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PRESIDENT'S MESSAGE



Israel is very much in the news these days and we feel obliged to deal with some of the matters which are of interest not only to Israelis but also to our members around the world. Obviously, many of the major issues discussed in the media, being directed at the general lay public, do not present the facts in their legal perspective. This is one reason why we have dedicated so much space in the past to explaining the legal aspects of the various peace accords. It is also the reason why we now deal with a number of additional subjects which are a matter of bitter controversy in Israel.

In May 1996, Israeli voters were called for the first time to decide, through direct elections, who their Prime Minister would be for the next four years. The major change in the electoral system, brought about by an amendment to one of Israel's constitutional laws, was hailed by some, strongly opposed by others, and ultimately decided by a very small majority in the Knesset. The public controversy has become even more heated since the election. Professor Mordechai Kremnitzer, an expert on the subject, analysed the law, its advantages and disadvantages.

At the mention of "Bar-Ilan", Israelis now ask, "the street or the university?" For Bar-Ilan Street in Jerusalem is where a battle rages every Saturday between the ultra orthodox religious inhabitants of the neighbourhood and secular drivers, over the demand to close a section of this major artery to traffic during Shabat. The issue is much larger of course, and it divides the Israeli population with little hope for a meeting of the minds in the near future. The Supreme Court of Israel has dealt with the balance which must be drawn between protecting the fundamental right to freedom of movement and the right not to have one's religious feelings impaired, in a major constitutional judgment, which we have summarized for our readers.

The issue of tolerance is also raised in a different context. Tolerance on the part of the religious community and the position taken by the Jewish *Halacha* on collective responsibility was the subject of an address given shortly after the assassination of Prime Minister Itzhak Rabin, by a prominent Rabbi in Israel, Rabbi Aharon Lichtenstein, a renowned scholar of Jewish studies and joint *Rosh Yeshiva* of *Yeshivat Har Etzion*. We are publishing his address in our column on Jewish Law.

As we near the High Holidays, we take this opportunity of wishing all our members and friends a happy and peaceful New Year.

Hadassa Ben-Zur

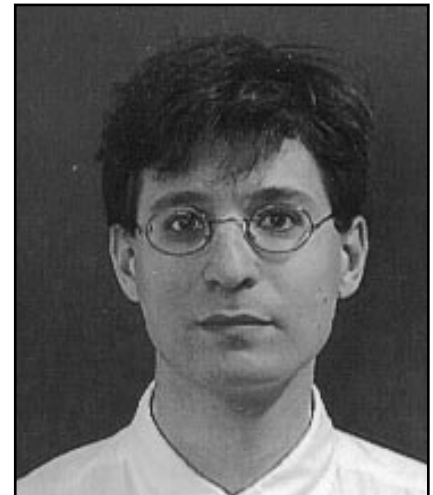
Israel's Unique Direct Election Model - Basic Law: the Government An Evaluation

Mordechai Kremnitzer, Shachar Goldman

Israel does not have a fully fledged written constitution. It chose the route of gradual development, through the enactment of specific topics, which, at the end of process will become a full constitution.

Three events have brought about a major change in Israel's political and constitutional system: the enactment of **Basic Laws: Human Dignity and Freedom and Freedom of Occupation**; the new **Basic Law: the Government** as well as a fundamental change within the main political parties which introduced the primary system as their means of selecting candidates.

Quality of governance is a product of the pressure of issues on the national agenda and the strength of the constitutional (governing) institutions. The strength of these institutions determines both the effectiveness of governance as well as the



legitimacy provided by the people to its government and, more important, to the system of government as a whole. Indeed, Israel of the last decade has an overloaded national agenda. Hence, the preponderant importance of the strength of these institutions. The main object of amending Basic Law: the Government was improvement of governability.¹ Has it been achieved? What are the direct and indirect effects on other important indices of the constitutional regime such as accountability and legitimacy? Do the benefits outweigh the inherent uncertainties that have been introduced into the Israeli governance structure?

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The authors acknowledge and are grateful for powerful insights to the Israel Democracy Institute, *The Era of Reforms: Trends, Prospects, Dangers*. (draft for a debate), Dec.1995, participating: Asher Arian, Dan Avnon, Arik Carmon, David Dari, Yaron Ezrachi, Reuven Hazan, Mordechai Kremintzer, David Nachmias and Emanuel Ottolengi.

1 A. Rubinstein MK, Basic Law Proposal :Executive Branch, KD (*Knesset Discussions*) 22, (19.3.1990) (Hebrew).

Historical Background

On 18 March 1992, the Knesset enacted a new Basic Law: the Government, which provides Israel with the distinction of being the only country to have direct popular election of its Prime Minister.

The previous electoral method practiced between 1951 and 1992 was a form of proportional representation. The entire Israeli electorate was treated as a single district. The number of seats each faction gained was almost exactly proportional to the number of votes the party obtained in the general elections. Minimum votes needed to enter parliament was one percent of the votes (since 1992 - 1.5%) - a low entry threshold compared to similar electoral systems.²

A direct result of the proportional electoral system was a multitude of parties in the Knesset. In the thirteen elections held by 1996 no party ever obtained a majority of seats in the plenary. Under the previous electoral law, the President of Israel met with newly elected factions for consultations before asking one of the MKs to try and form a government. With a single exception, the President asked the head of the largest faction to make the attempt. This procedure required a bargaining process for the formation of a coalition government.

The difficulties arising during this process of formation of governments, especially following the end of one-party dominance during the 1980's, led to serious consideration being given to the possible threat to Israel's democracy. Among other complaints raised were the electoral deadlock - no longer an exception, but the norm; small parties with disproportionate political power which caused two types of payoffs: allocation of government portfolios, and agreements over policies to be pursued by the future coalition. The formation of splinter parties was encouraged leading to a constant increase in fragmentation and polarization in the political arena. Multiparty government made the process of decision making difficult, with veto power granted to most parties in coalition on a variety of issues, thereby causing frequent cabinet crises which immobilized governments for long periods of time. The result of difficulties in executing parliamentary tasks was an increase in popular disaffection with the established parties and the overall perception of democracy.³

The events which led to a change in the constitutional system took place in mid 1990. After the 1988 election failed to deliver a definitive outcome - only a one seat gap between Labor and Likud - these two main parties, reluctantly, found themselves

back in a second National Unity Government. This time though, there was no consensus on national priorities.

The breakup of the National Unity Government was initiated by Labor, which was opposed to the intransigent position of Likud towards the peace initiative proposed by the US. In March 1990, Labor was able to muster a bare majority of 61 MKs - together with other parties - in order to carry the first successful vote of no-confidence in Israel's history, abruptly ending the period of national unity. It subsequently attempted to form a new government coalition without Likud. However, after having brought down the government, Labor discovered it could not command the same majority to form a new government. The Israeli polity system entered a period of crisis that lasted nearly three months during which the two major parties tried to outbid each other with ever increasing offers in order to gain support of minor parties as well as single MKs.

Having reached such a dangerous situation, it finally became evident that the time had come to improve Israel's incapacitated parliamentary system, and to create a more efficient as well as a more stable structure. A unique model was introduced, allowing the direct popular election of the Prime Minister. Several legislative amendments were also made aimed at limiting political maneuverings, such as single Knesset Members switching factions during their parliamentary tenure in order to gain immediate political advantages.

The Israeli Basic Law: the Government

The new electoral law, which has been widely opposed, includes two major provisions which are intended to strengthen the Prime Minister in the process of forming a coalition following a general election.

First, the Prime Minister is elected directly by the electorate. Voters use a double ballot. The first is used to vote for a party of choice, the second for the preferred candidate for Prime Minister. The prime ministerial candidate receiving more than fifty percent of the votes is popularly and directly elected. It was

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- 2 D. Nachmias & I. Sened, "The Bias of Pluralism: The Redistributive Effects of the New Electoral Law in Israel's 1996 Election", in: *Elections in Israel 1996* (A. Arian & M. Shamir eds.) (forthcoming).
 - 3 R. Y. Hazan, "Presidential Parliamentarism: Direct Popular Election of the Prime Minister, Israel's New Electoral and Political System", 15. *Electoral Studies*, No.1 (1996), 21, 27.

thought that the process of forming a coalition of parties would consequently become much simpler in relation to time and cost.

To further strengthen the authority of the Prime Minister-elect over potential partners and ensure the stability of coalition governments, the new law considerably diminished the potency of the vote of no-confidence.

The Election Procedure for Prime Minister

Israel's new electoral system is laid down in the new Basic Law: the Government. **Article 3b** states that the Prime Minister is to be chosen based on general, national, direct, equal and secret elections. **Article 13** states that the Prime Minister is to be elected according to a two ballot system; a majority vote is necessary. If none of the candidates obtain more than 50% of the vote, a second round is to be held two weeks later in which only the two highest vote candidates from the previous round are to participate. Therefore, the Prime Minister is to be elected by an absolute majority of the voters.

Generally, the tenure of the Prime Minister is to be concurrent with that of the Knesset - four years. Both are to be elected simultaneously. However, the Knesset continues to be elected by a strict list system of proportional representation with the entire State serving as one constituency, while the electoral threshold is set at 1.5 percent.

The qualifications for the office of the Prime Minister are detailed in **Article 8**. A candidate must be over the age of thirty and lead one of the lists of candidates running for the Knesset. A Prime Minister who remains in office for seven consecutive years or more is not eligible to run in the following elections.

Constitutional Powers Under the New System

The new constitutional system is described in several articles. According to **Article 3c**, the Prime Minister is given the power to nominate the Cabinet which, according to **Article 33a**, may not consist of more than eighteen or less than eight members - half of whom, along with the Prime Minister must be MKs. A preliminary vote of confidence is necessary before the Cabinet may commence functioning. The Prime Minister has the power to discharge a Minister unless the total number of members of Cabinet would thereby fall below eight. The power to remove a Minister from office is given to the parliament as well - according to **Article 35c** - by an extraordinary majority of 70 out of the 120 MKs, in accordance with a special process.

Article 19a states that the parliament may also oust the Prime

Minister by a vote of no-confidence, which requires an absolute majority of 61 members - compared to the previous rule under which a simple majority of members present was sufficient. Under the new model, removal of the Prime Minister brings about the dissolution of the Knesset as well, leading to new general elections.

Article 22a gives the Prime Minister a balancing power. The PM has authority to dissolve the Knesset, provided there is a constant majority of MKs who oppose the government and thereby prevent it from functioning. Such a radical step must receive the President's prior consent. The President is a symbolic official elected by the Knesset. The drawback is the ending of the PM's own tenure which forces new general elections. **Article 20** confers additional dissolution power on the Knesset, so that inability to pass the national budget bill implies the dissolution of the parliament and leads to new general elections.

According to **Article 27a** the legislature gains a unique authority to oust the Prime Minister without having to bring about its own dissolution; the special removal procedure is compelled by a majority vote of 80 MKs, after which a special election solely for the office of the Prime Minister is to be held.

In fact, the new system tries to provide the legislature with more effective means of supervision over the executive body than it ever possessed in the past. **Article 48** states that all regulations enacted by a Minister, including the Prime Minister, must be approved by the relevant Knesset committee; the power to declare a state of emergency, which has been, traditionally, within the power of government is now granted to parliament; according to **Article 52b** the Prime Minister is to comply with a request of at least 40 MKs and participate in a plenary consideration while any Minister is required to testify before any Knesset committee if so requested.

Evaluation

Undoubtedly, 15 months - since the new governance system was activated - is a very short period. Thus, one must be extremely cautious in deriving conclusions from the new political reality. One must keep in mind the major difficulty of determining a causal relationship between a specific constitutional change and complex realities. It is also extremely difficult to distinguish between structural weaknesses and "local" defects, in view of the short experience of the new constitutional reality and personal functioning of the political players. Therefore, the

main thrust of the evaluation is a theoretical analysis of chances and risks. Yet, even now, it is apparent that some expectations have not been fulfilled.

Supportive Arguments

Governability

Even today, more than a year since the new constitutional system has been launched, supportive voices declare that the intentions of the framers of the constitutional changes have been fully realized, and that the problematic bargaining process of government forming - periods of weeks or even several months of fuzziness - is over. By the end of election day, the identity of the Prime Minister-elect is certain.

As a result of the decisive determination of the Prime Minister, there is a fundamental change in the manner of negotiating the establishment of a government. The Prime Minister-elect has exclusive power over the elected parties. It has been argued that the main parties will gain power by means of the "coat tails effect" - voters tend to consolidate their vote and support their favourite PM candidate's party.⁴ Therefore - so goes the argument - the need for concessions on the part of the PM's party will be greatly reduced as will the disproportionate political power of smaller parties. Further, the government will be free to concentrate on issues on the national agenda, leading to greater stability in executive functioning.

The PM, drawing the legitimacy and authority of his office directly from the people, will have wide public support to direct an effective as well as clear national policy. No more "maverick" Ministers will conduct independent policies over their ministries, and feel free to publicly criticize their own government and colleagues.⁵ As a matter of fact, the Prime Minister will be free to consider purely professional, instead of political, ministerial appointments.

Moreover, the continuous threat posed by the opposition parties of voting out the Prime Minister and forming a new government has become a double edged sword as the Knesset would thereby bring about its own downfall. This has been described as a "balance of terror" between the legislative and executive branches. In spite of that, the increase in oversight powers of the legislature over the executive body ensures that a directly elected Prime Minister cannot become all powerful, with no external limits on his actions. Also, the new constitutional structure brings about a much more effectual role for the legislature that can be realized by the legislating authority without unfavourable political consequences.

Representation

The double ballot system is described as a highly developed system allowing the electorate to better express its preferences. In "fine tuning" the components of the executive body, the voter may direct and even balance the powers in a much more sophisticated manner than ever before. The direct representation of particular groups (through parties of their own) in the Knesset enables underprivileged social groups, such as new immigrants and Sefaradic Israelis, to gain direct and more lineal political representation.

Accountability

Being directly elected by the people, the Prime Minister is subject to a high level of public accountability. More than ever, the central executive position has all the needed authority and, as a corollary, public responsibility for successes as well as failures. Further, the new supervisory authority granted to the legislative branch will intensify its ability to control the actions of the executive branch.

Legitimacy

Popular election of the Prime Minister, increased representation, improved effectiveness, a higher level of accountability - will necessarily enhance the legitimacy of the government and the regime as a whole.

Moderation

In order to gain more public support, the new election structure forces the candidates to moderate and "centralize" their ideological positions. They have to adopt much more pragmatic platforms - as indeed happened during the last elections. In the Israeli political arena, which is characterized by strong tendency for polarization, this is a positive development *per se*.

Arguments Against Change

The Uniqueness of the New Regime

Not Parliamentary Neither Presidential - The double ballot system is unique among the democratic systems of the western

4 B. Zisser, *Direct Election of the Prime Minister - A Statement*, Jerusalem Center for Public and National Affairs (1997), 16 (Hebrew).

5 "Constitution for Israel", *Proposals for Amending Basic Law: the Government* (1992).

world as it fuses two forms of democratic government: parliamentary - based on proportional representation and dominated by consensus rule, and presidential - based on majority rule. It is well known that parliamentary and presidential forms of government are distinguished from each other by two distinctive characteristics: the method of selecting the chief executive and his/her dependence on the confidence of the parliament. In a parliamentary system the executive emerges from, and is responsible to, the legislature, whereas a presidential regime is characterized by the separation of powers - the President is elected directly and is not dependent on the confidence of the legislature. A parliamentary democracy is also characterized by a constant process of developing consensus through compromise.

By amending the law, Israel has left the parliamentary regime but has not moved all the way to a presidential one. The Israeli direct popular election system establishes a model by which the chief executive is to be selected directly by the electorate, thereby creating a separation of powers. Yet, once elected, the chief executive cannot exercise power independently of the elected assembly, and is under threat of removal from office by the legislature. Thus, the new system creates two separate channels of legitimacy and authority which are independent of each other. This unique multiplicity creates ambiguity and may cause difficulties in identifying "who is accountable".

Governability

Who Wins? Who Loses? - The anticipated reduction of political power within the minor parties has not occurred. In fact, the disproportionate political power of medium and small parties has not diminished, it is merely exerted **before** election day. Minor parties may use their massive influence on party supporters in order to gain political advantages in exchange for promising to round up their supporters to vote for a certain candidate. It is noteworthy that the greater the ability to enlist support - the greater the political power. Further, their bargaining position is likely to improve by fielding prime ministerial candidates of their own. Thus, by magnifying the probability of a second round of elections for PM, a small party may force a main candidate to "buy off" its candidate. The new system actually guarantees a pivotal status to minor parties in the bargaining process leading to the formation of a coalition government. The constant need for the support of smaller parties weakens the prospect of the establishment of a national unity government

although the ideological differences between the main political blocks are much reduced.

The double voting system has increased the power of the minor parties to the detriment of the main parties. In fact, large parties are bound to lose parliamentary seats to minor parties. Since the mid 1980's, the Israeli political system has turned into a bi-polar system in which two major parties compete, with the support of their satellite parties. Voters, fully aware of the constitutional practice - according to which the head of the largest faction was given the first opportunity of forming a governing coalition - tended to cast a ballot strategically in order to increase the winning chances of a preferred major party, despite their ideological preference for one of the minor parties.⁶

Under the new system, voters cast a ballot for the head of the party that leads the parliamentary bloc they prefer and then vote ideologically, or out of sectional interests, for their party of choice. Inevitably, this leads to added fragmentation within a system which is already overly fragmented.

