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The mozaic floor of an ancient Jewish home excavated in June 1996, dates back to the 2-3 Century A.D. The largest of its kind, the floor was discovered in the city of Lod, Israel. Photograph provided courtesy of the Government Press Office.

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**FROM THE SUPREME COURT OF ISRAEL**

**"And Jerusalem is the center of the Land of Israel,  
And the Temple is in the middle of Jerusalem" – 43**

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# PRESIDENT'S MESSAGE



Israel has just held one of its most important elections. Conscious of the fateful decisions on the agenda of its incoming government, an impressive 80% of the electorate turned out to vote and participate in shaping the future of the country. Constantly searching for new ways to improve its democratic process, Israel, for the first time, elected its Prime Minister by a direct vote. The newly elected Knesset and Government now carry responsibility not only for governing the country but also for proving whether the new system, equally supported and opposed by large numbers of experts, enhances Israeli democracy.

After almost half a century of statehood, Israeli society is still in the process of shaping its identity. There is still much division, as reflected by the diverse political parties which form the new Israeli Parliament. Even second and third generation Jewish Israelis are still identified by the origin of their parents, as "Ashkenazi" or "Oriental" Jews. We still speak of "Russian" Jews or of survivors of the Holocaust. There is an ongoing argument between orthodox, traditional and secular Israelis, as to the character of their society and the role of Jewish law and tradition in everyday life. Israelis are still seeking to reconcile their commitments to both a Jewish and a democratic state. The situation of the Arab minority in Israel is still the subject of debate. All these differences were reflected in the last election and the new Knesset will have to confront them in the next four years.

But most of all, the election was about the Peace Process between Israel and the Palestinians, its implementation and continuation, and the provision of security for Israel and Israelis.

Outgoing Prime Minister Shimon Peres loyally attempted to fulfil the legacy of the late Itzhak Rabin and implement his own vision of a New Middle East. His great contribution to the State of Israel is acknowledged even by those who did not vote for him.

His successor, newly elected Prime Minister Benjamin Netanyahu, has placed on record his commitment to continue the Peace Process, provide greater security, preserve the essence of Israeli democracy, and represent the rights and the interests of all citizens, striving for more unity and consensus. All Israelis pray that he achieves these goals and wish him success.

On a personal note, I wish to express my deep sorrow at the untimely death of Gili, the daughter of our Editor-in-Chief Dan Pattir. Our condolences and thoughts go to Dan and his family.

*Hadassa Ben-Zur*

# The Tradition of Freedom of Expression in Israel and its Problems

Aharon Barak

**I**n Israel, recognition of the importance of freedom of expression has increased since the *Kol Ha'am* case. The Courts have continuously repeated - since the seminal judgments of Justice Agranat in *Kol Ha'am* and Justice Shamgar in the *Electric Company case*<sup>1</sup> - that freedom of expression is the “jewel in the crown” of democracy, that it occupies “a place of honour in the hall of basic human rights”, and that it is a “supreme” “superior” right. Of course, not every speech covered by freedom of expression is a protected speech under Israeli law. Our case law has properly distinguished between the scope of freedom of expression and the level of protection afforded to freedom of expression. Indeed, like all constitutional rights, freedom of expression also is not an absolute right. The Courts have reiterated that freedom of expression is a relative right. This reflects the approach that freedom of expression, despite its importance, is not the only value in the life of society and State. Other values stand alongside freedom of expression. There are the values of the individual, such as human dignity, reputation, property, privacy and freedom of occupation; and there are the values of the collective, such as the very existence of the State, its democratic character, judicial independence and public peace and security. Freedom is not anarchy. Thus, the law does not protect the full scope of freedom of expression. The question which arises from this state of affairs is where is the boundary between the scope of freedom of expression and the protection given to it? Israeli law has been considering this question for the last 40 years. It has developed a complex structure of balances between freedom

of expression and the values and principles with which it collides.

One of these balancing formulas - the most commonly used *Kol Ha'am* test - provides that in the collision between freedom of expression and public peace and security, it is only possible to infringe the right to freedom of expression if one of the two following elements exist: *first*, the expression's violation of public security and peace is intense, serious and severe. This violation must exceed the “level of tolerance” accepted in a democratic society and “shake its foundations”; *second*, the probability of the occurrence of this violation of public security and peace must be of the level of “near certainty”. The *Kol Ha'am* formula has been applied in a variety of circumstances. It has been applied in the clash between freedom of the press and national security; between freedom of artistic creation and public peace; between freedom of demonstration and public peace. It has also been applied in numerous other situations. At the same time, this is not the only



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Justice Aharon Barak is the President of the Supreme Court of Israel. This article is based on a lecture delivered by him in Hebrew on 13.5.1996, which has already given rise to vigorous debate in Israel. JUSTICE is grateful to President Barak for allowing us to be the first to translate and publish extensive extracts of the lecture in English.

1 H.C.J. 73/53 *Kol Ha'am Ltd. v. Minister of the Interior* 7 P.D. 871, and H.C.J. 723/74 *Ha'Aretz Newspaper Publishers Ltd. v. The Electric Company* 31(2) P.D. 281, are two of the leading Israeli cases on freedom of expression. *Kol Ha'am* was a daily newspaper, published by the Israeli Communist Party (ed.).



principle balancing formula, as the colliding values are not always of the same normative level and the problematic aspects of the collision may vary. Thus, for example, when freedom of expression (of the press) collides with judicial purity - within the framework of the rules of *sub-judice* - it has been held that the balancing test is that of "reasonable possibility". Accordingly, there is a prohibition on the publication of a matter which is pending before the Court, if there is a reasonable possibility - and not a near certainty - that the publication will influence the conduct of the case or its results.

This approach to freedom of expression is built on three elements: the *first* is the desire to expose the truth. "It is necessary to ensure freedom of expression in order to enable disparate views and ideas to compete. From this competition - and not from the authorities' dictation of the one and only 'truth' - shall the truth emerge, as it is the fate of truth to triumph in the conceptual war". The *second* element is based on the need to bring about the self-realization of man. "The spiritual and intellectual development [of man] is based on his ability to freely develop his world views." The *third* element bases freedom of expression on the democratic regime. Freedom of expression also brings about social stability, as social pressure is released in talk and not in action. It increases tolerance - including tolerance towards the intolerable - and in this way strengthens democracy itself.

### The Tradition of Freedom of Expression

The tradition of freedom of expression was developed by the Supreme Court of Israel. Distinguished judges contributed to it. It was made possible by the trust of the public in its judges. An interdependent structure exists here: confidence of the public in the judiciary enabled the development of the tradition of freedom of expression. This tradition increased the trust of the public in its judges. Indeed, the judges made an appreciable contribution to the tradition of freedom of expression. However, this tradition would not have developed, and would not have been preserved, had Israeli society as a whole - and members of the press themselves - not regarded it as the "apple of their eye". The tradition of freedom of expression is rooted deep in our social culture. It reflects our history. It is an expression of our profound beliefs. Israeli democracy and freedom of expression are interconnected. Freedom of expression breathes life into the democratic regime. But to the same extent democracy gives life to freedom of expression.

Until recently, freedom of expression developed in Israel principally through the interpretation of statutes which limited it. Thus, for example, the Press Ordinance which imposed restrictions on freedom of the press was the basis, in the *Kol Ha'am case*, for a judgment which widened freedom of the press. Recently a shift has occurred, known as the "constitutional revolution". The Knesset constituted the Basic Law: Human Dignity and Freedom. This Basic Law is part of the constitution of the State. It turns the human rights referred to therein into supra-legal constitutional rights. It places human dignity in a central position. There is no express reference in the Law to freedom of expression. Nevertheless, it is possible to say - and the matter has still not been settled - that freedom of expression forms a part of human dignity. Indeed, human dignity as a constitutional right is not only the right of a man not to be tortured or not to be humiliated. Human dignity is not only the honour of a man - it is his dignity. It must be interpreted - as provided in the Basic Law - out of a "recognition of the value of man, the sanctity of his life and of his being free", and in such a way as "to entrench the values of the State of Israel as a Jewish and Democratic State in a Basic Law". It is necessary to understand it "in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel". Against this background one can say that human dignity means recognition of man as a free creature. Human dignity is freedom to shape the personality of every man. Human dignity is the autonomy of individual freedom, freedom of choice and moulding of one's world-view. Human dignity regards a man as an end and not as a means to an end. It is possible to argue - and, as noted, this matter is still open - that one must conclude from this approach to human dignity that freedom of expression is part of human dignity.

If indeed this view is accepted, then it provides significant normative strength to the tradition of freedom of expression in Israel. The latter no longer draws its strength, in normative terms, from ordinary statutes and case law interpreting the statutes. Rather, it is given life, on the normative level, from the constitution itself and its judicial interpretation. It is not the restrictive law, as a matter of judicial construction, which provides the basis for freedom of expression, constitutional freedom of expression as judicially interpreted, determines the constitutionality of the restrictive law. This is the conceptual change - the conceptual revolution - which the Basic Law: Human Dignity and Freedom brings about. This is the constitutionalization of Israeli law which derives from it.

## The Problems of the Tradition of Freedom of Expression

The tradition of freedom of expression appears therefore to be solid. Nevertheless, it gives rise to difficult questions and stands before serious challenges. Some of these questions are related to the *Kol Ha'am* formula itself. The majority ensue from legal and factual relationships with which the *Kol Ha'am* test was never intended to deal.

### The *Kol Ha'am* Test

As we have seen the foundation of our tradition is in the *Kol Ha'am case*. This judgment was given in 1953 and was influenced by the "clear and present danger" test, which was developed by Justices Holmes and Brandeis in the U.S.A. in the 1920s. Since 1953 an appreciable change has occurred to this test in the U.S.A. It is no longer used. It is regarded as a test which does not sufficiently protect freedom of expression. Two concurrent tests have since been developed in the U.S.: one in the area of "prior restraint", or censorship, and the *other* in the field of punishment after the act. In the first area it is possible to impose prior restraint on freedom of expression only in the most exceptional cases, such as to prevent the publication of military secrets. Where prior restraint is concerned, American constitutional law does not refer at all to the test of clear and present danger or any similar test. Its approach is that every prior restraint is presumed to be unlawful, whereas in this area we apply the test of near certainty. In the *second* field - post-offence punishment - it is possible to limit freedom of expression in the U.S.A. - for example, by attaching criminal liability to *provocateurs* - only where the expression is directed at incitement which causes an imminent breach of the law. The requirement of imminence gives greater protection to freedom of expression than the requirement of near certainty which we applied in Israel. At the same time, it should be noted that in applying our softer test, we arrive at the same results in practice as those reached in the U.S.A., when applying the more severe test which gives greater protection to freedom of expression. Nevertheless, we must still ask the question whether there is not now room to consider afresh the balancing formula accepted here?

Application of the *Kol Ha'am* test gets into difficulties when within the framework of the principle balance between freedom of expression and the public interest, we must consider not only the right of the individual to freedom of expression and the

interest of the public in public peace, but also the human rights of other individuals. I shall demonstrate this with two human rights: the right to privacy and the right to property.

Take the case - which arose before us - where people wish to demonstrate before the "private" residence of a public figure. The police refuse to grant a permit as the demonstration will infringe the privacy of the person and his neighbours. How should one draw the balance between the colliding values in this situation? Justice S. Levine held that privacy overrides. One may not demonstrate in front of a private house. Demonstrators must demonstrate near the public workplace of the public figure. My view was different. I pointed out that freedom of demonstration and the right to privacy are of equal standing. An enlightened democratic society would wish to uphold both. Accordingly, a balance is needed, the starting point of which is that both freedoms are of equal status. The balancing formula will determine restrictions of time, place and manner of one right, in order to substantively implement the other. It is possible to demonstrate in front of the private residence, while imposing restrictions which will reduce in so far as possible the violation of privacy. The third judge, Justice Goldberg, took a middle view. It is possible to demonstrate in front of a private residence only if there is no effective alternative. If such an alternative exists - such as the workplace of the public figure - one may not demonstrate near his residence. This case exemplifies the difficulties in determining a balancing formula and in determining the relative weight of the colliding rights and values. The difficulty arises because despite the fact that formally the balance is between freedom of expression (the demonstration) and public peace, substantively the clash is between freedom of expression of the individual and the right to privacy of another individual. A liberal man is divided.

A similar collision occurs in relation to the right to property. John Doe wishes to demonstrate in a shopping center. The property owners object. The police refuse to grant a permit on the grounds of the property rights of the owners of the center. There is no dispute that the demonstration could be held in the streets of the city, or in a parking lot of a government office - these are public lands. There is no doubt that a permit should not be given to demonstrate on private land used for private purposes, such as a dwelling house. But what is the fate of a shopping center which is private property used by the general public. Does the search for truth justify a violation of this property? Is the self-expression of the demonstrator balanced by the self-expression

of the property-owner which too lies at the foundation of property? It seems that a resolution must be sought in the democratic argument. A shopping center is private property used by the general public. It is an important tool in the public debate and promotes a democratic regime. *Prima facie*, it is an important tool particularly for those demonstrators who do not have the financial means to buy advertising space in a newspaper or who do not attract the interest of the radio or television.

If such an approach is accepted - and the question is open and has not yet been settled in Israel - a distinction will have to be drawn between the different factors lying at the root of freedom of expression, and the preference of one over another. So far, we have refrained from doing so, preferring to adopt an eclectic approach. But the examples I have given - privacy and property and many more - illustrate the numerous difficulties standing in the way. In the future we shall have to develop internal balances within the array of elements forming freedom of expression. This is a difficult and complex task, as it requires an internal choice between human rights *inter se*. This task is difficult because the internal choice between human rights does not stand on its own - the demonstrator does not sue the property owner, the neighbour does not sue the demonstrator - but they are interwoven in the struggle between the individual and the government.

### **The Tradition of Freedom of the Press and the Public Media**

The public media - television and radio - operate in Israel by virtue of statutory enactments. From the point of view of Israeli law, they comprise a statutory authority. The classic paradigm, which stands at the root of the tradition of freedom of expression in Israel - the right of the individual to freedom of expression against the government which desires to limit it - also applies in this case. The individual wishes to speak. The Broadcasting Authority prevents him from doing so. The individual stands by his freedom of expression and the Broadcasting Authority stands by the public interest. In all these cases, the Supreme Court of Israel has emphasized, of course, the fact that the Broadcasting Authority is a special type of statutory authority. This a statutory authority which itself enjoys freedom of expression. Thus, within the accepted paradigm, we have encountered a complication arising out of the dual capacity of the Broadcasting Authority: it is both State and speaker. We have overcome these difficulties, by adopting the *Kol Ha'am* formula. Indeed,

acknowledgment of the statutory nature of the Broadcasting Authority has enabled - within the framework of the classical paradigm of the tradition of freedom of expression in Israel - the recognition of the duties of the Broadcasting Authority as a statutory authority. These are duties of objectivity in broadcasts, prevention of politicization of the Authority, fairness in broadcasts, equality, reasonableness, absence of conflicts of interest and good faith in its decisions, and the duty not to discriminate. By virtue of this status, the Court was able to hold that the "Fairness Doctrine" applies to the Broadcasting Authority.

This Doctrine is none other than a special aspect of a more general duty imposed on the Broadcasting Authority as a statutory authority, and that is the right of access to the media. The Broadcasting Authority, as a statutory authority, does not act on its own behalf. It is the trustee of the public. It is the trustee of the radio waves which are the property of the public. It must enable access to the media. By stating this principle, our classic paradigm worked. It recognized the right of the individual to freedom of expression and the power of the State (the Broadcasting Authority) to restrict it only where there was a near certainty of a real danger to public peace. In so doing, it recognized the duty of the State (the Broadcasting Authority) to enable access to the media and thereby to further increase freedom of expression, as in the modern reality, recognition of the power of the individual to stand at a street corner and express his opinion, does not give adequate expression to freedom of expression. Without access to the media, freedom of expression may become a dead letter.

As is well known, the Broadcasting Authority is not only a speaker and not only the State. The Broadcasting Authority is also a platform or stage. It has a triple role. Through it, expression is given to the freedom of expression of others. Its duty as a "platform" or "stage" ensues from its status as a statutory authority. This is also connected with the approach that "the radio waves are the property of the public and not of one or another individual". The same principles apply to the Second Authority for Television and Radio, which despite being a commercial entity, operates under statute (the Second Authority for Television and Radio Law - 1990). This is reflected in the provisions of the Law and rules of ethics, promulgated thereunder. The same principles apply to a bulletin published by the Chamber of Advocates, which is perceived as a statutory authority which operates by virtue of the Chamber of Advocates Law - 1961. It has been emphasized that the Chamber of

Advocates is a statutory corporation, and a public body to which public law applies.

### The Private Press

Against this background it is clear that the classic paradigm, which lies at the root of our tradition of freedom of expression, is not built to solve the problems of the private press. The latter does not act as a government. It does not need the radio waves which are the property of the public. It acts as the owner of private property, and as a body which exercises its right to freedom of occupation. These two - private property and freedom of occupation - are constitutional human rights which are protected by our Basic Laws. Of course, it has freedom of expression *vis-à-vis* the government as a speaker.

However, the private press - that which does not act as a government- is not only a speaker. Like the Broadcasting Authority, the private press is also a platform or stage. It is a primary means through which freedom of expression is realized in Israeli society. Is it subject to duties, such as are imposed on the Broadcasting Authority, as a platform or stage, despite the fact that it is not a statutory authority? American law has answered this question in the negative. The Fairness Doctrine - whose application to the electronic media has in the meantime been negated by statute - and the rules of access do not apply to the private press. The press enjoys the same rights to freedom of expression as every individual; there is no duty on it to confer freedom of expression on another.

