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The Madaba map of the Holy Land with Jerusalem at its centre, comprises 2 million pieces of mozaic and is 15 metres long and 5 metres wide. It was discovered about 100 years ago by Greek Orthodox monks who wished to build a church on the site. The mozaic map is located south-west of Amman, Jordan.

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PRESIDENT'S MESSAGE



A

Among the outstanding achievements which mark this century, now drawing to an end, is the codification by the organs of the international community, of a body of conventions and covenants protecting human rights and freedoms. Many countries have ratified these documents, which constitute a kind of Magna Carta defining moral and legal norms for the behaviour of both individuals and nations.

There is no question that the standards set by these international codes are a big step in the right direction, yet it must be admitted that their implementation in most countries is at best partial, and often nonexistent.

In the next century the international community will have to deal with finding more effective ways and means of enforcing these human rights norms, without undermining the sovereignty of individual states.

Yet, here we choose to address a problem which arises, paradoxically, in those countries which are honestly trying to preserve human rights and freedoms for all, but have not found the means to prevent the misuse and abuse of those rights for evil purposes. If not addressed frankly and courageously, this phenomenon will disrupt the fabric of life in free societies and undermine the positive developments which have been achieved to date.

More than once, we have warned here of the need to limit the distribution of hate propaganda which has succeeded in drawing more and more people into an environment of hatred and racism and often incites violence. In 1989 we held a public trial in Jerusalem, which has come to be known as *The Protonia Trial*, dealing with this issue.

Those who advocate almost unlimited freedom of speech, often argue that hate propaganda is distributed by "fringe groups", which ought to be identified and dealt with in a way which does not interfere with the universal application of hard won rights. A right has no meaning, they say, unless it applies to everybody, good and evil alike.

This problem, which has existed for many years, now assumes different proportions. We are no longer facing "fringe groups". With the fast developing information super-highway, the spread of dangerous propaganda has become inexorable. The most blatant and virulent hate speech, based on false information and age-old libels, is now available in homes around the world. All a young man or woman has to do is press a button, to be exposed to brainwashing of the worst kind. Another button supplies information on how to prepare a home-made bomb.

Some countries, aware of the danger, are fighting a losing battle prohibiting by law the printing, importing and distribution of racist propaganda. Neo-Nazis do not need to act in secret anymore in fear of prosecution and imprisonment. They now openly quote the *Protocols of the Elders of Zion* and warn the world of the so called "Jewish Conspiracy" and shamelessly continue denying the Holocaust. We are informed that their audience of Internet users is constantly growing.

We cannot honestly boast that we are combatting racism, without urgently addressing ourselves to the prevention of this spreading virus.

Another major item on every country's agenda is international terrorism.

As this issue of *JUSTICE* is going to press, hundreds of guests who attended a party at the Japanese Embassy in Lima, Peru, are being held hostage by an armed group of

terrorists. Once again, the world is watching live, on television screens, how helpless are authorities in the face of such a blatant and brutal act of terrorism, and what difficult, cruel, choices must be made.

In the ongoing effort to protect, and sometimes save, the lives of innocent victims, picked at random by terrorists, with no regard for minimal human decency, we greatly depend on those who are in the forefront of this ongoing battle. Many of them have volunteered for this dangerous and thankless job, sometimes literally putting their lives on the line. We often expect them to perform miracles and criticize them for failing to do so. Yet we choose to define their authority in very vague terms, leaving them to walk a thin line which they cross at the peril of facing criminal prosecution.

Public sympathy, which is always in favour of the victims while a terrorist act is in progress, often turns in favour of the terrorists if it appears that any of their rights was abused.

I submit that if we expect these men and women to protect us, we must tell them exactly what means they may or may not employ in the performance of their duty. If difficult decisions are to be made, they must be made in advance by the proper authorities. The men and women doing the job should be furnished with clear guidelines, responsibility placed where it properly belongs.

But to do so authorities all over the world must frankly and honestly admit to practices which they would rather pretend never occur within their own countries. Governments must decide what limits they are willing to set on the means employed in the interrogation of a suspect to extract information which is very likely to save human lives, in what is commonly called "a ticking bomb" situation. If a suspect had been apprehended who could have supplied information which would have prevented the disaster in Oklahoma, would the interrogators have been allowed to exert any kind of pressure, and how much? Had the authorities in Paris arrested a suspect who could have revealed in which Metro station the bomb was hidden which later exploded, killing and maiming users of the subway, would they have been justified in extracting the information by means which exceeded oral interrogation?

In short, are we willing to allow interrogators to use even limited physical and/or psychological pressure to extract information which is likely to help prevent the hijacking of a plane, the bombing of a bus, the destruction of a building full of people, or the explosion of a subway?

This is a very controversial issue and we do not presume to offer solutions. There are no easy answers, but we urge the international community to address these issues frankly and openly, and most of all, honestly.

In Israel, both the legislature and the courts, have been trying to set norms for the interrogation of suspects defined as "ticking bombs". The Israeli experience is the subject of an article in this issue of *JUSTICE*.

Hate over the Internet and international terrorism will be discussed in the next International Conference of the Association to be held in London on June 1-3, 1997.

Hadassa Ben - 3/1/0

The Holy Places in Jerusalem: Legal Aspects

Shmuel Berkovitz

On 29.11.47 the General Assembly of the UN adopted the Partition Plan, recommending the partition of Palestine into two states, Jewish and Arab, apart from Jerusalem. In view of the holiness of Jerusalem to the three great religions, the General Assembly recommended that the city be made into a “separate entity” (*corpus separatum*) under an international regime under the auspices of the UN.¹ The Arabs in Israel and in the Arab world vehemently opposed this decision and launched into war to prevent its implementation. This was the war of liberation or independence of the State of Israel, and at its conclusion Jerusalem was divided into two: the western half in the hands of Israel and the eastern half under the control of Jordan.

The Legal Status of Western Jerusalem

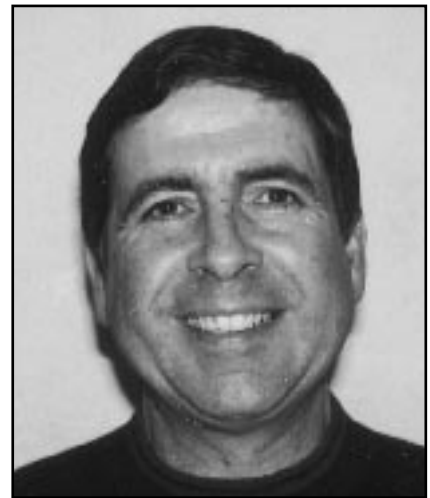
Israel adopted a number of measures to demonstrate its rule over western Jerusalem and establish it as the capital of the State of Israel. On 14.9.48, the seat of the Supreme Court of Israel was moved to Jerusalem. On 20.12.48, the government decided to move its institutions to Jerusalem. On 31.12.48, the Jerusalem Municipality was established. On 25.1.49, the residents of Jerusalem participated in elections for the Constitutive Assembly of Israel. On 2.2.49 the military government was dissolved, and the new government declared Western Jerusalem to be an indivisible part of the State of Israel.² On 13.12.49, the Knesset decided to move from its temporary seat in Tel Aviv to Jerusalem.³ Finally, on 23.1.50, the Knesset declared that “with

the establishment of the State of Israel Jerusalem has returned to be its capital.”⁴

The majority of jurists, both Israeli and foreign, are of the opinion that with the termination of the British Mandate of Palestine a vacuum was created in the sovereignty over Palestine, including

Jerusalem, which could only be filled in a legal manner. The war initiated by the Arab states in an effort to forestall the UN Partition Plan was in blatant breach of principles of international law regarding the prohibition of the use of force. The capture of western Jerusalem by Israel was, therefore, a justified act of self-defence and lawfully filled the vacuum in sovereignty over western Jerusalem by establishing Israeli sovereignty.⁵ At the same time, it should be pointed out that while Israel (like Jordan) was accepted as a member of the UN without being required to implement the UN decision regarding the internationalization of Jerusalem,⁶ to this day the UN has not recognized Jerusalem as the capital of Israel even though it has long abandoned the plan to internationalize the city.

Moreover, officially, to this day all the countries of the world, save for the United States, El Salvador and Costa Rica, have refused to recognize even western Jerusalem as the capital of Israel. They recognize the rule of Israel over Jerusalem as *de facto* rule only.



Dr. Shmuel Berkovitz is an advocate practising in Jerusalem. He is an expert on the historical, religious, political and legal aspects of the places holy to Islam, Christianity and Judaism, and will soon be publishing a comprehensive study on *The Struggle for Jerusalem and the Holy Places in Eretz Yisrael*.



The Western Wall of the Holy Temple, at the base of the Temple Mount (courtesy of the Israel Government Press Office)

The Legal Status of Eastern Jerusalem

Shortly after the Six Day War of 1967, Israel imposed its government and laws on eastern Jerusalem and joined the two halves of the city as its united capital.⁷ The unification of Jerusalem has not been recognized by any country in the world, and the UN has declared on numerous occasions that the measures taken by Israel to unify the city are null and void.⁸ Nevertheless, in order to demonstrate its determination to unify the city Israel enacted the Basic Law: Jerusalem in 1980, which declares the whole and united Jerusalem to be the capital of Israel.

The Jerusalem Law attracted sharp criticism from the supreme institutions of the UN. On 20.8.80, the Security Council adopted a resolution, almost unanimously (only the USA abstaining), condemning the enactment of this law, stating that it is contrary to international law, that it poses a serious obstacle to the attainment of peace and that it is null and void.⁹ The Council concluded its resolution with the exceptional call to all the members of the UN who maintain diplomatic relations with the State of Israel to remove their diplomatic representatives from Jerusalem. And indeed within a short period of time all 13 countries, which had diplomatic missions in Jerusalem, moved them to Tel Aviv. Only El Salvador and Costa Rica returned their embassies to western Jerusalem in April 1984. This is also the

situation today, out of the 81 diplomatic missions in Israel only 2 are seated in western Jerusalem. The US Embassy is also still located in Tel Aviv, although it is due to move to Jerusalem by May 1999, in accordance with the "Jerusalem Law" adopted by the American Congress on 24.10.95. By this law, the United States for the first time recognized Jerusalem (without distinguishing between the eastern and western parts of the city) as the capital of Israel.

The General Assembly adopted a similar resolution on 15.1.81, rejecting the declaration of the whole Jerusalem being the capital of Israel, within the framework of the Basic Law: Jerusalem, and declaring that law to be null and void.¹⁰ Since then, on an annual basis, the General Assembly has condemned Israel for its efforts to change the status, character and cultural, historical and religious traditions of Jerusalem, and in particular, the Basic Law: Jerusalem, with its declaration relating to the undivided Jerusalem being the capital of the State of Israel - and has pronounced them to be void and of no effect.

The main claim of those denying the legality of the Basic Law: Jerusalem, is that eastern Jerusalem is "occupied territory", captured by Israel during the Six Day War, and that according to international law occupied territory may not be annexed, so long as the war has not come to an end and an agreement relating thereto has not been signed. According to Israeli municipal law,

where the Knesset laws are determinative, the Supreme Court has held that Israeli rule on eastern Jerusalem was lawfully imposed.¹¹ In contrast, there is still controversy concerning the lawfulness of Israel's actions to unify the city as a matter of international law.

In this regard, I accept the opinions of E. Lauterpacht, Prof. I. Blum, (Israel's past Ambassador to the UN), S. Schwebal and M. Gruhin.¹² In their view, upon the termination of the British Mandate, a "vacuum in sovereignty" was created over Palestine, including Jerusalem, which should have been filled upon Jerusalem turning into an international city in accordance with the UN Partition Plan (29.11.47). Accordingly, the conquest of east Jerusalem by Jordan in May 1948 was an unlawful act of aggression, which did not confer any rights upon Jordan, as was evidenced by the fact that apart from Pakistan, no country in the world (and no Arab country) officially recognized the lawfulness of Jordan's rule over east Jerusalem.

As opposed to Jordan, Israel captured east Jerusalem within the framework of a lawful act of self-defence during the Six Day War, following the shelling of western Jerusalem by Jordan (Jordan ignored Israel's pronouncements that the latter had no intention of attacking Jordan, and disregarded Israel's requests that Jordan also refrain from attacking her). Thus, Israel acquired the sovereignty over east Jerusalem in a lawful manner, and in any event Israel's rights in this part of the city are superior to the rights of Jordan there.

The Legal Status of the Holy Places in Jerusalem

A. Introduction

There are about 30 important Holy Places in Jerusalem (in addition to 1072 synagogues, 52 mosques, 65 churches and 72 monasteries). Only 3 of the 30 are situated in the western half of the city: the Tomb of King David and Cenecale (the Room of the Last Supper) on Mount Zion, and Ein Kerem (the birthplace of John the Baptist). Two of these (the Tomb of King David and the Cenecale) were, until June 1967, in the no-man's-land between Israel and Jordan. Most of the others are concentrated within an area of 1.5 square miles inside the Old City in eastern Jerusalem.

Clearly, the status of the Holy Places depends, first and foremost, on the status of the land upon which they are situated. However, as a result of the importance of Jerusalem generally, and these sites in particular, to the three great religions, the national-political elements in two of the religions, the conflicts

between Judaism and Islam about sites which are holy to both (particularly the Temple Mount), or between the Christian sects, regarding the 4 most important sites included in the Ottoman *status quo* (the Church of the Holy Sepulchre, the Deir al-Sultan Monastery, the Tomb of St. Mary, and the Church of the Ascension) every action taken in connection with the Holy Places has important political repercussions. Against this background, and in the light of the fear of terrorist actions by extremists belonging to these three religions, the Israeli authorities have granted the Holy Places a special legal status in order to protect them and defend the rights of the members of the various religions in them.

B. Rights Ensuing from the Sanctity of the Holy Places

(1) Protection of the Holy Places from physical harm

Section 1 of the Protection of Holy Places Law - 1967 provides as follows:

"The Holy Places shall be protected from desecration and any other violation..."

This and other laws provide a list of criminal offences which attract heavy prison sentences for violating the physical integrity of a Holy Place. In order to prevent a possible physical violation of a Holy Place,¹³ other laws provide that the receipt of the consent and guidelines of the Minister of Religious Affairs (or the Minister of Education and Culture) are a precondition to the performance of certain actions in or near a Holy Place, such as excavations,¹⁴ drainage plans,¹⁵ water¹⁶ and sewage systems,¹⁷ declaring a site to be a national garden,¹⁸ vacating and demolishing houses,¹⁹ and more. As most of the Holy Places are also antiquities sites,²⁰ the Antiquities Law - 1978 also applies to them.

According to Section 29(a) of the latter law, no building, paving, quarrying, or interment may be carried out on an antiquities site or indeed a variety of other actions, except with the written permission of the Director of the Department of Antiquities. Moreover, according to Section 29(c) of the law:

"Where an antiquities site is used for religious requirements or devoted to a religious purpose, the Director shall not approve digging or any of the operations enumerated in subsection (a) save with the approval of a Committee of Ministers consisting of the Minister [of Education and Culture] as the chairman, the Minister of Religious Affairs and the Minister of Justice".

Section 37(c) of the law provides for up to 2 years imprisonment for a person contravening the provisions of the said Section 29. Section 37(a) provides for up to 3 years imprisonment for anyone causing malicious damage to an antiquities site. With regard to this law it should be noted that recently the Supreme Court of Israel, sitting as the High Court of Justice, has been involved in the *Affair of King Solomon's Stables*. This matter concerned the transformation of underground halls covering an area of about 4,500 square metres, located under the south-eastern corner of the Temple Mount, into a Moslem mosque which can hold some 10,000 worshippers. On 10.9.96, the Association of the Temple Mount Faithful petitioned the High Court of Justice for an order requiring the Municipality and the Attorney-General to take steps to stop all the work being carried out by the Moslem *Waqf* in King Solomon's Stables and prevent the site from being turned into a mosque.²¹

Inter alia, the petitioners claimed that since the issue related to an antiquities site, under Section 29(a) of the Antiquities Law, no construction work could be carried out there without the consent of the Director of the Department of Antiquities, and there was no dispute that the *Waqf* leaders had not bothered to ask for such consent. Moreover, the petitioners claimed that as King Solomon's Stables were part of the Temple Mount, they should also be regarded as "an antiquities site used for religious requirements or devoted to a religious purpose" within the meaning of Section 29(c) of the law. Accordingly, no construction work could be carried on there without the permission of the Ministerial Committee, as aforesaid. Such permission, too, was never obtained by the Muslim *Waqf*. The High Court of Justice dismissed these claims. In its judgment of 16.10.96, the Supreme Court held that bearing in mind that according to the report of the Department of Antiquities the work in King Solomon's Stables "did not cause practical harm to antiquities", the work which required building permission (such as laying concrete) had stopped and the rest of the work (paving) was in the nature of "an internal change" which did not require building permission according to the Planning and Building Law - 1968, the Israeli authorities had acted lawfully and reasonably in not preventing the work from going ahead. The High Court of Justice emphasized that the political and religious sensitivity of the Temple Mount, meant that great caution should be exercised in enforcing the law there; nevertheless, the Court did not consider the specific arguments of the Temple Mount Faithful regarding breaches of the Antiquities Law: it is undisputed that

work was performed in King Solomon's Stables which required advance permission of the Director of the Antiquities Authority. Moreover, the High Court of Justice also failed to consider the argument that as the Temple Mount was also "an antiquities site used for religious requirements or devoted to a religious purpose", no work should be carried on therein without the consent of a special Ministerial Committee, as required by the law. It was undisputed that the work in King Solomon's Stables was performed without this consent.