As a result, the Knesset is now divided into more factions than ever before. While, following the previous elections under the one ballot system, Labor led the coalition and relied on 61 MKs from three parties, in the present parliament the coalition of 66 members is comprised of eight parties - including three Jewish religious parties, former Russian "Olim" party and the "Third Way" party. Since these parties are committed to keeping their supporters voting, the prospect of achieving national goals instead of different political and sectorial agendas is much diminished. Moreover, in the Israeli political reality, the new system grants decisive power to radical factions within Israeli society which do not accept the consensus of Israel as a Jewish and democratic State. Such are certain ultra orthodox Jews who oppose the democratic structure as well as part of the Arab public which opposes the Jewish nature of the State of Israel.

On the other hand, the main political parties, Labor and Likud, have lost a considerable part of their hegemony as a cornerstone of any parliamentary regime. Never in Israeli political history has a winning party had such a small Knesset delegation as the Likud in 1996. In fact, Likud has lost almost 1/3 of its power with 22 elected members instead of 32 as in 1992 and Labor

⁶ D. Felesental, *Topics in Social Choice, Sophisticated Voting, Efficacy and Proportional Representation* (1990).

almost 1/4 with 34 members instead of 44. For the first time the two main parties do not command together a majority of votes in the parliament. As a result, their role of conciliation and modification - applying a broad perspective on the public interest - has lost much of its significance.

Improved Governmental Effectiveness?

The elected members of the Knesset are obliged to maintain a high level of public visibility in order to retain their chances of being reelected in future primaries. Because of the commitment MKs have towards their supporters, as well as the detachment between the Prime Minister and his faction members, there is a substantial decrease in political motivation of coalition Knesset Members to collaborate with their political leader. Moreover, the new model generates constant instability during the government's term, as political parties, as well as single MKs, have an incentive to re-negotiate their support for the government whenever new issues arise. The actual authority of the PM within the government itself has also not strengthened, and the expectation that Ministers would become more committed to government policy has not been realized.

The Prime Minister, therefore, needs to shape a series of *ad hoc* agreements to push through particular policies, at times, paying a heavy price which favours sectarian interests. The result is a decrease in the Prime Minister's ability to form national policy. This may lead to populist measures as well as theatrical politics, instead of confronting actual issues of national concern. One of the main goals of the reform - improvement of governability - may be missed, in a country with only one highly centralized administration that needs to handle a multitude of difficulties.

An additional result of the dual voting system is the danger of gridlock between the executive and the legislative branches. The new system's determination to depend upon the electorate and the Prime Minister to resolve the deadlock is problematic. It is possible that both the Prime Minister-elect and the respective parties may be unwilling to endanger their new gains in a fresh "roll of the wheel". The result could be a paralyzed government unable to function; a Prime Minister without real power to rule, almost immune from being discharged or replaced.

Popular election of the PM and the sense of power derived from it may lead towards arrogant and irresponsible behaviour of the PM-elect, for instance, in official appointments or policy making. This danger is increased in the Israeli political culture which has never been distinguished by its self-restraint.

Last but not least, as the qualities essential for being elected and those for governing are not the same, it cannot be ruled out that the PM-elect will not be suitable for the service. The new system makes it considerably harder to effect his substitution, even if the public itself loses confidence in his leadership. This may result in catastrophe for the country as well as for the democratic regime.

Legitimacy and Accountability

A direct result of the popular election of a PM is to diminish the public image and legitimacy of the Knesset, which in any event has never been high. The legislature is no longer the sole elected organ in Israel's democratic structure. The misleading image of the Prime Minister as a quasi head of state who dictates policies is harmful to the concept of democracy as a regime based on a constant need to strive for broad consensus over important issues.

The image created by the law is of the legislature being distinct from government, with the Prime Minister appearing to have autonomous power derived from the confidence of the electorate. This leads to increased expectations in relation to the arduous tasks which the PM has to carry out. In reality, the PM has very little independent authority. Moreover, the law does not provide him with an appropriate mechanism to fulfill his tasks. The Prime Minister must still be a Knesset Member (as must be at least half the Cabinet members) and head a party list of candidates. The constitutional practice whereby laws grant executive authority to specific Ministers and not to the government as an organ has not been changed, so Cabinet members are rather independent in their everyday functions. The government depends on a vote of confidence of the Knesset for its continued existence. The PM is very much dependent on a coalition of factions and even single MKs for the everyday activity of the government. This makes accountability extremely difficult.

The "personalisation" of politics (due to the direct election of the PM and the primary system within the parties) causes serious harm to the Israeli political culture, which is already far from perfect. The personalisation process makes the public debate more shallow and replaces debate on ideology and policy with personality cults of political figures. This process also increases the likelihood of a poor selection of candidates. In addition, the democratic system lost a powerful supervising instrument due to the shift of constitutive authority away from the main elected political party (in a parliamentary system) to a directly elected

PM who, a mere once every four years, accounts to the general public, instead of being subjected to a more intensive scrutiny within the party's supervising institutions.

Moreover, the "personlisation" process increases the danger of turning a political figure into a target for an attempted political assassination. An additional inducement for such an attempt is a feeling that there is no other feasible way to achieve political change and the knowledge that the death of the Prime Minister will be certain to lead to special elections for the PM's office.

A vote of no-confidence gaining a majority which is insufficient to overthrow the government, is likely to harm the people's confidence in the government. Increased criticism of the manner of government is probable and may target the democratic system. The public's confidence in the democratic structure may weaken as a result of this criticism and a gap may form between the PM's apparent authority and his actual authority, as well as between his formal authority and his actual *de facto* authority. This danger is particularly severe because of the high expectations generated by supporters of the amendment. The outcome may be a ruling government opposed by the majority of the citizens. This is a problematic situation for the legitimacy of the democratic regime.

Conclusions

The short experience of the new system mainly indicates its shortcomings: it has weakened and enervated the big political parties, weakened the notion of the primacy of the Knesset and at the same time increased fragmentation and the power of medium and small political factions as well as single MKs. From the perspective of governmental effectiveness, accountability and public legitimacy - the balance sheet of the new system is not positive.

Traditionally, the prevailing view among political scientists is that parliamentary systems are generally preferable to presidential systems. Despite the growing debate within the field as to whether parliamentary systems are indeed superior, the empirical evidence still favours the parliamentary model.⁷ Israel has chosen to behave in a unique manner; it has both majoritarian and proportional elections, and it combines aspects of both presidential and parliamentary regimes. In principle, it is obvious that adopting a unique constitutional system brings about considerable uncertainty since it does not enjoy a demonstrated structure of built-in checks and balances. In this sense, it is a continuous "experiment" like with living human beings. The

new system also lacks an integrating concept of governance. Because of its mixed nature, it possesses an inherent lack of clarity as to the Prime Minister - is he to remain basically "first among equals" in government or does he become a "president like" organ?

In spite of the need for change in Israeli political culture, it seems, that legal reform by itself just "cannot deliver the goods". It is unrealistic to achieve a change in political culture solely through legislation. This is especially so because the law itself is a result of the political culture. These, probably, were the main reason for the wide range of objections to the change among political scientists.

As to the future - along with the hope that it will succeed, it is possible that the new system will also suffer from the weaknesses of the aforementioned parliamentary and presidential systems without benefiting from their advantages. It might be impossible to retreat from this adventure since it is extremely difficult - if at all possible - to take power away from citizens once it has been acquired.

Despite all these reservations, there is reason to believe that the institutional changes may accomplish the opposite of what was intended. At least at this stage, the hopes for a better, "cleaner" and more effective political structure have not been realized. The primary danger is that widespread public disappointment with the new system may cause disappointment and despair with democracy itself. It is doubtful whether it was wise to confront the young and tender Israeli democracy with such a risk.

⁷ Hazan, 35.

Just Received

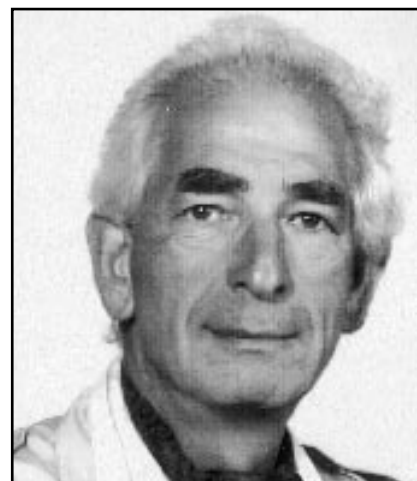
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Dangerous Censorship of a U.N. Special Rapporteur

René Wadlow and David Littman



Two incidents, which seriously limited rational discussion and debate, marred the 53rd session of the United Nations Commission on Human Rights held in Geneva from 10 March - 18 April 1997.

Aids-Libel Accusation Against Israel By Palestinian Representative

We shall not discuss here the first incident, a statement made on 11 March by the observer of the Palestine Authority in which he alleged that “the Israeli authorities have infected by injection 300 Palestinian children with the HIV virus during the years of the *Intifadah*”. As the representatives of a non-governmental organization (NGO), the Association for World Education, we reacted immediately in correspondence and direct discussions with the Chairman. This calumny became known to the public following two articles in the *Jerusalem Post* (26 March and 11 April) and an ADL advertisement in the *New York Times* (21 April) and the *International Herald Tribune*. It was again raised

René Wadlow (top) is editor of *Transnational Perspectives*, and a former Professor and Director of Studies of the Graduate Institute of Development Studies of the University of Geneva.

David Littman (bottom) is a historian and specialist of ideological currents in the Middle East. He co-edited *Arab Theologians on Jews and Israel*.

Both of them are experienced NGO observers at the U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, and are the NGO representatives of the Association for World Education at the United Nations in Geneva.

N.B. At the request of the authors, the word “antisemitism” has been spelled as one word, unless quoted, as explained in their article.

on 22 July (see E/1997/SR.37) by Israel’s Ambassador Yosef Lamdan and U.S. Deputy Permanent Representative Seth Winnick, at a meeting of the Economic and Social Council (ECOSOC), and in his previous letter of 18 July (including two

annexes) to the President of the Council (see E/1997/105). There, Mr. Winnick strongly expressed his “abhorrence at, and rejection of, the malicious, patently false and uncorrected statement by the observer from the Palestinian Liberation Organization,” yet Ambassador Nabil Ramlawi refused either to apologize or correct his AIDS-libel. As of September, this malicious calumny still remains in the record of the Commission on Human Rights. The U.S. ECOSOC document E/1997/105 will be introduced to the 54th session of the Commission on Human Rights (March - April 1998).

“Bashphemy” Charge at the United Nations Commission on Human Rights

The second incident, the main subject of our article, was a last

minute accusation on the grounds of “blasphemy” - levelled against the Special Rapporteur on Racism, Mr. Maurice Glélé-Ahanhanzo - and a demand for censorship. It concerned the section of his report sub-headed: “Islamist and Arab anti-Semitism”. This dangerous precedent can be used in future sessions if it is allowed to pass unchallenged. The censuring of reports of U.N. Special Rapporteurs, after they have been printed and discussed, weakens an essential structure of the protection and promotion of human rights. Thus, this report merits our attention. The possibility of the wider use of the accusation of “blasphemy” to limit analysis at any United Nation debate was raised on 27 August at the 49th session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities when the Indonesian representative, speaking for the Organization of the Islamic Conference (OIC), expressed satisfaction at “the excision of a blasphemous reference to the Holy Qur’an in the report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. We are glad that this offensive reference was excised by the Special Rapporteur *in consultation with the parties concerned.*” (our italics, from his verbatim statement, para 6; and E/CN.4/Sub.2/1997/SR35).

An Aborted 1994 “Blasphemy” Charge by the Government of Sudan

Already at the 1994 Commission, the Sudanese ambassador in a letter of 18 February addressed to all representatives and observers (E/CN.4/1994/122 of 1 March 1994) requested “an immediate withdrawal of those references” from the report of the Special Rapporteur on the situation of human rights in the Sudan (E/CN.4/1994/48), in which certain inconsistencies were indicated between the international human rights conventions to which the Sudan is a signatory party since 1986 and some provisions of its Criminal Act of 1991.

This letter stated that the paragraphs underlining these inconsistencies “contained abusive, inconsiderate, blasphemous and offensive remarks about the Islamic faith.” The Commission on Human Rights in Resolution 1994/79 of 9 March, however, accepted the analysis and the recommendations made by Dr. Gaspar Biro, the Special Rapporteur, on this subject and, *inter alia*, called upon the Government of Sudan “to comply with applicable international human rights instruments and to bring its national legislation into accordance with the instruments to which the Sudan was a party.” This call upon the Government of

the Sudan was reiterated in all subsequent resolutions by the Commission, including its latest Resolution 1997/59 on the situation of human rights in the Sudan. In his 1994 introductory statement, the Special Rapporteur had an opportunity to develop his arguments as he was supported by the majority of the 53 Member States. The Sudanese request to introduce modifications that included deletions of paragraphs in the report was unanimously rejected, both procedurally and in substance.

The Importance of Precedent at United Nations Human Rights Bodies

The Commission on Human Rights, as well as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, have rules of procedure, but in practice much of the work is done on precedent; once something has been accepted, it serves as an example. One can be fairly sure that this example will be cited again when a similar situation turns up. Hence, the importance of an analysis of precedents in the Commission on Human Rights and in the Sub-Commission which is one of the important strengths of B.G. Ramcharan’s book, *The Concept and Present Status of the International Protection of Human Rights* (Dordrecht: Martin Nijhoff, 1989, 611 pp.).

Strong remedial measures should be initiated to facilitate the constructive work of the United Nations human rights bodies, especially as the Commission on Human Rights is presently preparing a new World Conference on Racism and Discrimination, in whose preparation both the Commission and its Sub-Commission are to play major roles.

The Facts about the 1997 “Blasphemy” Charge at the United Nations

Let us now examine how the second accusation of “blasphemy” at the United Nations succeeded, thereby becoming a dangerous precedent.

By its Resolution 1993/20, the Commission on Human Rights nominated Mr. Maurice Glélé-Ahanhanzo as Special Rapporteur, later mandating him “to examine incidents of contemporary forms of racism, racial discrimination, any form of discrimination, *inter alia*, against Blacks, Arabs and Muslims, xenophobia, negrophobia, anti-Semitism and related intolerance, as well as governmental measures to overcome them, and to report on these matters on a yearly basis to the Commission.” His latest report was submitted to the Commission’s 53rd

session (E/CN.4/1997/71). In this report, there is a section on antisemitism that contains a sub-heading (E. 3, Chapter II) entitled "Islamist and Arab anti-Semitism," which concludes with a quotation taken from an annual survey, *Anti-Semitism Worldwide* (Tel Aviv University, 1997), and forwarded to the Special Rapporteur on Racism by Israel's ambassador and permanent representative in Geneva:

"The use of Christian and secular European anti-Semitism motifs in Muslim publications is on the rise, yet at the same time Muslim extremists are turning increasingly to their own religious sources, first and foremost the Qur'an, as a primary anti-Jewish source."

The original Arabic sources to which the quoted extracts refer are not included in the U.N. report. No question was raised on this wording when the Special Rapporteur introduced his report at the start of the Commission. But on the last morning of the session - in the absence of Mr. Glélé who had returned home - and at the time of the explanation of votes on the resolution accepting his report and supporting his mandate the Indonesian

representative, speaking on behalf of the OIC, referred to this passage and stated that:

"This amounts to the defamation of our religion 'Islam' and blasphemy against its Holy book 'Qur'an'. We are infuriated that such a statement has been included in the report of the Special Rapporteur. The Commission on Human Rights cannot become a silent spectator to this defamation against one of the great religions of the world. We, therefore, call on the Commission to express censure for this defamatory statement against Islam and the Holy Qur'an and ask you, Mr. Chairman, to express this censure on behalf of the Commission." (Verbatim text; see also the summary record, E/CN.4/1997/SR.68).

Prior to this, the Turkish representative (whose government was then led by an Islamist prime minister), a co-sponsor of the Draft Resolution on Racism, also objected to the alleged "blasphemy" as did the representatives of Egypt, Pakistan, Algeria and Bangladesh. Soon afterwards, negotiations began in private, over lunch and in hallways where NGOs could have no input. At a late, final evening meeting (SR.70), the Chairman read out an agreed draft decision, adopted by consensus, that became Decision 1997/125. In it, the Commission:

"Islamist and Arab Antisemitism"

The attempt to gag or censor the Special Rapporteur on Contemporary Forms of Racism at the last day of the 53rd session of the UN Commission of Human Rights, forms part of the deteriorating political climate at the U.N. It is characterised by the linkage of all issues involving both the Arab conflict with Israel and questions of Jewish concern, in the hostile political atmosphere prevailing as a result of the instigation of certain Arab States, the complaisance of the UN Secretariat, aided and abetted by the indifference of the Western Group of States with the notable exception of the United States. The vagaries of this process have ebbed and flowed with the fortunes of the peace process. At no time, however, was the political use of human rights issues abandoned as a means of exerting pressure against Israel in relation to the question of its status in the territories.