The problem has not yet been solved in Israel. A certain aspect of it has arisen before the Labour Court. The Regional Labour Court recognized the freedom of expression of a newspaperman *vis-à-vis* the newspaper. It referred to the newspaper not only as a speaker but also as a platform or stage. It restricted the managerial prerogatives of the newspaper owner. The newspaperman is not only an employee. He is also an individual who enjoys freedom of expression *vis-à-vis* the newspaper. This approach was not accepted by the National Labour Court, which adopted the view acknowledging the right to property, and freedom of occupation of the newspaper and its freedom of expression, but not the newspaperman's freedom of expression *vis-à-vis* the newspaper. The Supreme Court of Israel has not yet stated its view. The existing tradition of freedom of expression is not built to solve this problem. The classic paradigm of the individual standing against the government is not relevant to the private press. How should we solve these questions? What is the

theoretical model which we should construct to deal with these problems, which have not yet been examined by our tradition of freedom of expression?

The fundamental starting point lies in the question whether freedom of expression, as a constitutional right, exists in the relations between individuals *inter se*. Should it not be said that freedom of expression is freedom of the individual against the government alone? It is not freedom of one individual *vis-à-vis* another. In contrast, if we say that freedom of expression - like every other human right - is not only freedom *vis-à-vis* the government but freedom *vis-à-vis* other individuals, then we shall have to face the further question how to resolve the conflict between freedom of expression of the individual and the freedom of expression of another individual, when these clash. Such a clash may occur in several ways. Thus, for example, what is the fate of an employment agreement which negates the worker's freedom of expression? The question which now interests me is whether the private newspaper has a duty towards the individual - be he an ordinary citizen or a newspaperman - to provide him with a platform or stage to express his views. Such a duty is imposed on the Broadcasting Authority by virtue of its statutory character, but the private press is not the government. Does such a duty apply to a non-statutory body? This is a complex question.

I wish to raise an idea for discussion: I take no stand myself and am aware of the pros and cons. This is the idea:

A private newspaper is liable to be perceived as a two-dimensional or dual-natured body, a hybrid creature. On one hand, it is a body to which private law applies. On the other hand, it is arguable that it fulfils a public function, and resembles a "public utility". In the language of the Hutchins Committee:

"[the] great agencies of mass communications should regard themselves as common carriers of public discussions".

According to this line of argument, the private newspaper does not make use of radio waves which are public property - as does the electronic media. But the private newspaper controls the speaking platform, which is one of the most important public platforms in a democratic regime. In principle, every one may acquire such a platform or stage. In fact, few do so. There is a concentration of control over this platform or stage. There is what President Shamgar has called a "failure of the constitutional market" in this area. Whoever controls this platform or



stage controls an asset which is essential to the democratic regime. He controls a type of "natural treasure". True, the newspaper is not established by virtue of a law. The High Court of Justice is not competent to judge it. It is a private body, which under the proposed theory, fulfils a public function, but not by statute. Indeed, the private newspaper possesses control over the platform or stage through which democracy is preserved and it safeguards that democracy. The private newspaper controls the air needed for the survival of democracy. According to the idea raised for discussion, this platform or stage is not only a private asset, to which property law applies, this platform is also a public asset, which the newspaper holds as a trustee for the public.

It is true that as a private corporation, a newspaper enjoys all the same rights and owes all the same duties as an individual enjoys and owes. However, under the proposed idea, in fulfilling a public function, the newspaper is also subject to fundamental principles of public law. These are not the ordinary rules applicable to every public authority. It is not a public corporation created by statute; and it does not exercise statutory powers. But it is a trustee for the public. The same principles of public law required to preserve the public platform or stage and prevent undesirable control over it, should apply to it. Accordingly, it must act in relation to this platform or stage objectively. It must not discriminate; it must ensure true and trustworthy reporting; it must not enter into conflicts of interest; it must act out of a duty of trust; and it must give reasonable and appropriate access, as needed in terms of the substance of every matter. In this context, consideration must be given to the property rights of the owners and their freedom of occupation. Consideration must also be given to the nature of the newspaper.

The phenomenon of the dual-natured bodies - the hybrids - has been known in Israeli law for a long time. These are bodies which are not part of the government, and formally are bodies subject to private law while performing public functions. The Court has imposed a "normative duality" on them. Alongside private law, it has imposed on them a number of principles taken from the field of public law. Among these bodies, one can mention the Electric Co., government and municipal companies, the Burial Society, the Jewish Agency, the General Trade Union and the Diamond Exchange. The distinctions between these bodies are many. The same public law does not apply to all of them. But they form a developing group - in Israel and abroad - to which the Courts apply fundamental principles of public law.

The idea which I am suggesting is to include the private press within this group. If the press has properly been termed the "Fourth Estate" then it is right to impose upon it certain principles of public law - within the normative duality.

This idea raised for consideration, to the effect that alongside private ownership of the newspaper, recognition is given to the duty of public trust towards the platform or stage which the newspaper provides, is not foreign to the press' perception of itself. A review of the rules of professional ethics of the Press Council in Israel shows that the press fulfils a "public service"; that it must act out of a duty of trust; that the press "serves the public"; that it is prohibited from receiving a benefit which is liable to influence the manner of writing or editing. Out of the reality of recent times we have learned that if a chief editor is put on trial, he suspends himself from his job. Arguably, what unifies all this is the perception of the newspaper as a trustee of a public platform or stage, which attracts the application of certain principles of public law.

There is a significant difference between a modern newspaper which enjoys freedom of expression - and a person who stands on a soapbox in a public park - who also enjoys freedom of expression. Both are speakers, but only the newspaper is also a platform or stage. It is a public platform or stage, possessing vast powers of communication, which are essential to a democratic regime; needed for the self-expression of the individual; and without which the truth cannot be revealed. The argument is that whoever controls this platform or stage owes a duty of trust to the public. He controls, in a certain sense, a public asset.

Even if this view is accepted, this does not mean that newspapers should be licensed. That is a different issue. The duty of trust of the press as the owner of a public platform or stage is not connected to the question of licensing. Not everyone who possesses a license owes a duty of trust to the public; not everyone who does not possess a license is free from such a duty. No special legislation is needed for this. The duty of trust ensues from the general law and from general principles. The proposed approach is not intended to impose external censorship on the private press. It is intended to prevent unwarranted internal censorship; it is intended to prevent the control of the minority over a public platform or stage; it is intended to impose limitations on power - this time private power and not governmental power. The well-known saying that power tends to corrupt, and that absolute power corrupts absolutely - and the addendum to it that power corrupts, but the fear of the loss of

power corrupts absolutely - is true not only in the public arena. It is also likely to be true in the private arena. The rules of trusteeship are intended to rein in power, wherever it is found. Indeed, deposited in the hands of the private newspaper is the public interest in the free flow of information. This power requires, according to the theory posited here, supervision and restraint in order to prevent its misuse.

Thus, freedom of expression is not only a negative freedom - in the terminology of Isaiah Berlin. It is not only the defender against the interference of the State. According to the said theory, freedom of expression is also a positive freedom. It is a sword preserving free speech. It imposes a duty on the newspaper to act fairly, objectively, without conflicts of interest, and with equality, as someone owing a duty of trust to the public is required to act. I repeat: I have not established a firm position as to this idea. I have raised this question in the light of the current reality and literature on this subject. I put it forward for examination and debate.

## Conclusion

Our tradition is based on what may be termed first generation problems in freedom of expression. It is fed by the classic paradigm of individual-State relations. It is constructed primarily on the existence of freedom of speech and the government's ability to infringe it only where there is a near certainty that the freedom of expression will seriously harm public peace. This is the negative aspect of freedom of expression. This tradition is well-established and strong. But the nub of the problem today lies in those aspects of freedom of expression, with which our tradition has not yet dealt. This is the second generation of problems in the area of freedom of expression. These are problems connected to relations between individuals, and particularly between the indi-

vidual and the private media. In these relations the media is not only a speaker. It is also a platform or stage. It itself may be perceived as governmental and as possessing public functions. This is the positive aspect of freedom of expression. In this positive aspect a new model is required - alongside the classical model - which will provide a basis for freedom of expression in Israel. I have raised a number of ideas for consideration in this direction. I am aware that this is only the beginning of the road. A public debate is required, in which members of the public of all types will participate. An open and reflective debate is required within the press itself. It is not only a legal problem which the Court must resolve. It is a social problem which must reflect the fundamental beliefs of society itself.

The problem is particularly difficult because the struggle is not against the government, but is within the family of rights itself; the problem is difficult because it reflects a crisis within liberalism itself; the problem is difficult because the liberal person is asked to determine an order of priorities among his own values; the problem is difficult because we wish to protect and secure the freedom of all, of every individual, and of the private press. But we are aware that the safeguarding of a right against the private press may violate the freedom of that press; the problem is difficult because every duty imposed on the media has a deterrent and restraining effect. If we wish to initiate a public debate in a newspaper which is "unrebated, robust and wide-open" there is a fear that the imposition of a duty of trust may prevent the full achievement of this purpose; the problem is difficult because the imposition of duties of trust on the private press may result in a type of "forfeiture" of its property rights without specific statutory provision; the problem is difficult because it raises the question whether the judiciary should properly lead this normative change, or whether this is a matter for the legislature. ■

## Just Received

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# Water in the Peace Process

Jitzchak P. Alster

“And he removed from thence, and digged another well, and for that they strove not. And he called the name of it Rehoboth; and he said: ‘For now the Lord hath made room for us, and we shall be fruitful in the land’”

*Genesis XXVI, 22*



himself and waters his cousin Rachel’s sheep, an act which most probably impressed his bride-to-be immensely.

Our region’s scarcity of water resources as well as its prevailing arid climate have made the control over water resources a continuing contentious element of modern regional relations. Control over the Jordan river sources has ignited the region at times and the so-called “Battles over the Water” waged between Israel and Syria during the years 1964 to 1967 are but one example. The arrangements between Israel on the one hand and Jordan and the Palestinians on the other are however a sign of the recognition that a peaceful resolution to

**T**he control and use of water resources has always been one of the more heated issues in the Middle East. The Bible teaches us both about skirmishes which took place over the right to use a well as well as about practical water sharing arrangements. In the Book of Genesis we learn for example about the fights which took place between the servants of the Patriarch Isaac and the servants of Avimelech, the King of Gerar, over the use of wells dug by them. The citation in the preamble to this article describes the end of these struggles when finally a well was dug by Isaac’s servant over which no fights arose. When Isaac’s son, Jacob, arrives at the community well of Haran on his way to his uncle Laban and wonders about the presence of the herdsman at the early hour of the day he is told that the well is covered by a heavy stone which requires the presence of all of the herdsman for its removal. The heavy stone was put there, no doubt, to prevent unauthorized water drawings by any single herdsman thereby ensuring the availability of water for the use by the whole community. In a demonstration of strength, Jacob removes the heavy stone all by

these problems is attainable.

However, even the peaceful resolution of all of the water related conflicts in the region will not address the major dilemma facing our region which is the recognition that existing water resources will not be sufficient to meet the requirements for potable water of the ever growing population. It has already been recognized that the forecasted water deficit may be resolved solely through the development of new and additional waters from resources hitherto not utilized. Such sources could take the form of either desalinated sea water, a source for which Israel has already recognized the need, or could be obtained through the transportation of massive quantities of fresh water from outside the region. The need to develop new and additional water resources for the region will require coordination between the peoples of the region and such an effort is indeed being fostered through the Working Group on Water Resources of the Multilateral Peace Process.

Those who are not be familiar with the water balance of our region should be forewarned that large watercourses such as the Mississippi or the Amazonas are not present in abundance. With the exception of a number of large rivers which are far removed

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from Israel such as the Nile which flows through Equatorial and Eastern Africa and the Euphrates and the Tigris which flow from Turkey through Syria and Iraq to the Persian Gulf, most of the watercourses in the region are perennial ones, while the others have a limited annual discharge only.

Israel has a semi-arid climate with an average annual rainfall ranging from 25 mm (one inch) per year in Eilat (on the shores of the Red Sea) to 900 mm (37 inches) in the Upper Galilee. Rainfall in Israel occurs only during the winter months, furthermore, the intensity of the rainfall makes the catching of all the flood waters for storage or groundwater replenishment rather uneconomical. Consequently, a substantial part of the winter floods remains either uncaptured and flows into the Mediterranean or into the Dead Sea or evaporates from seasonal storage reservoirs.

### Israel's Water Resources

Israel's natural water resources comprise groundwater (more than 60%) and surface waters, mainly the Jordan River System-Lake Kinneret (Lake of Tiberias) basin. The water resources are replenished by rainfall as well as by groundwater recharging activities. At present, Israel consumes close to 100% of its renewable fresh water resources, approximately 1.6 billion CM per year and uses in addition, marginal waters such as brackish waters and treated wastewater. Consequently, the Water Commission's policy is that any additional non-domestic water allocation will be made only from treated wastewater and that in the future added urban uses will have to be based on added resources consisting mainly of desalinated water resources. In Eilat domestic uses are already being met by desalinated sea water.

### The Groundwater Aquifers

Almost two-thirds of Israel's renewable water resources are derived from groundwater aquifers. Israel's major aquifers are the Coastal Aquifer which extends beneath Israel's coastal area and the Mountain Aquifer also known as the Yarkon-Taninim Aquifer after its natural outlets, the Yarkon and Taninim Springs, in the Sharon area. Additional smaller aquifers are the Western Galilee Aquifer, the Shechem (Nablus)-Gilboa Aquifer, the Eastern Aquifer extending east of the national groundwater divide, the Arava Aquifer extends along both sides of the Jordan Israel border and the Hermon-Golan Aquifer in the north.

### The Jordan River System - Lake Kinneret Basin

Israel's main surface water resource is the Jordan River System - Lake Kinneret basin. Lake Kinneret is fed principally by the River Jordan which originates in the northern part of Israel from three main sources, the Dan, Hermon (Baniyas) and Snir (Hazbani and Wazani) springs. The outlet of the Dan is on the Israeli side of the pre-1967 armistice line between Israel and Syria and contributes an annual average approximately 250 MCM of water to the Jordan River. The sources of the Hermon (Baniyas) and Snir (Hazbani and Wazani) Rivers are on the Golan Heights and in Lebanon respectively and each contributes an annual average of 120 - 130 MCM to the Jordan River.

From the joining of these three sources south of the town of Kiryat Shmonah, the Jordan flows south through the Huleh Valley and is fed by a number of additional side tributaries originating principally on the Golan Heights. The Jordan flows into Lake Kinneret through the Buteiha Valley.

The average annual discharge of the Jordan north of and including the flow into the Lake of Tiberias is 800 - 900 MCM, out of which approximately 600 MCM are usable, due mainly to heavy evaporation.

Lake Kinneret is a fully regulated annual reservoir. No free flow of water from its southern outlet takes place. Its level is controlled and water releases from the Lake are either through the pumping stations of the National Water Carrier or, in the event of a water surplus in Lake Kinneret due to heavy rainfalls which cannot be fed through the National Water Carrier and which may cause the shores of the lake to flood, through the Deganiya Gates at the southern outlet from the Lake Kinneret.

The Yarmouk River forms the border between Syria and Jordan up to Hammat Gader (El-Hamma) and thereafter constitutes the border between Israel and Jordan. The Yarmouk flows into the Jordan River south of Lake Kinneret at the Naharyim confluence and henceforth the Jordan River flows through the Jordan Valley until its ultimate discharge into the Dead Sea. Since on average only small quantities of waters are released from Lake Kinneret, and since most of the Yarmouk River waters are captured by its riparians (Syria, Jordan and Israel), there is only a limited flow of water south of Lake Kinneret consisting mainly of overflows, various discharges and some side tributaries.

## The International Aspect

Water does not recognize political boundaries and a significant part of Israel's water resources either traverse boundaries or extend beneath different territories.

As explained above, Israel's main surface water resource, the Jordan River System is bordered by four riparian states (Lebanon, Syria, Israel and Jordan). The use of waters from this system by the upstream users affects the downstream users. Thus, for example, Syrian withdrawals from the Rokad tributaries, which is an upstream tributary of the Yarmouk, affects the flow in the Yarmouk and consequently potential uses by Israel and Jordan which are the downstream users of the Yarmouk river.

A number of Israel's groundwater aquifers are in a similar situation. For example, the Arava Aquifer extends on both sides of the border between Israel and Jordan and the Yarkon-Taninim Aquifer as well as the Shechem-Gilboa Aquifer extend beneath Israel and beneath areas under the control of the Palestinian Authority. Over-extraction of waters from the upper part of the Yarkon-Taninim Aquifer in the West Bank will result in a decrease of the yield of the Aquifer at their natural outlets in the Sharon area and will cause the salination of the wells tapping into the Aquifer.

While it is relatively simple to control the uses of a national water system by way of legislation or regulation, such is not the case in an international setting. Conflicting national interests and intended uses for water are not easily reconciled and require a degree of goodwill and mutual trust. In a situation where no political agreements regulate the relations between the riparians such goodwill and trust is very likely not to exist. The peace negotiations with Jordan, Syria Lebanon and the Palestinians are therefore the first opportunity for these parties to discuss directly on a bilateral basis a comprehensive settlement for the waters in which they have an interest, while taking into account their respective uses and need for these waters.

## The Early Arrangements

During the early years following the establishment of the State

of Israel a number of attempts were made to arrive at an agreed division of the waters of the Jordan River System between its four riparian countries. The most widely cited plan was prepared by Ambassador Eric Johnston of the United States who, during the years 1953 - 1955, attempted, in a series of visits to the region, to arrive at an agreed upon apportionment of the waters of the Jordan River System. Johnston did not succeed in his mission and, consequently, his proposals were never made public by the parties in any final formal manner. According to some foreign sources, the Johnston Plan was based on the following basic principles:

1. The waters of the Jordan River would be for the unconditional use of Israel subject to certain allocations to Lebanon and Syria of Upper Jordan River tributaries. In addition, Israel was to supply Jordan with an annual allocation from Lake Kinneret;
2. The waters of the Yarmouk River would be for the use of Jordan subject to a Syrian upstream withdrawal and a Jordanian downstream delivery to Israel. The allocation to Israel was based on the historical uses of the area known as the Yarmouk triangle which comprises the area delineated by the Lake of Tiberias, the Jordan River and the Yarmouk River; the Jordanian allocation was based on the arable lands of the Jordan Valley;
3. Jordan was to construct a water conduit system for the purpose of irrigating both banks of the Jordan River;
4. Storage and water regulation systems were to be constructed on the Yarmouk River for improving water use efficiency.