(2) *Protection of the Holy Places against "desecration or other violations" or against "anything likely to violate the feelings of the members of the different religions with regard to those places"*.²²

The inclusive language of the legislator testifies to the desire to give the Holy Places and the religious feelings of the members of the different religions, the most comprehensive protection possible. The Holy Places are protected not only against "desecration" but also against "other violations". In other words, protection is also granted against a violation which is not a desecration. Furthermore, they are protected against "any thing" even if that thing is not a "desecration" or "other violation", provided that it is likely to violate the feelings of the members of the different religions with regard to those places. The Penal Law - 1977 sets out a list of prohibitions, which are intended to protect the religious feelings of religious groups; these are contained in the chapter entitled "Offences Against Sentiments of Religion and Tradition". Usually one of the elements of a criminal offence is 'intention'. However, in the offences relating to the Holy Places the legislator has not made it a precondition for the commission of the offence that there be an intention to violate religious feelings regarding the Holy Places. Rather, the legislator is satisfied with real knowledge or even constructive knowledge of the offender that such an emotional violation is likely to be caused as a result of his conduct.²³

Section 170 of the Penal Law imposes punishment of up to 3 years imprisonment on a person who "destroys, damages or desecrates a place of worship... with the intention of reviling their religion [of certain persons], or with the knowledge that they are likely to consider such [an act] an insult to their religion".

Section 171 imposes punishment of up to 3 years imprisonment on a person who "wilfully disturbs any meeting of persons lawfully assembled for religious worship...".



The Al-Aqsa Mosque and Dome of the Rock on the Temple Mount
(courtesy of the Israel Government Press Office)

Section 172 of the Penal Law imposes punishment of up to 3 years imprisonment on a person who trespasses on any place of worship or burial and behaves in a way which indicates an “intention of wounding the feelings of a person or of reviling his religion or with the knowledge that the feelings of a person are likely to be wounded or his religion likely to be insulted thereby.”

The comprehensive protection afforded to religious feelings by Section 173 of the Penal Law is noteworthy. This section prohibits a person from publishing “any print... calculated to outrage the religious feelings or belief of other persons.” Again the mental component contains two alternative elements: a real intention or a constructive intention by virtue of cumulative knowledge to cause the prohibited result, as aforesaid.

With regard to oral statements, the protection is even wider and stricter. According to this section it is prohibited to “utter in a public place and in the hearing of another person any word or sound calculated to outrage his religious feelings or belief.” Moreover, the criminal offence may even be committed where a single word or sound is uttered - without words!

The wide scope of the protection described above, is capable of creating a severe restriction on freedom of speech, which is a fundamental principle in every democratic regime. This problem arose in all its seriousness in the case of *Wagner v. The Attorney General*.²⁴ The petitioner turned to the High Court of Justice in respect of the refusal of the Attorney General to bring charges against Supreme Court Justice Haim Cohn in relation to statements made by the latter during an American Jewish Congress convention, which violated the religious feelings and belief of the petitioner, contrary to Section 149(b) of the Criminal Law Ordinance 1936 (today Section 173 of the Penal Law). The Supreme Court dismissed the petition, and accepted the position of the Attorney General to the effect that:

“It is a great rule of our legal system that a man will on no account be punished because of an opinion which he holds and also not if he utters it. Section 149 - as an exception - relates not to the opinion itself but to the manner of its expression... we are required in my opinion... to preserve a proper balance between two great principles, namely, freedom to express an opinion on one hand, and refraining from violating the feelings of another, on the other hand... These matters belong in the area of public debate and a determination one way or another cannot be reached by means of criminal proceedings”.²⁵

Justice Vitkon added:

"I accept the assertion of the petitioner that his religious feelings were violated by the statements which are the subject of his complaint, and that others were affected like him. But this is not the only question which stands before the Attorney General, when he considers whether or not to bring criminal charges in accordance with Section 149(b) of the Criminal Law Ordinance 1936. He must consider whether the statements which were made are likely to violate religious feelings, also when taking into account the right of a person, guaranteed to him in a democratic regime, to express an opinion on a controversial issue of public importance."²⁶

Also noteworthy are the criminal prohibitions provided in Sections 406-408 of the Penal Law, which emphasize the seriousness which the legislator attached to the commission of offences in Holy Places. These strict prohibitions must be understood both against the background of the desire to protect the sanctity of the Holy Places and their physical integrity and against the background of the desire to protect the religious feelings of members of religious groups against violations which may result from desecration of the places holy to them by the commission of criminal acts. The seriousness of the said offences is reflected by the elements required for their commission. Where reference is to a place which is not used for worship, Section 407 of the Penal Law requires that that place be broken into, accompanied by an intent to commit a theft or felony. In contrast, where reference is to a place of worship, Section 406(a) provides that it is sufficient that the place be entered with the aforesaid intent, for the act to be considered a criminal offence. Where reference is to an ordinary place, Section 407(b) requires that not only must there be an intent to commit a theft or felony, but one of these acts must actually be committed or there must be a break out of such a building. In contrast, where reference is to a place of worship, Section 406(b) provides that it is sufficient if there is entry into such a place, even if it is made lawfully, which is accompanied by an intent to commit a theft or felony, for the entry into the place to be considered a criminal offence.

Where the offences referred to in Section 406 are committed in a place of worship, the legislator imposes a maximum punishment of up to 5 to 7 years imprisonment.²⁷

In this connection it is important to note that the Protection of Holy Places Law imposes punishment of up to 7 years imprisonment on an offence of desecration of a Holy Place,²⁸ and up to

5 years imprisonment for violating the religious feelings of members of a religious group in respect of the Holy Place.²⁹

In view of the fact that a number of places are holy to the members of more than one religion (in particular the Temple Mount and the Cave of the Patriarchs) because of the roots of Christianity and Islam in Judaism and because Christianity is split into a number of sects and Judaism into a number of streams (orthodox, conservative and reform) difficulties may arise in safeguarding all the values and rights of members of the various religions, sects or streams in the same Holy Place. Every religion or sect has different laws and customs regarding conduct in the places holy to it, and the laws and customs of one religion or sect may be regarded as a desecration or violation of the feelings of the members of another religion or sect.³⁰

Thus, for example, in the past Jews were prohibited from drinking wine in the Cave of the Patriarchs (save for the "Circumcision Hall") (prior to the physical division of the building between Jews and Muslims) which is also used as a Muslim mosque, as drinking wine is forbidden by Islam and violates the feelings of Muslim worshippers. At the same time the Muslims were prohibited from conducting funerals in the site, in accordance with their customs, (save in the *Jawliyyah* mosque hall) as the site is also used as a synagogue, and conducting a funeral in such a place is forbidden according to the Jewish religion and violates the feelings of Jewish worshippers.³¹ The Moslems claim that the prayers of the Jews on the Temple Mount contravene the principles of Islam and amount to a desecration of their *Haram al-Sharif* ("The Noble Sanctuary"). Accordingly, and for fear of a violent reaction on the part of the Moslems, the Israeli authorities prohibited Jews from praying on the Temple Mount.

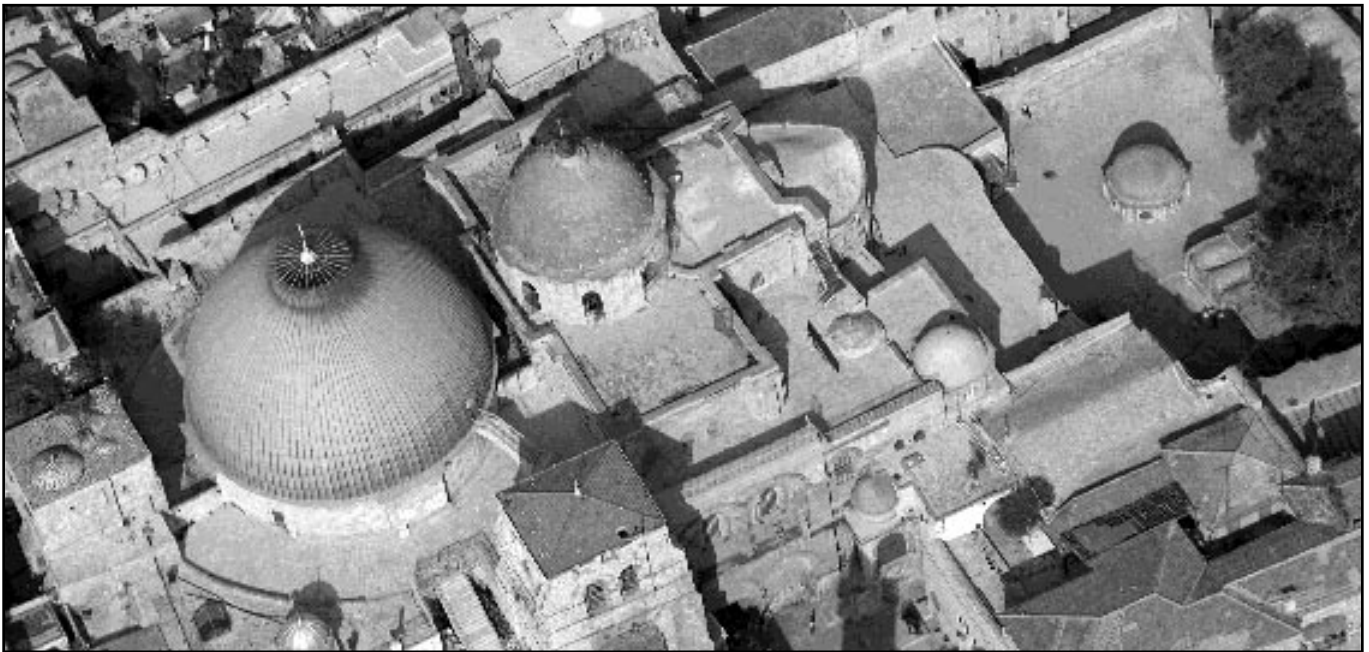
Against this background, the President of the Supreme Court, Justice Meir Shamgar, held in *Hoffman v. The Custodian of the Western Wall & Others*,³² that "in referring to desecration, against which the dignity of the Holy Place had to be protected, the legislator had in mind injurious acts, whose nature or consequences violated the sanctity of the place." The Protection of the Holy Places Law requires that freedom of access to the Holy Places be guaranteed, and that it be safeguarded against violations to the feelings of the members of a religion, for whom the place is holy "but it is clear that these central aims are not necessarily compatible with each other in all possible circumstances, and if a discrepancy occurs, the proper method of balancing these goals should be sought in order to ensure that the main objective is not foiled."

In the natural course there may be different approaches regarding the question of balance. One example of this is the *Hoffman case* referred to above. There, the matter of the “Women of the Wall” was considered: women who wished to pray at the Wall in a manner unacceptable to orthodox Judaism, carrying the Scrolls of the *Torah*, wrapped in prayer shawls, reading from the *Torah* and blowing the *shofar*. They were violently evicted from the area of the Wall by orthodox worshippers. The women petitioned the High Court of Justice to allow them to worship as they wished. During the hearing of the petition, the Regulations for the Protection of Holy Places for Jews - 1981,³³ were amended by adding Regulation 1a, prohibiting the “conduct of a religious ceremony (at the Western Wall) in a manner not in accordance with the practice of the place, which violates the feelings of the worshipping public towards the place.” The Deputy President, Justice Menahem Elon, held that the site was equivalent to a synagogue and accordingly the petition had to be decided in accordance with the principles of the Jewish *Halacha*. The nature of “the customs of the place” had to be determined therefore in accordance with the widest possible denominator common to all the worshippers in the place “and this was the custom existing in the place throughout the generations.”³⁴ Accordingly, the Women of the Wall would not be

permitted to worship in the place according to their custom, as this custom was “substantially” different to the custom of the place and because it would be a “grave and serious violation of the feelings of the vast majority of the worshipping public towards the place”.³⁵ In contrast, Justice S. Levin held, in a minority opinion:

“that as the Protection of the Holy Places Law was a secular law, it should not be construed and the petition should not be decided only on the basis of the Jewish *Halacha*. The terms contained in the law should be interpreted in accordance with the common denominator acceptable to the public in Israel as a whole. Accordingly, the terms ‘desecration’ and ‘other violations’ and ‘any other thing which is likely to violate the feelings of the members of religious groups’ towards those ‘places’ in Section 1 of the Law, should be interpreted on the one hand so as to reflect the right to freedom of worship and religion as it is accepted in a democratic society, and on the other hand, so as to preserve the interest of public safety and prevent ‘intolerable’ violations to the feelings of others, as accepted in the same society... I am not willing to accept in advance and as obvious that as a matter of the Law, the Western Wall must be regarded for all purposes as a ‘synagogue’ and that all the principles of the *Halacha* which apply to a synagogue, and no other, apply to the activities conducted therein.

Thus, for example, there are even some who believe that a partic-



Church of the Holy Sepulchre in the old city of Jerusalem (courtesy of the Israel Government Press Office)

ular mode of prayer is strictly prohibited by the *Halacha*... this fact, on its own, would not justify prohibiting activities of the aforesaid nature. In our opinion, the common denominator which has to be taken into account in the instant matter... is the denominator common to all the groups and people who in good faith visit the site of the Western Wall and square, whether for the purpose of prayer or for other legitimate purposes."³⁶

President Shamgar agreed with the opinion of Justice Elon, without referring to the specifics of Justice Elon's judgment, but he also held:

"One should continue to seek practical ways to enable every person wishing to turn to his creator in prayer to do so in his own style and manner, provided that the same does not violate in any real way the prayers of others. The legal starting point is indeed the existing situation. But the door cannot be closed to the good faith right of any one who wishes to pray in his own way... with regard to the Western Wall it would be proper to at least make an effort to reach an arrangement appropriate to the ways of all those who aspire to pray at the Wall."³⁷

As President Shamgar was of the opinion that an appropriate arrangement should be reached outside the courts, he joined Justice Elon's opinion, contrary to Justice Levin's opinion, and held that the petition should be dismissed "at the present stage".

Currently, the High Court of Justice is again considering the proper interpretation of the terms "desecration" and "violation of feelings" in the matter of King Solomon's Stables, referred to above. In a second petition submitted by the Association of Temple Mount Faithful and "Hai ve Kayam",³⁸ they claimed that the transformation of King Solomon's Stables into a mosque amounted to a desecration of the sanctity of the Temple Mount and violated their feelings towards this Holy Place, contrary to the provisions of Section 1 of the Protection of Holy Places Law.

Counsel for the State of Israel responding by relying on the judgments of President Shamgar and Justice D. Levin in the above *Hoffman case*, that "the proper significance of the terms 'desecration' and 'violation of feelings' must be, therefore, such that the very existence of the place of worship of a person of a particular religion in the places holy to the members of the same religion, will not, on its own, amount to desecration" of the sanctity of that place to the members of another religion or a violation of the religious feelings of the members of the other religion in regard to that place.³⁹

The High Court of Justice has not yet given judgment in this matter.

(3) Protection of Freedom of Religion in the Holy Places

Prominent among the criminal prohibitions considered above is the specific provision designed to ensure freedom of worship in the Holy Places. Section 171 of the Law prohibits wilfully disturbing "any meeting of persons lawfully assembled for religious worship" and the assault of a clergyman or one of the believers who assembled in the place.⁴⁰ The punishment imposed on a person committing one of these offences is relatively light and consists of a maximum of two months imprisonment or a fine.⁴¹ However, where there are aggravating circumstances, the prosecution may obtain heavier punishments. An offender may also be charged with desecration of the Holy Place or violation of religious feelings, under the Protection of Holy Places Law, as aforesaid.

It should also be recalled in this connection that one of the tasks of the police under the law,⁴² is to prevent "disturbances during an assembly or march... in the area of a place of worship at a time of public worship."

The difficulty in implementing the right of worship of Jews in the Temple Mount is a further example of the problems entailed in drawing a balance between various interests which the government is responsible for implementing by virtue of the law. In 1967, shortly after the liberation of eastern Jerusalem and its unification with western Jerusalem as the capital of Israel, the government of Israel decided "that Jews who go up to the Temple Mount would be directed to the Western Wall..."⁴³ because of the fear of the violent reaction of the Moslems. Since then all the governments of Israel have adopted the policy of prohibiting Jewish prayer on the Temple Mount, in distinction from merely visiting there. All the petitions which have been submitted to the High Court of Justice in an attempt to force the authorities to change this policy have been dismissed.⁴⁴ "In all the aforesaid judgments, without exception, it has been held that on one hand, the right of the Jewish people to pray on the Temple Mount is unchallengeable, it is eternal, it has existed from time immemorial and will exist for ever, and numerous similar statements; and on the other hand, in order to preserve public order and prevent the proximate danger of disturbances and riots, the Jews have been prohibited from praying in the Temple Mount square; freedom of worship has retreated, therefore, before the need to preserve public order, until the complete negation of Jewish freedom of worship on the Temple Mount."⁴⁵

At the same time, the Supreme Court has accepted the position of the State Attorney in HCJ 99/76,⁴⁶ allowing a single Jew to pray on his own on the Temple Mount, provided that the prayer

is not a demonstration;⁴⁷ although in a later judgment, the High Court of Justice also limited this prayer, holding that it could not be performed with prayer accessories, such as a prayer book, prayer shawl or phylacteries.⁴⁸

However, my own investigations have shown that in practice, **contrary** to the judgments of the Supreme Court, as aforesaid, for many years the police have **completely** prevented any Jewish prayer on the Temple Mount - even a single Jew who wishes to pray there in a non-demonstrative fashion and without any accessories will be refused.

