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**TABLE OF CONTENTS**

**PRESIDENT'S MESSAGE / Hadassa Ben-Itto – 2**

**The West Bank and Gaza Strip: Phase Two / Joel Singer – 5**

**Customs Aspects of the Interim Agreement  
with the Palestinians / David Shimoni – 18**

**The Restitution of Jewish Property in Eastern Europe / Shevah Weiss – 19**

**Magen David Adom and the Red Cross / Morris B. Abram – 22**

**Abraham Lincoln Marovitz at 90 / Haim Cohn – 24**

**The Future of Religious Intolerance / Daniel Lack – 25**

**Highlighting Constitutional Changes in the  
Israeli Legal System / Yaffa Zilbershats – 28**

**The "Ardeatine Graves" Massacre / Oreste Bizazza Terracini – 33**

**The Influence of Jewish Law in Anglo-American Law / Roberto Aron – 37**

**Spanish Parliament Revises the Criminal Code / Alberto Benasuly – 40**

**JEWISH LAW**

**Neither a Borrower nor a Lender be / Jonathan M. Lewis – 41**

**FROM THE SUPREME COURT OF ISRAEL**

**Distinction or Discrimination in the Israel Air Force – 46**

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## PRESIDENT'S MESSAGE



I am writing this message, in Tel-Aviv, on November 5, the day that marks the *Shloshim* of the murder of Israel's Prime Minister Itzhak Rabin.

Life in Israel came to a standstill on Saturday night, 30 days ago, when Prime Minister Itzhak Rabin was assassinated in cold blood in the center of Tel-Aviv, at the conclusion of a mass rally calling for peace and non-violence. It is not only his immediate family who sat *Shiva*, observing the traditional seven days of strict mourning. A whole nation sat with them. In an unprecedented authentic wave of mourning, people made a symbolic tear in a garment as they would on the death of a blood relative; some men did not shave and some women sat on low chairs; people cried openly and lit candles in public places and in front of Rabin's residence; many scribbled expressions of horror and sadness on walls of buildings, from others came admissions of guilt and promises of commitment to peace and to a different future. The world witnessed a bereaved and shocked nation trying to come to terms with the fact that its democratically elected leader had been murdered by a fellow Jew purporting to act from ideological reasons, in what he deemed to be the execution of God's will.

Many compared the situation to that of the Yom Kippur War, and in a way, it is a fair comparison, not only as to the element of surprise but also because Yom Kippur is mainly a day of *Cheshbon Hanefesh*, not only a day of atonement but also a day of reckoning. Indeed, Israeli society and Jewish communities everywhere, are now in the process of *Cheshbon Hanefesh*, daring to pose questions which were formerly taboo, facing moral, cultural and ethical dilemmas, openly admitting mistakes, and, most of all, asking again and again where we all went wrong, whether by act or omission.

This process has been long overdue and tragically it took the brutal slaying of an elected head of state to make us take the first steps on the road to frank self-evaluation and soul searching. This road must now be followed openly, courageously and persistently. Conclusions, even painful ones, must be drawn fearlessly. Israeli society has been placed under an X-Ray. The results indicate the need for major surgery before any process of healing can commence.

Israel is back at work. Politicians are again examining results of polls and making deals in anticipation of an election year. The democratic rules have been strictly observed in the quick appointment of a new government, committed to continue the peace process in the spirit of the late Itzhak Rabin.

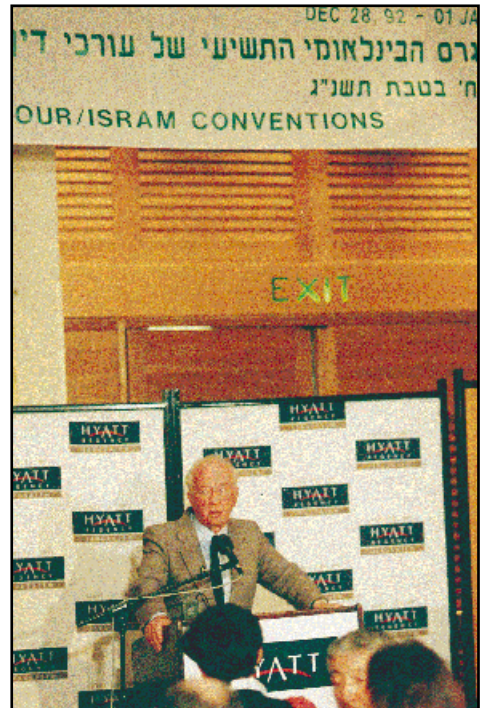
But the wounds have not healed. It will take more than the official period of mourning to implement the grand decisions publicly announced by everybody who had access to a television camera in those first days of shock, be it politicians, religious leaders, educators, representatives of the media or members of the legal community. The Commission of Inquiry appointed by the Government of Israel will decide how the most protected person in the country could have been so negligently exposed to the shots of an assassin in a public square, but the citizens of Israel must find answers to other burning questions which will not, and should not, go away:

These questions now high on the national agenda concern us in the legal community. We can no longer avoid defining clear boundaries to the freedom of expression which is

*continued on page 4*



# YITZHAK RABIN 1922-1995



Left column, top to bottom: The coffin of assassinated Prime Minister Rabin borne on the shoulders of IDF generals; the lying-in-state on the Knesset plaza, Jerusalem; over 80 heads of state attend the funeral.

Right column, top to bottom: Late Prime Minister Yitzhak Rabin addressing the Ninth International Congress of our Association; Israelis mourning on the site of the assassination in the Kings of Israel Square, Tel Aviv, now renamed Yitzhak Rabin Square.



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so important to the fabric of our democratic society, and which is being so cynically and dangerously exploited by those who care nothing for democracy and for constitutional rights. If we have learned anything from this national tragedy, we have learned the real meaning of “fighting words”. We Jews are particularly fit to bear witness to the ease with which words can be turned into weapons in the hands of fanatics. In a democratic society people must be free to speak their minds and voice their opinions without fear or apprehension, but they should not be allowed to use this freedom to delegitimize others and set them up for murder.

In a public trial held by our Association at our Eighth International Congress held in Jerusalem in December 1990, an international panel of 5 judges examined the nature of limitations which a democratic society can legally impose on the spread of hate propaganda. A majority of four judges, including the former President of the Supreme Court of Israel, Justice Moshe Landau, the former Deputy President of the Supreme Court of Israel, Justice Miriam Ben Porat, the President of the Cour De Cassation (the Supreme Court) of France, Pierre Drai, and Lord Justice Harry Wolf of England, held that a private television station spreading anti-Semitic propaganda and denying the Holocaust, should be shut down, its broadcasting license revoked. The protection of free speech in a democratic society should not be extended to “hate speech” aimed at minorities or groups.

The question now faced by the young and vulnerable Israeli democracy is much more complex: what limitations, if any, may legitimately be imposed on speech uttered in the framework of political dialogue on matters in dispute between political parties.

Today, and for the past three years since the signing of the Declaration of Principles on the tranquil lawns of the White House, the people of Israel have finally been forced to come face to face with some of the most difficult ideological issues at the core of Israel’s existence and also for the first time to accept and deal with solutions which offer hope to many but are also repugnant to others.

Hate speech directed at Israel’s government and Israel’s elected leaders has reached new heights. While every enlightened democracy recognizes the necessity of enabling political opposition to freely express its ideas and attempt to bring down the government through parliamentary means, such freedom cannot be extended to individuals advocating civil insurrection and legitimizing murder. The boundaries between free speech and incitement to insurrection are so thin as to be almost invisible, but following the horror of an actual political assassination Israel no longer has a choice. Israel must decide where those boundaries lie.

Society as a whole must confront this dilemma. The role of the legal community will be to shape the constitutional framework in which the moral and ethical principles are given their due weight.

The forthcoming Tenth International Congress of the Association will be convened in the atmosphere of debate and soul-searching now prevailing in Israel. Our gathering in Israel at this time will enable us to make our own contribution to the public debate on these fundamental issues.

*Hadassa Ben-Yahu*

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# The West Bank and Gaza Strip: Phase Two

Joel Singer



**O**n September 28, 1995, Israel and the PLO signed the Interim Agreement on the West Bank and the Gaza Strip in Washington, DC ("the Interim Agreement"). Broadly, this agreement sets out to extend Palestinian self-government arrangements, which formerly covered only the Gaza Strip and the Jericho Area, throughout the West Bank. The Interim Agreement contains detailed arrangements for the election of a self-governing authority - the Palestinian Council, and provides for the transfer of powers and responsibilities to the Council from the Israeli military government and its Civil Administration. The Interim Agreement also contains extensive security arrangements, including arrangements for the redeployment of Israeli military forces in the West Bank. In addition, the agreement regulates the relations between Israel and the Palestinian Council in legal and economic matters, and establishes a framework for encouraging programs of cooperation between the two sides.

The Interim Agreement constitutes the third out of four stages of implementation established by the Declaration of Principles on Interim Self-Government Arrangements signed in Washington, DC on September 13, 1993 ("the DOP"). The DOP sets out the framework and principles to govern Israeli-

Palestinian relations during a five year transitional period until the implementation of permanent status arrangements. This framework seeks to bring about a permanent change in the relations between Israel and the Palestinians. In the words of the preamble to the Interim Agreement, Israel and the PLO (which signed the agreement as the representative of the Palestinian people) are determined "to put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security". They also reaffirm "their desire to achieve a just, lasting and comprehensive peace settlement and historic reconciliation". Finally, they recognize that "the peace process ... as well as the new relationship established between the two Parties ... are irreversible". As detailed below, the DOP envisages the development of this process in four stages, of increasing complexity and sensitivity:

## 1. Gaza-Jericho Arrangements

The first stage of implementation of the DOP was the Agreement on the Gaza Strip and the Jericho Area, signed in Cairo on May 4, 1994 ("the Gaza-Jericho Agreement"). This agreement gave effect to the "Gaza first" approach of the DOP by implementing the DOP's provisions dealing with the withdrawal of Israeli military forces from the Gaza Strip and the Jericho Area and the transfer of powers from the Israeli military government and its Civil Administration to a Palestinian Authority. Significantly, because this first stage occurred before the Palestinian elections, the members of the Authority were not elected but rather appointed by the PLO with Israeli approval.

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The author is the Legal Adviser of the Israeli Ministry of Foreign Affairs. He negotiated, on behalf of Israel, the Oslo Declaration of Principles, as well as all subsequent Israel-PLO implementing agreements, including the most recent Interim Agreement. The views expressed in this article, however, are of the author and do not necessarily reflect those of the Israeli Ministry of Foreign Affairs.



מפת הסכם חביניים  
בין ישראל והפלסטינים

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## 2. Preparatory Transfer of Powers and Responsibilities.

With a view to avoiding an unbalanced situation in which self-government arrangements were in effect in the Gaza Strip and the Jericho Area, while the rest of the West Bank continued to be placed under military government in its fullest scope, the DOP called for "Early Empowerment" arrangements in the West Bank as the second stage of implementation of the DOP. In other words, the DOP provided that some civil powers and responsibilities would be transferred to the Palestinians throughout the West Bank, before the entry of the Interim Agreement into force. Accordingly, on August 29, 1994, Israel and the PLO signed the Agreement on the Preparatory Transfer of Powers and Responsibilities, which provided for the transfer of six civil spheres to the Palestinian Authority. A second agreement of a similar nature - the Protocol on Further Transfer of Powers and Responsibilities, signed on August 27, 1995 - provided for the transfer of an additional eight spheres.

## 3. The Interim Agreement

As noted above, the Interim Agreement, being the third stage of implementation of the DOP, provides for the establishment of an elected Palestinian Council and for the redeployment of Israeli forces throughout the West Bank. The arrangements contained in this agreement are to remain in force throughout the five year transitional period which began on the date of entry into force of the Gaza-Jericho Agreement (*i.e.*, on May 4, 1994) and which will be completed by May 4, 1999. These arrangements incorporate or supersede all of the provisions contained in the three earlier agreements described above. Under the Interim Agreement, the arrangements established for the Gaza Strip by the Gaza-Jericho Agreement were generally left unchanged, except for the modifications dictated by the experience gained in the implementation of the Gaza-Jericho Agreement. By contrast, the arrangements pertaining to the Jericho Area were replaced by the new arrangements to be implemented throughout the West Bank. Authority with regard to the civil spheres transferred to the Palestinians under the preparatory transfer arrangements is assumed by the Council as part of its assumption of powers and responsibilities under the Interim Agreement.

## 4. Permanent Status Arrangements

Article V of the DOP provided that negotiations on permanent status issues are to commence not later than the third year of the interim period. The Interim Agreement concretizes this date as

May 4, 1996 (Article XXXI(5)). The permanent status arrangements to be concluded through these negotiations are to be implemented at the conclusion of the five year transitional period. A list of some of the issues to be addressed in the permanent status negotiations is provided in Article V(3) of the DOP ("Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors and other issues of common interest"). The DOP envisioned the permanent status agreement to be the fourth (and last) stage of implementation, bringing about full peace and reconciliation between Israelis and Palestinians.

## General Structure of the Agreement

The Interim Agreement comprises over 300 pages and consists of the main body of the agreement and seven annexes, which deal with the following matters: redeployment and security arrangements, elections, civil affairs (transfer of civil authority), legal matters, economic relations, Israeli-Palestinian cooperation, and release of Palestinian prisoners and detainees. Attached to the agreement are nine maps delineating such matters as the areas of redeployment of the Israel Defense Forces, the deployment of Palestinian Police, the security arrangements, *etc.*

The agreement was witnessed and countersigned by the heads of states, foreign ministers or representatives of the United States, the Russian Federation, Egypt, Jordan, Norway and the European Union.

## Nature of the Interim Arrangements

### A. Source of Authority

The nature of the regime established in the West Bank and the Gaza Strip for the duration of the transitional period is that of a Palestinian autonomy under the supreme authority of the Israeli military government. As detailed below, in line with these fundamental principles, Israel will continue to be responsible, among other things, for the external security as well as the external relations of the West Bank and the Gaza Strip. Significantly, lack of authority in these two spheres is a well-established indication of autonomous regimes. That the Israeli military government will continue to exist is stated in Article I(5) of the Interim Agreement, which provides:

After the inauguration of the Council, the Civil Administration in the West Bank will be dissolved, and the Israeli military govern-



ment shall be withdrawn. The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council.

It follows that, unlike the Civil Administration, the military government does not dissolve. Instead, it simply withdraws physically from its former location, but continues to exist elsewhere as the source of authority for the Palestinian Council and the powers and responsibilities exercised in the West Bank and the Gaza Strip.

The fact that the military government continues in existence, and retains all necessary authority to exercise powers and responsibilities not transferred to the Council, is stated explicitly in the Interim Agreement (Article XVII(4)):

a. Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis.

b. To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis *in personam*.

**In the upcoming permanent status negotiations, no party may be barred from raising a claim or argument regarding the permanent status merely because that party has agreed in the Interim Agreement that a different arrangement be implemented during the interim period.**

Since the military government remains the source of authority in the areas, as with the previous agreements reached between Israel and the Palestinians, the military commanders of the Israel Defense Forces in the West Bank and the Gaza Strip issued proclamations concerning the implementation of the Interim Agreement, whereby they incorporated the provisions of the agreement into the domestic law.

## B. Residual Powers

The provisions of the Interim Agreement quoted above also resolve the issue of where residual powers are vested, *i.e.*, they are retained by Israel. In addition, Article I(1) of the Interim Agreement states that "Israel shall continue to exercise powers and responsibilities not so transferred [to the Council]". It follows that, if the agreement is silent on the question of where a

particular power vests, then that power is retained by Israel. It is noteworthy that the possession of residual powers is, normally, an *indicia* of being the source of authority.

## C. The Status of the West Bank and the Gaza Strip

The Interim Agreement states that the "status of [the West Bank and the Gaza Strip] will be preserved during the interim period" (Article XXXI(8)). Moreover, the agreement contains a clear undertaking that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations" (*Ibid.*, para. 7).

These provisions prohibit both sides from taking any unilateral step designed to change the status of the West Bank and the Gaza Strip which, as elaborated above, is a status of Palestinian autonomous areas under the supreme authority of an Israeli military government.

Since the status of the West Bank and the Gaza Strip is one of the fundamental elements of the Interim Agreement, one implication of this prohibition is that any attempt made by either party to change this status (such as by declaring an independent Palestinian state or by annexing the areas to Israel) may be considered a material breach and a ground for terminating the agreement.

## D. Interim Arrangements do not Prejudice Permanent Status

The arrangements included in the Interim Agreement are, as the name of the agreement suggests, interim arrangements only; they are not in any way intended to influence the outcome of the permanent status negotiations. In other words, in the upcoming permanent status negotiations, no party may be barred from raising a claim or argument regarding the permanent status merely because that party has agreed in the Interim Agreement that a different arrangement be implemented during the interim period. This principle is stated clearly in the DOP, and is restated in Article XXXI(6) of the Interim Agreement, which provides:

Nothing in this Agreement shall prejudice or preempt the



outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.

## Elections

### A. The Electoral Process

Unlike the Palestinian Authority appointed under the Gaza-Jericho Agreement, the Palestinian Council established pursuant to the Interim Agreement is an elected body. Israel recognized the importance of establishing a democratic and accountable system of self-government in the West Bank and the Gaza Strip. Accordingly, the provisions of Article III of the DOP, which call for "direct, free and general political elections" in order that the Palestinians of the West Bank and the Gaza Strip may govern themselves "according to democratic principles", are in Annex II of the Interim Agreement translated into detailed provisions ensuring a free and democratic process. In addition, going beyond the requirements of the provisions of the DOP, Israel agreed to the holding of separate and simultaneous elections for the Council and for the position of the Chairman (or "*Ra'ees*" in Arabic) of the Executive Authority of the Council (Annex II, Article III).

Throughout the negotiations on the elections, Israel was mindful of the fact that the elections are **Palestinian** elections. Accordingly, Israel was prepared to leave all issues relating exclusively to the conduct of the electoral process to be decided by the Palestinian side, expressing its concerns only with regard to such fundamental issues as the maintenance of security during the electoral process. A further expression of Israel's willingness to be seen not to interfere with the electoral process are the provisions of the agreement calling for a redeployment of Israeli forces from the Palestinian populated areas of the West Bank on the eve of the elections (*see* Section VII (c) below).

### B. The Right to Vote and Be a Candidate

The Interim Agreement provides that the right to vote will be universal, regardless of sex, race, religion, opinion, social origin, education or property status. Accordingly, all Palestinians of the West Bank and the Gaza Strip who are registered in the population register as residents of these areas and are over the age of 18 on the date of the elections are entitled to vote, unless disqualified by a Palestinian judicial decision (Annex II, Article II).

Any person registered to vote in the elections, and who meets the age criteria as set by the Palestinian Elections Law, may also stand as a candidate. Candidates for the Council must live in the constituency for which they wish to be elected. A candidacy shall only be rejected if the candidate professes racist views or acts in an illegal or undemocratic manner (Annex II, Article III).

### C. International Observation

All stages of the election process will be open to international observation, to ensure that they are free and fair (Annex II, Article V). The observers will include representatives from a large number of countries, including the United States, Russia, Egypt and Jordan, and international organizations, including the Organization of African Unity and the Islamic Conference Organization. At the request of Israel and the PLO, the European Union agreed to coordinate the election observation. The Interim Agreement provides for the establishment of a trilateral coordination forum, comprising the Palestinian Election Commission, Israel and the European Union to deal with all issues of security and logistics relating to the observers.