**During the early years following the establishment of the State of Israel a number of attempts were made to arrive at an agreed division of the waters of the Jordan River System between its four riparian countries.**

## Independent Water Resources Development

Since the Johnston Plan was not accepted politically by the Arab states, each of them commenced developing its water resources independently of the others.

In the 1960's both Israel and Jordan developed their independent water structures for the utilization of surface waters. During the years preceding the Six-Day War, Israel constructed its National Water Carrier ("NWC") aimed at carrying Jordan River waters to the southern part of the country and for efficient

water regulation. The NWC, which is the backbone of the Israeli National Water System ("NWS"), enables the efficient regulation and allocation of the main Israeli water resources, the Lake Kinneret basin, the Coastal Aquifer and the Yarkon-Tanimim Aquifer. The NWC carries waters of the Jordan River from Lake Kinneret through the coastal plain to the southern reaches of the land. Initially, the intake of the NWC was to be along the Upper Jordan River, adjacent to the Bnot Ya'acov Bridge. Due to lack of agreement with Syria on the implementation of the NWC, the venue of the intake was moved to the north-western shore of the Lake of Tiberias<sup>1</sup>. Once implemented, the NWS totally changed the agricultural development infrastructure of Israel by enabling the efficient use of all of Israel's main water resources in the coastal zone for urban and agricultural uses and in the north-western part of the Negev. Annually, some 400 MCM of waters are pumped from Lake Kinneret and transported through pipes and open channels to the south enabling the development of the agricultural settlements in the north-western parts of the Negev.

During the same years Jordan developed its own water projects as well. The main Jordanian project is a water conduit to transport water from the Yarmouk River at the Addasiya diversion point through a tunnel and thereafter through an open channel system along the Eastern Bank of the Jordan River. The King Abdallah Canal ("KAC"), also known as the East Ghor Canal, is at present some 110 km in length and transports annually an average of 120 MCM. The water is currently used both for irrigation purposes in the East Jordan Valley as well as for water supply to Amman through a pumping station at Deir-Alla. However, due to the lack of adequate storage systems, the full water potential of the Yarmouk River has not been exploited to date, and especially during the winter period when there is no immediate need for irrigation, water flows unutilized into the Dead Sea.

Prior to 1967, following the implementation of the NWC by Israel, Syria commenced the construction of a series of channel

conduits for the diversion of the waters of the Jordan River tributaries (Wazani and Baniyas) across the Golan Heights into the Rokad River Basin which flows into the Yarmouk River and confluences with the Jordan River south and downstream of the NWC, thereby effectively preventing Israel from utilizing these waters. The Syrian plan, which was approved by the Arab League, had two objectives. Originally, it was devised for the purpose of preventing Israel from utilizing the Jordan River waters through the NWC. At a later stage a plan was developed to store the diverted waters behind a storage dam at Muheibe on the Yarmouk River for use by Jordan as well as by Syrian farmers. The Battle over the Waters and later the Israeli control over the Golan Heights following the Six-Day War, prevented the Syrians from diverting the sources of the upper Jordan tributaries. In the course of the 1980's the Syrian Government implemented a major irrigation plan for the development of agriculture in the Syrian Southern Golan. For this purpose the Syrian Government commenced the construction of dams on the Syrian tributaries of the Yarmouk River thereby causing a reduction of approximately 40% in the flow of that river.

## The Peace Process

As anticipated, water arrangements are a core elements in the Middle East peace process. In practice, elements of water allocations between the parties are negotiated and concluded within the framework of the bilateral negotiations between Israel and each of its neighbouring countries and other cooperative water related issues are discussed in the framework of the Working Group on Water Resources of the Multilateral Peace Process.

To date, Israel has concluded a comprehensive agreement with Jordan on mutual water allocations and uses as well as an interim agreement with the Palestinians. Water allocations will undoubtedly also be dealt with in negotiations with Syria and Lebanon.

## Jordan - Israel

The Jordan-Israel Peace Treaty, concluded on 24 October 1994, contains a comprehensive water agreement between the two countries. The Treaty provides for water uses, divisions and allocations of both surface and groundwaters along the common border between the countries.

The water arrangements between Israel and Jordan are based on the following principles:

(a) The mutual recognition of the rightful allocations of both

1 The effect of the removal of the intake of the NWC from the upper Jordan River to Lake Kinneret is two-fold. It necessitates pumping the water from Lake Kinneret (209 meters below sea level) by some 400 meters instead of operating the NWC solely by way of gravitation and, due to the higher degree of salinity of Lake Kinneret compared to the Jordan River waters, the NWC carried water is far more saline than originally envisaged.

countries in the Jordan and Yarmouk Rivers as well as in the Arava Aquifer;

- (b) That the management and development of their water resources do not harm the water resources of the other party;
- (c) The recognition that the existing water resources are not sufficient to meet their needs and that, accordingly, the parties have to cooperate in finding additional water resources;
- (d) The need to prevent contamination of water resources.

Based on the foregoing principles, Israel and Jordan agreed on a number of specific arrangements which include allocations from the Yarmouk River as well the utilization of lower Jordan River waters, utilization of the Arava Aquifer, construction of storage systems on the Yarmouk and the lower Jordan River as well as cooperation in the finding of additional water for Jordan, as follows:

#### 1. The Yarmouk River

The major surface water resource common to Jordan and Israel is the Yarmouk River which flows from the east into the Jordan River and forms the border between Israel and Jordan from Hammat Gader (El-Hamma) westward. Pursuant to the terms of the Treaty of Peace and in accordance with historical uses, Jordan has been granted the residual use of the waters of the Yarmouk River after enabling Israel to pump certain quantities, as follows:

##### (a) 25 MCM to Israel

Israel has a priority right to pump an annual quantity of 25 MCM from the Yarmouk River, 13 MCM of which are pumped in the winter period and 12 MCM in the summer period. This quantity is extracted by Israeli pumping stations along the Yarmouk River downstream of the Jordanian diversion into the KAC Canal at Adasiya. An agreed division of the flow takes place at Addasiya to enable Israel to pump the allocated quantities.

##### (b) Exchange of 20 MCM

In the winter period, Jordan concedes to Israel pumping 20 MCM from the Yarmouk. Israel, in return, concedes the same quantity to Jordan during the summer period. The pumping of these waters by Israel in the winter period takes place through the pumping stations along the Yarmouk River, and in effect during the winter period Israel is entitled to pump 33 MCM from the Yarmouk River which is a combination of Israel's winter allocation of 13 MCM and the additional 20 MCM conceded waters. The transfer of the 20 MCM from Israel to Jordan during the summer period is effected by a pipeline which was constructed especially for that purpose and which extends from the Beit Zera reservoir across the Yarmouk River to the KAC Canal.

**The Battle over the Waters and later the Israeli control over the Golan Heights following the Six-Day War, prevented the Syrians from diverting the sources of the upper Jordan tributaries**

#### 2. The Jordan River

The arrangements between the two countries relate only to the waters of the Jordan River south of Lake Kinneret.

Following the construction of the NWC, Lake Kinneret has become an operative annually regulated reservoir with its southern outlet being opened only if the water level in the lake exceeds its maximum permitted

elevation of 208.90 meters below sea level. Accordingly, on average, only small quantities of Jordan River waters flow south of the Lake, and the River is fed mainly by diverted saline springs from the Kinneret, by side tributaries of the River south of the Kinneret, by various discharges into the river and by Yarmouk River as well as by Jordan River overflows.

##### (a) 10 MCM of Desalinated Waters

The salinity of the Lake of Tiberias is caused *inter alia* by the discharge of a number of saline springs into the Lake. Currently Israel diverts some 20 MCM of these saline springs from the Lake and releases them into the Jordan River downstream of the Deganiya Gates. In accordance with the terms of the Treaty of Peace these

saline springs are earmarked for desalination, Jordan is entitled to 10 MCM of such desalinated waters. Until such desalination takes place Israel agreed to transfer to Jordan during the winter period 10 MCM from Jordan River water. Like the 20 MCM referred to above, these 10 MCM are transferred through the pipeline between Beit Zera and the KAC Canal.

**(b) Maintaining Current Uses**

The marginal waters flowing in the Jordan River south of its confluence with the Yarmouk River, mixed with other flows in the River are utilized by Israeli downstream users for agricultural purposes in the Beit Shean Valley. In accordance with the terms of the Treaty Israel has the right to maintain its current uses of the Jordan River waters along the Beit Shean Valley up to Tirat Tzvi.

After satisfaction of these Israeli uses Jordan will have the right to utilize a similar quantity of water from the Jordan River.

**3. Storage**

The Treaty contemplates the construction of a number of storage systems on the Yarmouk and Jordan Rivers.

**(a) Diversion/Storage Dam at Addasiya**

The diversion of the Yarmouk River waters into the KAC Tunnel is effected through a provisional diversion structure in the riverbed immediately downstream to the entry into the KAC Tunnel. This provisional structure is adjusted periodically to effect the division of the flow between Israel and Jordan. The parties have agreed to cooperate in the building of a diversion/storage dam, downstream of the entry to the KAC Canal. The purpose of the dam is to increase the efficiency of the Jordanian diversion of the Yarmouk River waters into the KAC Tunnel while at the same time ensuring that all of Israel's allocations from the Yarmouk River waters and downstream uses are ensured. Preliminary studies for determining the exact site of the dam are currently being conducted.

**(b) Jordan River Storage and Excess Flood Waters**

Jordan is entitled to store for its use a minimum average of 20 MCM of floods in the Jordan River. The storage will be in the form of a system of storages on the Jordan River south of its confluence with the Yarmouk River. The storage system may be built to accommodate more

floods in which case Israel will be entitled to use an additional 3 MCM. Excess floods that are not usable and will otherwise be wasted can be utilized for the benefit of Jordan and Israel. A study is currently underway to determine the feasibility of the lower Jordan storages.

(c) Additional storage systems can be jointly agreed upon and constructed.

**4. The Arava**

The demarcation of the border between Israel and Jordan left 14 of the wells supplying water to the Israeli Arava settlements on the Jordanian side of the border. The Agreement stipulates that Israel will continue to have the use of these wells, and that it may replace such of these wells as fail.

In addition to the 14 existing wells, Israel has been granted the right to develop an additional 10 MCM of water from sources on the Jordanian side of the border. These additional waters are likely to be drawn from the deep groundwater aquifer and Jordan and Israel have already agreed to conduct a joint research of the deep groundwater aquifer to determine its water potential and its possible utilization as a source for the additional 10 MCM.

**5. Additional Waters**

On the understanding that there is an additional need for water to Jordan, Israel and Jordan agreed to cooperate to find, for Jordanian use, sources for the supply of an annual quantity of 50 MCM of waters of drinkable standards. The parties have not yet been able to agree on the sources of such additional waters with the Jordanian position being that these waters are to be drawn from the Lake of Tiberias while Israel insists that any additional waters are to be derived from desalinating sea waters.

**6. Water Quality and Protection**

The protection against pollution of the shared waters is a major objective. The parties have therefore agreed to monitor the water quality, to refrain, within three years, from discharging industrial and municipal waste into the river before treatment and to ensure that brine from desalination will not be discharged into the Jordan River.

*(Part 2 will deal with the Palestinian Agreement, Syria and Lebanon)*



# Armed Attacks from within Civilian Centres

Yoram Dinstein

In an interview conducted by JUSTICE with Professor Yoram Dinstein, Professor Dinstein discussed Israel's right of self-defence against *Hizballah* aggression, as implemented in the "Grapes of Wrath" operation, as well as legal aspects of the Qafar Qana incident on 18 April 1996, when *Hizballah* Katyuchas fired in proximity to a UN outpost led to an Israeli counter-attack in which many Lebanese villagers were killed. The interview focused on legal issues and not on the tragic nature of the incident for which the Israeli people and government have expressed regret.

**Can you tell us which international rules govern the use of force against guerrillas or terrorists, depending on how you define the *Hizballah*, who conduct attacks over the border into Israel and whether the *Hizballah's* acts are to be considered an "armed attack" which gives rise to the right of self-defence of Israel, in circumstances where those terrorists are hiding among the civilian population?**

You have posed several questions telescoped into one. The central issue is one of "armed attack" *vis-à-vis* self-defence under Article 51 of the Charter of the United Nations. The right of self-defence is vested in every country against an

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armed attack. Whereas there are often problems as to what particular mode of action constitutes an armed attack there is no question at all when a Katyucha falls on you. That is not just a threat, no mere admonition or exhortation, it is certainly an "armed attack". The question, however, is: an armed attack by whom? There are two types of guerrilla attacks. One is where the guerrillas are merely the long arm of a foreign government, for example, the *fedayeen* sent against Israel by Abdul Nasser in the 1950s. There was no difference between the Egyptian army and such *fedayeen* except in the sense that the Egyptian army represented the regular armed forces of Egypt and the *fedayeen* represented the irregular armed forces of Egypt; but that is not a valid distinction from the view point of international law.

Here we are in a different category because there is no doubt that the *Hizballah* are not sent by the government



of Lebanon, and the government of Lebanon does not stand behind them. If anything, the *Hizballah* are a subversive element which the government of Lebanon would relish getting rid of. So we have a situation where guerrillas hiding in an ostensible safe haven in State A are conducting armed attacks against State B without State A being in collusion with the guerrillas. Yet, State A is unwilling or incapable of contesting their presence on its territory. In such a case, under international law the target State need not sit idly by and turn the other cheek. It can definitely exercise the right of self-defence against those guerrillas across the international frontier. This is a category which does not have a title accepted by all international lawyers. Sometimes it is called "necessity", a title which I do not like because necessity means many disparate things in various contexts. I prefer the term "extra-territorial law enforcement". That is to say, enforcement of international law conducted extra-territorially, and the idea is that the victim state acts *in lieu* of the local sovereign, doing what the local

sovereign ought to have done but failed to do because of some overwhelming circumstances.

A very good example is that of the United States and Mexico in 1916; the famous episode described in the Hollywood film *Viva Villa*. Pancho Villa, a well-known bandit, crossed the Rio Grande River and attacked ranches and other civilian objectives in the south-west United States. The United States protested to the government in Mexico City. However, this was the period of the Revolution in Mexico which had commenced in 1911 and was to continue for a decade. The government of Mexico City could do nothing. Mexico was not in a position to impose order in the north, much as the government of Lebanon today cannot impose order in the south. President Wilson sent the U.S. Army under General Pershing into Mexico, traversing 300 miles in that country in pursuit of Pancho Villa. Villa was never found and the operation was a military failure but the attacks stopped. The United States then used precisely the same argument as Israel 80 years later: self-defence against armed attacks; the Mexicans were supposed to impose law and order, they were incapable of doing so and the U.S. therefore acted in their place.

There are a lot of other precedents for this principle. The most recent is the Turkish excursion against the Kurds in the north of Iraq. The Turks were being attacked by guerrillas and nobody in the north of Iraq could impose law and order. What else could the Turks do?

The rule is that if you exercise extra-territorial law enforcement into an adjacent State, and you encounter local army units, you should not fire upon them

because you are not conducting hostilities against them - you are in pursuit of the guerrillas and not of the local army. Indeed, Israel did not attack Lebanese army units or otherwise attempt to enter into a confrontation with them. By the same token, the local army should not fight you.

**How does the principle of 'proportionality' affect the situation in terms of the might of the Israeli army against a small guerrilla force firing Katyucha rockets?**

Proportionality has nothing to do with it. Usually guerrillas are smaller in number. "Guerrilla" is a Spanish word meaning small war, as distinct from "guerra" which means war. Guerrillas are always smaller in number but this does not mean that when they sting it hurts less.

**And the fact that the *Hizballah* were firing from under civilian cover? What is the position of the civilian population in such a case as a matter of international law?**

This is the crucial issue. The international law of warfare in this field was redefined in 1977 in a Protocol concluded in Geneva. This Protocol contains a specific clause in Article 51 (7), which prohibits the use of civilians to shield combatants. If combatants do so, they are in flagrant breach of international humanitarian law. If the other side fires against military targets with collateral damage to civilians, the blood of the civilians is on the head of the party which illegally attempted to render certain points immune from military operations through the presence of these civilians. Incidentally, the Geneva

Protocol is very anti-Israel in other respects. The 1970s were the heyday of the domination of the international community by the so-called Third World. The Protocol was signed only 2 years after the notorious "Zionism equals Racism" Resolution.

Thus, once the *Hizballah* fired Katyuchas - according to UN testimony, about 300 metres from the UN outpost - Israel was fully entitled to fire back at exactly the same spot. If the shell fell 100 metres to the left or to the right, it happens all the time and this is the essence of collateral damage.

Even if you take the most precise war in history - the Gulf War, in which the United States used state-of-the-art electronics against an enemy - there was a lot of collateral damage. No one took or could take the Americans to task for it, starting with the famous attack on a bunker full of civilians where hundreds of people were killed and ending with the performance of the Tomahawk cruise missiles. These missiles are the most precise weapon known to us. The Americans used over 300 of them in the Gulf War. In the post-War report they announced that the degree of precision was between 85-90%, but even taking the higher figure of 90% this means that 30 Tomahawk missiles missed the mark. Tomahawk missiles can do a lot more damage than an artillery shell and yet every one applauded. In war, there is always collateral damage.