(4) Protection of Freedom of Access to the Holy Places

In order to guarantee freedom of worship, it is vital to protect another, separate, right, namely, the right to freedom of access to the Holy Places. The guiding provision in this respect is contained in Section 1 of the Protection of Holy Places Law, to the effect that:

“The Holy Places shall be protected from... any thing likely to violate freedom of access of the members of religions to the places holy to them...”⁴⁹

The protection given to freedom of access is stricter than that given to preventing desecration. It is sufficient that a person has committed an act which is likely to violate freedom of access, and that freedom of access has not actually been violated, in order for the offence to have been committed. Freedom of access is a secular term. In principle, commission of the offence may be determined objectively, without consulting the relevant religious authorities. Indeed, on occasion, the violation of the freedom of access may amount to a desecration of the sanctity of a place, within the meaning of Section 2(a) of the Protection of Holy Places Law; in such a case the need may again arise to examine the position of the relevant religion to the facts of the case. The language of the Law is clear, freedom of access is guaranteed only to the members of the religion for whom the place is holy, in contrast to mere tourists. In other words, preventing a person from freely going to a Holy Place, where that person is not a member of a religion for whom that place is holy, will not be considered a criminal offence under the Law.

Reference should also be made to the supplementary provisions of Section 172 of the Law, which prohibit unauthorized entry “to a place of worship or burial”. This provision apparently allows those responsible for the Holy Place to prohibit persons, who are not members of a religion for whom the place is holy, to enter the place.

In 1968 the High Court of Justice considered the question whether the right to freedom of access also included the right to worship, as one could not enjoy the right to worship without the possibility of access to the place where the worship was performed. This question gave rise to an interesting conflict between the justices of the Supreme Court regarding nationalist groups.⁵⁰ This was the first petition to the High Court of Justice by Jews asking that the police be ordered to enable and assist them to realize their right to pray on the Temple Mount. The judgment considered the jurisdiction of the court to hear a dispute relating to a Holy Place in the light of Chapter Two of His Majesty’s Order in Council Regarding the Holy Places - 1924, which removed all disputes relative to the Holy Places from the jurisdiction of the Supreme Court, in contrast to the Protection of Holy Places Law, which refers to a number of issues, including freedom of access to the Holy Places. The question arose: which law takes precedence - the Mandatory law (the aforesaid Order in Council) or the Israeli law?

The justices of the High Court of Justice were divided over this issue. Two held that the Order in Council had no legal effect as a matter of Israeli law, and two others held that it had full effect. President Agranat had the decisive vote: the Protection of Holy Places Law negated the Order in Council *pro tanto*, *i.e.*, in respect of those matters provided for by the Protection of Holy Places Law, and therefore the Court also had jurisdiction in respect of those matters. However, those matters which were not referred to in the Protection of Holy Places Law, were governed by the Order in Council, and the Court had no jurisdiction in respect of them.

The question therefore arose whether the right of access referred to in the Protection of Holy Places Law contained within it the right of worship (since if so, the Court would have jurisdiction to hear disputes regarding the right of worship in any Holy Place) or whether these were separate rights, and as the right of worship was not mentioned in the Protection of Holy Places Law, the Court was not competent to consider its implementation in any Holy Place.

Again the justices were divided equally: two and two. President Agranat again cast the decisive vote holding that the right of worship is a separate right from the right to freedom of access and as the former is not referred to in the Protection of Holy Places Law, the Court has no jurisdiction to consider matters connected therewith. This was one of the main reasons for dismissing that petition.

Currently, the right of freedom of access of Jews to the Temple Mount is again being considered by the High Court of Justice in the *King Solomon's Stables case*. In their second petition to the Court, the petitioners argued that the transformation of the Stables into a mosque would prevent Jews from entering the place and would therefore violate their freedom of access to the Temple Mount, a right guaranteed to them by the Protection of Holy Places Law, as aforesaid. Counsel for the State responded that in the light of the complex reality in the Temple Mount, holy to both Jews and Moslems, and against the background of the great political and religious sensitivity of the place, restrictions had always been imposed on the freedom of access of both Jews and tourists. Visits were conducted at predetermined times and were limited to certain hours, which were not hours of prayer at the mosques. Further, in certain circumstances where there was a real fear of public disturbances, the police had even closed the Temple Mount to visitors altogether.⁵¹ The police had prevented the leader of the Temple Mount Faithful, Gershon Solomon, from going up to the Temple Mount on Jewish holidays for fear of violent reactions by Moslems who see him as a real danger to the integrity of their mosques in view of his statement that the Third Temple should be built on the Temple Mount. All Solomon's petitions to the High Court of Justice in this regard had been dismissed,⁵² relying on the preference to be given to the preservation of public order. The High Court of Justice had also confirmed other restrictions which the police had imposed on the Temple Mount Faithful when going up to the Mount (entrance in pairs, for limited periods of time, etc.). Against this background, counsel for the State argued that "the fact of the existence of mosques on the Temple Mount and the establishment of visiting arrangements in consequence, has never been regarded as a violation of freedom of access within its meaning in the Protection of Holy Places Law."⁵³ Accordingly, the opening of an additional mosque on the Temple Mount, *a fortiori*, in the light of the declaration made by the *Waqf*, that the place would also be open to visitors, could not be regarded as a violation of the right to freedom of access to the Holy Places. As noted, the High Court of Justice has not yet given its decision on this matter.

Finally, bearing in mind that according to the vast majority of great *Halachic* experts throughout the generations, Jews are forbidden to go up to the Temple Mount at all, is the Court entitled to apply the principle of freedom of access to this Holy Place?

In my view:

- This is a secular law which should not necessarily be interpreted according to the principles of the Jewish *Halacha*.
- The law does not require a person to go up to the Temple Mount but merely enables a person to do so, if he so wishes.
- There are a number of rabbis, led by the previous Chief Rabbi S. Goren, who have held that there is a certain area in the Temple Mount (in the southern part of the Mount) which Jews are allowed to enter, as it is definitely outside the boundaries of the Temple.⁵⁴

(5) *Limitations on the Enforcement of Israeli Law on the Temple Mount*

As a matter of case law, all Israel's legislation applies to the Temple Mount, as the Mount has been part of the territory of the State of Israel since the unification of Jerusalem and the application of Israeli law to eastern Jerusalem.⁵⁵ At the same time, against the background of the struggle over the control of and prayer on the Temple Mount between Jews and Muslims, the Attorney General introduced special guidelines for the various authorities in respect of the enforcement of the Planning and Building Laws and Antiquities Law, on the Temple Mount. *Inter alia*, the Attorney General provided that:

"It is not easy to apply the uncontested principles concerning the applicability of Israeli law - including with regard to antiquities, planning and building - on the site of the Temple Mount, and the "pragmatic" considerations, which inevitably arise from the extraordinary nature of this Jewish site. However, the responsible authorities must aspire to uphold the law, without being dragged into actions which may spark the conflict between religion and state."

Against this background, the High Court of Justice has refrained from ordering the Attorney General to bring charges against the heads of the Muslim *Waqf* in respect of offences committed by their workers on the Temple Mount, contrary to the Planning and Building Law - 1965 and the Antiquities Law - 1988, even though it has held that the Israeli authorities "more than is necessary, have turned a blind eye" to breaches of these laws.⁵⁶ An example of this approach may be seen in H CJ 4935/93,⁵⁷ where the High Court of Justice dismissed a petition submitted by the Temple Mount Faithful to stop repairs being carried out to the al-Aqsa Mosque. There the court stated expressly:

"In this petition we are again considering the enforcement of Israeli law on the Temple Mount. There is no doubt that the principle of the rule of law requires ensuring enforcement of the law, every law, in all the territory of the State, and on all its citizens and residents equally. At the same time, the authorities responsible for this are required to exercise their discretion in such a manner as to ensure that the enforcement of the law is carried out reasonably, in good faith, logically and with thought. Where reference is to matters which are connected to the Temple Mount, with all its religious, political and emotional sensitivity, an especially high level of caution is required."⁵⁸

For the same reasons, two months ago, the High Court of Justice dismissed the petition of the Association of Temple Mount Faithful against the Mayor of Jerusalem and the Attorney General, in respect of their refusal to stop works which were intended to transform King Solomon's Stables into a 4,500 square metre mosque.

The above statements were made in respect of the Temple Mount. However, there is no doubt that they are also applicable to other important and problematic Holy Places, such as the Western Wall, the Church of the Holy Sepulchre, Deir al-Sultan Monastery, the Tomb of St. Mary and the Church of the Ascension in Jerusalem, Rachel's Tomb in Bethlehem, the Cave of the Patriarchs in Hebron, and Jacob's Tomb in Nablus.

(The second part of this article will be published in the next issue of JUSTICE.)

1. A/Res/181
2. The Official Gazette of the State of Israel, No. 48 of 4.2.49, p. 376.
3. *Divrei HaKnesset*, [Knesset Records] Vol. 3, pp. 221, 226.
4. *Divrei HaKnesset*, Second Session of First Knesset, Vol. 3, sitting of 13.12.49, pp. 281, 287; sitting of 26.12.49, p. 313
5. *Divrei HaKnesset*, Vol. 4, p. 615.
6. A/Res/273 (11.5.49).
7. The Law to Amend the Law and Administration Ordinance - 1967.
8. See e.g. General Assembly resolutions - A/Res/2253 (4.7.67) and A/Res/2254 (14.7.67); and Security Council Resolutions - S/Res/252; S/Res/271 and S/Res/298.
9. S/Res/478. See also S/Res/465 (1.3.80); S/Res/476 (30.6.80).
10. A/Res/35/169. See also A/Res/35/122 (17.12.80).
11. See in particular - HCJ 223/67 22(1) P.D. 440; HCJ 171/68 23(1) P.D. 260; HCJ 283/69 24(2) P.D. 419 and HCJ 4185/90 47(5) P.D. 221.
12. E. Lauterpacht, "Jerusalem and the holy places", The Anglo-Israel Association, London, 1968; S.M. Scchwebel, "What Weight To Conquest" 64 AJIL (1970) 344; M.I. Gruhin, "Jerusalem: Legal and Political Dimensions in a Search for Peace", 12 Case Western JIL (1980) 205; I. Blum "The Legal Status of Eastern Jerusalem", Jerusalem, 1983.
13. See e.g. Section 2 of the Protection of Holy Places Law - 7 years imprisonment!
14. Section 8 of the Mines Ordinance - 1925; Section 29 of the Antiquities Law - 1978.
15. Section 22(a) of the Drainage and Protection Against Flooding Law - 1958.
16. Sections 70-71 of the Water Law - 1959.
17. Section 14 of the Local Authorities (Sewage) Law - 1962.
18. Sections 4-5 of the National Parks and Nature Reserves Law - 1963.
19. Section 51 of the Building and Evacuation of Rehabilitation Areas Law - 1965.
20. See the definition of this term in Section 1 of the Antiquities Law - 1978.
21. HCJ 6403/96 (Unpublished).
22. Section 1 of the Protection of Holy Places Law - 1967; Section 3 of Basic Law: Jerusalem, Capital of Israel - 1980.
23. Sections 19-20(b) of the Penal Law - 1977.
24. HCJ 4/64 13(1) P.D. 29.
25. *Ibid.*, at pp. 30-31, Justice Sussman.
26. *Ibid.*, at p. 32.
27. The punishments are of course maximum punishments only. The period of imprisonment is subject to the discretion of the judge.
28. Section 2(a) of the Law.
29. Section 2(b) of the Law.
30. See e.g. HCJ 223/67 22(1) P.D. 440.
31. See The Report of the Commission of Inquiry into the Massacre at the Cave of the Patriarchs in Hebron, 1994.
32. HCJ 257/89, 2410/90 48(2) P.D. 256.
33. Regulations 4252 of 16.7.81, p. 1212.
34. 48(2) P.D. 256 at 346.
35. *Ibid.*, at p. 356.
36. *Ibid.*
37. *Ibid.*, at p. 355.
38. HCJ 7128/96.
39. Para. 15 of the Supplementary Statement to the High Court of Justice of 29.10.96.
40. See also Section 4 of the Police Ordinance (New Version) - 1971.
41. Section 30(b) Amendment of Penal Laws (Means of Punishment) (Consolidated Version) Law - 1970.
42. Section 5(2) of the Police Ordinance.
43. Government Decision No. 761 of 20.8.67.
44. See e.g. HCJ 222/68 above; HCJ 99/76 30(2) P.D. 505; and HCJ 537/81 35(4) 673.
45. HCJ 257/89, 2410/90 48(2) P.D. 256 at 352.
46. HCJ 99/76 30(2) P.D. 505.
47. *Ibid.* at pp. 506-507.
48. HCJ 67/93 47(2) P.D. 1.
49. See also Section 3 of the Basic Law: Jerusalem.
50. HCJ 222/68 above.
51. See e.g. HCJ 3995/94 *Temple Mount Faithful v. Israel Police* (Unpublished, 14.7.94); and HCJ 4868/95 47(5) P.D. 221.
52. HCJ 2725/93 (Unpublished); HCJ 4044/93 (Unpublished); HCJ 3163/96 (Unpublished); HCJ 5288/96 (Unpublished).
53. Para. 11 of the Supplementary Statement to the High Court of Justice of 29.10.96.
54. See HCJ 4185/90 47(5) P.D. 221 at 261 for case references.
55. *Ibid.*, at p. 281.
56. *Ibid.*, at p. 288.
57. 47(5) P.D. 865.
58. *Ibid.*, at 870-871.

Israel's Interrogation Policies and Practices

Tamar Gaulan

In November 1996, Israel's Supreme Court handed down a decision which canceled an interim injunction ordering the General Security Service to abstain from the use of any physical pressure during the interrogation of a detainee. Since this decision was the subject of much controversy and was given an utterly mistaken interpretation in the world media, we found it necessary to submit this paper in order to clarify Israel's interrogation policies and practices and in particular the above-mentioned decision of the Supreme Court.

We would first like to emphasize that Israeli law strictly forbids all forms of torture or maltreatment. The Israeli Penal Code (1977) prohibits the use of force or violence against a person for the purpose of extorting from him a confession to an offense or information relating to an offense. Israel signed and ratified the U.N. Convention Against Torture and Cruel, Inhuman or Humiliating Treatment.

The State of Israel maintains that the basic human rights of all persons under



its jurisdiction must never be violated, regardless of the crimes that the individual may have committed. Israel recognizes, however, its responsibility to protect the lives of both Jews and Arabs from harm at the hands of terrorist organizations active throughout the world. To prevent terrorism effectively while ensuring that the basic human rights of even the most dangerous of criminals are protected, the Israeli authorities have adopted strict rules for the handling of interrogations. These guidelines are designed to enable investigators to obtain crucial information on terrorist activities or organizations from suspects who, for obvious reasons, would not volunteer information on their activities, while

ensuring that the suspects are not maltreated.

The Landau Commission

The basic guidelines on interrogation were set by the Landau Commission of Inquiry. The Commission, headed by former Supreme Court President, Justice Moshe Landau, was appointed, following a decision of the Israeli government in 1987 to examine the General Security Service's methods of interrogation of terrorist suspects. In order to compile its recommendations, the Landau Commission examined international human rights law standards, existing Israeli legislation prohibiting torture and maltreatment, and guidelines of other democracies confronted with the threat of terrorism.

The Landau Commission envisioned its task as defining "with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him." The Commission determined that in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information is unavoidable under certain circumstances. Such circumstances include situations in which information sought from a

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detainee believed to be personally involved in serious terrorist activities can prevent imminent murder, or where the detainee possesses vital information on a terrorist organization which could not be uncovered by any other source (e.g., locations of arms or explosive caches or planned acts of terrorism).

The Landau Commission recognized the danger posed to the democratic values of the State of Israel should its agents abuse their power by using unnecessary or unduly harsh forms of pressure. As a result, the Commission recommended that psychological forms of pressure be used predominantly and that only "moderate physical pressure", (not unknown in other democratic countries), be sanctioned in limited cases where the degree of anticipated danger is considerable.

It should be noted that the use of such moderate pressure is in accordance with international law. For example, when asked to examine certain methods of interrogation used by Northern Ireland police against IRA terrorists, the European Human Rights Court ruled that "[i]ll-treatment must reach a certain severe level in order to be included in the ban [of torture and cruel, inhuman or degrading punishment] contained in Article 3 [of the European Convention of Human Rights]." In its ruling, the Court disagreed with the view of the Commission that the above mentioned methods could be construed as torture, though it ruled that their application **in combination** (*emphasis added*) amounted to inhuman and degrading treatment. The question whether each of these measures separately would amount to inhuman and degrading treatment was therefore left open by the Court.

The Landau Commission was aware that the issue of moderate pressure during interrogation is both a serious and sensitive one. The guidelines regarding interrogation provide for limited forms of pressure under very specific circumstances, to be determined on a case by case basis. They by no means authorize indiscriminate use of force. Rather, specific circumstances have been identified and interrogation practices have been strictly defined in a manner that, in the opinion of the Landau Commission,

The guidelines regarding interrogation provide for limited forms of pressure under very specific circumstances, to be determined on a case by case basis. They by no means authorize indiscriminate use of force

"if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity."

To ensure that disproportionate pressure is not used, the Landau Commission identified several measures, which have been adopted and are now in force, namely:

1. Disproportionate exertion of pressure on the suspect is not permissible -

pressure must never reach the level of physical torture or maltreatment of the suspect, or grievous harm to his honour which deprives him of his human dignity.

2. The use of less serious measures must be weighed against the degree of anticipated danger, according to the information in the possession of the interrogator.
3. The physical and psychological means of pressure permitted for use by an interrogator must be defined and limited in advance, by issuing binding directives.
4. There must be strict supervision of the implementation in practice of the directives given to General Security Service interrogators.
5. The interrogators' supervisors must react firmly and without hesitation to every deviation from the permissible, imposing disciplinary punishment, and in serious cases, causing criminal proceedings to be instituted against the offending interrogator.