Reporting specifically on anti-Semitism as a specific form of contemporary racism, was introduced for the first time in the UN Commission of Human Rights by Resolution 1994/64 on Measures to Combat Contemporary Forms of Racism, Racial

Discrimination, Xenophobia and Related Intolerance, after a protracted struggle during the whole of that session. It followed the World Conference on Human Rights held in Vienna in June 1993 when all attempts to denounce anti-Semitism in this context were rejected for the same reasons. The attempt to dilute the specific reference to anti-Semitism can be seen from the juxtaposition in the list of other forms of contemporary racism and xenophobia on which the Special Rapporteur was asked to report under operative paragraph 4. It requested the Special Rapporteur to examine according to his mandate incidents ofdiscrimination against Blacks, Arab and Muslims, xenophobia, negrophobia anti-Semitism and related intolerance.... It is not without significance that every year since 1994, the Commission has witnessed attempts, to date unsuccessful, to diminish or exclude the reporting obligations of the Special Rapporteur with respect to the incidence of anti-Semitism.

The so-called gagging incident may perhaps be interpreted as another attempt to intimidate the Special Rapporteur in his efforts to expose particular manifestations of anti-Semitism,

1. Decided, without a vote, to express its indignation and protest at the content of such an offensive reference to Islam and the Holy Qur'an;
2. Affirmed that this offensive reference should have been excluded from the report;
3. Requested the Chairman to ask the Special Rapporteur to take corrective action in response to the present decision.

For an initial account of this event and the dangers of such a precedent, see René Wadlow, "Shooting the Messenger," in *Human Rights Tribune* (Ottawa, Vol 4, No. 2-3, June, 1997, page 10-11).

Freedom of Expression in United Nations Reports: An Empirical Approach

The reports of all U.N. Human Rights Special Rapporteurs must be open to questioning, comment and debate. It is in this spirit of dialogue that the Special Rapporteurs have an essential role to play in the defence of human rights. To force modification of a report is to denature their role and to weaken

possibilities for effective action. Moreover, to consider the analysis by the Special Rapporteur on Racism of discriminatory attitudes contained in current religious preaching and literature as "blasphemy", is to mask from examination a large segment of public discourse. Religious teachings constitute an important avenue for the transmission of ideas and attitudes. As with all bodies of ideas, religious doctrines should be examined carefully in their historical context.

Such analysis of religious attitudes in U.N. documents is rare, for religion deals with highly sensitive issues and deeply-set emotional attitudes. However, as the quotation under question deals in large part with religious teachings, we believe that the offensive reference merits close attention, as well as some bibliographical indications so that further research can be carried out in this field.

We believe that statements in thematic reports require some bibliographical references in order to meet high standards of evidence, so that the exactitude of the facts put forward by the Special Rapporteur may be examined. The inclusion of such references to support a sound analysis will ensure a constructive discussion aimed at remedial action. In the spirit of this empir-

including those reported as being of extremist Islamic inspiration.

What is particularly striking, however, is the contrast of the failure of the 53rd session of the Commission and its Chairman to condemn publicly the Palestinian Authority's notoriously intemperate observer Ramlawi for his manifestly false charge that the Israeli authorities deliberately injected 300 Palestinian children with HIV virus, a calumny still undeleted in the official UN Summary Record of the proceedings, whereas the reference to the alleged blasphemy of Islamic sacred texts is the subject of unanimous and precipitous action in the form of Decision 1997/125 leading to the excision of the offending words in the Special Rapporteur's report. The IAJLJ registered in its statement at the last Subcommission, its recognition of the importance of refraining from offending religious sentiments of religious observers by offensive attacks on sacred religious texts. However, it supported the principle of questioning the motives of those who seek peremptorily and arbitrarily to censor a human rights Special Rapporteur, engaged in the *bona fide* exposure of incidents of incitement to racism and racial discrimination of a distinctly anti-Semitic character based on

extremist excesses, by invoking the allegation of blasphemy. This threat to the freedom of expression of human rights investigators appointed by the UN Commission on Human Rights in the responsible exercise of their mandate, should not pass unchallenged.

This concern is all the greater when such excesses inspire the incitement to hatred of the character expressed in the Hamas credo of openly avowed genocidal intent against Israel and its Jewish citizens which characterised the barbarous suicidal terrorism on 30 July in Jerusalem. This was denounced by the IAJLJ in its statement of 27 August made to the 49th session of the Subcommission together with the World Jewish Congress, on the subject of terrorism and human rights. On 4 September 1997, shortly before this issue went to print, we have witnessed a repetition of this barbarous terrorist outrage in the form of the Ben Yehuda Street bomb attack, in the heart of Jerusalem. This is the background against which this article should be read.

Daniel Lack

The Association's representative at UN bodies in Geneva.

ical approach, it is necessary to provide examples of the accuracy of the above-mentioned controversial quotation that was used as an excuse to justify the introduction of a “blasphemy” accusation and a peremptory request to censure a report at the Commission on Human Rights. The crux of the matter concerns the validity or not of the sentence that provoked the “blasphemy” charge. Thus, on 15 July we submitted a written statement to the Sub-Commission (E/CN.4/Sub.2/1997/NGO/3), in which we indicated some of the factual background needed to analyse the above-mentioned three currents of antisemitism. While such information is no doubt familiar to readers of *JUSTICE*, we shall here highlight a few passages as the analysis of religious and ideological currents is rare at U.N. meetings and this 1500 word written statement by the Association for World Education may serve as a “positive precedent”.

Christian, Secular European, Islamist and Arab Antisemitism

We shall now briefly examine the three trends of antisemitism that appear in the controversial sentence: 1) Christian; 2) Secular European; 3) “Islamist and Arab anti-Semitism”.

On the origins of Christian antisemitism, we have chosen a quotation from Emeritus Professor William Nichols’ major work, *Christian Antisemitism: A History of Hate* (Northvale, N.J. & London: Jason Aronson, 1993, 499 pp.):

“(…) because the Jews rejected and killed Christ, they in turn have been rejected as God’s chosen people. The Jews have broken their ancient covenant with God, and he has made a new covenant, sealed in the blood of Christ, gathering to himself a new people, drawn from the Gentiles. This new people has now superseded the old Israel...The Jews have lost their Temple and been exiled from their land. Until the return of Christ, they will remain homeless wanderers upon the earth. What theologians are beginning to call the theology of supersession joins hands with the myth of the deicide, Christ-killing people to make the Jews a permanent target for Christian hostility and contempt.”

From the early 20th century, there has been a strong and active school of Christian scholarship whose aim has been to analyse the historic, social and political context in which Christianity developed. There have been patient efforts to understand all the positions in these first century debates where theology, politics, sociology and the quest for identity are all mixed together. Such scholarship is essential for the study of all

religious traditions so that religious texts, attitudes, laws and institutions are seen against their historical background. In the last two decades, this scholarship has become irrefutable, but “it will take time to be more widely absorbed” (p. 437). In this context, one should recall the 1965 historic *Nosstra aetatae* statement of Vatican II’s Ecumenical Council.

There are two major themes in Christian anti-Jewish thought which are used in Islamist publications. The first theme is the current irrelevance of the Jews in God’s plan of salvation for humanity - the early alliance of God with the Jews has been superseded. The second theme is of a collective Last Judgement - on a whole people, as well as upon each individual. These themes were reiterated in a subsequent article by an Islamist Egyptian writer, Dr. Mustafa Mahmoud, who uses both of these Christian themes as well as a dozen quotations from the Qur’an as a *primary anti-Jewish source*, predicting the millennial destruction of Israel in his conclusion: “Israel is continuing in the haughtiness that the Qur’an talks about. The small haughtiness is leading to the great haughtiness.” (“The Israeli Haughtiness, and How it Will End”, in *Al-Ahram International*, Arabic, Cairo, 17 May 1997).

Blood-Libel Accusation and World Conspiracy Theories

There are many European secular strands of anti-Jewish thought being widely spread in Arab and Islamist publications; more and more, the denial of the Holocaust, but especially “conspiracy theories” of history and the 1840 “Damascus Affair” Blood-Libel, which surfaced during the Gulf War at the United Nations Commission on Human Rights. On 8 February 1991, the representative of Syria, holding aloft a copy of *The Matzah of Zion* (Damascus, 1983/1985, Arabic) declared: “We should like to launch an appeal to all members of this Commission to read this very important work that demonstrates unequivocally the historical reality of Zionist racism.” In its preface by Syrian Minister of Defence Major-General Mustafa Tlass, one reads: “The Jew can... kill you and take your blood in order to make his Zionist bread... I hope that I have done my duty in presenting the practices of the enemy of our historic nation. Allah aid this project.” (For full UN documentation, see *Human Rights and Human Wrongs*, Nos. 10 and 11, Geneva: Editions Avenir: World Union for Progressive Judaism, 1991).

This dangerous “conspiracy theory” myth consists in the belief that a Jewish-led conspiracy seeks to control the world, a

plot which is seen at work in every revolution, in every war since time immemorial, and in all international organizations including the United Nations. The most widespread of these conspiracy theories of history is contained in a forged document called *The Protocols of the Elders of Zion*. This forgery was fabricated in Paris at the turn of this century for the use of the Czar's secret police, the Okhrana. It inspired Hitler's genocidal antisemitism. The long history of *The Protocols* has been documented in full by the French sociologist Pierre-André Taguieff in his, *Les Protocoles des Sages de Sion (Faux et Usages d'un faux)* (Paris: Berg International, 1992, 2 vols., vol. I, 407 pp., vol. II, 816 pp.).

The Protocols are still widely disseminated, having been reprinted in the last decades in at least ten European countries. However, it is in the Arab-Islamic world that it remains a best-seller of hate and can be found in the main centres of the Middle East and the Maghreb. An Arabic edition of *The Protocols* (Beirut: Dar an-Nafais, 2nd ed., 1990), available in the West, includes a preface with a rare example of religious and racial hatred against the Jews that concludes with the prophesy of Israel's destruction: "This destruction is what we believe and teach to our children, striving toward its realization and asking for success from Allah, the Exalted One." (On "conspiracy theories", see our written statement of 25 March 1997 submitted to the Commission on Human Rights (E/CN.4/1997/NGO/85) entitled: Constitution of the Islamic Resistance Movement Hamas: 18 August 1988).

Islamist and Arab Antisemitism as a Growing World Phenomenon

On the question: do Islamists regularly use "religious sources, first and foremost the Qur'an, as a primary anti-Jewish source?", a full documentation on such recurring themes may be found in *The Fourth Conference of the Academy of Islamic Research* (September 1968) (Cairo: Government Printing Offices, 1970; Arabic edition in 2 vols., 1968). This book contains research papers given by 22 theologians and scholars. Extracts were reproduced in *Arab Theologians on Jews and Israel*, edited by D.F. Green [the joint pseudonym of co-editors, David Littman and Yehoshafat Harkabi] (Geneva: Editions de l'Avenir, 1971; 3rd ed. 1976; French and German editions, 1972-1976, 95 pp.). D.F. Green writes in the introduction: "The ideas expounded in this volume could lead to the urge to liquidate Israel (politicide) and the Jews (genocide)." (p. 9).

The 1988 Charter of Hamas - a blueprint for genocide - is full of idiosyncratic interpretations of the Qur'an which we shall not quote here. But a controversial *hadith*, or saying attributed to the Prophet - now a commonplace with Islamists worldwide - concludes its Article 7:

"... the Hamas aspires to implement Allah's promise, whatever time that may take. The Prophet, Allah bless him and grant him salvation, has said: 'The Day of Judgement will not come about until Muslims will fight the Jews (and kill them), until the Jews hide behind rocks and trees, which will cry: O Muslim! there is a Jew hiding behind me, come on and kill him.' This article proceeds the Hamas slogan contained in Art. 8: 'Allah is its goal, the Prophet its model, the Qur'an its Constitution, *Jihad* its path and death for Allah's cause its most sublime belief.'"

Numerous examples of this trend have been documented in various publications over the last thirty years, beginning with Yehoshafat Harkabi, *Arab Attitudes to Israel* (Jerusalem: Israel Universities Press, 1971 and Hebrew ed. 1968). Here are the words used by Moshe Ma'oz then: "Arab Judeophobia draws essentially upon Islamic religious literature and religious teaching, because of the centrality of Islam in modern Arab ideologies and cultural tradition." (*The image of the Jew in Official Arab Literature and Communications Media*, 33 pp. at a July 1975 "Continuing Presidential Seminar on World Jewry and the State of Israel". (Shazar Library & Hebrew University of Jerusalem, 1976, p. 7). See also, *inter alia*, Olivier Carré, "Juifs et Chrétiens dans la Société islamique idéale d'après Sayyid Qutb," *Revue des Sciences Philosophiques et Théologiques*, 68 (Paris: 1984), pp. 50-72; id., *Mystique et Politique, lecture révolutionnaire du Coran par Sayyid Qutb, Frère Musulman radical* (Paris: Editions du Cerf, 1984, 248 pp.); id., *L'Utopie islamique dans l'Orient arabe* (Paris: Presses de la Fondation Nationale des Sciences Politiques, 1991, 275 pp.); Gilles Kepel, *The Prophet and Pharaoh. Muslim Extremism in Contemporary Egypt*. Preface by Bernard Lewis (London: Al Saqui, 1985); American ed. (University of California Press, 1986); original French ed. (Paris: La Découverte, 1984, 245 pp.); Johannes J.G. Jansen, *The Neglected Duty. The Creed of Sadat's Assassins and Islamic Resurgence in the Middle East* (New York & London: Macmillan, 1986, 245 pp.); Rivka Yadlin, *An Arrogant Oppressive Spirit: Anti-Zionism as Anti-Judaism in Egypt* (Oxford & Elmsford, N.Y.: Pergamon Press, 1989, 135 pp.); Raphael Israeli, *Muslim Fundamentalism in Israel* (London &

McLean, Va.: Brassey's, 1993, 203 pp.); Bat Ye'or, *Juifs et Chrétiens sous l'Islam: les dhimmis face au défi intégriste* (Paris: Berg International, 1994, 415 pp.); Daniel Pipes, *The Hidden Hand. Middle East Fears of Conspiracy* (New York: St. Martin's Press, 1996, 404 pp.); Martin Kramer, *Arab Awakening & Islamic Revival: The Politics of Ideas in the Middle East* (New Brunswick, N.J. & London: Transaction Publishers, 1996, 297 pp.); and the annual reports on antisemitism worldwide of the American Jewish Committee, the Anti-Defamation League and the World Jewish Congress.

These facts cannot be denied or dismissed as "blasphemous" when Islamists are quoted in such works, as well as those reproduced on cassettes and on the Internet (Emmanuel Sivan, "Eavesdropping on Radical Islam," in *Middle East Quarterly*, vol. II, No. 1, March 1995, pp. 13-25; David Sitman, "Propagating Anti-Semitism on the Internet," in *JUSTICE*, No. 12, March 1997, p.7; and Jeff Stein, "Look at What Hate Groups Say," in the *Baltimore Sun*, 5 April 1997, reprinted in the *IHT*, 6 April 1997).

Antisemitism within the Parameters of a Forthcoming Conference on Racism

Even after the publication of Mr. Glélé's "corrective action" that removed the "offensive reference" (E/CN.4/1997/71/Corr.1), the campaign continued at the substantive session of ECOSOC, when, on 22 July, the representative of Indonesia - on behalf of the OIC - referred to the "outrageous reference to Islam and to the Qur'an," and requested that his statement - which also cited the Hebron case of "blasphemy" - be distributed as an official U.N. document at the Security Council and at the forthcoming session of the General Assembly. The representatives of Egypt, Syria, Lebanon, Saudia Arabia, Sudan, Iraq, Jordan and Iran intervened on this issue to support Indonesia's request, and to make further negative comments about the "offensive reference to Islam and the Holy Qur'an" - some of them demanding that the sub-heading "Islamist Arab anti-Semitism" also be removed from that report (E/1997/SR.37).

We maintain - having demonstrated this in our detailed written text (NGO/3) - that the so-called "offensive reference" is accurate. If anything, it is a euphemism in regard to what is *actually* being said publicly on this subject, and published regularly in Arabic, and otherwise. Remedial action on all forms of racial discrimination - including antisemitism and anti-Christian attitudes - should not be blocked by invoking respect for religious

belief and practice. We must examine closely and without fear the ways in which discriminatory attitudes are formed and transmitted. In this way, the preparation for a new World Conference to Combat Racism will not be a bureaucratic exercise, but will be part of an important process to modify in a positive direction many negative attitudes and practices.

The conclusion of our written statement to the Sub-Commission was borrowed from the conclusion of Professor Inge Lønning's report on a notorious Swedish case of anti-semitism - "Radio Islam" or the "Rami-Bergman Affair". A former Rector of the University of Oslo, he sent us an abridged English version for use at the United Nations, and to be forwarded to the then Assistant Secretary-General for Human Rights, Ibrahim Fall, for transmission to the Special Rapporteur on Racism:

"The general lesson to be learnt from the "Rami-Bergman Affair" should be that the challenge of manifest antisemitism should be faced by all citizens, but first and foremost by those in charge of central institutions in society, like church and universities. Representatives of the academic and the religious community should, in their double capacity of citizens and professionals, have a special awareness and a special obligation to meet the challenge in an adequate manner."

Our above-mentioned written statement to the Sub-Commission (NGO/3) was circulated to all the 18 independent members of the Human Rights Committee and the Committee for the Elimination of Racial Discrimination at their respective sessions held in Geneva in late July and early August.