### D. Participation of Palestinians of Jerusalem in the Elections

The DOP provided that Palestinians of Jerusalem who live there "will have the right to participate in the election process according to an agreement between the two sides" (Annex I, Article I). In the course of the negotiations on the Interim Agreement, the Palestinian side insisted that this provision required that Jerusalem be treated as identical to the West Bank and the Gaza Strip for the purposes of electoral administration, that Palestinians of Jerusalem be entitled both to vote and to be elected in the elections, and that voting should take place within Jerusalem. Israel argued that participation for the purpose of this provision required only that arrangements be made to enable Palestinians of Jerusalem to vote in the elections, and that voting should take place outside Jerusalem. Eventually, the following arrangements were agreed:

#### 1. Electoral Administration

Article I(4) of Annex II of the Interim Agreement contains the following general provisions:

- a. All of the offices of the Central Election Commission and its subordinate bodies, including the offices of the District Electoral Commission (hereinafter "the DEC's") and the District Election Offices (hereinafter "the

DEOs") shall be situated in constituencies set out in the Palestinian Election Law in areas under the jurisdiction of the Council.

- b. All aspects of the electoral administration (such as publication of lists of electors or candidates, and other information concerning the conduct of the elections, appeals, counting votes, and publication of results) shall take place only in the offices of the relevant DEO.

These provisions have two significant implications with regard to election arrangements regarding Palestinians of Jerusalem:

- i. All offices of the Central Election Commission must be situated outside Jerusalem. While for the purposes of enabling Palestinians of Jerusalem to vote, Jerusalem may be included within a larger constituency which also includes parts of the West Bank, all the offices of the electoral administration, including the polling stations, must be situated in the West Bank, that is, outside Jerusalem. This provision is consistent with the general provision (Article I(7) of the agreement) requiring that all offices of the Palestinian Council be located in areas under its jurisdiction (*see* discussion in Section V(f) below).
- ii. In addition, all aspects of the electoral administration must take place outside Jerusalem. Since the District Election Offices must be situated in the West Bank or the Gaza Strip and all aspects of electoral administration are to take place only in these offices, it follows that no aspects of the electoral administration may be conducted within Jerusalem.

## 2. Candidates

Article III(1)(b) of Annex II to the Interim Agreement provides that every candidate for election for the Council or the position of the *Ra'ees* must have a valid address in an area under the jurisdiction of the Council. In the case of a candidate for the Council this address must also be in the constituency for which he or she is a candidate. Accordingly, a Palestinian who lives only in Jerusalem may neither be a candidate for the position of the *Ra'ees* nor for membership in the Council. Only Palestinians with a valid address outside Jerusalem, in the West Bank or the Gaza Strip, may be candidates for election. For the purpose of this provision, the agreement defines a valid address as "that of a residential property which is owned or rented or otherwise legitimately

occupied by the candidate". That the candidate's address must be his or her genuine residence is further emphasized by the agreement's definition of "address" as "the specific abode in which a person actually lives" and of "abode" as a "main permanent fixed address" (Annex II, Article II(1)(j)). A Palestinian who lives in the West Bank or the Gaza Strip, however, will not be barred from standing as candidate merely because he or she has a **second** address outside these areas, in Jerusalem or elsewhere (Annex II, Article III(1)(b)).

## 3. Election Campaigning

Any campaign activities which take place in Jerusalem will be subject to the relevant provisions of Israeli law. Candidates wishing to conduct such activities shall apply for the necessary Israeli permits from the Israel Police through the Central Election Commission. Representatives of this Commission, together with representatives of the Israel Police, will form a special committee to coordinate issues relating to election campaigning in Jerusalem (Annex II, Article VI(1)).

## 4. Polling Arrangements

Most Palestinians of Jerusalem will vote at approximately 170 polling stations situated outside Jerusalem in the West Bank. They will be notified by the Palestinian Central Elections Commission of the relevant polling station at which they are to cast their vote.

At the same time, a number of Palestinians of Jerusalem will vote in the elections through services rendered in five specified post offices in Jerusalem, in accordance with the capacity of these post offices (Annex II, Article VI(2)). In discussions between the two sides it was suggested that these postal facilities be made available to enable the elderly and infirm to participate in the elections. Those Palestinians who will vote through these Israeli post offices will be notified of the relevant post office by means of an Electoral Registration Card provided by the Central Election Commission.

In contrast to the situation in the West Bank and Gaza Strip polling stations, there will be no polling station commissions in the Israeli post offices. Any necessary procedures within such post offices will be conducted by the Israeli post office employees, who will be responsible for identifying the Palestinian electors and providing them with ballot papers and envelopes.

In these post offices, electors shall mark ballot papers at the post office counter and insert them in the envelopes

addressed to the relevant District Election Office in the West Bank. Thereafter, such envelopes will be delivered to this Office where they will be opened, and the enclosed ballot papers counted and totaled along with all the other ballot papers cast in the West Bank.

## The Palestinian Council

### A. Structure of the Council

According to the agreement, the Palestinian Council will comprise 82 elected representatives and the Chairman (“*Ra’ees*”) of the Executive Authority of the Council who, as noted above, is to be elected in separate and simultaneous elections (Article IV). After the conclusion of the Interim Agreement, Israel approved a Palestinian request to add one additional seat on the Council, which will be reserved for the Samaritan community of the Nablus district. Once elected, the Council will replace the Palestinian Authority appointed pursuant to the Gaza-Jericho Agreement.

The elected Council possesses both executive and legislative powers (Article III(2)). According to the DOP, these functions were to be performed by one organ (Article VII(2)). During the course of negotiations on the Interim Agreement, however, driven by its desire to see a fully democratic Palestinian society, Israel agreed to permit a separation between the legislative body - the Council itself - and a smaller executive committee of the Council (the “Executive Authority”)(Article V(1)). Such a division would ensure the existence of oversight and accountability, two prerequisites for a democratic regime.

While there is no specified number of members which are to compose the Executive Authority, the Palestinian Authority, which is performing similar functions in the Gaza Strip and the Jericho Area pending the inauguration of the Council, consists of 24 members. The Interim Agreement stipulates that the members of the Executive Authority must be drawn primarily from the Palestinian Council. However, the *Ra’ees* of the Executive Committee, with the Council’s approval, may appoint persons who are not members of the Council, the number of which can comprise up to 20 percent of the total membership of the Executive Authority (Article V(4)(c)). Israel agreed to such an arrangement, realizing that certain individuals who would be very suitable as members of the administrative body might not be able to be elected because they would be present outside the territories on the day of the elections, or might simply not desire to run as candidates in the elections. The agreement permits the

Council to establish other committees in order to assist in controlling the activity of the Executive Authority and to simplify the Council proceedings.

### B. Jurisdiction of the Council

The jurisdiction of the Palestinian Council in the West Bank and the Gaza Strip is defined in Article XVII of the Interim Agreement by three cumulative criteria: territorial jurisdiction, personal jurisdiction, and functional jurisdiction.

#### 1) Territorial Jurisdiction

The territorial jurisdiction of the Council is confined to those parts of the West Bank and the Gaza Strip in which powers and responsibilities have been transferred. As described below (*see* Section VII(c)), while the transfer of territorial authority in the Gaza Strip and the Jericho Area was completed in May 1994, immediately after the signing of the Gaza-Jericho Agreement, the transfer of such authority to the Palestinian Council with regard to the rest of the West Bank is to be effected in a series of stages consistent with the phased redeployment of Israeli forces. It follows that the territorial jurisdiction of the Council is not static, but will continue to expand throughout the process. At the conclusion of the process, the territorial jurisdiction of the Council will cover the territory of the West Bank and the Gaza Strip with the exception of “permanent status issues”, *i.e.*, Israeli settlements and military locations (Article XVII(8)). Israel retains territorial jurisdiction with regard to all West Bank and Gaza Strip lands not placed under Palestinian territorial jurisdiction (Article XVII(4)(a)).

#### 2) Functional Jurisdiction

With regard to the functional jurisdiction of the Council, Article XVII(2)(b) provides that this extends to all the “powers and responsibilities transferred to the Council, as specified in this Agreement or in any future agreement that may be reached between the parties”. Annex III of the Interim Agreement (Civil Affairs) deals with 40 spheres of civil authority. As noted above, since Israel has residual powers, unless Annex III specifically transfers particular powers and responsibilities to the Palestinian Council, such powers and responsibilities are retained by Israel. Indeed, with regard to some spheres, Israel declined to transfer authority, especially in matters pertaining to security (*see* Section VI(a) below).



The functional jurisdiction of the Council generally only applies in areas that are placed under the territorial jurisdiction of the Council. Thus, the Council's functional jurisdiction does not apply in Israeli settlements or in military locations. As an exception, however, with regard to a few thousand Palestinians that live in isolated houses in the non-populated areas of the West Bank who will continue initially to be under Israeli jurisdiction, the Council will have functional jurisdiction pertaining to non-territorial spheres of authority. Israel will retain the functional jurisdiction pertaining to territorial spheres of authority in these non-populated areas (*see* Section VII(b) below).

### 3) *Personal Jurisdiction*

The personal jurisdiction of the Council covers all persons present within its territorial jurisdiction, except for Israelis, "unless provided otherwise in the agreement" (Article XVII(2)(c)). Thus, the jurisdiction of Council in each of the spheres transferred is largely confined to non-Israelis, situated outside Israeli settlements and military locations. The proviso refers to the fact that, under the agreement, Israelis conducting ongoing business within the territorial jurisdiction of the Council are subject to the Council's civil jurisdiction (Annex IV, Article III(2)(a)). This jurisdiction, however, does not cover criminal matters. Thus, an Israeli who conducts business in an area under the territorial jurisdiction of the Council, must obtain all necessary business permits from the Palestinian Council and may be sued (e.g., for breach of contract) in a Palestinian court. However, such an Israeli may not be tried in a Palestinian court if he or she commits a criminal offense, in which case the personal jurisdiction remains with the Israeli authorities.

The reference to "Israelis" is defined in Article XX as including Israeli statutory agencies and corporations registered in Israel. No distinction is made between Israelis resident in the West Bank and the Gaza Strip or visiting Israelis resident outside these territories. Nor is any distinction made between Israeli soldiers and civilians. Rather, all

Israeli citizens remain under Israeli jurisdiction, save for the above-noted exception.

### C. **Legislative Powers of the Council**

As mentioned above, the Council has legislative as well as executive powers. According to the Gaza-Jericho Agreement, the legislative powers of the appointed Palestinian Authority were subject to an effective Israeli veto. During the Interim Agreement negotiations, it was decided not to constrain the elected Council with such a veto as the Gaza-Jericho arrangements have shown this restraint to be impractical for both sides. The Palestinians were burdened by having to submit for prior Israeli approval every law or regulation. Likewise, the Israelis were burdened by the monumental task of continuously monitoring, translating into Hebrew and reviewing all primary and secondary Palestinian legislation. Accordingly, the Interim Agreement does not maintain the requirement that all Palestinian legislation be submitted for Israeli approval, but simply provides that the Council's legislative powers may only be exercised within its jurisdiction (Article XVIII). The agreement goes on to provide that any legislation which exceeds this jurisdiction, or which is otherwise inconsistent with the DOP, the Interim Agreement or any other agreement between the two sides, "shall have no

effect and be void *ab initio*" (Article XVIII(4)(a)). In addition, it should be noted that Article XVIII(4)(b) places a specific obligation upon the *Ra'ees*, who has a discretionary power to refuse to promulgate legislation approved by the Council, not to promulgate any legislation which fails to satisfy the requirements of this Article.

### D. **Judicial Organs**

The Interim Agreement provides that the Council, within its jurisdiction, will have an independent judicial system composed of independent Palestinian courts and tribunals (Article IX) (6). The agreement also provides for the establishment of a Palestinian Court of Justice with powers of judicial review. This court, similar in nature to the Israeli High Court of Justice, may

**The personal jurisdiction of the Council covers all persons present within its territorial jurisdiction, except for Israelis, "unless provided otherwise in the agreement"**

review any act or decision of the Chairman or any member of the Executive Authority of the Council and decide whether such act or decision is *ultra vires*, or otherwise incorrect in law or procedure (Article VIII).

The establishment of Palestinian courts does not mean that the existing courts of the Israeli military government will cease to function. As noted above, the military government will continue in existence, retaining, *inter alia*, all judicial powers and responsibilities not transferred to the Council (Article XVII(4)). It follows that Israeli military courts may continue to function in the West Bank and the Gaza Strip with jurisdiction over all offenses that are retained under the authority of the military government (primarily security offenses).

### E. The Conduct of Foreign Affairs

Article IX(5)(a) of the Interim Agreement provides:

In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates, or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.

Since under international law full capacity to conduct foreign relations is one of the accepted *indicia* of sovereignty and statehood, the Council's lack of authority in the sphere of foreign relations is a clear indication of the fact that it is an autonomous and not an independent entity. However, as in the Gaza-Jericho Agreement, Israel understood that in order for the Palestinian Council to function effectively, a mechanism had to be established to enable some dealings with regard to specific matters between the Palestinian side and foreign states or international organizations.

Accordingly, the Interim Agreement permits the PLO (but not the Palestinian Council) to conduct negotiations and sign agreements with states or international organizations "for the benefit of the Council" in four specific categories (Article IX(5)(b)). These categories are: (i) specified economic agreements; (ii) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council; (iii) certain agreements for the implementation of regional development plans; and finally (iv) cultural, scientific and educational agreements.

In the same vein, where the PLO has entered into an agreement under this paragraph, the Interim Agreement permits the Palestinian Council to deal with representatives of the relevant foreign state or the international organization in order to implement this agreement. Furthermore, the Interim Agreement permits the establishment in the West Bank and the Gaza Strip of non-diplomatic "representative offices" for the purposes of implementing such an agreement. These activities by the Council are not considered foreign relations. Such a grant of limited authority to have dealings on the international plane is in accordance with international practice regarding autonomous regimes.

### F. Location of Council Offices

The Interim Agreement provides that the offices of the Council, its various committees and of the *Ra'ees* may only be established in areas under the territorial jurisdiction of the Council in the West Bank or the Gaza Strip (Article I(7)). The significance of this provision is that the Council is not only prohibited from establishing offices within Israel, including in Jerusalem, but that, even within the West Bank and the Gaza Strip these offices may not be located outside those areas in which powers and responsibilities have been transferred to the Council on a territorial basis.

## Transfer of Civil Authority to the Council

### A. General

The Interim Agreement provides for the transfer of agreed civil powers and responsibilities from the Israeli Civil Administration to the Palestinian Council. Specific arrangements for the transfer of 40 separate spheres of civil authority are set out in Annex III (Civil Affairs) of the agreement. With respect to each sphere, this Annex specifies (1) whether powers and responsibilities are transferred without any restrictions; (2) whether any specific powers and responsibilities, especially those with a bearing on security (such as telecommunications or aerial traffic), are retained by Israel; or (3) whether powers and responsibilities are transferred subject to particular restrictions. The treatment accorded to some of the more important civil spheres is reviewed below.

### B. Public Lands

The Interim Agreement provides that in those areas from which Israeli forces are redeployed, civil powers and responsibil-

ities will be transferred to the Palestinian Council concurrently with the stages of redeployment. In this context, the authority to administer all public lands that are included within these areas will also be transferred (Annex III, Appendix 1, Article 16). Administration of public lands outside these areas will be retained by Israel. This includes all powers and responsibilities relating to territory, such as planning and zoning, quarries and mines, and public works and housing.

### C. Water

Another highly sensitive issue dealt with in Annex III is the issue of authority over the water resources. Annex III sets out agreed principles and arrangements for the transfer of authority in this sphere (Appendix 1, Article 40). Among these principles, Israel recognizes Palestinian water rights in the West Bank. However, negotiations on the water rights, including the allocation of water resources and ownership of water related infrastructure, will take place only during the permanent status discussions. During the interim period, Israel undertakes to increase the amount of water allocated to the Palestinians by 28.6 million cu.m. per year. Any additional supplies to either side will be based on an increase in available water resources to be developed through international funding, as well as mutual cooperation within the framework of the tripartite American-Israeli-Palestinian forum, which is to convene following the signing of the Interim Agreement.

This Article also provides for the establishment of a permanent joint water committee that will coordinate management of water resources and enforce water policies, protecting the interests of both parties by, *inter alia*, preventing uncontrolled drilling and enforcing standards.

### D. Religious Sites

One of the most sensitive spheres dealt with in Annex III is that of religious sites (Appendix 1, Article 32). Under the arrangements set out for this sphere, responsibility over sites of religious significance in the West Bank and the Gaza Strip will be transferred to the Palestinian side in those areas from which Israeli forces are redeployed. Outside these areas responsibility will be transferred gradually during the "further redeployment phase", except for religious sites located in Israeli settlements and military locations. Both sides are required to respect and protect religious rights of Jews, Christians, Moslems and Samaritans, protect holy sites under their respective jurisdiction,

allow free access to them and permit freedom of worship and practice at the sites.

With regard to Rachel's Tomb in Bethlehem, Joseph's Tomb in Nablus and the Shalom Al Israel Synagogue in Jericho, special arrangements are set out in the agreement to guarantee security, freedom of access and freedom of worship at these sites (Annex I, Article V). With regard to the Tomb of the Patriarchs in Hebron, the parties agreed that the present situation at the tomb will be maintained and will be reviewed three months after the redeployment (Annex I, Article VII(8)).

## Security and Redeployment

### A. External Security and Security of Israelis and Settlements

Notwithstanding the transfer of powers and responsibilities relating to internal security and public order to the Palestinian Council in certain areas, the Interim Agreement provides that Israel will continue to have the responsibility for defense against external threats. This responsibility is defined as including responsibility for protecting the Egyptian and Jordanian borders and for defense against external threats from the sea and the air. Israel also retains the responsibility for the overall security of Israelis and Israeli settlements. Furthermore, the agreement states that Israel shall have "all the powers to take the steps necessary to meet this responsibility" (Article XII(1)).

### B. Internal Security and Public Order

With regard to internal security and public order in the West Bank, the agreement establishes initially three different types of arrangements:

#### i. Area A

Area "A" comprises the Jericho Area and the main Palestinian cities of the West Bank, namely Jenin, Nablus, Tulkarem, Kalkilya, Ramallah, Bethlehem and Hebron (except for the Old City of Hebron, the Jewish Quarter, and everything that is linked from there to Kiryat Arba and the Tomb of the Patriarchs). In Area "A", the Palestinian Council will have full responsibility for internal security and public order, as well as full responsibility for civil affairs.

#### ii. Area B

Area "B" comprises all of the other Palestinian populated areas in the West Bank (around 450 towns, villages, refugee camps and hamlets). In these areas, the Council will be



granted full civil authority, as in Area "A". The Council will also be charged with maintaining public order of Palestinians, while Israel will have the overriding security authority for the purpose of protecting Israelis and confronting the threat of terrorism. The use of the word "overriding" indicates that this Israeli responsibility shall take precedence over the Palestinian responsibility for public order.

Twenty five Palestinian police stations will be established in specified towns and villages in Area "B" to enable the Palestinian Police to exercise its responsibility for public order. The agreement contains provisions requiring that the movement of Palestinian Police be coordinated with and confirmed by Israel.

### iii. Area C

Area "C" comprises the unpopulated areas of the West Bank, and includes areas of strategic importance to Israel and the Israeli settlements. In Area "C", Israel will retain full responsibility for security and public order. The Palestinian Council will assume powers and responsibilities for civil affairs spheres not related to territory, such as economics, health and education, on a personal basis with regard to a few thousand Palestinians residing in isolated houses in Area "C". Israel will retain authority over all civil affairs spheres related to territory.

## C. Redeployment and Further Redeployments

It will be recalled that, under the Gaza-Jericho Agreement, the withdrawal of Israeli military forces from all areas of the Gaza Strip other than settlements and military locations took place as a one-time operation. In contrast to the Gaza-Jericho approach, the security arrangements for the West Bank included in the Interim Agreement provide for a gradual redeployment of Israeli military forces to take place in a number of stages:

### i. First phase of redeployment

The first phase of redeployment, designed to facilitate the holding of elections, involves the redeployment of Israeli forces from all of the populated areas of the West Bank. Special arrangements also provide for a partial redeployment in the city of Hebron. At the end of this first phase of redeployment, there will be no permanent Israeli military presence in any Palestinian population center. The agreement provides that the first phase of redeployment itself will be carried out in stages on a district-by-district basis.