Once these measures were set down, the Landau Commission went on, in a second section of its report, to precisely detail the exact forms of pressure permissible to the General Security Service interrogators. This section has been kept secret out of concern that, should the narrow restrictions binding the interrogators be known to the suspects undergoing questioning, the interrogation would be less effective. Palestinian terrorist organizations commonly instruct their members, and have even printed a manual, on techniques of withstanding General Security Service questioning without disclosing any information. It stands to reason that publishing General

Security Service guidelines would not only enable the organizations to prepare their members better for questioning, but would reassure the suspect as to his ability to undergo interrogation methods without exposing vital information, thus depriving the General Security Service of the psychological tool of uncertainty.

Safeguards

Since the interrogation guidelines are secret, the Israeli government recognized the importance of establishing safeguards and a system of review of interrogation practices in order to insure that General Security Service investigators do not violate the guidelines. As a result, the General Security Service Comptroller was instructed to check every claim of torture or maltreatment during interrogation. From 1987 until the beginning of 1994, the Comptroller carried out this responsibility, initiating disciplinary or legal action against interrogators in cases where they have been found to have deviated from the legal guidelines. Early in 1994, in accordance with the recommendations of the Landau Commission, responsibility for investigation of claims of maltreatment was transferred to the Division for the Investigation of Police Misconduct in the Ministry of Justice under the direct supervision of the State Attorney.

The Landau Commission also recommended that there be additional external supervision of General Security Service activities. Since the Landau Commission issued its recommendations, the State Comptroller's Office has launched an examination of the General Security Service investigator's unit. Upon the completion of its inquiry, the State Comptroller's findings were submitted to

a special subcommittee of the Knesset (Israeli Parliament) State Comptroller Committee.

In addition, an agreement between the State of Israel and the International Committee of the Red Cross (ICRC) provides for the monitoring of conditions of detention. Delegates from the ICRC are permitted to meet with detainees in private within 14 days of the arrest. ICRC doctors may examine detainees who complain of improper treatment. All complaints made by the ICRC regarding

The new guidelines clearly stipulate that the need and justification for the use of limited pressure by investigators must be established in every case, according to its own special circumstances

treatment of prisoners are fully investigated by the relevant Israeli authorities and the findings are made known to the ICRC.

In May 1991, a special *ad-hoc* committee composed of members of the General Security Service and the Justice Ministry was appointed to review complaints against the conduct of General Security Service investigators during interrogation at the Gaza Prison investigation section. The committee identified a number of cases in which investigators did not act in accordance with the guidelines for treatment of detai-

nees. As a result of the Committee's findings, action has been taken against General Security Service investigators involved in these cases.

Review

As recommended by the Landau Commission, a special ministerial committee headed by the Prime Minister was established in 1988 under the government to review periodically the interrogation guidelines themselves. On April 22, 1993, the ministerial committee determined that certain changes should be made in the general security service guidelines. On the basis of the committee's recommendations, new guidelines were issued to General Security Service investigators. The new guidelines clearly stipulate that the need and justification for the use of limited pressure by investigators must be established in every case, according to its own special circumstances. The guidelines point out that the use of exceptional methods was intended only for situations where vital information is being concealed and not in order to humiliate, harm or mistreat those under investigation. In addition, it is expressly prohibited to deny a person under investigation food or drink, to refuse him permission to use a bathroom, or to subject him to extreme temperatures. Since then the guidelines have been approved from time to time, including during the last year, in light of the conclusions drawn from recent experience.

It should be noted that these guidelines are reviewed against a background of escalating terror. The years since the signing of the Oslo agreement in 1993 have been the bloodiest since the estab-

lishment of the State of Israel. During this period Palestinian terrorist groups, such as Hamas and Islamic Jihad, have planned and perpetrated numerous violent attacks which have resulted in the death and injury of hundreds of innocent victims. The spate of suicide bombings on buses and public places designed to terrorize the local population has made it imperative that the defence and security services work as effectively as possible to prevent further terrorist attacks and ensure the security of the population.

Within the last year a number of petitions have been submitted to the Supreme Court of Israel sitting as the High Court of Justice demanding that the court issue an injunction forbidding the General Security Service from using any force throughout the investigation. The court's decisions have dealt with these guidelines and their implementation on a case by case basis. Two cases of particular significance are worth mentioning.

In December 1995, the High Court of Justice issued an interim injunction on the basis of a petition brought by Abd al-Halim Belbaysi against the General Security Service (HCJ 336/96), to abstain from the use of physical pressure against the petitioner during his interrogation. At the request of the General Security Service, this interim order was later canceled after the petitioner who had earlier signed a written declaration denying any connection on his part to any illegal activity, admitted that he had planned the heinous terrorist attack at Beit Lid on the 22 January 1995 at which two suicide bombers blew themselves up and killed 21 Israelis. Belbaysi confessed that three bombs had been prepared at his home, that he himself had hidden the bombs in the vicinity of Beit Lid and that on the day of the attack he had handed

over two bombs to the two suicide bombers and had driven them to the site of the attack.

Belbaysi also provided information which enabled the authorities to retrieve the third bomb, containing 15 kg of explosives from its hiding place. During the investigation it also became apparent that Belbaysi had additional information regarding serious terrorist attacks in Israel planned for the near future. In order to uncover this essential information, the General Security Service

As a result of General Security Service investigations of terrorist organizations activists during the last two years, some 90 planned terrorist attacks have been foiled

appealed to the court asking it to cancel the injunction.

The court therefore accepted the argument of the General Security Service's attorney, that disclosure of this information by Belbaysi could save human lives. In the light of this the court canceled the interim injunction. At the same time the court emphasized the importance of adhering to the rule of law: ".....it is clear that the cancellation of the interim order should not be seen as permission for the investigators to use measures which are not compatible with the law and the relevant guidelines."

In a more recent case, Muhammed Abdel Aziz Hamdan (HCJ 8049/96), the High Court again canceled an interim injunction which had been issued against the General Security Service following a petition by Hamdan, to abstain from the use of any physical pressure throughout his interrogation. This interim injunction was issued with the agreement of the General Security Service, who informed the court that at this stage of the investigation, they did not intend to use any physical pressure against the petitioner. However, within 24 hours, as a result of new inquiries and additional information regarding the petitioner, the General Security Service applied to the court for the cancellation of this interim injunction. It should be noted that Hamdan had previously been detained in 1992 at which time he admitted that he belonged to and was active in the Islamic Jihad cells. At that time he was included in the group of Islamic Jihad and Hamas activists who were deported to Lebanon. Upon his return, Hamdan was sentenced to 3 additional months of imprisonment, which he completed at the end of February 1994.

In July 1995 he was placed under administrative detention for one month, and in March 1996 he was arrested by the Palestinian Authority together with a number of activists of extreme terrorist organizations. He was released in August 1996. *In October 1996, the General Security Service received information which raised definite suspicions that Hamdan had in his possession extremely vital information, the disclosure of which would help save human lives and prevent serious terrorist attacks in Israel, of which there was a real fear of their occurrence in the near future.*

The conclusion was therefore reached that there was a vital need to immediately continue with the interrogation. It was at this point that the General Security Service petitioned the Supreme Court to cancel the interim injunction, as it was considered essential to waive the limitations of the interim injunction in order to be able to pressure Hamdan into disclosing information that could prevent danger to many human lives. The attorney for the General Security Service emphasized that "... the use of such pressure in the present circumstances is allowed by law." He also stated that the physical measures which the General Security Service wished to use did not amount to "torture" as defined in the International Convention Against Torture, and that each of these measures falls under the defence of "necessity" as specified in Section 34(11) of the Penal Law, the conditions of which existed in the present case. In the light of the classified information presented to the court by the General Security Service, the court was satisfied that there was indeed *an extremely high probability that Hamdan did indeed possess extremely vital information the immediate disclosure of which would prevent a terrible disaster and save human lives.* In canceling the interim injunction, the Court stated that "After reviewing the classified material presented to us, we are satisfied that the Respondent does indeed have in his possession information on which a clear suspicion can be based that the Petitioner possesses extremely vital information, the immediate disclosure of which will prevent the most serious attacks. Under these circumstances, we are of the opinion that there is no justification to continue with the interim injunction. Needless to say the

canceling of the interim injunction is not tantamount to permission to use interrogation methods against the Petitioner which are against the law."

Conclusion

In conclusion, we would like first to note that as a result of General Security Service investigations of terrorist organizations activists during the last two years, some 90 planned terrorist attacks have been foiled. Among these planned attacks are some 10 suicide bombings; 7

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car-bombings; 15 kidnappings of soldiers and civilians; and some 60 attacks of different types including shootings of soldiers and civilians, hijacking of buses, stabbing and murder of Israelis, placing of explosives, etc.

The State of Israel prides itself on having an open society with a democratic legal system which is subject to public scrutiny and which respects human values. Israel has a unique procedure for the judicial review of complaints of alleged maltreatment or torture, namely, the Supreme Court of Israel sitting as a High Court of Justice. Anyone who

believes he has been wronged - whether a citizen of Israel or someone merely under the jurisdiction of the Israeli authorities - can petition directly to the Supreme Court sitting as a High Court of Justice. Such a petition will be brought before a judge within 48 hours from the time of its submission. Every allegation of maltreatment is taken seriously and investigated. However, it should be noted that individuals arrested, tried or convicted have both personal and political motives for fabricating claims of maltreatment during interrogation. Personal motives include the desire to have a confession ruled inadmissible at trial, to present oneself as a "martyr", or to escape retribution from Palestinian terrorist cells which have often assassinated or tortured individuals who have given information to the Israeli authorities. Political motives include the desire to spread anti-Israel disinformation in the form of unfounded human rights complaints, in order to undermine Israel's human rights image or discredit the General Security Service.

It is the unfortunate reality that, during times of political unrest and violence, restrictions must be placed on individuals who threaten the life and welfare of the State and its citizens. This article has been aimed at demonstrating that, despite the harsh reality of continuing terrorism faced by the State of Israel, the state does everything in its power to uphold the rights of all persons under its jurisdiction while ensuring the safety of innocent individuals.

(The editor's note: Recently, the Supreme Court has again, with the agreement of the General Security Service, issued an injunction prohibiting the use of physical pressure in the interrogation of Mr. Hamdan.)

Heirless Jewish Assets In Swiss Banks Balance Sheet for 1996

Philippe A. Grumbach

The question of the extent and the fate of assets belonging to victims of the national-socialist regime and the role which the Swiss financial market played during and immediately after the Second World War, has taken on an increasingly significant character.

In order to clarify the role of Switzerland and of its financial market during this period, the Legal Affairs Committee of the National Council decided to initiate a draft Federal Decree which would be required to create the legal basis enabling experts to examine the position of the Swiss market place before, during and immediately after World War II. Prior to examining this draft law, it would be appropriate to recall certain important events which took place in 1996.

Review of Events

The Swiss Banking Association

On 1 January 1996 the new regulations of the Swiss Banking Association (SBA) regarding the treatment of heirless assets entered into effect. A central enquiry office was created for this purpose. It is run by the Ombudsman for Swiss banks and its task is to trace heirless assets in Swiss banks. This is a tracing office which acts as a go-between, acting on behalf of persons seeking heirless assets on the one hand and some 400 Swiss banks on the other. An initial interim report covering the first nine months of 1996, states that Swiss Francs 1.6 million were traced of which SF 11,000.- belonged to four persons who were victims of the Holocaust. About 2,500 applicants have already got in touch with the Ombudsman Mr. Hans Peter Haeni. The next report will be issued in the Summer of 1997.

It will also be recalled that the SBA had introduced an enquiry affecting all banks with the object of identifying the accounts

and deposits opened prior to 1945 by foreign clients, from whom the banks had no news for at least 10 years. This enquiry covered the accounts of all foreign clients and not only the accounts of Jewish victims of the Holocaust. The SBA published the results of this

enquiry in February 1996 which enabled the identification of 775 accounts or deposits of a total value of SF 38,700,000.-



The Memorandum of Understanding

On 2 May 1996 a Memorandum of Understanding (MoU) was signed between the SBA on the one hand and the World Jewish Restitution Organization and the World Jewish Congress, representing also the Jewish Agency and the Allied Organizations, on the other. The purpose of this agreement was to create an "Independent Committee of persons entrusted with the task of examining the investigations of the Swiss banks into assets whose owners did not have any further contact with their respective banks since the end of the Second World War." This committee is presided over by Mr. Paul A. Volcker, former Chairman of the US Federal Reserve Board. The Committee will examine the enquiries of Swiss banks on heirless assets deposited in Switzerland during the course of the Second World War. It is important to specify that international auditing firms recog-

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nized by the Swiss Federal Banking Commission will be given the task of examining primarily the investigatory measures used by the various banks and by the SBA.

It will be noted that the MoU only deals with the banking sector. From the standpoint of the Jewish Organizations, the question at issue is to clarify the role of Switzerland and of its financial market during the period in question. The international auditing firm charged with this question will also be entrusted with auditing the investigations already conducted through the Ombudsman. A provisional report should be provided before June 1997 and the final report will be issued in June 1998.

Developments at the Swiss political level

on the political level, the work of the Committee of Legal Affairs of the Swiss Parliament provided the opportunity to draw up a new draft Federal Decree on the enquiry made based on the historical and legal factors, into the fate of assets deposited in Switzerland as a result of the national-socialist regime. The draft was favourably received by the National Council at the end of September 1996 by a vote of 162 in favour and no votes against.

The State Council (equivalent of the Senate) at its session of 27 November 1996, adopted the draft law by 36 votes in favour and none against, but with an important difference which as from now divides the two chambers. This is with regard to the possibility of recourse to the Federal Court granted to any person affected by the enquiries who could thus block the entire process. The National Council will examine this point of disagreement during its December session.

The proposed Federal Decree constitutes the necessary legal framework within which to confer on experts the assignment of enquiring into the Swiss financial market's role prior to, during and immediately after the Second World War. The implementation of the Federal Decree will be entrusted to the Federal Council which will be responsible for appointing the experts. However, it is important to note that these experts will be entrusted with different assignments as compared with those entrusted to the Committee set up by the MoU between the ASB and the Jewish Organizations. The experts appointed by the Federal Council will have to conduct a global study on the role of the Swiss financial market before, during and immediately after the Second World War, whereas the Committee set up under the MoU is entrusted with examining the technical-financial aspects of the tracing of Jewish assets which has been carried out in recent months by the Swiss banks. The study made

by the experts appointed by the Federal Council will be aimed not only at the banks, but also at insurance companies, lawyers, notaries, fiduciaries and portfolio managers, as well as at other individual or legal persons and at the Swiss National Bank. The Federal Decree will be in force for five years. The enquiries carried out by the experts will not deal with individual claims by persons entitled to file them.

On the political scene, it will also be recalled that on 24 October 1996, Mr. Flavio Cotti, a member of the Federal Council (the Minister for Foreign Affairs) decided to appoint a task force whose aim will be to act quickly in coordinating the replies to attacks against Switzerland. The Federal Council also appointed two historians to draw conclusions from all the compensation agreements arrived at with Central European countries after the Second World War.

Comments on the draft Federal Decree on the enquiry based on historical and legal factors into the fate of assets deposited in Switzerland as a result of the nationalist-socialist regime

Warning

Just at the time that this article is being submitted, it has been learned that the Council of States decided at its session on 27 November 1996 to provide for a means of recourse to the Federal Court for anyone who wishes to preserve his or her anonymity. This amendment is to be greatly deplored, particularly since the draft Federal Decree provides that the historians are bound by the professional secrecy obligations of civil servants.

It is to be hoped that the National Council will maintain its initial approach as set out hereunder.

Scope of application and effect of Section 1

Section 1 defines the scope of the investigation. The enquiries must clarify in a definitive, complete and transparent manner the question of the extent of and what transpired to, all forms of wealth deposited in Switzerland as a result of the national-socialist regime, about which there has continued to be no news or which have been confiscated. This will primarily consist of an investigation of the historical aspects which will also take into account the relevant, legal and legislative framework. It has been decided that the enquiry would not be limited specifically to Jewish victims of the Holocaust, but that this opportunity should

be utilized to study exhaustively the role of the Swiss financial market during the period of the national-socialist regime. Thus the enquiries will also be directed to the fate of assets stolen or deliberately confiscated from members of other ethnic groups and other groups of persons persecuted by the national-socialist regime, such as gypsies. The role of the Swiss National Bank and above all its gold transactions with the German Reichsbank during the Second World War will also have to be examined.

The Federal Decree of 20 December 1962 on assets in Switzerland of foreigners or stateless persons persecuted for reasons of race, religion or political belief (see *JUSTICE* No. 9, June 1996) will be carefully examined from the standpoint of the manner in which it was carried out and its effectiveness. It will be recalled that based on this decree, which moreover has been subjected to numerous criticisms, a sum of approximately SF10 million was reported, belonging to 961 foreigners or stateless persons of whom there was no trace (FF 1974 11 802). The draft Federal Decree also provides for the examination of the Washington Agreement of 25 May 1946 (RS 14 356), as a result of which Switzerland agreed to partially liquidate German assets in Switzerland. Although there is no direct link between the Washington Agreement and the question of heirless assets, having regard to the fact that the Washington Agreement dealt with assets belonging to Germans living in Germany, Parliament considered that it was logical from a historical standpoint to include these state measures in the enquiry.

Section 2

This section deals with the appointment of experts. It provides that there has to be a group of independent experts composed of specialists in various fields: historians, lawyers and experts specializing in financial matters.

