentile hands until he divorces his wife.” (*Yad Ha-Hazakah, Hilkhos Gerushin, 2:20*)

The result is that a Jewish Court might properly issue what in the secular legal system is called a mandatory injunction requiring a husband to perform his religious duty of giving his wife a *Gett* or, alternatively, requiring his wife to accept one and calling the non-Jewish courts in aid.

It is certainly beyond the scope of this paper to discuss the intricacies of *Halacha* as to when such an order will be made. However, the general concepts are reflective of the basic Jewish notion that an empty shell of a marriage should not be allowed to continue. Moreover, it follows that a party would not be made to continue to reside in a marital relationship with a party whom they cannot abide.

The problem, of course, is that the writ of the *Beth Din* does not run in countries other than Israel.

To accommodate this difficulty,

various initiatives have been taken in different countries.

Canada has been at the forefront of such initiatives both at the Federal level (Divorce Act, Section 21.1), at the State level and also at the Provincial level in Ontario (Family Law Act, Section 56 (5) to (7)). The Ontario legislation of course, consistently with constitutional circumstances, deals with areas of maintenance and property settlement and is directed to ensure that the concept of duress is broad enough to encompass the threat of withholding a *Gett* as a basis for bringing to an end agreements that are so tainted. For a good consideration of the Canadian legislation, see Syrties, *Religion and Culture in Canadian Family Law*.

Federal legislation dealing with dissolution of marriage is like the so-called Second New York *Gett* Law directed towards the denial of remedy in a circumstance where freedom to remarry by reason, for example, of religious constraint is prevented by the absence of the other party's co-operation.

There have been, since *Brett v. Brett* (1969) 1 All ER 1007, solutions proposed in England based upon what might be called differential maintenance or property orders. Such a proposition forms the basis of the so-called First New York *Gett* Law.

It is to be borne in mind, however, that these propositions have considerable *Halachic* difficulties as they may give rise to what amounts in Jewish law to be unauthorised coercion.

Certainly, any solution that does not have universal acceptance is no solution at all. In an article by Chaim Dovid Zweibel written in the *Jewish Observer* in 1993 the writer severely criticised the Second New York *Gett* Law as giving rise to the risk of a *Gett Maussa*.

The problem with both the Federal Canadian solution and the First New York *Gett* Law is essentially that it does not offer any solution for a person whose spouse does not seek any matrimony relief in the civil courts. Although a 1992 study by the Federal Department of Justice in Canada demonstrated some improvement in the position as a result of the amendments to the Divorce Act.

The solution pursued in **Australia**, with some success, is based upon a different proposition.

In Australia, the Federal Family Law Act grants to the Family Court of Australia ordinary injunctive powers. Those powers may be exercised both as ancillary to other matrimonial relief and otherwise. The injunction power is contained in Section 114 of the Family Law Act, the relevant sub-paragraph providing that:

Injunctions

1. In proceedings of the kind referred to in paragraph (e) of the definition of “matrimonial cause” in **subsection 4(1)**, the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including:
 - (i) an injunction for the personal protection of a party to the marriage;
 - (ii) an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated;

- (iii) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;
 - (iv) an injunction for the protection of the marital relationship;
 - (v) an injunction in relation to the property of a party to the marriage;
 - (vi) or an injunction relating to the use or occupancy of the matrimonial home.
2. In exercising its powers under subsection (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.
 3. A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court considers appropriate.

In the *Marriage of Shulsinger* (1977) 2 Fam. LR 11611, the husband and wife had, in the course of a settlement that took place at the time of the decree for dissolution in the Family Court of Australia, given undertakings to the Court. The husband agreed to write her a *Gett* and to undertake all necessary acts and things so as to provide that *Gett* to her in accordance with Jewish law and the law of the State of Israel (where the wife was resident). The wife, for her part, gave an undertaking not to apply for maintenance. The husband failed to abide by his undertaking whereupon the wife sought to bring contempt proceedings against the husband and to be released

from her undertaking in respect of the issue of maintenance. The wife essentially failed at first instance but in the Full Court, although failing on the evidence to prove the contempt, succeeded in convincing the Full Court that the undertaking was one that could have been the subject matter of an order with the consequence that the under-

occasioned by the conduct of the husband which could easily have denied the wife the freedom that he had obtained."

The matter was much more fully considered in *Gwiazda v. Gwiazda*, No. M10631 of 1992, Emery, S.J., Family Court of Australia, 23 February 1983 (unreported).

The husband in that case sought specific injunctive relief seeking that the wife comply with all procedures according to Jewish law in the husband's application for divorce under Jewish law. This application was made in connection with the application for dissolution.

The judge examined, if at a fairly superficial level, the nature of the *Gett* and then went on to consider the vexed question whether it was appropriate for the civil courts of a country to involve itself in such matters.

The judge considered the reasoning of the Manitoba Court of Appeal in *Morris v. Morris* (1974) 14 RFL 163 and, in particular, the dissenting judgment of Friedman, C.J. It will be recalled that Friedman, C.J. took the view that an issue such as that in question did not involve the determination of religious rights but of a civil right, namely, the enforcement of a contract. The contract in question was a pre-nuptial contract having the effect of requiring the parties to take a matter such as their divorce to a *Beth Din*. Friedman, C.J. further went on, as Emery, S.J. noted, to find no reason in public policy that would prevent the Courts enforcing that agreement.

Emery, S.J. said:

"In the light of these cases (including *Aga v. Aga* (1969) 32 Appeal Division Reports, 2nd Ed., 298 (New York), [a

Gwiazda Order

The (husband/wife) is enjoined:

1. to appear before the Jewish ecclesiastical authorities of New South Wales known as The Sydney *Beth Din* in answer to any Summons of that authority in respect of the marriage of the parties; and
2. if so ordered by the said ecclesiastical court, to (give/receive) a Bill of Divorcement in accordance with Jewish law and do all other things as may be required of (him/her) to give validity and operation to Jewish law in respect of the dissolution of the parties' marriage in accordance with that law.

taking was properly received. In the result, the wife received the benefit of a costs order.

The basis upon which the Full Court proceeded was simply and shortly expressed:

"In our view, justice required His Honour to seek the undertaking he sought and that from there on the appearance before the Family Court

custody case] and of the provisions of the Family Law Act 1975, I can see no reason why this Court should not take into account the effect on the future life of a party of the tenets of his or her own religion. The Court is not being asked to determine what the law is, to enforce an order of a religious tribunal, or to influence in any way any decision the tribunal may make or be asked to make. What the Court is being asked to do is to ensure that a party submits to the jurisdiction of a tribunal set up well beyond time immemorial within the meaning of that phrase as known to the common law by the religion of which that party is a professed adherent. The purpose of that submission is to ensure so far as possible that the decree of dissolution of marriage made by this Court is fully effective."

The judge was very much influenced by the consequence of an order not being made and he proceeded to invoke the injunction power to which I have referred.

The terms of the order he made were:

"That the wife be and is hereby enjoined to appear if and when called upon by her husband so to do before the *Beth Din*, the Jewish Ecclesiastical Court of Melbourne and to accept into her hand a Bill of Divorcement or *Gett* if and when the same has been granted or ordered by the said Ecclesiastical Court and to do all other acts and things as may be required of her to give validity and operation, according to Jewish law, to any such grant or order as aforesaid in the matter of an intended application by the husband to the said Ecclesiastical Court for a divorce in accordance with Jewish law, provided always and it is hereby declared that this injunction shall not be construed as in any way inhibiting, directing, influencing or controlling any deliberation, decision or decree of

the said Ecclesiastical Court or in any way inhibiting the wife in making any application, request or submission to the said Ecclesiastical Court or, save as aforesaid, to deny her any right or privilege she would otherwise have."

In *Frey v. Frey*, Family Court of Australia, No. 96 of 1984, 12 November 1984, (unreported), the Court at first instance ordered the husband in terms somewhat similar to the *Gwiazda* order.

The husband appealed asserting that he would be willing to grant the *Gett* but only on the basis of there being a renegotiation of the division of assets as ordered in the Court below.

The Court noted that historically the Family Court and its predecessor dealt with matters of religion when determining aspects of custody, the decisions to which I have referred and felt no difficulty in following those decisions. The Court was not, however, convinced that the trial judge was right in imposing the requirement in respect of the *Gett* as a condition relating to custody and access.

The differential maintenance type of order was applied in *Steinmetz* (No2) 1981 F.L.C. 91-079. Quite aside from *Halachic* difficulties that might flow from such an order, the Full Court in *Frey* observed that such order needs to be justified on ordinary principles.

The Australian Constitution does not contain any Bill of Rights such as may affect the position in other jurisdictions. The only constitutional provision that may have had any relevance is Section 116 that provides simply:

"The Commonwealth shall not make any law for the establishing of any religion, or for imposing any religious observance or for prohibiting the free exercise of any religion and no relig-

ious test shall be required as a qualification for any office or public trust under the Commonwealth."

In *Shulsinger* (*supra*), the Full Court made it clear that the limited role of that provision was not such as to prohibit the making of a *Gwiazda*-type order or, as happened in that case, the acceptance of an undertaking.

There has not been any extensive or reported consideration of this question in the Australian Courts since the authorities referred to.

Recently, our Society, after discussions with the Sydney *Beth Din* and indirectly the London *Beth Din*, has now prepared a form of order that is being used so far without any significant opposition.

It is also worth noting that the majority of inquiries that our Society receives are from husbands complaining about the unwillingness of wives to co-operate in the *Gett* process.

The debate, however, cannot be said to be closed. There is still an undercurrent of opinion that would have the *Opes* view prevail.

The possible role of the civil courts in matters of religious debate may be said to be a matter of concern. Certainly, in the Supreme Court of Ontario, Madame Justice Benotto, J. in my view quite properly concluded that a debate over the propriety of a *Beth Din* upholding certain principles of *Kashrut*, namely, its policies on *Shomer Shabbat* and *Schechitas Chutz* were not properly justiciable in the ordinary courts of the land (*Levitts Kosher Food Inc. v. Levin & Ors.*, Supreme Court of Ontario, 27 July 1999, (unreported). *Klagsburn v. Va'ad Harabonim* 53 F. Supp. 732 CDN J

(1999) where a Court refused to decide whether a public shunning ordered by the *Beth Din* could give rise to an actionable libel.

Some of the reasons advanced justifying the 'interference' of the ordinary civil Courts in my view must be rejected. In the absence of a pre-nuptial agreement having contractual force, the matter cannot be properly described as one where the Courts can interfere on the basis that a contract is being enforced. In Australia, pre-nuptial agreements are not enforced. There is however an argument that by reason of certain provisions in the Australian Family Law Act, a provision in a *Ketubah* may be capable of being enforced; I doubt this argument will ever succeed. (A. Strun, "Jewish Divorce Law" in *Australia Journal of Family Law*, 1991 Vol. 17. 182).

In the **Rhodesian** case of *Berkowitz v. Berkowitz* (1956) (3) SA 522 (SR), Murray, C.J. took the view that a husband could not be committed for contempt by reason of his refusal to honour an undertaking to grant a *Gett*. His Honour said that such an undertaking is "of an intimate personal character concerned entirely with religious formalities - it is entirely *extra commercium*, and the Court would possess no power" to supervise control of the Jewish ecclesiastical authorities if they declined to give effect to an order of the Court.

Commenting on this article, no relative of mine, (N. Segal, "The Enforcement of an Agreement to Grant a *Gett* or Jewish Ecclesiastical Bill of Divorce", 1988, 105 *South African Law Journal*, 97) reflected that the judge misconceived the role of the *Beth Din* in the granting of a *Gett*. According to the author, the Judge had overlooked the true role of the *Beth*

Din which he observed was supervisory.

The reality is that in the circumstances contemplated by the making of such orders, the possibility exists of the *Beth Din* exercising a judicial power of forcing the giving or receipt of the *Gett*.

Subject to there being proper legislative power as exists in Australia, it seems to me that the issues favouring the argument that such an intervention is appropriate are as follows:

1. The parties are married in accordance with Jewish law. In the Australian context, this is reinforced by the fact that the religious ceremony is conducted by a Rabbi or Minister of Religion who is also a registered marriage celebrant; there is thus a coincidence recognised by our Marriage Act and regulations of the role of the marriage celebrant and the religious official. In the *Levitts Kosher Foods case* the Judge observed that the plaintiff had chosen to conduct his business in a religious context: the inference is both obvious and useful.

2. By the parties agreeing in their marriage ceremony to be married in accordance with the laws of Moses and Israel (as happens in the ceremony), it is reasonable that they should be taken, if the marriage fails, be willing to subject themselves to the obligations of that law and have it terminated in accordance with its usages. The Courts therefore would be only acting in accordance with the contemplation of the parties in lending their aid. In the Australian context this is not a contractual proposition, *cf. Avitzur v. Avitzur* 1983 446 N.E. 2d 136.

3. It is the role of the Family Court and the Act which it administers to achieve the type of social purpose to which Emery, S.J. said in *Gwiazda*; that is:

"If I correctly understand the intention of the Act, then it is the clear duty of a judge of this court to proceed - and I emphasize, within the bounds set by Parliament - to ensure that appropriate orders are made fully effective, not only in theory but in fact.

In this case the husband as a matter of law can marry any woman who is free to marry, subject only to the prohibitions in the Marriage Act, but as a matter of fact and of practicability he cannot do so."

It is simply not reasonable to expect that the Court should stop short of seeing the parties absolutely free to remarry particularly in accordance with the law and custom under which they agreed to be married.

4. The notion of multiculturalism carries with it recognition of cultural needs. There is in this area a real need. The question is whether there is any countervailing consideration in the form of an opposing social requirement. The only such consideration can be found, if at all, in the principal of church/state separation, that principal does not demand that the courts ignore matters of religion. Judicial consideration occurs in custody cases and in disputes over church property. What is sought here is no more than co-operation between two systems and not interference by one with the other.

5. Although there are significant policy reasons why the Courts ought not to intervene in the deliberations of religious tribunals, opine on matters of dogma or give directions to such tribunals as to how they should conduct their procedures, no such policy considerations apply in the circumstance being considered. The *Gwiazda*-type order does no more than require the parties to fulfil

their religious obligations as they themselves accepted them to be and have their matter determined by the tribunal of the faith to which they expressed themselves as adherents. What that tribunal then does is entirely a matter for itself and the principles that guide its deliberations.

For reasons which presently do not make a great deal of sense to me, in a recent meeting of the Organisation of Australian Rabbis, there was a failure to achieve agreement that all couples proposing to marry be required to enter into such a *Ketubah* or, more accurately, sign a document at the same time having the effect I have described.

The reason proffered for such reluctance is the alleged antagonism of married couples to signing such a document. My own view is that, in the vast majority of circumstances, the antagonism would cease if the presiding Rabbi properly explained the matters.

Moreover, if the position were unanimous, one would no doubt find that couples would soon get into the habit of knowing this document had to be signed. One must, of course, understand that nature operates in such a way as to deprive people of any significant degree of reason at the time of their marriage. However, I am optimistic enough to believe that some sense still remains.

In the Australian context, the existence of a pre-nuptial agreement whereby the parties agree to submit to the role of the *Beth Din* would only serve to strengthen the argument that it would be appropriate that the Court exercise its discretion to grant injunctive relief.

Post-mortem Examinations

The prophet, Malachai, said that: "Even the sacrifices of the heathens are to be considered as a glorification to God (*Mal* 1.11)." From this and other sources

in the *Midrash*, one learns of the role of other religions in God's plan and of a need for religious tolerance and indeed the recognition of the good in all people who support the principles of a civilized society.