### ii. Further Redeployments

In addition to the initial redeployment of Israeli military forces described above, the Interim Agreement provides that further stages of redeployment are to take place at six month intervals to be completed 18 months after the inauguration of the Council (Article XI). In the course of these further redeployments, additional parts of Area "C" will be transferred to the territorial jurisdiction of the Council, becoming either Area "A" or Area "B", while parts of Area "B" may become Area "A" (Article XI(2)(b)). By the completion of the three stages of further redeployment in July 1997, the territorial jurisdiction of the Council will cover West Bank territory, except for Israeli settlements and military locations. Significantly, the military locations are referred to in Article XVII(1) as "specified military locations" and not "agreed military locations" as suggested by the Palestinian side. The use of the word "specified", rather than "agreed", indicates that the number, extent and location of these areas is not a subject for negotiations between the parties, but rather will be decided unilaterally by Israel.

## D. Palestinian Police and Security Policy

The agreement, in Article XIV and Annex I, provides for the establishment of a strong Palestinian Police that will constitute the only Palestinian security force in the West Bank and the Gaza Strip. This force will incorporate the Palestinian Police already deployed in the Gaza Strip and the Jericho Area, and will number up to 30,000 policemen, up to 12,000 of whom will be deployed in the West Bank and up to 18,000 in the Gaza Strip. The Security Annex specifies the deployment of the Palestinian Police, its weapons and equipment and its rules of conduct.

The DOP envisioned that the Palestinian elections would take place nine months after the entry into force of the DOP, *i.e.*, in July 1994. This required that the Interim Agreement be concluded prior to this date. In fact, the Interim Agreement was signed 14 months later. This delay was in large part due to problems encountered in the implementation by the Palestinian Authority of the security provisions of the Gaza-Jericho Agreement. These problems were alleviated to some extent by the beginning of implementation of a declaration made by the Palestinian Authority on March 9, 1995, in which, for the first time, it clearly stated its security policy. This policy, which shall continue to bind the Palestinian Council throughout areas under

its jurisdiction, is restated in Annex I , Article II(1) of the Interim Agreement:

- a) The Palestinian Police is the only Palestinian security authority.
- b) The Palestinian Police will act systematically against all expressions of violence and terror.
- c) The Council will issue permits in order to legalize the possession and carrying of arms by civilians. Any illegal arms will be confiscated by the Palestinian Police.
- d) The Palestinian Police will arrest and prosecute individuals suspected of perpetrating acts of violence and terror.

#### **E. Coordination in Security Matters**

The complex allocation of security and public order responsibilities throughout the various areas of the West Bank, as described above, necessitates close coordination between the two sides on all issues relating to security. For this purpose, the agreement establishes a Joint Coordination and Cooperation Committee for Mutual Security Purposes. This committee has two joint regional subcommittees, one for the West Bank and the other for the Gaza Strip, and District Coordination Offices throughout these areas. The agreement also includes arrangements for Joint

Patrols to ensure free and safe movement along key roads, Joint Mobile Units to provide rapid response in the event of incidents and emergency situations, and Joint Liaison Bureaus to coordinate activity at crossing points and terminals.

#### **Legal Relations Between Israel and the Palestinian Council**

Annex IV of the agreement sets out arrangements governing the legal relations between Israel and the Palestinian Council. These provisions define the criminal and civil jurisdiction of the Palestinian courts and include detailed arrangements for legal assistance in criminal and civil matters, including cooperation with regard to police investigations.

#### **Economic Relations and Cooperation**

The Economic Annex attached as Annex IV to the Gaza-Jericho Agreement has been incorporated into the Interim Agreement as Annex V. Its articles and appendices, cover a variety of economic, monetary and financial issues. These include the application in Israel, the West Bank and the Gaza Strip of uniform customs and import policies so as to effectively convert Israel, the West Bank and the Gaza Strip into a single economic union.

In addition, an entire annex of the Agreement, Annex VI, deals with cooperation between Israel and the Palestinian Council. Under this Annex the parties undertake to cooperate on a number of programs involving their respective officials, institutions and the private sector in various fields, such as economics, science, culture and society.

A Standing Cooperation Committee is established under this Annex to consider and decide the methods and modalities for the implementation of the various areas of cooperation.

#### **Human Rights and the Rule of Law**

Under Article XIX of the Interim Agreement, both sides undertake to exercise their powers and responsibilities with due regard to the principles of human rights and the rule of law. In addition, the Israeli security forces and the

Palestinian Police are required to carry out their functions and responsibilities while adhering to these international norms, guided by the obligation to protect the public, respect human dignity and avoid harassment.

#### **Settlement of Differences And Disputes**

As in previous Israel-PLO agreements, the Interim Agreement provides that negotiations through the Joint Liaison Committee will be the primary dispute settlement mechanism between the parties as to the application and interpretation of the Interim Agreement (Article XXI). Where the Joint Liaison Committee is unsuccessful in resolving the dispute, there is no mandatory next step, but the agreement provides that such disputes "may be resolved by a mechanism of conciliation to be agreed between

**The agreement is ambitious in that it attempts to lay the groundwork for an all-encompassing resolution of the bitter, long-standing Israeli-Palestinian dispute.**

the parties". The use of the words "may" and "to be agreed" indicate that this is a voluntary proceeding in which both parties must agree on the need for and manner of conciliation. Where conciliation fails, the parties "may agree to submit to arbitration" the outstanding dispute. Again, the wording indicates that this is a voluntary procedure.

## Revocation of the Palestinian Covenant

The Interim Agreement contains a Palestinian undertaking that, within two months from the date of the inauguration of the Palestinian Council, the necessary changes will be made to the Palestinian Covenant with regard to those articles which deny Israel's right to exist or are otherwise inconsistent with the commitments included in Chairman Arafat's letter to Prime Minister Rabin of September 9, 1993 (Article XXXI(9)). This marks the first agreement in which a definite date has been specified for the amendment of the Covenant. In the original letter of September 9, 1993, Yasser Arafat only undertook that the Covenant was to be amended, but no particular date was set. In the Gaza-Jericho Agreement, it was provided that the Covenant would be amended in the next meeting of the Palestinian National Council, without setting a date for the meeting. The omission of a specific date for the revocation in the prior agreements was not accidental, but was meant to accommodate Yasser Arafat's continued contention that he would find it difficult to meet this obligation prior to the date of the Palestinian elections. As the Interim Agreement provides for the holding of these elections, the agreement provides a date for the revocation of the Covenant contingent on the inauguration of the Council.

Additionally, unlike previous agreements which simply requested that the Palestinian side present the necessary changes to the Palestinian Covenant to the Palestinian National Council, the Interim Agreement goes a step further and stipulates that the necessary changes be implemented. The obligatory language is stronger and mandates compliance.

## Release of Prisoners

In an effort to foster a positive atmosphere in the Palestinian public to accompany the implementation of the Interim Agreement, the agreement contains arrangements for the release of Palestinian detainees and prisoners who are residents of the West Bank and the Gaza Strip (Article XVI (1)). A similar provision was included in the Gaza-Jericho Agreement, pursuant to which 5,000 prisoners and detainees were released.

Detainees and prisoners from categories listed in Annex VII of

the Interim Agreement are to be released in three stages. The first stage of the release took place on the signing of the agreement. To date, close to 900 prisoners and detainees have been released pursuant to the Interim Agreement. The second stage is to take place prior to the date of the elections. A third stage of release of detainees and prisoners will take place during the permanent status negotiations. At that time, the parties may explore further categories for release.

## Coordination Mechanisms

As noted above, a number of joint committees are established in the agreement to coordinate various fields of activity - the Joint Security Committee, the Civil Affairs Committee, the Legal Committee, the Joint Economic Committee and the Standing Cooperation Committee. At the highest level, the Joint Israeli-Palestinian Liaison Committee established pursuant to the DOP will continue to be responsible for ensuring the smooth implementation of the agreement. At the same time, in the light of the parties' experience in implementing the previous agreements, the parties also agreed to establish a subcommittee of the joint Liaison Committee - the Monitoring and Steering Committee - to be responsible on an ongoing basis for monitoring the implementation of the agreement and steering the various joint committees (Article XXVI).

## Conclusion

The Interim Agreement is one of the most complicated agreements that Israel has ever concluded. It may well be one of the most complex autonomy arrangements ever to have been negotiated.

The agreement is ambitious in that it attempts to lay the groundwork for an all-encompassing resolution of the bitter, long-standing Israeli-Palestinian dispute. At the same time, it is fragile, due to the multitude of explosive issues that require constant attention, such as the conflicting national and religious claims and the ever present security threats.

While, the implementation of previous stages of the DOP was accompanied at the outset by numerous misunderstandings, violations and incriminations, it appears that, with the experience gained, the parties are increasingly successful in finding a common language in which to discuss and resolve their differences. It is to be hoped that this trend will continue as the parties face negotiations over even more sensitive issues, and that it will assist them in realizing their desire, as expressed in the preamble to the Interim Agreement, "to achieve a just, lasting and comprehensive peace settlement and historic reconciliation".



# Customs Aspects of the Interim Agreement with the Palestinians

David Shimoni

There are two fundamental principles underlying the Paris Agreement, signed after the Oslo Agreement, which provides the framework for the import and export policy to the Palestinian Autonomy and the trade between Israel and the Autonomy. First, the existence of free trade between Israel and the Palestinian Authority, such as that existing between California and Arizona, or between Tel Aviv and Haifa. This principle was established following economic negotiations between the two sides, and is based on each party's own market interests. The second principle holds that the external arrangements must be identical.

The Paris Agreement provides for free trade between Israel and the Palestinian Autonomy; the establishment of uniform customs structures for all foreign trade to Israel and the Autonomy, except in relation to a class of exceptional goods, in respect of which different rules have been provided.

The economic model pertains to three issues: first, the rates of tax; second, the legality of imports, such as standards, permitted and forbidden countries of origin, *etc.*; and third, work procedures.

1. The rates of customs duty and purchase tax valid in Israel will be the minimum rates for imports to the Autonomy. Save for some exceptions, all imports to the Autonomy will enter in accordance with the customs duty and purchase tax applicable in Israel although the Palestinian authorities will be entitled to set higher rates. To date, the Autonomy has not done so, for the simple economic reason that the existence of free trade and free movement of goods between Israel and the Autonomy makes it financially unworthwhile to set higher rates than those applicable in Israel, as this would lead to the importation of goods through

Israel and consequential losses to the Palestinian Autonomy.

2. With regard to VAT, the Agreement provides that there must be a uniform rate between local products and imports. It may be at a rate of 17% as in Israel, or a lower rate of 15 or 16%. To date, the Palestinian Autonomy has retained the rate of 17%.
3. With regard to the legality of imports, it has been agreed that all the import laws in effect in Israel, *i.e.*, standards, permitted and forbidden countries of origin, the issue of responsibility for imports and the provision of services, will be identical.

The Agreement further provides that all classification and customs tariffs shall be identical to Israeli tariffs, which in turn are identical to the international customs tariff as determined by the World Customs Organization. With regard to the assessment of goods, the Agreement provides that the same shall be performed in accordance with the current laws of Israel, until the present system is changed in January 1997, in compliance with the agreement between Israel and GATT.

The Agreement provides that all goods imported through Israeli ports will be processed by Israeli customs officials only, without the participation of Palestinian personnel. Where goods pass through the Allenby Bridge over the Jordan River, or the Rafiah Border Crossing, somewhat different rules apply, and there is defined participation of Palestinian customs officials, in collaboration with Israeli customs officials.

Slightly different rules apply to the movement of passengers through border crossing points. In such cases there is greater contact between the customs official and the passenger and therefore the issues are more sensitive.

Accordingly, in the Rafiah Crossing and Allenby Bridge respectively two sets of terminals have been established - one for residents of the Autonomy and the other for Israelis and tourists to Israel. The latter terminal, like Ben Gurion Airport, is operated by Israelis only. In the terminal which processes Palestinians, the work is performed by Palestinian customs officials, in collaboration with Israeli customs officials, who may at any time request to examine goods or a passenger, together with a Palestinian official. The aim is to reach joint decisions; disputes are transferred for decision to a special joint committee.

As to the categories of exceptional goods, in the first class - the Palestinians are entitled to determine customs rates, issue import/export regulations, and even import goods from countries where imports to Israel are forbidden, such as the Arab states. Because of the high level of freedom given to the Autonomy in terms of movement of goods, the Agreement provides quotas in respect of this class of goods, based on "the economic needs of the region". Concerning vehicles, the Palestinian Authority will be completely free to determine the rate of tax and no quotas will be operated. In accordance with the Agreement, the Palestinian Authority is entitled to issue import licences which accord with the import policy applicable in Israel.

Finally, special provisions have been made for waivers for returning Palestinian residents, and the tax liability of donors. The principle underlying the Paris Agreement is that all revenues from customs, purchase tax and VAT accruing from any merchandise imported by either Israelis or Palestinians, and whose final destination is the Autonomy, shall be transferred to the Palestinian Authority.

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# The Restitution of Jewish Property in Eastern Europe

Shevah Weiss

**P**oland is not the only place where the issue of the restitution of property to its Jewish owners is relevant. But the fact that more than 3 million Jews lived in Poland prior to the Holocaust, and most of them were destroyed there, has meant that most Jewish property and assets are located in that country. At the same time, it must be remembered that there is also Jewish property in Romania, Hungary, Czechoslovakia, Slovakia, Lithuania, Latvia, Estonia, Ukraine and in every other place where the Germans and their collaborators sewed death and destruction and murdered Jews.

Remaining property may be categorized as follows: first, private property, houses, plants, shops, offices, *etc.*, generally with no identifiable heirs. The question which arises is why the countries which witnessed these murders should take over the victims' property. If one cannot ask all of them: "you murdered and also inherit?", I can certainly say to all of them "you inher-



ited the property of those who were murdered", and to some of them "you also murdered".

Regarding the behaviour of Lithuania, Latvia and Estonia, large segments of their population were active partners in the murder itself. In Poland and other places there were collaborators but one cannot say that all the people murdered Jews. When the Germans arrived they found local collaborators and together they committed the atrocities. The anti-Semitism in Hungary gave rise to militias which slaughtered the Jews, and saved the Germans the work of killing. In Poland close to three million Poles were also murdered.

We have an obligation to locate the

Jewish property which was left after the war. In my view this property largely belongs to the Jewish people. It is necessary to negotiate with each country separately, and restore the property to Jewish ownership, on the basis of the economic capacity of each of the countries, with each country enacting the necessary internal legislation to enable the return of the property. This requires specific and realistic handling, supported by our full moral weight. It is impossible to act in a completely non-rational way towards all the countries, some of which are burdened by oppressive economic problems. Bearing in mind that we are considering the genocide of almost an entire people, it is possible to spread future agreements over one or two generations.

Secondly, private property was left where heirs **are** identifiable. There are many cases in which survivors of the war left behind property when they moved to Israel in the years 1946-1947, or to United States, Canada, Australia and other places. This was and remains their property; it must be located and the relevant countries in eastern Europe must ensure that suitable internal laws create a legal framework within which all the Jewish property can be restored to its owners, in a just and effective manner.

Third, there is communal property. I

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have dealt with this in recent years in Poland and other places. When I arrive on Parliamentary business to any of the countries of eastern Europe, I regard my service to the Jewish cause as having the same importance as my parliamentary, political or state service. I willingly engage in these matters which are outside the defined scope of my office because of my feelings of moral and personal obligation. In this category there is a great deal of property, including synagogues, libraries, land and cemeteries. In some of these countries Jewish communities have also remained. In part, these communities are also successors to the property. In Hungary a relatively large community remains; in contrast, the position in Poland is surreal. In Poland there were thousands of Jewish communities; indeed, at one time, this was the largest community in the world. Today, Poland has only a small Jewish community of about 10,000 people. The younger generation is growing smaller, partly because of assimilation, partly through emigration to Israel. However large quantities of property exists in Poland which can be located, including cemeteries which have been destroyed but where the land remains.

The central idea of the government of Poland is to begin locating this property and slowly appropriate it to local communities. This seems to me to be absurd. I have discussed this matter with the Chairman of the Polish Parliament, Dr. Juzef Oleksi, who has since become the Prime Minister of Poland. I also raised the issue in my meetings with the outgoing President of Poland, Lech Walesa, in my last conversation with him in August in his home, and with Tadeusz Mazowiecki, former Prime Minister of

Poland; Professor Geremek, Chairman of the Foreign Relations Committee of the *Sejm* (Polish Parliament); Adam Michnik, editor, journalist and author with great influence in Poland; and also with Aleksander Kwasniewski, who was recently elected as the new President of Poland. Some of these are personal friends and I have attempted to influence them on a personal level and induce them and others to work towards the completion of suitable legislation for the restitution of property.

I have indicated to these persons that it is improper that this extensive property

**We have an obligation to locate the Jewish property which was left after the war. In my view this property largely belongs to the Jewish people.**

be allocated only to those small Jewish communities left in Poland. Of course these communities must be helped as much as possible. However, the remaining property which belonged to the Jews is vast. It must be recalled that there are numerous large communities of ex-Poles throughout the world. In Israel itself there are hundreds of communities of ex-Poles which continue to focus on the memories of their youth and on the memory of the destruction of their homeland. Generally, one can say that the number of Jewish communities of ex-

Poles is close in size to what previously existed in Poland. Accordingly, I believe that we have just and moral grounds for demanding that the Jewish organizations which deal with the issue of the restoration of Jewish property to its owners, and the Government of Israel, directly, should be central partners in deciding the fate of this property.

One can already say, expressly, what should be done with the property, after it is identified: the establishment of museums, cultural centers, rehabilitation of all the cemeteries, the erection of memorials, research into the history of the communities, and the establishment of old-age homes in Jewish communities throughout the world for needy ex-Poles.

In Hungary there have been developments in terms of legislation, registration and return of property. In Romania there were great difficulties. The debate in the Knesset had appreciable influence on Romania in this connection. In Poland there has been some movement recently in respect of private property where there are identifiable heirs. Legal arrangements have been made and some of the heirs have had their property restored to them, although in many cases questions arise relating to tenants protected by statute who pay only a fraction of the true rent value. Some of the property has been nationalized and only recently laws have been enacted to denationalize them. With regard to communal property, Prime Minister Oleksi has recently promised me to expedite legislation in the *Sejm*. For their part, the Poles raise a number of arguments, including for example that not all the communal property was Jewish. This is an absurd and rather unfair argument, as the communal property belonging to the Jewish



communities comprised over 90 percent of communal property.

In my conversations with the leaders of Poland on this issue, some, including former President Walesa and Prime Minister Oleksi, claimed that they had been offended by the fact that the Jews had exercised extensive influence on the American Congress so that the Congress would cause US Secretary of State Warren Christopher to issue an order to the effect that countries which do not respect human rights, including the rights of destroyed communities, would find it very difficult to obtain American state, economic and other aid. The Poles also encountered similar attitudes in the European Council and in the European Parliament, making it difficult for them to join these bodies. The Polish claims in this regard are tinged by charges of Jewish conspiracy, as if there is a world Jewish conspiracy operating against them.

In my last conversation with former President Walesa, last summer in Poland, I stated expressly that this is not a marginal issue for us but rather it is central to our relations, and that it is natural that a people which has been destroyed on Polish land would not waive its elementary rights. Had Poland behaved more fairly in this matter, there would have been no need to activate various international institutions to intervene with them.