Section 3

This section provides for the application of professional secrecy rules analogous to those binding civil servants, to experts undertaking the enquiries and their colleagues. They will be submitted to such professional secrecy rules in accordance with Section 320 of the Swiss Penal Code. In consequence, persons taking part in the enquiries will be punishable by any violation of professional secrecy binding civil servants, extending beyond the expiration of the period of validity of the Federal Decree. The engagement of independent experts will be on a contractual basis, *i.e.*, by appointing them as agents.

Sections 4-7(a)

These sections deal in particular with the preservation of documents and the right to consult all documents as well as the use of the results of the enquiries. It is important to underline the fact that all individual or legal persons affected by Section 1 of the decree, their legal successors and the authorities and public bodies, will be bound to permit the experts and their assistants to consult all documents which can be useful for their enquiries. The obligation to permit consultation of documents takes precedence over any other legal obligation or undertaking to maintain secrecy.

It is expressly provided that the Federal Council will require the full publication of the results of the enquiries carried out by the experts. Finally, Parliament has provided for penal provisions applicable to anyone who violates the sections governing the obligation to preserve documents and the right to consult documents.

Sections 8-9

These sections govern the financing of these enquiries and the period of validity of the decree. It will be recalled that the period of validity of the decree was limited to five years. This period has already been subjected to criticisms coming principally from Senator Alfonso D'Amato.

Attitude of the Federal Council (Swiss Government)

The Federal Council is of the view that Switzerland has a political interest in having the fate of assets deposited in Switzerland as a result of the Nazi regime, clarified once and for all with all necessary transparency and that this matter should be finally closed. The Swiss government believes that even if this problem has been exploited in the United States for internal political reasons, against Swiss banks and the Swiss financial market, the request of Jewish organizations is justified. The Federal Council has also declared its readiness to accept the responsibility for carrying out the Federal Decree. The Swiss Government regards this as the opportunity to clarify exhaustively the role of the Swiss financial market during and immediately after the end of the Nazi regime. It is for this reason that it is of the view that the enquiries should not be limited to assets of Jewish victims of the Holocaust, even if this problem lies at the origin of the Federal Decree. It would also be neces-

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Nazi Gold: The Legal Dimension

David Wolfson



There has been considerable recent media coverage about the campaign to recover gold which was looted by the Nazis from both the states which the Nazis conquered and the individuals whom they dispossessed. The gold was held in central banks, including the Bank of England. Much of the gold has now been distributed to various European countries. The campaign therefore centres on the residue of the gold held by the central banks.

I do not propose in this article to rehearse the factual background. I prefer to leave that difficult task to the historians. In this article I shall discuss the legal issues which have arisen in relation to the campaign to recover Nazi gold. As will be seen, the legal side is as complex and murky as the history.

The Paris Agreement

The starting point is the Paris Agreement of 14 January 1946. The Tripartite Gold Commission for the Restitution of Monetary Gold (now

called the Tripartite Gold Commission) was established to implement the Paris Agreement.

The Paris Agreement distinguished between what was termed “monetary gold” and “non-monetary gold”.

“Monetary gold” (including gold coins) was that gold which had been looted or removed from states which had been conquered by the Nazis. Monetary gold was to be pooled for distribution to those states from which it had been looted or removed. However, any other gold, being the non-monetary gold, found by the Allied forces in Germany was to be allocated for the victims of German action.

It is interesting that the Paris Agreement contains no definition of either monetary gold or non-monetary gold. The only definition provided in the Agreement was the somewhat cryptic provision that gold coins were to be treated as monetary gold. However, in a questionnaire completed in 1947, the Tripartite Gold Commission defined monetary gold as:

“all gold which... was carried as part of a claimant country’s monetary reserve, either in the accounts of the claimant government itself, or in the accounts of the claimant country’s central bank or other monetary authority at home or abroad.”

The Tripartite Gold Commission

The sole purpose of the Tripartite Gold Commission was to implement that part of the Paris Agreement which was exclusively concerned with monetary gold. It was not set up to deal with, and had no jurisdiction over, non-monetary gold.

However, recent documents which have come to light, not least from the US National Archive in Washington DC, show that at least part of the gold which came into the possession of the Tripartite Gold Commission was not in fact monetary gold. It was instead gold looted by the Nazis from individuals including, in some cases, victims of the concentration camps. According to the Paris Agreement, such gold was not monetary gold.

Indeed, the bulk of the gold held by the Tripartite Gold Commission originated in the Foreign Exchange Depository in Frankfurt. It was to that institution that gold taken from the possessions and, in the most gruesome circumstances, even from the bodies of concentration camp victims was sent for smelting.

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Title to the Gold

A difficult question is who would have title to the gold?

The individuals who originally owned the gold (or their heirs) should still have title to the gold. Although under the laws of Nazi Germany the original owners might have lost title to the gold, no civilised country would recognize the Nazi system of law as effecting any change in title. Indeed, in 1943 the Allies issued a declaration entitled the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation and Control"¹ reserving their right to declare as invalid any property transfers which had taken place in German-occupied Europe.

As a matter of English law, expropriation which constitutes a violation of

human rights would not be recognized, see *Oppenheimer v. Cattermole*² and *Williams and Humbert Limited v. W & H Trade Marks (Jersey) Limited*³.

If the original owners cannot be found, there is a precedent for the proposition that an alternative recipient can be identified, for example, in its September 1952 agreement with Israel, Germany recognised Israel as being the appropriate recipient of compensation relating to Jewish victims of the Nazi regime.

Conclusion

The title to the gold rests *prima facie* with the original owners of the gold. Further, there was nothing in the Paris Agreement or in the constitution of the Tripartite Gold Commission which authorised the Tripartite Gold

Commission to distribute the non-monetary gold.

The residual gold now held by the Tripartite Gold Commission probably represents only a fraction of the non-monetary gold which has passed through the Tripartite Gold Commission. Both as a matter of law and as a matter of common decency, the whole of the residue of the gold now held by the Tripartite Gold Commission should now be made available for the benefit of the victims, their heirs, families and communities.

1 5th January 1943, Misc No. 1 (1943) Cmd. 6418.

2 [1976] AC 249.

3 [1986] AC 368.

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sary to enquire into the Nazi assets deposited in Switzerland prior to the final appointment of a group of experts. The affected circles will be heard, notably the Swiss Federation of Jewish Communities.

Provisional Balance Sheet

It is certainly premature to draw conclusions, since several procedures have only just been decided upon or voted into law. The criticisms of Switzerland ventilated in particular by Senator Alfonso D'Amato, which has been to a large extent echoed by the media with respect to the problem of heirless assets and which has been echoed in Switzerland as well as abroad, have certainly contributed to the concrete expression of the desire of the political and banking authorities in Switzerland to deal rapidly and completely with the problem of the assets during the period of the Nazi regime. Also recently, the representative of the Board of Directors of the SBA expressed recognition of responsibility at a conference organized by the Swiss Foreign Policy Association, to the Jewish Communities for the attitude taken by Swiss banks for many decades throughout which they behaved in an extremely narrow, legalistic manner.

This change of tone coming from the Swiss Banking Association must be noted and welcomed. The procedures which have been instituted must be allowed to follow their course. The relentlessness of Senator Alfonso D'Amato toward the Swiss financial market, can be regarded as having become excessive, even if it has to be admitted that the campaign conducted from the United States by Senator D'Amato and the World Jewish Congress have certainly contributed to accelerating the process of decision-making by Swiss political and banking authorities.

However, the legal actions begun in the United States against certain Swiss banks, are to be deplored as making no sense on the legal level, since they do not take any account whatever of the procedures which have been set up both by the Swiss Banking Association and within the framework of the Memorandum of Understanding, as well as by the new Federal Decree regarding the enquiry based on historical and legal factors into the fate of assets deposited in Switzerland as a result of the national-socialist regime. With regard to the latter initiative, it is to be hoped in conclusion that the work of the historians will not be jeopardized by the possibility of recourse to the Federal Court.

Israel, Jordan and the Palestinian Authority: The Competition for Investments

Gil Feiler

A point central in all discussions of peace in the Middle East has been the assurance that the economic benefits received by the parties involved would justify political and social sacrifices endured. The lifting of the Arab boycott against Israel and subsequent increased flows of trade and investment from around the world, the potential for joint ventures in infrastructure and industry, and the increase in tourism akin to politically stable nations, has wetted the appetites of Middle Eastern leaders since the initial discussions of peace.

The wars which have ensued between Israel and the Arab nations, as complex as their origins appeared, have generally touched on the Palestinian question. Accordingly, the peace process, and the dividends it brings, have been expected to also focus on the fate of the Palestinians.

Yet, as peace and economic improvement for some countries in the region starts to take root, the Palestinians are not reaping an economic reward. They are in fact in the midst of an economic decline. On the contrary, Jordan is seeing modest increased growth and development. For example, Jordan received more investment in the first half of 1996 than in all of 1995, a surge directly associated with Jordan's improved business climate and peace agreement with Israel. Israel has also seen significant growth since 1993, when many of the peace agreements came into effect.

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How has Jordan capitalized on the economic opportunities brought by the peace process while, to date, the Palestinian Authority (PA) has missed the boat? As a result of the peace process, have Jordan and the PA become competitors for investment,

creating an unforeseen rivalry between the two? This article answers these questions by highlighting the differences between each entity's investment attractions and each government's policies and actions to attract foreign investment.

An analysis shows that Jordan and the PA offer a relatively similar investment opportunity, and thus are competitors. However, Jordan does possess specific characteristics that the PA does not, and, most notably, Jordan has exerted greater effort to attract foreign investment. Because of this, Jordan is out-competing the PA in attracting investment. The result has been increased tension between Jordan and the PA with Israel occasionally caught in the middle.

While the PA's relationship with Israel has negatively affected efforts to attract investment, the PA does control its own affairs enough to take the actions necessary to attract substantial foreign



investment. Jordan's efforts in fact serve as an example of what the PA could do to better attract investment. Such or similar actions must be taken if the PA is to develop into a viable economic entity.

General Comparison of Jordan and the Palestinian Authority

The future well-being of the West Bank and Gaza Strip is dependent on the PA's ability to adequately address issues of trade, investment, and labour. All three are tightly linked. Regarding labour specifically, the substantial increase in the Palestinian labour force which followed Israeli-occupation in 1967 was largely absorbed in foreign markets, such as Israel, Jordan, and the Gulf countries. Because of the expulsion of hundreds of thousands of Palestinian workers following the Iraqi invasion of Kuwait, the increasingly disrupted flow of Palestinians working in Israel since the onset of the *intifada* and continuing throughout the peace process, and the needs of a growing Palestinian Authority, the brightest future for Palestinian labour is a domestic one.

The possibility of increased and freer trade and investment throughout the region, which has come with the peace process, makes the future mobility of Palestinian produced goods a natural substitute for the tentative mobility of Palestinian labour. Rather than work throughout the world, Palestinian should work in the territories, producing goods to be sent throughout the world. This would create jobs in the territories, jobs less-subjected to foreign interests, and more focused on growing the local Palestinian economy.

To accomplish this, industries suitable for export must come to the territories. In a situation as seen by the PA, with limited resources for domestic investment, this requires foreign investment. Potential investors are drawn to certain attractions in an investment opportunity, specifically a competitive wage rate, an established infrastructure with adequate natural resources, a stable political environment, and a commitment to market-based

economic policy with an encouraging investment climate. Through these criteria, investors weigh their options, and developing nations seek investment.

Labour

Since Israel first occupied the West Bank and Gaza in 1967, foreign investors have looked at the territories as a source of cheap and eager labour, assuming peace could be established. However, Jordan's present wage rate is roughly half of that in Gaza and the West Bank. Additionally, Jordan - because it is not tightly linked to the western style, consumer-oriented Israeli economy - offers a lower cost of living than the territories.

A study released by the Palestinian Economic Policy Research Institute (MAS) compared the ability of Palestinian manufacturers to compete with a handful of potential Jordanian counterparts. In all three sectors chosen for study - pharmaceuticals, garments, and shoes - the Jordanians had lower production costs, and were thus considered competitive threats to the Palestinian producers. Much of the difference in cost was associated with the lower wage rate in Jordan.

The possibility of increased and freer trade and investment throughout the region, which has come with the peace process, makes the future mobility of Palestinian produced goods a natural substitute for the tentative mobility of Palestinian labour

Infrastructure and Resources

Land is also cheaper in Jordan. Since Israel achieved independence, most Palestinians who remained within greater Palestine's borders have been crammed into the West Bank and Gaza Strip, making those two stretches of land more dense than, for example, the East Bank. The introduction of Jewish settlements in both areas throughout the last two decades has only made land scarcer and more expensive. Gaza, in fact, is considered one of densest population centers in the world, with nearly one million Palestinians crammed into a 362 square kilometer strip of land.

Jordan's infrastructure is also more developed than that in the territories. Conversely, from 1948 to 1967, the years in which the West Bank was annexed by Jordan, little investment in the area's infrastructure was undertaken. Egypt occupied the Gaza Strip during the same period but did not annex it, and also offered little investment. From June of 1967 until 1991, Israel

occupied both territories and did not invest in either region's infrastructure to a great extent.

Stability

No factor may prove more important to attracting investment than ensuring national, if not regional, stability. Jordan has evolved in recent years into a stable, increasingly democratic and capitalist nation, despite its alliance with Iraq during the recent Gulf War. King Hussein was the first national leader in the region to sign a peace treaty with Israel, aside from Egypt's commitment nearly two decades ago.

Jordan, at great risk of regional alienation and internal stratification, has placed itself at the forefront of the peace process.

Hussein has boldly criticized fellow Arab leaders for their apprehension toward joining the process. Beginning in 1996, and most noticeably in August of 1996, he assumed an intermediary role between newly-elected Israeli Prime Minister Binyamin Netanyahu and Syrian president Hafez Assad, the most reluctant leader of Israel's border states. Hussein's discussions with Netanyahu have also sent a strong signal to Jordan's business community that relations between Jordan and Israel shall remain positive for some time to come.

In 1995, Hussein even called Parliament in from its summer recess to repeal a number of anti-Israeli laws, keeping one of his early commitments in the peace process. His actions are seen within the international business and diplomatic communities as a strong sign of his willingness to enable foreign investment, and institute the incentives to attract such investment.

For example, prior to Jordan's August bread riots, donor nations, in an expression of support for Amman's continuing economic reforms, pledged over US\$1 billion in aid over the next two years. The duality of these events exemplifies the balance of political risk and economic gain through peace and reform that Jordan is facing.

The Palestinian Authority has not projected such efforts. The PA's early performance as a government has drawn much scep-

ticism. Its security forces have been the subject of numerous allegations of human rights abuses, and the PA itself has been accused of widespread corruption. As a result, much of the population under PA jurisdiction has grown dissatisfied with its government, and many have even begun to question its legitimacy. These factors have left potential foreign investors uncertain of how long this initial regime may last, and whether a stable Palestinian nation could ever be born.

For example, many long-term large infrastructure projects to be financed by the international donor countries were put on hold following the Palestinian elections, based on mixed reports from election observers. In place of the larger projects, smaller short-term projects have been suggested, but the need for the

long-term projects still exists. Many in the international donor community have simply begun to question the likelihood of larger projects actually being completed.

The Investment Climate

Jordan has more actively sought foreign investment, including joint ventures with Israel, than the Palestinian Authority. Differences in the language and application of each government's encouragement of investment laws illustrates this point. Chiefly, the Jordanian law has been modified to lessen, if not eliminate, the possibility of political or other irrelevant criteria tainting the

investment approval process. This has instilled investor confidence in Jordan. The PA law, however, is not moderated as such, resulting in fewer approved investments, and less investor confidence in the PA and the investment opportunities it offers.

Joint Ventures with Israel

The PA has not allowed any Israeli firms to register in the territories, and approved only a few joint ventures with Israelis since the signing of the Oslo I agreement, causing potential foreign investors to question the PA's interest in creating a vibrant private sector and market-based economy. These investors seek the ability to distribute their products throughout the Middle East, including the consumer-oriented Israeli economy.

Jordan has more actively sought foreign investment, including joint ventures with Israel, than the Palestinian Authority, the Jordanian law has been modified to lessen, if not eliminate, the possibility of political or other irrelevant criteria tainting the investment approval process

The PA's actions project an image of poor economic relations between it and Israel, making distribution from one entity to the other seem less likely to transpire.

Accordingly, one of Arafat's economic advisors, Gabriel Benon, recently wrote of his opposition to economic cooperation between the PA and Israel, and to the creation of a common market in the Middle East. He noted that the PA will not allow the Israelis to replace their military occupation in the territories with an economic occupation.

The small number of PA-approved investments came despite the enthusiasm of Israelis to invest in the territories, an enthusiasm greater than that displayed by even the Palestinian diaspora. That both approvals are monopolies and allegedly the result of pay-offs to Arafat's government only lessens the attractiveness of the PA for foreign investment.

Joint ventures provide a proven mechanism for developing economies, such as those of the Middle East, to acquire stable, large and evolving industries that bring considerable employment and investment. Foreign investment naturally precedes domestic investment, forming the anchors of an economy and providing stability for smaller domestic industries to grow upon and technology transfers those industries can utilize.

Joint ventures between Israel and either Jordan or the PA offer each party something to gain. The Israelis would obtain access to cheaper labour and land while Jordan and the PA would receive increased economic growth and employment, as well as the transfer of technology and access to Israel's trade ties throughout the West and Far East. Because of their similar characteristics relative to Israel and other developed economies, Jordan and the PA can be seen as competitors for foreign investment.

The prospects for trade within the region are less than optimistic. The Arab countries as a whole present a market smaller than Italy's, and only five percent of Arab trade is within the region. These countries as a group import approximately US\$ 130 billion per year, less than South Korea and Japan each import. The true market for the region's exports will be in the

developed economies of the West and Far East. Considering this, joint ventures seem more likely to bring the economic benefits these nations seek.