In this spirit, our Society in New South Wales works closely with members of other faiths and ethnic groups. A committee was established consisting of Buddhists, Muslims, Catholics and indigenous peoples to promote matters of common concern resulting from the interface of various religious and cultural concerns within the legal system.

Its first major task was in respect of post-mortem examinations which, for various reasons, are contrary to the principles of Judaism, Islam and Buddhism.

Submissions were made to the Attorney General of our State. The fact that they were supported by such a wide spectrum of the community had a

48A Objection to post mortem examination by senior next of kin.

A deceased person's senior next of kin may, by notice in writing, request a Coroner or an assistant Coroner not to direct a post mortem examination of the remains of the deceased person.

If such a request is made, an assistant Coroner must not make any further decision concerning the performance of the post mortem examination but must refer the matter to a coroner.

If the Coroner decides that the post mortem examination is necessary or is desirable in the public interest, the Coroner must immediately cause written

notice of that decision to be given to the senior next of kin who made the request.

The notice must:

1. indicate the earliest time at which the post mortem examination may be performed, and
2. state that the senior next of kin may apply to the Supreme Court for an order that no post mortem examination of the remains of the deceased person be performed.

Unless the Coroner believes the post mortem examination must be performed immediately, the post mortem examination must not be performed until 48 hours after the senior next of kin has been given notice of the decision.

Within 48 hours after the notice has been given to the senior next of kin, the senior next of kin may apply to the Supreme Court, in accordance with rules of court, for an order that no post mortem examinations of the remains of the deceased person be performed.

The making of the application to the Supreme Court operates to stay the operation of the Coroner's order for the performance of the post mortem examination.

The Supreme Court may make an order that: no post mortem examination, or a partial post mortem examination, be performed if it is satisfied that it is desirable in the circumstances.

48B Objection to post mortem examination by other persons

Nothing in Section 48A prevents a person, other than the deceased person's senior next of kin, from objecting to the performance of a post mortem examination of the remains of a deceased person.

If such an objection is made to an assistant Coroner, the assistant Coroner must not make any further decision concerning the performance of the post mortem examination but must refer the matter to a Coroner.

The provisions of Section 48A do not apply in relation to any such objection.

substantial effect, so it would appear, on the Attorney General's decision to accept the submissions made.

The effect of the amendments is to invest the Supreme Court of New South Wales with a general power of review in respect of a decision of the Coroner to order a post-mortem examination.

Of course, prior to the amendment, the ability to cause a review of such a decision was dependent upon administrative law principles.

Some success had already been achieved in the Courts prior to the amendment. In *Deitz v. Abernethy* 39 NSWLR 701, the Court of Appeal of New South Wales declared invalid a decision of the Coroner to conduct a post-mortem examination in the face of religious objection where it appeared the Coroner followed nothing more than his

usual practice in ordering such an examination in one of the categories of cases in respect of which he has jurisdiction. He failed to consider the individual circumstances and was thus held to have acted unreasonably within the Wednesday principles.

However, in coming to his conclusion, Mahoney, J.A. said at page 709:

"So far as the Courts are concerned, action taken by a Coroner must be taken in accordance with the law. A proper account will be taken of religious and other beliefs so far as the law allows and in many cases the law as properly administered will be able to accommodate the religious views of those concerned."

Since the introduction of the amendment, litigation has been rare, most particularly since the decision of *Krantz v. Hand*. The judgment of Woods, C.J. at Common Law spells out the circumstances and his sentiments:

"I express my entire agreement with the observations made in the decisions earlier mentioned as to the appropriateness of taking into account the religious beliefs of the family of the deceased where they can be demonstrated to be both genuinely held and in accordance with the faith of those concerned."

Subsequently, His Honour said:

"I am satisfied in a case such as the present that the public would readily understand the lack of any need for a post-mortem in respect of a frail 86 year old woman whose health was observed by independent observers to have been progressively declining, who had a supportive family, who died in her own home where there was genuine

evidence of strong religious belief shared both by her and her family concerning the undesirability of interference with a body at post-mortem."

A Final Comment

Significant steps, both legislative and judicial, have been taken within the Jewish context to improve the inter-relationship between religious practice and the secular law. It is not only in the Jewish context that such steps have been successful.

A development that must be borne in mind is that just as multiculturalism gives rise to our community's ability to seek the interventions of the type I have discussed that principal must require our community to accept in this global village cultural and social values which are unacceptable to our faith.

Web Site

The Association is pleased to announce the launch of its Internet site:

www.intjewishlawyers.org

The site provides information about the Association, a list of its international events and all published issues of *JUSTICE*, as well as Special Issues and Public Trials. On-line registration and subscriptions to *JUSTICE* is available.

The ICPAC Report and the Interface between Competition and National Economic Policy

Douglas E. Rosenthal

The U.S. Department of Justice, in 1998, commissioned an International Competition Policy Committee to advise it on “new tools, tasks and concepts”,¹ that will promote competition in the global economy in the new millennium. The Committee was co-chaired by an outstanding antitrust lawyer and former head of the Antitrust Division, Jim Rill. The other chair was Paula Stern, a highly respected international trade economist. It issued its final report (“ICPAC Report”) in February 2000.² Unlike many government reports, it is well written and worth reading. It has particular value for those in other nations who care about competition law and policy, who want to see those policies prosper as an important part of their national laws and political programs, and who are interested in the century-long American experience with

antitrust enforcement. We are moving toward the day when almost every member nation of the World Trade Organization will have passed its own national competition law and established a special competition agency to enforce it. So far, about half have done so. The ICPAC Report gives a good introduction to the American experience with competition - what has worked, what has not, and where competition law and policy should be heading. Eighty pages are devoted to the global intersection of trade and competition, a subject of particular interest to the WTO. The Committee would keep trade and competition enforcement largely separate, only recommending further study of possibilities for convergence. For the foreseeable future, the Committee would not have the WTO assume decision-making responsibility for dealing with mixed public and private anticompetitive acts which restrict competition in international trade.³

Most American competition specialists agree with this view. I do not. I do not believe a comprehensive, harmonized, homogenized competition code is required before the WTO can take reasonable and appropriate legal action

against Member State governments for anticompetitive non-enforcement or misenforcement of competition laws to restrict rather than enhance market access. WTO Member States which encourage or knowingly permit private domestic cartels, to impose unreasonable restrictions on the access of foreign goods and services to their markets by the failure to enforce, or the failure to adopt, effective national competition law should be held accountable.⁴ One Committee member, Prof. Eleanor Fox of N.Y.U. Law School, has a different perspective from her IC PAC colleagues. I am in agreement with her on this. She writes:

“Clearly, this problem should be remedied, and, in my view, it should be remedied in the WTO in a manner consistent with the principles of the

Mr. Douglas Rosenthal is a Partner in the US International Law Firm Sonnenschein Nath & Rosenthal. Former Chief, Foreign Commerce Section of the Antitrust Division U.S. Department of Justice. His presentation was delivered during the panel on Human Rights Decisions.

1 ICPAC Report, p. 34.

2 The report can be found at www.usdoj.gov/atr/icap.htm.

3 *Id.* pp. 27-28.

4 See D.E. Rosenthal, “Equipping the Multilateral Trading System With A Style And Principles To Increase Market Access”, 6 *Geo. Mason L. Rev.* 543 (1998).

world trading system. Once solution is: Nations could seek amendments to the GATT/WTO that 1) close the Fuji-Kodak loophole;⁵ 2) put the burden on nations to assure that their markets are open (free from artificial private as well as public restraints), and 3) hold nations accountable for the totality of market-blocking restraints. An obvious way for nations to fulfill the obligation to prevent private access restraints is to maintain and enforce competition laws that prohibit unreasonable market blockage.

The Advisory Committee worries about the weaknesses of the WTO, and it prefers unilateral solutions. I believe that solutions, to be legitimate, inclusive, and complete, must be multilateral, and that we must devote more energies to strengthening and constitutionalizing the WTO.”

Professor Fox and I strongly agree with most other Report positions.

Given my belief in a more integrated approach to trade and competition issues, my focus here is on one controversial, but important and correct, recommendation made in the Report.⁶ The Committee recommends that, without giving up any of its present law-enforcement responsibility and independence, the Justice Department’s Antitrust Division should play a more sustained and direct role in U.S. Executive Branch foreign economic policy-making - as does the U.S. Trade Representative, and the Secretaries of Agriculture, Commerce, Treasury, State and Labor. Most Committee members would have the Antitrust Division participate in subcabinet meetings of the National Economic Council, where most important national and international economic policy issues are discussed.

There are at least three reasons why the Head of the Antitrust Division should

assume this greater policy role, which he and his predecessors have usually eschewed, and/or been denied, during the 20th century. First, a pro-competition policy, such as the regulatory reform ending fixed commissions for stock-brokers, can lower prices, free up resources and remove anticompetitive restrictions on open markets much more quickly and effectively than can case-by-case antitrust enforcement. Increasing competition in a regulated industries has been one of the successes of competition advocacy. There were other successes in the 1970s, but such results have been infrequent previously and since. Second, more than at anytime in the past one hundred years, there is widespread (not overwhelming, but widespread) public acceptance that open, competitive markets, with substantially reduced government regulation and bureaucratic intervention, lower prices, increase consumer choice and product innovation, may actually reduce the threat of inflation and increase employment. Marxism, democratic socialism and central government planning, the popular alternatives, have been largely discredited. Third, antitrust officials have something useful to contribute. They have practical and analytical expertise in understanding how to promote open markets, are advocates for consumer interests, and have played an important role in past deregulatory successes. In democracies, voters often have a sense of the manner in which policy impacts them as consumers, but find it hard to give collective voice to their concerns.

One example relating to the interface between trade and competition concerns antidumping. There is a tension between those who support the use of national

antidumping laws to reduce the flow of less expensive goods (and thereby protect domestic factory owners with higher production costs, and employees, with higher wages), and those who supports the benefits to domestic consumers of such imports. Cheap imports increase the efficient uses of a nation’s resources adding to its wealth. They also promote greater wealth benefits to the nations who export those goods, like textiles. The traditional norm, that anti-trust enforcers should keep their noses out of trade policy, accepted not only in the United States but many other places in the developed world, precludes the possibility of useful dialogue that might reduce the conflict. This lack of dialogue has consequences. There has been little scholarly discussion, for example, of the relative frequency with which antidumping cases are settled by agreements involving private manufacturers interacting with government officials in a way which either creates a governmentally-sanctioned price fixing cartel, or the allegation of private cartel activity “under cover” of an antidumping case settlement.⁷ In my personal experience I have observed more than a dozen examples of such activity. Worse still, domestic

5 That is, States should be responsible for their serious governmental restraints even if the restraints existed at the time of tariff negotiations and even if they are not facially discriminatory. All other footnotes from this quotation have been excluded.

6 *Id.* pp. 294-296. I spoke on this subject at the first WTO, World Bank, UNCTAD Symposium in 1997.

7 But see R.J. Pierce, Jr. “Antidumping Law is a Means of Facilitating Cartelization”, 67 *Antitrust L.J.* 725 (2000).

manufacturers can attempt to raise import prices by announcing they are considering filing antidumping actions. This type of public communication in a non-antidumping context could lead to convening an antitrust grand jury to investigate price fixing or attempt to monopolize. In the context of antidumping, it is difficult to attack.

Hundreds of millions of dollars have been spent on related trade and antitrust investigations and legal defenses, where one authority damns you if you do stabilize prices or output, and the other damns you if you do not. At the very least, a joint effort by antitrust and trade officials would be useful to explain to foreign industry representatives, caught in the middle, how to steer clear of antitrust problems in trying to resolve antidumping problems.⁸ However, the two legal doctrines are so at odds, that I doubt whether such a reconciliation is possible. Getting that idea recognized might actually advance the possibility of policy reform. Not surprisingly, the ICPAC was warned off trying to address the conflicts between antidumping and antitrust when its mandate was set and no discussion of this type can be found in the Report. But enforcement of the antidumping law, which literally undermines enforcement of antitrust law, is a real problem. It puts executives of both multinational and smaller national companies at risk in choosing between economic survival for their firms on the one hand, and the possibility of criminal indictment in how they deal with antidumping threats on the other. The only governmental officials to raise this issue are the Japanese, whose companies have repeatedly been caught in the middle.

Why, in the United States at least,

have antitrust officials not been involved in national economic policy-making? Antitrust officials tend to be doctrinaire (policymakers and politicians would say “unworldly and impractical”) about the benefits of competition. As the U.S. antitrust laws have developed, consumer welfare has become the only value they recognize. National security, job protection, safeguarding the environment, protecting small business - these are on somebody else’s watch. When antitrust

“Without giving up any of its present law-enforcement responsibility and independence, the Justice Department’s Antitrust Division should play a more direct role in U.S. Executive Branch foreign economic policy-making”

enforcement promotes more competition than “the public” wants, Congress exempts certain activities or sectors from such regulations. Labor unions, farm cooperatives, railroads seeking to merge, and several other interests, including those seeking the protection of the antidumping laws, are largely exempted from much antitrust compliance.

However, just because antitrust enforcement is single-minded does not mean that the antitrust perspective should not be heard when the proper boundaries of antitrust are being debated. Antitrust officials know that have to compromise consumer welfare with other important

and often conflicting values when policies affecting market access of being made. The U.S. Trade Representative and the Secretaries of Agriculture, Commerce, Treasury, State and Labor have their own priorities, but that doesn’t keep their agencies from the National Economic Council table.

Even if invited to the policy table, many supporters of antitrust have their doubts about accepting that invitation. The ICPAC Report reflects a widespread uneasiness:

“[T]he participation of antitrust officials in deliberations on matters broader than antitrust enforcement runs a risk of politicizing antitrust decision-making which can erode the independence of the enforcement agencies and undermine the integrity of the neutrality of U.S. antitrust law and policy.”⁹

This is not the place for a full discussion of the extent to which U.S. antitrust enforcement is independent of politics - and rightly so. But I would like to offer a short rebuttal. I can point to several instances where antitrust independence and isolation have virtually assured insufficiently pro-competitive U.S. economic policies. At various times, U.S. economic policy has favored international commodity cartels to stabilize markets and friendly political regimes.

8 The few efforts in this direction during the past three decades such as brief discussions in three U.S. Department of Justice Guidelines for International Antitrust Operations beg more questions than they answer.

9 *Id.* p. 295.

Output restrictions have been supported for various mining and refining industries, and cartels have been established and protected in agricultural sectors, international shipping and international aviation policy. The United States has, in the last ten years, dramatically expanded the scope of copyrights, software patents and patents for business methods. These policies are having profound, but not yet clearly analyzed, effects on competition in high-tech markets. For example, *The Economist* reports in a recent issue that U.S. patent will soon be issued for a business method, "which aggregates buyers to secure a discount".¹⁰ As an antitrust lawyer who has helped clients form joint venture buying arrangements over a period of 25 years, I marvel at the notion that this is a novel and non-obvious invention eligible for patenting. Wouldn't it be relevant to hear the views of antitrust experts as the federal government begins to consider the question of whether some patents today are overbroad - more so than is necessary to promote innovation - and may therefore lead to abuses of economic power? Antitrust officials have had no or minimal input on any of these issues.