During the conversation I also made it clear that the Poles in the United States have also exerted and continue to exert pressure on the American Congress so as to cause it to exercise its influence with the Soviet Union, during the communist regime, in connection with the latter's relations with Poland. I emphasized that

if these external interventions are not to their liking, it would be best for us to speak directly, bilaterally. During my three day visit in Poland, last August, I met the majority of the country's leaders. I believe that I made an impression on them, particularly as I directly, fairly and openly expressed my sharp criticism of them. In appearances before the central television networks in Poland, I explained the issue of Jewish property to the Polish people, clearly and in the Polish language I remember from my youth.

The majority of the current leadership of Poland, including the government

**I shall continue to place great importance on the issue of the restoration of Jewish property in eastern Europe, to its owners and to their heirs.**

elite, is today pro-Israel and pro-Jewish. In recent years hundreds of books about the Holocaust have been published in Poland, some of them are soul-searching in nature, some were written by those Polish forces which joined the Jews in resistance to the Nazis. This is a country in which millions of people, including Jews, were murdered; and in which the Germans chose to establish their death camps. Further, one cannot ignore the waves of anti-Semitism still to be seen in today's Poland. In the last elections in Poland, the anti-Semitic forces joined Walesa leaving a stain on his reputation.

Accordingly, the winner, Aleksander Kwasniewski, seems to me from a Jewish point of view to be the right victor.

The Prime Minister of Poland Jozef Oleksi, who is a very important leader of the Socialist post-Communist party, promised me in my conversations with him that he will bear in mind the matters that I raised with him when he comes to deal with this issue. At the same time he asked me, as did Lech Walesa, not to bring heavy pressure to bear on him and not to intervene through external forces such as the United States, as Poland wished to settle the matter by itself. He was not more specific than this.

It is my intention to encourage the new Foreign Minister Ehud Barak to become involved and deal with this matter, which is of great importance to the Government of Israel, to the State of Israel, and to the central Jewish organizations. For my part, I shall continue to place great importance on the issue of the restoration of Jewish property in eastern Europe, to its owners and to their heirs, to the Jewish people as a whole and to its authorized representatives, and to advance this cause as long as I am Speaker of the Knesset, with the moral authority conferred on me to speak in the name of, and represent, all the parties in the Knesset.

### Books Just Received

Tel Aviv University Studies in Law, Vol. 12, 1994, ed: Amos Shapira. Papers on Human Rights and their Impact on Matters of Private Law. The Cegla Institute, Buchmann Faculty of Law, Tel Aviv University.

# Magen David Adom and the Red Cross

Morris B. Abram

**T**he Middle East Peace Process has generated much goodwill in the international community towards Israel. The genuine grief displayed by heads of state after the assassination of Yitzhak Rabin is testament to the atmosphere of respect which now prevails. One hopes that in the context of this new found spirit, progress can be made on certain matters concerning Israel's place in the international community.

An issue ripe for settlement is the status of Israel's national protective symbol, the *Magen David Adom* (Red Shield of David). Although the MDA has long been *de facto* recognized in Arab-Israeli conflicts as a protective symbol, it has never been *de jure* recognized as such under the Geneva Conventions of 1949 and Additional Protocols (the Geneva Conventions).

An unfortunate situation therefore exists: Israel's MDA Society - established in 1930 and formally recognized by the Knesset in 1950 as operating under the Geneva Conventions - cannot join the International Red Cross and Red Crescent Movement. This is because Article 4 of the Statutes of the Movement

requires that a national society must use one of the distinctive emblems recognized by the Geneva Conventions. According to Article 38 of the First Geneva Convention of 1949, these are the red cross, the red crescent and red lion and sun on a white background. Although the MDA Society can attend Movement events - like this December's International Conference of the Red Cross and Red Crescent in Geneva - it must do so as an observer and not as a fully fledged participant.

The exclusion of the MDA Society from the Movement is especially regrettable considering the Movement's mission. The Movement stands as a towering symbol of civilization in a conflict-ridden world, its fundamental principles exhorting it to uphold standards of humanity, impartiality, neutrality, independence and universality. Despite Israel's ratifying the Geneva Conventions in 1949, however, the Movement has failed to recognize Israel's protective symbol. The Movement now has the opportunity to make a positive contribution to the Peace Process by rectifying that situation.

## The Red Cross: Does it Have Religious Significance?

The most contentious issue in the MDA debate is the significance of the red cross. It has long been argued that the

red cross is a neutral symbol and that there is no need to amend Article 38 for the sake of unhappy states parties to the Geneva Conventions. Proponents of this argument point to the fact that the red cross was formed by reversing the Swiss Federal colours, and that some non-Christian countries use the red cross.

While this argument may have been persuasive before 1929, that is no longer the case. Why? First, in 1929 the Geneva Conventions were amended so that not only the red cross, but also the red crescent and red lion were recognized as protective symbols. This was done in response to pressure from Muslim states like Turkey which, since 1876, had used the red crescent as its protective symbol, arguing that the religious connotations of the red cross were unacceptable to a Muslim country. Although the international community had *de facto* recognized the red crescent (and red lion and sun in the case of Persia) before 1929, the *de jure* recognition granted that year amounted to an open admission that the red cross had religious connotations for some states.

Second, in 1986 the entire Movement, including its component parts (with the exception of the International Committee of the Red Cross) incorporated the phrase "red cross and red crescent" into its title. This seemed to acknowledge that two religions are embraced by the Movement: Islam and Christianity. Indeed in 1981, the then President of the International Committee of the Red Cross (ICRC), Alexander Hay, noted that:

"the co-existence of the two emblems of the red cross and the red crescent may give the false and unfortunate impression that our movement has two poles, a Christian and an Islamic one,

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and that other religious or lay modes of thinking are ruled out. Fortunately, many countries do not attach religious significance to the Red Cross. Nevertheless, the religious connotations attributed by some to the Red Cross and Red Crescent remains a problem: it weakens the protective value of the emblem and it may appear to favour two religious communities”.

## Has Israel Attempted to Have Article 38 Amended?

Israel has only made one attempt to have Article 38 amended. During the 1949 diplomatic conference on the Geneva Conventions, an Israeli-sponsored amendment to Article 38 was defeated by a vote of 22 to 21, with 7 abstentions. The lack of amendment attempts is often pointed to as a reason for the current *status quo*. But there has only been one other full diplomatic conference on the Geneva Humanitarian Law Instruments since 1949 - that took place between 1974 and 1977. Although the Israeli delegation originally put forward an amendment, it withdrew it when it became clear that it would be defeated at the conference plenary.

It is clear that Article 38 is the most difficult hurdle that must be overcome in the resolution of the MDA issue. A full diplomatic conference of states parties of the Geneva Conventions is required to amend it if settlement of the MDA question is to take place.

## The Statutes of the Movement

In 1986, a new Article 4 was inserted in the Statutes of the Movement. Article 4 incorporates the provisions of a resolution adopted at the International Conference of 1948 and lists 10 characteristics that a national society must possess in order to be officially recog-

nized. Included in this list of characteristics are: “Use of the name and emblem of the Red Cross or Red Crescent in conformity with the Geneva Conventions.”

In effect Article 4 has further institutionalized the MDA problem by providing a second hurdle that must be overcome if the MDA Society is to join the Movement. The Statutes of the Movement require a two-thirds vote for any change to take place. Technically, the International Conference to be held this December could amend the Statutes

**The religious connotations attributed by some to the Red Cross and Red Crescent remains a problem: it weakens the protective value of the emblem and it may appear to favour two religious communities.**

but there has been no official preparation for this. The next conference will not take place until 1999.

## Working Group

At the conclusion of the 1977 International Red Cross Conference in Bucharest, a Working Group was established to examine the emblem issue. At the International Conference held in Manila in 1981, the Working Group was disbanded, much to ICRC President Hay's dismay. Commenting on the MDA situation, he said:

“...we must realize that it must seem discriminatory to some and contrary to our principles that the MDA is not recognized. Indeed, that a Society in a member state of the international community which has signed and ratified the Geneva Conventions of 1949 and which has not been spared by conflict, that Society, as I was saying, is not a member of our Movement because at least part of its people feel that they cannot identify with the emblems we like to consider and actually call universal”.

The disbandment of the Working Group was addressed to some extent by the creation of a Consultative Committee in Birmingham in 1993. This Committee, which is mandated to report to the Council of Delegates before the International Conference this December, is to make recommendations on a number of issues, including the emblem problem.

## Conclusion

In the spirit of goodwill which now prevails in the light of the Middle East Peace Process, the time has come to address the MDA issue. As a preliminary measure, a working group should be established to make recommendations on this issue. Theoretically, the Consultative Committee set up in 1993 could be reconstituted by this year's International Conference as such a group.

Here are three of numerous possible solutions that a working group might consider:

1. *Design a neutral symbol free of religious connotations that states which are uncomfortable with the red cross, red crescent and red lion and sun feel free to use.* This solution is open to attack on two grounds: it diminishes

## Abraham Lincoln Marovitz at 90

The Honorable Abraham Lincoln Marovitz, of Chicago, Illinois, USA, recently celebrated his ninetieth birthday. He is one of the founding members of the Association and his jubilee affords welcome opportunity to join his many friends and admirers in congratulating and extolling him.

Marovitz was born to orthodox parents whose great American patriotism is evident from the fact that they named their son after the great American President. Throughout his life he regarded this fact as some kind of legacy bequeathed to him: not only did he remain a fervent and enthusiastic American but he cultivated his nominal affinity with Abraham Lincoln with an almost religious adoration. At the same time, his life long veneration of his parents, and especially his mother of whom he speaks in the most devoted and affectionate terms, kept his commitment to Judaism and Jewish religious and charitable causes ever alive and active. The American and Jewish faces of his personage are very impressively illuminated in the fittings of his chambers in the Federal Court Building in Chicago: one of the long high walls is covered from top to bottom with pictures, sculptures and documents of Abraham Lincoln; the opposite wall, only a little smaller, is covered with copies of all the portraits and sculptures ever made of Moses Our Teacher. This private museum is as unique as its owner.

After several years of service on the bench of Illinois state courts, he was appointed Federal Judge in the U.S. District Court of Chicago. He is a very distinguished and highly reputed judge. I have heard his praise sung not only by attorneys and by the judges of his own Court, but also by appellate judges both in Chicago and in Washington. When after several decades of exacting work he decided that it was time for him to

retire, he was persuaded to accept nomination as Senior Judge - by virtue of which he is still being recalled to sit on the bench when there occurs a shortage of judges or an overload of cases for trial.

The most conspicuous of his attributes is that he is a man of the world. Always impeccably dressed and painstakingly well-groomed, he bestows his custom on all the fashionable and elegant places of Chicago. To accompany him into a restaurant is to witness the triumphal entry of the most coveted patron. Those who had - like ourselves - the pleasure of being hosted by him in Chicago, partook of a resplendent hospitality.

And he is the most jovial and convivial of men: outside his courtroom he never displays any puffed-up judicial bearing, but only cheerful congeniality, and even inside his courtroom, he goes out of his way to be amiable with attorneys, reassuring frightened witnesses and encouraging dumbfounded litigants. Little wonder that the Jewish legal fraternity hails him as a paragon of lovingkindness.

All our Congresses were graced with his presence, and he made good and lasting friends of each and all of attending colleagues, perfectly implementing one of our foremost original goals, to strengthen ties of friendship between Jewish lawyers from all parts of the world. All of us wish the beloved nonagenarian many more blissful years in good health and spirits.

**Justice Haim Cohn**

Former Deputy President of the Supreme Court of Israel  
and Honorary President of the Association

the distinctiveness of the recognized emblems and it would require the MDA Society to use a new symbol as its main emblem. This solution is unlikely to be acceptable to Israel or the MDA Society. Other national societies and governments have also reacted negatively to this proposal in the past.

2. *Return to the pre-1929 situation so that only the red cross is recognized as a protective symbol under the Geneva Conventions.* This solution is premised on the idea that the red cross is a neutral symbol. While it avoids the problem of proliferation, it

would be difficult to turn back the clock and argue that the red cross has no religious meaning. This solution is unlikely to be acceptable to Israel, the MDA Society and those states which use the red crescent (the red lion and sun is not in use).

3. *Have the Geneva Conventions amended so that the MDA is recognized.* Although this solution is open to attack on the basis of diminishing the distinctiveness of the current emblems, it is clearly the preferred solution for the MDA Society and Israel. It would give the MDA *de jure* recognition in international law,

allowing Israel's national society to be recognized by the Movement. This was the course which ICRC President Hay favoured in 1981.

Clearly there is no perfect to solution to the MDA problem. But despite the difficulties involved there is a moral duty on the Movement to address the issue. Indeed, in so doing it will make a positive contribution to the Peace Process. In the meantime, the Movement is falling short of the lofty standards to which it is dedicated and has for the most part successfully upheld.



**T**he Association was founded in August 1969 and has as its primary purpose to contribute to the establishment of an international legal order based on the rule of law in relations between all nations and to promote respect for human rights and the equality of all peoples and States to live in peace.

This agenda item is of prime interest to the IAJLJ. We consider that freedom of thought, conscience and religion enshrined in Articles 18 of the Universal Declaration and the International Covenant of Civil and Political Rights, lies at the centre of the cluster of fundamental human rights and freedoms which gives humankind its inherent quality. No authority on earth can interfere with the human thought processes that determine individual convictions and belief, whereas the attempt to interfere with freedom of opinion and expression, being by its very nature an externalization of the thought process, is more readily subject to denial and abuse. For this reason freedom of religion and belief is recognized under Article 4 of the Covenant as one of the seven fundamental rights and freedoms, which must remain inviolate at all times and from which State parties cannot derogate, even in times of national emergency.

The Subcommittee has before it the second annual report of the current Special Rapporteur of the Commission on Human Rights, Mr. Abdelfattah Amor and the eighth since the 1986 decision of the Commission that manifestations of intolerance and discrimination based on religion or belief "inconsistent" with the

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Adv. Daniel Lack represents the IAJLJ at UN bodies in Geneva.

# The Future of Religious Intolerance

**Daniel Lack**

provisions of the 1981 UN Declaration on this subject - be the subject of reporting procedure to the Commission.

Mr. Amor has closely followed the methodology of his predecessor Mr. D'Almeida Ribeiro. We would like to

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**Extracts from the inaugural statement made by Mr. Daniel Lack on behalf of our Association during the 47th session of the UN Subcommittee on Prevention of Discrimination and Protection of Minorities: Elimination of All Forms of Intolerance and Discrimination based on Religious Belief.**

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congratulate Mr. Ribeiro on the important contribution he made to revealing the growing threat to freedom of religion and conscience and the significant pattern of inquiry and dialogue he has established where situations of violation of freedom of religion and conscience occur. We commend Mr. Amor in following in Mr. Ribeiro's footsteps and pursuing consistently the response of States, particularly where State action is at issue in provoking, condoning or encouraging the recurrence of such violations. Both have encouraged non-governmental sources to provide relevant information and have not hesitated to

bring such evidence of restrictions or denial of religious freedoms to the attention of the competent national authorities.

It is clear however that the 27 situations reported last year as compared with the 49 in this year's annual report of the Special Rapporteur, confirm that there is a sharp deterioration with respect to provisions of the 1981 Declaration. It has from the outset been apparent that denial of freedom of religion and incidents of intolerance and discrimination cannot be clearly distinguished from situations in which other basic human rights are violated. The Committee on the Elimination of Racial Discrimination monitoring reports of the 143 State parties to the convention on this subject, has asserted that intolerance and discrimination on grounds of religion are frequently inextricably linked with situations of racial and ethnic discrimination.

Various kinds of harassment or persecution such as arbitrary arrest and detention, torture or ill treatment are currently being reported to the Special Rapporteur on religious intolerance. Incidents of large scale loss of life attributable to a mixture of ethnic hatred and religious extremism have been recorded in Bosnia-Herzegovina and other areas of the former Yugoslavia by the Commission's Special Rapporteur Mr. Tadeusz Mazowiecki, who has since

resigned in protest at the international community's failure to take effective action.

Other areas of concern in this year's report include heavy loss of life in rioting between Muslims and Hindus in various parts of India in recent months, acts of severe religious intolerance by the authorities in Sudan, widespread assassinations in Algeria by Islamic fundamentalists and extremists threatening to extend their terrorist campaigns to other countries of the Maghreb. The actions of religious extremists in Egypt has also continued unabated, frequently directed against the Coptic religious minority.

The regrettable massacre of Muslim worshipers in the Hebron mosque by a deranged individual is mentioned by the Special Rapporteur. As has been widely reported, this tragedy was the subject of immediate remedial action including the appointment of a court of inquiry whose rigorous security recommendations to protect worshippers at this site, were promptly implemented in full, with all responsible sectors of public opinion, both secular and religious, unanimously condemning this heinous act. Both prior to and subsequently, as the Special Rapporteur has also reported in part, Hamas militant extremists have committed repeated bombing attacks against Jews by detonating explosive devices in crowded areas, principally on buses and public transport centres frequently with heavy loss of life and widespread injury to travellers in a patent attempt to wreck the Middle East peace process. These atrocities, although committed in an essentially political context, are nonetheless of great concern in connection with the increasing

phenomenon of religious extremism distorting the precepts of a major monotheistic world religion, which the Hamas group variously inspired by the Muslim Brotherhood and the Hizbullah, falsely purports to represent. In its frenzied and diabolical rhetoric as published in its so-called covenant, this fanatical terrorist sect calls for the spilling of Jewish blood whether in Israel or abroad as an act of worship. It is consequently feared that religious extremists of similar inspiration are linked to the atrocious car bomb terrorist attack on 18 July 1994 in Buenos Aires against the seven-storey

**Religious intolerance  
and extremism is  
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rights as a whole.**

building housing amongst others, the offices of the representative national Jewish institutions of the Argentine community, resulting in the death of almost 100 persons including passers by and 200 injured. Investigations over the past year have produced no conclusive evidence of the perpetrator's identity. It is one of the many examples of the dangers of religious extremist zealots who in betrayal of the very values they seek to defend, commit acts of self-immolation to secure the death of their victims, convinced that they will thereby open the gates to paradise.

But what happens to these painstaking and carefully prepared reports of the Special Rapporteur? They are listened to with scant attention by the Commission struggling to get through a crowded agenda and after a brief debate with little analysis of substance, they are filed to gather dust even though they are conscientiously followed up by the Special Rapporteurs. Ritualistic Commission resolutions deploring these phenomena do not produce effective action and other than the impact on public opinion, which is of marginal effect to authorities defying the rule of law and a matter of indifference to extremists, the international community resigns itself to inaction.

The Subcommission has a special responsibility in proposing the way forward. Some 30 years ago, the seminal study by Mr. Arcot Krishnaswamy proposed the drafting of a body of binding principles by States to protect freedom of religion and conscience and to combat incitement to hatred and violence on grounds of religious prejudice and intolerance. The legislative history which led to the dichotomy of approach distinguishing between racial and religious discrimination is well-known, going back to the twin resolutions of the General Assembly of 1962 (General Assembly Resolution 1780/1781 (XVII)). The Declaration on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly Resolution in 1963 and the Resolution which it adopted in 1965 opened the Convention for signature and ratification two years later and its entry into force with the twenty-seventh ratification in 1969. The Declaration on Religious Intolerance

finally saw the light of day only 12 years later and consideration of drafting a binding convention 14 years subsequently in 1995 still remains a dead letter.

While the text of the 1981 Declaration is well drafted and could be the basis of an extended treaty text converting imprecise commitments into binding obligations on all future State parties, departures from its standards are considered today as inconsistencies with principles of a non-binding character and not as violations of positive international law. We sympathize with the aspirations of the Special Rapporteur to consider the educational process as the ultimate remedy, but realistic expectations from this approach as well as the no less important road of inter-religious dialogue, will involve slow and painstaking progress over many decades.