**But what could the Lebanese villagers do?**

The villagers are certainly in the position to exclude 2 or 3 *Hizballah* fighters. Here the small numbers characterizing the *Hizballah* tactics work very much

against them. Had we been talking about a huge army of occupation, the villagers could do nothing. But we are talking about small squads of *Hizballah* who are acting with the full cooperation and collaboration of the villagers. If the villagers refused them entry, they would not enter. This is a typical situation in which, on the one hand, the civilians would like to benefit from the advantages of being civilians, and on the other hand they shelter combatants. Under international humanitarian law, you have to choose one or the other, you are either a civilian or a combatant. If you help a combatant you become a combatant, and if you are a combatant you become a legitimate target.

**How do you regard the Lebanese claim for compensation?**

There is no ground for compensation. There was even no need for a formal apology. If someone should have apologized it was the *Hizballah*. If compensation is due it is due from the *Hizballah*, certainly not from Israel. This was a legitimate act of war. Qana was precisely the location from which the Katyuchas came. I myself heard the UN spokesperson on television announcing that the Katyuchas were fired from a distance of 300 metres. Further, the *Hizballah* had done this before; the UN sent in a unit the previous day and a Fijian soldier became a casualty as a result. The UN should have ejected those *Hizballah*, but they did not. So the UN should look into its own acts of omission.

**In other words, the Lebanese government's claim for compensation is groundless?**

The Lebanese government should first

of all regain effective control of the south from the *Hizballah*. As long as anarchy prevails in the south, the Lebanese government is not in a position to complain to anyone.

**What about UNIFIL?**

The continued presence of UNIFIL (United Nations Interim Force in Lebanon) in its present positions is an incongruity. The whole point about a UN force is that it is supposed to serve as a buffer like UNDOF in the Golan Heights which is doing a tremendous job. No one should confuse UNIFIL with UNDOF. UNDOF deserves every medal in the book. There has not been a single accident in 22 years, since UNDOF was stationed in the Golan Heights in 1974. The only perfect record of any UN force anywhere. UNIFIL is on the opposite side of the spectrum. It must be recalled that UNIFIL was stationed before the creation of the security zone. As a result, it does not serve as a buffer but is positioned in the middle like a bone in everybody's throat. UNIFIL does not stop guerrilla attacks against us and it is incapable of stopping counter-attacks against them. All that happens is that it continuously sustains casualties. We are talking of dozens of casualties over the years, for no reason at all.

**Should Israel perhaps have approached the UN authorities with a complaint before taking action against the Hizballah?**

You can only approach someone with a complaint when you have time. Had Israel counter-attacked the following day, it would have been too late. This was an immediate response in self-defence against an armed attack. There is

no opportunity in such circumstances to conduct negotiations, because by then the *Hizballah* team would have disappeared, to reemerge elsewhere.

**Do you distinguish between the Katyuchas that come over the border into the northern towns and those fired against soldiers in the security zone in terms of self-defence?**

Not in terms of self-defence but in terms of choice of targets. Fighting has to be confined to combatants on both sides. Combatants are "paid" to run certain risks. The risks are of being injured or killed. It is unfortunate but one should not complain. Yet, when the *Hizballah* fire deliberately upon civilians, they are in breach of international humanitarian law.

**How far was the Syrian-American-Israeli understanding of 1993 binding?**

Until the recent bout of activities the understandings were oral. Oral understandings are not worth the paper on which they are not written, because with oral understandings you always have different versions. Everyone always remembers what he wants to remember. This time we have a written understanding. This makes the situation much clearer. Once the paper is duly signed by the parties it becomes the equivalent of a treaty and is binding. One should bear in mind that the *Hizballah* is not a State and therefore, to the extent that we talk of a treaty, the treaty is between Israel, Syria and Lebanon. The US, as always, acts as a witness.

**How far are the Syrians legally responsible for endorsing this treaty?**

The Syrians are involved primarily

because of the presence of Syrian troops on Lebanese soil. Once the Syrian army is there, it is indispensable to reach an understanding with them. No one seriously suggests today that the Syrians issue instructions to the *Hizballah*. The Syrians are responsible, however, for failing to stop the delivery of Katyuchas to *Hizballah* from Iran. It is not clear that the mere provision of armaments to guerrillas by itself constitutes an armed attack. There is the *Nicaragua Judgment* of 1986, in which the majority of the International Court of Justice in the Hague ruled, much to my surprise, that the mere supply of arms does not by itself constitute an armed attack. On the other hand, it is important to bear in mind that Syria and Israel are still in a state of war. There is a period of cease-fire now, there have been other periods of cease-fire before, so we have a lengthy ceasefire punctuated by the occasional eruption of hostilities. Nevertheless, the state of war continues. Accordingly,

there is no need to refer to an armed attack by Syria against Israel because in any event we are in a state of war. The original armed attack starting the war occurred in 1967. This was the second war with Syria. The first occurred between 1948-1949. The second war, which started in 1967, is not over yet after 29 years. To the extent that the Syrians are in violation of anything they are in violation of the cease-fire. On the other hand, an agreement is an agreement.

**Would you therefore regard the *Hizballah* attacks as an armed attack by Iran?**

On the assumption that all that is involved is the supply of arms then according to *Nicaragua* there is no armed attack. But more and more information is emerging according to which Iran is calling the shots. I read in the papers only this week that the attack in Beth-El in which a settler was killed was engi-

neered by the Iranians. If so, it is an armed attack.

**With a concomitant right of self-defence on the part of Israel against Iran?**

We would be entitled to act in self-defence against Iran. But this does not mean that we necessarily have to exercise our right. A country does not always immediately exercise its right to self-defence. Here we would want to negotiate first, exhaust all other possibilities, before launching a situation over which we have no further control. Before you decide to unleash all your forces against another country you have to consider and reconsider and re-evaluate and make sure that the information is correct. But it is interesting that recently the Americans confirmed our theory about Iran. The American Secretary of State issued a carefully drafted statement clarifying that Iran was to blame. Iran is definitely on a collision course with Israel. ■

**Article 51 of the UN Charter**

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present

Charter to take at any time such action as it shall deem necessary in order to maintain or restore international peace and security”.

**Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 1977**

Article 51(7)

“The presence or movements of the

civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”

# Palestinian National Covenant: Amended or Not?

The Palestinian National Covenant came into force in July 1968. 30 of its 33 Articles call explicitly or implicitly for the destruction of the State of Israel. The remaining three Articles are procedural in nature. On 9 September 1993, on the occasion of the signing of the Oslo Agreement, Chairman Arafat of the PLO sent a letter to Israeli Prime Minister Rabin, *inter alia*, stating as follows: "The PLO affirms that those Articles of the Palestinian Covenant which deny Israel's right to exist and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid. Consequently, the PLO undertakes to submit to the Palestinian National Council for formal approval the necessary changes in regard to the Palestinian Covenant."

On 25 April 1996, the PNC decided as follows:

1. To amend its National Covenant by repealing the provisions contradicting the mutual letters exchanged between the PLO and the Government of Israel on 9 September 1993.
2. To empower its Legal Committee to redraft the National Covenant and present [the draft] to the PNC at its first meeting thereafter.

The debate continues among legal, political and academic circles whether the PLO has in fact fulfilled its commitment to amend its Covenant.

A selection of provisions from the Covenant follows.

The unabridged text is taken from the official English language publication of the PLO:

## Article 2

Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit.

## Article 9

Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.

## Article 15

The liberation of Palestine, from an Arab viewpoint, is a national (*qawmi*) duty and it attempts to repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine. Absolute responsibility for this falls upon the Arab nation - peoples and governments - with the Arab people of Palestine in the vanguard.

Accordingly the Arab nation must mobilize all its military, human, and moral and spiritual capabilities to participate actively with the Palestinian people in the liberation of Palestine. It must, particularly in the phase of the armed Palestinian revolution, offer and furnish the Palestinian people with all possible help, and material and human support, and make available to them the means and opportunities that will enable them to continue to carry out their leading role in the armed revolution, until they liberate their homeland.

## Article 19

The partition of Palestine in 1947 and the establishment of the State of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right to self-determination.

## Article 20

The Balfour Declaration, the Mandate for Palestine and everything that has been based upon them, are deemed null and void. Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong.

## Article 21

The Arab Palestinian people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine and reject all proposals aiming at the liquidation of the Palestinian problem, or its internationalization.

*Article 22*

Zionism is a political movement organically associated with international imperialism and antagonistic to all action for liberation and to progressive movements in the world. It is racist and fanatic in its nature, aggressive, expansionist and colonial in its aims, and fascist in its methods. Israel is the instrument of the Zionist movement, and a geographical base for world imperialism placed strategically in the midst of the Arab homeland to combat the hopes of the Arab nation for liberation, unity and progress.

Israel is a constant source of threat *vis-à-vis* peace in the Middle East and the whole world. Since the liberation of Palestine will destroy the Zionist and imperialist presence and will contribute to the establishment of peace in the Middle East, the Palestinian people look for the support of all the progressive and peaceful forces and urge them all, irrespective of their affiliations and beliefs, to offer the Palestinian people all aid and support in their just struggle for the liberation of their homeland.

*Article 23*

The demands of security and peace, as well as the demands of right and justice, require all states to consider Zionism an illegitimate movement, to outlaw its existence, and to ban its operations, in order that friendly relations among peoples may be preserved, and the loyalty of citizens to their respective homelands safeguarded.

*Note: the geographical unit called Palestine in the Covenant includes the entire area of the present-day State of Israel, the Hashemite Kingdom of Jordan and the territory in dispute between them. Thus, the "liberation of Palestine" espoused by the Covenant has been interpreted as meaning the eradication of Israel, and, eventually, of Jordan as well as an independent state.*

## Lord Harry Woolf, Hon. President of the British Section, appointed Master of the Rolls

The International Association and the British Section in particular are delighted with the newly announced appointment of Lord Woolf of Barnes as Master of the Rolls. Known widely and affectionately as "Harry", Lord Woolf is the Honorary President of the British Section of the Association, and has played a leading role in the affairs of the IAJLJ over many years. A youthful 63, Lord Woolf is widely regarded as the outstanding British Jew of his generation, and commands the widest respect both in legal and lay circles of the general community. Whilst the English judicial hierarchy is not easy to describe, the position of the Master of the Rolls is, in effect, the head of civil justice and the Number 2 Judge in the country after the Lord Chief Justice. Tragically, that position became vacant as a result of the illness of another outstanding British Jew, Lord Taylor. Lord Woolf accordingly succeeds Sir Thomas Bingham, the previous Master of the Rolls, who becomes the new Lord Chief Justice.

Previous occupants of the seat of Master of the Rolls have included Lord Denning and in the last century another great Jewish Judge, Sir George Jessel. As Lord Denning demonstrated throughout the English speaking world, the Master of the Rolls is in a unique position to influence and

mould the development of the English common law. With Harry Woolf a man of kindness and humanity mixed with enormous shrewdness and that special gift of having many friends and few (if any) enemies, the great office is in safe hands.



### Jonathan Goldberg Q.C.

*Vice Chairman of the British Section of the Association*

# The Economic Dividend of Peace

Yigal Arnon

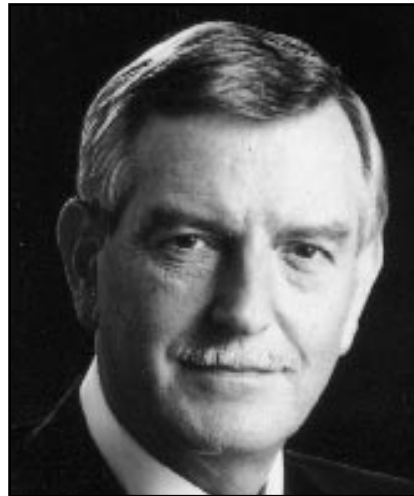
**A**ccording to the *Torah*, he who does wrong will be punished but on the other hand, one is not promised a reward for performing a *mitzva*. The reason is "*sechar mitzva, mitzva*" (the reward for a *mitzva* is the *mitzva* itself). For a good man, the reward for doing a good deed, is the good deed itself. He does not need another reward. It is only if one assumes that people are bad, that they should be rewarded for being good. But if one assumes that all people are good and should be good, there is no reason to reward them for being good.

What bearing does this have on the subject of my lecture? We are considering the economic dividends of peace. The dividend of peace is peace itself. We seek peace because it is right and just and not because of the benefits it brings. Nevertheless, when peace reaps benefits, the participants enjoy them. One such benefit is the economic dividend.

Peace itself is an irreversible process. However, we must face reality and understand that we should not expect too much from peace in terms of economic divi-

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dends, so far as the direct economic relations with our neighbours are concerned. We will have great peace benefits, but not because of the 100 million Arabs who are in our immediate surroundings and supposedly, or logically, should have formed a captive market for a developed country such as Israel with a population of about 5 million people.

In order to evaluate the economic dividend from peace, it is important to establish some facts about Israel's economy. Throughout the period 1990-1995, the Israeli economy experienced a rapid growth of 6.1% annually in gross domestic product and 2.5% in *per capita* income. This is a tremendous growth, especially when considering that it was constant; even though we expect it to slow slightly in the next few years.

Israel's *per capita* income matches, or almost matches, that of European countries, such as France, England, and even Germany.

The economic environment in Israel has improved since the mid 1990s. Real wages have declined while productivity has increased; the budget deficit has been cut; the exchange rate policy managed to preserve purchasing power parity; foreign trade is gradually being liberalised; some privatisation steps have taken place. As a result, economic activity has accelerated and new jobs have been created; today we are at the lowest rate of unemployment since 1989, which is a very good sign, especially if one takes into consideration the huge immigration during this period and the fact that the rate of unemployment among new immigrants was, at first, 30-40%. By the year 2000, Israel's population will reach about 6.2 million citizens, producing a gross domestic product of 100 billion dollars, with an average income *per capita* of \$16,000.

The peace process which has taken place since the beginning of this decade has been a major contributor to the growth process in the past few years. Moreover, it is a necessary condition for the continued growth forecast for the coming years. The expansion of the Palestinian economy, the peace treaty with Jordan and the renewed talks with the Syrians suggest that the peace process is irreversible. I hope it is, and that even tragic events like the murder of the late Israeli prime minister will not be able to stop it.

Israel is expected to enjoy a substantial economic benefit from the peace process, mainly through the reduction of the defence burden. Thanks to an improved business environment, the defence burden on the Israeli economy, as measured by the ratio of local defence expenditure to the gross domestic product, has been drastically reduced to 8% today, in contrast to

15% in 1980. This is a very dramatic change. Even if the defence budget remains as it is, the growth of the economy means that it will be, percentage-wise, only 6% of GDP by the year 2000. This defence burden reduction has already enabled the government of Israel to increase expenditure on education and health care, while keeping the budget deficit at a reasonable rate of 4%.

For many years, Israel faced difficulties in realising its potential competitive advantage. Foreign investments and even trade with Israel were sometimes avoided due to the regional geopolitical instability. This is now changing rapidly. Today, Israel enjoys a much lower risk premium as expressed by its new ranking of "A" and "A3" awarded by Standard and Poor and Moody's, respectively. Consequently, Israel faces no difficulties in raising money at compatible terms in the world capital markets. The success of the recent bond issue by the Government of Israel and the public offering of Koor, the biggest industrial conglomerate in Israel, in New York and London, demonstrates this new accessibility.

Interest in direct investment and trade opportunities is growing daily. Direct foreign investment in Israel fluctuated around \$500 million per year in the years 1992 to 1994, and is expected to triple to \$1.5 billion in 1995. This phenomenon has taken various forms: major international companies, like Inter, Motorola and others, are planning to establish their own plants in Israel for export to other countries. Other companies established new enterprises to sell services in the domestic market, like Cellcom, which was formed by Bell South and the Safra Family. Shares of domestic corporations have been acquired by foreign investors; for example, Shamrock, the Walt Disney group, bought a large stake in Koor; Cable and Wireless of England bought a stake in Bezek. Domestic and foreign

companies engaged in joint investments: "Volkswagen", with Israeli Chemicals; "Volvo" with a company called Merkavim. Production and marketing collaboration took place between Nestle and Osem. Major American and European investment banks and portfolio managers have diverted some of their activities to Israel, some by opening local offices.

A major peace dividend factor accrues from Israel's improved position as an exporter. Under the improved geopolitical environment and weakening Arab boycott, Israeli exporters have gained easier access to their traditional American and European markets. Moreover, Israel enjoys bilateral free trade agreements with both these markets. The new and renewed diplomatic and economic relations which have been formed mainly with the former communist bloc, and with countries in the Far East and Asia, have opened new markets for Israeli products.

With regard to trade and business with the Arab world, it should be noted that the GDP of the entire Arab world, including the Gulf countries and Saudi Arabia, is about 5% of the gross domestic product of the markets to which Israel is now exporting. This is one reason why Israel should not hope to do much in terms of trade with the Arab world. A second reason is that the Arab world consists mainly of very poor countries. Even in Saudi Arabia, *per capita* income is only about \$6,200 a year, maybe less, because of the oil price cuts. But other countries range from \$500 to \$1,500 *per capita*. Thus, the fact that a country has a population of 70 - 100 million does not alter the fact that Israel has almost nothing to sell to them, and regretfully, nothing to buy from them, except oil and maybe gas. We always hear, in conventions, whether in Casablanca or Amman, that the Arab states fear Israeli domination of the Arab economies. This is absurd. We can dominate almost nothing in those countries,

and can only help in agriculture or technology.

It is in our common interest as Israelis and as Jews, that the Arab countries around us become rich in the sense that their people enjoy a higher income. Only if the Arab economies substantially improve, might they form a good market for Israeli products. We, as good neighbours, should do whatever we can to help develop these countries. This will not work against us, but will benefit us. A true economic mutual interest might work better for keeping the peace than any written promise or undertaking.