Political pressure is brought all the time on the Antitrust Division and FTC by various political activists - especially members of Congress (who have limited the enforcement of the FTC on a few occasions) and the President. U.S. antitrust grand jury investigations have twice been stopped by the White House on political grounds. State Attorneys General lobby the federal agencies; so do other Cabinet Departments. Secretary of Defense, Casper Weinberger, tried to get President Reagan to stop the divestiture of AT&T. Weinberger, a former

chairman of the Federal Trade Commission was convinced that break-up of the telephone monopoly would compromise the ability of the U.S. military to maintain secure phone communications in times of national emergency. The State Department has, frequently during the 20th century, sought to influence Justice Department enforcement actions on foreign policy grounds. As this is written, Microsoft is mounting an aggressive lobbying effort aimed at many constituencies - including its shareholders and the Republican Presidential candidate - to moderate the antitrust remedy the U.S. Federal Judge will impose in the judicial decree in its monopolization case. I have observed a number of instances in which non-antitrust public policy considerations have influenced decisions about what the Antitrust Division or Federal Trade Commission should prosecute, and how. Few are suggesting (and I am not one of the few), that this kind of politicking is illegitimate, or jeopardizes the independence and integrity of our law enforcers. My point is that by being kept from the discussion of national economic policies directly affecting competition concerns, the non-political "purity" of antitrust, a dubious idea on its own, is not been protected.

Saying that broad independence from national politics is not possible or desirable for U.S. antitrust enforcers is not to be understood as an endorsement of bribery or intimidation. The Antitrust Division and Federal Trade Commission have been almost entirely free of corruption, and being dictated to, throughout their history. That history does, and should continue to, protect them from the possibility of heavy-handed co-optation by Presidents, or their staffs, or others.

The same respect should be sought by antitrust enforcers, and favored by politicians, in nations which have only recently adopted antitrust laws, or only recently promoted meaningful antitrust enforcement.

It could, however, be an even greater mistake for heads of antitrust agencies in emerging economies not to try to participate in national economic policymaking, than for the head of the U.S. Antitrust Division to decline. In most developing countries (and some developed ones as well), the benefits of competition are only newly appreciated. Expertise is limited. Entrenched business interests, with monopoly power, are politically powerful. The greatest chance for having a significant impact often lies in making competition reform a national political, public issue, not a narrow technical issue of law enforcement.

The Korean Fair Trade Commission is twenty years old. It made little headway over those years as a specialized independent law enforcement agency tackling the monopoly power of the big Korean chaebols. The Asian economic crisis of 1998 showed dramatic inefficiency and corruption in the arbitration of these chaebols. The heavy price the Korean people have paid for dependence on their monopolizing conduct was revealed. It is the reform President of Korea, Kim Dae-jung, who is leading the antitrust initiative in Korea. He has the power and public support which no antitrust agency anywhere, on its own, can summon.

The United States should, I believe, as a matter of U.S. trade and competition policy, propose a reform for the WTO for

¹⁰ *The Economist*, April 8, 2000, p. 76.

the future - the adoption of a commitment by Member States to promote consumer welfare as a more fundamental value in international trade than supplier welfare. If this reform were adopted, it would make it much easier for the WTO to promote open and competitive markets. A comprehensive world antitrust law would be unnecessary. The burden of proof in antidumping enforcement would fall heavily on those producers seeking trade protection. To prove dumping, they would have to show predatory pricing and the market power of importers to recoup sustained below-cost prices in the long run as monopoly profits. As U.S. antitrust cases show, that is a very hard burden to sustain. Consumer sovereignty would become a goal of international trade laws. With such a goal, it would be increasingly difficult for one nation to force its own

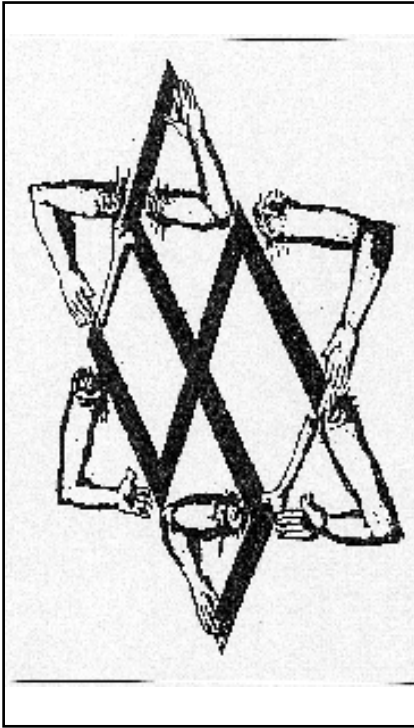
domestic consumers to pay higher prices than similarly situated customers in foreign countries. The problem of dumping would become much less significant, as has the problem of price discrimination within the United States. One reason this reform will not happen soon within the WTO is that consumer welfare generally promotes greater political self-awareness and louder calls for democracy. The WTO is not yet ready to endorse, even implicitly, political democracy as a means to promote global free trade. However, I would have thought that such a reform proposal in the United States should receive bi-partisan support - both for U.S. domestic policy and for U.S. goals for the WTO. More controversial in our country, but equally important, is the proper breadth and depth of intellectual property protection for software business methods and other

new forms of intellectual property; this needs more public review. We also need sorely missing empirical studies to determine how much protection of what kind provides the best balance of stimulating innovation by rewarding creativity and, at the same time, promoting competitive opportunity and choice. These are issues where experience is relevant, not ideology.

Now that the Cold War has been won, can we not, as a matter of American policy, link the promotion of competition with the promotion of democracy more explicitly? Perhaps, by making this suggestion from the vantage of an antitrust specialist, I confirm the judgments of those who think antitrust should continue to have no significant role in the making of national economic policy. But, remember, mine is not the consensus position.



From the Toronto Conference: panel discussing How Jewish and Israeli Issues are Portrayed in the International Media



Jordan: *A-Rai* (March, 1994)

Anyone declaring that the days of *Der Stürmer's* Nazi era vicious anti-Semitic cartoons are over, would be totally wrong. Anyone still entertaining the notion that the demonization of the Jews, as well as of Israel, is a matter that belongs to the past, should take a glance at the Arab print media, and his disillusion will be complete. An abundance of articles, editorials and above all cartoons appear routinely in all

Dan Pattir is the Editor-in-Chief of *JUSTICE* and former Counselor for Media and Public Affairs to Israel's Prime Ministers Yitzhak Rabin and Menachem Begin. These are highlights from his presentation during the panel on How Jewish and Israeli Issues are Portrayed in the International Media.

Arab Demonization of Israel and the Jews

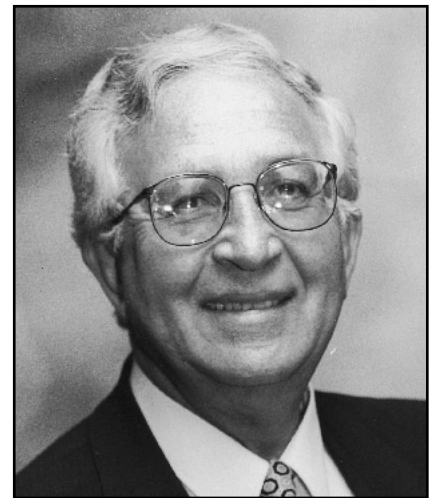
Dan Pattir

the Arab counties' print media. Daily, weekly, monthly papers, periodicals and magazines are filled with cartoons replete with the worst type of anti-Semitic content. They appear not only in most, but in all Arabs countries, including the ones which signed peace treaties with Israel - Egypt, Jordan and the Palestinian Authority.

The themes are repetitious and almost identical, in content as well as in style. There is no soft touch but always a rude, brutal, bloodthirsty punch. That is the way that cartoonists and their respective editors treat the denial of the Nazi Holocaust, the Jew as a stereotype, the Israeli with no difference, Israel as a totally negative Nazi-like entity, and Jewry as a whole as the greatest danger to mankind.

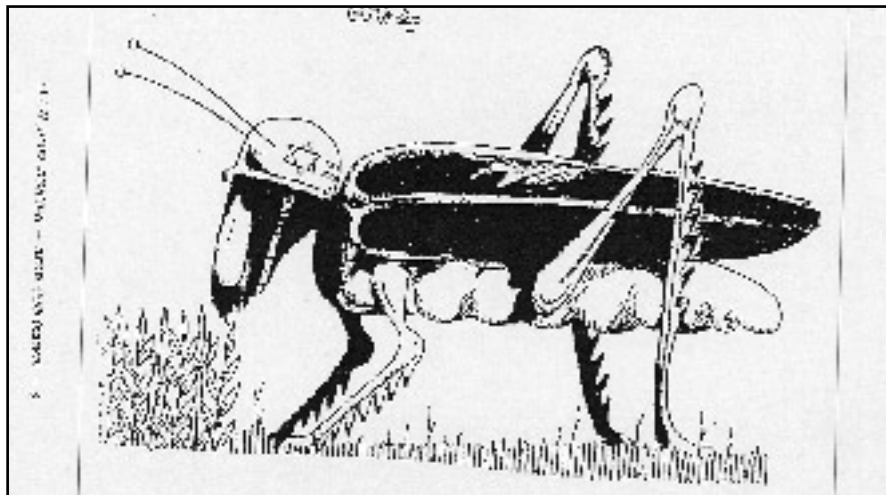
The phenomenon of demonizing the Jews and Israel through editorial cartoons in the Arab press is neither new nor recent. It has been part and parcel of the Arab media's mode of conduct since the establishment of the State of Israel and has always been perceived by the ruling Arab regimes as a legitimate tool, which need not be restrained in the fight against Israel.

It should be pointed out that in most cases, the indigenous Arab press does not exercise freedom of speech. It is totally - overtly or covertly - state controlled; the



chief editors are hand-picked by the rulers of the states; no editorial cartoon may be printed if it is contrary to editorial policy, no editorial policy is permissible if it runs contrary to the guidelines of the ruling regime.

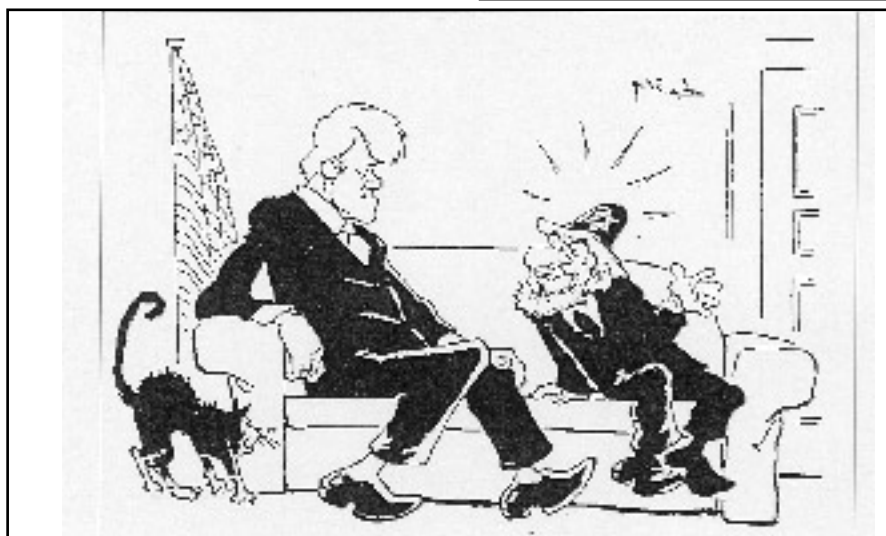
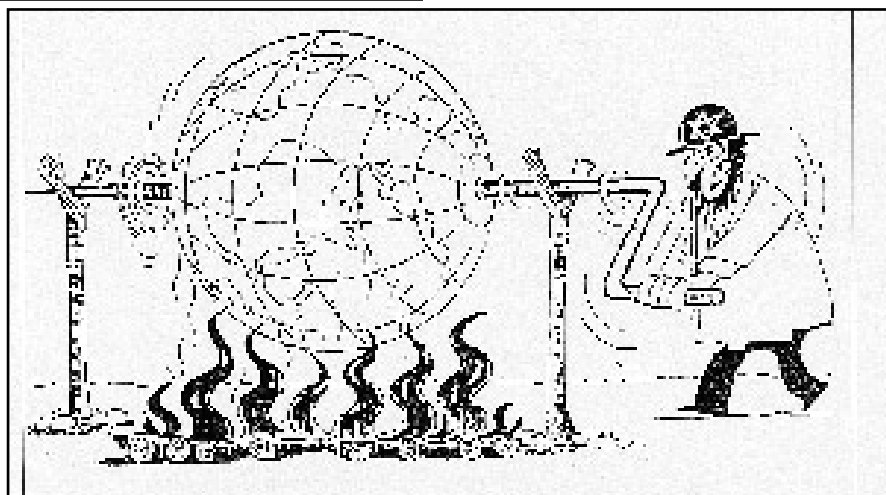
Even some of the so-called independent Arab newspapers - generally attached with unseen strings to certain ruling regimes in the Arab world - which are edited and printed in London or Paris, such as *Al Khayat* and *Sharq-al-Ausat*, follow the same pattern of carrying demonizing political cartoons. But what should be emphasized in this context is the behaviour of the media of Egypt, Jordan and the Palestinian Authority, regimes with which Israel has signed



Top:
Syria: *A-Thawra* daily (July, 1992)
"The Israeli locust"

Center:
Dubai: *Al-Itihad* (January, 1992)
"The end"

Bottom:
Egypt: *Al-Gumhuriya* (February, 1993)
"U.S.-Israel talks"



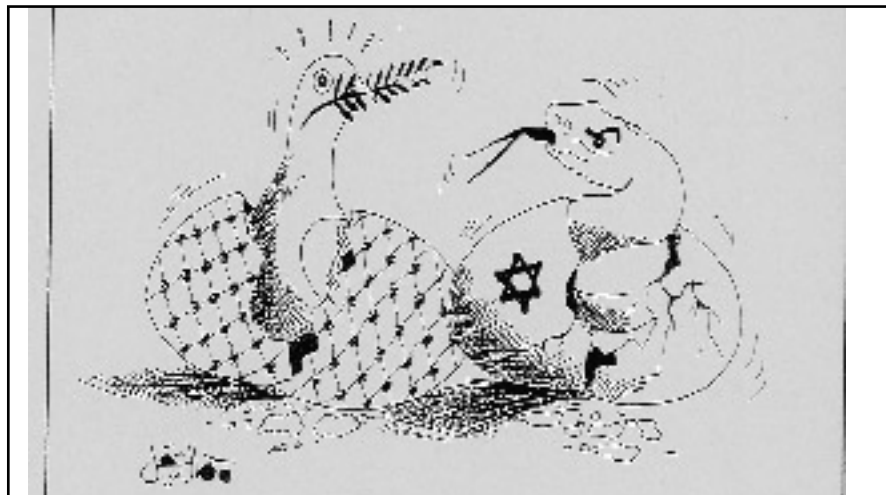
peace agreements. The same conduct may be seen in relation to the print media in the Gulf States, notwithstanding that it is regarded as being of higher quality and more open politically.

In spite of the prevailing peace treaties with Israel, the state-owned media in Egypt and other states have never restrained themselves from entertaining anti-Semitic images in editorial cartoons, ranging from Jews as a satanic force trying to undermine Islam to an international cabal of Jews seeking

domination of the Middle East and the world; Jews controlling the American government; equating Jews with Nazis and Israeli leaders wearing swastikas; conspiracy theories alleging that Israelis are attempting to poison or corrupt Arab youth; new versions of blood libels against the Arabs and displaying the Jews as demonic and sub-human creatures bent on killing innocent Arabs. Swastikas and snakes are the most common images attributed to Jews and Israel.

