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JEWISH LAWYERS

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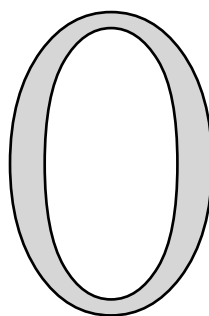
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PRESIDENT'S MESSAGE



ver many years serious professional discussions have been held regarding the establishment of a constitution for the State of Israel. During this process a number of Basic Laws have been legislated. Most deal with aspects of government and only two concern basic rights. The main obstacle to the completion of the process and the establishment of a comprehensive constitution has been the need to deal with conflicts that emanate from the very essence of the Jewish State.

The citizens of the State of Israel, through their representatives in the Knesset, will eventually decide the content of the constitution. However, the State of Israel is not just a state of its citizens. The State of Israel is also the state of the entire Jewish nation. The constitution that will be established will affect each and every Jew. Therefore, we were very pleased to hold, this March, in cooperation with the Israeli Institute for Democracy, a unique convention in Jerusalem, where the opinions and comments of Jewish jurists who do not reside in Israel were heard. The convention was small in size (about 40 participants) due to its highly specialized nature. Participants came from Argentina, USA, Canada, Great Britain, France, Austria and Russia. Taking part from Israel were three retired Supreme Court judges, headed by former President Meir Shamgar, alongside public figures, academics, lawyers and jurists. Certainly, a full legal-professional debate cannot take place without hearing the opinions of scholars from among our people in the Diaspora; the exchange of ideas among jurists regarding the nature of the provisions is the basis for the establishment of a worthy constitution.

The topics dealt with in the convention will be considered in forthcoming issues of *JUSTICE*. Here I will briefly mention that the participants commented on contentious issues on the public agenda: on one hand, a Jewish state - the state of the entire Jewish nation in Israel and the Diaspora - on the other hand, a democratic state that praises values of equality and non-discrimination; on one hand, a state where Judaism has a special status - on the other hand, a state that seeks to provide its citizens with the liberty to choose their own religion and their own way of life within their religion; on the one hand, a state the existence of which is being constantly threatened externally and where the well being of its citizens is threatened by extreme terrorism and on the other hand - the desire to avoid in so far as possible disproportional offence to the basic rights of the citizens whilst assuring the fulfillment of due process.

The debate that was held was the first of its kind. We expect that these subjects will surface again and again in our future conventions which will invite large numbers of Jewish jurists from all over the world.

In March we also held a special meeting in the Knesset in honour of the start of operations of the Organization for the Fight against Anti-Semitism in Russia and East Europe. In this meeting we hosted Mr. Alexander Brod, Chairman of the Moscow Bureau for Human Rights, with the participation of the Minister for Diaspora Affairs in the Israeli Government, Mr. Nathan Sharansky. We heard about the grave incidents of anti-Semitism in Russia and learned of the letter signed by nineteen members of the Russian Parliament (the Duma) calling for the delegitimization of Jewish organizations; we also learned that

in February a convention was held in the Russian Academy for Science during which accusations were made about the damage Jews were “causing” to the situation in Russia and their “spread” of alcoholism and discussions were even held concerning methods of fighting the Jewish bodies functioning in Russia.

These severe phenomena of anti-Semitism must be dealt with and it is pursuing this fight which our Association has set as its goal.

Alex Hartman

Mark Your Calender

Eilat: 10-13 November, 2005

**Members of the IAJLJ meet to discuss:
"International Aspects of Tax, Family,
Commerce and Litigation Law"**

Israel's Position on the Administered Territories

Irit Kohn, Michal Navoth, Marlene Mazel

In December 2004, the International Commission of Jurists (hereinafter: ICJ) requested the assistance of the International Association of Jewish Lawyers and Jurists (hereinafter: IAJLJ) in updating the 2005 Israeli Chapter of "Attacks on Justice", a report which evaluates the independence of judges and lawyers in over forty countries. The International Commission of Jurists is an independent, non-profit and international non-governmental organization (NGO) based in Geneva. The ICJ asserts that its goal is to promote international law and principles that advance human rights. The ICJ has two Palestinian human rights organizations as affiliates in Israel. IAJLJ's comments were submitted to the ICJ in early March and are excerpted in this article.



The *Attacks on Justice 2002 Report* covered a wide variety of legal issues in Israel. Regrettably, the proposed Report reflects an unacceptable imbalance and one-sidedness against Israel, its institutions and alleged policies. No attempt was made to understand the actions that the Government of Israel has taken in the face

of unrelenting terror attacks. Similarly, the Report did not raise the issue of incitement by the Palestinian Authority against Israel; incitement which is supported by a plethora of evidence and is a crime under international law. In order to balance the Report, these issues should be addressed.

In addition, we believe that the Report should be based on

Adv. Irit Kohn (top left) is the former Director, Department of International Affairs in Israel's Ministry of Justice. She has now been elected Vice President of the Association acting as Coordinator with International Bodies. Co-authors Michal Navoth (center) LL.B., M.A., and Marlene Mazel J.D., N.Y.U (right) are

both members of the Association and are with the Ministry of Justice. This article represents the personal views of the authors and does not necessarily reflect the official position of the Ministry of Justice.

facts and not contain political overtones. Therefore we have read the Report thoroughly and relate to all the points and legal developments as of January 2005, in a professional, impartial and legal analytical manner and we insist that the updated report will include all of our comments.

The Basic Laws of Israel guarantee the independence of the judiciary, which is highly respected by legislative and executive powers. The September 1999 landmark judgment of the High Court barring the use of torture and the April 2000 ruling prohibiting the holding of detainees as “bargaining chips” reflects the Court’s new willingness to actively intervene in national security matters. The High Court of Justice’s interventionist approach has continued in a variety of matters such as the army’s humanitarian obligations in HCJ 4764/04 *Physicians for Human Rights et. al. v. Commander of the IDF in the Gaza Strip* (30 May 2004) (hereinafter: *Rafah*)² and the legality of the fence HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* (30 June 2004) (hereinafter: *Beit Sourik*).

The Supreme Court’s role of protecting human rights must be viewed in the light of Israel’s defending itself against terror attacks that have intensified over the last four and a half years. The intensive terrorist attacks against Israel, which cost the lives of many civilians, compelled the government to adopt measures which unfortunately, at times, infringed the human rights of Palestinians. Under these difficult circumstances, the High Court of Justice has taken an active role in balancing Israel’s need for security with the human rights of the Palestinian population.

29 September, 2000 marked the beginning of the current violent struggle between Israel and the Palestinians. The struggle began as a popular uprising with mass marches, stone throwing and civil disorder. It quickly turned into a violent organized war with planned terrorist attacks aimed at the civilian population in Israel. The attacks perpetrated by Palestinian terrorists against Israeli civilians over the last four and a half years have been relentless. Between September 2000 and 26 September, 2004, 1,017 Israelis were murdered by Palestinian terrorists and over 6,000 Israelis were injured.³ Over the past four years, the Israeli Security Agency (hereinafter ISA) documented 138 suicide bombing attacks, 13,730 shooting attacks and 313 Kassam rocket attacks during which 460 rockets were fired. According to a study by the Interdisciplinary Center of Herzilya, between 27 September, 2000 and 1 May, 2004, 985 Palestinians and 715 Israeli non-combatants were killed by the other side.⁴ There is no doubt that terrorist attacks and the ensuing response has led to

civilian casualties on both sides.

Israel has adopted a policy of unilateral disengagement from Gaza. This policy has raised the difficult dilemma of how to withdraw from Gaza without empowering the terrorists. It has also led to the problem of how to evacuate over seven thousand Israelis from their homes without tearing apart Israeli society. The government is also analyzing how to withdraw from Gaza without causing unnecessary hardship to the Palestinian population.

Human Rights and Humanitarian Law Issues

Israel, the only democracy in the region, has struggled with the question of how to fight terrorism without harming civilians. This balance between terror and protecting civilians is complicated by the fact that terrorists continually violate international law by failing to distinguish themselves from civilians and by acting from within civilian population centers.

Israel, faced with unrelenting lethal terror attacks, adopted a policy of building a security fence. It did so reluctantly as it understood that the fence might impose hardships on the local population. However, the fence is specifically designed to stop suicide bombings, which despite taking up only ½% of total attacks suffered by Israel, make up over 50% of all Israeli casualties.

* A full copy of ICJ 2002 Chapter of Israel and the Occupied Territories, which IAJLJ’s comments related to, as well as a full copy of IAJLJ’s Comments is available at IAJLJ’s website at: <http://www.intjewishlawyers.org/html/officers.asp>.

¹ We refer to the “Occupied Territories” as “Administered Territories”. For an explanation, please refer to the section below on the Occupied Territories.

² English translations of the decisions are available at the website of the Supreme Court of Israel (www.court.gov.il).

³ *Which Came First-Terrorism or Occupation-Major Arab Terrorist Attacks against Israelis Prior to the 1967 Six-Day War* March 31, 2002. The report traces terrorism not only back to the inception of the State of Israel in 1948, but to the period before its inception as well.

⁴ Statistics regarding the number of Israeli and Palestinian civilians killed since September 2000 vary widely. Far too many Israeli and Palestinian civilians have been killed. An analysis of some of the studies undertaken to quantify the numbers of civilians killed do not always make the crucial distinction between civilians and combatants. The statistics cited are from the Israel Security Agency (which is available at the Israel Ministry of Foreign Affairs website www.mfa.gov.il) as well as from the International Policy Institute for Counter-Terrorism (ICT) (which is available at <http://www.ict.org.il/>) For example according to the ICT study, of 2806 Palestinians killed, 1326 were combatants and 325 were killed by their own side (totaling 1751).

A comparison between the terrorist attacks committed before the fence was established (from September 2001-July 2002) and the year after the fence was partially built (August 2003-August 2004) reflects a reduction of 84% in the number of people killed and a 92% reduction in the number of people injured.⁵ While the fence has saved the lives of many Israelis, it has also detrimentally affected the daily routines of many Palestinians living nearby. At times, land was appropriated to build the fence, and the fence separated farmers from their land and children from their schools. It has also been alleged that the route of the fence was designed to annex Palestinian territory to Israel.

Israel's Supreme Court has played a pivotal role in examining the legality of the Government's actions in its war against terror. In *Beit Sourik*, Israel's Supreme Court ruled that the balance struck between Israel's security and Palestinian human rights was disproportionate and ordered the government to redraw its plans regarding the route of the fence.⁶ This decision was issued prior to the Advisory Opinion on the fence issued by the International Court of Justice in the Hague⁷. The Government reviewed the proposed and existing route of the fence, meter by meter, to determine whether the criteria of proportionality had been met, and altered its route accordingly. Nevertheless, recently on the 13th of January 2005, the High Court of Justice again granted an injunction in response to a petition filed by the petitioners of Beit Sourik halting the building of the fence until a hearing on the petition is held. During the hearing the Court will review whether the altered route satisfies the criteria established by the Court.⁸

As of January 2005, sixty-five petitions have been filed to the Supreme Court relating to the fence. Of these, 51 relate to the route of the fence.⁹ There are many petitions currently pending before the Court relating to the fence, in one such petition currently pending the Court has requested that the Government submit its views on the advisory opinion of the International Court of Justice regarding the fence.

Torture

Israel is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰ In H.C.J. 5100/94 *The Public Committee Against Torture in Israel v. The State of Israel*, (9 September 2004) (hereinafter: *The Public Committee Against Torture*) the High Court of Justice ruled that the General Security Service (hereinafter: GSS)¹¹ agents did not have the authority to conduct interrogations. The Court held that any infringement upon an individual's liberty or dignity, as

guaranteed by the Basic Laws, must be sanctioned clearly and specifically by an appropriate statute, passed by the Knesset and subject to constitutional review by the Supreme Court.

According to the ruling of the High Court of Justice, discussed above, the Attorney General does not have the authority to approve the use of exceptional measures. In fact, in accordance with the HCJ ruling, the Attorney General does not grant approvals to use 'exceptional measures.' The ISA interrogators operate in accordance with standard operational procedures, detailing acceptable interrogation techniques, and receive extensive training on permissible investigation methods.¹² Furthermore, all individuals detained by the ISA are given written notice of their legal rights in Hebrew or Arabic.

Israel has established procedures for addressing complaints lodged against ISA personnel. All ISA detainees are entitled to file complaints concerning alleged mistreatment during investigations. The complaints are thoroughly investigated by MAVTAN, a unit in the Ministry of Justice charged with investigating detainee complaints. The Minister of Justice has granted the Director of MAVTAN the authority of a disciplinary investigator, thereby assuring the independence of MAVTAN from the ISA. No individual in the ISA, including its Director, may interfere with the methods or decisions of MAVTAN. The decisions of

⁵ Information obtained from the Ministry of Justice, January 2005.

⁶ See *supra* note 2; The Supreme Court's ruling in *Beit Sourik* was recently cited by Louise Arbour, United Nations High Commissioner for Human Rights, in discussing the oversight role of Courts in examining the legality of acts taken by the executive with respect to external threats of terror.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (July 9, 2004) available at the International Court of Justice website. In our comments we use the term "fence" to describe the security barrier and not wall as did the ICJ, as the term fence more accurately describes the facts on the ground.

⁸ H.C.J. 426/05-A, *Beit Sourik v. Government of Israel et. al.* (January 13, 2005).

⁹ Information obtained from the Ministry of Justice, January 2005.

¹⁰ Israel signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 22 October, 1986 and ratified it on 3 October, 1991.

¹¹ An English translation of the decision is available at the website of the Israeli Supreme Court at www.court.gov.il. The name of the General Security Service has been changed in recent years to the Israel Security Agency (ISA).

¹² Information submitted by the Ministry of Justice, MAVTAN unit, January 2005.

MAVTAN are examined thoroughly by the Attorney General, the State Attorney and the Head of the Department for Special Functions in the State Attorney's office. To date, complaints have led to a number of findings that a criminal offence has been committed. However, several disciplinary proceedings have been lodged against ISA personnel. It should also be noted that the decisions of MAVTAN are administrative decisions, subject to review by the High Court of Justice.

Prior to the issuance of the Supreme Court ruling in the *Public Committee Against Torture* in 1999, hundreds of petitions were filed regarding interrogation methods. Since 2000, the number of such petitions filed or pending before the High Court of Justice regarding suspect interrogation has been dramatically reduced.¹³ The dramatic reduction in petitions filed indicates that the investigations being conducted are fair and lawful, and in accordance with the ruling of the Supreme Court and with international law.

Occupied Territories¹⁴

The West Bank, Gaza Strip and Golan Heights came under the control of Israel as a result of Israel acting in self defence in a war waged by Jordan, Egypt and Syria.¹⁵ Aside from East Jerusalem, the territories have been administered by Israel pending a final settlement of their status between the parties. As a result of signing the Israeli-Palestinian Declaration of Principles in 1993, areas containing much of the population came under Palestinian control. However, since the outbreak of violence in September 2000, Israeli forces have made periodic excursions into Palestinian-controlled territory, as an act of self-defence.

The Israeli government has taken the position that the Geneva Convention does not apply *de jure* but has in fact applied the conventions to the territories *de facto*. Therefore, international humanitarian law obligations, including those contained in the 1949 Geneva Conventions, apply to Israel's role in the occupied Palestinian territories.

The statement in the *Attacks on Justice 2002 Report* that the "fundamental human rights and humanitarian norms of necessity and proportionality have been breached in most reported cases of confrontation between Palestinian civilians and Israeli forces" is a gross over-generalization. Israel has been attempting to balance the need to protect the security of its citizens with its obligation to protect the human rights of Palestinian civilians.¹⁶ Unfortunately, the correct balance is not always struck, and at times violations of human rights do occur. Soldiers that are found to have breached

human rights are investigated, and when indicated placed on trial, although there are those who contend that the Government's response to violations of human rights is insufficient.

Israel's Supreme Court has recently taken a more active role in ensuring that even during times of war, Israel implements its obligation to protect the security of its citizens in accordance with the principles of necessity and proportionality.¹⁷

However, Israel's primary duty is to secure the safety of its citizens and protect their right to life. In doing so, Israel applies a broad range of measures and activities which are compatible with international law. Amongst these measures, Israel operates to capture those that are identified by the security forces as terrorists who actively take part in carrying out lethal terror attacks. In certain cases where the capture of a terrorist who presents a clear danger to life of others is not possible and no other alternative means of prevention exist, Israel targets these terrorists as a last resort.

Judiciary

Israel's Basic Law guarantees the independence of the judiciary. The independence of the judiciary is always respected by the legislative and executive powers. The judicial authority is one of three State authorities, along with the executive and legislative authorities. Its independence is both substantive and personal. Substantive independence is ensured by the fact that in discharging their duties, judges are subject only to substantive law and not to any other authority or person. In this respect Article 2 of "Basic Law: The Judiciary provides: "a person vested with juridical power shall not, in judicial matters, be subject to any authority but that of the law".

¹³ *Ibid.*

¹⁴ See *supra*, note 1.

¹⁵ *The Rule of Law In the Areas Administered Areas*, International Commission of Jurists, Israel Article (1981).

¹⁶ *Israel, the occupied territories and the autonomous territories*, ICRC 2003 report (February 2004), p.273, (available at www.icrc.org) (In its report the ICRC noted progress in including International Humanitarian Law (IHL) courses in secondary school education in Israel. It also noted that the IDF accepted its assistance to incorporate IHL principles into their military training programs, and allowed the ICRC to make direct presentations to IDF operational commanders and border guards, as well as to hundreds of IDF combat unit troops, and that senior officers attended ICRC meetings to discuss the treatment of the civilian population in low intensity conflict).

¹⁷ See *supra* note 2.

Personal independence is ensured by the manner in which judges are promoted and appointed and is reflected in their term of office, the conditions of service and in matters concerning the discipline and immunity of judges.¹⁸ Article 22 of Basic Law: The Judiciary provides that it [the law] cannot be varied, suspended, or made subject to conditions by emergency regulations.

Structure

Article 1 of Basic Law: The Judiciary establishes that judicial power is vested in the following courts: the Supreme Court, District Courts, Magistrates Courts, and other courts designated by law as courts. It also vests judicial power in religious courts. No court may be established for a particular case.