Mme. Christine Chanet, the HRC's chairperson raised this grave matter on 16 September at a meeting of persons chairing the human rights bodies. She was followed the next day by Mr. Paulo Pinheiro, chairperson of the special rapporteurs, representatives, experts and chairpersons of working groups of the Commission on Human Rights and the Advisory Services Programme which on 23 May, resolved unanimously: "that the Special Rapporteurs should not be requested to amend their Reports merely because certain passages are deemed to be offensive by a particular Member State or group of Member States." On 18 September, at the new High Commissioner's first meeting with NGOs, we asked Mrs Mary Robinson if she would add her "voice of support for the total independence of all the Special Rapporteurs". This she agreed to do in her meeting with the chairpersons of the human rights bodies the following day. It is of crucial importance that all strongly defend the independence

of the Special Rapporteurs before this dangerous precedent of "censorship" becomes a United Nations norm.

The Ambiguous Quibble over the Term "Anti-semitism" / "Antisemitism"

As the word "antisemitism" is frequently misused at U.N. sessions - most recently in the statements mentioned above, made at the meeting of ECOSOC on 22 July - it is necessary to clarify a certain ambiguity about the term itself, which was first coined in 1879 by Wilhelm Marr, a German journalist. To quote Emeritus Professor William Nicholls: "Antisemites were and are not opposed to all so-called Semites but only to Jews, and not only to them as individuals but primarily to Jews as a group in society." (p. 325) As proposed in James Parkes' classic work *The Conflict of the Church and the Synagogue: a study in the origins of antisemitism* (London: The Soncino Press, 1934, 430 pp.), the term "antisemitism" should be spelt as one word, without a hyphen - as in French and German - and not as two words, with a capital "S" ("anti-Semitism"), as is customary in America and at the U.N. This way of spelling leads to a semantic legerdemain, a curious quibble that is often heard: "How can Arabs be antisemites? They are Semites themselves". If Arabs truly felt that the term "antisemite" also encompassed them as "Semites," they would not have insisted on adding the words "Arabs" and "Muslims" to the list of those specifically concerned by "any form of discrimination" in the 1993 resolution on racism. Perhaps a better word would have been "anti-Jewish". Indeed, it would be interesting to know why "Christians" were not mentioned in this resolution, in the same way as "Muslims," especially as in the last decades Christians are increasingly suffering from all forms of discrimination and persecution worldwide, both ethnic and religious.

The Dangers of Censorship and Auto-Censorship at the United Nations

We have described this censorship in some detail for there is a danger that unless there is a strong defence of the independence of the Special Rapporteurs from within the U.N. system and from NGOs, such censorship will become an irreversible trend. We see three aspects to this very real danger:

- 1) After the recent censorship - "in consultation with the parties concerned" - there is a real danger of auto-censorship by the Special Rapporteurs or by the editors of the report in the Centre for Human Rights, so that "Islamist and Arab anti-Semitism" would in the future be largely passed over, with

little or no analysis of what is being preached in Mosques, by radio, video and television, or on tapes and on the Internet. Only the persistence of traditional antisemitism in the West and "Christian and secular European anti-Semitism motifs in Muslim publications" would be mentioned for fear of the "blasphemy" charge.

- 2) Were such self-censorship to occur in the yearly reports of the Special Rapporteur, it is likely that antisemitism - especially in the Muslim world - would be downplayed, or only condemned ritually in the preparations for the forthcoming World Conference on Racism. The intellectual and policy preparations for this Conference are likely to be difficult and consensus is reached by neglecting awkward questions.
- 3) The third danger which merits serious attention is the use of the theological accusation of "blasphemy" - Molière had the same problem 300 years ago with Catholic clerics when *Tartuffe* was first performed - an ill-defined term, which can be expanded to mean anything an accuser dislikes. There is a proper sensitivity to the belief systems of government representatives which is part of diplomatic culture, but sensitivity should not induce blindness. Some accusations of "blasphemy" can be ill-disguised death threats which should have no place in civilised relations between governments. It is more dangerous when they are used against representatives NGOs or Special Rapporteurs - the threat to Dr. Gaspar Biro was explicit - who do not have the backing of a government.

Conclusion

The last years of this common era 2nd millenium is not a time to allow this form of "cultural relativism" to restrict freedom of opinion and expression at the United Nations - in Geneva, not far from the homes of both Voltaire and Jean-Jacques Rousseau. It is a dangerous precedent for charges of "blasphemy" to be given credence, and even consecration at the United Nations Commission on Human Rights and other U.N. bodies.

Rather, it is a real analysis which is needed if we are to come to grips with all forms of racism and discriminatory attitudes, including those which are transmitted by religious thought and teaching - from whatever the source. The struggle to combat racism in all its forms - including antisemitism - through serious scholarship and freedom of thought, opinion and expression should not be curtailed at the United Nations by auto-censorship, as a result of doctrinal accusations of "blasphemy" whose demands are legion.

The Double Standard of German Reparations Legislation

Special Report

About 600,000 Jews, who survived the Holocaust remain alive today. 350,000 of them live in Israel. Most are elderly people immersed in bitter memories. Their state of health is unsound and they are unable to free themselves from the horrors of that period. Their average age is 72 and therefore, within a number of years, most will die. As the years go by, the mortality rate among Holocaust survivors is increasing; so far, on average, the number of Holocaust survivors is being reduced by 30,000 annually.

More than half a century has passed since the end of the Second World War, since the gates of the concentration camps were opened and the terrible nightmare of Nazi Germany was removed. Suddenly, the shocking fact has emerged that more than half of those saved and still alive have not received any compensation for their terrible suffering. As opposed to these Holocaust survivors, the majority of Germans designated as “victims of the war” or their families, have attained a monthly *Rente* (a permanent fixed income) from the German Ministry of Finance. They are more than a million in number and among them are at least 60,000 SS men and Nazi war criminals, who took an active part in the mass murders. They too are elderly now, however, they have reached a ripe old age. Turning murderers into “victims” has been enacted in German legislation. The same German legislature, which outlawed hundreds of thousands of Holocaust survivors and other victims persecuted by the Nazis, made certain that their persecutors, thousands of Nazi war criminals, would be eligible for “a victim of war” *Rente*.

Highlights from a special report on *Reparations to Holocaust Survivors Versus Reparations to Nazi War Criminals*, just published by The Center for Organizations of Holocaust Survivors in Israel. Research and editing: Uri Yaakov and Raoul Teitelbaum.

This is the double standard of German war reparation legislation, which began a number of years after the fall of “The Third Reich” and the establishment of the German Federal Republic in West Germany and the German Democratic Republic in East Germany. This double standard has continued in reunited Germany. Today, the last campaign is being waged for the provision of some sort of compensation to another one hundred thousand Holocaust survivors. This is, of course, a very late and only partial rectification of an injustice.

“Germany will be judged by its treatment of the Jewish Holocaust survivors...” stated Konrad Adenauer, the first chancellor of West Germany, in his time. However, even then, it would have been appropriate to add that Germany would also be judged by its double standard towards the victims on the one hand and the war criminals on the other.

War Criminals Turned into Victims

Two German television reporters, John Goetz and Volker Steinhoff, collected information over many months on the pensions and *Rente* received by Nazi war criminals and their families in Germany itself as well as by those living outside Germany. The findings of this special inquiry were broadcast on German television in a program entitled: *Billions of Our Tax Money To Nazi War Criminals. How Has German Legislation Turned War Criminals Into War Victims?* Imagine the following surrealistic situation: If **Adolf Hitler** were alive today, he would be eligible for a disability pension from the German Ministry of Finance as “a victim of war”.

At the beginning of the program, broadcast in January 1997, as part of a series by the prestigious German investigative program, *Panorama*, Patrizia Schlesinger, television moderator on the ARD public First Channel of German television, explained: “Yes, you heard correctly. According to current legislation in Germany, Hitler is considered to be a “war victim”

because he was wounded in an assassination attempt in July 1944, and therefore is eligible for a pension of a few thousand Marks a month from our tax money...". Hitler's mistress too, **Eva Braun**, if she were still alive, would receive to this day a hefty widow's pension from the German treasury.

The example of Hitler and Braun illustrates the absurdity of this situation, which continues since the early 1950s. The situation in Germany on this issue is clear and straightforward. Murdering Nazis are recognized by the German government as "war victims" and enjoy considerable monthly pensions. A few more illustrations: The widow of **Rheinhardt Heydrich**, head of the Nazi Ministry of Defense and Eichmann's immediate superior, received a substantial widow's pension as Heydrich, who was killed in Prague in June 1942 by the anti-Nazi underground, was recognized as a "war victim". Among other things, Heydrich initiated and directed the infamous Wannsee Conference, wherein the final plans were made and the decision taken to deploy "The Final Solution" of the "Jewish problem" in Europe.

The sons of elite Nazi war criminals, such as **Heinrich Himmler**, head of the SS and security police, who was responsible for all the concentration and death camps and **Hermann Goering**, Hitler's second-in-command, benefited from relative's pensions until they reached the age of 18. Himmler and Goering committed suicide after the war and were recognized by German law as "victims of the war".

The notorious anti-Semite, **Julius Streicher**, who throughout the whole period of Hitler's rule spread wild racial anti-Semitic venom in his weekly *Der Sturmer* and was sentenced by the Nuremberg tribunal to death by hanging as a war criminal, was likewise recognized as a "war victim". His widow acquired a monthly *Rente*.

Roland Freisler, president of the "popular" Nazi court, sent hundreds to the gallows in a series of showcase trials of those accused of conspiring against Hitler and it was not in vain that he was known as "the bloody judge". He, too, was recognized as "a victim of the war" following his death in February 1945, in one of the Allies' bombardments. His widow, Marion, has received a widow's pension for over 20 years. However, she did not stop at this but submitted a claim to have her monthly *Rente* increased, typically claiming that had her husband remained alive, he would have collected additional pension rights, he would have risen in rank and achieved an illustrious career after the war, as did his colleagues. And, indeed, she received the

increase to her monthly *Rente*. Her supplementary monthly pension amounts to DM 900.

In the village of Bassbeutel, near Hamburg, lives **Wilhelm Mohenke**, who was the SS *Hauptsturmfuehrer* (captain) in Hitler's personal guard. For his crime of personally participating in the murder of 72 American prisoners of war, he was proclaimed a war criminal by the United States government. In Germany he enjoys a *Rente* as a "victim of the war" by reason of a leg wound.

Heinz Barth, a member of the SS division *Das Reich*, who took an active part in the massacre perpetrated in the French village, Oradour-sur-Glane, was sentenced in East Germany to life imprisonment. After the two Germanys were reunited, he was recognized as a "victim of the war" since his leg had been amputated. For seven years, he received a monthly pension of DM 720.

SS *Sturmbannfuehrer*, **Karl Hass**, now sitting on the accused's bench on trial in Rome for the murder of 335 citizens in the caves near Rome in 1944, "sits" at the same time on a fixed monthly pension of DM 900 from the German treasury.

Wolfgang Lehnigk-Emden, a *Wehrmacht* officer, charged with the murder of 15 women and children in the Italian village of Chiasso, was never tried due to the Statute of Limitations. Nevertheless, he benefits from a supplementary monthly pension of DM 708 as "a victim of the war" for a light leg wound incurred during the war. The case of the mass murder, which he committed, was published recently, yet no one batted an eye, save that Lehnigk-Emden was forced to resign from his current position as chairman of the local carnival.

Theis Christophersen is a well-known figure among neo-Nazis in Europe. During the war, he was an SS officer in Auschwitz. After the war, he moved to Denmark, from where he still directs the propaganda campaign of the deniers of the Holocaust in Germany and Europe. He does not hide his Nazi views and stands behind each word written in his book, *The Deceit of Auschwitz*. For years, he has benefited from a pension as "a victim of war" from the German government. The German taxpayer, thus, also finances the deniers of the Holocaust.

Christophersen is one of some ten thousand former SS men, who reside outside Germany and enjoy a monthly pension from the German government as "victims of war". Even those few Nazi criminals who were judged in German courts, some of whom are still sitting in prison, nonetheless retain their right to a "victim of war" pension, benefiting from it each and every month.

SS men, soldiers and officers of the Nazi *Wehrmacht*, generals, senior officials of the regime and minor Nazi officials, receive pensions according to their rank, seniority in the service of the German state and the disability percentage awarded them and are recognized as “victims of war” for all purposes. The rights they accumulated during the 12 years of the Nazi regime have not been lost. The crimes are subject to the Statute of Limitations - the criminal’s rights are not. It is all regulated in social legislation and regulations, as customary in any enlightened welfare state in the West.

Rudolph Petereit of the welfare office in Schleswig - Holstein addresses the television cameras. “According to the current legal situation, the fact that someone committed crimes in the past is not a reason to deny his pension as a war victim ...” The word in the German Ministry of Labour in Bonn, responsible for carrying out the laws pertaining to “victims of war” is, “It is impossible to correct this situation retroactively because of fundamental judicial-legal issues”. In any case, since 1950, not one pension has been denied in Germany to any Nazi war criminal.

A separate issue is that of the foreign collaborators, who served in the Nazi occupation administration, in SS units and auxiliary units, which the Nazis established throughout occupied Europe. After the collapse of Communist regimes in Eastern Europe, they too submitted applications for pensions from the German government. As, according to German law, there is no Statute of Limitations which applies to these rights, pensions were approved for many of them. According to partial data submitted to the *Bundestag*, monthly pensions from the German treasury are paid to some 11,000 SS men and collaborators with the Nazi regime, who reside outside Germany and nonetheless have been recognized as “victims of the war”. 1,100 of these collaborators live in the Baltic States, 1,010 in Croatia, 1,014 in Romania, 2,380 in Slovenia, 459 in England, 810 in France, 324 in Belgium and 3,377 in the United States.

One of these is **Kazis Ciurinskas**, of Latvian descent, who currently resides in the United States and was recently accused by a U.S. Attorney-General of participating in the murder of thousands of Jews and Communists in Byelorussia in 1941. However, the German authorities recognized him as a “war victim” in 1966, due to a wound to his hand. To date, Ciurinskas has received a sum totaling DM 186,000 from Germany.

Moslems, who were recruited by the Jerusalem Mufti, Haj Amin El-Husseini, to the SS *Handschar* division, are likely to

benefit from a monthly pension. Yet, those few Jews, Holocaust survivors who remained in Sarajevo, are not eligible for any reparations from the German authorities for the hardships they endured during that same period. The same is true of the Baltic States as well as the other countries of Eastern Europe.

An Ongoing Scandal

The issue of pensions for Nazi war criminals caused shock and aroused much feeling throughout the world and in Germany itself. However, it did not cause surprise, as this has been the legal situation in Germany since 1949, and has been approved over and over again by German legal authorities. Moreover, the German establishment also tries to justify this situation. For example, Friedrich Bohl, a state minister in the office of Chancellor Kohl, explained that it would not be fair to deny pensions to all the men of the *Waffen SS*, which included the guards in the concentration camps. They, he claimed, as opposed to the “death’s head” insignia men of the SS, were not found guilty of criminal acts of murder. According to Bohl, not all the men in the *Waffen SS* were volunteers. Many of them were forcibly recruited. Incidentally, State Minister Bohl was appointed by Chancellor Kohl to negotiate reparations for Holocaust survivors. In any event, recent discussions in the *Bundestag* in Bonn have made it clear that there is no legal possibility of cancelling pensions to German citizens, even if they have been condemned in the past as war criminals. At the initiative of the opposition, the “Green Party” and the Social Democrats, the German Parliament is currently examining the possibility of cancelling pensions, which benefit foreign citizens or those people residing outside Germany, who were charged with war crimes in the past.

German legislation of 1950 dealing with German “victims of the war” was one of the first laws legislated in the German *Bundestag*. This law was enacted immediately after the Nuremberg Trials. The atmosphere in Germany after the trials was forgiving. Many Germans wanted the Nazi period to be over and done with, along the lines of “We did not know and had not heard about the crimes”. Western Germany took its first steps as a sovereign state, while its ruling body was mostly staffed by former Nazis, who now looked after their own interests, as well as those of their colleagues. Within this configuration, more and more laws were enacted in Germany to look after the interests of German nationals who were injured in the war, as citizens or as servicemen in the Nazi armed forces. Besides the “Federal

Support of Victims of the War Law”, other laws were legislated. For example, the reparation law arranged for remuneration for the war disabled and their families and the federal law, concerning those expelled from Germany, granted reparations to those Germans expelled from the territories of Poland, Czechoslovakia, Yugoslavia, Hungary and Romania after the war.

These laws are in effect to this day. As befits a modern welfare state, the legislation intended to compensate victims of the war among the German people is fundamentally social and universal legislation, with no geographical restrictions or time limits. According to these laws, a German citizen or one who served Germany but is not a citizen may submit an application [for reparations] at any time he wishes. And indeed, many of the SS men and Nazi war criminals, who during the first years after the war were afraid and did not dare to demand their “rights”, did so in later decades.

The German treasury annually pays about DM 12 billion in monthly pensions to 1.3 million Germans as victims of the war, a sum six times higher than the sum allocated to compensate Holocaust survivors.

Some 100 welfare offices throughout Germany handle more than a million “victims of the war”, among them tens of thousands of war criminals, Nazi murderers who survived, or their widows, who receive pensions from Germany’s budget. According to data from the inquiry reported on by German television, about 5% of those receiving supplementary pensions as “victims of war” are Nazi war criminals. There are about fifty to sixty thousand Nazis who participated in shocking atrocities and now benefit from monthly pensions financed by the German taxpayer. More detailed data was published by the weekly *Die Zeit*, indicating that **every year the German treasury pays monthly pensions to 78,215 Nazi war criminals and their widows**. These figures, recently quoted in the *Bundestag* on January 30, 1997, have not been denied. Based on this data, it is estimated that since the law was enacted 47 years ago, the German treasury has paid out DM 35 billion in ongoing monthly pensions to Nazi war criminals defined by this law as “victims of war”.