Of the many forms of anti-Semitic

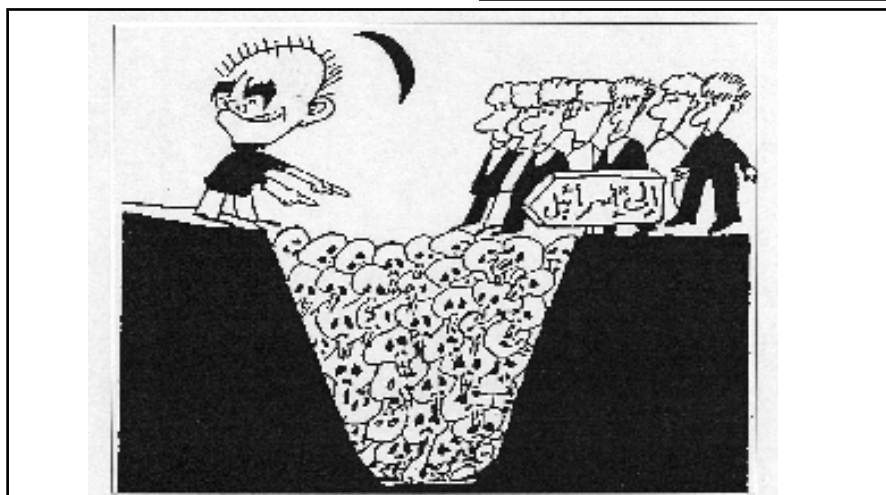
expressions in the Egyptian media, the most sinister and dangerous is the use of cartoons depicting Jews in classical stereotypes, often boldly displayed on newsstands, a practice which can inflame passions in a country where many illiterate young people do not read the newspapers but obtain a distorted impression of Jews from the illustrations. The most common depiction is the stooped, bearded man wearing a black robe with a long, crooked nose - the same distorted stereotype of a European Jew used by the



Top:
Jordan: *Al-Dastour* (February, 1998)

Center:
Egypt: *Al-Ahram* (February, 1990)
"The road to talks with Israel"

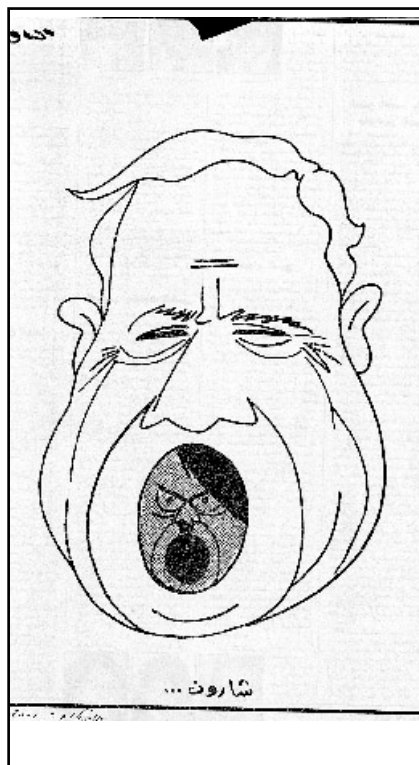
Bottom:
The Palestinian Authority: *Al-Khayat Al-Jadida*
(March, 2001)
"Elections in Israel. The Generals' race to the post."



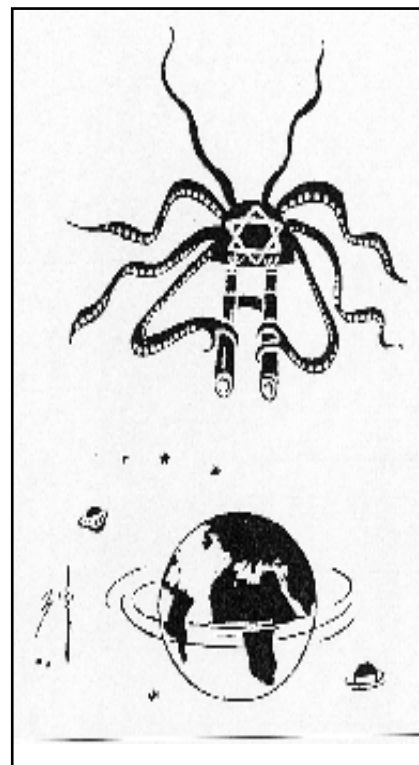
Nazis and later in the Communist Soviet Union.

The result of these unrelenting anti-Semitic attacks is that an entire generation has come of age since the 1979 Egyptian-Israeli Peace Treaty being exposed to the same negative presentation of Jews and Israelis. These anti-Semitic stereotypes have constituted a major set back to the normalization of ties with Israel and are in blatant contradiction to the peace treaties between Israel and its neighbours which call for "prevention of incitement and hostile





propaganda as specified in the Interim Agreement” (the Hebron Protocol of 1997), and as the more recent 1998 Wye River Memorandum states - “The Palestinian side will issue a decree prohibiting all forms of incitement to violence or terror.” The Palestinian Authority did not eradicate such incitement and hostile propaganda, on the



Top Left:
Egypt: *October weekly* (January, 2001)
Israeli Prime Minister Netanyahu as Adolf Hitler
Bottom Left:
Egypt: *Roz Al-Yusuf* (August, 1997)
Hitler equated with Netanyahu, Clinton and Albright
Center:
Egypt: *Al-Ahram Al-Arabi* (September 2000)
The Merchant of Venice: “The Judge: only Arafat’s pound of flesh”
Top Right:
Egypt: *Al-Ahram* (May, 1990)
“The Jewish Octopus”
Bottom
Jordan: *Al-Ousboua* (June, 1983)
Untitled

contrary it has done everything to stoke it.

A similar trend may be found, unfortunately, in the Jordanian press, prior to and after the 1994 peace treaty with Israel, although the royal authorities have tried to manifest more restraint. The newly-established press in the Palestinian Authority, both in its official media organs as well as in the so-called privately-owned papers (all under very strict supervision of the PA), are nowadays championing the worst kind of cartoons of hate and malice, equalling the dirtiest cartoons in the Syrian and the Iraqi media and bringing the demonization of the Jews and Israel to the lowest ebb.

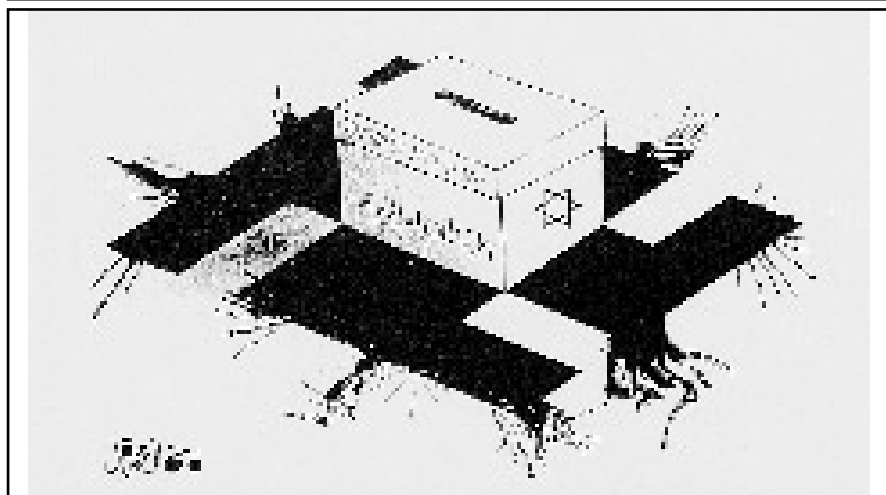
The distinguished Middle East scholar, Professor Bernard Lewis, stated in the book, *Semites and Anti-Semites*, that "the demonization of Jews goes further than it had ever done in the Western literature, with the exception of Germany during the Nazi period". Against the background of the continued vicious anti-Semitic attacks that have already become an acceptable and familiar element of hostility against Israel and the Jews within the Arab press, the question posed by Professor Bernard Lewis is of the utmost importance: "Given the scale on which all these activities are taking place, the question is no longer whether Arab governments are pursuing anti-Semitic policies; the question is: why were these policies adopted, how far have they gone; and how deep is their impact".

Top: The Palestinian Authority: *Al-Risalla*
(December, 2000)

"Barak is drinking the blood of the Palestinian people"

Center: Jordan: *Al-Dastour* (May, 1996)
"The elections in Israel"

Bottom: Jordan: *Al-Dastour* (February, 1990)
"U.S.-Israel relations"



Uruguay: The Example of a Small Country Fighting Against Racism and Anti-Semitism

Alberto M. Aronovitz



Uruguay - the smallest Hispanic country in South-America - is boxed into the Eastern coast of that continent by Brazil to the north and Argentina to the west.¹

Characterized in modern post-war times by its peacefulness and stability (only interrupted from 1974 to 1984, by a period of terrorism followed by military rule), Uruguay's democratic system has traditionally followed the principles of tolerance, equality and non-discrimination between persons. Article 8 of the Uruguayan Constitution well illustrates this spirit, stating that "all persons are equal before the law, the only accepted distinction being their virtues and talents".

It is true that, at the horizontal level, there have been some sporadic manifestations of racism and anti-Semitism (graffiti, some acts of vandalism in Jewish related places, isolated acts of physical aggression), carried out by individuals and small groups. However, neither the country nor the overwhelming majority of its population has ever been seriously infected by endemic Nazi doctrines or racist practices.² In my opinion, this fact is due to two major elements:

The first element is the spirit - traditionally tolerant - of the Uruguayan people, who have been exposed to different migratory and religious streams (mainly before and during the Second World War) without falling into the trap of embracing the

discriminatory and xenophobic doctrines, from time to time, promoted by well identifiable sectors.³ An important percentage of these immigrants were Jews, who escaped from the European inferno and arrived at the shores of the Plate River, in search of peace and refuge from persecution.⁴ As noted, the vast majority of the population accepted the foreign immigrants without surrendering to ideological racism, a state of mind traditionally alien to Uruguayan mentality.⁵ This fact was recently illustrated by the President of the Uruguayan Jewish Community (*Comité Central Israelita del Uruguay*) who declared in a press interview, that "in Uruguay, to embrace Nazi doctrines is not well seen".⁶ The same fact was emphasized by a person standing at the dark end of the spectrum (a Uruguayan skinhead) who, in an interview delivered to the magazine *Posdata*, declared: "if people discovered that I am a Nazi, they'd hit me with a stick in the head".⁷

The second important factor, was the early development of a legislative arsenal, which was quite avant-garde compared to other States, for the prevention and repression of manifestations of racism. The first instrument which I shall mention in this context, is a Law-Decree enacted in 1942, during the Second World War, imposing a prison sentence of 3 to 15 months on individuals taking part in associations, entities, institutions or sections tending to provoke or create racial confrontation or hatred.⁸ More recently, in 1989, a series of new anti-racist provisions were adopted:

- a. Article 149*Bis* of the Uruguayan Penal Code (UPC), which states that "any person who publicly or by any other means

Dr. Alberto M. Aronovitz, is a the Legal Counsellor at the Swiss Institute of Comparative Law.

adapted to public dissemination incites to hatred, degradation or any other form of moral or physical violence against one or more persons by reason of color, race, or national or ethnic origin, shall be sentenced to a term of imprisonment of 3 to 18 months".⁹

- b. Article 149^{Ter} UCP, which imposes 6 to 24 months imprisonment upon persons who commit acts of physical or moral violence, hatred or degradation against one or more persons by reason of their color, race, religion, national or ethnic origin.

Other provisions also merit a mention, even though they are only indirectly related to the crime of racism:

- c. Article 148 UCP, which imposes 3 to 24 months imprisonment on persons uttering public praise of acts categorized as crimes.
- d. Article 150 UCP, which imposes 6 months to 5 years imprisonment on persons associating for the purpose of committing one or more crimes - solely for such association.
- e. Law 9.936 of 18.6.1940, which considers illegal, and provides for the legal dissolution of associations disseminating ideas that are contrary to the Republican and Democratic form of government, and that depend on the authority of a person or power who or which are alien to the country, or that use symbols, uniforms, or body signs (*saludos*) belonging to foreign parties, tendencies or entities.

Until recently, these provisions were rarely applied because, as noted, the related crimes were rarely committed.¹⁰ However, in the late 1990s the situation began to deteriorate following attempts by neo-Nazi groups to expand their activities into Uruguay.¹¹

A first alert: groups of "young" racists

New communication means (such as Internet and electronic mail),¹² the emergence of racist movements in Europe and the USA and world wide television coverage given to the activities of the so-called skinhead and other neo-Nazi groups, had a destabilizing influence on certain sectors of the Latin-American population; Uruguay was not an exception.

In effect, by 1999, a group which styled itself *Orgullo Skinhead* (Skinhead Pride), established one of those typical Internet sites inciting racial hatred and discrimination. *Inter alia*, the site included a section dedicated to the Ku Klux Klan,

showing pictures and drawings of black individuals being burned by masked persons or kicked by military boots. The site incited potential readers to draw racist graffiti in public places and to distribute racist pamphlets and messages.¹³ It seems that the group was also involved in posting three bombs in different areas of Montevideo (for these acts, a former Marine soldier was sent to jail).

Following an investigation lasting more than seven months, the Uruguayan police captured the members of the group, who turned out to be three youngsters aged 16, 18 and 23. After obtaining the pertinent judicial authorizations, the police intercepted the phone conversations of the faction, and discovered that its members had cultivated a network of contacts with racist entities abroad, mainly in Argentina and Brazil, but also in Europe. Besides the usual "paraphernalia of the good racist" (*i.e.* anti-Semitic books, articles, uniforms, bracelets, flags and other symbols), the police confiscated the hardware used to facilitate the electronic racist activities. It was claimed that all the members of this group belonged to "good" families, lived in "good" neighborhoods and that their parents had no idea of their illicit activities.

The detainees were brought before a judge of criminal affairs, who processed two of the accused under Article 6 of the above Law-Decree 10.279 (membership of a subversive association) and the third accused under the same article together with Article 149^{Bis} UCP (incitement to hatred or violence on racist grounds). The Web page of *Orgullo Skinhead* was neutralized and put off-line.

Since then, the police have verified the existence of other racist cells operating on the Web, some of which have threatened Uruguayan personalities whom they have judged not to their taste. Investigations are currently underway aimed at also dismantling these groups.¹⁴

A second alert: groups of "senior" racists

In the first part of the year 2000, the Uruguayan population discovered, not without astonishment, the existence of an (until then) unknown racist group named *Frente Nacional Revolucionario del Uruguay* (FNRU). The activities attributed to this group included covering the construction known as El Aguila (the symbolic name of "The Eagle") with racist graffiti and hanging racist signs in front of the Supreme Court building and Montevideo's Municipality. Further, in September 2000, the FNRU published its "Communiqué no. 2", accusing some

Uruguayan public personalities of being “traitors” and “stateless” (*apátridas*) and blaming them for the “critical situation of hunger and misery.” The pamphlet also stated that “the Zionists are responsible for the misery and hunger of the weak population” and gave the full names of those they believed were responsible for this situation; most were Jews, holding political and public positions.¹⁵ The pamphlet concluded with the sentence: *Brazo en alto* (Hand up).