No effective argument has been produced to date to contradict the clear recommendations of Odio Benito to the Subcommission as its Rapporteur of the study on this question in 1986 to proceed forthwith in drafting a binding international convention. The study did however have a positive outcome in the appointment of Mr. Ribeiro by the Commission on Human Rights, and he lost no time in his monitoring activities to endorse strongly Mrs. Odio Benito's recommendations.

It is however somewhat disappointing that the present Special Rapporteur has had such a half-hearted reaction to the proposal of drafting a convention on the basis of the 1981 Declaration. As expressed in his report of last year when commenting on Mr. Theo van Boven's 1989 study of this question, Mr. Amor cautions that "Such an instrument should

not be hastily drafted. Time is still needed to achieve significant progress in respect of religious freedom and to combat intolerance and discrimination based on religion and belief". In this year's report Mr. Amor has developed in his conclusions a surprising holistic approach. Apparently, according to Mr. Amor's conception we must await the adoption of measures to eliminate extreme poverty and the promotion of the right to development before religious tolerance and non-discrimination can be achieved. This gradualist and evolutionary approach is disheartening and in our view even defeatist. Nothing in Mr. van Boven's study calls for postponing drafting of a binding convention to the Greek Calends. On the contrary, Mr. van Boven's useful comment shows a striking unity of purpose in linking the various elements in the Universal Declaration, the Civil and Political Rights Covenant and the principles set forth in the 1981 Declaration. The threat proposed by the resurgence of religious and racial intolerance has been under discussion for well over 30 years. It should not be forgotten in the year of the 50th anniversary of the end of World War II and of the creation of the United Nations, that religious persecution resulting in a policy of deliberate genocide on a scale unprecedented in human history, was the springboard from which the promotion and protection of human rights has developed.

We submit that the Special Rapporteur's conclusion that religious intolerance and extremism is jeopardizing the right of individuals and peoples to peace and is prejudicial to human rights as a whole, is nearer the mark. Suggestions as to whether a further treaty

system should be created, as opposed to the drafting of a further optional protocol to the Civil and Political Rights Covenant are premature at this stage. Even less persuasive are the objections of an administrative character with respect to the lack of budgetary resources, the added burden of reporting to States parties and the unjustified fears that a protracted drafting process would result in a diminution of standards. A clear signal from this Subcommission in the form of a recommendation to the Commission on Human Rights that a sessional working group be convened at an early date to draft an international convention, building on the important body of principles contained in the 1981 Declaration with the declared aim of converting them into binding norms, would be a sign of hope to the international community.

We believe that non-governmental organizations can contribute effectively to this process. The IAJLJ would be ready to contribute to this process together with other like minded organizations. In the interim, the mandate of the Special Rapporteur should be extended and be continued in parallel with the creation in due course of the appropriate treaty body, charged with supervising the new instrument. The need has been demonstrated in other human rights areas, of maintaining a functional rapporteur at the universal level, notwithstanding the existence of the treaty body supervising the convention system. A recommendation of this nature, would indeed be a fitting way to mark 1995 as United Nations Year for Tolerance in an otherwise bleak human rights horizon.

# Highlighting Constitutional Changes in the Israeli Legal System

Yaffa Zilbershatz

I approach the handling of this topic with a certain fear. In highlighting some issues, others, naturally, remain in the dark. Those which stay in the dark might be of importance, yet there is no way to illuminate all issues within the limited scope of this review.

I will try my best to describe the major recent changes that have occurred in Israel's Constitutional Law and pinpoint some of the legal problems to which these changes give rise. The legislation that caused these changes was enacted in March 1992. Many of the problems that it raises have not yet been decided by the Israeli Supreme Court and the law is not yet clear.

We will begin our review by outlining some basic tenets of Israel's constitutional legal system.

## A Written Constitution in Israel

Israel does not have a single formal instrument which is considered a Constitution. Instead it has a series of Basic Laws, that were enacted in the years following the establishment of the State of Israel on May 15, 1948.

Originally, the intention of Israel's Founding Fathers was to cause the enactment of a Formal Constitution at the very first stage of the establishment of the State of Israel. They expressed that intention in the Declaration of Independence. The Declaration which was proclaimed on Friday, 14 May 1948, just before the British Mandate on Palestine expired, called for elections to a Constituent Assembly. The elections were supposed to



take place no later than October 1, 1948 and the role of the elected Constituent Assembly was to formulate a Constitution.

One other statement made in the Declaration of Independence which is important to an understanding of the Constitutional process should be mentioned. The Declaration vested legislative powers within a temporary nominated body called the Provisional Council of State and that Council's executive body was appointed as the Temporary Government.

The elections to the Constituent Assembly did not take place on time but were postponed. Israel found herself in a very difficult situation after declaring her Independence. She was attacked by her Arab neighbours as the War of Independence broke out.

Though the War of Independence was still continuing, the elections to the Constituent Assembly took place on January 25, 1949. A law passed by the Provisional Council of State just before the elections to the Constituent Assembly, provided that the Constituent Assembly would replace that Council and become the legislative body. This law did not mention anything about the Constituent Assembly's power to formulate the Constitution. But, as mentioned above, the Declaration of Independence provided explicitly that the Constituent Assembly would formulate the Constitution.

The Constituent Assembly's life was quite short. It passed a law which stated that the legislator would be called "The Knesset" and that the Constituent Assembly would be called the "First Knesset". According to that law, the First Knesset was vested with the power that the Constituent Assembly had, to legislate regular laws and to formulate the Constitution. The

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First Knesset passed a law which transferred its powers to the Second Knesset and on to any other Knesset to be elected in the future. It is debated among scholars whether the Second Knesset and its successors were vested only with the power to legislate or whether they also inherited the power of the First Knesset to formulate the Constitution.

When the question of enacting the Constitution arose in the First Knesset, the religious members of the Knesset were against it. They were afraid that a Constitution providing for freedom of religion and conscience would cause the annulment of certain laws compelling a large part of the Israeli population to follow the Jewish religion. Other members of the Knesset opposed the enactment of the Constitution since they believed that the time was not ripe for drafting the Constitution.

As a compromise, the First Knesset adopted a decision proposed by Member of Knesset Harrari on June 13, 1950. This decision stated that the First Knesset required the Knesset's Committee of Constitution and Law to prepare a draft of a Constitution. However, this Constitution was not to be enacted in one stage. Rather, the Committee was to draft parts which, if legislated by the Knesset, would be considered Basic Laws becoming part of the future Constitution. Once the Committee finished its work, all Basic Laws would be assembled and become the Constitution of the State of Israel.

To date, the Knesset has enacted eleven Basic Laws.\* Not counting the 3 new Basic Laws we will be soon discussing, most of the provisions of the remaining 8 Basic Laws are not entrenched, meaning that they can be amended by a regular majority vote. The Supreme Court has decided that they may also be amended by regular laws and not necessarily by Basic Laws. This Supreme Court decision has been widely criticized by scholars, but has not yet been changed.

There is much to be said about the content and normative character of the Basic Laws. While we are unable to refer directly to all these issues here, we shall deal with them indirectly through our discussion of the changes brought about by the new Basic Laws enacted in 1992.

## Basic Law: The Government

The Basic Law: The Knesset was adopted in 1958 and, a decade later, in 1968 Basic Law: The Government was adopted.

Read together, Basic Law: The Government and Basic Law: The Knesset show that Israel is a democratic state with a Parliamentary regime. The people elect the Knesset. The President of the State of Israel then lays upon a member of the Knesset the duty of composing a Government. It is most likely that he will lay this duty upon the member of the Knesset who is head of the party which has won the highest number of seats in the Knesset. Such member of the Knesset has the best chance to form a Government through arranging a coalition of parties. Once a member of the Knesset succeeds in forming a Government, the Government has to receive an expression of confidence from the Knesset. This means that the people elect the Knesset and the Knesset has the power to approve the Government in the name of the people. The Knesset has also the power to disapprove the Government: Once the Knesset votes no confidence in the Government, the Chairman of the Knesset informs the President thereof and the Government resigns as of the date of the disapproving vote.

In March 1992, the Knesset adopted a new Basic Law: The Government which is to replace the original version. The new law was adopted in 1992 but is not in yet force. The coming elections to the Fourteenth Knesset in 1996 will be according to the procedure prescribed in this new law and the law itself will come into force on the day on which the Prime Minister elected according to the new procedure takes office.

The new Basic Law: the Government creates a considerable change in the Israeli regime. The law separates the election of the Knesset from the election of the Prime Minister. The people elect the Knesset but they also directly elect the Prime Minister. The elected Prime Minister forms his Government. The Government as a whole does not have to receive the confidence of the Knesset even though any appointment of a Minister by the Prime Minister requires approval. The Government is allowed to start functioning from the day the Prime Minister presents it to the Knesset.

This constitutional change means that Israel no longer has a purely Parliamentary regime. The Parliamentary regime has been changed by the new Basic Law. It is now more like a Presidential regime where people directly elect the head of the executive branch. However, the new law does not go all the way toward a Presidential regime, since the existence of the

\* Basic Law: The Knesset; Basic Law: Israel Lands; Basic Law: The President of the State of Israel; Basic Law: The Government; Basic Law: The State Economy; Basic Law: The Army; Basic Law: Jerusalem, Capital of Israel; Basic Law: Judicature; Basic Law: State Comptroller.

Government is still, to a certain extent, dependent upon the Knesset. The Knesset can decide in a vote of a majority of its members (61 members) to disapprove the Prime Minister. Should the Knesset vote that way it, too, is dissolved, and new elections take place for both it and the Prime Minister.

In addition, according to the new Basic Law, not only are the Prime Minister and his Government dependent on the Knesset, but the Knesset is also dependent on the Prime Minister. If he sees that the majority of the members of the Knesset oppose his Government and that he cannot run the affairs of State properly, the Prime Minister, after receiving the consent of the President, may dissolve the Knesset. This, too, would cause new elections both of the Prime Minister and of the Knesset.

There are, of course, more changes and new arrangements in the new Basic Law: The Government. I would like to refer to one particular arrangement of that law which, in my opinion, is of major importance to the Israeli constitutional legal system.

In the Israeli legal system, the legislature has the power to enact laws, and the executive may make regulations if so provided by law. As a rule, a regulation cannot contradict a law unless the executive acts under its emergency powers, and even then, such a regulation is limited in time and manner.

The emergency powers of the Government are provided in Article 9 of the Law and Administration Ordinance. According to this article, if and when the legislature proclaims officially that the State is in an emergency situation, the Government may allow the Prime Minister or any other Minister to enact emergency regulations for the security of the country, the security of the public, and the supply of necessary goods and services. Such regulations may contradict a law, but they are to expire three months after their enactment if the Knesset does not enact a law to lengthen their application.

On May 19, 1948 the Provisional Council of the State of Israel which was the legislative body at that time, declared the existence of a state of emergency. This declaration is still in force and it enables the executive branch to make regulations that contradict laws if they are for the purposes mentioned in Article 9 of the Law and Administration Ordinance.

There is no doubt that Article 9 suited the needs of the time of its enactment. The country was at war and assembling the Government, let alone the whole Knesset, was nearly an impossible task. Nevertheless, one cannot ignore the fact that during the forty eight years of its existence, Israel has not always been at actual war. The security situation has its ups and downs.

Sometimes there is actual war, sometimes the situation is very tense but there is no actual war going on, and at other times life is almost as normal and stable as if there were no security problems in the region. Legally, however, the Knesset has not cancelled the proclamation of the existence of the emergency situation, and the executive has full emergency powers as if the country was at constant war.

This undesirable legal situation is amended by the new Basic Law: The Government. In Articles 49, 50 and 64, a new arrangement for an emergency situation is provided. It substitutes the arrangements of Article 9 of the Law and Administration Ordinance.

According to the new Basic Law, the Knesset, on its own initiative, or at the request of the Government, may proclaim the existence of an emergency situation. The proclamation will be valid for only a limited period of time which cannot exceed one year. The Knesset may repeat its proclamation as provided above. In case the situation does not enable the assembly of the Knesset, the Government may proclaim the existence of an emergency situation. Such proclamation expires seven days after it was made unless the Knesset decides to confirm it.

The provisions of the new Basic Law regarding the emergency situation are made to suit the complicated security situation in Israel. If war breaks out, even the Government alone can proclaim the existence of an emergency situation. But if not in the midst of a war, the Knesset alone has the power to proclaim the existence of the emergency situation. But unlike the former legal arrangement, such proclamation will not last forever. It will be limited to a maximum of one year. If there is a request to stretch it beyond the period of one year, the Knesset will have to make a new proclamation and consider whether it is appropriate to continue the state of emergency.

Once an official proclamation of the existence of a state of emergency is made, the Government is vested with powers to make emergency regulations. These regulations, however, must pertain specifically to the situation at hand. Additionally, under no circumstances, may these regulations preclude a petition to a court of law or impose retroactive punishment, or impinge upon human dignity. These requirements not provided for in Article 9 of the Law and Administration Ordinance serve as a very important guardian of the rule of law. They ensure that no regulation contradicts a law unless strictly required by the exigency of the situation. They also make sure that such regulations will be null and void should they encroach upon some basic human rights.

## Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation

Enacting a Bill of Human Rights in Israel has always been a very complicated task. Israeli society, being a melting pot of Jews coming from all parts of the world, is divided in its mentality and priorities of life. One of the major social tensions is between the religious and non-religious population.

It has been very difficult to overcome the gap between the demands of the religious parties in the Knesset and those of the non-religious ones. That is the main reason why since the establishment of the State of Israel, all attempts to enact a Basic Law on Human Rights have not succeeded. The legislature sitting in its capacity to enact Basic Laws, came to the conclusion that it would rather pass a partial Bill of Rights than have no Bill at all. And that is how these two Basic Laws: Human Dignity and Liberty and Freedom of Occupation came into existence in March 1992.\*\* They were a compromise, and they embodied rights that the different parties in the Knesset both religious and non-religious agreed upon.

### What rights are provided by these two Basic Laws?

Basic Law: Freedom of Occupation provides for the right of every citizen or resident of Israel to hold any occupation or profession. Basic Law: Human Dignity and Liberty provides explicitly for the protection of a person's life, body and dignity. It also provides for the protection of every person's property. It states explicitly that the liberty of a person should not be hampered by arrest, detention, extradition or in any other way. It calls for the freedom of every person to leave the country and for the right of every citizen to enter Israel. It also provides for the right of privacy.

One can easily see that the list is partial. It does not explicitly include such fundamental freedoms as freedom of speech, freedom of religion and conscience, or the freedom of assembly. Nor does it speak about legal rights in criminal and penal matters, and the principle of equality is also absent from the text of the Basic Law. Moreover, no reference is made to economic or social rights. What then, is the status of these rights within the

Israeli legal system, since they are not mentioned explicitly in the text of the Basic Laws?

The answer to this question lies in a clarification which is to be stressed. Although the enactment of a Basic Law on Human Rights was not accomplished until 1992, the Israeli legal system did, indeed, provide for the protection of human rights. In the absence of a law, the Supreme Court took upon itself the important task of securing human rights for every person in Israel. It stated in famous and important leading decisions that freedom of speech, the right of assembly and association, freedom of occupation, the right to leave a country, freedom of religion, the principle of equality, the right to privacy, *etc.* are basic and fundamental principles of the Israeli legal system. This means that these two Basic Laws did not create something new, rather, they codified some of the rights that had previously been recognised by the Supreme Court. By enacting the new Basic Laws, a part of the Court's decisions have become enshrined in law.

What are the legal consequences arising from the codification? Does it change the normative character and the application of the rights enumerated in the Basic Laws? An answer to these questions leads us to the essential debate about the legal consequences of the enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.

Until the enactment of these laws, the Israeli court did not declare a law void except in very rare circumstances. When a law of the Knesset contradicted one of the only three entrenched articles among all Basic Laws, and this law was not passed by the required majority, the court would annul that law. That is to say that if on rare occasions the court declared a law void, it did so only for the procedural reason that the law was not properly enacted. The court did not consider itself competent to annul laws even if their content conflicted with one of the very fundamental basic rights.

In a line of articles and in his comprehensive book on Constitutional Interpretation, Chief Justice Barak expresses the view that the two Basic Laws: Freedom of Occupation and Human Dignity and Liberty changed this legal situation and created a constitutional revolution. He points at Article 8 of Basic Law: Human Dignity and Liberty and Article 4 of Basic Law: Freedom of Occupation as the legal sources for this revolution.

Article 8 of Basic Law: Human Dignity and Liberty and Article 4 of Basic Law: Freedom of Occupation (hereinafter: Articles 8 and 4) provide that the rights conferred by the Basic

\*\* Basic Law: Freedom of Occupation was amended in March 1994 and this amendment included also two additions to Basic Law: Human Dignity and Liberty. When we refer to these two Basic Laws we refer of course, to the amended version of both laws.

Laws shall not be infringed save where provided by a law which accords with the values of the State of Israel, which was intended for a fitting purpose and only to the extent necessary.

What would happen should a law not conform to the requirements of these articles? What if the Knesset enacts a law that is not for a fitting purpose or if a law restricts one of the rights enumerated in the Basic Laws to a greater extent than necessary?

Both laws are silent and give no explicit answers to these questions. According to Chief Justice Barak, it is the court that has to decide whether a law passed by the Knesset does not contradict these two Basic Laws. The court will have to see whether the law infringes upon the basic rights, and whether such infringement meets the requirements of Articles 8 and 4. If the law which infringes upon the basic rights conforms to the requirements of Articles 8 and 4, it is legal. But, according to Chief Justice Barak, should the court reach the conclusion that a law infringes upon the basic rights but is not for a fitting purpose or encroaches upon them to a greater extent than necessary, the court has the capacity to annul that law. Many legal scholars in Israel agree with Chief Justice Barak's approach. But others are more sceptical and doubt whether judicial review may be imposed in such an indirect manner, without an explicit instruction from the Knesset.

Chief Justice Barak himself, while advocating judicial review, recognizes the problems that such an incomplete law raises. Even if one agrees that the power to apply judicial review can be inferred from the two Basic Laws, it is still not clear which constitutional remedies may be provided by the court. Will it declare a law infringing upon a right not according to the criteria of Articles 8 and 4 to be void or voidable? Can every court of law in Israel decide upon the validity of the law or must such a decision be referred to the Supreme Court which will sit as a Constitutional Court? It would have been much easier and more proper for the Israeli constitutional legal system that the answers to these questions be provided explicitly in a Basic Law. But, as explained above, the Knesset is divided on these issues and, to date, has been unable to reach an agreement and provide clear legal solutions with regard to them. The Knesset must bear in mind that if it does not supply explicit solutions as to the existence of judicial review and its scope, the Supreme Court will be forced to fill in the gaps.

Going back to the question we raised before about the difference between the fundamental rights enshrined in the Basic Laws and those which are not, the answer is now very clear. If

the Supreme Court adopts Chief Justice Barak's approach and gives the court the authority to annul laws, the court will only be able to annul such laws which stand in conflict with the rights provided in the Basic Laws: Freedom of Occupation and Human Dignity and Liberty. Infringement upon fundamental rights not included in the Basic Laws will not be cause to annul laws even if such an infringement is not for a fitting purpose and is beyond the extent necessary.

Such a conclusion focuses on an important debate regarding the method of interpretation of the Basic Laws. Are Basic Laws to be interpreted according to the strict wording of the text bearing in mind the intent of the legislator, or should the text be considered an independent instrument that may be widely construed in order to fulfil the goal of maximum protection of human rights? Should the court adopt a strict method of interpretation, the list of rights protected under these two Basic Laws will be quite limited. If, however, a wide method of interpretation is adopted, a court could then insert into the concepts of human liberty and human dignity most other fundamental human rights, including those not explicitly mentioned in the text.