The Supreme Court of Israel sits in Jerusalem. The Supreme Court, which carries the ultimate judicial authority, is both an appellate court, called the Supreme Court of Appeals, when hearing cases from District Courts, and a court of first and last instance when it sits as a High Court of Justice (HCJ known in Hebrew as a *Bagatz*) in cases challenging the legality of a government action. In its capacity as a Court of Appeals its verdict is final.¹⁹ The general rule is that all acts of officials and public bodies are subject to judicial review.

The Supreme Court, sitting as a High Court of Justice, permits direct access to the nation's highest court. Fees are quite low and many people take advantage of this process. In 2004, there were approximately two thousand and six hundred *bagatz* petitions filed in the Supreme Court. From 2000 to 2004, there was a 60 percent increase in the number of *bagatz* petitions filed to the Supreme Court.

Furthermore, the Supreme Court has permitted residents of the West Bank and Gaza Strip to file petitions for review of any government act, or acts of the Israel Defense Force which affects them. This direct access to the Supreme Court of Israel on such a broad range of matters surpasses Israel's obligations established under public international law. The supervision exercised by the Court serves as an important tool for the preservation of the rule of law in the administered areas.

In many countries the general rule is that an application for judicial review may only be brought to the court by a person who has a personal interest in the case, a concept known as standing. In Israel, the Supreme Court held that in matters concerning the rule of law or in cases which raise problems of a constitutional nature it might make an exception to this rule. For example, in the *Rafah case*,²⁰ the Supreme Court sitting as a High Court of Justice,

granted standing to four human rights organizations: Physicians for Human Rights; Association for Civil Rights in Israel; The Center for the Defense of the Individual; and, B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories, which argued that the IDF, in the midst of a combat operation in Rafah was not fulfilling its duties under international humanitarian law.

The *Rafah case* also illustrates the expansive interpretation of the doctrine of judicial review in Israel. The IDF was engaged in a military operation in the area of Rafah, in the Gaza Strip, aimed at the terrorist infrastructure in that region, whose central objective was to uproot weapons smuggling tunnels from the Egyptian to the Palestinian side of Rafah. Petitioners claimed the IDF was not allowing them to evacuate the wounded, and claimed that food; water and medical supplies were not getting through to specific neighbourhoods. Petitioners also requested a full investigation of an incident where the IDF allegedly fired into a crowd of protesting civilians. An immediate hearing was scheduled. During the hearing the Court acted as a mediator between the human rights organizations and the army and addressed and resolved each of the claims raised. It found that at the time of the hearing the problems relating to running water and electricity had been largely resolved, and that medical equipment had been transferred through the Karni Crossing.²¹

Significantly, the Court rejected the government's argument that it should not intervene in the midst of a military operation. It broadened the concept of judicial activism, thereby opening its gates more widely than do many other Courts in democratic countries that dismiss such petitions as unjusticiable.

In its capacity as the High Court of Justice the Supreme Court has played a pivotal role both in ensuring that official actions comply with the rule of law, and in developing human rights norms. In many such cases, including those involving fundamental issues with immediate consequences, the petitions are heard on an expedited basis, sometimes within hours.

¹⁸ Israel Supreme Court website, English, General Information, available at: <http://62.90.71.124/eng/system/index.html> (last visited January 31, 2005).

¹⁹ *Israeli Democracy: How Does It Work*, available at the website of the Israel Ministry of Foreign Affairs.

²⁰ See *supra*, note. 2.

²¹ On January 14, 2005, Palestinian suicide terrorists attacked the Karni crossing, killing six Israelis.

Not only does the Supreme Court play a major role in protecting individual rights, but also in the absence of a Bill of Rights in Israel, the Supreme Court has contributed significantly to the protection and promotion of civil liberties and the rule of law.²²

The Supreme Court's role of protecting human rights must also be viewed in the light of Israel's defending itself against terror attacks, which have intensified over the last four and a half years. Under these difficult circumstances, the High Court of Justice has taken an active role in balancing Israel's need for security with the human rights of the Palestinian population.

In a judgment concerning the issue of assigned residence, H.C.J. 7015 *Ajuri et al v. IDF Commander in West Bank* (3 September 2002), President Barak concluded:

"The well-known saying that 'In battle laws are silent' (inter arma silent leges - Cicero) ...does not reflect the law as it is, nor as it should be. Indeed, '...even when the cannons speak, the military commander must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values' (H.C.J. 168/91 *Morcos v. Minister of Defence* [34], at p. 470).

...

There are those who claim that "members of the judiciary have tended to acquiesce to Government arguments of national security in sensitive cases." However, the Supreme Court's ruling in the September 1999 landmark judgment regarding interrogation methods used by the Israeli General Security Services, (*see supra*) and the April 2000 ruling prohibiting the holding of detainees for use as "bargaining chips" reflects the Court's new willingness to actively intervene in national security matters. This interventionist approach has continued on different matters such as the army's humanitarian obligations and the legality of the fence in the High Court of Justice's recent rulings in *Rafah and Beit Sourik*.²³

In *Beit Sourik* the Supreme Court ruled that the balance struck between Israel's security and the human rights of the Palestinian population was disproportionate and ordered the government to redraw the route of the fence. The Government reviewed the proposed and existing route of the fence, meter by meter, to determine whether the criteria of proportionality had been met, and altered its route accordingly. Nevertheless, recently in early January 2005, the Supreme Court again granted an injunction in response to a petition filed by the Beit Sourik petitioners halting the building of the fence until a hearing on the petition could be held on whether the altered route satisfies the criteria established by the Court.²⁴ There are many petitions currently pending before

the Court relating to the fence; in one such petition the Court has requested that the Government submit its views on the advisory opinion of the International Court of Justice regarding the fence.

The administration of justice has been criticized as discriminatory. According to some human rights organizations, the legal system often imposes far stiffer punishments on Christian, Muslim and Druze citizens than on Jewish citizens. For instance, Israeli Arabs are more likely to be convicted (and therefore subject to a mandatory life sentence) than Jewish Israelis. The courts are also more likely to detain Arab Israelis until the conclusion of the proceedings. However, we would like to emphasize that neither Israeli penal law nor prosecutorial policy support discrimination. The Supreme Court has played a pivotal role in dealing with issues involving questions of discrimination. In this respect the Supreme Court both as the High Court of Justice and in its capacity as Supreme Court of Appeals has issued a number of precedential decisions that have resulted in modification of past practice. For example, in H.C.J. 6698/95 *Ka'adam v. The Israel Lands Administration*, the Court prevented the allocation of State land on the basis of any discriminatory criteria. Although there has been some improvement in this area, the problem of discrimination against Israeli-Arabs exists, and must be comprehensively addressed by all levels of Israeli society.

Judges

The office of the Ombudsman reflects a recent legal innovation linked to the independence of the judiciary. On 1st October 2003 the first Ombudsman of the judiciary was nominated (hereinafter: the "Ombudsman"). The Ombudsman heads a unit called "Public Complaints Commission for the judiciary." This unit was set up by The Ombudsman for the Judiciary Act, 2002 (hereinafter: the "Act"). The Ombudsman supervises judges by way of investigating complaints lodged by the public relating to judicial conduct.

The purpose of this supervision is to improve the unique service given by judges to the public while maintaining judicial

²² *Human Rights and the Rule of Law*, (June 1, 1999) available at the Ministry of Foreign Affairs website).

²³ See *supra* note 2.

²⁴ *High Court Halts Fence Construction Around Beit Sourik*, *Haaretz* Newspaper, January 14, 2005.

independence. In order to achieve this integration between judicial independence and accountability, the Act establishes the Ombudsman as a neutral and independent body and provides it with efficient means to investigate complaints.

Basically, the Ombudsman devotes its activity to the following problems: (a) Delays in the processing of cases pending before the courts; (b) Delays in awarding judicial decrees, judgments and decisions; (c) Inappropriate behaviour of a judge, which may cause an unnecessary insult to a party to the trial or to a lawyer; (d) Infringement of the basic principles of justice, such as the right to be heard before the court or the court's duty to refrain from any bias or prejudice; (e) Erroneous processing, such as undue management of the protocol...The investigation of complaints contributes to improving the unique service given by the courts to the public and is crucial in maintaining the basic right to due process.

The independence of the judiciary also serves to inspire and bolster public confidence. Public trust is based on the feeling that a judicial ruling is carried out honestly, with objectivity and is not biased. Public critique of the judiciary is permissible and acceptable.²⁵

Military Courts

While it is true that military courts are situated in military bases, as of the summer of 2003, they are no longer attached to settlements. Palestinian lawyers have free access to the military courts that are now located in military camps. Palestinian lawyers visit and represent their clients regularly, many on a daily basis. It is possible that at times, due to the security situation (in which the State of Israel is on heightened alert due to the threat of Palestinian terror attacks), that there are delays or problems of access through roadblocks in the region. However, these delays are not related to the specific location of the military court, nor do Palestinian attorneys encounter difficulties accessing the court complex itself. Palestinian lawyers do not require authorization to enter the military courts.

Military court trials meet international standards for fair trial. Trials are conducted under strict procedural safeguards, and pursuant to the rules of evidence applicable to Israeli courts.

Recently, on 12 October, 2004, Israel undertook a major organizational and substantive overhaul regarding the employment and appointment of military judges. While judges are *formally* nominated by the IDF Regional Commander, they are now selected by an *independent professional selection committee*,

quite similar in its composition, to the selection committee of judges serving within IDF military courts inside Israel.

The independent professional selection committee is comprised of seven individuals: the President of the Military Court of Appeals; the IDF Chief of Personnel; the Coordinator of Government Activities in the Territories; the Vice President of the Military Court of Appeal; the President of the Court of Appeals in the Territories; a retired civilian judge and a representative of the Central Committee of the Israel Bar Association.²⁶

The appointment of military judges is not limited in time. Military Order 1550 also bestows security of tenure on military judges, stipulating that they may be removed from office *only* by a decision of the nominating committee, by a *majority* of its members. In addition, promotion of military judges is no longer dependent on the Military Prosecutor General; the committee is vested with the authority to select judges to be promoted to the Appellate Chamber.

Under the new law the IDF Regional Commander no longer has authority to dismiss military judges, the Selection Committee is now the only body possessing the power to dismiss a judge. Except in the event of organizational changes necessitating a reduction in the number of judges, in which case the President of the Military Court of Appeals in the Territories has the authority to dismiss a judge.

In early 2004, the military courts were separated from the Military Advocate General's Corps, and placed under the auspices of the Military Courts Unit. These changes placed military judges in the Territories under the command authority of a professional judge - the President of the Military Court of Appeals, a Major General (actually outranking the Military Advocate General) - as opposed to the previous system where judges were under the authority of the Military Advocate General. This change was made in order to provide the military judges with absolute independence from the Military Prosecutor's Office and to avoid any appearance of impropriety which might have resulted from the judge being part of the Military Advocate's General's Corps.

The allegations relating to torture of detainees are unfounded. The State of Israel is bound by the Supreme Court decision in this matter and complies with the established guidelines.

²⁵ Information submitted by the Israeli Ombudsman of the Judiciary, January 2005.

²⁶ See Military Order 1550 enacting the 89th amendment to the Order on Security Provisions (No. 378) 1970).

Administrative Detention

In Israel and the Administered Territories, administrative detention is a procedure under which the detainees are held without charge or trial. In Israel and East Jerusalem, the Minister of Defence issues administrative detention orders, specifying the term of detention. In the Territories, except for East Jerusalem, military commanders issue such orders. Before the term expires, the detention order may be renewed. The process may continue indefinitely. Administrative Detention Orders are valid for six months *at the most* and many are issued for shorter periods. Every single order is brought for judicial review within *eight days* of the arrest, *automatically*, with no action required from the detainee. All decisions relating to detention orders are subject to judicial review and to appeal to the Military Court of Appeals. Indeed, as of January 2005, 74% of detainees exercised this right of appeal. Moreover, detainees may receive leave to appeal the decision of the Military Court of Appeals to the Supreme Court of Israel. Israel's detention procedure complies with and actually surpasses the protections given to the rights of detainees as set out in Article 78 of the IV Geneva Convention. No time limit is proscribed by Article 78, which calls only for periodic review, with the possibility of a hearing once in 6 months, *if possible*. In addition, as discussed earlier, administrative detention orders are valid for six months *at the most* and many are issued for shorter periods. Israel grants a hearing *automatically* after *eight days* to every detainee.

There are cases in which classified evidence is not disclosed to the defense for security reasons. Israel's Supreme Court has been an active watch guard in reviewing and evaluating classified evidence to ascertain whether such disclosure would harm state security. The Court has ruled that if disclosure would not harm state security the evidence should be disclosed in whole or in part to the petitioner.

The Court has the discretion to deny the defence attorney the right to cross examine witnesses, in the event that security concerns mandate that the identity of the witness(es) remain secret. The Court also has the discretion to review classified security information *in limine*. (See Article 87 tet in the Order on Security Regulations; Order No 1226, the Order on Administrative Detentions (Temporary Order))

It should be noted that Israel's Administrative Detention Law applies to Israeli citizens as well. Its purpose is to allow Israel's Security Agency to detain any individual who poses a threat to public safety or to state security. The Supreme Court has issued rulings upholding the detention of Israelis who endanger public safety.



(Top) Passover Haggadah published in 1816 in Basel, Switzerland
(Bottom) Passover Haggadah published in 1883 in Baghdad, Iraq



Can Nazi War Criminals Be Prosecuted in the 21st Century?

Efraim Zuroff

The recent memorial ceremonies held at Auschwitz and at the United Nations in late January 2005 to mark the sixtieth anniversary of the liberation of the largest of the Nazi death camps, with the participation of numerous heads of state and leading dignitaries, reinforced the growing perception that over the past half-century, the Holocaust has become the ultimate paradigm of modern genocide. Judging from the speeches made at the events, it is obvious that there is no immediate danger that the systematic annihilation of European Jewry by the Nazis and their collaborators will be forgotten and it appears that the civilized world has learned some important lessons about the potential dangers of racism and anti-Semitism.

Yet while this development is certainly highly significant and very welcome, it is also important to note what was missing from the speeches made at those ceremonies. Thus, besides the sympathy expressed for the victims and the determination to prevent such atrocities in the future, to the best of my knowledge, not a word was said about the necessity of bringing those unprosecuted Nazi war criminals still alive to the bar of justice. And while most people would naturally attribute that “oversight” to the many years which have passed since the crimes were committed and to the consequent ostensible “impossibility” of



prosecuting Holocaust perpetrators at this point in time, the statistics on this subject paint a very different picture which makes the absence of the call for justice particularly regrettable.

Since 1 January, 2001, the Simon Wiesenthal Center has been keeping statistics on the investigation and prosecution of Nazi war criminals all over the world. The figures compiled, which are published each year in an Annual Status Report made public on *Yom ha-Shoa*, speak for themselves. Thus, for example, during the period from 1 January, 2001 until 1 April, 2005,

a total of 32 convictions of Nazi war criminals were obtained in six different countries. During the last year for which complete statistics are available (1 April, 2003 until 31 March, 2004), ten new indictments were filed in three countries, 335 new investigations were initiated in ten different countries, and as of 1 April, 2004 there were 940 ongoing investigations underway in twelve different countries. The criminals in question, range from hands-on SS murderers such as Anton Malloth and Julius Viel (both of whom committed their crimes in Theresienstadt and were convicted in Germany) to Eastern Europeans who served in local security police units, such as Kazys Gimzauskas (convicted in Lithuania) or SS-Death's head guards in concentration camps such as Theodor Szehtinsky (Gross-Rosen among other camps), Johann Lepprich (Mauthausen), and Jakob Miling (Sachsenhausen among other camps), all of whom were convicted in the United States.

These figures, however, are only part of the story. In reality, to this day, the question of the prosecution of Nazi war criminals is still pertinent in dozens of countries all over the world because it

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affects not only the countries in which the crimes of the *Shoa* were committed or whose nationals carried out those crimes, but also the countries which knowingly or unknowingly granted postwar refugee status to Holocaust perpetrators. In this regard, it is important to remember that in order to carry out a crime of the magnitude of the *Shoa* which took place in practically every European country with the exception of the six neutrals (Switzerland, Sweden, Spain, Turkey, Portugal, Ireland), enormous manpower was required - Germans and Austrians, as well as local collaborators. Many of those involved in these crimes were relatively young men, and with the advances of modern medicine, many are still alive. Thus, there is no shortage of potential candidates for prosecution.

The methods chosen to punish these criminals vary due to various historical and legal circumstances. In the countries in which the crimes of the *Shoa* were committed, the suspects are tried on criminal charges such as genocide, crimes against humanity, war crimes and murder, and this is also the case in countries of refuge such as Australia and Great Britain, which passed special laws (in 1989 and 1991 respectively) to enable such prosecutions. In the United States and Canada, however, the suspects are tried on civil charges - for immigration and naturalization violations - rather than on criminal charges, and are stripped of their citizenship and deported. In two countries, Norway and Sweden, a statute of limitations on murder precludes any possibility of the investigation, let alone prosecution, of such cases. A similar statute of limitation was scheduled to be implemented in Germany in 1969, but was twice delayed and ultimately rejected by the Bundestag.

The difference in prosecution methods has had a profound impact on the number of successful prosecutions during the past two and half decades, and especially during the past four years. Thus, of the 32 convictions achieved since the beginning of 2001, more than seventy percent were obtained in the United States, and if we add Canada, both of which pursue denaturalization and deportation, the figure rises to over eighty percent. The reasons for the tremendous gap in conviction rates between the two methods do not only relate to the relatively easier task of achieving a victory on civil rather than criminal charges. Probably the most important factor in this regard is the existence of abundant political will in the United States, and to a much lesser degree in Canada, to proactively pursue these cases and to take whatever measures are necessary to prevent guilty defendants from exploiting the legal system to prevent their punishment. Thus the American Office of



Passover Haggadah published in 1838 in Cologne, Germany

Special Investigations has taken successful legal action against 98 Nazi war criminals since its establishment in 1979, a record unparalleled anywhere else in the world during this period.

The issue of the existence of political will to prosecute has proven to be increasingly critical, especially in the countries in which the crimes of the *Shoa* were committed. As time goes by, with the obvious practical problems faced by these proceedings mounting, prosecution is often dependant to a large extent on political, rather than judicial or evidentiary, factors. The statistics for the last four years clearly demonstrate this fact. Thus the country which has achieved the most criminal convictions since January 2001 is Germany, which is one of the few countries in Europe in which there is sufficient political will to prosecute Holocaust perpetrators and no serious political opposition to such trials. Thus, half of the six convictions on criminal charges have been in Germany, with one each in Poland, France (in absentia) and Lithuania (a medically-ill defendant who did not attend a single court session and was not punished). The only indictments submitted on criminal charges during the past year were also

in Germany. By comparison, in Austria in which numerous unprosecuted participants in crimes against Jews reside, there has not been a conviction of a Nazi war criminal during the past three decades.