The police acted efficiently and arrested the head of the FNRU, a 54 year-old man, who affirmed that he had been elected by his comrades to lead the group. The other members of the FNRU arrested were all aged over 40, an indication that racism is not just a “fashion” attacking “some rebel youngsters”, but something that may even destabilize the minds of mature individuals. This time, apart from the usual “soft” racist equipment (Nazi flags, emblems and pamphlets), the Police confiscated different types of guns, a fence bearing a Nazi emblem, wigs and gas pistols; all this showing that the group was ready to act.

As with the *Orgullo Skinhead*, the FRNU members were captured because of a thorough investigation, in the course of which the police discovered a video tape of an interview accorded by the leader of the group to a journalist. In the video, which allowed identification of other members of the group and proceeded to their detention and which later became a central piece of evidence in the criminal process, the leader appeared wearing a Nazi-like uniform and standing in front of an emblem resembling a swastika. He was charged with violation of Article 149 *Bis* UPC and sent to prison.

Some Reflections

The first distinction looming from the above mentioned cases is that, although the ideological platform looks similar, the operational tools implemented by the “young” racists were different from the means applied by the “senior” ones.

On one hand *Orgullo Skinhead* had recourse to the Internet, exchanged electronic mail and information with similar groups abroad, and even attempted to attract other youngsters with the lure of Skinmusic and Skinvideos (one of the members of this group used to sell this kind of material on the market) whilst, on the other hand, FRNU “mature” racists were electronically isolated and implemented more “traditional” methods (such as the “decoration” of the symbolic El Aguila building with racist Nazi and racist signs, the publication of Communiqués and

threats and the recording of a racist video).¹⁶ Both groups practiced or were ready to practice violence.

This diversity of operational means requires a re-examination of the existing legal instruments, in order to verify whether or not they are adapted to tackle the modern manifestations of racism and anti-Semitism. In this respect, there are some *lacunae* that could be filled, as suggested below:

a. In the light of modern technological advances, it seems necessary to sharpen the existing legislative arsenal in order to curb the use of the new communication technologies to disseminate racist doctrines. This is not an easy task, because the WWW (a sort of virtual wall, where anyone can draw racist graffiti, while hiding behind a veil of anonymity), does not respect sovereign borders. Therefore, a site closed in Uruguay may be replaced, for example, by installation in a mirror site in the US.¹⁷

From the criminal point of view, it is clear that the first persons responsible are, of course, the author and manager of the racist Web pages. However, these individuals are usually difficult to discover, because they operate underground (in the case of *Orgullo Skinhead*, the police seemed to benefit from the negligence of one of the builders of the Web-site, who registered the page in a foreign server using the real name and phone number of one of his comrades,¹⁸ but such is not the case of sophisticated Cyber-racists, who hide behind false names and addresses). Therefore, in view of the impossibility of discovering the authors, the idea of making other entities responsible (either at the criminal or civil levels) such as the “Web access providers”¹⁹ and/or the “Web hosts”,²⁰ seems to be making headway in some countries.²¹

The European Commission Against Racism and Intolerance (ECRI)²² has recently proposed that Web access providers be made responsible for the illegal contents of Web sites - whenever they know that such sites exist and fail to block access, while Web hosts would be held responsible whenever they fail to exercise due vigilance (*vigilance étendue*) regarding the contents of the sites, especially in the case of sites whose authors remain anonymous.²³ However, it would be unjust to oblige access providers (and, up to a certain level, even Web hosts) to read the hundreds of thousands of documents that may circulate throughout their electronic installations in order to identify the illegal ones (in this sense, the objective situation of Web hosts and access providers is not precisely analogous to the status of an editor under press laws, because the latter is meant to be aware of the contents of the published articles). Therefore, an additional procedure for “calling the attention of access

providers and/or Web hosts to the existence of a racist site within their domains” could be established (such a procedure would be in the form of a notification that surfers who discover the existence of the site should notify the host and/or the access provider of the same. This could even be done by e-mail).²⁴ Once the host or the access provider become aware of the existence of a racist site within their domains,²⁵ (either by discovering it themselves or by notification from a third party), they should take the necessary measures to prevent access or neutralize the site by a certain deadline.²⁶

b. Another problem to be resolved is the question of denial of the Holocaust. Like many other States, Uruguay lacks a criminal provision punishing denial of the Holocaust and revisionism.²⁷ It is well known that one of the *chevaux de bataille* of every respectable racist is the attempt to deny the existence of the Holocaust, the gas chambers and/or the crematoriums, sometimes cynically accusing the victims (*i.e.* the Jews, Romany and homosexuals) of having invented these stories.²⁸ By enacting specific legislation prohibiting dissemination of revisionist positions, an important tool of racist action may be removed. A source of inspiration could be the Spanish Criminal Code²⁹ which imposes, in Article 607.2, from 1 to 2 years imprisonment on those who disseminate - by any means - ideas or doctrines denying or justifying crimes related to genocide, or attempting to rehabilitate institutions or regimes advocating such crimes.

c. In order to cover the wide spectrum of crimes that may be committed for racist motives (from vandalism, robbery, threats, injuries, to falsification, kidnapping, harassment, inflicting degrading treatment, murder, *etc.*), one could study the possibility of including racism and anti-Semitism among the “aggravating circumstances” contemplated in Article 47 UPC. This was done, for example, by the Spanish legislature in Article 22.4 of that country’s criminal code, which provides that: “the fact that the crime was committed for racist, anti-Semitic or other discriminatory motives based on the ideology, religion or beliefs of the victim, his ethnic origin or race...” is an aggravating circumstance.

d. It is a fact that, apart from some personalities, such as Member of Parliament Dr. Nahum Bergstein and the Police Ministry at the executive level, few Uruguayan politicians have demonstrated serious concern about the recent racist manifestations. At least in respect of a few, one may attribute such failure to the old belief that in Uruguay “there are only anti-Semites, but not anti-Semitism”,³⁰ and that “racism was never a massive and generalized problem in the country”. For this reason, groups and organizations whose goals are to identify, monitor and denounce

racist groups and their activities and to promote educative anti-racist programs, may play an important role in the enlightenment of public opinion, as well as in the fight against racism and anti-Semitism. Such is the case of *Tholerancias*,³¹ a group composed of members of different faiths. In order to encourage and facilitate the activities of these groups (which can also act in the detection of racist Web sites and send notifications to Web hosts and Web access providers as proposed above), one may envisage defining their legal status, thereby giving them procedural legitimization and perhaps affording them some public financing.

Final Remarks

If the actions undertaken by Uruguay - crowned, as they were, by the successful detention and conviction of the members of racist groups, becoming one of the few countries in the world and the only one in South America that, to-date, has dismantled racist groups operating in the WWW - would have been carried out by a State that is “more important for the media”, the world’s enlightened public would have loudly praised and applauded it.

For this reason, we have judged it pertinent to bring these developments and the proposals for improving the existing legal arsenal to the attention of the readers of *JUSTICE*.

1. See <http://www.lonelyplanet.com/dest/sam/uru.htm-hist>. Please note that some of the Internet sites referred to in this paper may cease to be active in the future, this being one of the handicaps of electronic sources.
2. In the period preceding the Second World War, especially in the 30’s, some pro-Nazi groups started to operate in Uruguay. Mainly composed of German immigrants and/or their descendants, these groups had an ephemeral life, disappearing after the German defeat: Renzo Rossello, “Operación ‘Cuarto Reich’”, in *El País*, 16.9.00; and see notes 4 and 6.
3. In effect, during the 30s, Uruguay’s traditionally open immigration policy was restricted by legislation enacted in reaction to the economic crisis of 1929. Among this restrictive legislation, was law no. 8.868 of 19.7.1932 and law no. 9.604 of 13.10.1936, both aimed at making immigration difficult. Though not formally directed against Jews, these laws posed obstacles to their entering into Uruguay, to the point that some boats carrying European Jewish refugees were denied access to the country. Such was the case of the Conte Grande (documented by Miguel Feldman in his article: “El Antisemitismo en Uruguay Durante los Años Treinta”, in *Antisemitismo en Uruguay*, Montevideo, 2000, p. 27. The author mentions that the refugees screamed from the vessel that they would prefer to jump into the water than to be returned to Nazi threatened Europe, but the authorities remained inflexible, and finally the Chilean Consul obtained the consent of his government to host the refugees. Similar situations were created by the arrival of other vessels, such as the Oceania and the General San Martín). On the other hand, historians state that, despite the normative restrictions, Jews arrived, by means of family

- reunification, by taking advantage of legal *lacunae* (for example, by arriving in Uruguay as tourists on first class tickets, then making the necessary arrangements to stay) or by the tolerant application of immigration laws by some officers of the administration (Miguel Feldman, *ibid.*, p. 25). Finally, the Jewish Community of Uruguay played an important role, interceding with the local authorities in favor of arriving Jews (Daniela Bouret, Alvaro Martínez & David Telias, *Entre la Matzá y el Mate*, Montevideo, 1997, p. 48-51); see also note 6.
- 4 Some historians maintain that the first Jews (of Sephardic origin) arrived in Uruguay in 1889 (Gabriel Abend, Zola, "los Judíos y el Novecientos", in *Antisemitismo en el Uruguay* [supra note 4], p.71 f.) Uruguay counts some three million inhabitants, the Jewish population is today estimated at around 25,000 - 30,000. Besides Jews, Uruguay hosted other migratory waves, mainly from Spain, Italy and Eastern European countries (Lithuania, Russia, Lebanon, Poland, Hungary, Germany, and Czechoslovakia).
 - 5 For the sake of accuracy it is underlined that there were some racist and anti-Semitic groups operating in Uruguay before and during the first part of World War II. One of the most notorious pro-Nazi entities germinated amid the Uruguayan community of German immigrants in the framework of which, in 1931, a local branch of the National-Socialist party (*National Socialistische Deutsche Arbeitspartei* "NDAP") was constituted. This entity, which operated in coordination with the German Embassy in Montevideo to introduce Nazi ideology and methods to Uruguay, preached in favor of a rapprochement with Germany, active anti-Semitism and racial discrimination, was denounced by Hugo Fernandez Artucio in his book: *Nazis en el Uruguay*, Montevideo 1940, and by the parliamentary Commission of Inquiry on Anti-National Activities, charged, *inter alia*, to investigate the actions of the NDAP. Fernandez Artucio and the above mentioned Parliamentary Commission confirmed the pro-Nazi character of the NDAP, thus contributing to the condemnation of nine of its members and to the dissolution of the movement (Daniela Bouret, Alvaro Martínez & David Telias, *Entre la Matzá y el Mate* [supra note 4], p. 118). The NDAP and other small racist groups were fueled by the ink of some journals, especially one named *La Tribuna Popular*, which published a large number of discriminatory articles against immigration in general and Jews in particular (a review of these articles can be seen in the book of Daniela Bouret, Alvaro Martínez & David Telias [supra note 4] p. 52, notes 17-67). These and most similar manifestations in favor of Hitler's Germany lessened and practically disappeared with the distancing of the Uruguayan governments from the Nazi regime towards the last part of the war (María Magdalena Camou, "Nazismo en el Uruguay", in *Antisemitismo en el Uruguay* [supra note 4], p. 51).
 - 6 *Revista Posdata*, 2 October 1998, no. 210.
 - 7 *Ibid.*, under the title: "There is Official Concern for the Presence of Neo-Nazi Skinhead Groups in Uruguay".
 - 8 Law-Decree 10.279 of 19.11.1942, in *Código Penal de la República Oriental del Uruguay*, Anotado y concordado por Adela Reta & Ofelia Grezzi, Montevideo, 1996, p. 514.
 - 9 See Nahum Bergstein, *Delito y Discriminación Racial*, Montevideo, 1981, p. 21, 31 ff. This article and Article 149 *Ter* were included in the UCP by the so-called "Anti-discrimination Law" (Law no. 16.048 of 16.6.89).
 - 10 *El País*, 11.8.99
 - 11 See Anti-Semitism Worldwide 1999/2000 - Uruguay, Report on Anti-Semitism and Racism, by the Stephen Roth Institute, in <http://www.tau.ac.il/Anti-Semitism/asw99-2000/uruguay.htm>.
 - 12 See: Cyberwatch: The Task Force Against Hate, Simon Wiesenthal Center <http://www.wiesenthal.com/watch/taskforce.html>.
 - 13 *La República* 7.7.00.
 - 14 The press refers to groups such as Uruguay Anticapitalista, Euroamerikaners and Black Arkans of Hitler: *La República*, 7.7.00.
 - 15 *El Observador*, 15.9.00.
 - 16 Another difference is that *Orgullo Skinhead* was involved in bombing operations, while the FRNU did not commit violent acts (although, given the fact that the police confiscated an arsenal of guns and other objects, it is not excluded that they would have acted in the future).
 - 17 The United States is known to be one of the countries where racist, anti-Semitic, xenophobic and other discriminators may hide with impunity behind the principle of "freedom of expression", thus disseminating their doctrines of hatred. Internet communications are classified as "speech" in the American legal system and, as such, the special protection accorded by the First Amendment to the United States Federal Constitution makes the regulation of their content extremely difficult. As a result, and despite numerous attempts, there is currently no comprehensive Federal legislation prohibiting racism on the Internet. See Legal Instruments to Fight Against Racism on Internet, Research by the Swiss Institute of Comparative law, a study prepared in August 2000 by the Swiss Institute of Comparative Law (Lausanne) for the European Commission Against Racism and Intolerance, Doc. CRI (2000) 27 (hereinafter: "SICL Rapport").
 18. *Revista Posdata*, 12.8.99 no. 254.
 19. The "access provider" accomplishes a rather technical role, by allowing users to have access to the sites existing in the WWW.
 20. A "Web host" is an entity offering authors a certain amount of virtual memory in which they can install a Web site.
 21. See Jon Silverman, "European Perspectives on Anti-Semitism on the Internet", in *JUSTICE* no. 25, 2000, p. 22.
 22. The Web site address of the ECRI is: <http://ecri.coe.int/>.
 23. SICL Rapport [supra note 18] p. 6.
 24. See the Simon Wiesenthal Center's CyberWatch Hotline: <http://www.wiesenthal.com/watch/wholine.html>.
 25. See SICL Rapport [supra note 18] p. 52.
 26. Of course, the subject of Cyber racism is complex, and there are still problems to resolve, such as the responsibility for keeping on a non-racist site some "links" leading to racist Web pages.
 27. Uruguay ratified the International Convention on the Prevention and Punishment of the Crime of Genocide (law 13.482 of 7.7.1966).
 28. Such denial was made by one of the members of a Skinhead group interviewed by the magazine *Posdata*. *Revista Posdata*, 2.10.1998, no. 210: "The Holocaust did not exist ... 'only' 500,000 Jews died ... they died as consequence of the war".
 29. Código Penal Español, Ley Orgánica 23.11.1995, in Aranzadi, *Legislación* 1995 no. 3170 (BOE 24.11.1995, no. 281); also in <http://noticias.juridicas.com/leci/ Penal/lo10-1995.html>.
 30. The phrase also appears in the back cover page of the book *Antisemitismo en el Uruguay* [supra note 4].
 31. *El País*, 16.9.00 [supra note 3]; *La República*, 8.6.99, p. 15.

The Objectives of Punishment

Abraham Tannenbaum

The Bible deals, *inter alia*, with various punishments imposed on Pharaoh by reason of his refusal to release the people of Israel from their bondage. These punishments, which are termed in the Scriptures “the ten plagues of Egypt”, have become a symbol of harsh punishments imposed on offenders and other evil persons. The question which must be asked is why all these plagues were not imposed on Pharaoh simultaneously in punishment for his attitude to the people of Israel during the years of oppression and repression?