Peace can generate similar benefits for the Arab countries. One benefit is the lowering of defence expenditures there too. A second benefit will be the change in the political environment to an environment of peace. Foreign investments play an important role in developing countries and a combination of foreign investors using the still low wages in the Arab countries, might do wonders in an era of peace in the region.

Where do we lawyers come into the picture? Statesmen are peace-makers; they pave the way for the lawyers who are the deal-makers. We lawyers have an important role in world economy. Deals cannot be made without us. It is not simple to do business in the Middle East today; there are various legal systems in operation and when it comes to trade and foreign investments, the stability of the legal system and the unification of contracts and trade conditions is very important. In particular, a unified commercial code for the Middle East may be vital, the same applies to an arbitration system which will bind all or part of these countries, and which will enable businessmen to feel confident in their legal dealings in the Middle East.



# Major Developments in Israel's Public Procurement Law: A New Era in International Tendering

Arie Reich



Israel's public procurement environment is undergoing important changes recently, as a result of two major developments. One, is the entry into effect of the Public Tenders Law,<sup>1</sup> which creates a statutory obligation on all central government agencies and government enterprises to conduct public tendering in relation to almost all of their business transactions. The second is Israel's ratification of the new GATT Agreement on Government Procurement,<sup>2</sup> which requires its signatories to open up their public procurement to international competition. Both these developments, coupled with a general change in the economic ideology of the Israeli society over the past few decades, are opening up new opportunities for foreign contractors and suppliers in the Israeli public market.

Prior to the Public Tenders Law, which came into effect in June 1994, there was no statutory duty on central government agencies to conduct public tenders. Although internal directives issued by the Ministry of Finance did require public tendering in relation to most transactions, much discretion in this regard was left with the agency itself. Given that the internal directives are not considered a binding legal norm, the ability of potential suppliers to challenge the agency's decision not to conduct a public tender, or the manner in which such tender was conducted, was naturally limited.

The new law prohibits all government entities and enterprises

from entering any contract to perform transactions in goods or real estate, or to perform work, or procure services, except through a public tender which offers every person equal opportunity to participate.<sup>3</sup> The exact form of the tenders and the procedural rules which are to govern them, as well as cases where the agency is exempt from the duty to perform tenders, were to be determined in regulations issued pursuant to the Law. Such regulations were issued in 1993.<sup>4</sup>

The absolute equality guaranteed initially by the law (to all "persons" - including foreign citizens) was later overturned by the Knesset in Amendment No. 3. This amendment authorized the Government to issue rules regarding domestic preferences ("Buy National" policies), on set-off and buy-back requirements from foreign contractors, and preferences for suppliers from development regions. Such rules were issued in 1995 in the form of binding regulations: The Public Tenders Regulations (Preference for Domestic Products and Requirement of Commercial Cooperation) 5755-1995 (hereinafter, the

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- 1 The Law of Public Tenders, 5752-1992, S.Ch. 1992, 1387, 12.3.1992, p. 114.
- 2 Agreement on Government Procurement, GATT Uruguay Round, Annex 4: Plurilateral Trade Agreements, Apr. 15, 1994, available in LEXIS, GATT File.
- 3 The Public Tenders Law, *supra*, Article 2.
- 4 The Tendering Duty Regulations, 5753-1993, K.T. 1993, 5523, 19.5.1993, p. 826.

“Preference Regulations”).<sup>5</sup> These regulations grant a fifteen percent price preference to products made in Israel, and thus basically preserve policies which existed prior to the enactment of the new law. Accordingly, when an Israeli product is competing with an equivalent foreign product for a government contract, the former may win the contract even if it is more expensive up to a difference of fifteen percent. Similar rules are unfortunately prevalent in many other countries, the most well-known being the U.S. Buy American Act, which was enacted in 1933 during the depression.<sup>6</sup>

In addition to this policy, the Preference Regulations also provide for offsets and industrial cooperation requirements, which are to be applied on government contracts valued at above NIS 1.5 million.<sup>7</sup> Thus, foreign firms competing for such contracts will be required to undertake written obligations to purchase goods or services in Israel at an amount of 35% of the total contract price. The foreign firms can also satisfy such offset obligations by sub-contracting a part of the contract to an Israeli producer, or through transfer of technology or investments in Israel at the said amount. If the government contract in question is worth more than NIS 15 million and is likely to promote the industry and technological development in Israel, local sub-contracting will be required. There is a central government authority in charge of the implementation of this policy - the Industrial Cooperation Authority - and it may determine which contracts will be subject to these special requirements.

The second important development - which to a large extent is meant to curb the protectionist impact of some of the above regulations - is the entry into force of the new GATT Agreement on Government Procurement (AGP), negotiated in the Uruguay Round of multilateral trade negotiations.<sup>8</sup> The aim of this agree-

ment is to open up public procurement contracts to international competition under equal commercial conditions free of any national preferences. The AGP therefore prohibits any discrimination against products and suppliers originating from any of the signatories of the Agreement, requiring all procuring agencies subject to the Agreement to extend “national treatment” to all such suppliers. In addition to this substantive rule, the AGP also prescribes very detailed tendering procedures which are to apply to all purchases of both products and services subject to the Agreement. The procedures are designed to guarantee true competitive conditions for all potential suppliers and to prevent disguised discrimination against foreigners. They require, for instance, that a tendering notice for every intended procurement is published in English in a previously determined publication (in Israel - the *Jerusalem Post*) inviting suppliers from all AGP countries to bid for the contract on equal terms. The Agreement also requires that the technical specifications for the product in question be based on international standards (such as ISO standards), if they exist, as opposed to national standards, which may give local producers an unfair advantage. There are also detailed provisions on all other facets of the procurement process, such as the technical qualification procedures, the bid-opening procedures, the contract award criteria, post-award information, *etc.*

However, the AGP does not apply to all government contracts. Its coverage is determined according to four main parameters: the value of the contract, the procuring agency, the type of products or services, and their origin. In Israel all Government Ministries, except Defence and Police, are covered by the Agreement. Also covered are the three largest Municipalities and some major government controlled agencies and corporations, such as the Ports and Railways Authority, the Airports Authority, the National Insurance Institute, and some of the procurements of Bezek and the Israel Electricity Company. Apart from products, the Agreement also covers services, such as all construction services, architectural and engineering services, computer services, *etc.* The value thresholds range between approximately NIS 0.5-1.5 million for products and general services, depending on the type of procuring agency, and NIS 34 million for construction services. The national treatment obligation of the Agreement relates only to suppliers from AGP member countries.

The parties to the Agreement, in addition to Israel, are the U.S., Canada, Japan, all EU members and other West-European countries. Thus, in consideration for the opening up of its

5 K.T. 5653, 1995, 15.1.95, p. 562. The preferences for development regions are found in special regulations, the Public Tenders Regulations (Preference for Products from National Priority Regions), 5755-1995, K.T. 5683, 1995, 1.6.95, p. 1490.

6 41 U.S.C. §§ 10a-10d. On Canada's domestic preference policies, see Arie Reich, “Government Procurement and Bid Challenging in Canada After the Free Trade Agreement”, 18 *Canadian Business Law Journal* 195 (1991), 199-205. On domestic preference policies generally, see Arie Reich, *Toward Free Trade in the Public Sector: A Comparative Study on International Agreements on Government Procurement* (A Doctoral Thesis, University of Toronto, 1994), p. 4-18.

7 The Preference Regulations, *supra*, par. 5.

8 *Supra*, note 2.

domestic procurement market to suppliers from these countries, Israel will receive reciprocal market access abroad for its exporters. However, on one issue Israel is enjoying a special status, being the only developing country that is currently a party to the AGP: on offsets. While such requirements are generally prohibited under the new Agreement,<sup>9</sup> a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Israel indeed negotiated a permission to require offsets of up to 35% of the contract, going down to 30% after five years and 20% after nine years, beginning from January 1996.

The permission, however, is qualified by several conditions. First, the existence of the offset requirements must be indicated in the tender notices, and clearly specified in the contract documents.<sup>10</sup> Secondly, the requirements may be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. This means that some of the existing provisions of the Preference Regulations - which require the foreign bidders to indicate themselves the extent of local sub-contracting they are willing to offer, improving their chances to win the contract the higher their offer is<sup>11</sup> - cannot be applicable to tenders subject to the AGP. Finally, foreign suppliers may not be required to purchase goods "that are not offered on competitive terms, including price and quality, or to take any action which is not justified from a commercial standpoint."<sup>12</sup>

One may wonder whether **any** mandatory offset requirement can be considered commercially justified, when it has to be forced by law upon the foreign supplier? If the goods are offered on competitive terms or the local sub-contracting is entirely commercially justified - why wouldn't the foreign firm choose to make these business deals on his own free will, with no need for government regulation and supervision? One possible answer

could be that the foreign firms are not aware of the industrial potential of Israel, and that high-value government contracts provide an opportunity to promote business connections between Israeli producers and large foreign concerns. Another argument may be that this type of requirements is needed in order to overcome the impact of the Arab boycott on the foreign firms. Be that as it may, a foreign firm will be right in refusing to perform offset obligations that are commercially unjustified.

A final question that has to be discussed is the legal status of the AGP in Israel's domestic law, considering the dualistic approach of our system which traditionally does not give any domestic legal effect to international treaties.<sup>13</sup> This question appears to have been solved by the Knesset in Amendment No. 3 to the Public Tendering Law, discussed above. While on the one hand authorizing the Government to legislate Preference Regulations, the Knesset also restricted this authority by providing that any regulations under that Law will apply only to the extent that they do not contradict any international treaty obligation of Israel.<sup>14</sup> The legislator thus in effect granted superiority to international treaties (and to the AGP, in particular) in relation to secondary legislation (*i.e.*, regulations). The practical implication of this provision is first and foremost that most of the Preference Regulations will not apply to any government contract that is covered by the AGP. These contracts will have to be solicited in a non-discriminatory manner open to all AGP suppliers. This conclusion has already been confirmed by the Tel-Aviv District Court in a recent decision.<sup>15</sup> It also means, according to this author's opinion, that any deviation from the provisions - both substantive and procedural - of the AGP, can be challenged in a regular court of law.<sup>16</sup>

Indeed, one of the innovations of the new AGP is that it requires its signatories to provide "non-discriminatory, timely, transparent and effective" challenge procedures enabling

9 Article XVI:1 of the Agreement.

10 Paragraph 1(a) of the Note attached to Israel's Appendix to the AGP.

11 See para. 9(b) of the Preference Regulations. According to this regulation, a local sub-contracting commitment of 10% of the main contract value gives the bidder a preference margin of 1% in relation to other bids. Every additional 5%, gives him an additional 1% preference. Thus, the offset requirements are in effect used as an award criteria, improving your chances to win the contract the higher offset commitments you are willing to offer.

12 Paragraph 1(b) of the Note attached to Israel's Appendix to the AGP.

13 See, e.g., Y. Dinstein, *International Law and the State* (Jerusalem, 1971) 143-148 (Hebrew).

14 The Public Tenders Law, *supra*, Article 5A(b).

15 H.P. 417/96 (Tel-Aviv) *Heiman Systems GmbH v. State of Israel* (Sirota, J.) (not yet published); currently under appeal to the Supreme Court.

16 A further elaboration on this question is found in: Arie Reich, "The Impact of the GATT Agreement on government Procurement on the Israeli Law of Public Tenders", 12 *Bar Ilan Law Studies* 419 (1995), 425 (in Hebrew).

suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.<sup>17</sup> The challenges shall be heard by a court or by an impartial and independent review body. Challenge procedures must provide for rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. At the conclusion of the procedures, the court or review board must be authorized to either order a correction of the breach (for instance, to issue a new tender), or to order compensation to the aggrieved bidder. Israeli courts obviously have all these authorities, so by allowing them to hear bid challenges in relation to AGP procurements, Israel would be fulfilling its international obligation in this regard under the AGP.

Considering this far-reaching impact of the GATT Agreement on Government Procurement in relation to Israeli public tender law, one can only regret the fact that the Government has not yet found fit to incorporate the provisions of the Agreement into the

country's public tender regulations, so that they can be known and understood by everyone. Not only that, but the AGP has not even been officially translated yet or published in any official publication, even though it has been in effect since January 1996. We have therefore found ourselves in a peculiar situation where a major source of legal norms with domestic effect - norms which are superior to officially binding regulations - have not been published in any Israeli official publication and cannot be found in the Hebrew language. This situation can hardly be said to meet the Agreement's transparency requirements, nor elementary constitutional standards on the publicity of the law and the right of the citizens to know what the law is.<sup>18</sup> One can only hope that this will be corrected shortly.

17 Article XX:2 of the AGP.

18 See for instance Article 10(a) of the Law and Administration Ordinance, 1948; and A. Rubinstein, *The Constitutional Law of the State of Israel*, 278.

## A Tribute to F. Ashe Lincoln, Q.C.

The Association wishes to pay tribute to the outstanding contribution of Ashe Lincoln, Q.C. to the work of the Association in general and to his commitment to Jewish values and the State of Israel in particular, on the occasion of the publication of his autobiography *Odyssey of a Jewish Sailor* (Minerva Press, 1995, 78pp).

Ashe Lincoln was one of the founding members of the International Association of Jewish Lawyers and Jurists and today is an Honorary Deputy President. He is a prominent and highly respected barrister and active member of the Anglo-Jewish community. In the words of Dr. Jonathan Sacks, Chief Rabbi of the United Hebrew Congregations of the Commonwealth, in the foreword of the book, he is also "a man of faith, one who has always been proud of his Jewish religious heritage and who has lived out that faith in difficult circumstances in an exemplary way."

*Odyssey of a Jewish Sailor* bears this out. The book is anecdotal in nature; it relates the experiences of Ashe Lincoln as Jewish naval officer during the Second World War with both charm and modesty: telling of Ashe Lincoln's war duties in rendering safe mines both inland and at sea; his success in main-

taining a Jewish way of life while partaking in the invasion of Sicily and during other naval operations; his participation in the rescue of a group of some 4,000 Jewish refugees from Croatia as well as his help in bringing Jewish individuals and families to safety in Britain. The second part of the book recounts Ashe Lincoln's active involvement in the Zionist Federation, the Jewish National Fund and the World Jewish Congress; his efforts to assist Holocaust survivors reach Palestine by utilizing his negotiating skills as a K.C. as well as his contacts with high ranking military personnel. One story tells of the supplies he managed to organize for the helpless refugees on the ship *Exodus* which had been turned back from Palestine by the British Authorities and had anchored in Gibraltar on its way to Hamburg.

A significant section of the book deals with the author's activities in and for the benefit of Palestine in 1947-1948, including his ultimately accepted proposals to Shertok and Ben Gurion for the formation of a Navy, and his active work in establishing the Navy itself; the transport of *Aliyah Beth* refugees from Famagusta, Cyprus to Israel; and a variety of naval operations during Israel's War of Independence which were rewarded by appointment as Naval Adviser to the State of Israel.

# Heirless Jewish Assets in Swiss Banks: Fact or Fiction?

Philippe A. Grumbach

**T**he problem of heirless Jewish assets in Swiss banks has become the focus of media attention in Switzerland and the United States.

In Switzerland, Mrs. Verena Grendelmeier, a member of the Swiss Parliament representing Zurich, brought matters to a head in March 1996 by initiating a parliamentary motion aimed at securing the return of assets entrusted by Jews to Swiss banks during the Second World War.

## The 1962 Federal Decree

This is not a problem of recent vintage. In 1952, the agreement settling financial issues between Switzerland, the allied powers and the Federal German Republic resulted in the return of 16.5 million Swiss francs to persons entitled.

Subsequently, the Federal Decree of 20 December 1962 concerning assets in Switzerland of foreign stateless persons persecuted on racial, religious or political grounds, entered into effect on 1 September 1963 for a ten year period, expiring on 31 August 1973. The first section of this enactment provides as follows:

“1. All assets in Switzerland whose last known owners were foreign or stateless

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persons, concerning whom no reliable information has been received since 9 May 1945 and in respect of whom it is known or presumed that they were victims of racial, religious or political persecution, shall be reported within a period of six months from the entry into effect of the present decree to an authority that the Federal Council shall appoint, hereinafter referred to as “the competent authority”. The report shall indicate all changes which have occurred since the disappearance of or the receipt of the last information from the owner.

2. Compartments of safe deposits in which such assets or documents relating to them may be found, shall be opened.”

Any person whether an individual or a

legal entity, who managed, held, safeguarded or was responsible for the security of these assets, was required to make a report. The duty to report such assets to the Authority took precedence over professional secrecy of banks, trustees, lawyers, notaries, insurance companies and legal advisors.

As a result of this Decree, a sum of about 10 million Swiss francs was identified, of which 6 million came from banks. A reserve fund for any possible future claims was established and credited with the sum of 1.5 million Swiss francs. The remaining 2 million francs, were distributed to relief agencies, primarily through the Swiss Federation of Jewish Communities. The legal status of the residual assets was finally determined by the Federal Decree of 3 March 1975, which allocated two-thirds to the Swiss Federation of Jewish Communities and one-third to the International Committee of the Swiss Red Cross.

The current controversy in which the World Jewish Congress is engaged, arises in particular from the disclosure by the Swiss Banking Association last year of an additional 38 million Swiss francs of heirless assets held by Swiss banks.

## The Present Dispute

Two questions now arise: firstly, the unsatisfactory implementation of the Federal Decree of 20 December 1962

and secondly the amount of funds still held by Swiss banking or financial institutions.

According to the World Jewish Congress, this amount is reported to be in the region of 8 billion Swiss francs, whereas the Swiss Banking Association only acknowledges that there are 38.7 million Swiss francs.

Moreover, documents declassified by the U.S. secret services reportedly contain information according to which one Swiss banking establishment alone allegedly holds 24 million Swiss francs.