In post-Communist Eastern Europe as well, the lack of political will to bring local Nazi war criminals to justice is probably the most serious obstacle to the prosecution of Holocaust perpetrators. This is particularly unfortunate, because of the extensive collaboration with the Nazis in these countries and the important role played by the locals in the murders. Thus such trials, besides achieving justice, have highly-significant educational potential and constitute one of the best ways of enabling these countries to face the issue of the complicity of their nationals in the crimes of the Holocaust.

In the Baltics, for example, there has not been a single trial of a local Nazi war criminal held since these countries became independent, in which the defendant was present at the trial sessions on a regular basis and was medically fit to be punished following his conviction. In Lithuania, for example, both Aleksandras Lileikis and Kazys Gimzauskas, the commander and deputy commander of the Saugumas (Lithuanian Security Police) in the Vilna district, both of whom fled the United States after legal proceedings were instituted against them, were ignored as long as they were healthy and were only investigated and subsequently indicted (in accordance with special laws passed for that purpose by the Lithuanian parliament) after it was clear that they were medically unfit to stand trial, let alone bear punishment. In Latvia, the local prosecution studiously ignored abundant evidence against escaped Arajs Kommando officer Konrad Kalejs until international pressure finally led to an extradition request (which was unfortunately thwarted by his demise) and in Estonia, Nazi war crimes investigations have languished unresolved for years.

The situation elsewhere in Eastern Europe is, with several exceptions, hardly any more promising. In fact, with the exception of Croatia, which successfully convicted Jasenovac commandant Dinko Sakic (presently in prison serving a twenty year sentence for murder) and Poland, which convicted Chelmno operative Henryk Mania (currently serving an eight year prison sentence), not a single country has ever prosecuted a Nazi war criminal since the fall of Communism. In fact, until recently, there has never even been any such investigation, although numerous Communist criminals have been investigated, and more than a few prosecuted, during this period in these countries.

Two and a half years ago, the Simon Wiesenthal Center

launched its "Operation: Last Chance" project (www.operationlastchance.org), which offers financial rewards of up to 10,000 euros for information which will facilitate the prosecution and punishment of Nazi war criminals, in seven post-Communist countries (Poland, Romania, Hungary, Lithuania, Latvia, Croatia, and Estonia), as well as in Germany and Austria, and it has had two positive effects. On the one hand, it has focused public attention on the problem of local complicity (among other means by publishing newspaper ads which highlight this phenomenon) and by encouraging the submission of concrete information regarding suspected Nazi war criminals. To date, the names of 78 suspects have been submitted by the Center to local prosecutors in Lithuania, Latvia, Croatia, Hungary, Romania and the United States, and at least two cases appear particularly promising, that of Milovoj Asner, who served as the Ustashe chief of police in Slavenska Pozega in Croatia and played an active role in the persecution and deportation to concentration camps of at least hundreds of Jews and Serbs; and of former Hungarian Army officer Charles Zentai who, in the fall of 1944 in Budapest, conducted manhunts of Jews whom he beat and tortured and in at least one case murdered. Asner, following his exposure, left Croatia for Austria and Zentai has been living in Australia since 1950, but both are fairly likely to be extradited to the site of their crimes, to stand trial.

Besides the prosaic issues related to such cases, we would be remiss if we did not reiterate the principles which constitute the legal foundation for the efforts to bring Nazi war criminals to justice in the twenty-first century. First and foremost, that the passage of time in no way diminishes the guilt of the perpetrators of such crimes. Second, that there should be no statute of limitations on the prosecution of such crimes. Third, that each individual bears personal responsibility for his actions and that "superior orders" is not an acceptable defence for crimes against humanity, war crimes and genocide. (The Canadian Supreme Court and its Ontario counterpart are the only courts in the world which have recognized superior orders as a legitimate defence, a decision which in 1994 forced Canada to switch to denaturalization and deportation).

If we add our sense of obligation to the victims of the *Shoa* to attempt to hold the perpetrators who victimized them accountable for their crimes, I believe there is a powerful case for the continuation of these efforts during the next few years. With this in mind, the silence from world leaders on this subject at the Auschwitz death camp is deafening and incomprehensible.

Article 282 of the Russian Criminal Code against Ethnic Hatred

Article 282 of the Russian Criminal Code enables the prosecution of acts of incitement. The Association inquired with the Russian Guild of Defence Lawyers why this article is not being implemented against perpetrators of anti-Semitic incitement. Two prominent members of the Guild responded as follows:

Article 282 of the Russian Criminal Code: Incitement of Ethnic, Racial or Religious Enmity provides as follows:

1. Actions aimed at stirring up ethnic, racial or religious enmity, the abasement of ethnic dignity as well as the propaganda of exclusivity, superiority or inferiority of citizens based on their religion, or ethnic or racial affiliation, provided that such actions have been committed in public or by using mass media - shall be punishable by one of the following: a fine of five hundred to eight hundred times the minimum wage or the sum of a wage or salary or any other income of the convicted person over a period of five to eight months or suspended sentence of up to three years or by a prison term of two to four years.
2. The same deeds committed by: use of violence or with the threat of violence; a person using his or her official position; or an organized group - shall be punishable by a prison term of three to five years.

The Criminal Code also provides for the imposition of more severe penalties if, in certain instances, the motive of national, racial or religious hatred or enmity is present in committing an offence or, generally, such motive constitutes an aggravating circumstance (Article 63(1)).

The question has been asked why this article of the Criminal Code, which penalizes any actions directed at instigating national, racial or religious hatred, has not been implemented in Russia.

• **The answer of Adv. Gasan Borrisovitch Mirzoyev, President of the Russian Guild of Defense Lawyers is as follows:**

“This is a very real problem for Russian society.

It seems to me, as a man of faith, that this is not only a legal question but also a spiritual one. From a spiritual point of view, when a man believes in God, the problem of ethnic enmity never arises, as faith requires man to love his fellow man.

On the other hand, if we return to the legal aspect, in the current circumstances, the main problem is that the government cannot guarantee the security affairs of its citizens. The term ‘security affairs’, from my point of view, reflects all the issues concerning the security of the citizens, their rights and freedoms. How many times has there been talk of enacting laws against xenophobia? How many attempts have been made to review Article 282? These steps have been met by great difficulties, inter alia, because, unfortunately, certain individuals in Russian society and Russian government are still affected by anti-Semitism. Routinely, rumors are spread that all the oligarchs are Jewish, even though this is not true. I know oligarchs who are not Jews and oligarchs with Jewish family names who became Christian many years ago.

The impression which has been created is that among the government structures there are persons who simply do not love their country. A man who loves his country will avoid inciting hatred between ethnic groups. People simply do not understand that Russia is a multi-national and multi-faceted country. Such attitudes play into the hands of the enemies of Russia, the same ones who are interested in drawing attention away from the political and social problems with which our government is contending.

Even though in my view the traits of loving mankind and rejecting xenophobia are intrinsic to the true Russian character, there is no truth in the position taken by high ranking officials to the effect that the problem of anti-Semitism has been fabricated and is artificial.

Only if this position [of the high ranking officials] will change, will Article 282 begin to be implemented."

• **The answer of Adv. Igor Yakovlevich Rahmilov, of the Law Firm 'Rahmilov and Partners', is as follows:**

"A clear example of the reason why Article 282 has not led to social change was the appearance of Vladimir Ustinov in the Federation Council [the upper chamber of the Russian parliament] on 26 January 2005. If the Prosecutor General, the person responsible for the rule of law, in this forum answered the question of Senator

Narasova regarding an anti-Semitic letter, by saying 'if we won't touch - it will not smell' [a Russian proverb which implies that the less noise made - the less trouble created - ed. note] then the trend is absolutely clear.

There is absolutely no doubt that if this is indeed the attitude of the Prosecutor General, the article will not be implemented and no criminal proceedings will be conducted for inciting ethnic hatred. If, on the other hand, the position taken by the Prosecutor General's Office will change, as well as that of Mr. Ustinov, and if Mr. Ustinov will not only deal with selected cases [*i.e.* cases chosen by the political leadership - ed. note] but will react to every act of xenophobia, then the legal situation will also change.

Were incidents brought before the courts - then the courts would deal with them.

For the time being, many cases simply do not reach the courts."



Passover Haggadah published in 1870 in Outat, Morocco

Neo-Nazi Trends in the Country that Defeated Fascism

Alexander Brod

On 27 January we celebrated the 60th anniversary of the liberation of Auschwitz by the Soviet army. Auschwitz became a symbol of the Nazi extermination machine. Millions of people of different nationalities who resided in the territory of the USSR perished in these concentration camps. In its so-called “Drang nach Osten” the German army, Gestapo and subsidiary troops committed unprecedented atrocities, exterminating entire villages. Several million people were driven into forced labor in Germany. Nevertheless, today there are groups in Russia which profess neo-Nazi ideology and use Hitler symbolism.

The origins of these groups go back to the end of the 1980s - beginning of the 1990s, when the collapse of the monolithic Soviet propaganda, led part of the population to form an image of Hitler as the herald of the “third way” - who oppressed only specific ethnic or social groups.

Nazi Symbolism

Using Nazi symbolism is the most striking and the most noticeable manifestation of promoting neo-Nazism. Usually it concerns graffiti incorporating the traditional Nazi swastika, Nazi



slogans and the like.

The Russian National Unity (RNE) uniform is a khaki or black shirt with a swastika stripe on the sleeve. Arm-bands with Nazi slogans add to this picture. RNE has even published a special information leaflet signed by its leader A. Barkashev dedicated to “visualization of our symbol”, urging comrades to distribute arm-bands and graffiti. There, it is specifically stressed that swastika graffiti is more effective than “Hail Russia” or “RNE”.

The *skinhead*'s uniform includes heavy boots, rolled up khaki pants or jeans, suspenders, black (or sometimes khaki or dark blue) jackets - bomber, scooter or “Bundeswehr” - and military caps. On the stripes: Celtic Cross; Confederate Cross (flag of the southern slave-owning states in the civil war); skull and bones (“Totenkopf”) over a heart; inscription “Skinhead” in gothic script on the back; the right white fist with the words “White Power” or letters “WP” over it (contrary to the Trozkyists who use the left fist in their symbols); imperial or state flag over the thunderbolt on the left sleeve; stripe with a shield on the right sleeve; swastika (both 4-ray and 3-ray - symbol of racists in the South African Republic); Hitler's portrait; bulldog in a spiked collar; stylized picture of a baseball bat, runic symbols used in Nazi Germany - doubled “zig” (two thunderbolts like SS), “othal” and others; “Oi!” - the greeting of British workers that rendered a name to a style in music; numbers 88 (“Heil Hitler”) and 18 (“Adolph Hitler”); 14 words (“We Must Secure The Existence Of Our People And A Future For White Children!”).

The skinhead image includes Nazi tattoos and Nazi greetings.

Wide-spread abbreviations also include RaHoWa (Racial Holy

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War) and ZOG (Zionist Occupation Government).

Nonetheless, for a lot of teenagers the swastika has already turned from the symbol of aggression against Russia into a badge aimed at shocking adults. That is why it would not be appropriate to speak about significant teenage groups having turned fascist.

When the swastika is used deliberately, the groups that use it try to distance their source from Hitler. For example, the *Russkoye Deystvie* (Russian Action) political movement declares that the swastika in their symbolism is the labarum that Emperor Constantine saw in 312 AD and stresses that it is a sort of a cross that “symbolically expresses the crossing of the heavenly dominating vertical and the earthly inferior horizontal”. After that the genealogy of swastika is traced back to the skolot tribe which populated the northern coast of the Black Sea in the first millennium BC and allegedly created the great empire that included Scythes as subordinate tribe.

The *Russian Orthodox National Socialist Movement* also traces the swastika back to Christian symbolism and declares that “today for an Orthodox Christian, the swastika is not only a symbol of worship as is the Cross, but a symbol of our fight against all demonic forces: communists, Yid - masons, Islamists and other bastards”.

Again, the RNE is the one that deals thoroughly with this issue. In an attempt to refute the accusation of being a Nazi party it declares that its symbol - a turned over swastika against the background of an eight-pointed star (officially called “kolovrat”) - symbolizes “the presence of God in Russia” and was on the banners of the princes Svyatoslav and Vladimir and on the banknotes of Nicolas II. The RNE greeting that visually resembles a Nazi greeting is explained as follows: “Our greeting - raised hand and the words “Hail Russia!” - is the oldest Slavic greeting. The hand stretched forward and up - to God - the hand with an open palm symbolizes that our priority is spirituality over all earthly material”. Black shirts are linked not to Hitler’s uniform but to the robes of warrior-monks in the Middle Ages.

The nationalistic *Partiya Svobody* (Party of Freedom) has even included in its program a special section headed “Partiya Svobody Program Declaration on Fascism” where it declared “fancying Nazi ideas and symbolism” blasphemous.

The playing of specifically Nazi and pro-Hitler songs of certain nationalistic singers is yet another way of popularizing Nazi ideas. For example, the songs of Valery Poryvayev (lyrics M.Strukova) are to a great extent devoted to this theme. In his song “The Right to Fascism” he says:

“Patriotism became the symbol of fascism
So should we consider it an insult?
If the enemies of Russia are afraid of it
All of us are ready to become fascists
If the right for glory is taken away
And the light of dream is dissipated
The people have their last right
The right to fascism
Two poisonous rascals will be destroyed
Twins: democracy and Zionism
Force of freedom and joy of revenge -
Our right to fascism”

Another song “To My Mother” is also dedicated to the singer’s attempt to justify affiliation with the followers of fascism:

“You are shocked, mother
With all that seems alien for a Russian soul
With runes, swastikas and the book of Adolph
Mother, do not hasten to blame me
We turned to the Third Reich
Our ancestors will have to understand us
If using the German model
We will start cleaning Russia
Mother, I hate communism
I hate democratic nonsense
I agree with the mercilessness of fascism
In pursuing the victory of Empire”

In yet another song the “officer - nationalist” with a swastika on his chest and SS symbols is praised as “he who taught to fight for the people” and “the soldier of national revolution”.

A web-site was opened designed specifically to popularize V. Poryvayev’s songs. Here everybody may download the songs free of charge. However, it should be noted, that the administrators of the site apply caution. Visitors are greeted with the following comment: “If the songs may insult you in any way, do not listen. This site does not violate any Russian or international law”.

Ideology and Practices of the Russian National-Socialists

Russian National Unity (RNE) is the most renowned organization to use Nazi symbolism and ideology. This organization headed by A. Barkashev originated from the *Pamyat* organization in 1990. In the 1990s it was the biggest pro-Nazi organization in Russia. It was used by the authorities and mass media as a ‘scarecrow’ during the debates about the “Weimar Russia”. In 1999-2000 the RNE split into several organizations, one of which is still headed

by Barkashev. However, despite the split, the RNE ideology remains unchanged. It calls for the creation of a corporate nationalistic state and “national-proportional representation”. RNE affiliates compare modern Russia with Germany of the 30s calling Hitler’s rise to power “reaction to national humiliation and to the attempts to destroy a national state from within under the guise of democracy, internationalism, liberalism and socialism” and identify themselves with “the people” who committed those deeds.

Members of *Slavyansky Soyuz* (Slavic Union) may also be reckoned among those who openly admire Hitler. The leader of this organization Dmitry Demushkin shortens its title to the abbreviation SS, clearly identifying it with Hitler’s SS troops. This organization emerged during the split of the RNE and, according to Demushkin, included the members of the RNE ideology department. According to the Slavyansky Soyuz leader, the “basic ideology” of the organization is identical to Barkashev’s ideology. Further developing its ideological genealogy, Demushkin traces it back to Konstantin Rodzayevsky, leader of Russian fascists in China, and to the Krasnov brothers, who had fought on Hitler’s side during the war.

Demushkin became famous for initiating a persecution campaign against civil rights activist D. Krayukhin (who demanded that an action be brought against the RNE) in the town of Oryol, accusing him of “heresy” and clearly threatening him with murder. The SS departments are active in Moscow, Kaluga, Kostroma, Murmansk, Twer and Tumen.

All visitors to the organization web-site are greeted with the following statement:

“Relentlessly and firmly professing the ideology of national-socialism we appeal to all Russians: regardless of the difficulties of our cruel time, do not give in, do not lose yourself in a sequence of endless and useless one-day parties, let us unite our efforts, let us fight for the right to the dignified existence of our nation. And the day will come, when having overcome all difficulties and challenges, we will be proud to look back at what we have accomplished and look into the eyes of our children and grandchildren for whom we will have won this right. Dmitri Demushkin. SS Party leader.”

Next to this declaration we see the picture of a soldier with a Nazi swastika and inscription: “Tell everybody - I am a proponent of national-socialism”. The organization itself is defined as “the Russian national-socialistic movement”; its banner is a white classical swastika against a red background.

The SS leader describes the current world situation as an eschatological battle of good and evil. By the latter he understands: “international humanism and its agents - Jews and Zionists”.

He also condemns mixed marriages calling them “blasphemies”. However, he clearly tries to clear Nazism of accusations of atrocities. In the web-site article “Mystical national-socialism” he declares that the “genuine” national-socialism is “the ideology fulfilling the role of counterbalance to the modern rational material world order”, “the fight for spirituality, originality, mentality and culture of the nation”. Talking about the situation in Germany in the 1930s the author states that this “genuine national-socialism” with deep religious roots going as far back as Buddhism was accessible only for “the chosen”, for “the people with outstanding physical and, primarily, spiritual qualities”. And the rest is for the masses.

However, the following list of methods of work clearly demonstrates how he will implement his “mystical national-socialism”:

“The goal of our organization is propaganda and promoting the national-socialistic ideal in society using all possible methods (agitation, force, finance, professional, administrative etc). Any method is good in our fight except for ineffective methods”.