Granted, in certain respects the PA and Jordan face vastly different circumstances. The PA, as a legitimate government able to enact policy, is starting from scratch while Jordan is a more stable nation. It is natural to expect the PA to face certain difficulties in its early stages of existence. The Israeli-instituted border closure in the winter and spring of 1996 also damaged the PA's ability to convey an image of stability, and thus attract investment, and this occurred outside of the PA's control.

But the PA does carry enough authority regarding its own affairs to take many of the actions necessary to better attract foreign investment, and compete with Jordan for this investment. Paramount in such an effort, is the reformation of the investment approval process so that political or other irrelevant criteria do not taint the process. Just as important, the PA must commit itself to opening up its economy to the investment process, both in rhetoric and policy.

Jordan's marked success in attracting foreign investment just within the first half of 1996, in effect, serves as a prime example to the PA, and other nations which have acted hesitantly toward the peace process, of the type and scope of economic benefits that come from peace and positive economic relations with

Israel. Because they have become competitors for foreign investment, a portion of Jordan's increased investment can be seen as coming at the expense of the PA, an unforeseen outcome to the peace process.

The PA has not allowed any Israeli firms to register in the territories, and approved only a few joint ventures with Israelis since the signing of the Oslo I agreement, causing potential foreign investors to question the PA's interest in creating a vibrant private sector and market-based economy

Erratum

In the article concerning the memorandum for the restitution of Jewish property in Hungary, by Dr. Peter Segal, in *JUSTICE* No. 10 (Sept. 1996) p. 35, the date of the memorandum should have read June 1996, and not June 1966.

Majority Decisions in Jewish Law

Joseph Rivlin

The Biblical words of siding with the majority¹ is *halakhically* interpreted in the *Talmud* as a direction to the court (*Beth Din*) to hand down its decisions according to the majority opinion of its members. The numerical composition of the court is regulated in Jewish Law in the following way: Property cases are decided by a court of three; capital cases are decided by a court of twenty-three; and a court of seventy-one decided national issues.² In every instance the verdict is handed down by a majority. The *Mishnah* expresses it thus: “[If] two [judges] say: He is innocent and one says He is guilty he is innocent”.³



Maimonides (Moshe ben Maimon) codifies it in the following way: If the Court is divided, some voting for acquittal and others for conviction, the majority opinion is followed. This is a positive biblical command, as it is said: “To incline after the many”.⁴ In every legal system questions arise concerning majority decisions and Jewish law too wrestles with various issues bound up with this subject, e.g. are verdicts always dependent on majority decisions? Can a majority of one be regarded as a majority or is there need for a decision to be made with a larger margin? What is the law in the case of a judge withholding his opinion? Is there importance to the voting procedure; is it to be held *in camera* or is it to be conducted according to a certain pattern? Is there any significance to the opinion [of all members] or just to those concurring? Is the decision of a majority also applicable outside the courtroom? Jewish law dealt with each one of these questions and, furthermore, resolved them. We shall review the

innovations introduced in dealing with these questions.

Insufficient Quorum

A quorum of judges is needed for every court both for the hearing and verdict and hence any deficiency in these spheres *per se* renders the judgment void. Moreover, even if the judges heard the case together, if one of them declares ‘I cannot reach a decision’, no verdict can be given and this applies also where the rest of the justices were unanimous in their decision. Spelled out it means that every judge must render a verdict after participating in the court hearing and decision. The *Mishnah* states it

thus: “[If] one says: He is innocent and one says: He is guilty - or even if two declare him innocent and two declare him guilty, but one of them says: I don’t know, they have to add to the judges”.⁵ So too in capital cases: “And even if twenty-two vote for acquittal or vote for conviction but one says: I have no opinion, they add to the number of the judges”.⁶ The adding of judges is necessary in order to meet two requirements:

1. To reach a verdict through judges expressing an opinion.
2. The number of these judges shall be no less than that required for the pertinent case. These principles are well illustrated by the examples Maimonides brings:

“If one finds him not guilty, one finds him guilty and one has formed no opinion, or two find him not guilty or guilty and one

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1 Exodus 23:6

2 M. [=Mishna] *Sanhedrin* Ch. 1.

3 M. *Sanhedrin* 3:6. Similarly a not guilty verdict in a capital case, *ibid* 3:5.

4 Exodus 23:2, Maimonides, *The Book of Judges, Sanhedrin*, 8:1.

5 M. *Sanhedrin* 3:6.

6 M. *Sanhedrin* 5:5.

has formed no opinion, two more judges are added. There are thus five judges deliberating the case. If three find him not guilty and two find him guilty, he is pronounced not guilty. If three find him guilty and two find him not guilty, he is pronounced guilty. If two find him not guilty, two find him guilty, and one has formed no opinion, two more judges are added. But if four find him not guilty or guilty and one has formed no opinion or three find him not guilty, one guilty, and one has formed no opinion, the majority opinion prevails. It matters not whether the one who has formed no opinion is a member of the original court-of-three and was undecided at the outset (of the trial), or is one of the judges that have been added. If they are evenly divided and one has formed no opinion, two more judges are added... until the tribunal comprises seventy-one men.”⁷

Even though among the five judges there is one who declares: I have formed no opinion since a tribunal of three is required on the case in hand, a clear opinion has been formed and a majority of those agreeing to the same verdict has emerged, judgment is delivered. If a majority opinion is not reached despite the maximum number of seventy-one judges on the tribunal, the plaintiff cannot realize his claim and the respondent receives the benefit of the doubt ‘and the money remains in the possession of its owner’.⁸

A Special Majority

Many of the legal systems have determined that certain issues require a special majority. Jewish law determined such a principle in capital cases. A sentence of death requires a majority of no less than two. The *Mishnah* derived that from the Biblical verse: “You shall not follow a majority to do evil; to incline after the majority”⁹ whose explication is “to teach that the majority to ‘incline after’ for good [*i.e.* for a favourable decision] is not the one to ‘incline after’ for evil [*i.e.* for an adverse decision] since for good, a majority of one suffices; whereas for evil, a majority of two is required”.¹⁰ This point is stressed as a distinguishing characteristic between capital and civil cases:

“What is the difference between civil and capital cases... in property cases they decide by a majority of one whether for acquittal

or for conviction, while in capital cases they decide by a majority of one for acquittal but only with a majority of two [judges] for conviction.”¹¹

Maimonides incorporates in his ruling the fact that we are dealing here with the death sentence:

“But in capital charges, in the event opinions differ as to whether the accused is liable to death, if the majority is for acquittal, he is acquitted; but if the majority is for conviction he is not put to death unless those who are for conviction exceed those who are for acquittal by at least two.”¹²

Except for this extraordinary case, the majority of cases call for a majority of one. We do find in the *Halakha* a requirement of a special majority in certain instances unconnected to court verdicts, e.g. the requirement for a majority of two on descent issues such as a single woman who has become pregnant and it is not known who is the person responsible. The female offspring will be able to marry a *Kohen* only if the majority of the passers-by are persons of legitimate status and the majority of the inhabitants of the city whence these passers-by had come must also be legitimate. Hence, the underlying assumption is that even if the passers-by who had left the city comprise a minority and yet a majority of them are legitimate, we have here a special majority of 75% to enable the offspring to marry [a *Kohen*].¹³ This also applies to the double doubt. A man marries a woman and it emerges that she had committed adultery. There are two doubts here: The first is whether she had intercourse before her betrothal (*kiddushin*) or after it had taken place and the second doubt is whether it had taken place with her consent or not. From the arithmetical side we have here a special majority of 75% to enable the woman to retain her unblemished status and she is permitted to her husband.¹⁴

Independence

The judge is obliged to express his opinion and hence it has been ruled: ‘Any judge in a capital case whose vote - either for

7 Maimonides, *Sanhedrin* 8:2.

8 *Ibid* 9:2.

9 Exodus *loc. cit.*

10 *M. Sanhedrin* 1:6.

11 *M. Sanhedrin* 4:1.

12 *M. Sanhedrin* 8:1.

13 Babylonian *Talmud, Kethuboth* 15a; Maimonides, *Issurei Biah* 18:14.

14 *Kethuboth* 9a; Maimonides *ibid.*¹⁰

acquittal or for conviction - voices not his own carefully considered opinion but that of a colleague, transgresses a negative command'.¹⁵ In order to ensure this independence, a special arrangement was made for a final counting of votes: '... in capital cases we commence with (the opinion of) those on the side (benches)'.¹⁶

Maimonides explains:

"It had been learned by tradition that in capital cases we do not begin with the eminent one lest they rely on his opinion and do not regard themselves as worthy to disagree with him but each one shall say what is his own opinion."¹⁷

Unanimity

An exceptional ruling of Rav Kahana is found in the *Talmud*: 'If the *Sanhedrin* unanimously find (the accused) guilty, he is acquitted. Why? - Because we have learned by tradition that sentence must be postponed till the morrow in hope of finding new points in favour of the defence. But this cannot be anticipated in this case'.¹⁸ The implication of this is that if all the judges vote to convict him, the defendant is acquitted. The reason brought in the *Talmud* is connected to another ruling: 'Stay of execution', by which: 'In capital cases they come to a final decision for acquittal on the same day but on the following day for conviction'.¹⁹ And as Rashi explains: 'If they acquitted him on the first day, they stop his trial immediately and he is free. But if they cannot acquit him on the first day, his trial is postponed to the next day, in the hope that perhaps new points in his favour will be found during the night'.²⁰ The basis for this is if there is a judge in favour of acquittal, one has to postpone judgment in the hope that this will influence his fellow judges who are for conviction. If, however, they are all for conviction, there is no room for mutual influence and no reason for postponement of sentence. In such circumstances where postponement is pointless, the verdict has no validity and he is, therefore, freed.

Though this ruling applies only to capital cases attempts were made to restrict it more on account of the great and revolutionary innovation it initiated. Maimonides wrote here: 'If in trying a capital case all the members of the *Sanhedrin* forthwith vote for conviction, the accused is acquitted'.²¹ There were those who deduced from the stress on the word forthwith (*shepathu*) that all the judges decided at once at the beginning of the hearing to find the accused guilty, and in such a case where there is a suspicion that the verdict is not true, the accused is acquitted. Others held that this ruling is only applicable to the *Great Sanhedrin* and not to other tribunals.²²

Among contemporary commentators some even explained 'he is acquitted - he is immediately executed' but this interpretation has no basis in fact.

Erudition

The question is posited: Is the 'quality (or weight) of votes' to be taken into consideration as an additional factor when counting the votes? Is there a method for quantifying votes? It seems reasonable to assume that the wisdom of the members of the court is equal, notwithstanding the fact that there are, here and there, differences between them, their 'wisdom', from the judicial point of view, is equal. In sum, differences are not given to measurement and quantification and can have no practical application and hence reference is constantly made to the number of votes and not their value. However in our traditional sources there is discussion on the issue of 'erudition'. The first to relate to it explicitly was Rav Hai Gaon. In a *responsum* attributed to him it is stated: In a tribunal of three, two are of this opinion and the other of another opinion, if they are equal in wisdom we disregard the dissenting opinion and act according to the two, and if the one is superior to the two we accept the opinion of the one who has given cogency to his findings.²³ A similar view is found in *Sefer ha-Hinnukh*:

"To incline after the majority, *i.e.* when a controversy occurs among the Sages about some law among the laws of the entire *Torah* and so too about a particular (matter of) law... The choice of his majority is evidently when the two contending groups

15 Maimonides, *Sanhedrin* 10:1.

16 *M. Sanhedrin* 4:2.

17 *M. Sanhedrin* 10:6.

18 *loc.cit.* 17b.

19 *M. Sanhedrin* 4:1.

20 *Sanhedrin* 32a pericope beginning: Capital Punishment.

21 Maimonides *Sanhedrin* 9:1.

22 Commentaries to Maimonides *ad loc.*

23 *Teshuvot Geonim Kadmonim*, ch. 144.

know the *Torah* equally. For it cannot be said that a small group of *Torah* scholars should not outweigh a large group of ignoramuses, even it is as immense (in number) as those who left Egypt.”²⁴

The reasoning is similar to what had been said by Hai Gaon but has been formulated by the *Sefer ha-Hinnukh* not in the context of a judicial decision but refers to a controversy among the Sages. Other commentators too are not referring to judgments but to general matters. Rabbenu Nissim ben Reuben Gerondi rules as regards feeding a sick person on *Yom Kippur* (the Day of Atonement): ‘And since we have a tradition that the question is decided according to the opinion of experts it follows that here too we do likewise. And hence one expert who disagrees with two others who are not experts, we do not act as they opine.’ He concludes: ‘And, therefore, if it is clear to us that his expertise outweighs by far the other, we follow his decision whether it be lenient or stringent’.²⁵ From the foregoing, it follows that a minority endowed with far more wisdom outweighs the majority and overrides it. Other commentators aver that the weight accorded to wisdom is not so overwhelming as to override a majority but is equal to it. Menachem ben Shelomo ha’Meiri explains it thus: ‘In any case, where a controversy broke out and a count was taken showing that one group had a majority over the other one, if they are of equal standing, the view of the majority is accepted. If the minority’s reasoning is more cogent, no decision is taken and they are regarded as two equal groups’.²⁶ This is also to be inferred from *Yom Tov ben Abraham Ishbili* (Ritba): ‘The School of Shammai is sharper, hence is regarded to be equal and one acts according to its opinion even for leniency...’.²⁷ In the work *Shevut Yaakov* (Yaakov ben Yosef Raisser) a *responsum* is cited drawing support from Nahmanides ruling that if three sat on a case and two of them were ignoramuses who disagreed with the third, an expert, the majority opinion prevails. Samuel ben Moses de Medina (Maharshdam), also supports this view. He was asked about the weight to be accorded to wisdom in community matters and replied: ‘The Biblical command of “siding with the

majority” applies specifically when the two disagreeing parties are equal, then the advantage of being a majority comes into play. However, if they are unequal then it is possible for one man to be weightier than one thousand men’.²⁸

The Weight of Erudition in other Decisions

Shabbetai ben Meir ha-Kohen (Shakh) sums up the different factors taken into consideration with regard to the personalities divided on *Halakhic* questions, but is not concerned with court (*Beth Din*) decisions, thus he writes:

“Two scholars who are divided on issues of defilement and purity or what is permitted and forbidden - if the disagreement pertains to a Biblical precept - the stringent view, though it be held by the scholar who is of lesser stature and number *i.e.* he has fewer pupils than his colleague, prevails. Should he be a pupil of his then the teacher’s decision prevails even where the pupil is more stringent concerning a Biblical precept. If the pupil has acquired learning up to the level of his teacher, they are regarded as equal. In a case concerning a Rabbinical precept where the disagreeing parties are of commensurate stature, it not being known who is greater, the opinion of the lenient one is followed. Should one of them be greater or has more pupils and he is lenient, even where the stringent opinion of the lesser one has been put into effect, it is rescinded. If it is the greater one who is stringent we rely on the lesser one in an emergency. In a case where one is greater in learning but the lesser one has many pupils even when they (pupils) do not express any opinion, much more so, when the majority of the pupils deliver a concurring opinion as their teacher, we regard the latter as surpassing his colleague. Seniority in age does not accord anyone a superior status and we rely on the pupil in place of the teacher where a Rabbinical precept is involved and there is urgency. Further, where there is a majority in a controversy and the stringent opinion of one was put into effect the decision is rescinded; should the majority have been stringent in a Rabbinical precept and there is urgency, we rely on the individual’s opinion.”²⁹

The first point to note is that where there is disagreement between a single opinion and a majority, ha-Kohen apparently holds that the decision goes according to the majority since he does not mention erudition or number of pupils. The discussion concerns a disagreement between two individuals who hold diametrically opposed views.

24 Commandment 78.

25 The end of *Yoma*.

26 *Yebamoth* 14a.

27 *Ibid.*

28 *Shevut Yaakov*, ch. 137; *Maharshdam*, ch. 37.

29 *Shulhan Arukh*, *Yoreh Deah*, end of 242.

The principles which are derived from these ruling are:

1. A difference in age does not constitute grounds for reaching the verdict.
2. Where a pupil disagrees with his teacher, the assumption is that the teacher's opinion carries more weight unless it is known that the pupil's stature has become commensurate with that of the teacher, in which case they are regarded as equal and the decision will be made upon the basis of other criteria.
3. On matters connected to Rabbinical prohibitions, the decision goes according to the more erudite one or the one with a greater number of pupils.
4. When there is disagreement between one more erudite and one with more pupils, the latter prevails.
5. On Biblical prohibitions the stringent opinion prevails even where the holder of the lenient opinion is more erudite or has a greater number of pupils. The exception to this is when the controversy is between teacher and pupil.
6. Rabbinical precepts where there are no additional factors are decided according to the lenient view.
7. Rabbinical precepts questions where there is also urgency the decision goes according to the lenient opinion even where it is pupil versus teacher or one against many.

Disputes Between Courts

The *Mishnah* says: 'And why do they record the opinion of a single person among the many, when the *Halachah* (accepted ruling) must be according to the opinion of the single person it may depend on him. For no court may set aside the decision of another court unless it is greater than it in wisdom and in number.'³⁰

Maimonides explains that the other court if it acts according to the opinion of a single person will only be justified doing so if it be greater than the first court in wisdom and in number. However, Abraham ben David of Posquieres holds that the second court can act according to the single person's opinion if it maintains that the *Halacha* is in consonance with it even if it does not surpass the first court in wisdom and in numbers. The conclusion to be drawn is that the principle: 'The latest tradition is the important one' overrides the principle: 'Where there is

controversy between the single person and the many, the *Halacha* is according to the many'.