The issue to be determined for the Swiss banks, is now to arrive at a final settlement. In fact, on 24 April last, representatives of the Swiss banks were heard by the Banking Commission of the U.S. Senate. Since then, both the Swiss Parliament and the Swiss Government have been dealing with this problem.

### **An Historic Agreement**

This diplomatic manoeuvring ended on 2 May last by the signing of an agreement between the Swiss Banking Association and the World Jewish Congress appointing an independent Joint Commission with the purpose of facilitating enquiries by Jewish families who frequently have only sparse details about deposits made by a relative.

The actual enquiry will be conducted by an international auditing firm under the supervision of the Joint Commission. This firm will be provided with extensive powers and have access to many documents.

The Joint Commission is composed of three representatives of the banks and three representatives of the Jewish organizations. The banks have appointed Professors Kurt Gasteyger and Alain Hirsch, as well as Klaus Jacobi, former Ambassador to Washington. The Jewish

organizations for their part have nominated Avraham Burg, Chairman of the Jewish Agency, Reuben Beraja, President of the Latin American Jewish Congress and Shevah Weiss, Speaker of the Parliament of Israel. The costs will be borne by the Swiss Banking Association.

A week after the signing of this agreement, the Federal Council ordered an inquiry to be made concerning German accounts which could have been funded by assets plundered by genocidal measures against Jews. The Legal Affairs Commission for its part drew up a draft decree aimed at facilitating access to archives by experts.

It should be noted that as early as on 1 January 1996, the Swiss Banking Association established a procedure which should enable help to be given to persons entitled to heirless assets in their enquiries. For this purpose the banks have been given to 30 June 1996 to designate deposits and safes whose owners have not been heard from for ten years. A Central Contact Office headed by an Ombudsman of the Swiss banks has been created. Thus an individual who believes that he or she is the heir or heiress of the client of a Swiss bank can apply to this Central Office which will take care of the enquiries which have to be made. This procedure is intended to continue until the Joint Commission provided for by the agreement of 2 May 1996 has begun to function.

These enquiries constitute a breach of Swiss bank secrecy. It should be noted in this connection that bank secrecy was introduced in 1934 by the Swiss Parliament to prevent the Nazi regime from seeking out Jewish assets entrusted to Swiss banks. It was a political action intended to signal the independence and neutrality of Switzerland. Thus by an ironic twist of fate, bank secrecy intro-

duced to protect Jews, must now be lifted for the benefit of their descendants.

Further, sight ought not to be lost of the fact that additional enquiries need to be conducted for other categories of asset holders other than banks, enumerated in the Federal Decree of 20 December 1962. Substantial assets apart from those entrusted to the banking sector, were held by firms and individuals held accountable under Section 1 of the Decree quoted above. Such holders of assets, notably fiduciaries and insurance companies, should, through their professional associations, also collaborate in the search for funds belonging to the victims and where the facts justify it, the necessary measures should be taken by the authorities. Thus, for example, there is reason to believe that Nazi victims took out life insurance policies with Swiss companies either of their own volition or, in some instances, they were compelled to do so by the Nazi authorities who were named by the victims placed under duress, as the assignees of the benefits under the policy. The subscribers and the intended family beneficiaries under these policies who did not survive the Nazi genocide, were unable to claim their rights under the matured policies. These categories of asset holders, in addition to the banks, should not be forgotten in this necessary if belated exercise.

The desire of the Swiss banks and authorities to co-operate with Jewish organizations for the purpose of tracing Jewish heirless assets, can now only be welcomed. This notwithstanding, it would be prudent not to indulge in excessive optimism. The unsatisfactory implementation of the Decree of 20 December 1962 shows the need to be vigilant.

# Canadian Teacher Disciplined for Off-Duty Anti-Semitic Statements

**David Attis v. The Board of School Trustees, District No. 15, The Human Rights Commission of New Brunswick, Malcolm Ross, Department of Education of New Brunswick, the New Brunswick Teacher's Federation, the Canadian Jewish Congress and Others**

**Court of Queen's Bench (1991) 121 N.B.R. (2d) 361; Court of Appeal (1993) 142 N.B.R. (2d) 1; Supreme Court (1996) File No. 24002.**

## Facts

On 21 April 1988, David Attis filed a complaint with the Human Rights Commission of New Brunswick, alleging that the Board of School Trustees, District No. 15, violated Section 5 of the New Brunswick Human Rights Act, by discriminating against him and his children in the provision of accommodation, services or facilities on the basis of religion and ancestry. Attis alleged that the School Board, by failing to take appropriate action against Ross, a teacher working for the School Board who made racist, discriminatory and bigoted statements both to his students and in published statements and writings, condoned an anti-Jewish role model and breached Section 5 of the Act by discriminating against Jewish and other minority students within the educational system served by the School Board.

On 1 September 1988, the Human Rights Board of Inquiry was established to investigate the complaint. Attis described himself as a Jew in the complaint. He alleged that the discriminatory conduct by the School Board occurred from 29 March 1977 to 21 April 1988, and arose from the actions of Ross, a teacher at Magnetic High School. Ross made racist and discriminatory statements to his students and in published writings and one public television appearance. In his writings, Ross argued that Christian civilization was being undermined and destroyed by an international Jewish conspiracy.

Concern about Ross' writings had been expressed publicly since 1978. In 1988, the School Board instituted disciplinary action against Ross, including a reprimand and warning that continued public discussion of his views could lead to further

disciplinary action, including dismissal. He was also informed that the warning was applicable to his out of school activities.

The Board of Inquiry found that there was no evidence of any direct classroom activity by Ross on which to base a complaint under Section 5 of the Human Rights Act. However, the Board found that Ross' off-duty comments denigrated the faith and belief of Jews. The Board concluded that Ross' actions violated Section 5(1) of the Act and there was no reasonable excuse to justify the discriminatory effect of those actions.

The Board concluded that the School Board discriminated by failing to discipline Ross meaningfully in that, by its almost indifferent response to the complaints and by continuing his employment, it endorsed Ross' out of school activities and writings. This resulted in an atmosphere where "anti-Jewish sentiments flourished" and where Jewish students were subject to a "poisoned environment" within the School District "which has greatly interfered with the educational services provided" to Attis and his children.

On 28 August 1991, the Board of Inquiry ordered, *inter alia*, in Clauses 2(a), (b) and (c) that the Department of Education place Ross on leave of absence without pay for 18 months, find him a non-teaching job within that period, and dismiss him at the end of that period if he refused such a job. In addition, Clause 2 (d) stated that Ross was to be dismissed if at any time he published anything that mentioned a Jewish or Zionist conspiracy, attacked followers of the Jewish religion, or sold certain anti-Semitic publications.

Ross applied for judicial review requesting that the Order of the Board of Inquiry be removed and quashed.

## Court of Queen's Bench

On 31 December 1991, Creaghan J., allowed the application in part, *inter alia*, on the basis that there was no jurisdiction to order the Department of Education to terminate Ross' employment if he published anti-Semitic writings. This was because it had not been proved that the Department of Education itself had violated the Human Rights Act and therefore had to rectify the violation. Creaghan J. also found that there was no claim that the School Board violated the Act other than by continuing Ross as a teacher in the classroom. Accordingly, there was no jurisdiction in the Board of Inquiry to make an Order [Clause 2(d)] that directed the School Board to place restrictions on Ross' activities outside the classroom in the event that he was no longer employed by the School Board as a teacher in the classroom. With regard to Clause 2(a), (b), (c), Creaghan J. reviewed the findings of the Board of Inquiry and held that:

"[t]he function of this Court is not to determine whether these findings were correct. There was some evidence upon which the Board of Inquiry could come to the conclusion it did and I am not prepared to find that its findings were patently unreasonable as this term has been defined by the authorities binding on me...This [part of the] Order was within the jurisdiction of the Board of Inquiry to make pursuant to its enabling legislation and I cannot see where it can be found to be patently unreasonable."

Creaghan J. concluded that Ross' rights under Sections 2(a) and (b) of the Canadian Charter of Rights and Freedoms had been "impinged" in respect of Clause 2(d) and could not be saved by Section 1 of the Charter:

"Applying a rigorous application of the standard of proof by a preponderance of probabilities, the Respondents have failed to satisfy me that Clause 2(d) of the Order meets the test of proportionality. The rational connection to the objective of Section 5 of the Act is tenuous, there is too great an impairment of the constitutional rights in issue and I do not find that the effect of this aspect of the Order is reasonable and demonstrably justified given the importance of Section 5 of the Human Rights Act within the factual situation that arises in this instance."

Ross appealed to the Court of Appeal for New Brunswick which allowed the appeal, Ryan J.A. dissenting.

## Court of Appeal for New Brunswick

(Hoyt C.J.N.B. for the majority)

Hoyt C.J. stated that Clauses 2(a), (b) and (c) of the Order offended Ross' rights under Sections 2(a) and (b) of the Charter because "[f]or publicly expressing his sincerely held views, Mr. Ross was penalized by being prevented from continuing his teaching career". Hoyt C.J. defined the issue as follows:

"The issue is whether an individual's freedom of expression can prevail against the fear that there will be a public perception that Mr. Ross' discriminatory remarks directed against a religious or ethnic minority are being condoned. The discrimination here is aggravated because the minority is one that has been historically targeted for discrimination and because the author of the discrimination is a teacher, who might be considered a role model to students."

Hoyt C.J. stated that there was "no doubt that a teacher may be disciplined for off-duty activities". He referred to the decision of the Supreme Court of Canada in *R. v. Zundel* [1992] 2 S.C.R. 731, and stated that the purpose of the Order, removing Ross from the classroom "must be 'so pressing and substantial' before the constitutional guarantee of freedom of expression can be overridden by Section 1 of the Charter". Viewed in that context and considering the evidence, the Order could not stand. He emphasized that it was Ross' activities outside the school that attracted the complaint and concluded that:

"[T]he sanction, curtailment of Mr. Ross' freedom of expression, must be considered in the context of the evidence. As noted, it has never been suggested that he used his classroom or school property to further his views. In such circumstances, I do not conclude that this remedy, which violates Mr. Ross' constitutional guarantee of freedom of expression, meets the requirement of being 'a specific purpose so pressing and substantial' that the guarantee should be overridden. To hold otherwise would, in my view, have the effect of condoning the suppression of views that are not politically popular any given time. Perhaps I am giving too much weight to the 'slippery slope' fear expressed by Dickson C.J. in *R. v. Keegstra* [1990] 3 S.C.R. 697, at p. 766. In my opinion, however, the denial of an individual's freedom of expression can only occur in the clearest of cases. In my view, the evidence does not disclose that this case meets the test."



### Ryan J.A. (dissenting)

Ryan J.A. stated that “a teacher cannot discriminate, in the sense of show bias, inside the classroom or publicly, in such an important area as is this target in the Human Rights Act of this province.” In his view, to sever Clause 2(d) from the classroom situation did not answer the problem in a meaningful way because it “falls too short of the mark”, and he emphasized that the wrong was “in the continued discrimination publicly promoted by Ross, a public servant, as a role model to children. Ross was known as a teacher whether in the classroom or outside of it. His conclusion was that a balance had to be struck between Ross’ freedoms, the victims’ freedoms and “an educational system which teaches impartiality and does not espouse prejudice, bigotry or bias”.

Three separate appeals were brought before the Supreme Court of Canada against the Court of Appeal decision. The appellants were Attis, the Human Rights Commission of New Brunswick, and the Canadian Jewish Congress.

## The Supreme Court of Canada

### (La Forest J.)

La Forest J. identified the main issue as follows: whether a school board, which employs a teacher who publicly makes invidiously discriminatory statements, discriminates with respect to the services it offers to the public pursuant to Section 5(1) of the New Brunswick Human Rights Act 1973, and whether an Order to rectify the discrimination, which seeks to remove the teacher from his teaching position, infringes upon the teacher’s freedom of expression and freedom of religion guaranteed under Sections 2(a) and 2(b) of the Canadian Charter of Human Rights.

### Discrimination

On the basis of the facts before it, the Supreme Court accepted the Board’s finding that the effect of Ross’ publications was to denigrate the faith and beliefs of Jews and to incite in Christians contempt for Jews by the assertion that they seek to undermine freedom, democracy and Christian beliefs and values, and that continued media coverage of his statements over an extended period contributed to his views having gained notoriety in the

community and beyond. The Court then considered whether Ross’ conduct in fact adversely impacted on the school community on the basis of the actual environment in the school as established by the evidence. In the absence of direct evidence of an impact upon the school district caused by Ross’ off-duty conduct, the Court held that the inference of what was reasonable to anticipate had to be considered in the light of whether, in the circumstances, it was reasonable to anticipate that the off-duty conduct “poisoned” the educational environment in the school board and whether it was sufficient to find discrimination according to a standard of what is reasonable to anticipate as the effect of the off-duty conduct.

The Supreme Court held that a school is a communication centre for a whole range of values and aspirations of society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas, and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. Teachers are inextricably linked to the integrity of the school system. They occupy positions of trust and confidence and exert considerable influence over their students as a result of their positions.

“By their conduct, teachers as a ‘medium’ must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to ‘choose which hat they will wear on what occasion’. It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. This is not to advocate an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour - which could lead to a substantial invasion of the privacy rights and fundamental rights of teachers. However, where a ‘poisoned’ environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant”.

On the facts, the Supreme Court accepted that a reasonable inference was sufficient in the case at bar to support a finding that the continued employment of Ross impaired the educational environment generally in creating a “poisoned” environment characterized by a lack of equality and tolerance. Ross’ off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught, and the chronology of the School Board’s response showed that the School Board had discriminated in its failure to take a proactive approach to the controversy surrounding Ross, the effect of which was to suggest the acceptance of Ross’ views and of a discriminatory learning environment.

### Freedom of Expression

The Supreme Court accepted that the Board of Inquiry’s Order infringed Ross’ freedom of expression. It held that Section 2(b) of the Charter must be given a broad, purposive interpretation. The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation and self-fulfilment. The Supreme Court noted that it has adopted a two-step inquiry to determine whether an individual’s freedom of expression is infringed:

- (a) determining whether the individual’s activity falls within the freedom of expression protected by the Charter;
- (b) determining whether the purpose or effect of the impugned government action is to restrict that freedom.

The Court held that the first step was undoubtedly satisfied. As to the second test the Court held that the purpose of the Order, while intended to remedy the discrimination with respect to services available to the public, was to prevent Ross from publicly espousing his views while he was employed as a public school teacher. The Order thus had a direct effect on Ross’ freedom of expression and so violated Section 2(b) of the Charter.

### Freedom of Religion

The Supreme Court accepted that, assuming the sincerity of an asserted religious belief, it is not open to the Court to question its validity. Freedom of religion ensures that every individual must

be free to hold and to manifest without State interference those beliefs and opinions dictated by one’s conscience. This freedom is not unlimited, it is restricted by the right of others to hold and manifest beliefs and opinions of their own, and be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order health or morals and the fundamental rights and freedoms of others.

A broad interpretation of this right has been preferred, leaving competing rights to be reconciled under the Section 1 analysis elaborated in *R. v. Oakes* [1968] 1 S.C.R. 103, as opposed to formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme is raised.

The Court concluded that the Order infringed Ross’ freedom of expression and freedom of religion, and the issue therefore was whether this infringement was justifiable under Section 1 of the Charter.

### Section 1 of the Charter

The Supreme Court held that under the *Oakes* test any attempt to determine whether the Order was a justifiable infringement of Ross’ freedom of expression and of religion had to involve the accommodation of a wide variety of beliefs on the one hand and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and respect for the inherent dignity of the human person on the other. The test had to be applied flexibly, so as to achieve a proper balance between individual rights and community needs, with a close attention to the factual and social context.

The Supreme Court considered the educational, employment and anti-Semitism context. The Court concluded that the importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. Secondly, the State, as employer, has a duty to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence. Third, Ross was not to be permitted to use the Charter as an instrument to “roll

back” advances made by Jewish persons against discrimination. Finally, the Court held that it should proceed under Section 1 with recognition of the sensitivity of human rights tribunals in the area of discrimination, and permit such recognition to inform the Court’s determination of what constitutes a justifiable infringement of the Charter.

The Court applied a less “searching degree of scrutiny” to the restrictions imposed by the Order on Ross’ freedom of expression and freedom of religion, making them easier to justify under Section 1. The Court noted that Ross’ expression was expression that undermines democratic values in its condemnation of Jews and the Jewish faith. It impeded meaningful participation in social and political decision-making by Jews, an end wholly antithetical to the democratic process. Further, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in Section 2(a). Ross’ views served to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a court undertaking a Section 1 analysis.

The Oakes test required two matters to be established:

- a) the impugned state action had to have an objective of pressing and substantial concern in a free and democratic society; and
- b) there had to be proportionality between the objective and the impugned measure,

Applying this test, the Supreme Court held that with respect to Section 1 of the Charter, Clauses 2(a), (b) and (c) of the Order were a justified infringement upon the freedom of expression and freedom of religion of Ross. Clause 2(d) was an appropriate case in which to apply severance on the basis that it did not constitute a justifiable infringement of the Charter (as it failed the minimal impairment branch of the Section 1 analysis) and was therefore in excess of the Board’s jurisdiction.

Accordingly, the Supreme Court allowed the appeal, reversed the judgment of the Court of Appeal and restored Clauses 2(a), (b) and (c) of the Order.

### **Section 5(1) of the New Brunswick Human Rights Act 1973**

“No person, directly or indirectly, alone or with another, by himself or with the interposition of another, shall

- (a) deny to any person or class of persons any accommodation, services or facilities available to the public, or
- (b) discriminate against a person or class of persons with respect to any accommodation, services or facilities available to the public, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental instability, marital status, sexual orientation or sex.”