Today we are witnessing a significant expansion of the skinhead movement. The number of skinheads in the Russian Federation reaches 50,000. Today skinhead communities exist in 85 cities in Russia (to compare: the number of skinheads around the world, excluding Russia, is over 70,000). Mostly they form isolated groups of 3 to 10 members. Today it is a “neo-Nazi street movement” rather than a political organization. The majority of skinheads are 13 to 20 years old. Skinheads, “the soldiers of the third war where the white race will win or die” as they call themselves, are the most aggressive representatives of the “new right wing”. “It is not too late to exchange money for an automatic gun”, - declares the title of an article on the skinhead group Reutov Front web-site.

Practically all major skinhead internet resources have their on-line libraries. Among the bestsellers for the Russian neo-Nazis: Hitler’s *Mein Kampf*, Dmitri Nesterov’s *Russia Wakes Up*, David Lein’s *88 Commandments* and *The ABC of Slavic Skinhead*.

Many of the web-sites include materials related to revision of the Holocaust.

Yuri Belyaev’s *Partiya Svobody* (Party of Freedom) with headquarters in St. Petersburg also makes use of the Nazi

“heritage”. Even the party newspaper is called “Our Public Observer” (an analogy to Hitler’s “*Folkisher Beobachter*”). In the party materials Adolph Hitler is called one of the greatest political figures of the 20th century, *Mein Kampf* is referred to as eternal book and non-white ethnic groups are called “coloured bastards”, “*untermensch*” and “colored trash”.

The *Opritchnina Fellowship in the Name of Saint Mikhail Volotsky* organization has been working openly since 1998, stating as its ideology “the dislike for the modern world” and the old Uvarov’s trinity “Orthodoxy, monarchy, people” in “apocalyptically eager conservative-revolutionary reading”. The organization openly supports the words of one of the above mentioned Krasnov brothers who declared that Russia needs a “Russian Orthodox Hitler”. The Führer himself is considered “the Leader of German people chosen by God” and “the Leader of the Great German Empire”. The members of the fellowship see in him the forerunner of the Last King, spoken about by the prophet Daniel.

The *Russian Orthodox National-Socialist Movement* falls within the same category as the *Opritchnina Fellowship*. This marginal ultra radical group headed by Bishop Amvrosiy (Mr. Smirnov - Sivers who declared himself a bishop) whimsically combines “catacomb” Orthodoxy (a version of the Genuine Orthodox Church) with national-socialism and racism, and the latter prevails. According to its manifesto, this movement awaits God’s chosen Leader indicated by the Genuine Orthodox Church and adheres to theocratic ideas. Hitler, in this case is called “Christ-loving leader”. Orthodoxy is regarded as a “religious - racial doctrine”. In the event of coming into power the party manifesto would support, *inter alia*, introducing “apartheid policy”, deportation of “hostile alien elements”, introduction of punishments for “religious and racial crimes” and forced isolation of “all degenerates, perverts and other asocial elements”. These provisions are a precise copy of Hitler’s racial doctrine of the 1930s. It seems that the Russian Orthodox National-Socialist Movement advocates the most extremist of opinions regarding aliens. In one of the issues of its *Mirovissreniye* (Outlook) bulletin it published the poem “The Russian Intifada”, describing “the Uprising against Total Destruction and against the International Yid”:

“Cross and axe are united
Their union is sacred
Russian Intifada
Synagogues on fire

Our Sonderkommando
Knows that God is with us
The sun - our eternal leader
Drives away the night
Hail to our Russian Hitler
Leader of the Third Rome”

The author A. Shiropayev supports similar views. He even published in the *I Am Russian* newspaper an article entitled “The orthodoxy of Swastika is coming”, in which he called the swastika “the symbol of the sacred hatred of the righteous towards the modern world” and tried to prove that the swastika is a modernized cross. Hitler was called “Hero - Crusader or Opritchnik”.

Yet another famous ultra nationalist Roman Perin in his book “Psychology of Nazism” dedicated a chapter to national-socialism. There, he tried to prove that Hitler’s ideology, which he described as “politically formed instinct of nationalism of the given race” and “national memory awakening”, was prepared by the age-old German “cultural nationalism”.

The *Russkoye Deistviye* (Russian Action) organization headed by Russian National Union ex-leader Konstantin Kasimovsky - reckoning among its “teachers” Ivan the Terrible and Stalin - at the same time declares that “it would do us some good to learn from the leaders of European fascism - Hitler, Mussolini, Degrell, Mosli and others”. It sees an example in K. Kodryanu, leader of the Romanian *Iron Guard*. The organization publishes as teaching and methodological aids the works of Mussolini, of Italian new right wing leader Julius Evola and translated articles published by neo-Nazi and neo-fascist organizations of Western Europe.

Also of some interest are the actions of individual admirers of Hitler who now have the opportunity to propagate their views *via* the Internet. For example, Ilya Maslov has published an article on his web-site entitled: “Hitler and the Fellowship of Nations”, where he tried to picture Hitler as “the logical continuation of all the doctrines of Kant, Rousseau, Gegel, Nietzsche about the Free Individual”. Demagogically declaring “that the Fuhrer did not pity himself as well” the author derives from that fact Hitler’s right to use euthanasia and concentration camps. The tens of millions of deaths in WWII were, according to him, for the people’s welfare, since Hitler “had awoken them to conscious life, had made them think, fight and believe”. According to Maslov, the major goal of Hitler was the revival of Aryavata, the coalition of Indo-European tribes that existed in 3000 BC, and Hitler’s only mistake was attacking the USSR. He casually ignores the fact

proven by hundreds of researchers (and accepted even by some nationalists) that Hitler considered the Slavs an inferior race. Indeed, practically all Russian admirers of Hitler adhere to this point of view.

Russian national-socialists have participated in all kinds of demonstrations; they are responsible for vandalizing synagogues and cemeteries. They also try to take control of the skinhead movement, organizing concerts of nationalistic music groups and distributing records that, in addition to the videos, include instructions for “direct action”.

Today, it looks as if these people are ready for even more aggressive action. In their publications skinheads openly incite to violence towards “aliens”, “blacks” and “kikes”, and to the organization of terrorist attacks. Neo-Nazi publications also include sections on city guerilla warfare (for example, *Revolutionary Terror Theory*, *Interrogation Conducted by Enemy*, *Escaping Pursuit*, *Instructions for the City Partisan* by Carlos Mariguella, *Prisoner’s Cook Book* etc). The *Opritchnina Fellowship in the Name of Saint Josef Volotsky* regularly publishes articles on the necessity of an “Orthodox revolution” similar to the “Islamic revolution” in 1979 in Iran.

The last step in this direction is SS leader D. Demushkin’s web-site directive, in which he urges all members of the organization to get a weapon. “If you legally own a weapon” - he continues - check it regularly and make sure it works”. The low ranking officers of the organization are instructed to purchase a weapon and to “promote the necessity of acquiring a legal personal weapon among your comrades”. They are also instructed to ensure military training of the party members. They are merely one step away from unleashing terror against dissidents.

Revisionists

Yet another group of Hitler’s admirers are the revisionists of the Holocaust. It is necessary to stress that revisionism is included in the ideology of practically all Russian pro-Nazi movements. The range of web-sites addressing this topic is very wide: Orthodox Christian, pagan, “left wing”, monarchists, Muslims and even Satanists.

Listed below are the major arguments of Holocaust revisionists: 1. The Jewish Holocaust is one of many Holocausts, even in the 20th century; 2. There were no gas chambers and no German attempts to eliminate Jews; the term “exile” differs greatly from the term “extermination”; 3. The total number of six millions victims is exaggerated; 4. WWII became an unprecedented

slaughterhouse for all parties involved - not only Jews; only about 2% of the total number of WWII victims were Jewish; 5. Hitler gave no order to exterminate European Jews. There are no documents confirming Hitler’s plans to eliminate Jews. 6. If Jews did go to the concentrations camps, it was because of their traitorous activities.

Until recently the *Duel* newspaper published by Yuri Mukhin was the major tribune for revisionist ideas. On its web-site one may find dozens of revisionist articles and books (for example, *Holocaust Myth* by Yurgen Graf). But though revisionism occupies a certain niche in this publishing project, it could not and did not become its main direction. At the end of May 2003 a major internet resource “Revisionism of the Holocaust” was created (author and host N.V. Salamandrov). As the author describes it, “the Revisionist Project is a long-term educational historical non-profit anti-misinformation independent Russian resource. The Revisionist project is a major collection of intellectual works of analysts and historians, religious and secular scientists, researchers and common citizens, whose activities are dedicated to the search for the Truth and information related to this issue. The Revisionist Project is the opposition to all forgers of history. It is a sound response to Zionists, Russophobes, and racists of all kinds, regardless of their ‘victim’ or ‘humanistic’ disguises”.

The web-site (that was significantly expanded in August 2004) also features the “works” of European Revisionism “expert” Roget Garodi (*Myth of Zionist Anti-Fascism*, *Holocaust Myth*, *Myth of Nuremberg Justice*), the works of “conspirologist” Anthony Satton (*Geopolitics and Revisionism*) and the works of such authors as Orthodox writer Yuri Vorobyevsky (*Auschwitz: Argument about Crosses*), “higher sociologist” and “degenerate- homosexual- and Jew- hunter” Grigori Klimov (*Interview to a Moscow Journalist*), left-wing Israeli writer Isroel Shamir (*Holocaust as a good Geschäft*), editor of the *Zavtra* (Tomorrow) newspaper Alexander Prokhanov (*Did the Holocaust Really Happen?*), “secret societies expert” Oleg Platonov, Igor Shafarevich (*Creation of the States of Israel*), Alexander Panarin (*Genocide*), NDPR leader Alexander Sevastyanov (*Not the Second World War, but the Great Patriotic*), and editor of the *Duel* newspaper Yuri Mukhin. In addition, the web-site features “conspiracy studies” (for example, *How the Order Organizes Wars and Revolutions* by Anthony Satton and *Adolph Hitler - the founder of Israel* by Hanneke Kardel) as well as “racial studies” (for example, *Russian People and Protection of the White Race* and other books by master of European racism Gaston-Arman Amodrus).

Some authors accuse Jews and Judaism of fascism and racism, among them Mark Weber (*Wiesenthal - the False Fascist Hunter*), Res Grenata (*Critical analysis of the official point of view on Auschwitz in the light of chemistry and technology*) and Mikhail Nazarov (*The Law on Extremism and Shulhan Aruh*). The latter was among those who signed the letter of “the Russian public” that appeared in the *Rus Pravoslavnyaya* newspaper on 14 January, 2005 (altogether 500 signatures, among them 19 deputies of the State Duma) to the Attorney General of Russia demanding to “officially bring an action against and prohibit all religious and national Jewish associations as extremist” and to “bring an action against the officials responsible for providing state and municipal premises, properly, benefits and state financing to such organizations, regardless of the rank of those officials”.

The site also includes *Holocaust - the Weapon of Jewish Nazism* by A. Zhivoluk, *Old Mein Kampf* by Igor Galkin and even an article entitled *Porno Holocaust*, “the anthology of the racist Judaic religious sources” and “revisionist” poetry.

In addition to the two above mentioned resources there is another small but informative Revisionist web-site and the *Mythical Holocaust* internet-chat site. The following resources also adhere to a lesser or greater extent to revisionist views: the *Russki Vestnik* newspaper, the Palestine Informational Centre, the Islam radio, the *Russkaya Liniya* Orthodox informational agency, the neo-pagan Vedaria resource, the *Left-wing Russia* resource (one of the authors Isroel Shamir), the *Russkoye Nebo* Orthodox resource, the *Black Fire Pandemonium* web-site (web-site Warrax, the “main” Satanist of the country), the Russian national-socialist *Brangolf* portal and the neo-pagan *Velesova Svoboda* resource.

Revisionists are ready to declare “Yids’ accomplices” all those who try to refute their statements, even if they are prominent figures. For example, at one of the RNE forums they defamed the well-known conservative philosopher I. Ilyin, who called the Holocaust “Hitler’s mistake”. He was immediately ranked among “Jewish Masonic Intelligentsia” and called “half-German and half-Jewish”.

Pseudo Scientists

Yet another group of Hitler’s admirers - so-called racologists - comprises the followers of Hans Gunter, Ludwig Voltman, Ludwig Wielser, Otto Ammon, George de Lapoige and other “fossil” scientists who have tried to prove that in the course of the development of society, the “nobler”, “white” elements acquire dominating positions, while the “darker” elements become

inferior and that “the white person” should be protected from harmful mixing with “southerners”. “Racology” is usually the field of interest of pro-Nazi neo-pagans. The *Ateney* magazine is the major magazine engaged in publishing “racology” doctrines.

The following resources feature “racology” sections or materials: the neo-pagan Svetorusie web-site (for example, *Racology of German People*, *Addendum to Racology of German People*, *Short Racology of Europe* by “racology expert” G. Gunter); the main Russian Satanist Warrax’s *Black Fire Pandemonium* web-site (in particular, his article “Racology against Russophobia”); the neo-pagan *Rusograd* and *Slavyanskoye Naslediye* web-sites; the neo-pagan *Velesova Svoboda* resource; the web-site of Orthodox researcher V. Makhnach; the Russian national-socialist *Brangolf* portal.

Two major “racology” authors are Vladimir Avdeev, ideologist of the modern neo-paganism and a standing author for the *Ateney* magazine, and Andrey Savelyev (pseudonym A. Kolyev), State Duma Deputy from the Motherland faction, who, according to unofficial information, acted as a speechwriter for party’s leader Dmitri Rogozin. In 2002, V. Avdeev published the anthology “*Russian Racial Theory before 1917*”. In his interview to the *Stringer* information agency he said, in particular: “I am not urging that people be sent to concentration camps, but I do not want them to breed and to worm their way into power. They should not be in the parliament; they should not be responsible for education throughout the country. I just urge you to protect me and normal society from the rule of degenerates.”

International Cooperation

Over the past several years Russian ultra-nationalists managed to establish close ties with their Western “colleagues”. For example, with the help of “white brothers from throughout the world” D. Demushkin managed to close a contract for the maintenance of his web-site with an American provider.

The *National Sovereign Party of Russia* - whose party license was revoked by the Ministry of Justice - has now agreed to an open union with neo-Nazi parties from Germany. Guests from Germany - representatives of neo-Nazi organizations - participated in the NDPR party assembly that took place on 1-2 October, 2004 in Moscow.

Having forgotten his previous attacks on Hitler’s admirers, in his concluding remarks A. Sevastyanov called the Molotov - Ribbentrop Pact “the peak of Russian and German diplomacy in the 20th century” and expressed his regrets over the fact that

the Hitler - Stalin alliance had been broken off. Nonetheless, this did not prevent him from including in a later published volume of his works a number of articles written in the 1990s in which he had described Nazi lootings, accused the authors of pro-Hitler articles of Russophobia and compared them to Smerdyakov. In one of these articles expressively titled "Hitler's Lessons" A. Sevastyanov severely criticized Hitler, declaring that "as a result of Hitler's rule Germany was turned into a debtor of its worst enemies - Jews" for many tens of years to come and that Germans had lost their chance for "healthy national future". At the same time he praised Hitler for his economical and political successes in the 1930s and did his best to separate Hitler from acts of violence committed by Nazi Germany. In one article he declared:

"I am not astonished that Hitler's Germany undertook these tremendous efforts to get rid of Jews, I am astonished that this attempt had not taken place earlier: the German soul was ready to it for a long time".

Then he added the myth about the Berlin Jewish community that allegedly numbered 200,000 members and allegedly survived during WWII and mildly called the Holocaust "a deportation".

He repeated the Soviet anti-Zionist myths about "selection carried out by the Judenrat", with only the weak and the ill being sent to the concentration camps, and declared that "there was not one well-known person among those who died in the camps". Hitler is acquitted of elimination of millions of people on an ethnic basis. The responsibility is shifted from Hitler to Jews who, as it turns out, had "pressured" Roosevelt and Chamberlain to start the war after being outraged by the economic losses inflicted by Hitler in Germany.

Conclusion

Russia today lacks targeted legal resistance to Nazi ideology and to neo-Nazi groups. The necessary mass education is lacking. Public consciousness has not yet formed an aversion to Nazi ideology. In 1999-2000 law enforcement agencies suppressed some activities of RNE groups. After the head of the Ministry of Internal Affairs, R. Nurgaliyev, issued a statement on skinhead danger, law enforcement increased and searches and arrests of skinheads took place. Several members of skinhead groups were put on trial and convicted. However, we are still very far from appropriate legal reaction to ethnic extremism. Publishers of neo-Nazi newspapers, publishing houses responsible for pogrom literature and hosts of internet resources feel at ease. I would like

to express the hope that in the year of the 60th anniversary of the Great Victory the Russian authorities and law enforcement structures in cooperation with civil rights organizations will resolutely oppose Russian neo-Nazis. I believe it is necessary to establish a special cross-organizational committee on xenophobia and ethnic extremism that should include representatives of the RF Justice Ministry, the RF Internal Affairs Ministry, the RF Attorney General's Office, the RF Supreme Court, the RF Education and Science Ministry, the Culture and Mass Communications Ministry and non-government organizations for regular analysis of the current situation and development of a joint course of action. Studying European experiences regarding combating neo-Nazism must be among the priorities of such a committee.



Passover Haggadah printed in 1930 in Jerusalem, illustrated by the well-known Israeli artist Nachum Gutmann

A Constitution for Israel

Our Association was proud to be invited to organize together with the Institute of Democracy, a seminar which took place in Jerusalem on 19 to 21 March 2005, attended by some 40 participants, among them 11 guests from abroad. Topics included *The Concept of "Agreement" as a Foundation for a Constitution; Mutual Concessions - State and Religion; The Constitutional Process in the Knesset; Israel, the Land of the Jewish Nation - the Citizens of the State of Israel and Freedom of Expression in Israel and the Rise of Anti-Semitism in the World*. Addresses were given by MK Michael Eitan, Chairman of the Constitution, Law and Justice Committee; Justice Meir Shamgar, Former President of the Supreme Court and MK Tzipi Livni, Minister of Justice and Immigrant Absorption.

The unanimous decision to hold similar follow-up seminars attests to the success of this event. The fact that this was the only unanimous decision indicates that even in this seminar there was no consensus on any of the issues on the program, although there was a general feeling that the participants had gained much important information and that they would all return home with food for thought.