The iniquities and injustices caused to survivors of the Holocaust by German reparation laws are clearly evident against this backdrop.

A disabled German who served in the *Wehrmacht* during the Second World War receives a monthly disability pension of DM

3,000 - 3,500. On the other hand, a Holocaust survivor with 25% disability receives a minimal pension of DM 732 a month.

One of Hitler’s *Wehrmacht* generals or a senior officer in the SS, or their respective widows, benefit from hefty monthly pensions of DM 7,000 and even DM 8,000. The maximum pension of a Jewish survivor, for example, a Jewish judge forced to flee Nazi Germany, may only reach DM 3,000 - 3,500.

Thus, for Nazi war criminals, there are no binding time limits and no geographical restrictions. Nonetheless, very grave restrictions, which can deny any sort of reparations at all, are applied by German law to many Jewish Holocaust survivors and other peoples persecuted by the Nazis, although not as Jews, Gypsies, homosexuals or “asocials”. For example, according to the basic German reparation law, victims of the Nazi regime could submit their applications to receive personal reparations only up until 1969 and only if they resided in Germany or in Israel. Anyone who did not conform to these conditions lost his right to reparations as a persecuted victim of the Nazi regime. However, the Nazis themselves could submit their applications to welfare offices in Germany with no time limits and no qualifications regarding their place of residence.

The Tight-Fisted Policy towards Holocaust Survivors

There is a clear difference, in principle and practice, between legislation intended for “German war victims” and the laws and regulations intended for Holocaust survivors and others persecuted by the Nazi regime. In 1953, following an agreement signed between the German government and “the Conference for Material Claims of the Jewish People against Germany”, “the Federal Law for Supplementation” was enacted. This law was intended to supplement the reparations arrangements previously applied to those persecuted by the Nazis in the occupied areas in Western Germany and principally in the area under American occupation.

A person persecuted by the Nazi regime was defined by law as one who was persecuted for political reasons due to his worldview or for reasons of race or religion. Subsequently, an amendment to the law excluded Communists from eligibility for reparations. The basic reparations law in Germany, intended to compensate victims of the Holocaust, does not explicitly mention the Jewish people, the main victims of Nazi Germany. This fact, which has most serious implications, did not receive an appropriate response at the time by representatives of the

Jewish people nor by the State of Israel. Today, it is difficult to imagine that someone would dare attempt to “make the Jewish people disappear”.

Over the years, this law was amended twice due to pressure by Holocaust survivors and Jewish organizations until the time limit to submit claims based on the law expired at the end of 1969. Regarding survivor’s claims, German legislation expressly set rules of limitation. Such rules were not mentioned in other laws relating to reparations for “German war victims”.

This was patchwork legislation. It was continued in laws which arranged payments for distress from various funds subsequently established. German politicians indeed spoke a great deal about their moral responsibility towards Holocaust survivors. However, both the legislation and ensuing arrangements contained restrictions and the strictest qualifications. In fact, Holocaust survivors from Eastern European countries were ineligible to receive personal reparations by geographical restrictions on the one hand, and a strict and crowded schedule of deadlines for submitting applications on the other. The entire geographical area, wherein the annihilation of the Jewish people took place, was excluded from the sphere of incidence of the basic federal reparation law. Thus, due to political considerations, Jewish Holocaust survivors in Eastern Europe became “victims” of the Cold War.

In addition to the harsh qualifications determined by law, complex and puzzling “ideological” criteria were also set. As if Auschwitz, the ghettos, the concentration camps, persecution, forced labour and gas chambers were not sufficient, a Jewish Holocaust survivor was only eligible for monthly reparations, if he could prove that he belonged to “the sphere of German language and culture”. That is to say, Holocaust survivors also had to pass a German language test.

Thus, the *Rente* was granted to Jewish Holocaust survivors not according to their portion of suffering at the hands of the German Nazis but rather by their degree of closeness to the very nation from which the murderers emerged. In this manner, the German legislature actually denied the right to reparations to most Holocaust survivors. In particular, Jews, who suffered the most during the Holocaust and were exposed to the gravest danger of annihilation did not receive anything from the Germans as reparations or received only token reparations. All the legal definitions, restrictions and qualifications gradually narrowed the chances of Jewish Holocaust survivors to rehabilitate themselves. By immersing the survivor’s applications for

reparations in a rigid and arduous entanglement of bureaucracy and “red tape”, a condition of perpetual injustice was created.

Those found eligible for reparations received only partial reparations for material damages, e.g. injury to earning capacity or damage to health or impairment to professional or financial advancement or damage to property. The one-time reparation payment, allotted for the deprivation or restriction of freedom, was a mockery: DM 5 for every day of torment at Auschwitz.

A grave paradoxical situation was created. The closer a survivor was to the centers of the extermination process of the Jewish people in Eastern Europe during the Holocaust, the lower were his chances after the war of receiving any sort of reparations from the German authorities. However, this distortion was far from being the only one in an arbitrary set of laws; and, from the point of view of survivor Jews, it was but the final nail in the coffin of a mournful chapter of injustices by the German government.

Over the years, no effort was made by the German government to legally amend the resounding wrong, caused by the grave injustices characteristic of this system. Just the opposite was true. The basic tendency of the political establishment in Germany was not to prescribe the issue of reparations in law, but rather to amend the situation by searching for partial solutions, for example, within the distress funds. This also continued after Germany’s reunification. Instead of enacting a new reparation law for Holocaust survivors and those persecuted by the Nazi regime, the German government preferred to establish a distress fund by means of an amendment to the law. Typically, the amendments inserted in this law over the years were the result of external pressures - by representatives of the survivors or Jewish organizations or members of the American Congress - and were never an independent German initiative.

At the end of the 1940’s, Germany assured the western Allies it would find “a quick, encompassing legal solution for reparations to Holocaust survivors”. However, even then, it was clear that the actual practice would be far from the fundamental pledge. The tight-fisted policy of Germany toward the Holocaust survivors was recognizable from the start. When Konrad Adenauer, West Germany’s first chancellor, was asked why he decided to grant only DM 5 as reparations for each day of torment in the Nazi extermination camps, he replied, “That is the sum Germany is able to pay today...”.

The official spokesmen for the German government and especially their treasury representatives tend to note the large sums

Germany allocated to Jewish Holocaust survivors and indeed, the original sums, which the German government planned to allot for reparations to survivors in the early 1950's, were large. However, not only were these amounts meagre when compared with sums intended to compensate Nazi "war victims", but they were ridiculous when balanced against the dimensions of the crime.

Today too, the economic rationales and the need for budget cuts in Germany remain the central arguments in the negotiations with the representatives of the Claims Conference, although Germany has meanwhile become an economic superpower, second only to the United States.

German reparation legislation was not based on lofty moral considerations but principally on pragmatic political considerations. Richard Hebenstreit, a senior official at the German Ministry of Finance, admits this, based on his survey of the operations of the special distress funds. In *The Official History of Reparations*, a document published in 1983 at the behest of the German Ministry of Finance, Hebenstreit wrote:

"It was all built schematically, with no consideration for the real situation of the applicants. In many instances, approval or denial of an application was haphazard. And this [the reparations] was thought out intentionally, since the special distress fund served more of a foreign policy purpose than any social aims... The intention was not to achieve individual justice [for Holocaust survivors]. It was much more an offering, which the German Federal Republic could present as fulfillment of its obligations, in accordance with international law, to demonstrate its willingness to pay reparations. This demonstrative aspect stood at the forefront. The benefit of the reparations to the recipients was only the backdrop ... the whole issue was more a matter of foreign policy than a social one..."

The scandal of pensions being provided to Nazi war criminals and their recognition as "victims of war" has only recently penetrated public awareness. 1,100 Lithuanian SS men, who served in murderous Nazi units during the Second World War, are eligible for monthly pensions from the German Ministry of Finance for their service. On the other hand, hundreds of Jewish Holocaust survivors, who remained in the Baltic States, are not eligible for any compensation, because they are outside any legal framework determined in Germany for personal reparations. Only the personal intervention of Chancellor Kohl, led to "a favour" being done to 300 Holocaust survivors in these countries, who received some compensation, though the amount allotted to them amounted to little more than charitable alms.

German politicians, in various discussions, tend to say, "Unfortunately, there is no absolute justice. The crimes against the Jews were so great that it is impossible to compensate them with money. However, we have, nonetheless, contributed a great deal..."

In the last 45 years, Germany has actually paid out a total of DM 75 billion in reparations to Holocaust survivors. This indeed is a considerable sum, however, there are a number of prominent facts which must be remembered:

The German government pays its own "victims of war", which include about 70,000 Nazi war criminals, annual compensation six times higher than the compensation paid to Jewish Holocaust survivors.

The laws and compensation provisions for Holocaust survivors were determined a few years after the war ended, while Germany was still plunged in ruin, and the meagre compensation determined by the Germans related to the difficult economic situation. Today, Germany has become the second greatest economic superpower in the world. Yet, in all the negotiations conducted to rectify the injustice to Holocaust survivors, German representatives continue to present the same economic rationale. They ignore the fact that the annual rate of the cost of funding various reparations for Holocaust survivors does not surpass 0.67% of the annual German gross national product, which amounts to DM 3,300 billion annually. The allocation for compensation for Holocaust survivors is DM 2.2 billion *per annum*.

The Claims Conference

Following its reunification, Germany took on the debts to those persecuted by the Nazi regime and Holocaust survivors that East Germany had not supported. In November 1992, following a renewal of the question of personal reparations, a new reparation agreement was signed. The Center for Organizations of Holocaust Survivors in Israel, founded in 1989, took a leading role in attaining this reparation agreement. The Center currently serves as an umbrella organization for 25 different survivor organizations in Israel. It also serves as an apolitical framework intended to ensure the rights of Holocaust survivors to individual reparations and their rights to Jewish property. After much effort, representatives of The Center, together with representatives of a similar U.S. Holocaust survivor organization, were admitted to join the Claims Conference of the Jewish People Against Germany. This is the

first time since the establishment of the Claims Conference in the early 1950s that direct representatives of Holocaust survivors may participate in negotiations with the German government. This has inserted a new spirit, well recognized at meetings with government representatives there. The Center for Organizations of Holocaust Survivors in Israel made its participation in the Claims Conference conditional on the committee's willingness to again hear claims against the German government for a fundamental rectification of injustices regarding personal reparations. Indeed, the Claims Conference formed a new policy concerning contacts with the German government. Following exhaustive and complex negotiations at various levels in Bonn among representatives of the Claims Conference, including representatives of survivor's organizations in Israel and the US and representatives of the German treasury, a number of achievements were attained. Yet, quite a few qualifications and restrictions, placed by representatives of the German government, remain.

The central achievement is undoubtedly the monthly pension now received by survivors recognized as eligible.

Following the expiration of the basic reparations law at the end of 1969, the German establishment refused to allocate a fixed monthly *Rente* to Holocaust survivors who had not received any compensation, or to those who had only been eligible for an insubstantial one-time compensation payment.

It is true that DM 500 a month is a minimal *Rente*, given only to Holocaust survivors in financial distress, who spent at least 6 months in concentration camps, or 18 months in a ghetto or living in hiding or with the underground. Nonetheless, this is an achievement in principal, since the German government has retreated from its former position, that it would not discuss again the issue of monthly pensions. In July 1996, representatives of the German treasury announced that due to "budgetary problems", there would not be any further negotiations on reparations to Holocaust survivors until the end of 1999. However, again, due to pressure by Holocaust survivors, and a group of US senators, it has now been agreed to resume negotiations. At present, August 1997, negotiations in Bonn are being resumed between representatives of the German treasury and representatives of the Claims Conference, who demand the removal of a series of restrictions set to limit eligibility and the inclusion of additional types of survivors in this pension.

Due to the advanced age of Holocaust survivors, it is possible that this may be the last round of negotiations. The agenda includes claims against the German government to rectify grave

injustices, which border on the absurd, towards Holocaust survivors, who have as yet received no reparations at all or have received only token compensation for all the suffering and the hardships caused them by the Nazi regime. Further, there still remain a number of survivor groups, which the German government has not recognized at all as eligible for compensation or *Rente*.

Unrecognized Concentration Camps - In order to receive a monthly pension according to criteria determined by Germany, it is not sufficient that a Holocaust survivor had been interned in a Nazi concentration camp. According to the German authorities, the camp must be "a recognized concentration camp", pursuant to a list of the economic department of the Nazi SS. Therefore, the eligibility of survivors from about 38 "unrecognized" concentration camps, set up in Austria, on the border with Hungary and Czechoslovakia, has not been acknowledged.

Open Ghettos - According to instructions by Nazi Germany during the war, the Bulgarian authorities had exiled the Jews to villages and remote provincial towns and forbade them to leave these precincts. These were ghettos in every way except for a physical wall. According to criteria set by the German government, living in these open ghettos does not make one eligible for a monthly pension, even if one lived there over 18 months.

Forced Labor Camps - Thousands of Jews in Hungary and Romania were recruited for forced labour within the framework of army service. The harsh conditions in these camps did not differ greatly from those in the concentration camps - severe physical abuse, starvation and, of course, high mortality rates. Nevertheless, these survivors were not recognized as eligible for any sort of reparations.

Assumed Identity - For some reason, a survivor, who managed to stay alive in the Nazi inferno by means of securing forged documents and living under an assumed name during the Nazi occupation, suffering deprivation of freedom and constant fear, was not eligible for compensation and a monthly pension.

Holocaust Survivors in Eastern Europe - Those survivors, who still reside in Eastern Europe or on territory of the former Soviet Union, are not eligible for the monthly pension of DM 500. The same applies to survivors, who currently reside in western countries. Polish Jews, Holocaust survivors, who, before the war, lived as immigrants in France and during the Nazi occupation were taken from there to Auschwitz, remained without reparations. The French government does not pay them compensation since they are not French citizens. The Polish government

does not pay them anything since they were not taken to Auschwitz from Polish territory. Germany also does not pay them, since they are residents of Poland or France, and refers them to these governments respectively.

Jews of Budapest - Almost all of the Jews of Budapest are ineligible for a monthly pension according to criteria set by the Germans. This is so because they “managed” to stay in ghettos “only” 10 months and not the minimum 18 months, required by German criteria. Evidently, the fact that during that relatively short period of time, Eichmann managed to destroy half a million Hungarian Jews is insignificant to the German authorities.

Means Test - Only survivors whose monthly net income is less than DM 1,941 per person and DM 2,563 per couple are eligible for the monthly pension of DM 500, if they, of course, fulfill additional conditions as well. The means test does not take into account special expenses that many survivors have and which are not covered by current health insurance, such as dental expenses or special expenses for treatment of chronic illnesses.

Thus, a survivor is eligible for a pension not because of the suffering and hardships he endured in concentration camp or in the ghetto, but rather because he presently finds himself in financial distress. The question is, of course, fundamental: Is a Holocaust survivor entitled to reparations from Germany because of the hardships he endured in the Holocaust or because he is currently poor? Is the financial issue to be examined, in order to determine eligibility, the survivor’s current financial situation? Another question is why SS Nazi war criminals, who currently receive pensions as “victims of war”, do not have to pass the same means test. These and other questions lead to the forbidding conclusion: Setting an obligatory means test turns reparation payments to Holocaust survivors into welfare payments for the poor.

Linkage - The DM 500 pension given to eligible Holocaust survivors is the only one that is not linked to an index in the whole pension system in Germany. It is absolutely clear that even under current conditions of relatively low inflation in Germany, the real value of the *Rente* is being eroded over time. As opposed to this, the pensions received by former SS men are linked to the average wage in Germany and are updated annually.

In the renewed negotiations, representatives of the German government will be requested to rectify these injustices. However, even if all the injustices in the pension system are

rectified, the sphere of those receiving reparations will be broadened to include another one hundred thousand Holocaust survivors. This is still only one third of the number of Holocaust survivors, who have not yet been compensated at all or have received only token compensation.

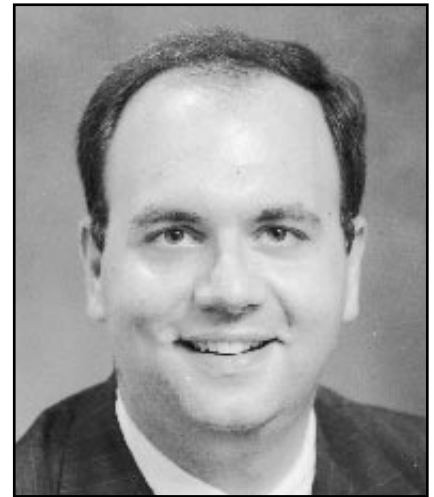
Before It Is Too Late

Over time, the situation of Holocaust survivors gradually deteriorates. The traumas of the Holocaust do not disappear as the years go by. Just the opposite is true. The survivor’s physical and mental anguish actually increases with age. The atrocities of the Holocaust and the memories of the camps and ghettos rise up anew over and over again with the passage of time. In another ten to fifteen years, there will no longer be any Holocaust survivors. Official data of the German treasury shows that in 1972, the pinnacle year for compensation payments, 278,000 eligible people received a monthly pension in accordance with German federal reparation law. Since then, 178,000 survivors, who received reparations monthly, have died. Therefore, the number of current recipients of monthly reparations is now only about 100,000. Following agreements reached in recent years, 30,000 additional recipients of monthly reparations of DM 500 from the special fund, established for this purpose, have been added. More than half a century has passed since the Holocaust occurred. Before the “biological solution” is completed and the lives of Holocaust survivors will have come to an end, it would be commendable for the German authorities to relax their rigid criteria for the receipt of a monthly pension and rectify the injustices they have created over the years. These are appalling injustices, which exacerbate the trauma of the Holocaust, suffered day in and day out by survivors of the Nazi inferno, who have not been recognized as eligible for reparations.