### **Section 2 of the Canadian Charter of Human Rights**

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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# Arbitration Procedure in Jewish Law

Ya'akov Habba

A few years ago, Israel adopted an amendment to the Courts [Consolidated Version] Law - 1984. The purpose of the amendment was to confer upon a judge jurisdiction to adjudicate a matter by way of compromise, if the litigants so agreed. Similarly, the amendment empowered the judge to propose to the parties that they apply to an external body to help them reach a compromise or act as an arbitrator in their dispute. The decision to apply to an arbitrator as a method of dispute settlement has become more common, principally because the Court system is already heavily over burdened and parties often have to wait for very long periods before their case is heard. Both rulings by way of compromise and the transfer of a matter to external arbitration or compromise are options which are conditional upon the previously obtained consent of the parties.

Jewish Law recognizes and frequently makes use of the possibility of settling a dispute within the framework of an out-of-court compromise or arbitration process. In the same way the *Dayan* (Rabbinical Court judge) is entitled and may even be under a duty to propose to the parties that he settle their dispute without completing the trial, or rule on a matter which comes before him as an arbitrator. The Law does not refer to the possibility of the *Dayan* initiating an out-of-court arbitration. The parties themselves are entitled to choose, at any stage in the proceedings, to apply to a body outside the Rabbinical Tribunal which can act as an arbitrator or compromise between them, however, once a matter is brought before the Rabbinical Tribunal, the Tribunal will not initiate the transfer of the case to an external body, although, as noted, the Tribunal may settle it as an arbitrator, and in any event is obliged to obtain the agreement of the parties to give judgment by way of compromise.

In a previous issue of JUSTICE (No. 5) we considered a

ruling by way of compromise. Here we shall consider arbitration procedures in Jewish Law.

## The Arbitral Bench

The arbitration institution appears in Israel's laws in as early as the days of the *Tannaim* (*Mishna, Sanhedrin*, 3, 1):

Monetary laws ("*Dinei Mamonot*") require three arbiters. This appoints one arbiter and this appoints one arbiter and both parties appoint another arbiter - the words of Rabbi Meir. And the Sages say: two *Dayanim* appoint another.

The *Halacha* has ruled in accordance with a second opinion, that the two arbiters are the ones who select the third arbiter who joins them (*Rambam, Sanhedrin*, 7, 1; *Shulchan Aruch, Hoshen Mishpat* 13, 1). The parties are entitled to agree on another method of appointing the arbitrators, however this is the accepted method.

The fact that the parties are themselves involved in determining the identity of the arbitrators who will settle their dispute, gives the litigants great confidence in this institution, as each party trusts his representative to protect his rights and assert every possible argument in his favour, and in the words of the *Talmud Hayerushalmi, ibid*: "From the fact of being chosen, he pursues his rights". However, it should be emphasized that despite the fact that two of the arbitrators are chosen by the parties, the former do not act as representatives of the parties who selected them. These arbitrators too must make their decision objectively, according to the law, although concurrently they are supposed to ensure that the legitimate interests of the party who appointed them are not infringed. Thus, for example, Rabbi Asher Ben Yehiel (*Rosh*, Spain, 14th Century, *Sanhedrin*, 3, 2) warns against "persons ignorant of the law", who believe that an arbitrator may protect the party who appointed him in respect of matters which are unlawful. Rabbi Meir Eizenstat (Poland-Austria, 17-18 Century, *Responsa, Panim Me'iroi*, Part 2, Section 159) also clarifies the position:

Mr. Ya'akov Habba, is a member of the Faculty of Law, Bar-Ilan University, Ramat-Gan. His previous article concerning 'Compromise in Jewish Law' was published in JUSTICE, Issue No. 5.

“But the *Dayan* himself must never find supporting arguments which are in his party’s favour without him being entitled to full judgment, and if he were to wrongly convince his brother to accept the arguments as to which he himself is doubtful, this would make him one who perverts the trial. But by being selected by the party, he understands his claims perfectly, and he will assert his best claims when negotiating with his brothers, and the same is done by the second *Dayan* to the other. Thus no right is hidden or concealed from the two, and the third hears the negotiations of the two and decides and true justice is done.”

The requirement of a fair, unprejudiced hearing, causes the Respondent to impose restrictions on the arbitrators’ entitlement to wages. Each party indeed pays the arbitrator selected by him, but he must pay his wages in accordance with uniform criteria which were previously determined and which are defined as an attendance allowance, and he is prohibited from paying more than this. The restriction on payment of exaggerated wages is intended to prevent interdependence between the arbitrators and the parties who appointed them, and to preclude the possibility of prejudice on the part of the arbitrator towards the party who appointed him. Indeed, in the same *responsa*, the Respondent invalidated an arbitrator who was appointed by one of the parties, because of the high wages promised him.

Similarly, the rule is that arbitrators are prohibited from hearing the claims of one of the parties without the presence of the other, and accordingly the arbitrator must refrain from hearing the party who appointed him in the absence of the second party.

The parties themselves determine whether to apply for regular proceedings in the Rabbinical Tribunal or perhaps to opt for the arbitral process. In a place where there is no active Rabbinical Tribunal, one party may force his opponent to settle the dispute by arbitration; but in a place where there is an active Rabbinical Tribunal, one party is not entitled to force an arbitration on the other, and it is the right of each party to demand a regular judicial process in the Rabbinical Tribunal (Rabbi Moshe Eizerlish, *Hoshen Mishpat*, 3, 1).

The arbitration process was so popular among the people of Israel, that in one of his responses Rabbi Yaakov Reisher (Prague, 17-18 Century, *Responsa Shvut Yaakov*, Part B, Section 143) held that it would be wrong to revoke a custom which had existed among the population to apply for arbitration, and it would be wrong to replace this custom by the establishment of an active Rabbinical Tribunal:

“Because it is wrong to change a rule where people have always acted in accordance with it from time immemorial, and no man remembered that there was an active Rabbinical Tribunal, and because it is an ancient custom.... Accordingly, it is clear to me that one should not change an ancient custom which is founded on law and *Halacha*.”

**The parties themselves determine whether to apply for regular proceedings in the Rabbinical Tribunal or perhaps to opt for the arbitral process. In a place where there is no active Rabbinical Tribunal, one party may force his opponent to settle the dispute by arbitration**

## The Arbitration Agreement

The agreement between the parties as to arbitration, including the names of the arbitrators, must be concluded in writing. The arbitration instrument is termed in the *Mishna* and in the *Talmud*, as an “arbitration bill” (*shtar borrhin*) (*Mishna, Baba Metzia*, 1, 8 and more). Once the arbitration instrument has been written, the parties may not revoke their consent to the contents thereof (*Shulchan Aruch, Hoshen Mishpat*, 13, 2). Rabbi Moshe Eizerlish, *ibid*, is of the opinion that the requirement of writing is not an absolute requirement, and if the agree-

ment of the parties to the arbitration process and the arbitrators is accompanied by a “property act” (“*ma’ase kinyan*”) this is sufficient, and the parties are bound by it even if there is no written arbitration agreement. Moreover, even without a “property act” and without an arbitration instrument, the parties will be obliged to litigate before arbitrators if they have started proceedings before them, and none of the parties may retract his consent thereto.

The extent of the arbitrators’ powers is determined by the parties and is written in the arbitration instrument.

The arbitrators must act within the framework of the powers conferred upon them by the parties. A deviation from their powers will result in the negation of the aberrant part of their determination and their award. When the severance of the

different parts of the judgment is impossible, the whole of the judgment becomes null (*Responsa, HaRosh*, Rule 85, Section 5-6; *Responsa, Rabbi Yaakov Bi Rav*, Spain, 15th-16th Century, Section 27).

In the arbitration agreement the parties also decide which law shall govern the arbitration - whether the arbitrators will apply the law of the *Torah* or whether they shall decide as they see fit. The parties may also empower the arbitrators to impose a compromise between them (see: *Responsa, Rabbi Yaakov Bi Rav, ibid*). The parties are also entitled to release the arbitrators from their obligation to give grounds for their reasons.

### Recusal of an Arbitrator

Numerous sources consider the question of the qualifications of arbitrators, who would have been disqualified from acting as *Dayanim*, had the matter been heard before a Rabbinical Tribunal, either because of their relationship with one of the parties or for another reason. In one case, the debate revolved around an arbitrator who was a relation of the legal representative of one of the parties. Rabbi Moshe Eizerlish (Poland, 16th Century, *Responsa*, Section 104) who considered the matter, ruled that this state of affairs was improper, and that the arbitrator or the legal representative should be replaced. Rabbi Yehezkiel Landa (Prague, 18th Century, *Responsa*, ed. 1, *Hoshen Mishpat*, Section C) invalidated a decision of arbitrators, when after the delivery of the decision it became apparent that the third arbitrator, chosen by the two arbitrators selected by the parties, was a relative of one of the parties. Rabbi Yair Haim Ben Moshe Shimshon (Germany, 17th Century, *Responsa Havat Vair* Section 3) ruled that even where the family relationship was a distant one, the relation would not be qualified to act as an arbitrator, notwithstanding that a *Dayan* in the same circumstances would not be disqualified by the laws of the *Torah* but as a matter of strict performance of the law. Nevertheless, he also refers to the opposing opinion of *HaMaharik*, who believed that a distant relationship with one of the parties did not disqualify a person from being appointed an arbitrator.

In any event it is agreed that the parties are entitled to agree to the appointment of an arbitrator even if he is a relation (*Shulchan Aruch, Hoshen Mishpat*, 22, 1). Such an agreement may be express or implicit, such as where the parties have commenced proceedings before the arbitrator despite knowing his relationship to one of the parties. The arbitrators need also not be scholars, provided there is agreement thereto.

### Appeal

Another question which has been considered by the *Poskim* is the right of the parties to appeal against the judgment of the arbitrators. Rabbi Ovadia Bartanura (in his commentary on the *Mishna, Sanhedrin*, 3, 1) rules that in principle there is no appeal against the decision of arbitrators, even where the arbitrator cannot be classified as an expert:

“...when the parties accepted one who would give judgment for them whether for them or for many, and he gave judgment, his judgment is law and may not be controverted, even though he is not an expert for many.”

However, if there is a mistake as to an express rule of *Halacha*, it is possible to appeal against the decision and apply for the annulment of the judgment, and it will indeed be annulled.

In the judgment of the Rabbinical Court of Israel (Collection of judgments of the Chief Rabbinate of Israel, edited by Z. Wahaftig, p.71) a slightly different approach is revealed, according to which in a place where there is an active Rabbinical Tribunal and a fixed right of appeal, it is also possible to appeal to it against the decision of arbitrators, in accordance with the same criteria as determine the right of appeal against the decision of a Rabbinical Tribunal. The power of arbitrators shall not exceed the power of the Rabbinical Tribunal. In accordance with this approach too, the parties may waive in advance the right of appeal, and if this waiver is written in the arbitration agreement, it will not be possible to appeal against the decision of the arbitrators.

### Conclusion

1. The institution of arbitration is ancient in the laws of Israel, and is referred to even in the *Mishna*; it was very common among many Jewish communities throughout the generations.
2. The arbitration process must be conducted by the joint wish of the two parties, but in a place where there is no active Rabbinical Tribunal, one party may force the other to proceed by way of arbitration.
3. An arbitration agreement must be completed in writing - in an arbitration instrument. There are some who believe that consent accompanied by a “property act” (“*ma’ase kinyan*”) suffices to bind the parties to an arbitration process, and also

that once hearings have been commenced before arbitrators, the parties are not allowed to retract their consent even where the hearings were not preceded by a written agreement or consent accompanied by a "property act".

4. The extent of the powers of the arbitrators is determined by the parties, and a deviation therefrom will result in the annulment of the judgment or the annulment of a part of the judgment, where the latter may be severed from the judgment as a whole.
5. A person who is disqualified from acting as a *Dayan* or from judging the particular case, is disqualified from judging it also as an arbitrator, unless the parties agreed to his appointment.
6. The approach of the Rabbinical Court today is that the parties have the right to appeal the judgment of arbitrators in accordance with the criteria applicable in the case of appeals against judgments of the Rabbinical Court, unless the parties agreed in advance to waive the right of appeal.

*Note: This article is based on an answer which I gave within the framework of the "Shema" Project. Thanks are due to Rabbi Meir Batist, the chief researcher of the Project for his helpful comments. I was also assisted by E. Shochetman, "Legal Procedures" (Jerusalem, 1988).*

**Mark Your Calendar:**  
**The next international meeting of the Association will be held on 1-3 June 1997**  
**Details will follow**

**The Association  
 is very grateful  
 to the  
 Kennedy Leigh  
 Charitable Trust**

**for its support for**

**JUSTICE**

## **Swiss Section founded - Congratulations and Welcome**

The Association is gratified to announce the founding of the Swiss Section of the Association by a Constituent General Assembly held on 5 May 1996 in Lausanne. The 20 founding members unanimously elected the Board of the new Section.

Her Hon. Vera Rottenberg Liatowitsch, Judge of the Supreme Court of Switzerland, was elected Honorary

President, and Advocates Frederique Zimra and Leo Weiss were elected Vice-Presidents for the French and German speaking parts of Switzerland respectively. Judge Hadassa Ben-Itto, President of the Association, was the guest speaker at the General Assembly.

The Association welcomes the new Swiss Section into its ranks and wishes it every success.



# In Memoriam

Three well-known figures in the Jewish legal world have recently passed away, Ab Kramer, one of the founders of our Association; Dr. Arieh Ben-Tov, a member of the Executive of our Association, and Prof. Ariel Rozen-Zvi, Dean of the Law Faculty of Tel Aviv University and member of our Association. The Association mourns their loss and in tribute to their contribution to law and Jewish causes generally notes some of their respective achievements as described by those who knew them well.



## **Ab Kramer 1908 - 1996**

Abraham Kramer (known universally as “Ab”) was born in London on 13.9.1908. He studied law, qualifying and being enrolled as a Solicitor of the Supreme Court in 1932 when he was the top student for that year in the whole of England and Wales.

In his late teens Ab became a Zionist and joined a young Zionist group called “*Halapid*”, where in 1930 he met Dorothy Davis his future wife and lifetime soul-mate. In 1931 he became Chairman of the Association of Young Zionist Societies. Ab rose to become Chairman of the Zionist Federation of the U.K. and was one of its Life Presidents at the date of his death. He was one of those who conceived the Zionist Federation Educational Trust (now known as Scopus Jewish Educational Trust) in the early 1950s, and was Chairman for most of the subsequent years during which it was instrumental in establishing a network of Zionist day schools. Z.F.E.T. was probably the accomplishment in which Ab took greatest pride, and he was Life President at the date of his death.

Ab also conceived the Balfour Diamond Jubilee Trust. For many years he worked for the Joint Palestine Appeal (now the Joint Israel Appeal); was a long-serving member of the Board of Deputies; was a very active delegate to the W.Z.O. and served on some of its committees; and was a Trustee of British W.I.Z.O. He was also a Delegate to Zionist Congresses, a member of the Zionist General Council and Jewish Agency Assembly and Vice-Chairman of the World Confederation of United Zionists. In later years he helped form the U.K. branch of the International Association of Jewish Lawyers and Jurists and served as its Chairman.

On 21st February 1996, he and his wife Dorothy met their deaths together in a tragic road accident.

*(From an obituary by Asher Felix Landau, Former President of the District Court of Jerusalem)*

## **Arieh Ben-Tov 1923-1996**

Dr. Arieh Ben-Tov was born in Poland, 73 years ago. He was one of the survivors of Auschwitz where he lost his whole family. Dr. Ben-Tov devoted a great deal of time to subjects related to the Holocaust. He travelled numerous times to Poland where he saw to it that the



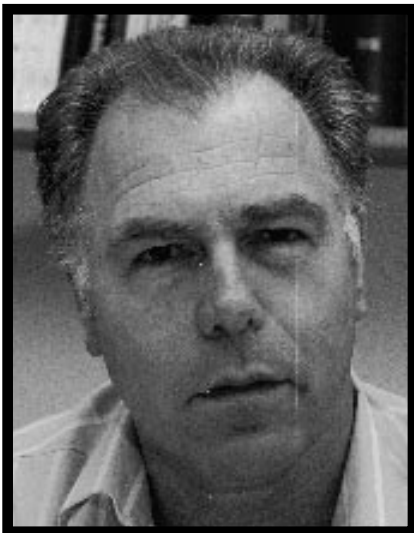
Jewish sites in the vicinity of his birthplace were revived and preserved. He was also one of the leaders of the Organization of Survivors of the Holocaust and published a book on the activities of the Red Cross regarding Jews in Hungary during the Second World War.

Arieh Ben-Tov was a practising lawyer. In Israel he waged a fight for years for the rights of Holocaust survivors who were not entitled to compensation from the German government. He also had extensive relations with many prominent personalities, in various European states, where he was appreciated as a courageous fighter - particularly against denial of the Holocaust and anti-Semitism.

Dr. Ben-Tov served as Secretary of the Parliamentary Group of the Progressive Party under Pinhas Rosen. Later he was active within the Liberal Party and participated often in Israeli delegations to Congresses of the Liberal International. He was also a prominent member of the Human Rights Committee of the Liberal International.

Dr. Ben-Tov died suddenly a month ago during a speech delivered at a meeting of the Congress of the Liberal International in Holland.

*(From an obituary by Adv. Itzhak Nener, First Deputy President of the Association)*



## **Ariel Rozen-Zvi** **1944 - 1996**

Ariel Rozen-Zvi was a one-man battle-front. Orthodox in faith and life-style, a democrat by legal education and his world-view, he was a fighter whose perception of himself was of a man called to the front. A religious Jew, facing a society which did not always understand him, he challenged himself to bring orthodox and secular Jews closer together. In the face of attempts to force a religious lifestyle on the general public, Ariel, sometimes alone, stood like a rock in his belief that coercion is forbidden. Civil marriages and divorce alongside traditional religious marriages and burials, the establishment of civil cemeteries and equal rights for women were causes for which he fought everywhere and always.