The major issues under discussion were at the very heart of the controversy:

- Should Israel strive to adopt a constitution at this stage or would it be better to continue the slow process of adopting Basic Laws which together with the decisions of the Supreme Court would in time comprise the future constitution.
- Is it worth adopting a constitution based on compromise if such a constitution does not promise full equality to various sectors of society and thus sanctions existing discrimination.
- Can an acceptable compromise be reached on the highly controversial issue of State and religion.
- Can current discrimination against women in matters of personal status, governed by religious laws and adjudicated by religious

courts, be left out of a written constitution.

- What are the limits of freedom of expression in relation to two major issues on the Jewish and Israeli agenda:
 - The fight against anti-Semitism; and
 - Protecting Israeli democracy from expressions that border upon incitement.

The Institute of Democracy is a well-established and highly respected institution that deals with major problems on the Israeli public and political agenda. Throughout the years the Institute has gained a reputation for providing a forum for serious discussion on matters of public interest, assisted by outstanding academics and public figures of high standing.

One of the most prestigious projects undertaken by the Institute is the drafting of a suggested constitution for the State of Israel. The very professional team that worked on the project was headed by the former President of the Supreme Court, Justice Meir Shamgar, and comprised experts of unimpeachable reputation who represented conflicting views of various groups in Israeli society.

There is wide consensus that a constitution should not be adopted by a small majority in the Knesset, even if such a majority could be reached. This is why the Institute has strived to prepare a draft that has a chance of being supported by a considerable majority. They labeled it "A Constitution by Consensus" even if full consensus can never be reached. This premise dictated compromise and indeed the draft prepared by the Institute represents compromise on various conflicting issues.

Israel purports to be "a Jewish and a Democratic State", a term which has never been precisely defined. A written constitution will not be able to avoid such a definition, so it seemed only natural that important Jewish jurists from the Diaspora be given a chance to join their Israeli colleagues in discussing matters of interest not only to Israelis but to Jews everywhere, albeit without participating in the voting process.

Anti-Semitism in Russia

A special session on the current situation on anti-Semitism in the Soviet Union was held on March 17, 2005 in the Knesset in Israel sponsored by the Association. In this session addresses were given by Alex Hertman, President of the Association; Minister for Diaspora Affairs Nathan Sharansky; Honorary President of the Association Hadassa Ben Itto and Alexander Brod, Chairman of the Moscow Bureau for Human Rights. Mr. Brod presented a video showing the extent of the anti-Semitic book and newspaper market in Russia, the admiration of Russian youth for Stalin and excerpts from nationalistic and anti-Semitic speeches.

Mr. Brod spoke of the growing skinhead phenomenon and the fact that every month approximately 10 racial attacks take place against Asian or dark skinned people as well as against Jews and Jewish community

leaders. He spoke of the attacks against synagogues and the almost complete lack of reaction by the police. Where charges have been filed against hooliganism they have not been based on the relevant provisions prohibiting racialism. With regard to various journals denying the Holocaust a number of editors and writers have been tried but later pardoned, primarily as a result of low levels of legal expertise in these areas, the empathy or anti-Semitic views of the judges themselves and internal Soviet problems. Anti-Semitic phenomena are regarded by the government as a way of releasing internal pressure caused by the grave domestic problems. The panelists concluded that one of the ways of dealing with this phenomenon is increasing public awareness and public outcry.

The session was attended by leading members of the Association.

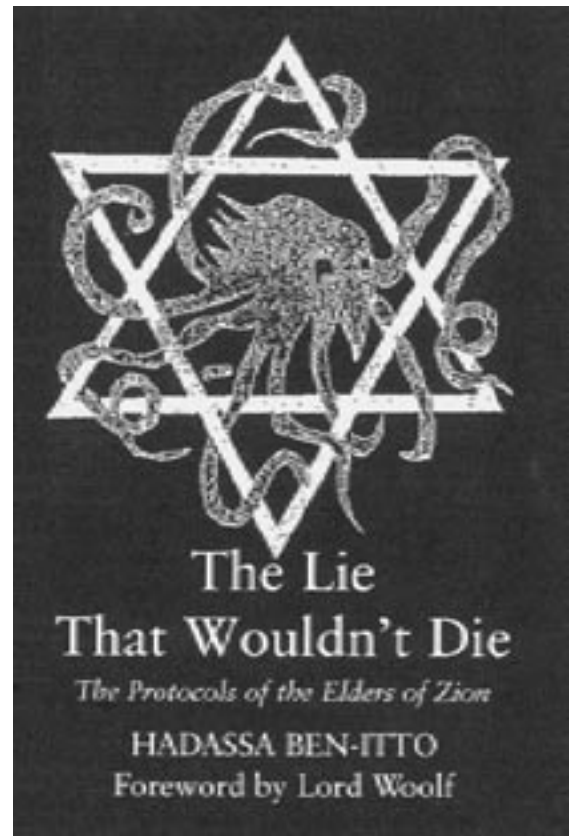
“The Lie That Wouldn’t Die”: An English Edition

Judge Hadassa Ben-Itto’s book on the Protocols of the Elders of Zion: “The Lie That Wouldn’t Die” - was recently published by Vallentine Mitchell in London. This English edition follows publication in eight other languages. The book is also available on Amazon. This edition was prefaced by Lord Harry Woolf, The Lord Chief Justice of England, and by Judge Edward R. Korman, Chief Judge, United States District Court for the Eastern District of New York. Here are highlights

Lord Woolf: “It is possible that there are those who have so little regard for truth...”

This is a remarkable book by a remarkable woman, Hadassa Ben-Itto. Because of her background she knows from personal experience the corrosive effect of anti-Semitism. This has caused her to devote her immense energy and talents in a personal crusade to combat its effect. In particular, she has attacked the poisonous lies that over the centuries have fuelled anti-Semitism.

As Hadassa Ben-Itto has been a distinguished lawyer and judge, it is not surprising that one of the principal weapons she has used, so effectively, in her campaign against anti-Semitism is the evidence she has collected that establishes beyond doubt the total inaccuracy of the most damaging lie of all *The Protocols of the Elders of Zion*. This book is the product of her research. It demonstrates not only her total mastery of her subject, but also her ability to tell a most compelling story. Even when her material is largely based on the records of one of the trials that should have indelibly and permanently labelled the *Protocols* a forgery there is



nothing turgid in her account. On the contrary, her account brings the proceedings to life. You are transported to the court in which the trial is proceeding and you feel you are witnessing at first hand what must be one of the most fascinating trials that has ever taken place.

This is a book you will find difficult to put down. When you do, you will be left amazed that it is possible that there are those who have so little regard for truth that they can still publish the *Protocols* without placing at the start and foot of each page in red ink “This volume is a forgery, its contents are lies. It serves no purpose other than to demonstrate the lengths to which those who wish to damage the Jewish people will go to achieve their objective”. That the lie will not die does not detract from Hadassa’s achievement. She cannot prevent the repeated publication of the calumny, but what she has achieved is that it is far more likely that the lie will be recognised for what it is. She deserves our applause.

Judge Korman: “It should serve as a potent weapon in the struggle against the revival of virulent anti-Semitism”

For several years now my judicial responsibilities have included the negotiation and implementation of an agreement with Swiss banks concerning Holocaust era claims. In this context I sought a deeper understanding of the historic and political roots of anti-Semitism and their effect on the rise of Nazism. It was very clear that *The Protocols of the Elders of Zion* served as a poisonous wellspring for Tsarist pogroms and the Final Solution.

In February 1943, three and a half years after the Second World War began with Hitler’s invasion of Poland, Nazism’s end became predictable with the destruction of the German 6th Army at Stalingrad. The failure of Hitler’s invasion of the Soviet Union was followed in May 1943 by the surrender of all Axis troops in North Africa after the rout of General Rommel. Yet I was particularly startled to read in the diaries of Goebbels under the 18 May 1943 entry: ‘I have devoted exhaustive study

to *The Protocols of the Elders of Zion*. in the past the objection was always that they aren’t suited to present-day propaganda. In reading them now I find that we can use them very well. *The Protocols of the Elders of Zion* are as modern today as they were when they were published for the first time.’ The entry then continues as follows: ‘At noon I mentioned this to the Führer. He believed *The Protocols* were absolutely genuine ...’ After a long recital of the Führer’s fulminations against Jews and references to ‘the Jewish peril’, Goebbels quotes the Führer: ‘There is therefore no other recourse left for modern nations except to exterminate the Jew ... The nations that have been the first to see through the Jew and have been the first to fight him are going to take his place in the domination of the world.’ For Hitler and Goebbels, the strength of the *Protocols* - ‘The Lie That Wouldn’t Die’ - inspired them to ignore the writing on the wall and to prolong the war against the Jews and the predictable demise of the Third Reich.

The world will shortly mark the 60th anniversary of the liberation of Auschwitz, followed by VE Day - the military defeat of the Third Reich. This was also the time when we hoped and dreamed of ‘Never Again’. To the shame of the Free World we are facing today a serious rise of anti-Semitism with ugly manifestations in countries where hundreds of thousands of Jews were murdered during the Second World War.

Hadassa Ben-Itto - a fellow judge - deserves great credit and recognition for the masterly and passionate exposition of the murderous fraud that was perpetrated by the authors of *The Protocols of the Elders of Zion*. *The Lie That Wouldn’t Die*, the result of Hadassa Ben-Itto’s prodigious research and powerful prose, should serve as a potent weapon in the struggle against the revival of virulent anti-Semitism at the start of the twenty-first century.

Ed. Note: *The Protocols of the Elders of Zion* continue to remain a best-selling text in the Arab world with a new Syrian edition featuring at the Cairo International Book Fair. The *Protocols* also appeared on the State Information Service Web site affiliated with the Palestinian Authority until demands by the Anti-Defamation League led to its removal in May 2005.

Human Rights Enforcement in Israel

Asher Maoz

The five books of the Pentateuch (Torah) are divided into fifty four portions that are read on the Sabbath in synagogue. *Re'eh* ("See") and *Shoftim* ("Judges") are two consecutive portions. *Re'eh* ends with an injunction for all males to appear before God three times a year in a place of His choosing¹. *Shoftim* begins with the following injunction:

Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, throughout thy tribes: and they shall judge the people with just judgment².

The 12th century Torah commentator, Avraham Ibn Ezra, wrote:

"Although every commandment stands on its own, there seems to be a connection between the two portions... Although you must go three times to the place where the priests serve in the temple and there inquire about laws and justice, these will not be sufficient until you have judges at every gate and policemen... And the reason is that the judge will judge and the policeman will enforce the judgment upon the wrongdoer"³.

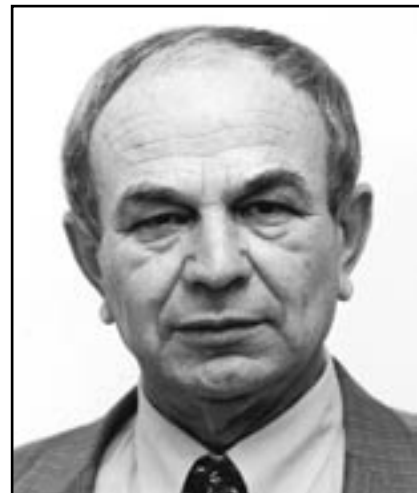
Rabbi Elazar Ben Shamua, a 2nd century sage, wrote:

"If there is no policeman there is no judge. Why? Because when the court rules against a litigant, if there is no policeman to enforce the judgment, as he leaves the courtroom the judge has no means to do anything to him; but if he hands him over to the policeman, the policeman will enforce the judgment."⁴

The status of human rights in Israel is problematic for several reasons. First, the question of whether a constitution exists at all

cannot be answered unequivocally. The Supreme Court declared a decade ago that Israel has a constitution with supreme normative status over ordinary legislation passed by the Knesset. This approach, highly controversial at the time, is today accepted by most legal scholars in Israel. Nevertheless, some still demur, even within the Supreme Court itself. A severe critic of this approach is the Chairman of the Constitution, Law, and Justice Committee of the Knesset, who, ironically, heads the committee that, as its name indicates, is charged with drafting a constitution for the country. The Knesset adopted several Basic Laws that are supposed to be part of Israel's constitution, but opponents stress that the Knesset does not enjoy constitutional power.

Second, the Basic Laws that address human rights, the most recent chapter of the constitution, adopted in 1992, covers the domain of human rights only partially. Initially, the Knesset intended to pass a complete bill of rights. But because of opposition by several members, primarily from religious parties, only those rights were adopted that did not raise any fears of



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¹ Deuteronomy 16:16.

² Deuteronomy 16:18.

³ Commentary on Deuteronomy 16:18.

⁴ Tanhuma, Shoftim, B.

infringing upon religious principles. These rights are captured in two Basic Laws: (a) Basic Law: Human Dignity and Liberty and (b) Basic Law: Freedom of Occupation. There is controversy as to the rights included in the former. The Basic Law refers explicitly to the right to property, the freedom to leave and enter the country, freedom from detention, and the right to privacy. But there is controversy that cuts across both judicial and academic circles as to whether the law also includes derivative rights, among them equality and freedom of expression. A bill for Basic Laws regarding freedom of expression and association, rights to legal redress, and social rights has been introduced to the Knesset but not yet adopted.

Still, these truncated Basic Laws in the area of human rights raised the constitution of the State of Israel to an adequate normative level and helped settle the argument about the very existence of a constitution. To a great extent, this was accomplished by virtue of the paragraph prohibiting derogation of the rights stated in the Basic Law "except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law."

The trenchant language of this paragraph, which subordinates to its provisions the ordinary legislation of the Knesset, forces the conclusion that this is indeed a part of Israel's constitution. Even more important, is the application paragraph: "Every branch of government is bound to respect the rights under this Basic Law." In other words, all three branches of government - legislative, executive, and judicial - are subject to the provisions of the Basic Laws and cannot violate them.

Even before the Basic Laws in the area of human rights were adopted, Israeli courts recognized the privileged status of human rights. There was a measure of judicial virtuosity in this. At its founding, the State of Israel adopted Mandatory Law, which was in force during the British rule over Palestine. This was not a democratic regime. Its main objective was not the advancement of human rights but the enforcement of public order and of government stability. Mandatory legislation was rich in ordinances that curtailed individual freedoms, but without mentioning any right to such freedoms. Thus, Mandatory Law contained draconic regulations limiting freedom of expression and freedom of the press, while right to freedom of expression received no statutory recognition. To a great extent this remains true in present-day Israeli law.

In this situation, human rights were created by the Supreme

Court *ex nihilo*. The Court followed this path from its inception. The State of Israel was born on the battlefield. Immediately after the Declaration of Independence of the State of Israel, when the Jewish community numbered only six hundred and fifty thousand people, it was attacked by the Arab armies attempting to destroy it. These were not optimal conditions for a tradition of human rights to take root, but nevertheless the Supreme Court facilitated just that.

In 1948, in the besieged city of Jerusalem, the Supreme Court heard the petition of an Arab resident suspected of spying and terrorist activities, against whom the Army Chief of Staff issued an administrative detention order⁵ based on the Defence (Emergency) Regulations, 1945 inherited from the British era. The Court ordered his release on the grounds that an advisory committee that was supposed to be formed according to statute, and before which the detainee could raise objections against the order, was not in existence at the time when the order was issued against him.

In another case brought before the Supreme Court in the following year,⁶ the Court ordered the release of an Arab administrative detainee because the Army Chief of Staff had not specified in his decree the location where the person was to be detained, but instead had ordered that "the detention place will be determined by the Police Commissioner or by the Chief Warden of the Israel Prison Authority."

These appear to be formalistic rulings. In the first case, the advisory committee was established before the court proceedings took place. Moreover, a military commander who issues an administrative detention order is not bound by the recommendations of the committee. The second case is even more surprising and the Court appears to have been caught in some technical scrupulousness.

Nevertheless, these ruling should not be treated as though they dealt with purely linguistic niceties. The justices did not conceal their disapproval of the draconic regulations. In the first case, the Court wrote: "The authorities are subject to the law in the same way as all the citizens of the state, and the rule of law is one of the firm foundations of the state. It would cause grievous injury

⁵ H.C.J. 7/48 *Al Carbutli v. Minister of Defence*, 2 P.D. [Piskei Din = Law Reports of the Supreme Court of Israel] 5.

⁶ H.C.J. 95/49 *Al'khuri v. The Chief of Staff*, 4 P.D. 34.

to both the citizenry and the state if the authorities used even temporarily the power granted them by the legislator and ignored completely the qualifications attached to the use of this power.” The Court then added: “There is no need to emphasize again the severity of the regulation that must be complied with as long as the state of emergency makes it necessary, and which under normal circumstances would be annulled for being unreasonable and contrary to the basic rights of the individual.” And finally: “It is true that the security of the state, which justifies the detention of a person, is no less important than the need to protect civil rights, but whenever both objectives can be achieved neither should be overlooked.”

The Court, therefore, objected to apparently marginal technical flaws to reach a significant objective that it deemed consistent with the protection of civil rights. One of the justices of the panel was to write later in his memoirs: “This ruling impressed both the Jewish and Arab populations. The Jewish population and the authorities learned that the rule of law is not merely a technical matter that can be ignored, especially in a state of emergency, and that the judicial branch was fearlessly protecting the rule of law. The Arab population, in view of the incitement by propagandists of the Supreme Arab Council who had claimed that they would be enslaved in the State of Israel, was surprised to find that the release order was issued despite the directive of the chief commander of the Israel Defence Forces.”⁷

If in these rulings the Court found a way to anchor the values it was pursuing in the language of the statutes under review, this was not the case in another matter that the Court was considering at the same time having to do with the decision to prohibit individuals from representing car owners at the Registry of Motor Vehicles.⁸ The decision was prompted by rumors that agents would bribe the clerks and receive preferential treatment over unrepresented vehicle owners. The brokers challenged the prohibition in court. The state argued for the rejection of the petition on the grounds that “there is no law granting the right to act in the registry’s offices as ‘professional agents,’ and there is no law imposing on the state any public obligation with regard to the petitioners.” The Court upheld the petition and stated that “it is a general rule that every person has a natural right to work or engage in a profession of his choosing as long as the work or profession are not prohibited by law... This right is not written in any book of law, but follows from every person’s natural right to seek sources of livelihood and to find remunerative employment.”