## Conclusion

Whether one sees the constitutional changes in the Israeli legal system as a revolution or not, one cannot ignore the fact that the three Basic Laws enacted in March 1992 are of considerable importance and will surely have a great influence upon the Israeli constitutional legal system. Many questions that these changes raise find an answer in the Supreme Court's decision now decided on appeal. This decision clarifies many constitutional issues and sheds light on most of the problems discussed above although it is still preferable to have these questions and problems solved by the legislator. The Knesset has not yet enacted a Basic Law on legislation and has not yet completed the legislation of a Basic Law on Human Rights. The time is ripe for completing such legislation which will put the constitutional law of Israel on a firmer and clearer basis.

*Ed. Note: This article was prepared prior to the delivery of the extremely important and voluminous (500 page) decision concerning the validity of an amendment to a law regarding financial regulations in the agricultural sector (the Gal Law). The latter decision of 9 Justices of the Supreme Court answers many of the questions raised in this article and will be reviewed by Dr. Zilbershatz in one of the next issues of JUSTICE.*



# The “Ardeatine Graves” Massacre

## The Extradition and Trial of Erich Priebke

Oreste Bisazza Terracini

**O**n March 23 1944, the Resistance exploded a bomb in a Rome street as a company of German soldiers were marching by, killing 32 of them.

Rome at that time was occupied by Nazi troops and a reprisal was immediately mounted: for each dead German soldier ten Italian citizens were to be executed. Civilians were immediately rounded up in their houses and in the streets, and political prisoners and Jews were picked out.

The next day these hostages were taken out and shot a few kilometres outside the city walls, at a site from which building materials were quarried, and which since that time has been called *Le Fosse Ardeatine* (the “Ardeatine Graves”).

As a warning to the local people, fifteen more people were shot in addition to those killed in reprisal, bringing the total

number to 335, instead of the 320 planned. Thus one crime was compounded by another.

Responsibility for carrying out and organizing this ferocious reprisal lay essentially with two Nazi officers: Lt-Colonel Herbert Kappler, and SS Captain Erich Priebke.

Kappler was later captured by the liberation forces, convicted and sentenced to life imprisonment, while Priebke managed to escape, without even being tried in his absence, and simply vanished.

Fifty years later, Priebke was discovered in Argentina and the Public Prosecutor of the Rome Military Court applied for his extradition to Italy to stand trial, charged with “conspiracy in acts of violence and the aggravated murder of Italian citizens” (Articles 13 and 185(1) and (2), Wartime Military Penal Code, in relation to Articles 81, 110, 575 and 577(3), (4), (61) and (4) of the Italian Penal Code). As a member of the German Armed Forces, which were enemies of the Italian State, he is charged with having conspired with Herbert Kappler and other German soldiers (already convicted) to commit several actions to implement the same criminal plan, treating the victims cruelly, and causing the death of 335 members of the military and civilians, mostly Italian citizens, who had played no part in the war, executing them with premeditation by shooting them in the Ardeatine Quarries on 24.03.1944 while Italy and Germany were in a state of war.

This crime has not been time-barred under Italian law, and in his statements to the media Priebke has never denied taking part in shooting the hostages, claiming that his action was lawful at the time, both because the reprisal had to be considered legal, and because he had not acted on his own initiative but was obeying orders.

### Negligence, Reprisal or Collective Punishment?

If the accused retracts his public statements at his trial and is able to prove that some of the persons over and above the original number were shot by mistake because their names had been put on the list as a result of negligence rather than by willful intent, he could be acquitted because a crime committed as a result of negligence would be time-barred.

But quite apart from the overall role played by the defendant in these events, this episode cannot be merely considered to be a result of his “extraordinary negligence”.

Priebke is charged with being party to a crime of violence against private individuals, his enemies. This rules out the



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charge of abuse in reprisal (Article 176 of the Wartime Military Penal Code) because in technical and legal terms it was not a reprisal but an inhuman massacre in which one 16-year old boy and 75 members of the Jewish Community of Rome were put to death, guilty merely of belonging to a particular ethnic and religious group. No defence, save absolute necessity for the purposes of the war, can justify the mass murder of defenceless citizens, who are wholly extraneous to military operations.

This is the conclusion one reaches even without taking account of the 1949 Geneva humanitarian conventions in wartime abolishing the international right to armed reprisals - because it was a primitive instrument likely to lead to all kinds of abuse and to extend violence to acts of barbarism - applying the principle that criminal law cannot be applied retroactively enshrined in the Italian Constitution (Article 25(2)).

For as the law stood at the time of the massacre, an essential distinction was drawn between reprisal, collective punishment and revenge as means of self-protection in international relations. The 1907 Hague Convention (ratified by both Italy and Germany) and in particular the Regulations annexed to the Fourth Convention Relating to the Laws and Customs of War on Land, expressly refrain from using the word "reprisal".

Conversely, Section 8 of the Italian War Act (enacted by Royal Decree on 8 July 1938) took up and defined "reprisal", as developed in the literature,

carefully taking out the features that emerged as it developed through time - from being an instrument of self-defence used arbitrarily to encompass a range of unilateral measures which are essentially subject to constraints deriving initially from customary law and subsequently from the law of treaties.

In particular, the final subsection of Section 8 provides that compliance with rules issued in order to implement international conventions expressly banning reprisals can never be suspended.

It is therefore essential to refer to the Regulations of the Fourth Hague Convention mentioned above, and more specifically to the obligations and prohibitions on military forces occupying the territory of an enemy state.

They emphasize the following:

The obligation to "restore" and as far as possible guarantee law and order and public life, ensuring compliance with the laws in force in the country, unless absolutely prevented from so doing (Article 43).

The prohibition on obliging the populations in an occupied territory to provide information on the army of the other belligerent and on its means of defence (Article 44).

The duty to respect the honour and rights of the family, the lives of individuals, private property and also religious confessions and worship (Article 46).

No less important, lastly, is the ban on collective punishments

(Article 50): no collective punishment, in the form of a fine or any other kind, may be imposed on the population for individual actions for which they cannot be held jointly and severally liable.

In conclusion, the "Ardeatine Graves" massacre against the background of the war in which it took place and the contingent events giving rise to it cannot by any standards be considered a "reprisal" in its technical and legal sense, which has different connotations from its ordinary meaning.

The mass shooting was intended to be a collective punishment, in terms of its power to intimidate (which is also banned in international law). In the way in which it was planned and carried out, it was a barbaric and savage act of collective revenge.

The massacre might be considered not only a war crime but also a crime against humanity, including genocide, according to the declaratory provisions of Articles I and II of the United Nations Convention adopted by Resolution 260 of 9 December 1948, to which Italy acceded under Law no. 153 of 11 March 1952. Because of the principle that criminal law cannot apply retroactively, the people responsible for executing members of the Jewish community cannot be indicted for the crime created under Section 12 of Law no. 962 of 9 October 1967, (on the prevention and punishment of the crime of genocide) resolving the underlying "technical" problems relating to speciality and incorporation in the apparent combination of co-existing legal

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rules. In other words, the original charge made against Priebke and his co-defendants remains unchanged.

It is, however, evident that whatever formal names may be used, they are still essentially crimes under international law, in the “technical” form of war crimes and crimes against humanity for which the contemporary collective conscience demands that no time bar should exist (*cf.* the Convention adopted by the United Nations General Assembly under Resolution no. 2391 (XXIII) on 26 November 1968: the Council of Europe Convention adopted at Strasbourg on 25 January 1974).

### Obeying Superior Orders

There is absolutely no justification for the conduct of the accused on the grounds that he acted in the course of a duty based on the obligation to obey orders of his superiors. For such justification under Article 40 of the Military Peacetime Penal Code, repealed by Section 22 of Law no. 382 of 11 July 1978, was not allowable when an order received from a higher authority was carried out by performing a manifestly criminal act. The situation is essentially no different under Article 51(3) of the Penal Code which applies today.

Indeed, even Germany’s harsh military discipline left soldiers with a degree of freedom to judge the orders received. Article 7 of the 1926 German Military Code (*Reichsgesetzblatt*) which was in force at the time the deed was committed, provided as follows:

“If the execution of a military order, in the course of duty, constitutes a violation of criminal law, the superior officer issuing that order shall be solely and personally liable, but the subordinate putting that order into effect shall also be liable in so far as

- i) he acts in excess of the orders received,
- ii) he was aware that the order of his superior involved an action that entailed the commission of a crime and an infringement of ordinary law and military criminal law.”

It is true that some German military defendants indicted jointly with Kappler were acquitted by the Rome Military Tribunal on 20 July 1948 on the grounds that they had acted on orders received from their superiors. But in their case they were unaware that the order was unlawful and did not intend to carry out an unlawful order because, in view of their rank and their role, they were not in possession of all the facts underlying the collective punishment decreed by their superiors or the form it

was to take, for they were at the bottom of the hierarchical ladder.

But their position cannot be likened in any way to the position of Priebke, who occupied important executive functions in the German security police command in Rome, headed by Kappler (confirmed by the documentary evidence gathered during the preliminary investigation, and forwarded by the Federal Public Prosecutor of Dortmund). In the light of the provisions of Article 192(3) of the Code of Criminal Procedure, it is possible to check the truth of the statements made by Priebke’s co-defendants regarding the part he played in carrying out the “Ardeatine Graves” massacre.

The available evidence logically leads us to conclude that Priebke worked jointly with Kappler in planning the execution of 320 people to avenge the 32 German soldiers who died in the attack in Via Rasella, Rome; he took part, and at all events did not object to Kappler’s initiative to raise the number of hostages to be shot to 330, following the death of one of the soldiers injured in the bomb attack.

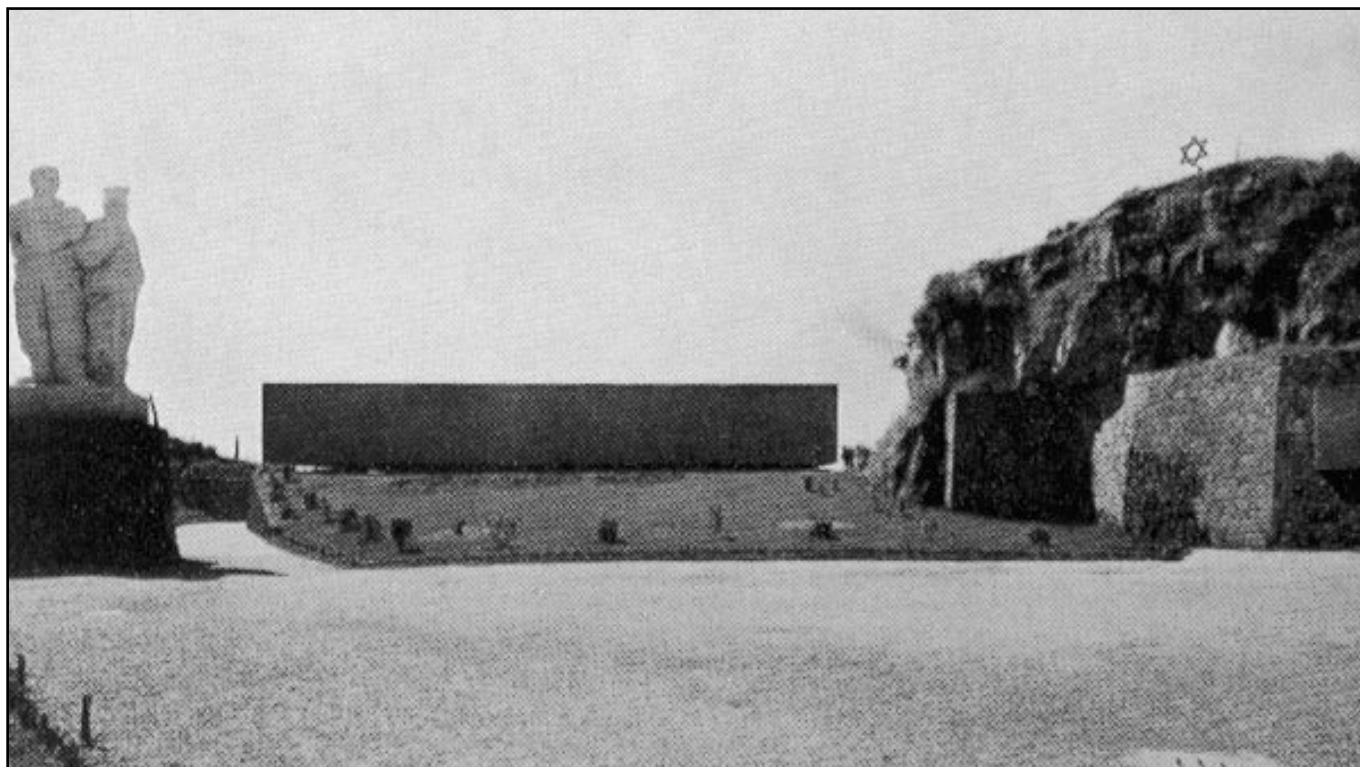
### Murder by Mistake

There still remains the problem of the proper indictment for executing the other five persons by mistake. Article 82(2) of the Penal Code provides that a series of different events may constitute one and the same crime: the intended wrong (the murder of 330 persons) is attributed to willful intent and the event caused by error (the death of five people) is attributed to objective liability.

### Premeditation and Cruelty

Then there are the aggravating circumstances set out in the indictment: premeditation and cruelty, in relation to the specific form in which the collective executions were planned and carried out. The reasons given in the verdict handed down against Kappler on the basis of the forensic medical evidence of the expert witnesses, highlighted the ferocious brutality of the execution (pages 59, 67 and 68).

The deep, dark tunnels in the “Ardeatine Quarries” gradually swallowed up in horrific succession all the men named on the list, who had been led to the place in groups of five. As the designated victims were forced to wait outside the entrance to the tunnels, they heard the screams of the victims who had entered before them, punctuated by shots, and afterwards when



The Ardeatine Graves Memorial, outside Rome, site of the Nazi massacre of 335 civilians on 24.3.1944.

their turn came to enter the tunnels, the torchlight lit up the bodies that lay strewn around or in piles.

The grim spectacle of the bodies of the first victims to be executed that awaited the victims designated to follow them as the latter entered the tunnels and fell to their knees to be shot, was vividly described in the reconstruction of the witness Amon who was present at the executions, but did not fire a shot because he could not muster the strength to do so. At the hearing on the 12 June 1948 he said, "I was supposed to shoot, but when someone lifted up the torch and I saw the corpses, I passed out... I was appalled by what I saw. One of my companions pushed me aside and fired for me" (*cf.* the reasons given in the judgment convicting Kappler, page 22).

Lastly, before being shot, the intended victims were forced to clamber over the piles of bodies and kneel down with their heads bent forward to be shot in the neck. After the shooting stopped mines were exploded to cut off that part of the tunnels where the bodies were heaped together in piles about one metre high.

## The Ardeatine Quarries became the Ardeatine Graves.

The conclusion to be drawn is that responsibility for the inhuman and cruel psychological suffering associated with the way in which the execution was carried out must necessarily be attributed to those who, like Erich Priebke, were responsible for master-minding the collective shooting operations.

On the basis of these considerations I believe that Captain Erich Priebke will be put on trial in Italy, and I am confident that he will be convicted.

The International Association of Jewish Lawyers and Jurists will attend the trial, not as a direct party to the proceedings, but through myself as Counsel for the injured parties, the relatives of the victims of the massacre.

There are still many procedural hurdles to be overcome but, God willing, substantial justice will soon prevail through formal justice, and the seal will be set once and for all on yet another tragic chapter of history, by securing Priebke's conviction. ■



# The Influence of Jewish Law in Anglo-American Law

Roberto Aron

**L**aws are not improvisations, creations or caprices of a single person or group. They are the products of life experience and human nature, the results of a social necessity to confront difficult situations often common to otherwise distinct countries or civilizations.

If we study the evolution of the codes of law, beginning with the most ancient, the Sumerian Codes (*circa* 3,500 B.C.E.), the Ur-Nammu Codes (*circa* 2,050 B.C.E.), the Lipit-Ishtar Codes (*circa* 1860 B.C.E.) and the Hammurabi Codes (*circa* 1790 B.C.E.) we see that the primary sources of law were primitive tribal customs, sometimes under religious influence, later modified and transformed by more advanced civilizations into statutes or laws, eventually establishing norms of conduct, enforced by an authority, in order to satisfy social necessities.

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Studying the sources and establishment of laws in different countries, we take into consideration the principle that **similar circumstances normally create similar needs and reactions.** Consequently, it is understandable that if a law is enacted in a given country as a result of certain social needs, an identical or similar law could be enacted in another country if the circumstances and needs are similar.

From a general point of view, in our opinion, in no country or civilization can

we find a “chemically” pure, original and non-influenced law. Even in the cases of the Bible and Talmud, and in spite of our belief in the divine origin of the Laws of Moses, it is necessary to inquire whether in our sacred books, there are not some legal concepts derived from other nations. Compare, for example, the Roman principles of *Jus Civile* and *Just Gentium* with the similar principles of the seven Noachide Laws found in the Talmud.

## Two Discoveries

A lot has been spoken and written about the influence of Jewish law in Anglo-American law. For years, many professors, lawyers and authors have noted the fact that there is some influence of Jewish law in both the English and American legal systems. To prove this, commentators have noted that it is possible to make analogies linking Biblical or Talmudic precepts with American or English legal precepts.

To the best of our knowledge, however, no incontrovertible evidence has ever been introduced to prove the analogies; the influence has never been established directly by saying, for example, “Here, American or English law mentions its Biblical source.” In other words, a “smoking gun” has not been found.

In preparing the thesis entitled “Analogies and Influence of Jewish Law in Some American Constitutional Amendments” for a Masters Degree in Hebrew and Judaic Studies at the New York University, I was lucky to make two discoveries: First, regarding the English Law, I found a King’s Bench case where, in a judicial decision in

1592, the Court took into consideration a case mentioned in the Bible. Second, regarding the American law, I found "The Body of Liberties of 1641", part of the Colonial Laws of Massachusetts, which refers to the liberties of the Massachusetts Colony in New England.

## The Influence of Jewish Law in English Law

The case that we search out is the *Norton d. Ratcliff v. Rowland*, known as "Ratcliff's Case" (Hil. 34 Eliz., - in the King's Bench - 1592).<sup>1</sup> This was an entangled custody case involving, as it is mentioned: "Who is entitled to be guardian by nature - Rules of Descent - Exclusion of the ascending line - Right of primogeniture and of representation - Exclusion of the half-blood - Rule of *possessio fratis*."

The pertinent part of the court's decision, regarding the Jewish law, says:

"Yet because the common law doth differ in this point from the civil law, these reason of this principle of the common law were alleged, scil. That in this point as almost in all others, the common law was grounded on the law of God, which was said, was *causa causarum*, as appears in the 27th chap. of Numbers, where the case which was in judgment before Moses was, that Salphaad<sup>2</sup> had issue five daughters claiming it *jure propinquitatis*, as their birthright, and next heirs to their father; the brothers claiming it as heirs male *jure honoris* to celebrate and continue the name of their ancestors; and this case seemed of great difficulty to Moses, and therefore, for the deciding of that question, Moses consulted with God; for the text saith... Why which general law (which extends not only to the said particular case, but to all other inheritances, to all persons, and at all

times) it appears that the father himself, and all lineal ascension, is excluded."

There is also a marginal note, saying:

"With respect to the reasons given in this case excluding lineal ascent, Mr. Hargrave observes, that 'neither of them seems satisfactory. The inference from God's precepts to Moses is unwarranted, unless it can be shewn, that it was promulgated as a law for mankind in general instead of being, like many other parts of the Mosaic law, a rule for the direction of the Jewish nation **only**. Besides, by the Jews law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him.'"

As we can see, the reference to Jewish law is so clear that any commentary would be superfluous.