Medical Consultation

According to the *Talmud* an ill person is to be fed on the Day of Atonement 'at the word of experts'.³¹ We have already cited the opinion of Nissim ben Reuben Gerondi: 'And hence one expert who disagrees with two others who are not experts we do not act as they opine'.³² But Nahmanides (Moshe ben Nahman) rejects this approach and writes thus: '... and it is not so, since we have not found with regard to the *Sanhedrin* that decisions are not made according to a superiority of wisdom but rather by a superiority of numbers'. In his view the only difference between the *Sanhedrin* and a medical consultation is that when the doctors are evenly divided, one takes into consideration wisdom and expertise, which is not the case with the *Sanhedrin*. However, a minority of experts does not override the majority except where he was exceptionally endowed with wisdom and says that the ill person be fed we follow it in its leniency. Rabbi Abraham Hafutah sums up the various opinions:

1. Maimonides and his followers maintain that we act according to the majority of doctors and only when there is an even division of opinion it is the expertise of the doctor which is the deciding factor.
2. The opinion of Jacob ben Asher (Tur) and others is that if two say that the ill person needs to eat he is fed even if one hundred disagree and say that he does not need and they be greater experts. Similarly, when there is a disagreement between two individuals we feed the ill person though the one claiming that there is no necessity to feed, be the greater expert.
3. The opinion of Nissim Gerondi that it is the expertise of the physician which determines the course of action, be it for leniency or for stringency.
4. The opinion of Nahmanides is that the expertise of the doctor is useful only for a lenient decision.³³

Summary

The aim of the article was to elucidate the principles guiding

continued on p. 34

³⁰ *Eduyyot* 1:5.

³¹ *Yoma* 82b.

³² *Yoma* 83.

³³ *Noam*, 5 (1962), pp. 195-202.

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continued from p. 33

decisions in Jewish law and the various approaches to gauge the importance of the preponderance of wisdom. The conclusions drawn point to the fact that outside the courts there is a much greater tendency to recognize the weight which expertise and wisdom command.

There are a number of authorities who also accord importance to superiority in wisdom in the court. It seems, however, that the inclination of most practitioners of Jewish law is that in the courts and for judicial decisions it is the number of concurring opinions and not their profundity which determines the verdict. The basic assumption which underlies this is that one appointed to be a member of the court is worthy and his conversance with the law is extensive and that no substantial gaps in comprehension, knowledge and wisdom exist to change the judgment.

Anti-Semitic Publication in Bulgaria

In 1994, *The Teachings of Fascism* by Benito Mussolini, was published by Hristo Hristov in the town of Veliko Tarnovo, in Bulgaria.

While the 30 page book is not itself anti-Semitic, the foreword - comprising 31 pages and signed by Julianus Augustus (Hristo Hristov's pseudonym) - is deeply and dangerously anti-Semitic. In it, he declares that the Jews are guilty of causing all the world's major crises up to the present day, and that they have created Bulgaria's social and economic crises.

The Bulgarian section of the Association decided that such a publication could not be left without legal response and, together with the organization of Bulgarian Jews "Shalom" (the Federation of Jewish Communities), approached Bulgaria's Chief Prosecutor. After carrying out a preliminary investigation - including obtaining evidence from readers as to their reaction to the book - the case was passed to the District Court in the town of Veliko Tarnovo, charging Hristo Hristov with a crime under Art. 162(1) of Bulgaria's Penal Code.

The trial is expected to start within the next few months.

Jossif Geron

President of the Bulgarian Section, IAJLJ

Gabay Re-elected to U.N.'s Administrative Tribunal

Mr. Meir Gabay, Chairman of The International Council of the Association has been recently re-elected by the United Nations General Assembly to a second term as Judge of the U.N. Administrative Tribunal.

Mr. Gabay has served in that capacity since the beginning of 1994. Prior to that he served as Civil Service Commissioner and Director General of the Ministry of Justice of Israel.

Law Versus Justice?

Shulamit Almog

Nachmani v. Nachmani
Further Hearing 2401/95
Unpublished, Judgment delivered on 12.9.1996
Before President Barak, Justices Bach, Dorner, Goldberg,
Kedmi, Maza, Orr, Strasberg-Cohen, Tal, Tirkel and Zamir

On 12 September 1996, the Supreme Court of Israel delivered judgment in the Further Hearing of the petition filed by Ruthi Nachmani against her husband Daniel Nachmani. This judgment is another crucial and perhaps even decisive, but not final stage in the continuing fued between a couple, which even if it originated within the protected sanctum of the laws of privacy, has since become part of the public domain and the subject of incessant debate and controversy.

The judgment given following the Further Hearing has stirred interest on a number of levels. First, like the previous judgments concerning the Nachmani couple, this decision relates to a complex human story, involving difficult controversies, conflicting emotions and intense disputes. It is little wonder that they prompt mixed feelings of unease, fascination and a sense of identification in the hearts and minds of the observer. Second, the principle legal question considered by the judgment, namely, whether a spouse who consented to a process of artificial insemination may retract his consent, where the eggs have already been fertilized artificially, is a matter of great interest in itself, as are such ancillary questions as what law applies when the right to parenthood clashes with the right not to be a parent, and the legal status of the fertilized eggs. These questions, which are directly connected to the specific dispute being tried, are the subject of a

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very interesting discussion in the judgment, on a number of different levels. Third, the judgment also relates to a broader set of issues, unconnected with the particular facts of the dispute at hand, which attempt to deal with fundamental issues which even today are central to



an examination of the nature of law. In this connection, the judgment draws a complex picture of differing and occasionally conflicting philosophies concerning the ancient contest between law and justice, and analyzes principles of adjudication in general. It is rare to find a judgment containing such varied (11 justices heard the case) and detailed (the judgment extends over 186 pages) opinions on these issues.

The Story So Far

Danny and Ruthi Nachmani were married in 1984. Three years later, as a result of an operation, Ruthi lost the ability to become pregnant and give birth naturally. In 1988 the couple decided to attempt to bring children into the world by extracting eggs from Ruthi, fertilizing them in a laboratory with sperm taken from Danny, and transplanting the fertilized eggs into the womb of a surrogate mother. The couple planned to carry out the fertilization stage of the procedure in Israel, and the surrogate stage in California, U.S.A., where they could engage the aid of an establishment dealing with such matters. The couple encountered difficulties following the promulgation of regulations which precluded artificial insemination in circumstances such as

those which obtained in their case. Nevertheless, united in their desire to fulfill this dream, the Nachmanis decided to engage in legal proceedings and petitioned the High Court of Justice. This petition was settled in a compromise which received the effect of a judgment in 1991, and in terms of which the artificial fertilization could be carried out in Israel. The couple immediately began putting their plan into action. Over a period of 8 months Ruthi underwent a series of difficult medical treatments, during which eggs were extracted from her body, 11 of them were fertilized and thereafter frozen in a hospital. During the entire period (as indicated by Justice Dorner in the Further Hearing) Danny supported his wife, encouraged her and helped her. The couple entered into a contract with an establishment dealing with these matters in the U.S.A. for the purpose of locating a surrogate, however, at this stage the Nachmanis began having marital difficulties.

In 1992 the couple separated: Danny left the marital home and began living with another woman. Two children have since been born from this relationship. Ruthi, for her part, requested the hospital housing the frozen eggs to release them to her, so as to enable her to proceed with the original plan, namely, transplantation of the eggs into the womb of a surrogate mother in the United States. As a result of Danny's opposition, the hospital refused to release the eggs into Ruthi's care. Ruthi filed suit in the District Court of Haifa. The District Court Judge Hanoch Ariel found in her favour, holding that the hospital was bound to enable her to make use of the fertilized eggs for the purpose of transplanting them in a surrogate, and that Danny had to refrain from interfering in this process. Danny appealed to the Supreme Court. His appeal was heard by 5 judges and upheld by majority decision (*C/A 5578/93 R. Nachmani v. D. Nachmani and Others*, Unpublished). Counsel for Ruthi petitioned for a Further Hearing in the matter. President Shamgar decided to uphold the petition because of the novelty and interest of the issues in dispute, and as a result of this decision the dispute was brought for a Further Hearing before an expanded panel of 11 judges. This panel, by a majority of 7 against 4, decided to uphold the petition filed by Ruthi and set aside the earlier judgment.

This did not put an end to the legal battle. In March 1996 the Israeli parliament enacted the Contracts for the Carrying of Embryos (Confirmation of the Contract and Status of the Child) Law - 1996. Danny Nachmani filed an application in the District Court of Haifa to prohibit Ruthi from continuing with the process of transplanting the eggs, by reason of various restric-

tions imposed by the new law. The District Court Judge Ariel dismissed the application, and held that the Surrogate Law is not applicable to the facts of the instant case. Danny appealed against Judge Ariel's decision to the Supreme Court.

Eleven Paths to Two Destinations

The President of the Supreme Court, Justice Aharon Barak, was one of the 4 judges in the minority who dismissed Ruthi's petition. In giving the reasons for his position, Justice Barak wrote:

"The conclusion which I have reached, in my view reflects existing law. It is inescapable from every possible legal vantage point."

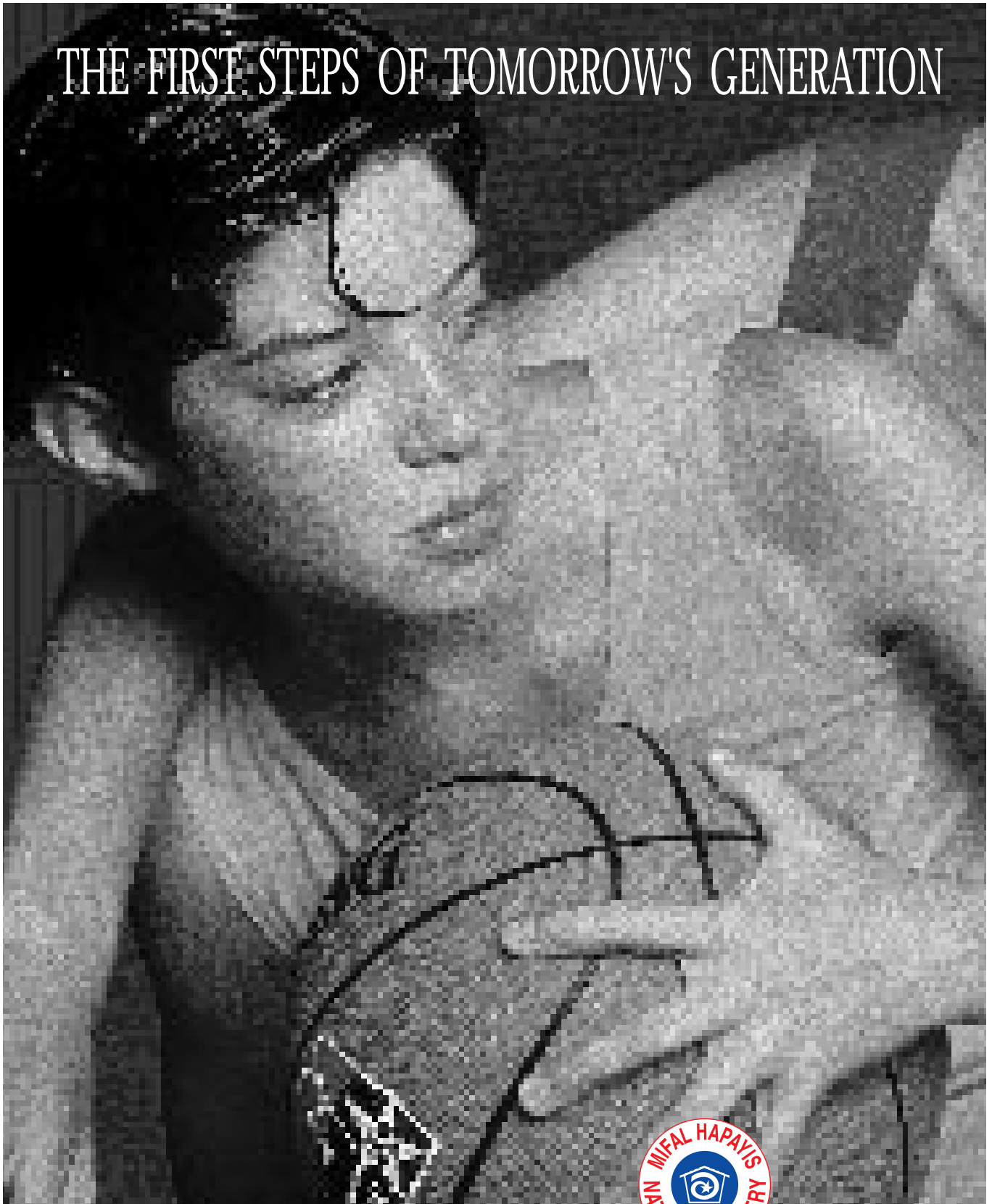
Notwithstanding this decisive statement, the Nachmani case provides a fascinating record of how judges approaching the same issues from different perspectives, reach opposite legal conclusions.

In her comprehensive judgment, **Justice Strasberg-Cohen** in fact considered a range of legal issues touching these matters, however she was of the opinion that the field of law closest to the dispute at hand was "contractual law in its wide sense." She saw the agreement between Ruthi and Danny in connection with the birth of a child as a special contract, which was valid only for so long as a proper marital relationship was in existence. Such an agreement "cannot be enforced and it is not appropriate that it be enforced in the absence of a mutual desire on the part of the two for the duration of the process."

Justice Tal was of the opinion that this case related to "the field of medical law which has not yet been regulated by the legislator" and that in such a situation, where there is a *lacuna*, the judge must, in his capacity as a developer of the law, create norms which will apply to the case before him. In order to create such a norm, Justice Tal examined the conflicting interests, the legitimate expectations of the parties and the proper legal policy considerations. This examination led him to uphold the petition submitted by Ruthi, and even draw the wider conclusion that in any case where there was no agreement between the parties, such as in the instant case, the husband/wife had to be allowed to continue with the transplantation process even in the face of opposition from his/her spouse.

Justice Dorner also preferred the path favouring a balancing of interests. In her view the case required the establishment of a

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Tens of thousands of lively youngsters flock to the sport halls which are at the very heart of the community centers built by Israel's Mifal Hapayis National Lottery the length and breadth of the country. Many of the children who are today taking their first steps on the sports courts of the Payis centers will become our sporting champions of tomorrow. Israel has all the luck - courtesy of the Mifal Hapayis National Lottery. ☺

balance between the right to be a parent and the right not to be a parent. Such a balance had to be drawn while bearing in mind the stage at which the process had been put on hold, the representations made by the parties to each other, the expectations of each party created thereby, and the reliance placed on such representations, as well as the alternatives available for realizing the right to parenthood. Balancing the various interests in this way caused Justice Dorner to uphold the petition.

Justice Goldberg, like Justice Tal, was of the opinion that there was a normative *lacuna* in the instant case, and in the absence of any other applicable option, assistance should be sought from the fundamental value underlying our legal system, namely the aspiration to obtain a just result. For this purpose, the judge attempted to assess which of the parties would be most damaged if his petition was dismissed. On this basis the judge concluded that the result which afforded the greatest justice would be achieved by upholding Ruthi's petition, as her reliance on the initial consent of Danny was reasonable in nature.

Justice Kedmi assigned greater importance to the existence of the fertilized eggs, which in his view comprised "a new entity, combined from the two persons who created it, and which can no longer be separated". The spouse wishing to retract his consent had no right to destroy the contribution of his/her partner to the fertilization process, apart from destroying his own contribution to the fertilized eggs. With regard to destroying the fertilized eggs, Justice Kedmi added that each spouse had the right of veto; the right of a person requesting to preserve the eggs and continue the process taking preference over the right of a person wishing to destroy them. On this basis Justice Kedmi also found for Ruthi.

Justice Tirkel was of the opinion that the answer to this complex question had to be found in "the world of internal values" and "the treasury of emotions" within each one of us. In his opinion, the right to be a parent had an "incomparably" greater weight than the right not to be a parent. Added to this was the moral conviction, held by Justice Tirkel, concerning the potential for life in the fertilized eggs, which "shifted the balance" in favour of Ruthi.

Justice Bach also found in favour of Ruthi, although he was of the opinion that even in the absence of a legislative norm it was not sufficient to rely on a legal solution based on feelings of justice. He based his judgment on the classification of rights: in his view preference had to be given to the imposition of a specific restriction on the right of Danny not to be a father

against his wishes, as opposed to the imposition of a general restriction on the right of Ruthi to be a mother. This was because the injury afforded by the former restriction to Danny's rights was less than the injury afforded by the latter restriction to the rights of Ruthi.

Justice Orr thought that Ruthi and Danny had entered into an agreement having legal validity, but of a special nature. He attempted to assess the attitudes of the two parties as reasonable people, and on this basis concluded that the consent of the two sides was needed for each and every stage of the long and complex procedure leading to the birth of a child by means of artificial insemination. Where one of the parties retracted his consent prior to the transplantation of the egg - the other party had no legal grounds for compelling his spouse to continue with the process. Accordingly, Justice Orr held that Danny's position was to be preferred and the original judgment should be upheld.

Justice Zamir defined his position as close but not identical to that of Justice Strasberg-Cohen. In his view the Public Health (Artificial Insemination) Regulations 1987 applied to the fertilization process. Under these regulations, Danny's consent was required for the transplantation of the fertilized eggs. Danny refused his consent to the transplantation process and was not estopped from so refusing. Accordingly, Ruthi had no grounds for forcing Danny to agree to the transplant and the Court had to dismiss her petition. In Justice Zamir's view this result accorded not only with the law but also with justice.