Even in the last years when he needed every ounce of mental and physical strength to fight his illness, Ariel fought for every ideal in which he believed. Whether it was positive discrimination, aimed at making it easier for socially deprived students to enter the Law Faculty; or, whether it was the Supreme Court of Israel, which exercised judicial review in circumstances he thought were wrong, or where the Court did not criticize the security discretion of the authorities when he thought it would be right to do so - it was Ariel who stood at the gates. He did so with the brilliant analytical freedom of a scholar, mingling incisiveness and wisdom gained from his knowledge of the Torah and general culture.

Ariel Rozen-Zvi believed not in the ultimate value of the letter of the law but in the spirit of the law as the appropriate measuring rod for a man who must pursue what is right and moral. Ariel's measures were love of man and the love of battle for human values, his model was Hillel the Elder whose belief was in bringing together those far apart.

*(From an obituary by Prof. Zeev Segal, Professor of Law, Tel Aviv University)*

## “And Jerusalem is the center of the Land of Israel, And the Temple is in the middle of Jerusalem”

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Temple Mount Faithful v. Attorney-General, Inspector-General of the Police, Mayor of Jerusalem, Minister of Education and Culture, Director of the Antiquities Division Muslim Waqf.

H.C.J. 4185/90, 47(5) P.D. 6

(Judgment delivered 23 September, 1993)

Before Deputy President M. Elon, Justice A. Barak and Justice G. Bach

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### Precis

The petition concerned allegedly illegal construction operations on the Temple Mount in Jerusalem. The Petitioners alleged that the Muslim *Waqf* violated the Planning and Building Law - 1965 and Antiquities Law - 1978, by engaging in constructions on the Temple Mount without obtaining the necessary building permits, and that the Attorney-General and other authorities had improperly refused to press charges or otherwise act to stop these violations. The Supreme Court examined the history and descriptions of the Temple Mount chronologically, by historical periods: when the Jewish people lived in its land; when the Second Temple was destroyed and the Temple Mount was under the rule of different nations; and when the Temple Mount was liberated in the Six-Day War. The Court described the viewing conducted by it on the Temple Mount in order to resolve the factual contentions of the Petitioners and the *Waqf*, and in that connection reviewed the *Halachic* strictures regarding access to the Temple Mount. Ultimately, the Court held that despite receiving the impression that the Israeli authorities had closed their eyes to violations of the law more than they should have, the Court would not disturb the result reached by the Respondents, partly because of the conditions and provisions the Court prescribed for meaningful and strict supervision from then on, and for taking suitable measures to mark and preserve every ancient or archaeological relic.

The judgment delivered by M. Elon, D.P. provides a learned exposition of the legal, *Halachic*, historical and archaeological

importance of the Temple Mount. Short extracts follow (note: the majority of the numerous citations have been omitted):

### The Temple Mount in Jewish History

The Temple Mount, on which the Temple was located (*Isa. 2:2*: “The Mount of the Lord’s House shall stand firm”), symbolized the unique religious world and political independence of the Jewish people, from the beginning of its existence in the Land of Israel. In great measure, the history of the Temple Mount is the history of the Hebrew nation up to the time that the nation’s political independence ended. That this is true is attested by the fact that historians and *halachists* have labelled and identified the historical period of some thousand years during which the people of Israel dwelt in its own land with the Temple Mount. The first period of the history of the people in its land, up to the Babylonian exile (from the tenth to the sixth century BCE) is known as the “First Temple period”; and the second period, from the Return to Zion in the fifth century BCE to the destruction of the Temple in 70 CE, is called the “Second Temple period.” The aggadists reiterated the centrality of the Temple Mount:

The Land of Israel is the umbilicus of the world,  
set in the center of the world,  
And Jerusalem is the center of the Land of Israel,  
And the Temple is in the middle of Jerusalem,  
And the *Heikhal* [the Holy of Holies] is in the center of the Temple,  
And the Ark is in the center of the *Heikhal*;  
And the Foundation Rock, on which the world rests, faces the *Heikhal*.  
(*Midrash Tanhuma* [ed. Buber], *Kedoshim 10*).

The people of this nation, both those in the Land of Israel and those in the diaspora, came to it as pilgrims throughout the year and on the three pilgrimage Festivals, in times of distress as in periods of joy. They longed and yearned for it.

Just as the existence of the Temple on the Temple Mount was the highest expression of the political independence and religious singularity of the people of Israel, so was its destruction the most traumatic event in Jewish history, symbolizing the loss of Jewish political independence in its own land and its exile and

dispersion among the nations of the world. Indeed, now that the Hebrew nation has returned to its land and has been restored to sovereignty after two thousand years by the establishment of the State of Israel, there are those who call our time the “Third Temple period”.

Synagogues everywhere are oriented towards the Temple, built on Mount Moriah, where Abraham’s faith in the one God was manifested in the Binding of Isaac (*11 Chron. 3:1*). When a Jew prays he directs his mind toward the Temple Mount in Jerusalem and to the Temple built upon it.

This is the law which has been established and observed throughout history, in every exile and diaspora, in every place where the members of this nation have been exiled and gathered together (*Maimonides, Mishneh Torah, Laws of Prayer 5:1*).

All the great attributes of Jerusalem - its beauty, splendour, and eternal nature, all the laws and legends which have adorned and lauded it - stem from the Temple Mount. And just as the earthly Jerusalem mirrors the heavenly one (*Talmud Bavli, Taanit 5a*), so too does the earthly Temple mirror the heavenly Temple (*Talmud Yerushalmi, Berakhot 4:5*).

## The First Temple

We learn of the construction, plan and purpose of the First Temple from 1 Kings 6-8, II Chron. 2-4, the book of the prophet Ezekiel, and various *Tannaitic* and *midrashic* sources:

Then Solomon began to build the House of the Lord in Jerusalem on Mount Moriah, where [the Lord] had appeared to his father David, at the place where David had designated, at the threshing floor of Ornan the Jebusite  
(*11 Chron. 3:1*)

The essence and mission of the Temple are that it is to be a place for the service of the Lord, for the manifestation of the Divine Presence, and for prayer, a place to which Jews individually and as a people direct their prayers and entreaties, whatever the time, place or circumstance.

## The Second Temple

From the construction of the Second Temple upon the Return to Zion from Babylon in 515 BCE until its destruction by the Romans in 70 CE, the Second Temple occupied center stage in national events of major import in the history of the Jewish people. The Second Temple was the religious and national

center even for the Jews of the diaspora; and the teaching and law that went forth from it were accepted without challenge by the Jewish people wherever they lived.

As great as the religious and national significance of the building and existence of the Second Temple, so great also were the mourning and tragedy that befell the Jewish people throughout the world, when the Second Temple was destroyed. The destruction of the Second Temple left an indelible mark on the laws and way of life of the Jewish people, in its days of joy as well as of sadness; the expressions “In memory of the destruction,” on the one hand, and “May the Temple be speedily rebuilt,” on the other hand, are an integral part of every act or event, individual or communal, on joyous occasions as in times of trouble and mourning.

Sometimes the Temple Mount, the Temple and its treasures had the favour of the Gentile authorities, while at other times they were a target to be exploited and plundered by the Hellenistic rulers or - after the Hasmonean period - by the Roman authorities (Pompey and Crassus).

Herod brought about a great change in the history and plan of the Temple Mount, and the present appearance of the Mount is the result of his endeavours. He sought to win the hearts of the people and accordingly resolved to rebuild the Temple with even greater splendour and thus restore its glory as of old.

Gedaliah Alon, the great historian of the Jews in the Land of Israel in the *Mishnaic* and Talmudic period has summarized the position of the Temple during the Second Temple period and the reasons why the Temple was destroyed by Titus [the eldest son of the Emperor Vespasian]:

“[The Temple] continued to serve as the only center for the collective worship of the nation. More, the Temple was indispensable for the religious life of even the individual Jews, because only there could he practice the sacrificial rites that atoned for his sins, that freed him from ritual impurity, and that enabled him to fulfil other personal religious obligations...

The Temple was also an important element in the juridical structure of the country, at least during certain periods of the Second Commonwealth. The Jewish State was thought of as revolving around the sanctuary, and the sanctuary was looked to as the source from which the state drew its legitimacy. This was the way the Persian imperial authorities understood the status of Judaea during the last generations of their overlordship; and this too was the way their successors, the Ptolomaiids and the Seleucids, understood the matter. Internally, the same view is reflected in the Jewish conception of where the High Court belongs; the *Sanhedrin* sits in the Chamber of Hewn Stone.



Indeed when it is finally displaced from there, its authority and jurisdiction are somehow diminished...

But there was something far more important than any of this: the Temple was “the Tabernacle of the Lord,” the dwelling place of the *Shekhinah* of the God of Israel. It stood for everything that set the Jews apart from all other nations. Here was the very rock from which Israel was hewn, the center and focus of all that was bound up in the faith of Israel’s God. Consequently, there was a strong belief among the people that the Temple was eternal, as indestructible as the nation itself; and this belief persisted right up to the Destruction...

Thus the Temple was the hub of the Jewish religion and of the Jewish state, the fortress of the people’s pride. It was probably for this very reason that Titus gave the order to have it burned down.”

(G. Alon, *The Jews of the Mishnaic and Talmudic Age (70-640 C.E.)* (Jerusalem: 1954).

## The Muslim Conquest

Following the Muslim conquest in the seventh century, the new government some time later took a new and different attitude towards the Temple Mount.

According to the Islamic tradition:

“Muhammad was miraculously borne away at night on his legendary horse *al-Buraq* to Jerusalem, together with the angel Gabriel. Upon their arrival at the Temple Mount they met Abraham, Moses, Jesus, and other prophets. Afterwards, he ascended from the “Rock” by means of the wondrous ladder *Miradj* to the seven heavens, accompanied by the angel Gabriel. He left *al-Buraq* behind, tethered to the Western Wall, whence the Wall’s Arabic name, “*Al-Buraq*”. (*The Temple Mount and Its Sites*, Ariel 13 (1989) ed. E. Schiller).

The “Islamization of the Temple Mount culminated at the end of the seventh century, with the establishment of the Dome of the Rock above the Foundation Stone and the construction of the al-Aqsa mosque in the south of the Temple Mount in the eighth century. Many of the Jewish traditions and sayings of about Mount Moriah and the Foundation Stone as the umbilicus of the world, the beginning of the Creation, and the most blessed place were absorbed by Islam in relation to the Temple Mount, perhaps under the influence of Jewish converts to Islam.

Throughout the entire period of the Muslim conquest, until the fall of the Jerusalem to the Crusaders in the late eleventh century (1099), the Muslims built various structures on the Temple Mount, memorial sites, gates, *etc.*, during the reigns of the Umayyad, Abbasid, and Fatimid dynasties.

## The Temple Mount During the Crusades

The Temple Mount enjoyed a prominent position in the period of the Crusades... During the time of the Crusader Rule, the Temple Mount became the focal point for Biblical and New Testament traditions which were generally quoted with textual changes.

“[But] despite the events of great importance on the Temple Mount, it did not become a Christian holy place in the accepted sense of the word or a pilgrimage site...(*Schiller, p. 18*).

## The Temple Mount in the Mameluke and Ottoman Period

The long reign of the Mamelukes extended from 1260-1516 and was a time of relative tranquillity.

The Mamelukes attributed little importance to Jerusalem, which had only a marginal status. Nonetheless, they undertook projects with religious significance... The Mount was favoured with extensive construction and restoration projects, which have influenced its character to the present day...

Despite the lengthy rule of the Ottomans in Jerusalem (1516-1917) there were few restoration and building projects in their period, and these were mainly limited to the beginning of their regime, in the time of Suleiman the Magnificent. His two most important projects are still regarded as among the most impressive sites in Jerusalem: the erection of the walls of the city and the panelling of the Mosque of the Dome of the Rock with blue faience tiles. (*Schiller, pp. 33-35*).

## The British Mandate and Jordanian Period

The British found the Temple Mount in a state of neglect... Extensive renovations were carried out in the al-Aqsa mosque in 1924-27... and again in 1938-1943, completely changing the facade of the structure.

In the period of Jordanian rule extensive renovations in the Dome of the Rock, once again gave it a new face. During the course of the restorations (1958-64) in the Dome of the Rock, the second lead dome was replaced by a gold-coloured aluminium dome and the mosaics within the structure were restored (*Schiller, pp. 33-37*).

## The Liberation of the Temple Mount and the Western Wall in the Six-Day War

In the Six-Day War in June 1967, after the Kingdom of Jordan launched a military attack against the State of Israel and Jewish

Jerusalem, the Temple Mount and the Western Wall were liberated from Jordanian control. In addition to the religious-cultural link between the Temple Mount and the people of Israel which had never been severed, Jewish political sovereignty over the Temple Mount, which had existed during a long period in the history of the Hebrew nation, beginning with the building of the First Temple by Solomon, *circa* 3,000 years ago, was now restored.

A few days after the liberation of the Temple Mount, the government of Israel decided, for reasons of state, for security considerations, and in order to maintain public order, to order the paratroop company which had remained on the Temple Mount to clear their position; an observation post of the Border Guards was established there, and the site is under constant guard. The government also decided to allow Muslims to continue to maintain their presence and to pray on the Temple Mount. For these very reasons, and for other reasons... and in order to prevent friction with the Muslims, the government of Israel decided not to allow public prayer by Jews on the Temple Mount. From time to time petitions have been submitted to this Court challenging the legality of prohibiting such prayers by Jews, but the Court did not disturb the decision by the government of Israel.

### Pertinent Legislation

Petitioners' claims relate to four types of illegal activity by the Muslim *Waqf* in the Temple Mount area; various types of construction in existing, ancient structures; covering antiquities with fill dirt; constructing side-walks and prayer platforms over the dirt coverings; and finally, the planting of trees over the dirt coverings. The Petitioners contend that all these works are carried out contrary to the Planning and Building Law and contrary to the Antiquities Law.

[After considering the evidence, the Court held that there was a *prima facie* violation of these laws.]

### Entry to the Temple Mount at the Present Time according to the *Halacha*

[The Court noted that in order to understand clearly the nature and force of the arguments of the parties regarding the conduct on the Temple Mount, the Court decided to view the site, and prior thereto to examine the relevant *Halachot* regarding entry to the Temple Mount at the present time.]

According to the *Halacha*, it is forbidden to enter the Temple, because its sanctity requires special purification as a condition for entry, and such a rite is not possible at present after the destruction of the Temple.

[The Court studied the works of the *poskim* and their *responsa* in order to ascertain the areas of the Temple Mount to which the prohibition against entry does not apply, *i.e.*, the areas that are not included in the description of the Temple Mount appearing in *Mishnah Kelim*; and to understand which laws must be carefully observed when entering even the permitted areas - laws derived from the obligation of the veneration of the Temple].

[The Court described its route through the Temple Mount and the various works undertaken by the Muslim *Waqf* there.]

### The Legal Framework

[The Court considered the legal arguments of the parties, including the *Waqf's* threshold defence challenging the Court's right even to entertain the petition. The Court held that the argument in so far as it pertained to the current sovereignty of the State of Israel over the Temple Mount and to the jurisdiction of the courts of the State of Israel in regard to the Mount was without merit.]

The area of the Temple Mount is part of the territory of the State of Israel. Clear expression of this principle is to be found in Basic Law: Jerusalem, Capital of Israel, Section 1 of which determines:

"Jerusalem, whole and united, is the capital of Israel."

Obviously, it follows from the sovereignty of the State of Israel over united Jerusalem, and especially over the areas of the Temple Mount, that all the laws of the State - including the Planning and Building Law and the Antiquities Law - are in effect in the area of the Temple Mount, and the right of every individual to freedom of religion, freedom of access to the holy places, and of protection against desecration extends to the area of the Temple Mount.

The power to give practical effect to the right to worship resides in the executive authority, and not the judiciary, as has been established by the Palestine [Holy Places] Order in Council, 1924, Section 2, as interpreted by H.C. 222/68, M.A. 15/69. It nevertheless should be emphasized that despite the absence of judicial review of the means by which the right of

worship is made effective, this intrinsic right is eternal and inalienable. In the words of the late Agranat P.:

“...the right of the Jews to pray on the Temple Mount is *par excellence* the national and historic right of the Jewish people; they cherished it and longed to exercise it in every generation, and they exposed themselves to mortal danger to attain their desires regarding it...” (at p. 228).

In the present case, Respondents 1-5 have decided... not to exercise their prosecutorial or administrative powers against the *Waqf* for conduct on the Temple Mount that is *prima facie* illegal. The decisions of these Respondents are subject to review by this court. The decision facing us, therefore, is: Judged by the criteria adopted and established in our rulings, are these decisions flawed to such a degree as to justify and require us them to set them aside?

We were faced with a difficult decision. On the one hand, the Petitioners correctly indicated - and we gained the same impression from our viewing of the site - the many continuing violations *prima facie* committed by the Muslim *Waqf* in the

Temple Mount region. On the other hand, Respondents argued that the nature of the construction does not justify prosecuting the *Waqf* or restoring the *status quo ante*, in view of the length of time that has passed, the special political and religious sensitivity of the Temple Mount, and the need to maintain public security.

It is difficult for us not to feel that the Respondents did indeed, to a degree more than was proper, ignore the violations of the law by the *Waqf*. Nevertheless, but not without reservations, we have decided not to disturb, this time Respondents' exercise of discretion.

The main reason why we concluded not to reverse the decision of the Respondents is their commitment to thoroughly and rigorously supervise activities on the Temple Mount, and to ensure that the law is observed and the value of the antiquities on the site is not impaired.

*Note: JUSTICE is grateful to The Israel Colloquium for permission to print passages from its English translation of the judgment. The English text of the judgment may be found in Vol. 45 of the Catholic Law Review, pp. 862-940.*



Aerial view of the Temple Mount in Jerusalem