We cannot end this short section about the influence of Jewish law in English law, without mentioning, at least, the situation of the celebration of a Jewish marriage in England, which is regulated by Part III of the Marriage Act, 1949.

## The Influence of Jewish Law in American Law

It is difficult to find words to express the importance of the "Bodies of Liberties of 1641" proving the influence of Jewish law in American law, and the implications of that influence.

The Puritans, when they arrived in America, believed and had a special devotion for the Old Testament, the Jewish Bible, and also had knowledge of the Talmud. They believed in the New Testament regarding Christ's history. The Puritan's voyage, liberating them-

selves from the Official English Church, was for them equivalent to the Jew's exodus from Egypt. There is extensive literature proving that the intention of the Puritan's was to establish in the new country the Mosaic law, and that Hebrew would be the official language of the country.

These Puritans, inspired by the Old Testament, were the same people who, in 1641, published in America the "Body of Liberties of 1641". Their devotion to the Old Testament is reflected in a direct citation to Biblical precepts as the source of their "Capital Laws" (Article 94 with its 12 sub-articles), and in the Biblical concepts mentioned in its first 17 articles as roots of the "Liberties of the Massachusetts Colonie in New England."

The citation of Biblical precepts in the "Body of Liberties of 1641", one of the earliest American systems of law, is the nexus that we were looking for in order to prove the direct influence of Jewish law in the American law.

The limitless connections made apparent by historical research are amazing. I began the research looking for a connection between Jewish law and Anglo-American law and, accordingly, found the "Body of Liberties of 1641", which is not only the incontrovertible link that we were searching for, but is also an inexhaustible fountain of principles with startling ramifications in the political and constitutional life of our countries; and which, certainly, deserves and requires more research.

The foregoing law of 1641 establishes, among other principles of democracy, that justice must be the same for all people; that the people's rights and property are inviolable; the freedom of speech and other freedoms.

We find later, in similar words, most of the same principles repeated in the American Declaration of Independence, in the American Constitution and in the Bill of Rights.

If we consider that the French Declaration of Men's Rights and Citizenships was evidently inspired by the American Declaration of Independence, we must conclude that we are witnesses to an incredible boomerang in history.

In order to prove it, we set out the process, from a chronological angle:

1. The Bible, the undeclared Constitution of the Jewish people,

established the basic principles of human rights, and with its Ten Commandments, established the fundamental laws of behaviour for the human being, not only for the Jews but for the entire world.

2. The English Puritans adopted these Biblical principles as proper and took them to America, where they applied them in their Body of Liberties in 1641.
3. Following this route, the same principles later constituted important parts of the basic documents of American democracy, and afterwards propelled by the winds of history,

returned to Europe, helping in its liberation, bringing - as a consequence of the French Revolution - the light of the Emancipation to the Jewish people, redeeming them as citizens, like all citizens, with the same rights and obligations.

This is the incredible boomerang: principles which were to become important sources of fundamental historical documents and the core of human rights and democracy **emerged from the Bible of the Jews and returned to the Jews of the Bible.**



## The International Association of Jewish Lawyers and Jurists

welcomes the participants to the

# 10th International Congress of the Association

to be convened in Jerusalem and Tel-Aviv between 26-31 December 1995.

We look forward to a successful congress and  
wish our visitors an enjoyable stay in Israel.

# Spanish Parliament Revises the Criminal Code

Alberto Benasuly



In the last issue of JUSTICE Mr. Benasuly reviewed the initiatives leading to the new 1995 Basic Law concerning the crime of genocide. In this note he brings us up to date on the latest developments in the movement to reform the Spanish Criminal Code.

In my article published in Issue No. 6 of JUSTICE I explained that the Spanish Parliament considered two proposals for reform:

- \* A Basic law which modified and added sections to the Criminal Code, relating to racism, xenophobia and anti-Semitism (including denial of the Holocaust). This law came into force on 12.5.1995.
- \* A government proposal for a general reform of the Criminal Code, including sections relating to anti-Semitism, denial of the Holocaust, etc.

On 23 November 1995, the Spanish Parliament adopted the new Penal Code which came into effect the following day upon publication in the Official Gazette.

The new Code replaced the law of May 1995.

The main provisions of the law which are of interest to the Jewish community are as follows:

- \* Section 22(4) - Under this section the commission of a crime *inter alia* for racist or anti-Semitic motives, or because of the ideology, religion or beliefs of the victim, the victim's ethnic, racial or national affiliation, sex, or sexual orienta-

tion, is deemed to be an aggravating circumstance. As in the law of 12.5.1995 there is an express reference in this provision to "anti-Semitism".

- \* Section 510(0) - This section provides for the offence of provocation to discrimination, hate, or violence against groups or associations for racist or anti-Semitic motives. A person committing this offence is liable to imprisonment for 1-3 years, plus a fine. The same punishment is provided for the dissemination of information which is offensive to groups or associations for the same reasons.
- \* Section 607 - Denial of the Holocaust. Dissemination by any means of ideas or doctrines which deny or justify the crimes detailed in the previous section (*i.e.*, the crime of genocide) or purport to rehabilitate regimes or institutions which advocate these crimes, is an offence which carries a liability to imprisonment of 1-2 years.

In addition to race and ethnicity, **religion** has now been added as an aggravating circumstance in the commission of a crime. This has been a very important victory for the Jewish community. The Commission of the Jewish Organizations in Spain has now finished its work and is disbanded, however, Adv. Benasuly has undertaken to personally continue his work against anti-Semitism, denial of Holocaust, racism and discrimination in Spain, not only in terms of amending the existing law but also in the field of education and otherwise. The Association congratulates Adv. Benasuly on his contribution to the reforms mentioned here which are of great importance to the Jewish community.

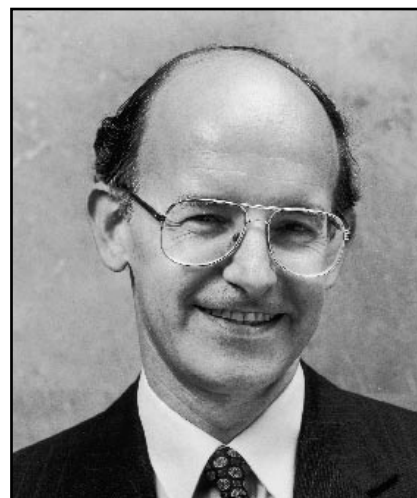
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Alberto Benasuly is the Coordinator of the Commission of the Jewish Organizations in Spain for the Reform of the Criminal Code and is a member of our Association.



## Neither a Borrower nor a Lender be

Jonathan M. Lewis



**N***either a borrower nor a lender be.* This was part of the famous advice given in Shakespeare's *Hamlet* by Polonius to his son Laertes on the eve of his departure from Denmark. This might have been wise counsel; but, had it been universally applied - as, in the medieval Christian world it effectively was - credit would have been unavailable and economies would have stagnated. Had Shylock, in *The Merchant of Venice*, been instructing his daughter Jessica in Jewish Law on the subject, he would have put it rather differently. "Neither a careless borrower nor a non-repayer be" is how he might have expressed it. In even the most rudimentary society, credit is essential. How else can a man acquire land, or flocks, or goods, or a vocational training, or a business, or a home? A man must borrow, and may do so, responsibly. And he must repay his debts. If debtors do not repay, creditors will not lend, and credit will dry up. A point may come at which a debtor's circumstances prevent him from repaying. But he still remains a debtor to the Almighty, from whom all material things derive. If he does not endeavour to repay one day, he is a *rasha* - an evil person.

### The Prevention of Insolvency

Prevention is better than cure, in every area of life. So, too, with insolvency. The Torah speaks about the thief who is unable to repay his victims (*Shemot*, 22,1-2). This may be its only reference to the state of insolvency. But the concept of prevention of insolvency is rooted in Torah. "When you lend money to any of My people, to the poor who are with you, you are not to be to him as a creditor, and you are not to lay interest upon him" (*Shemot*, 22, 24). There is a positive duty to lend money to a

fellow Jew who needs it. This is an act not of *tzedakah* - charity - which is directed at the poor, but of *chesed* - lovingkindness - which is directed at rich and poor alike. As Dr. Meir Tamari has written, "to the poor person the interest-free

loan represents a chance to establish himself in a craft or business, thus breaking the cycle of poverty. In the case of the rich, the interest-free loan represents a form of assistance during periods of extreme liquidity problems, thus preventing bankruptcy". So it is that interest-free loans have always been an important part of Jewish communal structures.

Many societies have faced the problems of the poverty cycle. The Torah offered a solution. "At the end of seven years you are to make a release. And this is the manner of the release: every creditor is to release from his hand the demand for payment which he has the right to demand from his neighbour, he is not to exact payment from his neighbour and his brother, for it is pronounced a release to the Lord" (*Devarim*, 15, 1-2). The law of *Shemittah* - the sabbatical year - acts as a statute of limitation on bankruptcy for the poor debtor, enabling him to discharge his liability for debts and to start life anew, without the fear that his future earnings will be seized by his former creditors. So it was that the *shemittah* of debts - *Shemittah Kesafim* - was over time extended by the Rabbis to every land.

"Beware that there be not a base thought in your heart, saying 'the seventh year, the year of release, is at hand', and your eye be evil against your needy brother and you give him nothing" (*Devarim*, 15,9).

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This, of course, was exactly what happened. The bold answer was Hillel's famous *Prosbul* - a declaration by the creditor transferring to the Court the right to collect his debt. It was, in effect, the transformation of private debts into public debts, to prevent their forfeiture whilst entrusting to a *Beth Din* the responsibility for treading the path between justice and mercy in deciding if and when to collect the debt. As the *Rosh* wrote, many centuries later, in Spain, in a famous *Responsum* (80, 8) "our sages were extremely concerned not to shut the door for future borrowers".

### The Ethics of Insolvency

If the door was not to be shut for future borrowers, nor should it be shut for future lenders. If it was, the economic system would equally collapse. If creditors were to be obliged to make loans to poor people, and to do so without interest, and if every seven years their right to repayment was to be waived, or at least transferred out of their control, they must be entitled to look to borrowers to treat their obligations seriously. To take advantage of a climate so favourable to borrowers was wicked. So it was that "the wicked man borrows and does not repay, but the righteous deals graciously and gives" (*Psalms*, 37,21). In the famous discussion in *Pirke Aboth* (2,14), the Rabbis discussed the good way to which a man should adhere, and the evil way which he should avoid. To the first question, Rabbi Simeon replied that the good man was "he who foresees the event". Seemingly he had in mind the irresponsible borrower; for, when he came to answer the second question, as to the evil way, he cited the quotation from the *Psalms* in censoring the man "who borrows and does not pay".

In our own time, Samson Raphael Hirsch interpreted Simeon's answer in terms of a social compact between man and the Almighty. "Whatever we receive from this world - and indeed the entire Universe makes countless contributions to every breath we take on earth - is only a loan granted us to help us strive for and bring about those goals by means of which we advance the welfare of G-d's world in accordance with His Will as revealed to us in His Law. No one exists solely for himself and the greater the loan he has been granted, the greater his obligation and the sum total of achievement that may be expected of him in return."

### Striking the Balance

Every legal system has to strike a balance between the interests of creditors and those of debtors. Inevitably the insolvency

of the debtor ultimately renders them irreconcilable. Very broadly speaking, insolvency systems in the Old World sought to protect creditors and to penalise debtors. The common law of England entitled a creditor to seize the assets of his debtor, or to seize his person and detain him in prison, potentially indefinitely, at the creditor's pleasure. The Debtors' Prison in England survived until the 19th century. English and Commonwealth legal systems may still be said broadly to favour the protection of the creditor over the rehabilitation of the debtor. The position is otherwise in the New World. Immigrants went there for many reasons; half of the Founding Fathers, according to one quip, went to America to escape their creditors. So it was natural that the land of the fresh start should facilitate the rehabilitation of the debtor, whilst circumscribing the activities of those professional lenders, the banks.

Especially under the stimulus of the current recession, many essentially pro-creditor legal systems are today seeking ways to become more accommodating to the need to rehabilitate debtors, whilst many of the more clearly pro-debtor systems are seeking to restrain the excesses and abuses which they permit to unprincipled debtors. So, in a contemporary climate which is broadly leaning towards the protection and rehabilitation of debtors, the emphasis placed by Jewish Law on the rights of creditors may seem anachronistic. Yet so, too, may the protection afforded to the debtor, for his livelihood and even his self respect.

### Limitations Upon Taking and Enforcing Security

Much of Jewish Law was consolidated, by Maimonides (1135-1204) in the *Mishneh Torah* and by Joseph Caro (1488-1575) in the *Shulkhan Arukh*, from which many of the following statements derive.

Jewish Law limits the security which a lender may accept from his borrower. He may not accept the means of a man's livelihood: "no man shall take the mill or the upper millstone to pledge, for he takes a man's life to pledge"; "a team of plough oxen" may not be taken. Nor may "utensils which are used in the preparation of food, such as a mill, a wooden kneading trough, a kettle used for cooking, a slaughterer's knife, and the like". Security may not be taken from a widow, whether she be poor or rich; if taken, it must be returned. The debtor's garments must be returned to him at sunset.

At the same time, Jewish Law imposes strict limits upon the action which an unpaid creditor may take to recover his debt. He may not press the debtor when he knows that the debtor is

unable to pay. He may distraint upon the property of his debtor only through the court. He must "return the pledge to the debtor at the time when he needs it, if the debtor is an indigent man in need of things taken as a pledge. The creditor must return to the debtor the pillow at night that he may sleep on it, and the plough during the day that he may do his work with it." "The creditor must return to the debtor in the daytime articles that are used during the day and at night articles that are used during the night. If there are two utensils in his hands he keeps one and returns the other." As compensation to the creditor, the pledged articles are exempt from the operation of the *Shemittah* year, and become available to the creditor upon the debtor's death. If the pledged article is something which is needed by the debtor, the creditor's obligation to return it subsists indefinitely.

### The Position of the Insolvent Debtor

A man is obliged to repay his debts. So, if he claims that he cannot fulfil this obligation, the *Beth Din* is required to value and sell all of his assets, including expensive personal belongings and those of his wife and family. The debtor is left with the minimum requirements of a person who is just above the poverty line. The debtor must bring all of his moveable property "without leaving even a single needle". He is allowed food for thirty days, suitable clothing which will last him for twelve months, bedding, shoes and religious objects. If he is a craftsman, he may retain his basic tools. Some authorities permit a scholar to retain his books. At the beginning of the 19th century, Moses Sofer permitted a shopkeeper to retain his stock, in order to preserve his livelihood. The concept is an "arrangement" for the benefit of poor debtors (*siddur le-va'al hov*), under which an exclusion of certain property from the reach of creditors (*mesaderin le-va'al hov*) ensures that the debtor is left with a "shred" (*shareyd*) or "remnant" of his property.

But the responsibility for supporting the debtor then becomes that of the whole community. The care of the poor and needy is financed through communal taxation. Every member of the community must bear his share, including the bankrupt's creditors. So, ironically, a wealthy man who is owed only a modest sum by his debtor may find, if he is instrumental in bringing about the debtor's insolvency, that, quite apart from recovering little or nothing of his debt, he actually has to bear a tax liability to support his debtor which is far greater than the debt itself.

Normally there are strict limits on the amount of charity that a poor man may be given from the community purse: "two meals a

day, a pallet to sleep on and some sort of housing". But, in the case of the failed businessman, Jewish Law recognises that his problems will be not only financial but also social and psychological. So it holds that, where a rich man becomes poor, the community is required to provide him with everything to which his lifestyle had accustomed him. "Even if it had been his wont to ride a horse, with a manservant running in front of him, and he has now become poor and has lost his possessions, one must buy him a horse to ride and a manservant to run before him, as it is said, "Sufficient for his need in that which he wanteth" (*Devarim*, 15,8). You are thus obligated to fill his want; you are not, however, obligated to restore his wealth".

### Responsa and Takkanot

The *Responsa* literature deals with all aspects of life, including, inevitably, matters commercial. Within communities, local business customs sometimes developed; and yet transactions were sometimes agreed and documented in ways which did not entirely follow these customs. One such situation was addressed by Rabbi Asher Ben Yehiel (the *Rosh*), writing (*Responsa*, 80,8) in Spain in the early part of the fourteenth century. A creditor held the debtor's house as security on the documented contractual basis that he could enforce his claim against the security without the debtor being entitled to have the value of the property assessed by a *Beth Din* and established by auction, as was otherwise the local custom. The *Rosh* found that in Sephardic Spain - perhaps by contrast with his native Germany - contractual documents were regarded as giving way to the custom of the city, unless that custom itself conflicted with traditional sources. He therefore ruled that, despite the terms of the contract, the value of the property must be evaluated, and the property auctioned, in order to protect the debtor from its sale at an undervalue. However he ruled that this must be done immediately, even though the value of the property might rise over time, in order not to deny the creditor the immediate recourse to the debtor's assets for which he had bargained and thus not to discourage lenders from making loans to people who needed them. As to the order of application of the debtor's assets, he held that recourse must be had firstly, if it was available, to money; then to moveables; and only then to real property, or at least to as much of it as was necessary to satisfy the debt, even though the value of the property might at that particular time have fallen.

At various periods, and in various places, economic crises led

to an increase in cases of insolvency, and of communal enactments - *takkanot* - to deal with them. *Takkanot* are one of the legal sources for the development of Jewish Law. They are rulings enacted to supplement the Law, often within a given community. Over time, some acquired widespread application (a famous example being Rabbi Gershom's ban on polygamy); others lapsed with the passage of time, or disappeared with the community itself.

*Takkanot* were mostly instituted by the *Halachic* scholars, but, particularly from the tenth century, many derive from enactments by the community through its leaders. Many of these enactments addressed issues of insolvency and, specifically, the issue of imprisonment for debt, because of their close connection with the social and economic conditions of the community.

Questions arose as to the extent to which the *takkanot* of one community or jurisdiction should be followed elsewhere. Writing (*Responsa, Hoshen Mishpat*, 55) in Hungary in 1836, the *Hatam Sopher* was asked to rule whether a supplier who had sold merchandise on credit to a person who had died was entitled to recover his merchandise in priority to the deceased's other creditors. The Council of the Four Lands (which were Greater Poland, Lesser Poland, Russia and Lithuania, and did not include Hungary) had issued a *takkanah* directed against fraudsters who obtained goods on credit and then disappeared with them, to the effect that the supplier was entitled to recover his goods in priority to the claims of other creditors. The *Hatam Sopher* held that this *takkanah* should not be followed, both because the circumstances which it envisaged were quite different to those in the present case (an argument obviously not confined to *takkanot*) and specifically because Hungary was beyond the jurisdiction of the Council of the Four Lands (even though, interestingly, the Council had itself been dissolved in 1764).

## The Distribution of Insolvent Estates

Where the debtor's property includes land, creditors whose debt is evidenced by a written obligation - a *shetar* or deed - have recourse to that land in the sequence in which their liens were created. This concept is similar to the order of priorities which exists in modern legal systems in relation to specifically charged assets (whether or not they happen to be land.)

In the many periods and many societies in which Jews were prohibited from owning land, their property inevitably comprised only moveables. So Jewish Law had to develop a system for distributing the assets of insolvent debtors amongst their creditors.

Modern western legal systems essentially follow the principle of proportionality: that the estate is divided between creditors of the same class in proportion to their claims, so that all receive the same calculated percentage of their debts. Jewish Law adopted a different approach.