In yet another case brought before it,⁹ the Supreme Court had

to contend with the language of the law. The issue involved an article in two daily newspapers of the Communist Party, in which the government of Israel was accused of “pushing its way into the front ranks of the warmongers’ camp” and of “speculating in the blood of Israeli youth.” The basis of the attack was a spurious item that appeared in another newspaper whereby the State of Israel had informed the US that it would place at its disposal two hundred thousand soldiers in case of war between it and the Soviet Union. The news item and the article caused a scandal. In response, the Interior Minister decided to prohibit the publication of the papers for ten days and based his decision on the Mandatory Press Ordinance¹⁰, which grants the minister the authority to close a newspaper if “in his opinion, any matter appearing in [it] is likely to endanger the public peace.” The Court reversed the minister’s decision and declared: “The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards the basing of the State ‘on the foundations of freedom’ and the securing of freedom of conscience’, mean that Israel is a freedom-loving state.” The Court declared that the term “likely,” which was the condition of the minister’s exercise of his authority, was not met unless the odds of injury to the public peace as a result of the publication were on the order of “probable.” In this manner, the Court emptied the regulation of its original and natural meaning in order to protect freedom of expression.

These four examples are from the early days of the Supreme Court, when it was not considered an activist court as it is being labeled today. In each case the Court used different tactics, at times questionable, to enforce the protection of human rights.

In 1967, following the Six Day War, Israel found itself in control of large territories on the West Bank of the Jordan, the Gaza Strip and the Sinai peninsula. From the beginning, the Supreme Court, in cooperation with the Attorney General, decided to allow

⁷ Y. Olshan, *Din U’Dvarim* [Discussions] (Schocken: Jerusalem and Tel Aviv, 1978), 219

⁸ H.C. J. 1/49 *Bezherano v. Police Minister*, 2 P.D. 80.

⁹ H.C. J. 73/53 *Kol Ha’am v. Interior Minister*, 7 P.D. 871; 1 S.J. [Selected Judgments of the State of Israel - an authorized English Translation] 90.

¹⁰ Press Ordinance, 1933, *Laws of Palestine*, vol. 2, 1214.

citizens in the territories to appeal before the Court against actions taken by military commanders in the various districts. This was an unprecedented move in international law, which does not grant citizens in conquered territories the right to appeal to the courts of the conquering power. The move was controversial. Some claimed that it represented a *de facto* annexation of the territories. Others claimed that the percentage of favorable outcomes for petitioners from the territories was significantly lower than that of Israeli citizens. The criticism seems far-fetched, however. First, a large portion of petitions by residents of the territories deals with security issues in which judicial intervention is low to begin with compared to other areas. Second, it is local, not Israeli law that applies to the territories. International law even requires that the military commander be responsible for the public order and proper government of the area, and grants him the authority to take whatever measures are necessary to ensure the safety of his troops. To this end, he is entitled to take steps that are not allowed in a democratic state. Finally, it is a mistake to evaluate the success of the petitioning process by the percentage of petitions that are granted favorable rulings. The number of petitions by residents of the territories that have ended without a ruling is relatively high. This must be the result of the fact that following the filing of the petitions, the petitioners' request was granted before the court hearings were concluded. Moreover, it appears that the threat of petitioning the Supreme Court deters commanders in the field from taking measure that might trigger such petitions. Military and state attorneys handling the matter in the stages preceding the appeal to the Court have a similar effect. The fact that such a large number of residents from the territories petition the Court (in some years, they made up 13% of all petitions) points to the trust these residents place in the Supreme Court and to the fact that in many cases they obtain satisfaction.

Indeed, the Supreme Court stated that the military administration should limit itself "to measures absolutely vital to the preservation of the security and peace of the public, and to implement, in theory and practice, the approach that is not satisfied with the formal meaning of the rule of law but adopts our attitude to it in its essential meaning."¹¹

In another case, the Supreme Court ruled: "The regional commander and his subordinates are agents of the State of Israel, and wherever they may be carrying out their agency, they are required to behave according to the practice of their country, which is the practice of a lawful state. This Court will never accept the claim that in the exercise of his duty on behalf of the

state, anywhere, a military person or state employee can wash his hands of the norms upheld by the state or of the sway of its laws. An action or omission, which had it occurred in Israel would serve this Court as a reason to provide succor, will serve it to the same extent even if it occurred outside Israel."¹²

Among the many rulings of the Supreme Court relating to the territories, I mention only two landmark decisions. The first one dealt with the establishment of the settlement at Elon Moreh near Nablus on land that was partially expropriated from private owners.¹³ The decision to establish the settlement was taken by the Ministers Committee on Security Affairs following the recommendation of the Army Chief of Staff who declared that the region and the establishment of a settlement there were important for security reasons. The Chief of Staff reiterated this position in an affidavit filed with the Court. Despite it, the Court ruled that the decisive consideration in the politicians' decision to establish the settlement was not military, and therefore the settlement was not legal. The Court ruled that the expropriation was void and issued an order to remove the settlers and to dismantle their homes, an order that was carried out in full.

The second case occurred on the eve of the First Gulf War in 1991.¹⁴ The state distributed gas masks to the Israeli population. Gas masks were also distributed to Jewish settlers in the West Bank but not to the Palestinian population. The petitioner, a Palestinian resident of the West Bank, challenged the government's practice. The state was given two hours to respond. In its answer, the state pointed out that there was no danger of an Iraqi missile attack on the territories, and that the Jewish residents were given the gas masks because they commuted daily to Israel, where they worked, studied, and maintained family relations. After a brief deliberation, the Court ordered the Defence Minister to distribute gas masks to all residents of the area. In its ruling, the current President of the Supreme Court wrote: "When the cannons roar the muses are silent. But even when the cannon roar, the military commander must observe the law. The resilience of a society to stand up to its enemies rests on its recognition that it fights for values worth protecting. The rule of law is one such value. The military commander's obligation to treat equitably all the citizens of the region does not expire when the security tensions are on the

¹¹ H.C.J. 619/78 "*Al Talia*" v. *Defence Minister*, 33(3) P.D. 505, 511-512.

¹² H.C.J. 320/80 *Kawasme v. Defence Minister*, 35(3) P.D. 113, 127.

¹³ H.C.J. 390/79 *Dwikat v. Government of Israel*, 34(1) P.D. 1.

¹⁴ H.C.J. 168/91 *Murkus vs. Minister of Defence*, 45(1) P.D. 467.

rise; it is a continual obligation that applies at all times.”

The present Palestinian uprising (*intifada*) has also been attended by judicial appeals that took place simultaneously with operative bellicose activities. Petitions were filed with respect to the blockade of terrorists barricaded inside the Church of the Nativity in Bethlehem;¹⁵ dealing with the medical needs of residents of the territories during fighting; against the burial of the victims of the battle in the Jennin Refugee Camp, arguing that the IDF might cover up the behaviour of its soldiers during Operation Defensive Shield;¹⁶ asking to order the IDF to refrain from shelling a refugee camp in which terrorists were taking cover, where the residents of the camp served the terrorists as a living shield and refused the IDF demand to evacuate temporarily in order to enable the Israeli forces to fight the terrorists.¹⁷ Subsequently, the Court heard a petition to allow the Physicians for Human Rights organization to send a delegation on its behalf to areas of the Gaza Strip while the IDF was fighting there against the terrorist infrastructure.¹⁸ All the petitions were handled with dispatch, and some were heard on the day of their filing. Although the petitions were generally rejected, in some cases, arrangements were made during the hearings that answered some or all the demands of the petitioners. The Court took advantage of the discussion of a petitions alleging that the IDF fired at medical teams in ambulances and hospitals to emphasize that:

“We see fit to emphasize that our combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill, and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances [reference was made here to cases where explosives were transported via ambulances and wanted terrorists found shelter in hospitals] has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the state. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in the light of the values of the State of Israel as a Jewish and democratic state.

The IDF shall once again instruct the combat forces, down to the level of the lone soldier in the field, of this commitment by our forces based on law and morality - and, according to the state, even on utilitarian considerations - through concrete instructions which will prevent, to the extent possible, and even in severe situations, incidents which are inconsistent with the rules of humanitarian law.”¹⁹

At this very time there is a petition pending before the Supreme

Court to stop the targeted killings that Israel carries against terrorists claiming that it is the only means of preventing large-scale suicide attacks.²⁰

In all these petitions the Supreme Court acts as a High Court of Justice with prerogative authorities and powers to oversee government agencies and to issue injunctions against the state. In the United Kingdom this authority is placed with the Queens Bench Division, which is a court of first instance. The British Mandatory Administration wanted to prevent District Courts, staffed with local judges, from ruling on petitions against the administration. Therefore, they merged it with the Supreme Court where there was a majority of English judges. This authority was retained by Israeli legislator, which turned out to be of benefit, because combining this authority with the highest instance in the country guaranteed judicial boldness and maximum objectivity in its rulings. This contributed greatly to the rule of law and the protection of human rights in Israel.

I have chosen to focus on the intervention of the Supreme Court, acting as a High Court of Justice, in petitions by residents of the territories involving security issues. In this area, the Israeli Supreme Court has gone farther in intervening in operative military activity than any court in the world. Still, these topics represent a small portion of the Court’s activity. Most of the petitions that come before the High Court of Justice deal with the petitions of individuals who challenge a government authority that denied their rights or treated them inequitably. In hearing these petitions, the Supreme Court established its position as “the safest and most objective house a citizen can have in its conflict with the authorities.”²¹ It has been said about the High Court of Justice “that its highest imperative is prevention of wrong and serving the cause of justice.”²² The authority of the High Court of

¹⁵ H.C.J. 3451/02 *Almandi vs. Minister of Defence*, 56(3) P.D. 30.

¹⁶ H.C.J. 3114/02 *Barake v. Minister of Defence*, 56(3) P.D. 11.

¹⁷ H.C.J. 2997/02 *Adalah - The Legal Center for Arab Minority Rights in Israel v. IDF Commander of Judea and Samaria*, 56(3) P.D. 6.

¹⁸ H.C.J. 2117/02 *Physicians for Human Rights v. IDF Commander in Gaza Strip*, 56(3) P.D. 39.

¹⁹ H.C.J. 2936/02 *Physicians For Human Rights v. The Commander of I.D.F. in the West Bank*, 56(3) P.D. 3.

²⁰ H.C.J. 769/02 *Public Committee Against Torture v. Government of Israel*.

²¹ H.C.J. 287/69 *Miron v. Labor Minister*, 24(1) P.D. 337, 362, per J. Berinson.

²² *Ibid.*

Justice, as defined in Basic Law: Judicature,²³ includes:

15. (c) The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court or tribunal.

(d) Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent -

- (1) to make orders for the release of persons unlawfully detained or imprisoned.
- (2) to order state and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting;
- (3) to order courts, tribunal and bodies and persons having judicial or quasi-judicial powers under law, other than courts dealt with by this Law and other than religious tribunals, to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given;
- (4) to order religious tribunals to hear a particular matter within their jurisdiction or to refrain from hearing or continue hearing a particular matter not within their jurisdiction, provided that the Court shall not entertain an application under this paragraph if the applicant did not raise the question of jurisdiction at the earliest opportunity; and if he had no measurable opportunity to raise the question of jurisdiction until a decision had been given by a religious tribunal, the Court may quash a proceeding taken or a decision given by the religious tribunal, without authority.

Over the years, the Supreme Court expanded the domain of its intervention to an unprecedented extent, and there is almost no government activity that is free from its oversight. The Court opened its doors wide and accepted petitions dealing with the rule of law and the legality of administration even if the petitioner had no personal stake in the substance of the petition. Indeed, there have been frequent appeals to the High Court of Justice. A study carried out a few years ago found that the number of petitions in Israel is ten times that in the UK despite the fact that the Israeli population is 8.5% that of the UK.

By its nature, the largest contributor to the protection of human rights is the Supreme Court in its authority as the High Court of Justice. But the lower instances and the Supreme Court sitting as



Passover Haggadah published in 1846 in Bombay, India

an appellate court have also made their mark. This is especially true in criminal proceedings dealing directly with the basic rights of suspects and the need to balance these with the rights of the victims of crime. The first criminal appeal that came before the Supreme Court, in the midst of the War of Independence, is an indication of how the courts fulfill this function.²⁴ In this case, a British citizen and resident of Jerusalem was convicted of publicizing news that could aid the enemy in harming state security. It had been proven that he broadcast to British citizens residing in areas under the control of Arab forces about the fact that an Arab shelling of the Jewish sector landed only a few meters from the Electric Company's power station and that the station was continuing to operate. The broadcast was made with equipment he had installed in his home to maintain contact with

²³ S.H., 1984, 78; 38 L.S.I. [Laws of the State of Israel = Authorized English translation of Israeli legislation].

²⁴ Cr. A. 1/48 *Sylvester v. Attorney General*, 1 P.D. 5.

members of the British community in divided Jerusalem. His appeal was accepted and he was acquitted. President Zmora noted that "the criminal procedure is the Magna Carta of the criminal." The Court found that it was not proven that the accused intended to harm the state. The Court stressed: "The fact that the information he broadcast could have aided the enemy is no proof that the broadcast was in fact carried out for this purpose." The acquittal was granted despite the court's awareness that "British officers serve as advisors and commanders in the Arab Legion that is shelling Jerusalem." Indeed, during the arguments of the State Prosecutor in favor of the conviction, a shell fired by the Arab Legion exploded in the yard of the courthouse.

Although the courts and the Supreme Court above all made important contributions to the protection of human rights,²⁵ they were operating under a severe handicap. In the absence of a constitution and an entrenched bill of rights, any explicit law had the potential of infringing these rights. While the courts often narrowed the scope of such laws by interpreting them in such a way as to make them compatible with the protection of human rights, their ability to safeguard these rights stops short before an explicit and unambiguous law.²⁶ Much improvement occurred in this respect with the adoption of the Basic Laws, which declared these to be constitutional rights and restricted the ability of the Knesset to curtail them. The courts extended the scope of these rights far beyond what is mandated by the Basic Laws. Moreover, despite the fact that the Basic Law: Human Dignity and Liberty excluded existing laws from the requirements of the Basic Law, the Supreme Court ruled that these laws must also be interpreted in the light of the Basic Law.

Another institution that has contributed greatly to enforcing human rights and guaranteeing the rule of law is the office of the Attorney General, which has greater sway in Israel than similar offices almost anywhere in the world. The Attorney General combines several functions: he is head of the state prosecution; represents the state in court; advises the government and government agencies in legal matters and helps them draft bills. Although it is not stated explicitly by the law, it has been established that his interpretation in legal matters is the official interpretation, and it obligates government agencies as long as a court has not ruled otherwise. Moreover, it has been established that the Attorney General need not restrict himself in his opinions to purely legal matters and is entitled to address ethical issues and issues dealing with proper government and administrative norms. The Attorney General voices his opinion on the protection of the

rule of law and of human rights. His power rests on his discretion to decide whether or not to defend the state's position in court. He declines to do so whenever he deems an action by the state to be illegal or detrimental to public policy. His appointment is not political and his decisions are not subordinate to the government. Lately his status increased further, after the government adopted the recommendation of a public committee headed by a retired President of the Supreme Court, Meir Shamgar, which established the duration of his appointment and made it independent of the

²⁵ It is common among constitutional lawyers in Israel to compare decisions of the Supreme Court of Israel with those of the US Supreme Court in the area of human rights. In this case, the *Kol Ha'am* decision should be compared with the decision in *Dennis v. U.S.*, 341 U.S. 494 (1951), handed down two years earlier, where the US Supreme Court upheld the conviction of twelve leaders of the American Communist Party under the Smith Act. Reacting to this decision, Emerson noted that "most observers would have had a difficult time to find a 'clear and present danger' of overthrow of the government arising from the teachings of Marxism-Leninism by the Communist Party," T.I. Emerson, *The System of Freedom of Expression* (1970) 115. Another commentator was of the view that the Court virtually sanctioned the suppression of political speech which "merely embarrassed the government or was unpalatable to the majority of the population," "Note: Development in the Law - The National Security Interest and Civil Liberties," 85 *Harv L. Rev.* 1130, 1136 (1972). The *Al Carbutliand the Al'khuri the Sylvester* cases, as well as decisions of the Israeli Supreme Court during the Palestinian uprising, should be evaluated against the confinement of all Americans of Japanese ancestry following the Japanese attack on Pearl Harbor during World War II without any hearing or right of appeal; Cf. A.M. Dershowitz, "Preventive Detention of Citizens During a National Emergency - A Comparison between Israel and the United States" 1 *I.Y.H.R.* 295, 307-9.

²⁶ Cf. C.A. 450/70 *Rogozinnsky v. State of Israel*, 26(1) P.D. 129, 135. In several rulings, the Supreme Court raised the possibility of voiding a law and even a provision in the constitution that contradict basic principles of the system, even if these basic principles were not anchored in constitution or in a guaranteed Basic Law. The Court raised this possibility following a ruling of the German constitutional court (BV ERF GE 3. S225FF and Verf G E 5/142). In one case, one of the justices followed this method and found reason to disqualify an electoral list that denied the existence of the State of Israel from participating in the Knesset elections even in the absence of legal authorization for the disqualification (Elections App. 1/65 *Yaakov Yeredor v. Chairman of the Central Election Commission for the Sixth Knesset*, 19(3) P.D. 365, 389). In another case, Justice Barak rejected such a possibility as deviating "from our customary approach and from our legal-political tradition," an approach molded after the English jurisprudence (H.C. J. 142/89 *La'or Movement v. Speaker of the Knesset*, 44(3) P.D. 529, 554).

wishes of the government. This outcome was accomplished as follows: although the government appoints the Attorney General, it must choose from among candidates approved by a public commission headed by a retired justice of the Supreme Court. Moreover, the government cannot remove the Attorney General from his position without the approval of the commission.

In this context, the police also plays an important role in the protection of human rights, as it follows from its functions defined in the Police Ordinance.²⁷ The police “shall be empowered for the prevention and detection of offences, the apprehension and prosecution of offenders, the safe custody of prisoners and the maintenance of public order and the safety of person and property.” Moreover, the importance of the police lies also in the execution of court orders and of the Attorney General’s injunctions.

Yet another institution of importance in the protection of the rule of law and the enforcement of human rights is that of the State Comptroller, appointed by the Knesset and charged with reviewing the business, public, and legal operation of the executive branch of government.²⁸ The State Comptroller also serves as the Public Ombudsman. In this capacity he receives grievances from individuals who suffered some injury from an agency that is charged with exceeding its authority, improper or rigid conduct, or glaring injustice. The Comptroller submits the findings of his investigation to the plaintiff and the respondent. He may indicate that there is a need to redress the wrongs his investigation has uncovered, and specify the method and timeframe of the remedy. The Comptroller has special authority with regard to an employee persecuted by his supervisor for having blown the whistle on a corrupt situation, and can issue any injunction in the employee’s defence, including voiding his dismissal, ordering his transfer to another position and granting reparation payments.