President Barak concluded the judgment. In his view this case did not involve a clash between the right to be a parent and the right not to be one, at all, but was concerned instead with an examination of the substance of the consent reached by the parties. Under his approach, at the root of the consent reached by Ruthi and Danny, whether the same was defined as a contract or as an agreement which was less than a contract, or as "joint property" or a special "legal phenomenon", there was a presumption of continued joint marital life. When this terminated - the consent came to an end, and the transplantation procedure could not be continued against the wishes of Danny. Justice Barak held that this result was both just and accorded with the public good.

On Justice and Adjudication

Justice Zamir's judgment, which is of great rhetoric interest, contains the following statement:

“Justice, in contrast [to law] is a wilderness, in which every one goes in the direction which seems right to him, subjectively, without signposts and without traffic lights.”

And indeed, the Nachmani judgment furnishes a remarkable example of the subjectivity which underlies the perception of justice. The approaches adopted in the judgment fall within three discrete categories.

The first approach seeks the integration of law and justice. This, for example, was the approach taken by Justices Tal and Dorner. Justice Tal based his judgment on a legal analysis although he pointed out that considerations of justice also required Ruthi's petition to be upheld. Justice Dorner, followed a legal path and concurrently held that “the aspiration to justice is at the root of law”. In her view an integration of law and justice could lead to the formulation of the appropriate rule.

The second approach placed a stronger emphasis on considerations of justice. This was the position taken by Justice Goldberg, which as noted regarded justice as “the basic value prevailing in our system” and the aspiration to a just result as “deriving from judicial discretion” and central to judicial activity. Similarly, Justice Bach described the “legitimacy of considerations of justice” in general, and in this case in particular, where in Justice Bach's view there is no legislation to guide us. Justice Tirkel adopted this approach even more vigorously, emphasizing the personal sense of justice, and the fact that in his view the determination was a determination of principle, and indeed a determination of the emotions.

The third approach attempted to refrain from relying on considerations of justice or subjective feelings. This approach was also adopted by judges in the majority. Thus, Justice Maza held that a just determination in this case should in fact be based on a proper balance between the clashing rights, however, this balance could not be founded solely on feelings of justice, and in order to reach that balance use should be made of objective standards. All four of the minority judges anchored their judgment in principles of law, although they too did not hesitate to refer to their own perceptions of justice, or its place in the process of adjudication. Justice Strasberg-Cohen noted that justice is hard to define; Justice Orr cautioned against the very approach recommended by Justice Tirkel, namely, following one's personal emotions and principles. In a difficult case such as this, he warned, a judge had to withstand the temptation “to attempt to suit the result to the special set of circumstances being tried, in

order that wrong should not be committed by reason of any particular approach”. Instead of pursuing his personal beliefs, the judge should “examine the law and decide in accordance therewith”. Justice Zamir too cautioned against giving excessive weight to ‘justice’:

“...a judge must not leap from facts to justice, as if there is no law intervening between them. Justice has its own place of honour, but it must rest on a foundation of law.”

President Barak illustrated, by means of a line of hypothetical presumptions, the fluid nature of justice, and thereafter held that in his view “justice is equality”, and in this case - equality meant giving the two parties an equal right to decide for the duration of the process. In his view, mitigating factors did indeed exist - not issues of justice - which supported Ruthi's claim - but they were incapable of being determinative.

Concurrently with these statements, and perhaps not surprisingly, the minority judges took pains to answer those who might accuse them of reaching an “unjust” result and asserted that their result did in fact accord with principles of justice.

“And what will happen to justice?” asked Justice Zamir. Is it clearer or more certain following a reading of the judgment? It would appear that the answer is negative. All the references to it in the judgment emphasize its complexity, whether as a value existing concurrently with the law or in the background or whether standing on its own; its slippery nature but at the same time its powerful presence, concrete and continuous which cannot be ignored; its allure and at the same time its unattainability. Justice, it would appear, like beauty, is in the eye of the beholder.

Conclusion

This is how the Nachmani case stands at the time of publication of this issue of *JUSTICE*. It is impossible to be certain how long a legal journey still lies before Ruthi Nachmani and whether, even if she succeeds in her litigation, she will achieve her dream of raising her own genetic child. Ruthi herself relies not on law and not on medicine but on something more intangible: “I believe in God. Whatever he wants will happen”. (*Ha'aretz*, 19.11.1996, following Judge Ariel's last decision).

IAJLJ to Collaborate with Yad Vashem Against Holocaust Denial

On November 3, 1996, the International Presidency of the Association met in Israel.

Judge Hadassa Ben-Itto, President of the Association, reported on current activities and outlined plans for the future.

Delegates from country chapters reported on activities of chapters: Max Kingsley from England reported on the preparations for the meeting of the International Council in London, in June 1997, which will be hosted by the English chapter.

Joseph Roubache, President of the French chapter, reported on his efforts to assure accreditation of the European Council of the Association by the Council of Europe. The Presidency adopted the suggested framework for the activities of the European Council of the Association.

Oreste Biaza Terracini (Italy) reported on his involvement in the



L to R: I. Nener and H. Ben-Itto (Israel), J. Roubache (France)



L to R: J. Geron (Bulgaria) and M. Kingsley (U.K.)

Priebke trial and efforts to increase the membership of the Italian chapter.

Daniel Lack reported on developments in the newly formed Swiss chapter, and on plans to establish a site on the internet.

He also reported on his activities as representative of the Association at the U.N. bodies in Geneva.

Milton Zlotnik reported on the formation of a new chapter of the Association in Sao Paolo, Brazil.

Jossif Geron, President of the Bulgarian chapter, reported on the steps taken by the Bulgarian chapter against anti-Semitism in that country, with emphasis on promoting anti-racist legislation.

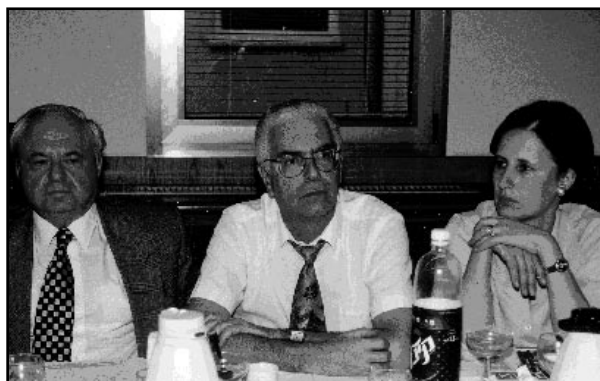
The Presidency decided on a membership drive to reach larger numbers of lawyers and judges in various countries.

In countries divided into states or provinces, an effort will be made to establish local chapters, according to the constitution of the Association.

Itzhak Nener, First Deputy President of the Association, reported on the increase of Holocaust denial around the world, and on the agreement with Yad Vashem to collaborate in combating this phenomenon by legal means. The Presidency decided to place this matter high on its agenda and encouraged Mr. Nener to continue in his efforts.

It was decided to plan a special event to commemorate the centennial of the first Zionist Congress which was held in 1897 in Basel, Switzerland. The Swiss chapter was asked to submit a suggestion for such an event, to be hosted by them.

Members of the Presidency reported on positive response to the publication *JUSTICE*, and it was decided to continue efforts to increase subscription and funding of the publication. It was also decided to try and renew the publication of *JUSTICE* in French and in Spanish.



L to R: M. Rosenne, A. Shapira and Y. Zilbershats (Israel)

WORLD COUNCIL MEETING

The International Association of Jewish Lawyers and Jurists

London, England, June 1-3, 1997

THE RULE OF LAW AT THE MILLENIUM'S END - MYTH OR REALITY?

Venue: Waldorf Meridien Hotel, Aldwych, London

Programme

Sunday, June 1, 1997

Morning - Walking tour of London's Jewish East End

- 14:00-17:00 Registration at Waldorf Meridien Hotel
16:00-18:00 Meeting of the Presidency and Heads of Sections at the Waldorf Meridien Hotel.
Chairman: Advocate **Itzhak Nener**, First Deputy President of the Association.
19:00 Welcome Reception at the Law Society, Chancery Lane.
19:30 Opening Session at the Law Society.
Chairman: Judge **Meir Gabay**, Chairman of the International Council of the Association.
Welcome: Judge **Myrella Cohen**, Q.C., Chairman, U.K. Section of the Association.
Mr. **Eldred Tabachnik**, Q.C., President of the Board of Deputies of British Jews.
Opening Remarks: Judge **Hadassa Ben-Itto**, President of the Association.
Keynote Speaker: To be announced.

Monday, June 2, 1997

8:30-9:30 **Berwin Leighton**, solicitors, who are hosting the conference will be pleased to greet overseas delegates in the Charter Suite of the Waldorf Meridien Hotel.

Morning Session

9:30 - 12:30 **Antisemitism And Holocaust Denial In The Internet Era.**

Chairman: Ambassador **Morris Abram**, Chairman, U.N. Watch, former U.S. Ambassador to the U.N. in Europe, Geneva, Switzerland.

Speakers: Mr. **Maurice Glele-Ahanhanzo**, United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination and Xenophobia. Benin, Africa (invited, not confirmed).
Mr. **Mike Whine**, Executive Director of the Community Security Trust, Board of Deputies of British Jews.
Judge **Denise Levy Tredler**, Vice-President of Association, Rio de Janeiro, Brazil (to be confirmed).

12:45-14:15 **Buffet Lunch**

Hosts: Mr. F. **Ashe Lincoln**, Q.C., Vice President U.K. Chapter, and Mrs. **Lincoln**.

Afternoon Session14:15-17:15 **Combating Terrorism - Law, Rhetoric And Reality.**

Chairman: Professor **Yoram Dinstein**, President, Tel-Aviv University, Israel.

Speakers: Mr. **David Veness**, QPM. Assistant Commissioner, Specialist Operations, Metropolitan Police, London, England.
Mr. **Jacob Perry**, President of Cellcom, Israel, former Director of the General Security Service of Israel.

20:00 Reception: Houses of Parliament.

(B) Legal Aspects of Hi-Tech**(I) Legal Aspects Of International Technology Transfer.**

Mr. **Jean-Victor Prevost**, Legal Partner, Deloitte & Touche, Paris, France.

(II) International Tax Aspects Of International Technology Transfer

Mr. **Eric Tomsett**, International Tax Partner, Deloitte & Touche, London, England.

19:30 Reception and **Gala Banquet** at Great Hall, Lincoln's Inn.*

Tribute to The Rt. Hon. **Lord Woolf**, President of the British Section, on his appointment as Master of the Rolls.

Hosts: **Sir Harry** and **Lady Solomon** of London.

* *Black Tie or dark lounge suit*

Tuesday, June 3, 1997**Morning Session**9:30-12:30 **Immigration And Asylum - Conflicting Rights And Interests.**

Chairman: Professor **Amos Shapira**, Director, Cegla Institute of Comparative Law, Faculty of Law, Tel-Aviv University, Israel.

Speakers: Ms. **Phyllis Oakley**, Assistant Secretary of State for Refugee Affairs, Washington, D.C., U.S.A.
Dr. **Francis Rosenstiel** Delegué General aus Etudes du Conseil de l'Europe.

12:45-14:15 **Buffet Lunch**

Hosts: His Honour **Israel Finestein**, Q.C., Vice President U.K. Chapter, and Mrs. **Finestein**.

Afternoon Session

14:15-17:15 Chairman: Mr. **Michael Goldmeier** - Partner, Berwin Leighton.

(A) Business Ethics

Sir **Trevor Chinn**, CVO - Chairman and Chief Executive Lex Services PLC, London.

Wednesday, June 4, 1997

Morning: Depart for TOUR TO SCOTLAND (Optional) from Wednesday, June 4 to Sunday June 8, 1997.

- Simultaneous translation English-French-English will be provided.
- Kosher food will be served at the official receptions, buffet lunch and Gala Dinner.
- Transport will be provided.

We are grateful to the **Rubin Foundation** and **Messrs Berwin Leighton**, who have generously sponsored the conference.

Registration Fees: Participant - **£200** Sterling
Spouse - **£125** Sterling

Registration Fees include:

- Gala Banquet, 2 lunches, 2 receptions, coffee/tea breaks, morning walking tour of London's Jewish East End, participation in all sessions and simultaneous translation.
- Enclosed registration form which you are kindly requested to complete and return together with a deposit for registration fees in the amount of **£100** Sterling in order to ensure your participation at the conference.
- This cheque should be made out in favour of: **"I.A.J.L.J Conference Reserve Account"**. Registration forms and registration fees in full should reach the IAJLJ office in Tel-Aviv not later than May 10, 1997.
- As accommodation at various functions is limited, we cannot guarantee participation for late registrants.
- Details of hotel accommodation and Scotland tour on page 44.

NOTE to Participants from the U.K:

Please arrange your registration directly with the U.K. Section, c/o Mrs. Susie Richman, 20 Manor Park Gardens, Edgware, Middlesex, HA8 7NA.

Telephone: 0181-9514673, Fax: 0171-7949269

Please arrange hotel accommodation and participation in Scotland tour through ISRAM.

Hotel Accomodation

Rooms have been reserved in London at the Waldorf Meridien Hotel, the venue of the conference, and also at the following hotels: Strand Palace, Forte Posthouse Bloomsbury, and the White House.

Rates:

1. Waldorf Meridien Hotel - 5 star

Aldwich, London WC2B 4DD

Telephone: 0171-836 2400

Twin or double room (2 persons sharing) including English breakfast **£170** Sterling

2. Strand Palace Hotel - 4 star

Strand, London WC2R OJJ

Telephone: 0171 836 8080

Twin or double room (2 persons sharing) including English breakfast **£132** Sterling, single room **£107** Sterling.

3. Forte Posthouse Bloomsbury Hotel - 4 star

Coram Street, London WC1N 1HT

Tel: 0171 837 1200

Twin or double room (2 persons sharing) including continental breakfast **£104** Sterling, Single room **£83** Sterling.

4. White House Hotel - 4 star

Albany Road, Regents Park London NW1 3UP

Tel: 0171 387 1200

Twin or double room (2 persons sharing) including continental breakfast **£88** Sterling, Single room **£74** Sterling.

- Rates include accommodation in standard rooms, breakfast, taxes and service charge.
- Rooms can be reserved from Friday, May 30, 1997 for those participants wishing to stay in London on the week-end prior to the conference.
- To ensure your hotel accommodation please complete the enclosed form and return it with your cheque made in favour of ISRAM also in the amount of **£100** Sterling for London hotel deposit, and **£150** Sterling for Scotland tour deposit.

ISRAM

- Address: 40 Aliyat Hanoar Street, Tel-Aviv 67450, Israel.

- Telephone:(972) (3) 6961111. FAX: (972) (3) 6966677.

Transportation to conference venue (for guests of White House and Forte Posthouse hotels only) will be provided on 2nd and 3rd of June in the morning at **£8** Sterling.

- Airport transfers arrival and departure will be provided at an extra charge for those who reserve it when booking hotel accommodation with Isram..

Please note:

- **June is high season in London for tourism and hotel accommodations.**
- **Early registration is strongly recommended.**
- **Rooms will be reserved on the basis of first come first served.**

Tour to Scotland

4 Nights

Wednesday June 4 - Sunday June 8, 1997

Rate per person in a double room £435 Sterling

Single room supplement £96 Sterling

Package rate includes: 4 nights accommodation in 4 star hotels as specified below, full English/Scottish breakfast daily, dinner at Lancaster and Glasgow hotels, touring in modern, ventilated bus, fully licensed English guide for 3 days, walking tour in Edinburgh with Scottish guide, entrance fees to all places of interest en-route and in Edinburgh, portage at hotels, local taxes and service charges, departure transfer from hotel in Edinburgh to airport, Israeli escort through-out.

Package rate does not include: insurance, tips to guide and driver, tips to hotel staff, expenses of personal nature, international and local flight.

Note:

It is strongly recommended that all participants to the congress make sure that they have personal health and travel insurance, valid for the full duration of the trip.

Programme

Wednesday, June 4:

London - Stamford - York - Lancaster

Depart London to York. Stop in Stamford, a quaint Georgian town, often used as a setting for filming of classical novels. Continue to York for an "in depth" visit including the Minster, the Castle, Medieval Walls, Clifford Tower associated with Jewish history, *etc.* Free time to stroll in this unique historical city. Evening arrival in the Forte Posthouse Lancaster Hotel for dinner and overnight.

Thursday, June 5:

Lancaster - Lake District - Borders - Galsgow

After breakfast depart to the English Lake District. Enjoy a cruise on the "Windermere Iron Steamboat" on Lake Windermere. Continue to Carlisle and on to Gretna Green, on the borders of Scotland. Continue to Drumlanrig 17th century castle and end the day in Glasgow. Evening arrival at the Glasgow Marriot Hotel for dinner and overnight.

Friday, June 6:

Glasgow - Loch Lomond - Stirling - Culross - Edinburgh

After breakfast depart Glasgow and head north to Lake Loch Lomond and the Trossachs. Stop at the Glengoyne Highland malt distillery and continue to Stirling to visit one of the most impressive castles in Scotland. Continue to Culross, a preserved old village, and to the Firth of Forth to view the famous Forth Bridge. Evening arrival at the Carlton Highland Hotel, located next to the Royal Mile and near Princes Street, Edinburgh's famous shopping street. Dinner on your own.

Saturday, June 7:

Walking Tour of Edinburgh

Late morning 3 hour walking tour of Edinburgh and its famous castle. Afternoon and evening free. Dinner on your own. Optional Scottish folkore evening - price to be quoted. Overnight at the Carlton Highland Hotel in Edinburgh.

Sunday, June 8:

After breakfast, depart the hotel to Edinburgh airport for your onward connections.