The line of thinking began in a Talmudic discussion. A man dies leaving three wives. Their *ketuboth* entitle them to different sums - in the examples 100, 200 and 300 *zuzim* respectively. The claims against the estate thus total 600 *zuzim*. The estate is insufficient to meet their claims - in successive examples the estate comprises 100, 200 and 300 *zuzim*. The debate turns not so much upon issues of insolvency as such as upon the question of the proportions of the estate to which each wife is entitled to lay claim and the effect of renunciations by a wife of her right to claim a proportion of the estate. The significance of the discussion in the present context is that underlying it is a presumption not of proportionality in the treatment of creditors but of equality, in the sense that each receives the same amount. Where the estate is 100 *zuzim*, the *Mishnah* rules that it is divided equally between the three claimants, despite the disproportion of their claims. The *Gemara*, though discussing possible alternative solutions to the cases where the estate is 200 and 300 *zuzim* respectively, does not question this ruling in relation to the 100 *zuzim* estate at all. And at the end of a complex discussion of the distribution of the 200 and 300 *zuzim* estates, Rabbi Judah the Prince says that he does not agree with the result - which is one of inequality between the three wives - and that, quite simply, the three wives should take equal shares. He clearly regards this as so obvious as not to need any explanatory reasoning. So he goes so far as to disregard issues of legal entitlement and renunciation in favour of the principle of equality.

The argument is developed, into the area of insolvency *per se*, by Maimonides in the *Mishneh Torah* and by Joseph Caro in the *Shulkhan Arukh*. The latter gives two examples:

1. The fund is 300 *dinars*, and there are three creditors with claims for 300, 200 and 100 *dinars* respectively. Each receives one third of the fund, *i.e.* 100 *dinars*. This is effectively the Talmudic example above.
2. The fund is between 500 and 600 *dinars*, and there are the same three creditors for 300, 200 and 100 *dinars* respectively. Each claimant first receives an amount which is equal to the smallest claim (*i.e.*  $100 \times 3 = 300$ ). Of the balance (between 200 and 300 *dinars*), each of the two remaining



creditors receives an amount equal to the smallest claim (*i.e.*  $100 \times 2 = 200$ ). The remainder (up to 100 *dinars*) goes to the highest claimant.

The *Mishneh Torah* gives an almost identical set of examples. “And in this manner,” concludes the *Rambam*, “the division is made between the creditors when they all come at the same time to obtain satisfaction, even if they be one hundred in number.”

So the principle is one of simple equality in the amount received by creditors. All creditors receive an equal share of the fund, irrespective of the amount of their claim. The only qualification is that, self evidently, a creditor cannot receive more than the amount of his debt.

Amongst legal systems, this method of distribution is unusual, and perhaps unique. It treats creditors equitably, not in the sense of proportionately, but in the sense that they take equal shares of the estate. Interestingly, *Maimonides* ends his discussion with the comment: “But some of the *Geonim* have taught that division of available property is made among the creditors in a ratio equal to that of their respective debts”. But this, to us more familiar, principle of proportionality seemingly remained a minority view, although the authorities were divided on the issue.

The assumption underlying this system may simply be the fairness of absolute equality. Alternatively it may be that the smaller is a man’s claim, the more significant it is to his finances, and, conversely, that the larger is his claim, the better able is he to absorb the loss of a larger proportion of it. The method of distribution emphasises both the Jewish concept of social justice - that society should be so structured as to protect its economically weaker members - and the desirability of prudence in lending - that a man should “see the event” and should not lend to a borrower who may not be a good risk more than he can afford to lose.

To modern western thinking, this method of distribution is strange, in the sense not only of unfamiliar but also of peculiar. But it bears thoughtful consideration. As a practising insolvency lawyer, the writer may perhaps venture to confirm the accuracy of the generalisation that “small” creditors are greatly disadvantaged by even a “small” bad debt, for which say a 10% distribution in an insolvency is little economic compensation, whilst “large” creditors find the same, say, 10% distribution of correspondingly little economic value. Obviously, the higher the percentage distribution, the less true is the generalisation. But, *a priori*, distributions in insolvencies are generally rather closer to the 0% end of the scale than the 100%! So this system of distri-

bution may in fact tend to protect the “small” creditors without correspondingly prejudicing their “larger” counterparts.

## The Absence of a Bankruptcy Procedure

In modern secular legal systems, insolvency procedures have two functions: to distribute the available assets of the debtor between his creditors, and to provide a means of discharging the debtor from his debts. The distribution of assets in Jewish Law has been discussed above. As to the release of the debtor from his debts, Jewish Law has no such procedure “in bankruptcy”. In Biblical times, and subsequently, the septennial release of debts doubtless effectively achieved this object. As times and circumstances changed and the septennial release of debts ceased to be available, some accommodation with governing civil legal systems - *dina d’malkhuta* - became necessary. In medieval Spain, for example, a practice developed, in accordance with the principle of *dina d’malkhuta dina*, of giving effect to governmental ordinances which stayed collection of a debt until other creditors had an opportunity to present themselves and their claims. The custom was to proclaim publicly that all creditors who failed to present their claims by a certain day would lose their rights. Generally, too, the Rabbis recognised that civil legal systems were obliged to provide a mechanism - a bankruptcy procedure - to enable insolvent debtors to be released from their obligations to their creditors, and accepted this, under the principle of *dina d’malkhuta dina*. But debtors remained under a moral obligation to repay their debts one day if they could, “in order to be clean before G-d and men”. In the end, “The wicked man borrows and does not repay”.

## In Conclusion

As practising lawyers, we wrestle all the time with what seem to be very contemporary problems. But, if we embark on even the briefest voyage through the sea of Torah, Talmud, Codes and *Responsa*, it is difficult not to be surprised at how many contemporary issues were debated thousands of years ago. Perhaps there is, after all, nothing new under the sun.

Modern day, secular, legal systems, in which we all practise, have tended in large measure to divorce law from morality. Insolvency questions are seen as issues of commerce, not of morality. For a religious legal system, such as *Halacha*, such a distinction is not meaningful. As in every area of life, the aspiration of *Halacha* is to do, in the words of *Devarim*, 6,18, “What is right and good in the eyes of the Lord”.

# Distinction or Discrimination in the Israel Air Force

Alice Miller v. Minister of Defence, the Chief of Staff of the IDF and others

H.C.J. 4541/94. Before Justices Matza, Kedmi, Strasburg-Cohen, Tal and Dornier sitting in the High Court of Justice. Judgment delivered on 8.11.1995.

## Precis

The question considered here was whether the IDF policy not to enlist female soldiers as pilots was void for sexual discrimination. By a majority of three to two the High Court of Justice held that the decision was void and that the budgetary, planning and logistic considerations underlying the IDF policy could be neutralized by appropriate expenditures. Accordingly the Petition was upheld and the IDF was ordered to allow the Petitioner to present herself for testing as an aircrew candidate.

## Judgment

Justice Eliahu Matza

The Defence Service Law (Consolidated Version)-1986 ("the Law") discriminates between men and women in three areas only: length of service, reserve service, circumstances of release from service. The Law does not draw a distinction between the **nature** of the service of men and women, such distinctions are found in the orders issued by the Army Command. The list of military professions available to women exclude fighting units, and a female soldier may only join such a unit by volunteering. This provision is still on the books however the statutory regulations behind it have been repealed by the Knesset.

The Petitioner's application to enlist as air crew was denied by the Israel Air Force on the grounds that women were not to be placed in fighting units. The Petitioner argued that the blanket refusal of the IDF to permit her to apply for the training course was a breach of the fundamental right to equality between the sexes, and a negation of her right to an equal opportunity to serve in the army as a pilot if found to possess the necessary qualifications. Additionally, the Petitioner argued that this policy

posed an obstacle to women seeking senior positions in the air force and army, and later in life in Israeli society. The Petitioner did not demand complete integration of women into all units but on the other hand opposed their blanket rejection. The IDF limited its opposition to the Petition to the specific issue at hand, namely, enlistment to pilots courses, but justified its policy on operational planning grounds, e.g., that by law female soldiers serve less time than male soldiers both in the regular army and in the reserve service with the result that the army would fail to obtain the maximum benefit from the enormous cost of training if the pilot was a woman; and female soldiers would be restricted in their service if they became pregnant.

Justice Maza found that there are relevant differences between the sexes which may justify distinctions being drawn. But in order to achieve substantive equality it is necessary to assess such relevance bearing in mind the particular purpose which requires such distinctions being drawn; in other words, the *nexus* required between the special characteristics of one sex, which are absent in the other, and the purpose for which it is permissible to prefer one to the other, must be direct and concrete.

In providing for the duty and conditions of military service, the Law distinguishes between men and women. But this is intended to alleviate the position of women. The army must take this into account when planning its manpower array, but it cannot be a reason for allowing discrimination against female soldiers. Moreover the Law is silent as to the allocation of specific posts to women or precluding them from others. In the absence of express provision to the contrary, the Law must be construed as respecting the right to equality between the sexes and even helping it to materialize.

This approach is strengthened by the enactment of the Basic Law: Human Dignity and Freedom, which has raised the normative status of the principle of equality to a constitutional "supra-statutory" level.

It is uncontroverted that the capabilities needed to fly an aircraft may be found in equal levels in women and in men. Women pilots have been successfully integrated into the air forces of other countries. Recently, the issue of the integration of women pilots in the US Air Force in fighting units has been examined by a presidential commission set up to look into the



issue of women joining combat units. By a majority of eight to seven the commission recommended against assigning women to air force combat units. But the minority opinion has prevailed and in April 1993, Defence Secretary Les Aspin ordered the restriction to be removed.

In Israel too, women pilots served in the Air Force, for example, as transport pilots during Operation Kadesh. The change in policy has been attributed to budgetary limitations. The current budgetary objections to the Petition have relatively little weight where the Petition is for the enforcement of a **basic right** as in the instant case. The main objection of principle raised by the Commander of the Air Force, however, is on long-term planning grounds, particularly, the shorter service of female soldiers, their limited reserve duty obligations, and the fact that even if they volunteer for extended service they can retract that undertaking without any legal recourse on the part of the Air Force. These fears are unfounded. As a rule, it is proper to assume that a person who takes upon himself an undertaking is willing and able to fulfill it. Even if the average contribution of female pilots - from the point of view of length and continuity of service - will be less than that of male pilots, this is a difference which ensues from her being a woman. This difference is not a fault and can be factored into long term operational planning.

So long as the Air Force does not allow the trial integration of females into pilots courses, and does not operate a routine and accurate follow-up of their progress in their courses and units, we will never be able to know whether in the special circumstances prevailing in Israel, women can successfully integrate into air crew. Within the framework of the trial there would be no fault in setting quotas for female pilots. Quotas, by nature, do not allow equality, but this is not the case where they are set as part of a trial aimed at advancing equality without at the same time prejudicing vital security interests.

The Court is not accustomed to intervene in professional-planning decisions of the military authorities. But it has never been doubted that the decisions and orders of the army, which reflect the policy of the army, are subject to the judicial review of this Court. In my view, a policy which involves a breach of a basic right provides a clear ground for the intervention of the court. Violation of the principle of equality, as a result of discrimination on grounds of sex, is a clear example of a case which justifies and requires intervention.

#### Justice Yaakov Kedmi (Dissenting)

Regrettably, I cannot agree with the judgment of Justice Matza, on the following grounds:

1. In my view, decisions of principle by those responsible for national security, should be attributed a high level of reasonableness; with the result that those opposing it have a heavy burden of persuasion.
2. I would hesitate to intervene in such decisions as long as I am not convinced that they are extremely unreasonable, arbitrary or made in bad faith.
3. The objection to the Petition is based on the working assumption that female pilots would not be able to meet all the Air Force's expectations regarding length of service and maintaining operational capacity over the course of years. I do not believe that I have the qualifications to judge the reasonableness of this assumption and I would not ease the burden of responsibility for national security lying on the Commander of the Air Force by forcing upon him a course of conduct which he opposes.
4. We cannot learn from the experience of other countries because our defence needs are completely different. "Mistakes" in this connection may have far reaching results.
5. There is no "discrimination" here but a "distinction" based on routine defence needs.

At the same time, I agree with Justice Matza that it would be proper to test the fears underlying the military authority's decision, and it would be right to take the first step in this direction as soon as defence circumstances permit.

#### Justice Tova Strasburg-Cohen

I would join the judgment of my colleague Justice Matza.

A policy of inequality has grown out of the distinctions drawn by the Defence Service Law between men and women in relation to service conditions. In my opinion, it would be wrong to perpetuate the distinctions created by the Law, through discrimination. Some would regard the provisions of the Law as being paternalistic towards women who are regarded as weaker, more fragile, in need of defence and whose destiny is to raise a family. Others would argue that the Law benefits women by easing their service conditions. Either way, the distinction drawn by the Law is a fact which is not under examination by the Court, but rather the starting point for the policy not to allow women pilots.

In Justice Matza's view the Respondent's position is unacceptable because the distinction between the conditions of service of the two sexes is **not** relevant and therefore the discrimination is wrongful. I, also believe the pilot's course should be open to women but think that the distinction **is** relevant and causes real difficulties. The grounds for refusing women pilots are substan-



tive and not arbitrary, and *prima facie* the discrimination is therefore not wrongful. But this is only *prima facie* the case, as it is not sufficient for the distinction to be relevant to put an end to the allegation of discrimination; relevant distinctions which can be rectified or neutralized in order to achieve equality, should be rectified or neutralized, although not at any price.

We are not considering positive discrimination intended to open doors to groups previously excluded, even if this group is less suitable than others to function in a certain area. In the instant case, we are considering neutralizing the distinctions between persons possessing equivalent abilities by allocating resources which allow an equal starting point for two persons equally suitable to fulfill the same function, save that characteristics which do not affect the substance of the function, impede the path of one of them.

The instant case primarily concerns cultural, social and ethical issues. The status of the principle of equality as a supreme value in Israeli society, has a place of honour in case law and legal literature. A society which respects its basic values and the basic rights of its members must be willing to pay a reasonable price so that the principle of equality will be put into practice.

With regard to the clash between the principle of equality and the principle of national security as an outcome of military needs, the latter principle carries greater weight only if there is a **near certainty of real injury and real damage to the security of the state**. The Air Force policy relating to the enlistment of female pilots does not meet this test. Nor does the policy meet the easier test of a reasonable possibility of real damage. The difficulties pointed to by the Air Force - are in part economic and in part based on speculations as to the future. Even the Air Force does not allege that real damage will be caused to the security of the state by the enlistment of female pilots. Accordingly, the courses should be opened to women with the appropriate qualifications in order to enable them to realize their basic right to equality.

#### Justice Zvi Tal (Dissenting)

I join the Opinion of my brother Justice Kedmi and agree that we have before us "distinction" and not "discrimination". Had the IDF an unlimited budget it would have been possible to hold that it should pay the price for the principle of equality between men and women. In reality the defence budget is limited. Thus, the huge expense needed to achieve equality will by necessity be on account of other vital security needs. Human safety is also a basic right (Section 4 of the Basic Law: Human Dignity and Freedom), and as such it supersedes the principle of equality.

Budgetary constraints are also reasonable considerations within the framework of the theory of "relevant distinctions". There is a reasonable risk that the reserve duty of a women will be cut short because of pregnancy, with the result that the enormous expense of qualifying a female pilot would be worthwhile for only a short time. From a practical point of view the investment would be lost.

From the above it is clear that we are not considering discrimination between equal parties but distinctions between unequal ones. Like Justice Kedmi, I would leave the Air Force command to decide upon a trial integration of women pilots at a time and in circumstances which will not harm national defence needs.

#### Justice Dalia Dorner

This Petition concerns yardsticks for translating the distinction between men and women into legal norms. These yardsticks can and should be just. Women are different from men. They are limited by virtue of their natural functions - pregnancy, birth, nursing. These differences were at the root of the division of functions between the genders in primitive human society, which led to the patriarchal family. But the division has remained even when economic and technological developments have meant that there is no objective reason for it.

Thus, at the end of the 19th Century, the English poet Alfred Tennyson wrote:

"Man for the field and woman for the hearth  
Man for the sword and for the needle she  
Man with the head and woman with the heart  
Man to command and woman to obey  
All else confusion."  
(The Princess, 2nd Song, 5, 427).

In Israel, as in other democratic countries, the rule is that women should not be discriminated against by reason of their sex; see, for example, the Declaration of Independence (The State of Israel ... will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex"); the Equal Rights for Women Law - 1951; the Equal Work Opportunities Law - 1988; the Basic Law: Human Dignity and Freedom, and others.

While the Basic Law: Human Dignity and Freedom was not intended to provide express constitutional protection for the principle of general equality, it was intended to protect a person against humiliation. Humiliation violates the human dignity of a person. Not every infringement of the principle of equality is a



violation of human dignity, but discrimination on the basis of group affiliation, including gender, is such a violation.

As Professor Rhode wrote:

“American equal-protection analysis has developed largely within an Aristotelian tradition that defines equality as similar treatment for those similarly situated. Under this approach, discrimination presents no legal difficulties if the groups differ in ways relevant to a valid regulatory objective... Challenges to gender classifications underscored the theoretical and practical limitations of this approach... contemporary gender-discrimination analysis has presented difficulties along several dimensions. At the most basic level, traditional approaches have failed to generate coherent or convincing definitions of differences. All too often, modern equal-protection law has treated as inherent and essential differences that are cultural and contingent. Sex-related characteristics have been both over and under valued. In some cases, such as those involving occupational restrictions, courts have allowed biology to dictate destiny.”

The test in the instant case should be twofold: first, is the sex consideration relevant, and second, if so, is taking it into account justified in the circumstances of the case.

Section 11 of the Basic Law requires all government authorities to respect the rights established therein but does not provide the standards on the basis of which those rights will be honoured. In the US, the theory of “the level of scrutiny” has been established to examine the importance of the social values underlying the right. The “minimal standard” from the point of view of the restrictions placed on the authorities applies to actions (including laws) which violate economic rights. In such a case, a violation of a right will be found to be justified if rationally required to achieve a legitimate interest of the state. The most severe standards (or “strict scrutiny”) relate to violations of fundamental rights, such as freedom of speech, freedom of movement, *etc.* Only a compelling state interest will justify such a violation. Classification according to sex, however, has been regarded in the US as controversial although case law has granted it a “suspect” classification, which requires application of “strict” standards of scrutiny.

In Israel, we must apply the provisions of Section 8 of the Basic Law by analogy. Section 8 provides as follows:

“There shall be no violation of rights under this 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 required, or by regulation enacted by virtue of express authorization in such law.”

1. The fundamental rights of a person should not be restricted except by express legislative provision.
2. Laws violating fundamental freedoms should be construed narrowly.
3. Laws should be construed on the assumption that they are not intended to infringe the right to equality.

The power to discriminate against women must therefore be expressly provided by law, and it is not sufficient to provide an authority with discretion in that regard. Rather, as noted, the authority must exercise its powers in such a way as to respect basic human rights. The violation must accord with the values of the State of Israel and the violation of the right must be for a proper purpose. Most important, the violation must not exceed what is necessary.

The right to respect - which embraces the prohibition on discrimination against women - is one of the most important basic rights of a person. The humiliation of a woman by discriminating against her because of her sex injures her deeply. Moreover, at the root of the right lie a number of vital societal interests. Consequently, the individual and social reasons underlying the prohibition against discrimination requires the application of the stricter test of **near certainty of grave danger**.

In cases where the distinction between men and woman is a relevant consideration, a range of measures can be applied by the authorities exercising their consequential discretion.

As Professor Mackinnon put it:

“Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure. Under the difference rubric, women are measured according to their lack of correspondence to man, their womanhood judged by the distance from his measure. Gender neutrality is the male standard. The special protection rule is the female standard. Masculinity or maleness is the referent for both”.

(C.T. Mackinnon, *Toward a Feminist Theory of the State* (Mass, 1989) 221).

In my view the solution lies in the intermediate model. In order to achieve equality between the sexes, consideration must be given to the special needs of women. The interest in ensuring their dignity and status on one hand, and the continued existence of society and family life on the other, require, in so far as possible, that women should not be prevented from achieving their potential and aspirations simply because of their natural functions.

*Abstract prepared by Adv. Rahel Rimmon.*