A separate institution has been established to handle the grievances of soldiers. The Soldiers Comptroller establishes whether the grievance is justified. If so, he may indicate that there is a need to redress the wrongs his investigation has uncovered, and specify the method of the remedy. The Comptroller receives a report regarding the steps taken in response to his findings from a special officer appointed by the Chief of Staff for this purpose.

One other institution that has a function in protecting the rule of law and human rights is the Commission of Inquiry, established by the government or by the Knesset Committee for Government Oversight to discuss “a matter of vital public importance at the time and that requires clarification.”²⁹ Members of the commission are appointed by the President of the Supreme

Court and the commission is headed by a judge or a retired judge. The authority of the commission is that of a court. At the end of its work it reports on the findings of its investigation and is entitled to make recommendations. One such commission, headed by President Kahan, investigated the massacre carried out by Christian phalangists in the Sabra and Shatila refugee camps in Lebanon in 1982. The Commission found that no Israeli official had any direct responsibility for the massacre. Nevertheless, it also found that several officials should have foreseen such a possibility and taken preventive steps. The Commission recommended action against some of them. Among others, it recommended the removal of then Defence Minister Ariel Sharon from his post, a recommendation that was carried out.

Recently, the commission charged to investigate the killing of Arab citizens by police in the course of severe riots that took place at the beginning of the current *intifada* handed in its report. The commission, headed by the Deputy President of the Supreme Court, Justice Orr, found flaws in the conduct of the police and recommended changing police operating procedures to prevent the repetition of such occurrences. It also recommended taking steps to promote the equality of the Arab population in the country. Additionally, the commission made personal recommendations against several police officers and the Police Minister.

I noted at the outset that the firm status of human rights in the country developed despite the objectively unfavorable conditions that prevailed. Two additional points are noteworthy. First, Israel is located in a region that does not excel in the protection of human rights and the rule of law. Second, most of the immigrants arrived in Israel from countries where these rights were largely ignored. These facts, however, did not affect the attitude of the State to human rights. One of the possible explanations could be that the principles of the rule of law and respect for the rights of the individual are basic norms in Judaism. These norms were inculcated in the members of Jewish communities in the Diaspora from where they were brought to Israel.

²⁷ Police Ordinance (New Version), 1971, The Laws of the State of Israel (New Version), 1971, 158; *L.S.I. [N.V.]*, vol 2, 158.

²⁸ Basic Law: The State Comptroller *S.H.*, 1985, 30.

²⁹ Commissions of Inquiry Law, 1968, *S.H.* 1968, 28, 23 *LSI* 32.

“Who is a Jew” on the Proper Role of the Judiciary in a Democratic State

Gidon Sapir

The Law of Return, which was enacted in 1950, grants every Jew, as such, the right to immigrate to Israel; this law combined with the Nationality Law - 1952, which grants every *oleh* (immigrant) the right to be naturalized in Israel, enables every Jew to become a citizen of the state. The Population Registry Law - 1965 mandates the registration of a number of details in relation to each citizen of the state, including nationality and religion. Since the enactment of the Law of Return and the Population Registry Law, numerous disputes have arisen concerning the question: Who is a Jew for the purposes of these statutes. The Supreme Court of Israel has been required to consider these issues on a number of occasions but they have yet to be finally and permanently settled. The history of the dispute may be divided into two periods - prior and post 1970. Until 1970, the Law of Return and the Population Registry Law did not provide any definition for the term ‘Jew’, leaving open a wide variety of possible interpretations. In 1970 both statutes were amended. As part of the amendment, a definition of the term ‘Jew’ was inserted into the Law of Return, namely, the child of a Jewish mother or a convert, while the Population Registry Law was made to refer to the Law of Return. From that point on the question ceased to be: Who is a Jew, and instead became: Who is a convert? the legislature having failed to establish which conversion satisfied the requirements of the law. The decision to abstain from providing a definition, or a precise definition, led to the re-ignition of the dispute and ultimately to its transfer to the courts for decision.

In this article I shall consider the dispute concerning who is a Jew for the purposes of the Law of Return and the Nationality

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Note: Following this article being sent to press, the Supreme Court of Israel delivered a decision in the *Toshbeim* case which has important implications for the matters discussed in this article. That decision is not analysed in this article.

Law. I shall not deal with this question on the merits in order to support one of the substantive positions or to present my own view. Instead, I shall seek to focus on the proper role of the court in settling this issue, as an illustration of the more

general circumstances in which the political system fails to reach full agreement on a question which has manifestly ideological implications eventually forcing it to the courts for determination. In the first section I shall briefly describe four key cases in which the court dealt with this issue and refer to the chronological connection between them. In the second section I shall describe and critique the arguments upon which the majority judges in the first three cases based their opinions. In the third section I shall present three alternatives which the court could have chosen, reject two and recommend the adoption of the third.

Background

As mentioned, I shall review four key cases in which the Supreme Court of Israel dealt with the dispute concerning who is a Jew. The first and most prominent - both from the point of view of public awareness and the political and legislative reaction to which it gave rise and from the point of view of the scope and depth of the discussion which the judges of the Supreme Court devoted to its resolution - is the *Shalit* case. The *Shalit* case



belongs to the first period - prior to 1970 - and it was the decision of the court there that led to the amendment of the Law of Return and the Population Registry Law and the transition to the second period. The other three cases which I shall consider, namely, the *Pessaro case*, the *Na'amat case* and the *Toshtbayim case* belong to the second period in which the question became more limited and focused on who is a convert.

In the first case, the Shalit family sparked the controversy. Benjamin Shalit, a naval officer, married Anne, a non-Jewish Scottish woman whom he met during the course of his studies in Edinburgh. Anne joined her husband in Israel in 1960 and received a resident's permit. In her registration documents she declared herself to be 'without religion' and a British national. In 1964 the couple had a son and in 1967 a daughter. Shalit applied to register the children in accordance with the provisions of the Population Registry Law, entering that they were 'without religion' in the rubric for religion, and that they were 'Jews' in the nationality rubric. The Registry Official rejected the latter entry and Shalit petitioned the High Court of Justice arguing that a distinction had to be drawn between religion and nationality and that a person could be a Jewish national even if he was not of the Jewish faith. In his opinion, the test which ought to have been adopted regarding Jewish nationality was one of identification with Israeli-Jewish culture and values; a test which he claimed was met by his children. He argued that this test should contain a subjective and objective element: subjective in accordance with the feelings and sensitivities of the person, and objective in accordance with his links to the Jewish national group.

The Supreme Court, sitting with an unprecedented bench of nine justices, unanimously asked the government to remove the nationality rubric from the register of residents, in order to obviate the need to decide the question which was, in the words of then President of the Court, Justice Agranat, ideological in nature and not legal, and a matter of deep controversy among different sections of the Israeli public. The government did not meet this request and the court was therefore forced to decide, by a majority of 5:4, to uphold the petition and order the registration of the children as possessing Jewish nationality.

The court's decision gave rise to public outcry and a threat on the part of the National Religious Party to withdraw from the coalition thereby causing the government to fall. As a result of the pressure, the Law of Return and the Population Registry Law were amended. A new section was enacted which defined a Jew, for the

purpose of these Acts, as a person born of a Jewish woman or one who had converted and was not a member of another faith. From that point onwards the question was no longer who was a Jew but who was a convert, as the legislature did not establish which form of conversion would satisfy the requirements of the law.

Alian Pessaro, a Christian from Brasil, arrived in Israel as a tourist. In Israel she met a Jew named Goldstein and they married in a consular ceremony. Prior to the marriage, Pessaro underwent conversion conducted by the Reform movement in Israel. Her application to receive a certificate as a new immigrant and register as a Jew was rejected and she petitioned the Supreme Court. *Prima facie*, Ms. Pessaro was supported by an express ruling of the Supreme Court in a previous case dealing with the status of a reform conversion for the purpose of the Population Registry Law, namely the *Shas case*. In that case, the Supreme Court held that "notification [of conversion] accompanied by a document testifying to conversion in any Jewish community abroad, is sufficient to compel the registration of a person as a Jew. For this purpose it is irrelevant if the community is Orthodox, Conservative or Reform." However, the Minister of the Interior sought to distinguish Pessaro's issue from that dealt with in the *Shas case*. He argued that the *Shas* ruling was limited to conversions carried out abroad. In contrast, conversions carried out in Israel, were subject to the provisions of the Ethnic Community (Conversion) Ordinance which requires authorization by the Chief Rabbi in order to validate a conversion. The court rejected this contention by a majority of 6:1 and explained that the Ethnic Community (Conversion) Ordinance deals with issues of personal status only and has no bearing on the Population Registry Law.

Consequently, the court held that the result ought *prima facie* to have been to uphold the petition, in other words, to order the petitioner to be registered as a Jew and granted an immigration certificate. However, the court did not make such an order. President Barak held:

"Our decision today is limited in scope. All that we hold is the non applicability of the Ethnic Community (Conversion) Ordinance in relation to the recognition of conversion under the Law of Return. We do not hold that every reform conversion is recognized for the purposes of the Law of Return and the Population Registry Law. Accordingly, we do not order the respondents to regard the petitioner as a Jew for the purpose of the Law of Return, and we do not order her to be registered as a Jewess in the Registry."

The court's decision is astonishing. Ms. Pessaro had applied

to the Ministry of the Interior for recognition of the conversion which she had undergone, and the Ministry of the Interior had rejected her application on the ground that the conversion did not meet the requirements of the Conversion Law. Upon rejecting the arguments put forward by the Ministry of the Interior the appropriate course of action would have been to accord the petitioner the relief sought. Indeed the court itself made it clear in the reasons given for this surprising decision that it refrained from making an operative decision because of its desire to allow the Knesset the opportunity to set the appropriate standard for recognition of conversions for the purpose of the Law of Return. These reasons are perceived by various commentators as a rare example of judicial restraint. At the same time, the court took the trouble to make it clear that it was only temporarily refraining from making a decision in a step contingent upon a clear future determination of the issue by the legislature. In the words of Justice Barak:

“We are not determining ‘what is’ (the precise essence of conversion in Israel). As we have pointed out, ‘what is’ is likely to be determined expressly and in detail by the legislature. At the same time - so long as the Knesset has not had its say - we do not live in a legal vacuum. The solution to the problem of ‘what is’ is found in the Law of Return which defines who is a Jew. If the legislature will not add to this provision, there will be no choice but to judicially decide this matter in accordance with the existing definition.”

In consequence of this judgment and the pressure of the ultimatum posed by the court, a committee was appointed under the chairmanship of Yaakov Ne’eman. The committee, which comprised representatives of the Orthodox community as well as representatives of the two “liberal” Conservative and Reform streams, formulated a compromise under which an institute would be established which would teach people prior to conversion as well as actually perform conversions. According to the proposal, representatives of all three streams would participate in the teaching process prior to conversion; however, only Orthodox rabbis would perform actual conversions. Towards the end of the committee meetings, the representatives of the liberal movements made their agreement to sign the conclusions of the committee dependent upon a public declaration of support for these conclusions by the Chief Rabbis. The Chief Rabbis refused to make such a declaration, and in reaction, the representatives of the liberal movements refused to sign the committee’s conclusions. In the ensuing circumstances, the political bodies which had backed

the efforts at compromise and dialogue found it difficult to obtain the necessary majority in the Knesset to enact the Ne’eman recommendations as law. MK Alex Lubitzky, of the Party of the Third Way, made a final effort to allow the Knesset to have its say and tabled the committee’s recommendations as a Motion on the Agenda. The Motion achieved the support of a significant majority of MKs, however, this could not of course replace due legislation - which proved impossible. Members of the liberal movements ceased regarding themselves as committed to a compromise process outside the court and accordingly reinstituted proceedings in court in an effort to achieve their goals.

The *Na’amat* case partially continued the debate which had ended in the *Pessaro* case. This time the court sat with a bench of 11 judges and heard 5 actions: 4 petitions and an appeal against the decision of the District Court. Two of the petitions dealt with an application for recognition of being Jewish, both for the purposes of the Law of Return and for the purposes of the Population Registry Law, while the other two petitions and the appeal dealt with recognition for the purposes of the Population Registry Law alone. After long delays the court decided to separate the hearings of the two groups, decide the cases dealing with the Population Registry Law only and deal with the question of who is a convert for the purpose of the Law of Return at a later stage. The three actions dealt with conversions which had been carried out in Israel by Conservative or Reform rabbis, or with conversions carried out abroad, where the converts were not members of the community in which the conversion had been performed. With regard to conversions carried out in Israel, the State reiterated the stance it had taken in the *Pessaro* case. The State further sought to distinguish conversions which had been carried out abroad from conversions in respect of which a ruling had been made in the *Shas* case, on the ground that the *Shas* ruling related exclusively to foreign conversions, when the convert had joined the community which eventually carried out the conversion, but it did not relate to an Israeli citizen who had travelled abroad and undergone conversion without any prior desire to join the Jewish community there. By a majority of 10:1 the court rejected the State’s argument and ordered the converts to be registered as Jews. As noted, the court limited its decision to the Population Registry Law only and left the question of who is a convert for the purposes of the Law of Return to be decided in the future.

In the *Toshbeim* case, the most recent stop in the long saga, but as we shall see not the final stop, the court dealt with the three petitions which it had previously adjourned in the *Na’amat*

case. As noted, in these cases the question was not only who is a convert for the purpose of the Population Registry Law but also who is a Jew for the purpose of the Law of Return. The moment of truth on this significant issue was drawing near.

Prima facie, the dispute turned on the status of Conservative and Reform conversions for the purpose of the Law of Return. However, shortly before the hearing on the two petitions counsel for the State put forward a new, fundamental argument, which sought to divert the focus of the debate from the question of the validity of **liberal** conversions. The converts who were the subject of the two petitions had undergone conversions processes after a period of living in Israel as non Jews. The State now argued that the converts' prior stay in Israel negated their right to obtain the status of an *oleh* (immigrant) under the Law of Return, irrespective of the matter of the validity of the conversion process which they had undergone. It was argued that the Law of Return concerned immigration to Israel. It applied only to Jews living outside Israel who sought to immigrate to it, or Jews who had come to Israel and lived there as Jews, but it did not apply at all to persons who arrived in Israel and while living there underwent a conversion process (in Israel or abroad). Under this view, the purpose of the Law of Return was to gather the exiles and bring back Jews to their homeland. It was not an immigration statute intended to regulate the status of non Jews lawfully or unlawfully living in Israel. Counsel for the State also pointed to the fact that Israel had become a significant immigration destination for non Jews, and argued that allowing citizenship on the basis of conversion for persons entering Israel prior to converting would lead to the State being flooded with immigrants whose only goal was to obtain Israeli nationality - an objective extraneous to the Law of Return and contrary to the public interest and welfare. According to the State's reasoning the character of the conversion was unimportant and indeed counsel for the State explained that if this position was accepted the Law of Return would not apply even to a person undergoing an Orthodox conversion in Israel.

In my opinion, the State's choice of this new line of argument was the outcome of a partnership between two bodies and two power centres, which generally held opposing interests, but interestingly had come together at this particular point in time. On one side stood the Minister of the Interior, Avraham Poraz, who was responsible for implementing the Law of Return and the Population Registry Law. After many years in which the Ministry of the Interior was under the control of the religious parties, at first the National Religious Party and later Shas, control of the

Ministry had passed into the hand of the Shinui (Change) Party which saw its mission as the struggle against religion and the dominant role of religion in determining the identity and nature of the State. The Shinui Party also represented a capitalist viewpoint and was perceived by many as representing the wealthy secular community. From the point of view of the minister representing this party, giving an unconditional right of immigration to labor migrants was an evil which had to be prevented, particularly when it vested as a result of a religious ceremony. The proposal to interpret the Law of Return restrictively, in such a way as to prevent persons living in the country prior to converting from obtaining nationality by virtue of return was *prima facie* compatible with the policies of the Shinui Party. However, the Minister of the Interior would not have succeeded in formulating a policy of the type described above were it not for the fact that this policy was also compatible with the interests of the Orthodox power centres in Israeli politics. As explained above, in the *Na'amat case*, the Supreme Court compelled the State to register persons who had undergone liberal conversions, whether in Israel or abroad, as Jews. I also explained that the definition of a Jew in the Population Registry Law is identical to that found in the Law of Return. In view of this fact, it is difficult to see how the court could distinguish between the two laws and provide a different answer to the question who is a convert in relation to each of them. For this and other reasons, on the eve of the hearing of the *Toshbeim case* it appeared that the victory achieved by the liberal movements, which to that date had only occurred in the context of the Population Registry Law, was about to expand to the Law of Return. In my opinion, it is against this background that one must understand the willingness of the Orthodox elements to adopt the stance presented by the State. Adoption of the position taken by the State compelled the Orthodox camp to agree to a significant waiver, as to the extent that the convert lived in Israel prior to converting, not only would the liberal conversions not be valid for the purpose of the Law of Return but Orthodox conversions too would be subject to the same fate. Nonetheless, had the position taken by the State been upheld it would have postponed, at least for a while, a decision on the status of liberal conversions carried out abroad, a decision feared by the Orthodox camp in view of the earlier rulings of the court.

According to the explanation offered above, the position taken by the State in the *Toshbeim case* was the outcome of a somewhat strange collaboration between two camps which were usually bitter opponents. However, the court, by a majority of 7:4, refused

to accept the State's argument. President Barak, who wrote the principal judgment in the name of the majority, explained as follows:

"'Aliya' [immigration] signifies the settling of a Jew in Israel. For this purpose it is unimportant when the person who settled in Israel became a Jew - prior to his living in Israel or thereafter.... It would be wrongful discrimination if one person was regarded as an *oleh* because he had converted and thereafter settled in Israel, and another person asking to settle in Israel would not be regarded as an *oleh* merely because his conversion occurred after he had settled in Israel. Both converts joined the Jewish people and settled in the State of Israel; both are sons returning to their homeland. The difference between the two converts found in the 'timetable' of conversion and immigration is not relevant to the purpose of the Law of Return, and the Law of Return ought not to be interpreted in such a manner as to lead to wrongful discrimination."