The answer given this question underlies one of the great principles of the theory of penal law, “there is no punishment without a prior warning”, and as Pharaoh was not warned, it was not possible to punish him appropriately for his past behaviour.

A different answer emphasizes God’s will that Pharaoh repent of his acts, as is stated in the *Midrash*:

It is the custom of human beings, when they wish to punish a rival, to bring a witness whom he does not know, the Holy One Blessed Be He however warns Pharaoh of each and every plague in order that he repent.” (*Midrash Raba, Exodus, Parasha I, Para. I*).

In order to understand the laws of punishment in Jewish law, it is necessary to try and understand the objectives of punishment. Is there one dominant objective which may be seen as the focal point of the punishment? Or does the punishment, perhaps, serve other objectives, which may sometimes even contradict one another? Thereafter, one must ask: is the theory of punishment in Jewish law consistent with current theories of punishment?

Dr. Abraham Tannenbaum is a judge of the Traffic Court, Jerusalem. *JUSTICE* expresses its appreciation to Dr. Michael Vigoda, the Director of the Jewish Law Department in the Ministry of Justice and to Adv. Aviad Hacohen, the Director of the Center for Jewish Law Studies at *Sha’arei Mishpat*, College of Legal Studies, for referring this article to *JUSTICE*.

The Objectives of Punishment

In discussing the punishment of one person who murdered another not for the sake of the murder itself, but in order to achieve another purpose, the rape of a girl who stood next to the murdered man, Justice Silberg said:



“Indeed the entire essence of punishment is to prevent the commission of the offence... ‘offences will terminate, and not offenders’, Bruria the wife of Rabbi Meir, stated it precisely, and as is known, Rabbi Meir agreed to this (*Brachot*, 10a): this means negating the sin is a more desirable objective than the punishment of the sinner. It seems to me that no one would wish to dispute this view.”¹

Others contend² that the objective of punishment stated in the *Torah* is primarily religious: it is intended to prevent desecration of God’s name caused by the offender breaching the sacred commandment, and not as a way of protecting society.

There are also those who believe³ that the objective of the Jewish criminal law is primarily educational. In their view, by imposing a severe punishment, the *Torah* expresses its repugnance for the act, and causes men to distance themselves from it.

However, the contention that Jewish law recognizes only one objective of punishment does not pass scrutiny: a comprehensive review of the sources of Jewish law reveals that they express a variety of objectives. A few examples follow.

Modern legal literature refers to four primary objectives in the

law of punishment, namely: **reward, deterrence, prevention and rehabilitation**; and there are those who add three additional issues: the duty of **compensation, reconciliation and repentance** - all these may be found in the Scriptures and writings of the Sages.

Revenge and Reward

Revenge is perceived in contemporary times as an undesirable objective of punishment. In practice, the theory of reward is often discussed as a more moderate form of the theory of revenge. Repudiating revenge as a punishment also appears in our sources, although it is occasionally mentioned as one of the important objectives of the theory of punishment. Thus, the *Talmud* asks:

“Therefore from now, revenge is great which has been given between two names, as it is said [revenge is desirable, this word appears between the two names of the Holy One Blessed Be He, and that is evidence of its importance]? [He said to him, yes] [= in a place where where is a need] it is desirable.” (*Talmud Babli, Brachot*, 33a).

That is to say, according to the author of the *Talmudic* passage, there are situations in which revenge is good and desirable.

On occasion, these statements were said in less moderate language. Psalm 137 - “By the rivers of Babylon”, attracted publicity because of the central statement “If I forget thee, O Jerusalem, let my right hand forget her cunning”. Further in the passage, it is said of Babylon: “Happy shall he be that taketh and dasheth thy little ones against the stones” (verses 5, 9). These are inspiring words, severe and intransigent, which cannot comfortably be justified, and can only be explained against the background of the declaration at the beginning of the verse: “O daughter of Babylon, who art to be destroyed; happy shall he be, that rewardeth thee as thou hast served us.”

Biblical law clearly expresses the law of reward in the principles concerning the “revenger of blood”, where the *Torah* justifies revenging the blood of a person murdered by one of his relatives (*Numbers* 35).

It would be appropriate to examine how the principle of reward can be reconciled with the express command in the *Torah*: “Thou shalt not avenge nor bear any grudge against the children of thy people” (*Leviticus*, 19:18).

Deterrence and Prevention

The *Torah* itself declares in relation to a number of offences

that the purpose of punishment is to deter potential offenders. Thus in relation to “the rebellious scholar”: “And all the people shall hear, and fear, and do no more presumptuously” (*Deuteronomy* 17:13), and in relation to scheming witnesses: “And those which remain shall hear, and fear, and shall henceforth commit no more such evil among you” (*Deuteronomy* 19:20).

Moreover, even when the offender has been sentenced to death, execution of the sentence must be deferred until the date of the pilgrimage to Jerusalem, in order that he be executed in public, and thereby strengthen the element of deterrence.

An additional objective which justifies criminal sanctions, is preventing the offender from committing new offences in the future. This objective is currently achieved by imprisoning the offender or otherwise confining him, for example under house arrest or parole. These punishments are not mentioned in the Bible. On the other hand, with regard to the death sentence, nine times it is stated in the Bible: “So shalt thou put the evil away from the midst of thee”. Possibly this commandment entails the ultimate form of prevention: sentence of death, which on occasion is the sole absolute means of preventing the commission of further crimes by the particular offender.

Rehabilitation

Alongside punishment, the centrality of rehabilitation is acknowledged in Jewish law. The phrase frequently used in this context, is repentance. The Prophet Ezekiel, calls loudly in the name of the Lord: “I have no pleasure in the death of the wicked; but that the wicked turn from his way” (*Ezekiel* 33:11).

On occasion, the moral and legal duty of a thief to return the property stolen to its owner was deferred to the rehabilitation of offenders,⁴ and the desire to make it easier for the offender to repent, as the *Talmud* states:

“Reference is to one person who wished to repent. His wife said to him: you shall go naked if you repent, even the girdle that you wear is not yours [= because he had stolen all his clothes]. And he refrained and did not repent. At that time it was said: [with regard to] the thieves and money lenders who returned [money which they had taken unlawfully], nothing is taken from them; and one who takes from them, the spirit of the Sages is not content with him.” (*Talmud Babli, Bava Kamma* 94b).

In other words, notwithstanding the clear legal obligation which requires the thief to return what he stole, the Sages

encouraged the victim of the offence to waive his right, if this assisted in rehabilitating the thief and bringing him back to the right way of life.⁵

Atonement

Atonement, as one of the goals of punishment, is mentioned in the Scriptures in relation to the murderer. The *Torah* emphasizes that the murder cannot be atoned for except by a death penalty, and in no case may the punishment of the murderer be replaced by a monetary fine, or “satisfaction” (blood money), in the language of the Scriptures:

“Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death... And ye shall take not pollute the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it” (*Numbers* 35:30,33).

Possibly, it is because of this that the *Torah* repeats the commandment “So shalt thou put the evil away from the midst of thee” a number of times.

Compensation and Settlement

In relation to a number of offences, the punishment appears to be directed at returning the situation to its former state, and even more to compensating the victim. Thus, for example, in relation to the offence of theft, the thief must pay the owner of the property which was stolen twice the value of the property stolen.

From the review so far, it follows that the various objectives of punishment currently accepted were already mentioned in the early sources. Moreover, already in the beginning of the life of Jewish law, we find sharp disputes regarding the justification of punishment, particularly in relation to the death penalty.

The Dispute Relating to the Death Penalty

“Rabbi Tarfon and Rabbi Akiva say: Had we been in the *Sanhedrin*, no one would ever be killed. Rabbi Shimeon Ben Gamliel says: “Because of them more blood will be shed in Israel.” (*Mishnah Makkot*, A,10)

It should be pointed out that this dispute was born in the period after the cancellation of the powers of the *Sanhedrin*, and in any event is completely theoretical. Notwithstanding this, two of the important *Tannaim* emphasize that had they been judges

in the *Sanhedrin* they would have done everything to prevent a judgment of death and the execution of a person by a precise reliance on the law of evidence.

In contrast, a third sage, Rabbi Shimeon Ben Gamliel, took the view that their approach would have led to an increase in the number of cases of murder and bloodshed. This dispute is relevant to this day.

The Theory of Punishment of the *Rambam*

The *Rambam* devotes a full chapter in *The Guide For the Perplexed* (Part 3, 41) to the theory of punishment. With regard to the considerations guiding the legislature and the judges in determining the severity of the sanction, he states:

“Whether the punishment is great or small, the pain inflicted intense or less intense, depends on the following four conditions:

1. The greatness of the sin. Actions that cause great harm are punished severely, whilst actions that cause little harm are punished less severely.
2. The frequency of the crime. A crime that is frequently committed must be put down by severe punishment; crimes of rare occurrence may be suppressed by lenient punishment considering that they are rarely committed.
3. The amount of temptation. Only fear of a severe punishment restrains us from actions for which there exists a great temptation, either because we have a great desire for these actions, or are accustomed to them, or feel unhappy without them.
4. The facility of doing the thing secretly, and unseen and unnoticed. From such acts we are deterred only by the fear of a great and terrible punishment.”

It would seem that these considerations have one purpose: deterrence for the sake of the good of the State and ensuring public order. In the light of these considerations, the *Rambam* offers a new and original explanation for the question: why is the *Torah* less strict with a person stealing chattels, who only pays twice the value of the property stolen, than a thief of live stock, who, if he has sold the animal, must pay a fine equal to four or five times the value of the animal stolen. Thus, he states:

“For this reason one who stole a sheep had to pay twice as much as for other goods, *i.e.*, four times the value of the stolen object; but this is only the case when he has disposed of it by sale or slaughter. As a rule, the sheep remained always in the fields, and could therefore not be watched so carefully as things kept in town. The thief of a sheep used therefore to sell it quickly before

the theft became known, or to slaughter it and thereby change its appearance. As such theft happened frequently, the punishment was severe.”

The Modern Approaches to Punishment

Broadly, it is possible to point to three approaches in the modern law of sanctions. The first is **justification** of sanctions, which may be placed within the framework of the law of morals; the second is the **efficiency** of sanctions in preserving social order, war against crime; and the third is the **sociology of punishment**.

The first approach sees punishment as a moral problem. Its starting point is that punishment *per se* is not positive, and by its nature is not permissible, and accordingly it must be justified. According to this approach, punishment is a process which answers the question: “what is just”? and its abstract objective is the pursuit of justice, on the assumption that we know what is just.

The second approach sees punishment as a way of fighting crime in order to ensure social order. According to this approach, criminal sanctions form part of a system intended for a particular, defined purpose - reducing crime in so far as possible. Punishment is needed only so that the rest of the population, the non-offenders, will be able to live their lives with maximum tranquility and safety. The central question is: can punishment provide a means of frustrating offenders. And if so, how this will be done. This approach is part of the tradition of the classic approach of the 18th century, which prevails to this date throughout all aspects of the legal system. According to this approach, the objective of punishment is very simple: lessening the level of crime and the level of criminality, and nothing else.

The third approach is known as “the sociological-historical approach to criminal sanctions”. The sociology of punishment focuses more on questions of society and punishment and the connection between them. The sociological framework attempts to merge the historical facts known about punishment in a specific society with society as a whole, and interpret them; it attempts to learn how sanctions are explained within the formal ideological framework and the real reasons for these punishments. According to the sociological approach, it is difficult to talk of the “purpose” of punishment or the “objective” of punishment, and it is more correct to ask: how did these particular institutions of punishment and modes of punishment develop, without making excessive efforts to harmonize them or their

purposes. It should be pointed out that, generally, lawyers tend to ignore this sociological perspective.⁶

The Insolvable Tension Between the Different Approaches

It is easy to see that these three approaches, justification of sanctions, war against crime, and the socio-historical approach to punishment - may be contradictory. At the same time, in certain cases, it may be argued that a certain form of punishment is directed at all three elements: it is efficient - because it fights crime; it is just - for reasons which are found in the law of reward; and the historical reasons which led to the use of it are still relevant today. Indeed, reality teaches that not everything that is just is also efficient, and certainly it does not always develop in a natural historical manner.

Take, for example, the deterrent sanction, which is regarded as one of the basic pillars of the war against crime. Many people believe that the sole justification for this type of punishment is its capacity to deter both the particular offender subjected to the penalty and other future offenders.

Notwithstanding this intuitive assumption, the very definition of deterrence as an objective of punishment, has led to sharp criticism by a number of philosophers. The latter have claimed that it is not right to punish one person in order that others refrain from offending. Punishing Reuven in order that Shimeon will not commit an offence seems to them to be unjust, because we are turning Reuven into a tool for improving the lives of others.⁷

Others have criticized the objective of deterrence from the practical point of view. Numerous studies have shown that punishments do not deter either the offender or the rest of the public, and only causes unnecessary suffering. Accordingly, the sole reasons for punishment must be reasons of justice.

Different theories were developed over the years in an attempt to mediate between the various demands of efficiency and justice, none with any great success.

If we return to the classic objectives of punishment referred to above, it may be seen that they can be easily classified in the first two frameworks:

Reward, atonement, compensation and settlement, clearly belong to the law of morality, whereas deterrent punishments belong in the framework of the war against crime. With regard to rehabilitation, it is arguable whether this should be seen as affiliated to the area of morality or alternatively to the battle against crime. The objectives mentioned clearly govern all the legal thinking, and they are accepted by most of those

researching sanctions. The major portion of legal literature concerned with punishment - if not all of it - deals with the questions referred to above: justification of the punishment, war against crime and the weight to be accorded to each of them.

Accordingly, it is very difficult to talk of a clear single objective of the theory of sanctions. The three approaches are applied concurrently - generally intertwined - as guidelines throughout the entire modern law of sanctions.

The Policy of Punishment in Jewish Law

In view of the aforesaid, it is easier to understand the ambiguity regarding the nature of punishment in the sources of Jewish law. As we have seen, almost every contention raised in relation to the objective of sanctions, finds an echo in our sources, of one sort or another, and often opposing critical comments have been added.

The lack of clarity in the policy of punishment of Jewish law is therefore understandable by virtue of the very nature of punishment. Punishment is only an attempt to find a balance between clashing value systems which are irreconcilable. Accordingly, it is no surprise that anyone wishing to support a particular approach in the theory of sanctions, may find authority for it in the sources of Jewish law. At the same time, it should be remembered that punishment by its nature is an institution comprised of conflicting principles living in disharmony.

Criminal punishment is an institution having different and conflicting objectives, which is greatly influenced by historical and political proceedings. Like any other social institution, tradition and history influence it no less - and perhaps even more - than rational considerations. Like every other significant social institution, it is difficult to precisely define its goals. Thus, for example, to the question what is the "objective" of a school: is it to provide the knowledge necessary for the survival of the person? To educate a fair citizen? To enable every student to exploit his abilities? To develop necessary discipline? Or, to provide a caretaker for children whose parents work? Obviously, there is an element of truth in each of these answers.

In addition to the ordinary problems posed by every social institution, punishment is also constructed on contradictions which cannot be reconciled. We are trying to defend the freedom of one by means of negating the freedom of another; to reduce the suffering of one by causing suffering to another.