Legal Aspects of High-Tech Law and Immigration & Asylum were among the issues discussed during the World Council Meeting of the Association held in London in July 1997. Harold Ullman and Richard Lister addressed the first issue; Christian Charrière-Bournazel addressed the second. More highlights from the Council Meeting will be published in the next issue of *JUSTICE*.

Developments in High-Tech Law

Harold Ullman



The topic of high tech law has special relevance for the international Jewish legal community as many high tech issues (such as developments in biotechnology law) raise significant moral and ethical concerns. In addition cross-border transactions, particularly those involving Israel, are increasingly high tech in content, and an understanding of the relevant legal and tax considerations is important for today's international practitioners and essential for attorneys expanding their Israeli practice.

On June 3, 1997, I was privileged to chair the first of two IAJLJ sponsored programs on the topic, "Legal Aspects of

High Tech." The program occurred as part of the IAJLJ 1997 World Council Meeting in London. It consisted of a panel presentation led by three experts on high tech law: Professor Jean-Christophe Galloux, a consultant with Coudert Freres, Paris, France; Richard Lister, a partner with Berwin Leighton, London, England; and Eric Tomsett, a partner with Deloitte & Touche, London, England (his presentation will be published in the next issue of *JUSTICE*). The panel began with an overview of recent high tech intellectual property developments which was followed by a discussion on the basic legal and tax issues involved in cross-border high tech transfers. The panel concluded with a practical application of these concepts to structures involving the transfer of technology to and from Israel.

Overview of High Tech Intellectual Property Developments

As international regulatory bodies struggle to keep up with high technology

developments, practitioners struggle to familiarize themselves with the current outpouring of international pronouncements. Our first speaker, Professor Jean-Christophe Galloux, provided an overview of recent world intellectual property developments in the areas of biotechnology and information technology law. Professor Galloux is a Professor of Law at the University of Versailles and consults to Coudert Freres, Paris, France on intellectual property, pharmaceutical and biotechnology laws. In addition he serves as an expert to the European Commission and UNESCO on biotechnology law matters.

Professor Galloux reviewed attempts by the European Union to harmonize biotechnology patent law. Although international patent law on biotechnology is diverse, harmonization of biotechnology law proves

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contentious. This is particularly the case where living material, such as human genetic materials, is concerned as the issues have cultural and value-laden significance. Questions currently under discussion include: (a) the patentability of animals and (b) the patentability of human body parts or products. Once fairly generous in granting patents, the European Patent Office has become increasingly restrictive in granting biotechnology patents.

With respect to information technology, Professor Galloux discussed developments arising from the WIPO Diplomatic Conference of December 1996 which were aimed at reinforcing the protection of the author's copyright in the digital age: (a) the WIPO Copyright Treaty (WCT), which revises the Berne Convention, (b) the WIPO Performances and Phonograms Treaty (WPPT), which updates the 1961 Rome Convention, and (c) a draft WIPO Treaty on Intellectual Property in Respect of Databases (the Draft WIPO Database Treaty). The WCT recognizes two rights under international law previously not covered under the Berne Convention (a right of reproduction and communication and a right of making available to the public) and covers traditional items as well as computer programs. The WPPT contains provisions relating to digital technology and the rights of distribution.

Under current law databases that do not pass an originality test are not protected by copyright under international treaties. The production of such databases, however, requires considerable investment. The Draft WIPO Database Treaty would establish a *sui generis* protection system for the makers of databases, irrespective of whether their databases are protected by copyright.

Legal Considerations in Advising Clients on International Technology Transfers

Although the laws governing technology transfer vary among jurisdictions, there are basic legal considerations that arise in most technology transfer deals. Richard Lister, provided an overview of the basic legal considerations in advising clients on international technology transfers. The text of his address follows on page 28.

Tax Considerations in Advising Clients

The structure of high tech transfer deals is more often than not motivated by tax considerations. Failure to take into account the tax consequences of a particular structure can result in missed tax savings and unexpected tax traps. Eric Tomsett provided an overview of the key tax issues relating to international technology transfers.

Technology Transfers with Israel

Having reviewed the basic legal and tax considerations on international technology transfers, the panel applied these concepts to transfers of technology to and from Israel. The panel based its discussion on papers prepared by Dr. Samuel Borenstein, Yitzchak Chikorel and Yael Katz, members of the Jerusalem and Tel Aviv offices of Igal Brightman and Co., a member firm of Deloitte Touche Tohmatsu International.

With respect to transfers of technology to Israel, a key consideration is the ability to protect the intellectual property in Israel. Israeli law grants intellectual rights the status of property that can be the subject of ownership and transactions. Trademarks, patents and designs can be registered under

Israeli law and copyrights are protected. The key tax considerations discussed were accruing the royalty income in a low-tax jurisdiction and reducing Israeli withholding tax (normally a 25% rate) on royalty payments to foreign licensors through the use of Israel's growing tax treaty network (e.g. the U.K.-Israel income tax treaty provides for 0% royalty withholding except for royalties from cinematographic or television films). Participants also discussed the impact of Israel's anti-tax treaty shopping policy on the ability to utilize royalty structures to minimize withholding taxes.

With respect to transfers of technology from Israel, practitioners should be aware of the implications under the Encouragement of Research and Development Law ("R&D Law"). The R&D Law enables developers to receive governmental grants in consideration of royalties paid by the developer to the government once the development is completed. In addition the grants may be conditioned upon the government R&D Committee approving the transfer. Participants also discussed the tax considerations of the transfer, including royalty and dividend routing structures utilizing the Israel-Netherlands income tax treaty.

ABA San Francisco Meeting Panel on "High Tech in the Middle East"

The IAJLJ American Section was pleased to co-sponsor a panel on "High Tech in the Middle East" as part of the 1997 American Bar Association ("ABA") Annual Meeting in San Francisco, California. This program was one of the first ABA panels to be sponsored by the IAJLJ and brought together practitioners from the United States and Israel.

Legal Considerations in Advising Clients on International Technology Transactions

Richard Lister

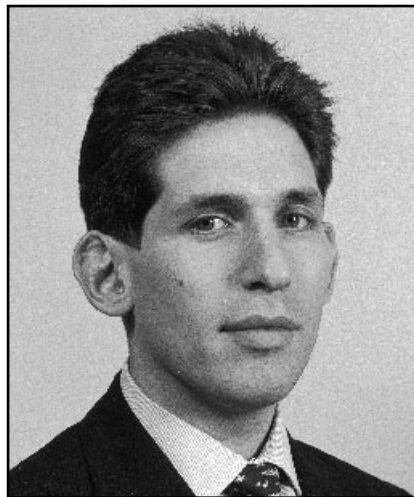
Technology transfer is a broad term. Generally it is taken to mean the transfer of a bundle of intellectual property rights which go to make up a particular product or process. This can include patents, copyright, know-how and trade marks; some of the rights may be registered or, at the other extreme, may be resident only in someone's head and therefore transferable by consultation with the owner.

Mechanisms of Technology Transfer

Consultancy and Exchange Programmes

The first type of mechanism which might be used to transfer technology might be the use of a consultancy or exchange programme. By using a consultant, technology transfer may take place by the consultant transferring the relevant skills and information to enable the

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organisation to use the transferred technology itself. Sometimes, organisations that are particularly reliant on technology do this by way of an exchange programme.

Research and Development Programmes

A more formal version of the exchange programme is a research and development programme which typically involves parties entering into an agreement under which a new product may be

developed or improved with the resulting intellectual property being shared between the joint developers.

Purchase or Licence of Intellectual Property Rights in a Particular Technology

The two main ways in which technology is transferred are the **purchase** or **licence** of intellectual property rights in a particular technology.

The similarity with transfers of real property should be immediately apparent: one may either buy title to the technology outright, if possible without inheriting any restrictions on one's use; or, alternatively one may purchase a limited right (or combination of rights) to exploit the transferred technology to one's own advantage or, in some instances, to the mutual advantage of licensee and licensor.

Many issues influence the decision of whether technology is purchased or licensed. Licensing is often the chosen route where the owner wishes to appoint a variety of entities to exploit its technology. A good example is the owner of a software product who is looking for maximum gain in a particular territory of the world. It may be that the most effective route for the owner would be to appoint a number of licensees to exploit its product: in this instance, therefore, the use of a non-exclusive licence would be a sensible idea. The main issue which often drives the decision is taxation.

An outright purchase is usually simpler than a licence negotiation, particularly in the case of registered trade marks and patents where the particular right being assigned is easily defined by reference to the registration. It is easier to say what is being sold and the transfer is

generally more straightforward to document.

Licensing is more complex. In most licensing negotiations a licensor, whilst naturally wishing for its technology to be exploited for its benefit by the licensee, will want to ensure that the precise ambit of the licence is clearly defined and that wherever appropriate the proper controls can be exercised over the licensee's activities. The licensee however will usually want to be able to go its own way in exploiting the licensed rights as far as possible.

Other Technology Related Agreements

Other technology related agreements used to transfer technology between parties include (a) joint venture arrangements, which may include the establishment of a jointly owned company which has rights licensed to it by its shareholders; and (b) franchises where a franchisor grants the franchisee the right to carry on business in accordance with a clearly identifiable business format comprising various designs, insignia, trade marks, trade names, copyright materials, business systems and techniques.

Of all of the above, the two which one most commonly encounters in the commercial context are the outright transfer of technology and technology licensing.

Outright Transfer of Technology

Due diligence: what am I buying?

Perhaps the most important issue on an outright transfer of technology is the process which the purchaser undergoes in order to satisfy itself: *first* that the bundle of rights which is on offer prop-

erly comprises the technology which the purchaser wants to buy; and, *second* that the vendor owns what it purports to sell.

In order to get answers to these questions, it is customary for a purchaser to instruct its advisers to carry out "due diligence" into the rights which are being acquired.

Where the purchaser is acquiring a registered right such as a patent or a trade mark, the issue of due diligence is more straightforward: the registration can generally be searched and confirmation obtained that it is valid and in the name of the person who purports to sell it. An issue which often arises is that of cost: where a world-wide portfolio of patents or trade marks is being acquired, search fees can run into the tens of thousands of pounds (which is not particularly well received by clients).

Carrying out due diligence into unregistered rights, such as copyright in the United Kingdom, creates more difficulties. If a foreign investor is looking to purchase a UK software product for example, it would be wise to investigate ownership of software, by reference to the first authors of the software and, in particular, their relationship with their employer. In the UK, we have a situation where an independent contractor (for example a computer consultant) who has not executed a written assignment in favour of an employing party, will still retain title to the software which has been written for its employer. The situation is different for employees: copyright in software written in the course of one's employment vests automatically in the employer except where there is an express agreement to the contrary.

It is therefore key in carrying out due diligence into the ownership of copyright

in computer software to trace back into every developer who has contributed to a product in order to establish whether title is properly vested in the vendor.

In an international transaction, due diligence can be more complex as one is forced to delve into the possibility of different bits of the same product being written by employees in different countries and thus subject to different copyright regimes.

But a comprehensive due diligence process is important, therefore, in order to give your client the comfort required that the vendor is able to sell the technology which is on offer and that the correct rights are being purchased.

How is the technology valued?

Valuation of intellectual property rights is a complex area. A reasonable and reliable valuation of rights is often difficult to obtain. Criteria which are sometimes applied include the number of countries where registered rights have been obtained by the vendor; the existence of competing products; and the potential duration of rights which are acquired.

Are there local law formalities which need to be complied with in order to perfect title?

As to local law formalities, most transfers of registered rights such as patents, designs and trademarks need to be formally registered with the national body which maintains the relevant register. There may also be requirements for the signing of a transfer document. Local advice needs to be obtained before completion in order to ensure that documents are valid and binding on the parties.

Licensing Technology

Defining the licensed technology

Licensing of technology is the classic method of transferring technology between parties. A transfer of technology under a licence will almost invariably include passing confidential information, coupled with a grant of rights to the licensee both to use that information and to work under any registered intellectual property rights which the licensor may have.

In common with the outright purchase of technology, it is important to ensure that the licensed technology is correctly defined. In some cases, licensees may carry out due diligence in the same way as a purchaser would if it were buying technology outright.

The definition of "technology" may be very broad. At the one extreme, there are registered rights (particularly patents) which may include copyright, trade marks, know-how and confidential information. The key in a technology transaction is to ensure that one has properly described all the relevant rights which, together, form the technology which is to be licensed to the licensee.

Parties negotiating technology licences should be prepared to be flexible. Invariably, the entire licence when negotiated represents a collection of compromises; it is generally unwise, therefore, to agree finally any one aspect (unless clearly favourable to the party concerned), unless all other aspects have been agreed upon also.

The degree of detail to be included in the licence is a matter of personal preference and will depend on the cultural background of the parties. United States' organisations generally prefer to see every likely contingency dealt with in some detail, while on the other hand

continental European licences are frequently expressed quite simply and leave much to be implied.

Anti-trust

Anti-trust laws play an important part of licensing transactions. In a number of jurisdictions, anti-trust rules limit the use of the monopoly conferred by intellectual property rights and specify what the legislature sees as legitimate restraints on competition. These rules can be very prescriptive, perhaps the best example being the Technology Transfer Block Exemption issued by the European Commission.

The Block Exemption is effectively a safe harbour for those drafting certain types of technology licence. It sets out, in some detail, the types of restriction which can be included in licences without the agreement falling foul of the anti-competitive provisions of the Treaty of Rome. It contains a so-called "White List" of restrictions which are commonly found in agreements and which are permissible; and a so-called "Black List" of restrictions which may not be included in licensing agreements if the parties wish to benefit from the Block Exemption.

Compliance with the block exemption, in terms of time and legal fees, can be particularly onerous from the perspectives of licensor and licensee alike. In addition, it very often shapes the commercial nuts and bolts of a transaction where parties wish to benefit from the exemption.

Where licences take effect in other countries outside the EC other rules of competition law may well apply. United States' anti-trust law is highly developed in relation to licence agreements, though the attitude of the authorities to the

restrictions commonly found in licence agreements is now appreciably more liberal than it was a few years ago.

Australian and Japanese competition laws have application to licence agreements which operate in their respective territories; the laws of the Latin American countries and of India all contain stringent provisions regarding terms that may be included in licences. In Latin America and India, technology licences must generally be registered with the appropriate authorities and their approval of the licence terms is often necessary before the licensee is permitted to remit royalties to the licensor.

Taxation

Taxation issues often influence the decision as to whether technology should be licensed or purchased outright. Since every country has its own unique tax regime, it is necessary first of all to decide which tax laws may apply: while those of the countries of residence of the licensor and licensee will undoubtedly be relevant, those of the country where the licensee in fact carries out its operations (where different from the country of residence) may also need to be considered.

There may well be a case for having all or at least the bulk of the assets to be licensed held by a company in a country with a suitable tax regime; though a transfer of such assets out of jurisdictions such as the United Kingdom may have its own tax consequences and specialist advice must be sought. The Netherlands Antilles and Jersey are quite often chosen, but there are many other alternatives, and there is no one country that is right for all circumstances. Particularly important is the existence or otherwise of suitable double taxation treaties which

allow the licensee to pay royalties to the licensor gross, free of any withholding taxes that would otherwise be levied in the licensee's country.

Insolvency of the licensor

Understanding the effect of local law on the insolvency of the licensor is an area which needs to be addressed before financial commitments are made under a licensing arrangement.

On the face of it, the issue is fairly straightforward: will the licensor's insolvency entitle the appointed trustee in bankruptcy (in the US), liquidator or local law equivalent to reject the terms of the licence agreement. In practice, the legal position can be unclear and difficult to protect in absolute terms and is often complicated when offshore structures are used.

The situation which one needs to guard against is the possibility of the liquidator or receiver attempting to start afresh and re-sell or re-license the technology to a new licensor. Alternatively, the appointee may demand an additional payment from the licensee for it to continue its business under the licence agreement. Some jurisdictions contain protection against rejection of licences in these circumstances; others allow liquidators to disclaim contracts which are in any way onerous. The risk to the licensee needs to be defined from the outset and precautions taken if possible. The most common approach is to take some sort of security over the technology which is being licensed in order to protect the rejection of a licence.

Current Issues in Technology Transactions

Two current issues which affect tech-

nology transactions on a day to day basis, are escrow and year 2000 compliance.

Escrow is a legal term which is used to describe the deposit of a document, money or goods with a third party who then holds the deposited material pending the fulfilment of a specific set of agreed circumstances.

In technology terms (and in particular in the hardware and software industries), escrow has the same meaning: the deposit of a vital piece of technology (for example, a set of instructions which would allow the user of a piece of software to maintain it without reference to the owner or of a set of original designs for hardware parts) with a third party agent who is charged with releasing the deposited material to the user in specific circumstances, typically the insolvency of the owner.

Escrow is increasingly common in international technology transfers as a way of protecting the licensee against the insolvency of its licensor. The intention of the escrow arrangement is simple: to place the obligation of releasing the valuable deposited material on a third party (the agent) and not on the owner, thus avoiding the possibility of an appointed liquidator attempting to keep the valued technology and disclaim the obligation to release the deposited material.