Prima facie, upon dismissal of the State's argument against the petitioners' right to an immigration certificate under the Law of Return, the way was open for the court to decide the case on the merits. However, this time too, as in the *Pessaro case*, the court refrained from making a decision and again asked the State to present its substantive position regarding the nature of the conversion required as a condition for turning a person into a Jew who would thereupon become entitled to the status of an *oleh* under the Law of Return. Thus, the big question remains open, albeit the time for a decision is coming ever closer.

3. The rationale of the majority judges in the *Shalit* and *Na'amat* cases and the weaknesses of that reasoning

In both the *Shalit* and *Na'amat* cases, the court favoured the position of the petitioners regarding the definition of who is a Jew for the purpose of the Register. However, in both cases, the majority judges argued that their decision was not in the nature of a stand on the substantive dispute regarding who is a Jew but rather one which was neutral. The reasoning of the majority judges in both cases was based on a rationale which had first been developed in a case dealing with a dispute concerning yet another element in the Population Registry, namely, the rubric of "family status". In order to understand the rationale of the court in the two cases we must first describe the arguments of the court in that case. There - Mrs. Vonk - a Christian permanent resident of Israel - married an Israeli Jew - Mr. Shlesinger - in a civil ceremony in Cyprus. Equipped with the Cypriot marriage certificate which

had been given to her by the Cypriot District Officer, Mrs. Vonk Shlesinger applied to be entered in the Register as married. The Minister of the Interior rejected the application on the ground that according to the laws of personal status of the parties they were not a married couple. A petition was submitted to the Supreme Court against this decision. The court upheld the petition.

Justice Sussman analysed the provisions of the Population Registry Law - 1949. With regard to the functions of the Registry Official under the Population Registry Ordinance he held: "The function of the Registry Official, under the said Ordinance, is nothing more than to collect statistical material for the purpose of managing the residents ledger, and he has not been granted any judicial power whatsoever." Regarding the significance of the Register under the Population Registry Ordinance, Justice Sussman wrote that "The said Ordinance did not accord the entry in the Population Register any evidentiary or probative force. The purpose of the Ordinance is... to collect statistical material. This material may be true and may be untrue; no one guarantees its veracity." Justice Sussman added: "By recording the family status of a resident, it is not the job of the Registry Official to give his opinion on divorce laws. There is a presumption that the legislature has not imposed an obligation upon a public official that he is incapable of meeting. It is sufficient for the official, in order to fulfil his functions and record the marital status, if evidence is adduced before the official of the resident having undergone a marriage ceremony. The question of the validity of the ceremony has a variety of aspects on occasion and an examination of its validity exceeds the boundaries of the Population Registry."

Careful scrutiny of Justice's Sussman's reasoning reveals that in fact it is two fold in nature. First, the entry regarding marriage does not comprise *prima facie* evidence of its truth, and second the official is not given power to decide its validity. The two strands came together. Had the matter possessed significant practical relevance, it would not have been possible to pass over it so easily and hold that the official was not entitled to decide the issue of validity. If the official was not entitled to decide, the court was required to do so, by way of interpreting the law. But the court refrained from deciding merely by describing the issue as insignificant.

In the *Shalit* and *Na'amat* cases, the majority judges used precisely the same reasoning in an effort to detract from the importance of the Population Registry. If the rubric of nationality in the Registry held no importance, a decision in favour of the petitioners in connection with the Register was not fundamental to

the issue of who is a Jew and therefore did not deviate from being a neutral decision. However, in my opinion, the position which favours severing Population Registry laws from substantive laws, by presenting the Registry as valueless, is fundamentally flawed in a number of ways. I shall mention just two of these flaws:

1. The Registry is a symbol of the State and therefore an entry in the Register possesses significance.
2. Even if the Register itself is unimportant, the definition which is adopted by the court may be used in the future in other areas which do possess substantive significance. I suspect that this underlay the court's decision in the *Na'amat* case to arbitrarily sever the decisions on the Population Registry Law and the Law of Return, notwithstanding that the legislature had clarified that the definition of a Jew in both laws is identical.

A. The Register as a symbol

The majority judges in the *Shalit* and *Na'amat* cases argued that the Register itself is unimportant. However, the minority judges had already rejected this argument in the *Shalit* case. Thus, for example, Justice Landau asked:

"If all this is a trivial matter, why does the petitioner fight with such stubbornness for his petition, and why does the hearing of this petition give rise to such broad interest among all sectors of the public, both in Israel and in the Diaspora?"

President Agranat spoke in the same vein, saying:

"Such registration, when authorized, will possess not merely technical value, but will also be politically and socially important; this is proven both by the great debate held by Knesset members on this issue... and by the great interest generated by this case among the wider public."

Thirty years later, in the *Na'amat* case, Justice Engelard reiterated the puzzlement of Justices Landau and Agranat: Justice Engelard:

"The majority in the *Shalit* case tirelessly emphasized that registration in the Population Registry is merely a statistical matter, lacking practical significance, and that it does not substantively determine the ideological question as to who is a Jew. However, it was not only some members of this court who refused to accept this idea; the general public also did not heed it. In consequence of the judgment in that case, a political storm broke out, which led to a swift change in the law negating the ruling just made by a slight

majority... and indeed, if we are only considering insignificant statistics, why did the numerous struggles over registration continue? Why were there so many judgments covering dozens of pages in which the judges were divided? The truth is, of course, that the symbol here is the substance, and without a given view there is no decision on the issue of registration and there are no statistics."

My opinion is the same as the opinion of the minority judges, Landau, Agranat and Engelard, that the issue of registration is not marginal in view of the far reaching symbolic importance accorded to it by both the petitioners and the respondents.

B. The manipulative separation of the registration debate from the substantive debate

As explained above, in the first period, that which ended in 1970, no definition of the term "Jew" appeared in the Law of Return or the Population Registry Law, thus leaving open a wide range of possible interpretations. In the absence of a definition in the two laws there was also no conceptual obstacle to interpreting the term differently in the context of each law. In 1970 the Law of Return and the Population Registry Law were amended. Within the framework of the amendment, a definition of the term "Jew" was inserted within the Law of Return, while the Population Registry Law was made to refer to the provision in the Law of Return. From 1970 onwards, therefore, the interpretation of the term in both enactments has become unified. If the court orders a convert who has undergone a Conservative or Reform conversion to be registered as a Jew, *prima facie* an identical conclusion must be drawn in relation to the claim by the same convert to receive the status of an immigrant under the Law of Return. As noted, those favouring the neutral view argue - contrary to the view I have proposed above - that registration *per se* has no substantive importance, however, all would agree that the right to return has such significance. One might have supposed, therefore, that following the amendment of the Law of Return and the Population Registry Law the neutral view would have been abandoned, or at least those favouring it would have found another argument to support their approach. This has not been the case, however. In the *Na'amat* case the court reiterated the very same rationale.

As noted, a number of files were being considered by the bench dealing with the *Na'amat* case, and some of them dealt with both the issue of return and the issue of registration. The court decided to separate the two questions and therefore deferred the decision on the "dual" cases which entailed the issue of return. It

was this arbitrary separation which enabled the court to continue applying the neutral argument, according to which the dispute over the question of registration did not necessarily give rise to the substantive question concerning who is a Jew. In the words of President Barak:

“Registration under the Population Registry Law is one thing and status under the Law of Return is another”.

President Barak did not ignore the fact that the definition of “Jew” in both statutes is identical, but he answered this problem as follows:

“The powers of public officials in examining the details of the definition are different. In relation to the Population Registry Law - and against the background of its ‘statistical’ purpose and the status of the Register - the Registry Official acts (in an initial registration) in accordance with the statement of the applicant, in so far as it does not contain a blatant inaccuracy, and he does not decide a legal issue which has a variety of aspects. In contrast, for the purpose of the Law of Return - and against the background of the law and rights and obligations which it establishes - it is necessary to examine whether the applicant’s statement meets the requirements of the Law of Return. Thus, the public authorities must be aware of the special nature of the Register, and the manner in which administrative discretion is exercised in that context. After the public authorities - and against the background of the awareness regarding the limited function of the Register - the wider public too understands that recording the details of religion, nationality and marital status in the Register ‘is only intended for statistical purposes and the like, and it does not grant the applicant any special rights...’. Indeed, a record in the Register is ‘neutral’ in relation to the various struggles which have been waged since the establishment of the State with regard to nationality, religion, marriage, and it is right that it should remain so. The substantive dispute in relation to these issues should be conducted following an examination of substantive rights, and these are found outside the Register.”

In my opinion, President Barak’s argument is unconvincing. First, in the way it is worded it contains an inexplicable logical leap. From an argument about the powers of public officials it moves to a finding in relation to the significance of making a record in the Register. It is unclear why the fact, the truth of which is doubtful, that the Registry Official is not empowered to decide a substantive dispute, leads to the conclusion that the registration is unimportant. *Prima facie*, from the time that the legislature created a link between the two enactments in relation

to the definition of a “Jew”, the question in both enactments became substantive. Second, it is not clear what the argument, and the tactics it explains, seeks to achieve, at least in relation to the question who is a Jew. Ultimately, the court will be forced to decide who is a convert for the purpose of the Law of Return, and its decision on this question will immediately apply also to the question who is a convert for the purpose of the Population Registry Law. If a Conservative conversion is valid for the purpose of the Law of Return it is also valid for the purpose of the Population Registry Law. If it is not valid for the purpose of the Law of Return, can the Registry Official register the Conservative convert as a Jew? *Prima facie*, the answer is no, unless the court finds a way of continuing to separate the two enactments which the legislature expressly linked, through a process which we cannot fathom. What, therefore, does the court seek to achieve by postponing its decision?

Conceivably, the answer to this question may be found in the comments of President Agranat in the *Shalit* case. In that case, President Agranat disagreed with the argument that the decision on the question of registration is insignificant from a substantive point of view, and argued that validation of a registration otherwise than in accordance with the *Halacha* has social and political importance. President Agranat explained that “It might be thought that validation of a registration as aforesaid would be interpreted, in the course of time, as a shift which has ramifications in relation to the meaning of the term ‘Jew’, and to other areas of life, until slowly it will be pushed into the corner of *Halachic* law.” In other words, in President Agranat’s opinion, what is presented today as a minor matter of registration, lacking evidentiary effect, may in future provide a spur for adopting the view of the petitioners in other substantive areas, by reason of it becoming fixed in the public mind and thereby becoming an unquestioned state of affairs. Was this what the court had in mind in the *Na’amat* case when it severed the two issues and held in favour of the petitioners, in relation to the Register alone?

4. Is there an alternative?

The question who is a Jew has never been fully decided by the Israeli legislature. In the absence of a democratic decision it has been placed at the doorstep of the judiciary. In the previous section I presented the response of the majority judges in the Supreme Court and I explained that the judges described their decision as neutral. Against this approach, I explained that this neutrality was false and I cast doubt on the good faith of the judges who put

forward this view.

Readers may wonder whether the judges had a better alternative, when dealing with a question which the Israeli legislature has so far successfully avoided deciding. In this section I shall attempt to deal with this issue. I shall briefly present two alternatives and explain why they are no better than the one actually chosen. I shall then present a third alternative and explain why in my view it ought to have been followed.

One possible response which could have been chosen by the court was to decide the case on the merits applying substantive arguments. This path was followed by a number of minority judges in the *Shalit*, *Pessaro* and *Na'amat* cases. In seeking to deal with the challenge facing them, these judges attempted to find the proper definition of the term "Jew". The judges applying this methodology emphasized the ideological aspect of the issue. Consequently, they were not satisfied with a narrow interpretive legal analysis but sought to analyse the question of who is a Jew from a broad perspective: scientific, historical, sociological, psychological, nationalist, Zionist and religious. All the judges who used this methodology reached the same conclusion as that adopted by the Orthodox community. In my opinion, this methodology is problematic from a democratic point of view. The function of a judge is not to create norms based on his own views, but to apply existing norms which were democratically adopted by the government authorities responsible for their creation. Nonetheless, the sharp distinction between the application and the creation of norms is arbitrary, and it is clear that a judicial decision cannot be completely free of personal views which contain subjective values. However, a decision on the merits on a dispute such as that being discussed here necessitates a pure act of value judgment, which *prima facie* exceeds what is customary even according to the moderate description of the judicial process.

The court had another response option available to it. It will be recalled that all the petitions arose after the State had refused to uphold the petitioners' requests and register them as Jews or grant them Israeli nationality by virtue of the Law of Return. It follows that the disputes reached the court after they had already been decided by the executive authority. Two of the minority judges in the *Shalit* case, President Agranat and Justice Landau, chose to respect the decisions of the executive authority and refrain from intervening in them. In my opinion, this path has an advantage over the two others. In a democratic system it appropriate that fundamental decisions, such as the one being considered here, be expressly made by the legislative authority. Yet, the legislature

may also express its views by way of refraining from intervening in the decisions of the executive branch. This is not an optimal way of decision making but it is still decision making. The judicial approach of Justices Agranat and Landau may therefore be described as a decision not to intervene in the decision of the executive authority which was tacitly confirmed by the legislative branch. At the same time, in my opinion, this response also has its problems. The decision of the court not to intervene retains the *status quo*, where such a situation is acceptable to one side only while the dispute itself has not been suitably examined in the legislature.

So far I have described three possible responses available to the court (selected by different groups of judges) and have rejected all three. I argued that that the neutral decision making process is not really neutral; the substantive decision making process requires the court to exceed its functions in the democratic system; and the approach of judicial restraint - refraining from intervening in the decision of the executive authority which has been backed by the silence of the legislature also circumvents the duty to decide substantive disputes in a democratic manner.

In my opinion, the court has a fourth option open to it, one which is also the most correct from the democratic point of view. The court opted for this path, for a short period of time, when considering the issue who is a Jew. Unfortunately, in the long term, the majority judges did not withstand temptation and ultimately, time after time, chose the neutral position which I have argued is the worst of the four possibilities.

True democracy requires that alongside the court and **before** it, from a chronological point of view, the **legislature** will consider matters in dispute. In a true democracy, when the legislature refrains from stating a position, it is the function of the court to spur it to do so. Regarding the issue of who is a Jew, the Supreme Court has on at least one occasion used a decision making process which is consonant with this perception of its function. I am referring to the court's decision in the *Passaro* case where, it will be recalled, the court rejected the arrangement implemented by the executive authority prior to the decision, but at the same time did not base its rejection of the existing situation on a value laden analysis and also refrained from making a positive determination regarding the operative outcome which ought to be achieved. This tactic accords with the proper function of the court in circumstances where substantive questions are not clearly decided by the "democratic" branches of government. In such cases, as noted, it is the function of the court to compel the legislature or

at least to take such measures as it can in order to pressure the legislature to reach a democratic decision on the matter.

But here, of course, a problem arises. The court can “bring the horse to water” - but it cannot make it “drink”. If the Knesset refrains from making a clear decision, or it refuses to anchor its decision in primary legislation, what can the court do? As I have said, the persuasive tactic adopted by the court in the *Passaro case* led to the establishment of the Ne’eman Committee, however, ultimately the attempt to translate the activities of the committee into a legislative arrangement, failed. Abstaining from intervening and leaving the *status quo* in place - the path chosen by Landau and Agranat - contravenes the principle of democratic decision making, yet this is also true of the contrary option; intervention also violates this principle, even when it garbs itself with the (false) cloak of neutrality. Is there any way of compelling the legislature to decide a matter when it does not wish to do so? Using the horse metaphor again - my answer is that one cannot force it to “drink” but sometimes one can “bring down its head”, and therefore one must always ensure that every effort has been made to reach a decision. As in every case, creative thinking on the part of the court may be fruitful. Indeed, in my opinion, the approach taken by Justice Tirkel in the *Na’amat case* clearly illustrates how creative thinking can create new ways of exerting pressure.

In his opinion in the *Na’amat case*, Justice Tirkel disagreed with President Barak and with the other majority judges who had reiterated the argument to the effect that, at least in relation to the Register, a decision in favour of registering liberal converts as Jews was neutral. However, Tirkel also disagreed with Engelard who wished to decide in favour of the Orthodox position, on subjective grounds. Tirkel’s suggestion - as I understand it - favoured compelling the legislature to decide. In his words:

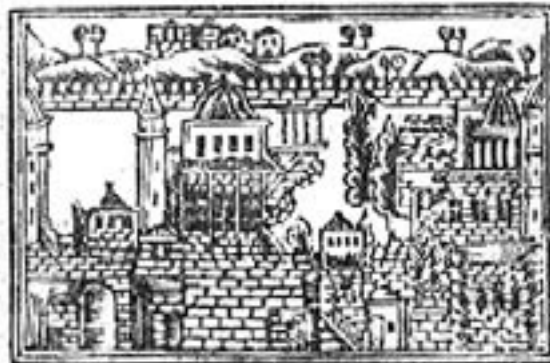
“In my opinion, the result of the abrogation of the *Vonk Shesinger* rule is that a ‘legislative vacuum’ has been created in the Population Registry Law which the legislature must fill with a new definition of the term ‘who has converted’, or with express guidance to the Registry Official. In the absence of such legislation the term ‘who has converted’ in Section 4B of the Law of Return has no legal significance whatsoever and it is as if it was never written at all. In any case the notice and certificate received by the Registry Official have no significance... consequently, following the abrogation of the rule, the Registry Official is not entitled to record anything in the nationality and religion rubrics”.

Justice Tirkel does not say so expressly, yet the direct outcome

of his comments is that not only is the right to be registered as a Jew now negated in respect of those seeking to be so registered by virtue of conversion, but also the right to return. If the term “who has converted” in Section 4B of the Law of Return is vacated of significance, it will not be possible to grant the status of *oleh* (and by virtue thereof the status of citizen) to any convert, including those who have undergone an Orthodox conversion either in Israel or abroad. Had Justice Tirkel’s opinion been accepted, would not the decision of the court have exerted heavy pressure on the various political parties to reach a legislative decision on who is a Jew?

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עם כל הדינים מר"ח ניסן ואילך - ופרשת הגמלאים - ודיני
בדיקת חמץ - ודיני פ"פ - וע"פ שחל להיות בשבת -
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יקרים הנחתמים מזהב - הלא האזה שלשה מטיבי לעד היינו
פירוש **הכל בו** : ופי' הגר"א מוילנא : ופי' הרב
המגיד תדובנא זיע"א - גם העמוד
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תחת ממשלת אדונינו המלך ההסיד הרהמן
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