The dialogue which we conduct in this matter with our

sources, teaches us that the problems existing in the past, also exists in the present, and it seems will also exist in the future.

Those dealing with the theory and practice of sanctions can find comfort in the fact that our Sages also did not find a solution to all the questions arising from it, and it is not for us to complete the task.

- 1 Criminal Appeal 125/50 *Jakobovitz v. Attorney General*, 6 P.D. 514.
- 2 See, for example, A. Anker, "Principles of Jewish Criminal Law", 24 *Mishpatim* (1994) at pp. 177, 193.
- 3 See, for example, A. Kirshenbaum, "The Place of Punishment in Jewish Criminal Law", 12 *Iunei Mishpat* (1986) at pp. 253, 258, 265.
- 4 See generally, M. Frishtik, *Punishment and Rehabilitation in Judaism*, Jerusalem, 1986. See also the Crime Register and Rehabilitation of Offenders Law - 1981, and the preamble to the Bill.
- 5 The desire to rehabilitate the offender led to a change in the law. For example, the "*Marish*" ruled that a thief would not be held liable except for monetary compensation, when the return of the property was not reasonable.
- 6 There is extensive literature on this subject, see, for example, the research of one of the leading scholars on the law of sanctions, D. Garland, *Punishment and Modern Society: a Study in Social Theory* (Chicago, 1990). D. Garland, "Sociological Perspectives in Punishment" *Crime and Justice: a Review of Research* (Chicago, M. Tonry, Ed. 1991), pp. 115-165.
7. The most famous critic of the idea of deterrence was Immanuel Kant. See his remarks in I. Kant, *Metaphysical Elements of Justice* (Translated by John Ladd, Indianapolis, 1965) pp. 331- 333.
[Note: The quotations from Jewish sources other than Biblical sources have been freely translated].

From the Association

- The Association regrets to announce the passing of Mr **Jean S. Brunschvig** on 30 December 2000, at the age of 86. Advocate Brunschvig was one of the founders of the Association, and a devoted member who attended many of our international conferences.

- The Association also regrets to announce the passing of Mrs. **Erna Proskauer** on 18 January, 2001, at the age of 97 in Berlin. Mrs. Proskauer was one of the first Jewish female jurists in Berlin before 1933. She moved to Palestine in 1933 and returned to Berlin in 1953. Mrs. Proskauer gave a much appreciated account of her experiences during the Berlin Conference held by the Association in June 1999.

The Scope of Powers of a Resigning Prime Minister

HC 5167/00; 9607/00; 84/01; 147/01

Professor Hillel Weiss and others v. The Prime Minister and others

Before President Aharon Barak, Deputy President Shlomo Levin; Justices Theodor Or; Eliezer Matza; Itzhak Zamir; Yaacov Tirkel; Yitzhak Englard

Judgment delivered on 25.1.2001

Precis

The question considered in this petition was whether following his resignation from office, Prime Minister Ehud Barak and the other outgoing Ministers possessed the authority to continue negotiating a political settlement with the Palestinian Authority, with the aim of signing an agreement before the approaching special elections for the office of Prime Minister. The judgment considered the scope of the powers and breadth of discretion of the outgoing government; whether it was entitled to sign an agreement, and the scope of the judicial review which could be exercised over the decisions of such a government. President Aharon Barak, delivering the leading judgment, noted that these were weighty questions which, in the normal course, would require lengthy consideration, however, in view of the fact that time was of the essence, a decision had to be made speedily.

President Barak held that Israeli constitutional law did not recognize a special doctrine to the effect that upon the resignation of the Prime Minister his powers and the powers of the Ministers were exclusively limited to routine activities. With regard to judicial review, the Court would ask itself whether the balance drawn by the Prime Minister and government between the need for restraint and the need for action was a balance which a reasonable outgoing Prime Minister was entitled to make.

In the instant case, President Barak held that the outgoing Prime Minister and government had acted within the scope of

reasonableness and that judicial review was to be conducted by the *Knesset*.

Justices Theodor Or, Eliezer Matza and Yitzhak Englard concurred. Deputy President Shlomo Levin and Justice Itzhak Zamir also concurred but for somewhat different reasons - which are reviewed below.

Justice Yaacov Tirkel dissented - while he agreed with the method of analysis of President Barak he could not agree with the conclusion that the outgoing government's activities were within the scope of reasonableness. Further, since, in practice, the *Knesset* could not exercise its oversight powers, the Court should do so, and in the circumstances the outgoing Prime Minister had not shown that negotiations had to be conducted at this specific time for public reasons which were essential in the extreme.

President Barak

The Contentions of the Parties

President Barak noted that the government of Israel had been negotiating with the Palestinian Authority for many months and that there was an intense dispute in the country regarding whether these negotiations should be conducted and the contents thereof. Against this background, on 12.12.2000, the Prime Minister had resigned from his post and special elections were set for 6.2.2001. The Petitioners claimed that the outgoing government had no power to continue negotiations on the grounds that the government was a "transitional government" and that it was confined to exercising powers dealing with routine matters. The Petitioners based this analysis on Basic Law: the Government and on constitutional practice, as well as on the principle of reasonableness. The Petitioners noted that Basic Law: Law and Government (Repeal of the Application of Law, Adjudication and Administration) - 1999 and Basic Law: Jerusalem, the Capital of Israel (Amendment) were laws requiring the *Knesset* to make the decisions on territorial modifications. The outgoing government did not have a majority in the *Knesset*, and accordingly could not satisfy these requirements.

This too had the effect of limiting the powers of the outgoing government. According to the Petitioners, the High Court of Justice had to exercise its full powers in examining the constitutionality and legality of the actions of the government. This was particularly so since the *Knesset* was on vacation and could not exercise its oversight powers over the activities of the government.

The Attorney General contended that the applicable constitutional principal was that of “continuity of government”. The interpretation of Basic Law: the Government did not lead to the imposition of qualifications on the powers of the outgoing government, and there was no constitutional practice requiring such qualifications. At the same time, the exercise of powers during an election period, necessitated caution to be applied. The Attorney General added that any agreement reached would have to be ratified by the *Knesset*. Further, any decision of the government, according to which the law, adjudication and administration of the State of Israel would no longer apply to land to which it currently applied, would also have to be ratified by a majority of the *Knesset*. Additionally, any decision regarding the transfer of powers within the jurisdiction of Jerusalem to a foreign body required the enactment of a Basic Law which would have to be adopted by the majority of the *Knesset*.

The Normative Framework

President Barak noted that according to Section 23(c) of Basic Law: the Government, special elections had to be held following the resignation of the Prime Minister. The powers of the outgoing Prime Minister and Ministers were set out in Sections 31 and 32 of the Basic Law:

“Continued functioning of the Prime Minister and Ministers

31. (a) A Prime Minister who has resigned or in whom the *Knesset* expressed no confidence, will continue in office until the newly elected Prime Minister assumes office.

(b) In the event of the Prime Minister’s death, permanent incapacitation, resignation, removal from office, or an expression of no confidence by the *Knesset*, the Ministers will continue in office until the newly elected Prime Minister assumes office.

Continuity of Government

32. During the election period for the *Knesset* and the Prime Minister or during special elections, the Prime Minister and the Ministers of the outgoing *Knesset* will continue in office until the Prime Minister and the Ministers of the new Government assume office.”

Thus, a Prime Minister resigning continued to fulfill his functions until the newly elected Prime Minister entered office; similarly, the outgoing Ministers continued to officiate until the newly elected Prime Minister entered office. Underlying these provisions was the concept that no governmental “vacuum” could be allowed to arise upon the resignation of the Prime Minister, and that the government continued to operate as the executive authority of the State. This guaranteed continuity and stability. However, by resigning, the Prime Minister returned to the people - who were sovereign - the confidence which they had placed in him. In this state of affairs, the Prime Minister continued to officiate by virtue of Section 31 of the Basic Law, where the basis for the continuation of his office was provided by the provisions of that law. This was the case until the newly elected Prime Minister, who had gained the trust of the public in the special elections, took office.

President Barak answered in the negative the question whether following such a resignation there were any formal restrictions on the exercise of the powers of the Prime Minister. In his view, nothing in the Basic Law restricted the formal powers of a resigning Prime Minister and the formal powers of his Ministers exclusively to routine matters.

President Barak noted that the contention relating to the restriction of powers to routine matters (“*expedition des affaires courantes*”) was not new, but had been accepted in a number of parliamentary regimes. It was an approach which had been examined by a public committee in Israel, in relation to the powers of a transitional government under the old Basic Law: the Government, and that committee had decided not to adopt the “theory of routine activities”.

Moreover, with the adoption of the new Basic Law, the *Knesset* decided to continue to follow the accepted approach and refrained from incorporating any formal changes to the powers of an outgoing government. Accordingly, President Barak thought it would be inappropriate to introduce in Israel, by way of interpretation, the Continental doctrine relating to the restriction of the powers of an outgoing government. The *Knesset*, as the constitutive body, was entitled to restrict the powers of an outgoing government, if it saw fit.

President Barak also rejected the argument that there was a constitutional practice to the effect that an outgoing government was limited exclusively to routine or “maintenance” matters, or that there was a constitutional practice to the effect that international treaties of special importance to which Israel was a

party required the ratification of the *Knesset* - and that such ratification could not be retroactive but had to be obtained before the government signed the treaty. President Barak noted that the question of the validity of the constitutional practice in Israel, had not yet been examined by the Court. For his part, President Barak was prepared to assume, without giving judgment to that effect, that the constitutional practice was a legal source for the creation of binding constitutional law in Israel. However, in the instant case it had not been proved that there was a constitutional practice to the effect that an outgoing government was limited to routine powers only. With regard to the ratification of international treaties of special importance, the government had accepted that any agreement reached in this matter would be brought for ratification by the *Knesset*. President Barak held that no constitutional practice had been proved to the effect that the consent of the *Knesset* had to be given in advance.

President Barak held that accordingly, Israeli constitutional law did not recognize a special doctrine to the effect that upon the resignation of the Prime Minister his powers and the powers of the Ministers were exclusively limited to routine activities. At the same time, the outgoing government, like all governments in Israel, had to operate with reasonableness and proportionality, where the difference between an outgoing government and an ordinary government was expressed by the application of the test of reasonableness. President Barak held that the principles of reasonableness and proportionality were principles of general law, which applied to the activities of every government, including an outgoing government. The "scope of reasonableness" which determined the range of activities beyond which the activities of the government would not be considered reasonable, also applied to the activities of an outgoing government. As was well-known, an outgoing government could arise for different reasons such as the resignation of the Prime Minister, a vote of no-confidence by the *Knesset* in the Prime Minister, the dissolution of the *Knesset* by the Prime Minister with the consent of the President, the dissolution of the *Knesset* by itself, and also the ordinary situation of a government operating after elections had been held on the due date.

Asking what the principles of reasonableness and proportionality signified in relation to the activities of an outgoing government, where the Prime Minister had resigned, President Barak held that it was necessary to consider the purpose underlying the continued office of the Prime Minister and Ministers notwithstanding the resignation of the Prime Minister. This

purpose was twofold. On one hand, it was intended to prevent a governmental vacuum and ensure stability and continuity. On the other hand, consideration had to be given to the special status of the outgoing Prime Minister, whose office, *prima facie*, was due to terminate, but where in fact he continued to hold office until the entry into office of the newly elected Prime Minister, by virtue of the provisions of the Basic Law itself. Against the background of this twofold purpose, it was necessary to conclude that the resigning Prime Minister and the outgoing Ministers had to act in the full awareness of this purpose. In other words, they had to act with the restraint appropriate to the status of an outgoing government, while ensuring continued stability and continuity. The duty of restraint did not exist where there was an essential public need for action. Where such a need existed, the government was required to meet it, with the requisite proportionality. Accordingly, what was required was a flexible approach drawing a balance between restraint and action, in accordance with the circumstances of the matter and taking into account changing reality. The question which the principles of reasonableness and proportionality posed was not whether the activity was routine or exceptional. The correct question was whether the overall balance - taking into account all the circumstances - required restraint or action.

It followed that in relation to certain issues, the scope of reasonableness applicable to a resigning Prime Minister was narrower than the scope of reasonableness applicable to a Prime Minister and government officiating as usual. This was because the former, unlike the latter, had to take into account a special factor, namely, the purpose for its existence and the source of its power. Moreover, the scope of reasonableness of the outgoing Prime Minister and government varied as the date of termination of office approached. Thus, the scope of reasonableness became increasingly narrow and the need for restraint increasingly great following elections, and prior to the new Prime Minister taking office, subject always to the essential needs of the public. For example, it would be inappropriate, within the context of domestic policy, for an outgoing Prime Minister and Ministers to make appointments to senior posts, but this should be left to the newly elected government, save if in the circumstances of the matter, it was necessary for essential public reasons to man this post without waiting for the new government to take office, or the post was a professional one and there was no need to defer making an appointment to it. The same principles had to be applied to the conduct of foreign and security policies. It was

inconceivable that the outgoing Prime Minister and government could not defend the security of the State simply because they were in their last days of office.

Judicial Review

Considering the scope of judicial review of the decisions of a resigning Prime Minister and his Ministers, President Barak held that such a government did not enjoy any special status. Every government was subject to judicial review, and a resigning Prime Minister and Ministers did not enjoy immunity from the same. Accordingly, within the framework of judicial review of the proportionality and reasonableness of the decision, the Court would ask itself whether the decision of the government was a decision which a reasonable government was entitled to make. The Court would not ask itself which decisions it would have made had it been the government. The same test also applied in relation to the review of the activities of an outgoing Prime Minister and government. The Court would ask itself whether the balance drawn by the Prime Minister and government between the need for restraint and the need for action was a balance which a reasonable outgoing Prime Minister was entitled to make.

The scope of the judicial review would be influenced by the scope of the administrative powers. Thus, the Court would not order the Prime Minister and Ministers to adopt a policy of privatization or nationalization. It was for the Prime Minister and his Ministers to decide this within the framework of their powers, and not for the Court. The *Knesset* oversaw their activities, and it was for the *Knesset* to scrutinize the policies of a government acting within the scope of what was reasonable. This was true of a Prime Minister and government operating routinely and an outgoing Prime Minister and government.

From the General to the Particular

The government was the executive authority of the State (Section 1 of Basic Law: the Government). By virtue of this status and the additional powers conferred upon it, it was entitled to conduct the foreign and security policies of the State. The scope of reasonableness in relation to these issues was broad, and within the confines of the scope of reasonableness the Court would not replace the government's discretion with its own. Supervision of the exercise of the government's powers in relation to these issues was in the hands of the *Knesset*. Thus, had the petitions being submitted prior to the resignation of the

Prime Minister, the Court would probably have dismissed them. President Barak noted that the Court had dismissed a long line of petitions concerning government policies relating to the resolution of the Arab-Israeli conflict.

The situation was not different because reference was to an outgoing government. The determination between the need for restraint (asserted by the Petitioners) and the need to act (claimed by the government) was permeated with considerations of security and peace.

President Barak held that in view of the material before the Court, the Court was not convinced that the conduct of negotiations by the outgoing Prime Minister exceeded the scope of reasonableness. Beyond this, determination of this question - the dominant components of which were political and the focal point of dispute in Israeli society - had to be made within the framework of the political discourse in Israel, by means of the organs of the *Knesset* or the vote of the people. President Barak emphasized that the Court's approach was not that there was no room for judicial review. Rather, the approach was that within the framework of judicial review, it would be appropriate, in the prevailing circumstances and in the light of the characteristics of the special question posed to the Court, that review of the decisions of the outgoing government be performed by the *Knesset*. President Barak rejected the contention that the *Knesset* was unable to act, and held that it had all the tools necessary to oversee the activities of the government.