The main issue on an international transaction is the location of the escrow agent and the governing law of the escrow agreement. Otherwise, careful definition of the triggering events (which give rise to the release of the deposited material) is essential.

Year 2000 compliance - the second issue, year 2000 compliance, has been fairly well publicised in the United States but to a far lesser extent in Europe (except perhaps in the UK where consid-

erable amounts of time and money have been spent on establishing a Government task force to bring the problem to people's attention).

The collapse of many of our technology systems is being forecasted towards the end of the century by virtue of the change in year from 1999 to 2000. Because computer programmers in the middle part of this century looked to save space on their systems, they entered the year as two digits only (for example 89 or 90). The habit became entrenched, despite cheaper storage costs and the problem has prompted draft legislation in both the US and the UK.

At the beginning of the millennium, therefore, computers around the globe will, it is predicted, fail to recognise "00" as 2000 but will count it as the beginning of the century. Given that many IT specialists are predicting that the resulting damage to businesses and the economy is likely to be substantial, the area is one which requires attention when technology is transferred, whether by way of licence or outright purchase.

This has had an interesting effect over the last 18 months in technology transactions. Purchasers and licensees have sought to obtain a year 2000 compliance warranty under which an assurance or combination of promises are given in relation to the performance of the technology which is being sold. Some vendors are content to give this warranty. Others have made it a sackable offence within their organisation to give the warranty in a transaction.

In practical terms, the issue should be tackled when the purchaser is carrying out its due diligence into the target business. In addition, contractual comfort, where it is available, should be obtained.

Immigration and Asylum - Conflicting Rights and Interests

Christian Charrière-Bournazel



France has seen an evolution in immigration law since the end of the Second World War and the Vichy government with its harsh provisions relating to foreigners. Two proclamations were published in 1945, dealing with nationality and the rights of foreigners. General de Gaulle had a number of objectives, one of which was to enable the immigration of up to 5 million foreigners. These immigrants were welcomed into France not for humanitarian motives but because France needed manpower and labour which was both cheap and undemanding in trade union terms. The tolerance prevailing during this period, known as the “Thirty Glorious Years”, was followed, however, by a new reality.

French constitutional principles stem from a number of documents. First, the Declaration of Rights of Man of 1789. This document seems to distinguish between the rights of “man” and the rights of a “citizen”. The preface to the Constitution of 1946 is very precise in

Me Christian Charrière-Bournazel, is the former President de la Commission Juridique de la Licra, Paris, France. This address was given during the panel discussion on Immigration and Asylum, during the World Council Meeting of the Association, held in London in June 1997.

terms of the rights of man: equality, presumption of innocence, freedom of opinion, and equality of opportunity for men and women, but there are certain rights which are applicable only to French citizens, for example, the right to vote and the right to be elected. Other rights relate only to foreigners, for example, the right to asylum. There is one right inscribed in the Constitution which states that any man persecuted due to his action in favour of freedom has a right to asylum on French territories. The Constitutional Court has held that the principle of equality must prevail in the Republic between nationals and non-nationals, and between men and women, who are on French territory; nevertheless, there may, for example, be special police measures which govern the entrance of foreigners. Supranational principles now govern these issues - the 1951 Geneva Conventions and 1967 Protocol, and the Schengen Agreement, setting up procedural regulations in respect of asylum claims, which is part of the European Convention on Human Rights and is applicable to all the EU signatory states. France has ratified the right to individual recourse. But only in 1989 did the *Conseil d’Etat* accept that the European Law should be transposed into France’s national body of law.

Asylum in France has three legal bases: as noted, the *first* is found in the preamble to the Constitution of 1946, transposed into the 1958 Constitution (any man persecuted due to his action in favour of freedom has a right to asylum on French territories). This is a rather romantic notion and brings to mind the French poet Alphonse de Lamartine, who said that: *I am the citizen of the same country as any man who thinks freedom is my country.* But the way this provision is applied is rather astonishing. In France, we are going to admit a dictator Jean-Claude Duvalier, undesirable though he is, whereas many of his victims, Haitians living in France is willing in an irregular administrative position and are often sent back to Haiti as they have not been given the status of refugees.

Secondly, there is the Geneva Convention of 1951 and Protocol of 1967. As a matter of law, all signatory parties of the Convention are required to examine the situation of the asylum seeker to see if his fears are well founded, by reason of his race, religion, nationality or the fact that he or she belongs to a certain social group, or holds certain political opinions.

If such asylum seekers are not excluded by the Convention they must benefit from the status of refugees. Excluded are persons who have committed crimes against peace, war crimes, crimes against humanity or serious common law crimes.

Third, the right of asylum and the rights of immigrants are now merged in the Act of 2 November 1945.

The request for admission - A number of organizations and lawyers work on behalf of immigrants. One prominent group in France is GISTI - Information and Support for Migrant Workers Group. The request for admission is governed differently depending on whether the person is already on French territory and asking for asylum or whether he is entering through an airport or other border crossing. When the foreigner requests asylum he is kept in a waiting area until the time arrives for his departure, his request is examined to see whether or not it is obviously grounded on the wrong principles. This is because the statute provides that a person seeking asylum must have the status of political refugee the moment the application has been made, whereas a foreigner who arrives in France may well be met by administrative measures, for example an *arrete* by the *prefet de police*, declaring that the application is groundless. In such a case, he will not be entitled to the status of asylum seeker, instead he will be returned to the border. There are a number of administrative detention centres around Paris. The organizations dealing with immigrants have made it clear that the foreigners placed in these centres are often unaware of their rights, do not know how to fill in the proper forms and do not know French. There is much hypocrisy in this field, and the figures bear this out.

In 1990, in France, 54,813 foreigners

were asylum seekers. In 1993, the figure dropped by about half to 27,564. In 1995 the figure dropped to 20,000, and in 1996 the number was below 20,000. It is incredible to think that in these dramatic times there are fewer applications than in 1990. But if there are fewer applications it is because the results are so negative, that it is an active way of discouraging asylum seekers.

A telling example relates to Algerian refugees. The number of Algerians who have obtained refugee status since the beginning of Islamic terrorism is as follows: in 1992 - 15; in 1993 - 14; in 1994 - less than 20; in 1996 there were only 643 requests from Algeria compared to 1,800 in 1995. Most Algerians know there is no point in making an application. Why? Because we are confronted with a situation where the law demands from a person whose life is at risk to prove that he is in peril of death. There must be proof of persecution of the group to which the person belongs which enables the right of asylum to be granted. France is in a terrible dilemma - looking at the history of Algeria, asylum seeking by Algerians could lead to a massive influx of people.

Nevertheless, it should be noted that the authors of the Geneva Convention did not intend to limit the prosecuting agents to the representatives of the legal powers. The Commission stated that one should not only examine people who are being persecuted in the country in which they live but people who are being persecuted because the State is an accomplice of terrorism or because the State has not managed to protect that person. The Appeal Commission rejects this view but that is because France is not willing to admit any more immigrants.

Rights of refugees in France - the law of 23 April 1997, is a law which contains

additional controls as to foreigners' rights to stay in France. It contains important innovations which reflect a hardening of policy, and whose objective is to fight against illegal immigration. The essential measures are: to enable the police to retain the foreigner's passport against a receipt which does not allow him to cross borders, so that the foreigner is stranded in the country where he is seeking asylum. This is an administrative decision not a judge's decision. Further, in certain areas, a person sitting in his car may be searched at any time, without need for a judge's authorization. Fingerprints are being collected and will be filed. Finally, an employer who has hired foreign workers may be penalized and the worker may have his temporary work permit removed. These are preemptive administrative measures, which are contrary to fundamental rights and transform the employer into someone who employs asylum seekers in an irregular manner.

Since 1980 the law on immigrants and foreigners has been modified by 10 successive laws. This shows that there is great uncertainty as to the democratic position of France in the face of these issues. Secondly, we are in a situation where we no longer know whether a reasonable approach to control is integration or repatriation. In France 10 million French people have either both parents or a grandparent who is a foreigner. France is a mixture of peoples, nations and origins and this is what makes France a strong country. Now France is afraid and in danger of losing its own soul. However, there is no other solution but to resort to law. It is not law which maintains or keeps us, it is us who maintain the law.

Balancing Freedom of Movement Against Impairment of Religious Feeling

HCJ 5016/96; 5025/96; 5090/96; 5434/96

Lior Horev, *et al.* v. Minister of Transportation, *et al.*

President of the Court Aharon Barak, Deputy President Shlomo Levin, Justices Theodor Orr, Eliahu Matza, Mishael Cheshin, Zvi Tal, Dalia Dorner.

Delivered on 13.4.97.

Opinion of Justice Aharon Barak (*Extracts*)

In the Israeli public discourse, Bar-Ilan Street has ceased to be a mere thoroughfare. It has become a term of social significance. It reflects a deep political dispute between the Haredim [those who adhere strictly to religious law and custom] and the secular [population]. The dispute is not limited to the issue of freedom of movement on Bar-Ilan Street on the Sabbath. It is a deeply rooted dispute as to the relationship between religion and state in Israel; it is a penetrating dispute as to the character of Israel as a Jewish State or a democratic State; it is a bitter dispute as to the essence of Jerusalem. We must decide the matter despite the political and social consequences. The dispute before us is legal in nature... In question is the margin of discretion given to the Central Traffic-Sign Authority to [give instructions] as to traffic arrangements for Bar-Ilan Street such that the street will be closed to traffic during specified hours on Friday evening and on the Sabbath. In order to answer these questions we must turn to the language and purpose of the regulations. Our determination will be based upon legal standards... I am aware that many will not read our legal rationale. They will consider only the societal results. They will not inquire into the relative weight of our normative considerations. They will focus on the political consequences of our ruling. We are aware that our judicial determination has extra-legal implications. We are unable to prevent this. Our judicial role obligates us to determine the law as we best understand it...

The Facts

Bar-Ilan Street is a major traffic artery. It is approximately 1.2 kilometers in length. Bar-Ilan Street connects the city entrance with the northern neighbourhoods. It crosses *Haredi* neighborhoods, and services the residents of these neighborhoods. It also services those residents of the northern neighborhoods wishing to travel downtown for services, business and other purposes. The volume of traffic on a weekday is great. However, there is less traffic on Sabbath and holy days, approximately 21-28% of the weekday level.

On July 7 1996, the National Superintendent of Traffic, rendered a new decision, [that] Bar-Ilan Street would be closed to traffic on the Sabbath and holy days during prayer time. The petitions before us are directed against this decision.

The Petitions

The first petition before us (5016/96) is that of Lior Horev, claiming that the decision is not legal, as it was affirmed without consulting the residents of the secular neighborhoods and the head of the local authority. In the Petitioner's opinion, the decision is unreasonable in the extreme, for it effectively closes the central traffic artery for a number of hours on a regular basis (as opposed to a temporary closing for a special event). According to the Petitioner, the decision to close the street is based upon political considerations. The Petitioner warns against interfering with the free movement of security and emergency vehicles, which traverse Bar-Ilan Street on their way to the hospital on Mount Scopus. The Petitioner requested that we declare the decision invalid. We were also requested to grant a temporary injunction, in order to maintain the *status quo* until final judgment...

The Normative Framework

The starting point is section 70(1) of the Traffic Ordinance

[New Version], which empowers the Minister of Transportation to arrange traffic and to determine rules as to use of the roads by motor vehicles. In accordance with this power the Transportation Minister enacted Regulation 17 of the Traffic Regulations 1961 [allowing the Central Traffic-Sign Authority to instruct the local traffic-sign authority on making, altering and canceling traffic arrangements]. The “Central Traffic-Sign Authority” is the Superintendent of Traffic... In the matter before us the Central Traffic-Sign Authority is the Minister of Transportation...

Regulation 17 grants the Superintendent of Traffic administrative power to determine traffic arrangements. This power must be implemented with administrative discretion and according to the principles of administrative proceedings. According to the doctrine of administrative discretion, the administrative authority may consider only the relevant factors. In addition, the administrative authority must balance the relevant considerations in an appropriate manner. The balance must be reasonable. The decision must be reasonable. The use of administrative discretion must be based upon a systematic, honest and pertinent assessment of the facts. *Quare*, in this matter, whether these two requirements have been fulfilled.

The Rules of Administrative Discretion: Relevance

The administrative authority, which implements governmental power, may consider relevant factors alone. It may not consider extraneous factors. In the matter at hand, the Transportation Minister considered the harm to the religious feelings and the religious lifestyle of the *Haredi* population dwelling around Bar-Ilan Street... Whether a consideration is relevant is a function of the purpose that underlies the administrative power. As an interpretive guideline - subject to the specific purpose of any legislation - it may be asserted that the consideration of religion and the religious lifestyle is inappropriate if application of the administrative power is intended to impose religious obligations upon the individual. Consideration of religion and the religious lifestyle is permitted if its purpose is to give expression to the religious needs of the individual...

Consideration of religious feelings - when such consideration does not reach the level of religious coercion - is a “general consideration”, which may be considered during the implementation of governmental authority. Taking religious considerations into account is within the boundaries of the general purpose of any law. This purpose may, of course, be inconsistent with a particular purpose, according to which relig-

ious considerations should not be taken into account... This basic approach is strengthened following the enactment of Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation, which provide that their purpose is to protect the dignity and freedom of man and the freedom of occupation, “in order to anchor in a basic law the values of the State of Israel as a democratic and Jewish State”. Consideration of religious feelings and religious lifestyle has been recognized in the past - as part of the general purpose of legislation - for it is consistent with the values of the State of Israel as a democratic State. This consideration now receives added force, as it is consistent with the values of the State of Israel as a Jewish State. Indeed, the values of Israel as a Jewish and democratic State are intertwined. Both are constitutional principles. Both are used in the interpretation of old and new law. One must make every interpretive effort to achieve synthesis and compatibility between the two...

Administrative Discretion: Balance and Reasonableness

One must not forget that considering the religious feelings of one individual may impair the human rights of another. Such consideration may injure the feelings (religious or otherwise) of another. It may injure other interests as well. The conflicting factors must be balanced. This balance, when properly conducted, will lead to the conclusion that a decision was reasonable...

Religious feeling is a public interest that must be considered. However, it is not an “absolute” value. One must (horizontally) balance religious feelings against other values that express the public interest. One must (vertically) balance religious feelings against the human rights that have been impinged...

Moreover, just as religious feelings are not “absolute” values, but rather “relative” values that must be balanced against other rights, values and interests, so freedom of movement is not an “absolute” value. Indeed, it is well known that roads may be partially or completely closed to traffic. The Traffic Law is full of signs and symbols that dictate traffic arrangements resulting in the limitation of freedom of movement. Freedom of movement is therefore a relative freedom. The law does not protect the full extent of this freedom. Indeed, the vast majority of human rights are relative. They may be impaired to realize interests that the community considers worthy. This is because human rights in general and the right of freedom of movement in particular are not the rights of an individual on a deserted island; they are the rights of an individual in society. They assume the

existence of a State that must realize social and national goals. Thus all democratic societies that are sensitive to human rights recognize the need to limit such rights in order to maintain a society that guards them...

The balance between conflicting values and interests should be either principled or "definitional." By law, the balance should be based on general principles that will allow the solution of future cases. The balance must express a "rational principle."... It must reflect "a standard that includes within it a value-laden guideline" that distances itself from a "random paternalistic criterion, the direction and substance of which cannot be assessed in advance." (Justice Shamgar in Rehearing 9/77 *The Electric Company Ltd. v. Publishers of "Ha'aretz" Newspaper Ltd.*, 32(3) P.D. 316, 337)...

"Balance" is a metaphorical concept. When a judge balances between conflicting values he is acting normatively. At the basis of the "balancing" doctrine lies the principle that "not all values have identical importance in the eyes of society, and in the absence of legislative direction, the court must assess the relative social importance of the different values. Just as there is no person without a shadow, so there is no value without its relative weight. Determining 'balance' on the basis of relative weight implies a societal evaluation as to the relative importance of different values." (H.C.J. 14/86 *Lior v. The Film and Play Review Board*, 41(1) P.D. 421, 434)...

Democracy finds itself in distress when it must confront the question of whether the protection of human feelings can justify the impairment of human rights. A democratic society is a society which takes into account the feelings of every individual. Moreover, a democratic society is willing to recognize the limitation of rights (such as the freedom of expression or worship) if implementing these rights will injure a person's life or body... A democratic society that is willing to recognize the limitation of rights due to potential bodily harm must be sensitive to the possibility that limitation of rights may cause emotional harm. At times emotional harm is more severe than bodily harm. A democratic society that protects life, body and property, must also protect feelings and the human spirit.

On the other hand, a democratic government places human rights at the top of its scale of values. Democracy is not only formal democracy... where decisions are determined by the majority. Democracy is also substantive democracy... in which the majority does not have the right to impinge upon human rights... The need to guard and protect human rights - according to (substantive) democracy - will encounter considerable diffi-

culty if one can, in every case, impair human rights in order to protect human feelings that are damaged by human rights. Indeed, it is the nature of a human right that it is likely to damage the feelings of another.

Indeed, communal life in a democratic society by its very nature requires an awareness that feelings may be injured in order to maintain human rights. The principle of tolerance... leads, by itself, to the requirement that a person whose feelings have been injured will be tolerant towards the person whose right has been damaged. "This is the 'other side' of the mutual tolerance necessary in a pluralistic society." (Justice Witkon in H.C.J. 549/75 *Leisure Films Ltd. v. Film Review Board* 30(1) P.D. 757, 764)...