In view of the above, President Barak held that in the circumstances before the Court, review of the balance between the need for restraint and the need for action, was in the hands of the *Knesset*. This determination was based, *inter alia*, on the declaration made by the Attorney General that if any agreement was signed between representatives of the outgoing government and representatives of the Palestinian Authority, the agreement itself would provide that its validity on the international level would depend on the necessary ratification taking place in accordance with domestic law, including its ratification by the government and the *Knesset*. Accordingly, the petitions would be dismissed.

Justices Or, Matza and England concurred.

Deputy President Levin concurred with the dismissal of the petition but for somewhat different reasons. Justice Levin agreed that the outgoing government had not exceeded its formal powers in conducting negotiations with the Palestinian Authority

and also agreed that in principle the Court could intervene in the activities of the government in accordance with the principles of public law, *i.e.*, where the outgoing government significantly and unequivocally exceeded the scope of the accepted powers of an outgoing government. The question whether the government had exceeded such powers could be a matter of sharp dispute, and there was a very broad discretion on this matter, in which the Court would not intervene. The Court could intervene in matters lying outside this discretion. As the subject-matter of the petitions was a matter of bitter public debate, the Court, by virtue of its discretion would not intervene where the *Knesset* was able to expressly restrict the power of the outgoing government to act improperly. In the light of the material before the Court, Justice Levin was not convinced that it was not in the power of the *Knesset* to intervene. In the absence of such a consideration, the Court would have had to decide whether there was sufficient evidence to justify a determination that the outgoing government had significantly and unequivocally exceeded the scope of powers of an outgoing government.

Justice Tirkel concurred with the method of analysis of President Barak but did not agree with the conclusion that the outgoing government's activities were within the scope of reasonableness.

In Justice Tirkel's opinion, the scope of reasonableness of an outgoing Prime Minister and government was narrower than the scope of reasonableness of a Prime Minister and government officiating as usual. Moreover, the scope of reasonableness became increasingly narrow and the duty of restraint imposed on them increasingly great, as the date of termination of office approached. In this Justice Tirkel followed the approach of President Barak, with only a slight change of emphasis, but in his view it also followed from this that the weight of the essential public need (President Barak's test with which Justice Tirkel also agreed) required in order to justify the activities of the outgoing Prime Minister and government during the transitional period - also increased as time passed and the date of termination of office approached. In other words, as time passed, it was not sufficient for the public need to be essential, it had to be essential in the extreme in order to negate the duty of restraint. Further, as time passed, "the burden of proof" that the outgoing Prime Minister and Ministers were acting within the scope of reasonableness was transferred from those having reservations about these activities to the shoulders of the outgoing Prime

Minister and government to show that there was a public need which was essential in the extreme justifying their actions.

Justice Tirkel stated that he was persuaded that the conduct of negotiations between the government and the Palestinians *per se* - might fetter the incoming Prime Minister and government should a new Prime Minister be elected. Special elections were due to be held on 6.2.01, *i.e.* 12 days later. The question which therefore had to be decided was not whether the negotiations conducted by the government with the Palestinian Authority - which were undoubtedly momentous for the future of the State - were within the scope of reasonableness. Rather, the question was whether the conduct of negotiations during the period so close to the date of the special elections was within the scope of reasonableness. A determination on this issue had nothing to do with the contents of the negotiations, the desirable political settlement, considerations of security and peace, *etc.* The only question was whether there was a public need which was essential in the extreme to conduct negotiations specifically in this period of time. According to Justice Tirkel, the government had not proved that there was such an essential public need at this time.

Justice Tirkel agreed that generally, scrutiny of the government's activities carried out within the scope of reasonableness and the exercise of its powers, was a matter for the *Knesset*. Further, generally speaking, it was best for the Court not intervene in such matters. However, the instant matter was exceptional and required the Court to act in an extraordinary manner. True, as a matter of principle, the *Knesset* had the legal tools to implement its power of oversight, however, Justice Tirkel was persuaded that as a matter of practice this was not the case, and the *Knesset* was not in the position to implement its powers.

In view of this, and in view of the little time left, the Court had to exercise its powers of review, and not remove itself from the arena. The Supreme Court had to make itself heard. Justice Tirkel held that he would have upheld the petition in the sense of ordering the Prime Minister and government to refrain from reaching any treaty, agreement or understanding with the Palestinian Authority, whether in a document or by other means, and refrain from making any commitments in any manner, within the framework of the negotiations underway, which might fetter the incoming Prime Minister and government.

Justice Zamir agreed with President Barak that Basic Law:

the Government did not provide, either expressly or by implication, that an outgoing Prime Minister and government were more limited in their powers than an ordinary government. The government was the government and the law did not create two types of government. This was also the case after the Prime Minister resigned. The law conferred powers on an institution, namely, the government, and changes taking place to an organ of the institution, namely, the Prime Minister, did not vary the powers of the institution itself. Justice Zamir agreed with President Barak that there was no constitutional practice limiting the powers of an outgoing government. A constitutional practice, like any other practice, required to be proved. No proof had been brought of such a practice. And it was not for the Court to create a practice out of nothing, in a judgment.

Accordingly, the question in the instant case, was not one of powers, but one of discretion. In other words, according to the law, the government today had the same power as the government yesterday, including the power to conduct political negotiations, however, the question was whether the discretion of the government, in conducting such negotiations, had been exercised lawfully, *i.e.*, was there a defect in the government's discretion which justified the intervention of the Court?

The discretion of the government, like the discretion of every Minister in the government and every other authority, was limited and guided by legal rules, and the Court was responsible for the maintenance of these rules. *Inter alia*, the government was obliged to exercise its powers in accordance with relevant considerations and not on the basis of extraneous considerations, within the framework of the scope of reasonableness and in a proportional manner. These rules applied to every government, including an outgoing government, and according to these rules the Court was entitled to review the decisions of every government, including an outgoing government.

These rules did not vary from authority to authority and from matter to matter. However, the application of these rules might vary depending on the authority and the matter. Accordingly, implementation of the rule of reasonableness, for example, might vary if the ordinary government became a transitional government. In an outgoing government the scope of reasonableness might, in particular matters, be narrower. Accordingly, intervention by the Court in the discretion of an outgoing government might be broader. An outgoing government had to take into account, on a daily basis, that the scope of reasonableness available to it in exercising its powers might be

narrower, and had to take the appropriate measures compatible with this. Accordingly it might be said, in the language of President Barak, that in certain matters an outgoing government had to act with relative restraint.

This was an important principle. It contained a novelty, in the sense that up to that time the Court had not been required to state that the scope of reasonableness of an outgoing government might be narrower than the scope of reasonableness of an ordinary government.

The Petitioners had not contended that the outgoing government was conducting negotiations with the Palestinian Authority for extraneous reasons, and in the circumstances, the test of proportionality was not applicable. However, the Petitioners had contended that by conducting negotiations, the government had crossed the boundaries of the scope of reasonableness. They had contended that conducting negotiations so close to the time of elections, was unreasonable in the extreme. Accordingly, the Court was being asked to hold that conducting negotiations, which all had regarded as legal a short time earlier, had become illegal after the Prime Minister resigned, and the Court was being asked to issue an order prohibiting the government from continuing negotiations, or issue a declaration that the negotiations were illegal. Was it proper for the Court to prevent these negotiations?

Before examining the discretion exercised by the government in conducting negotiations, and deciding whether it was unreasonable and illegal, the Court first had to exercise its discretion, and decide whether it was proper for the Court to intervene in such a matter. As was well-known, the Court had discretion and was entitled to dismiss a petition *in limine*, without deciding it on the merits. Thus, the Court was entitled to exercise its discretion to dismiss the petition *in limine* because it had been submitted tardily or because there was alternative relief. This was also the case where a petition raised a matter of a manifestly political nature, which by virtue of the law or the substance of the matter, was within the responsibility of the government or the *Knesset*. Such a case was similar to the situation where there was alternative relief. In these cases another body was deemed to be more appropriate than the Court to deal with the matter. The foreign relations of the country had always been considered to be a clear example of this principle.

Justice Zamir noted that the Petitioners had admitted that notwithstanding that they had looked, they had not found any example worldwide of a case where a Court had intervened in

political negotiations being conducted by the government and prohibited it or declared it to be illegal. Justice Zamir thought that no such case had been found because none existed, even in those countries where there was a doctrine holding that an outgoing government only exercised maintenance powers. Justice Zamir thought that this was the case because even in those countries, it was accepted that the oversight powers of the negotiations being conducted by the outgoing government, be exercised by the house of representatives, or directly by the public, and not by the Courts. In a democracy the Court had a very important function, but a limited function, it was not supposed to and was not capable of solving every problem and providing succor in every crisis.

The Israeli Court, like the Courts of any other country, did not have the capacity to assess whether political negotiations were reasonable or whether perhaps they were outside the boundaries of the scope of reasonableness, and it was not for the Court to take upon itself the responsibility involved in issuing an order prohibiting political negotiations. A Court order, prohibiting or stopping political negotiations, might itself be unreasonable and irresponsible.

Concluding, Justice Zamir held that these petitions dealt with political negotiations of a manifestly political character, which sharply divided the public. The government had expressly notified the Court that if these negotiations led to an agreement, the agreement would contain an express provision making the validity of the agreement contingent upon ratification by the government followed by ratification by the *Knesset*, and that the agreement would accord with all the other provisions of domestic Israeli law. Moreover, the *Knesset* was always in a position to intervene in the negotiations insofar as it saw fit; this was its power and this was its responsibility. Accordingly, this was the right path to take in these circumstances. Justice Zamir was also of the opinion that no Court in the world would take it upon itself to intervene and terminate negotiations by way of an order or declaration. Therefore, this Court too would not do so. Accordingly, he agreed with President Barak that the petitions be dismissed.

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



From the Toronto Conference: former Israeli Minister of Justice, Dr. Yossi Beilin, addresses the plenary

Remember Warsaw

**International Conference to Commemorate Jewish Lawyers and Jurists
in Poland and Mark their Contribution to the Polish Legal System**

Warsaw, Poland, May 9-13, 2001

Venue: Sheraton Hotel, Warsaw

Post - Conference Tour: May 13-15, 2001

Under the auspices of the Secretary General of the Council of Europe, Mr. **Walter Schwimmer**

Co-sponsored by:

The Polish National Council of Legal Advisers.

The Polish National Bar Association.

IUSTITIA - The Polish Judges Association.

MEDEL - European Judges and Prosecutors for Democracy and Freedom

Local Organizers:

The International Law Firm of Miller Canfield,

Paddock & Stone

Historical Adviser: Dr. **Shlomo Netzer**, Tel-Aviv University

Program

Wednesday, May 9, 2001

15:00-17:00 Registration at Sheraton Hotel

18:00 **Welcome Reception** hosted by the Polish National Council of Legal Advisers

Opening Session: Presiding Mr. **Andrzej Kalwas**,
President of the Polish National
Council of Legal Advisers

Greetings: Mr. **Czeslaw Jaworski**, President of
the Polish National Bar Association
Justice **Teresa Romer**, Supreme Court
of Poland, President of IUSTITIA -
The Polish Judges Association
Prof. **Shewach Weiss**, Ambassador of
Israel to the Republic of Poland
Mr. **Janusz Niedziela**, Minister of
State, Ministry of Justice, Poland

Opening Address: Judge **Hadassa Ben-Itto**
President, The IAJLJ

Venue: Regional Bar of Legal Advisers

Presiding: Prof. **Feliks Tych**, Jewish Historical
Institute

1 Jews and the Polish Constitution of March
1921

Dr. **Shlomo Netzer**, Tel-Aviv University

2 Jews as Citizens of the Polish Republic -
Legal Aspects

Prof. **Jerzy Tomaszewski**, University of
Warsaw

10:30-11:30 Coffee Break

11:00-12:30 **Jews in Polish Courts - Accused and Defenders**

Presiding: Advocate **Haim Zadok**, former
Minister of Justice, Israel

1 The Steiger Trial

Mgr. **Barbara Letocha**, National Library,
Warsaw

2 Jewish Issues in the Courts - Some Case
Studies

Dr. **Jolanta Zyndul**, University of Warsaw

12:30-14:00 Light Lunch at Sheraton Hotel

14:00-15:30 **Discrimination**

1 Status of Jewish Lawyers in the Late Thirties
as Reflected in Polish Legislation,

Prof. **Szymon Rudnicki**, University of Warsaw

Thursday, May 10, 2001

Sessions at Sheraton Hotel

9:00-10:30 **Civil Rights of Polish Jews**

- 2 March 1968
Dr. **Dariusz Stola**, Institute of Political Studies, PAN, Warsaw

15:30-16:00 Coffee Break

16:00-17:30 **Jews and Jewish Issues in Today's Poland**

- 1 Poland Today
Mr. **Konstanty Gebert**, Journalist
- 2 Restitution of Jewish Assets in Poland - Legal Aspects
Advocate **Monika Krawczyk**, Cameron McKenna, Law Firm
- 3 The Preservation of Jewish and Holocaust Sites
Mgr. **Jan Jagielski**, Jewish Historical Institute, Warsaw

19:00 Reception: hosted by the Polish National Bar Association

Friday, May 11, 2001

09:00-12:00 Guided Tour - **Jewish Warsaw**
Lunch Break

Afternoon: **Treblinka**

18:00 Return to Hotel

20:00 Optional: Shabbat service at Nozyk Synagogue

21:00 Shabbat Dinner at Victoria Intercontinental Hotel

Saturday, May 12, 2001

09:30 Optional: Shabbat service at Nozyk Synagogue

12:00 **Walking Tour of the Old City of Warsaw**

Meeting Point: at the entrance to the Old City of Warsaw

Afternoon Free

21:00 Dinner at Sheraton Hotel

Guest speaker: Minister of Foreign Affairs
Prof. **Wladyslaw Bartoszewski**
introduced by Ambassador of Israel to the Republic of Poland,
Prof. **Shewach Weiss**

Sunday, May 13, 2001

9:00-12:00 **The Years of the German Occupation**

Presiding: Advocate **Itzhak Nener**, First Deputy President, The International Association of Jewish Lawyers and Jurists.

1 The Warsaw Ghetto Uprising - Why So Late?
Mr. **Marian Turski**, Journalist

2 Polish-Jewish Relations during the Nazi Occupation

Dr. **Barbara Engelking-Boni**, Institute of Philosophy and Sociology, PAN, Warsaw

3 Personal Recollections

12:15 Light Lunch at Sheraton Hotel

Simultaneous translation will be provided in Polish/English/French

Post Conference Tour

Sunday, May 13, 2001

14:00 Transfer of luggage to Krakow

15:35 Travel by train to Krakow

19:00 Arrival at Forum Hotel, Krakow

20:00 Guided walking tour of the Old City of Krakow and dinner

Monday, May 14, 2001

Morning: **Auschwitz - Birkenau**

Afternoon: Lunch and guided tour of **Kazimierz** (Old Jewish quarter).

Time permitting, visit also to Jewish sites around Krakow

Evening Free

Tuesday, May 15, 2001

9:55 Train to Warsaw

13:00 Arrival in Warsaw and transfer to Old City for lunch.

After lunch, continue to airport or for those staying on in Warsaw transfer to hotels.

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