In a democratic society, how can we solve this complex dialectic? How can we resolve the difficulty arising from the fact that tolerance - which is at the base of the democratic outlook - justifies both the protection of this right and its infringement? It appears to me that the solution lies in recognizing a "tolerance level" of injury to feelings, which each member of society accepts as part of the social consensus at the base of democracy. The limitation of human rights in a democratic society may be justified only when the injury to feelings rises above this tolerance level. Naturally the "tolerance level" is not uniform. It varies from right to right and from injury to injury...

The tolerance level naturally varies from one democratic society to another. For example, as the separation between religion and State is more pronounced in a given legal system, and as rights are couched in absolute terms, that legal system will prefer human rights over feelings. On the other hand, as the barriers between State and religion fall and the legal culture is based, to a greater extent, upon a relative concept of human rights, so that legal system will give greater consideration to feelings as an appropriate justification for the limitation of human rights. Our society has its unique aspects. Our solution will no doubt be unique. It will be an Israeli solution...

In determining the "tolerance level" we must consider the nature of the right impaired - as it is understood in our society - as well as the extent of the resulting impairment, and the likelihood of injury to feelings.

The Nature of the Right: The accepted view is that rights are not of equal stature regarding their protection against impairment. The right of human dignity is not equivalent to the right of property, and within the context of the right itself there may be differences in the degree of protection against impairment. For

example, the right of political free speech is not accorded the same degree of protection as that accorded the right of commercial free speech...

[F]reedom of movement - the impaired right in question - is one of our most basic rights. So it is in comparative law. So it is in Israel. Justice Zilberg, in discussing the "freedom of movement of the citizen to exit the country" stated that this right:

"is a natural right, recognized as a given in every democratic country." (H.C.J. 111/53 *Kaufman v. Minister of the Interior* 7 P.D. 534, 536).

These words are true, *a fortiori*, regarding freedom of movement within the country.

The Degree of Harm to Feelings: In a (substantive) democracy we recognize the possibility that human rights may be limited in order to prevent harm to human feelings. In order to justify the impairment of basic human rights that are seen as the very heart of democracy, the injury to feelings must be harsh, serious and severe. These will be exceptional and unusual cases that by their nature shake the foundation of mutual tolerance... In my opinion, the same approach must apply when limiting the freedom of movement within the State because of an injury to religious feelings and lifestyle. The right to freedom of movement is similar to the right of free speech. Both are rights of the "highest order"; the "infringement equation" in both cases must be the same...

The Likelihood of Harm: Impingement of human rights is justified only when there is a high probability that feelings will be impaired. A remote danger is not sufficient. The standard of likelihood required is that of a "reasonable possibility"...

In the light of the similarity between freedom of movement within the bounds of the State and freedom of speech and worship it appears to me that the same standard of probability should apply as to infringement of freedom of movement within the State. Thus, in a democratic society, one may limit freedom of movement in order to ensure public peace and public order - including protection of religious feelings and lifestyle - only if there is a near certainty that the realization of freedom of movement will impair public peace and public order.

"Fitting Purpose"

Human rights may not be infringed, except by legislation enacted for a fitting purpose (Section 8 of Basic Law: Human Dignity and Freedom). The question as to whether a purpose is

fitting is subject to two tests: (a) if it embodies a societal goal that is sensitive to human rights, and (b) if the need for its fulfillment is important to the values of the State and society. The degree of importance may change according to the essence of the right impaired... We must apply the highest level of scrutiny when examining an infringement of the freedom of movement... Accordingly, an order forbidding Sabbath travel when such travel impairs religious feelings and lifestyle is fitting as to its content, since it is intended to protect important individual feelings. It will be fitting as to the need for its fulfillment, only if the need to protect religious feelings and lifestyle is a compelling State interest, a pressing public necessity or a substantial State interest...

"To An Extent That Does Not Exceed The Necessary"

Such infringement is not in accordance with law if it exceeds the extent necessary. While the "fitting purpose" test examines the end, the "to the extent necessary" test examines the means. This is a test of proportionality. The proportionality test contains three subtests:[a] the means adopted by the State must lead rationally to realization of the end (the "rational relationship test"); [b] the State means are appropriate only if the end cannot be achieved by other means that would impair human rights to a lesser extent (the "minimal harm" test); [c] State means are not appropriate if the harm to individual rights is disproportionate to the benefit achieved by realization of the goal (the test of "proportionality in the narrow sense")...

Considering the feelings of a particular segment of society may harm other segments of society. Here, considering the religious feelings and lifestyle of the *Haredi* Jews who live around Bar-Ilan Street impairs the freedom of others who wish to use Bar-Ilan Street as a thoroughfare. Under the proportionality test, one may not impinge the freedom of movement of such individuals beyond the extent necessary to honour the religious feelings and lifestyle of other individuals.

A Summary of the Normative Framework

Consideration of feelings - including religious feelings and lifestyles - as an appropriate justification for the impairment of human rights is especially problematic from the perspective of democratic values. The Israeli solution is this: consideration of feelings may justify the impairment of human rights if three conditions are met: *First*, such consideration must square with the special purpose that is the basis of legislation granting

governmental jurisdiction. *Second*, consideration of religious feelings is permitted only if it does not include religious coercion. *Third*, consideration of religious feelings is permitted only if the injury to feeling is so severe that it exceeds the appropriate tolerance level. That level varies from right to right. Impairment of freedom of movement due to impairment of religious feelings and lifestyle exceeds the appropriate tolerance level only if the following conditions are met: *First*, the impairment of religious feelings and lifestyle is harsh, serious and severe. *Second*, the likelihood of harm is at a level of near certainty. *Third*, there is a substantial social interest in defending religious feeling and lifestyle. *Fourth*, the impingement of freedom of movement does not exceed the extent necessary. One must choose the means that cause the least damage; impairment of freedom of movement must be in proportion with the purpose, which is protection of religious feelings and lifestyle.

From the General to the Particular

Jurisdiction: No one before us has disputed that the closing of tens of internal streets in *Haredi* neighborhoods to Sabbath and holy day traffic is within the jurisdiction of the Superintendent of Traffic. If this is so regarding internal streets, it must be so as to other streets as well...

Discretion: In exercising his authority as Superintendent of Traffic, did the Minister of Transportation properly exercise his discretion? The Superintendent of Traffic must give primary weight to the transportation consideration. He must ensure, *inter alia*, that people can travel to their places of residence... He must guarantee that inter-city highways and entrances to the city be open to traffic. Indeed, if it were to be determined that Bar-Ilan Street... has no replacement, it could not be closed to traffic on Sabbath and Jewish holy days regardless of the impairment on religious feelings and lifestyle. However, there is an alternative for Bar-Ilan Street as a main artery...

Even though the traffic consideration is primary, it is not the only consideration. The Superintendent of Traffic may consider secondary considerations... Is the religious consideration a relevant secondary consideration?...

Competing Interests and Values: On one hand stands the societal interest of preventing harm to the feelings of the religious population residing adjacent to Bar-Ilan Street.... In the *Haredi* area surrounding Bar-Ilan Street are more than one hundred synagogues and Torah institutions. On the Sabbath the residents flock to the synagogue and Torah lectures, and visit

rabbis, families and friends in their neighborhoods and adjacent *Haredi* neighborhoods. Sabbath violation on Bar-Ilan Street injures their feelings. From their point of view the injury is harsh and bitter. It should be emphasized that I do not believe that Sabbath travel on Bar-Ilan Street injures the constitutional right to freedom of religion of every person in the neighbourhood. The residents of the neighborhood are free to observe the religious commandments. Vehicular traffic on Sabbath does not deny them this right and does not injure it...

On the other hand, the right to freedom of movement is a basic right of every person in Israel... The individual's right to travel freely within the boundaries of the State and outside it is a clear expression of the autonomy of personal will... Therefore, the closure of the street to traffic on the Sabbath... impairs the constitutional right of freedom of movement of every member of the public. Moreover, preventing Sabbath travel on the streets of the city harms the public interest in free transportation... It is the government's role to protect this interest... [Further] part of the secular public will feel outraged by what, to them, seems to be religious coercion.

How can we characterize, in legal terms, the conflicting interests and values in this case? Freedom of movement... is a constitutional right. This right is impaired by the Sabbath closure of the street. We are therefore dealing with the impairment of a constitutional right recognized in Israel. What is the characteristic of the interest that injures this right? This interest does not have the status of a human right... traveling on the Sabbath, while it harms religious feelings and lifestyle, does not in itself infringe upon the religious freedom of the observant population. Therefore, we are not faced with a (horizontal) conflict between two opposing human rights...

Relevance of the Competing Interests: The Superintendent of Traffic was permitted to consider impairment of the religious feelings and lifestyle of all residents of the neighbourhoods surrounding Bar-Ilan Street as a relevant consideration in exercising his discretion. The key question is how to balance between the relevant religious consideration and other competing considerations...

Balance Between the Relevant Considerations: Balancing is properly carried out today in terms of the limitation clause in Basic Law: Human Dignity and Freedom. The values of the State of Israel as a Jewish State are confluent with consideration of the religious aspect of closing Bar-Ilan Street and with giving substantial weight to this consideration. The main difficulty is in

the values of the State of Israel as a democratic State... If the arrangement of traffic on Sabbath in order to protect religious feelings and lifestyle is a substantive social need, if the continuation of Sabbath and holy day traffic causes harsh, serious and severe harm to these religious feelings, and if the likelihood that this harm will occur is on the level of almost certainty, only then can one say that the injury to the religious feelings and lifestyle of the *Haredim* in the neighbouring communities exceeds the level of tolerance that can be expected in a democratic society...

In my opinion, the injury to the feelings of the *Haredi* population as the result of vehicular traffic in the heart of the neighborhood on Sabbath is a harsh, serious and severe injury... The religious Jew sees the Sabbath in a normative context, intended to create a particular atmosphere. The rabbis described this particular atmosphere as the special soul given to man at the outset of the Sabbath and removed from him at its end (Babylonian Talmud, *Beyzah* 16a)... The religious community anticipates that Sabbath tranquillity will not be limited to the private property of its members but will surround the public domain as well. Enter Sabbath - enter tranquillity, not only in the private courtyard of the individual, but in the streets of the community as well...

Not only has near certainty been proven in our case... It has been proven [with absolute certainty] that... the religious feelings and lifestyle of the *Haredi* residents are, in fact, impaired in a manner that is harsh, serious and severe.

Freedom of movement may not be infringed, except for a "fitting purpose"... Protection of religious feelings and lifestyle is a fitting purpose as to its content. This follows from the values of the State of Israel as a Jewish and democratic State. This follows from the special purpose inherent in the power of the Superintendent of Traffic. It is true that this is not the only purpose, nor is it the dominant purpose. The primary purpose is as to transportation. The religious consideration falls within the boundaries of the secondary purpose. This is therefore a secondary fitting purpose. The question is... whether it is necessary for this purpose to be realized, since realization impairs freedom of movement. In this regard, the appropriate standard of scrutiny is whether a "substantial State interest" is involved... Naturally, the determination as to the extent of this need is objective. It seems to me that according to objective criteria the case is borderline. In these circumstances there is no reason for the court to intervene in the Superintendent of Traffic's position... Indeed, two decisions - that which prohibited Sabbath travel on

Bar-Ilan Street and that which permitted Sabbath travel - seem to me to fall within the bounds of the "margin of reasonableness" as regards the degree of necessity for closing the street.

The impingement of freedom of movement - the human right impaired as a result of the closure of Bar-Ilan Street to Sabbath traffic - must be only to the extent necessary... The primary impairment to the religious lifestyle occurs at prayer-time. Closing Bar-Ilan Street for additional periods of time impairs the freedom of movement to a greater extent than necessary... Regarding the rights of the secular members of the public living outside the *Haredi* neighbourhoods abutting Bar-Ilan Street who wish to exercise their freedom of movement from one section of the city to another, the impairment to their freedom of movement caused by closure of the street seems to me to be an injury that does not exceed the extent necessary... their only injury is a deviation in route, of no more than an additional two minutes... [But] closure of Bar-Ilan Street to traffic on Sabbath seriously injures the secular residents of the neighborhoods surrounding the street... One should, therefore, consider permitting the secular residents to receive stickers that would allow them vehicular use of Bar-Ilan Street during the hours that the road is closed. Just as security and emergency vehicles may travel on Bar-Ilan Street on the Sabbath without limitation ...

Collection of Data and Defects Therein: An appropriate State decision requires an appropriate factual basis, based upon a pertinent, systematic and material examination of the facts.

Not every defect results in invalidation of the administrative decision. In general, only a substantive defect results in invalidation... The substance of the defect is determined by two considerations. *First*, is the breach of administrative procedures likely to have influenced the content of the decision? *Second*, how will the individual and public be affected if the decision is invalidated? The decision will be invalidated only if there is a material justification for doing so; a question determined according to a "functional test" and not a technical formal test.

The Minister of Transportation was not presented with an appropriate factual basis as to the freedom of movement of the secular residents living in the *Haredi* neighbourhoods surrounding Bar-Ilan Street... the defect is certainly substantial... the data in the matter of the secular residents is critical in making a decision as to partially closing Bar-Ilan Street on the Sabbath. This defect is substantial also in light of the second consideration, which deals with the influence of the invalidation on the individual as well as the public...

Violence: For a considerable time, *Haredi* groups have acted violently on the Sabbath on Bar-Ilan Street. There is a basis for the position that it is this violence that brought about the new thinking as to freedom of movement on Bar-Ilan Street.

Yet, that violence is what placed the issue on the public agenda, and brought about this reconsideration, does not in itself invalidate the decision that followed. This is provided, that the content of the decision was not affected by this violence...

Tolerance: Tolerance is one of the values of Israel as a democratic State. Tolerance empowers us to permit impairment of human rights in order to protect human feelings, including religious feelings and lifestyle. Tolerance is also one of the values of Israel as a Jewish State. Tolerance serves as a criterion for proper balance between different conflicting values. But should tolerance be shown towards the intolerant? In the petitions before us we heard the argument that the *Haredi* residents do not demonstrate tolerance towards the secular residents.

What, then, is the law when there are non-tolerant forces in society? We must be consistent in our democratic conception, according to which, the tolerance that guides society's members is a tolerance to all, including the non-tolerant...

Judicial Review: The Minister of Transportation was faced with a "hard case." He was entitled to decide to continue with the existing situation. Bar-Ilan Street would have remained open to traffic. That would have been an appropriate decision. It would have appropriately balanced the various relevant considerations. But the Minister of Transportation decided to close part of Bar-Ilan Street to traffic on the Sabbath. He was entitled to do so regarding the use of Bar-Ilan Street as a thruway with no direct access to the adjacent local properties. That decision falls within the scope of reasonableness. In these circumstances there is no place for the High Court of Justice to intervene. The question is not how would I have acted had I been the Superintendent of Traffic. The question is whether the Minister of Transportation acted as a reasonable Superintendent of Traffic would have been entitled to act. The answer to this question is affirmative. This is not the case as to the use of Bar-Ilan Street as a thruway with access to the adjacent local properties. In this regard the administrative procedure was flawed. In this context the decision is not within the scope of reasonableness. As to this decision we have no alternative but to intervene.

The Result: Regarding traffic arrangements from one end of the city to another, there is a reasonable alternative to Bar-Ilan Street. Under these circumstances the partial closure of Bar-Ilan

Street during prayer time, appropriately balances the right to freedom of movement with the religious feelings and lifestyle of the *Haredi* residents of the neighbourhoods surrounding Bar-Ilan Street. Therefore, I would have rejected the petition and invalidated the conditional order, had no problem arisen as to the secular residents of the *Haredi* neighbourhoods surrounding Bar-Ilan Street [but] contingent upon the fulfillment of three conditions: *First*, the alternative routes are open to traffic on the Sabbath. *Second*, Bar-Ilan Street is open to traffic on Sabbath during the hours that the street is not closed without any violent interference. *Third*, even during the hours that Bar-Ilan Street is closed on Sabbath, it remains open to security and emergency vehicles. But the facts are different. There is a problem as to the traffic arrangements of the secular residents of the *Haredi* neighborhoods - along with their families, relatives and others who travel on the Sabbath to visit those religious residents who do not complain about Sabbath desecration. The Minister of Transportation's decision, as it pertains to these individuals, was reached without proper administrative procedures... Under these circumstances I would recommend to my colleagues that we deny the petition in H.C.J. 5434/96 and render final the conditional judgments in H.C.J. 5016/96, 5025/96, and 5090/96 such that the Minister of Transportation's decision to partially close Bar-Ilan Street be annulled and the matter returned to him for a new determination. In his new decision the Minister of Transportation must consider the interests of the secular residents of the neighborhoods surrounding Bar-Ilan Street and their visitors... This consideration must be based upon a proper factual foundation and upon the conditions that were before us in this judgment and as described herein.

Justices Levin and Matza agreed with President Barak. Justices Orr, Cheshin and Dorner agreed but thought that the order should be made absolute even if it become clear that no injury was being caused to the secular residents. Justice Tal would have upheld the petition of the Association for the Protection of the Religious Public although for pragmatic reasons he joined the result in the opinion of President Barak.

Abstract prepared by Dr. Rahel Rimon.

“The City or the Temple Court Yard?”

Rabbi Aharon Lichtenstein



To the extent that we feel any sense of unity within *Am Yisrael* [the people of Israel], to the extent that we feel like a single body, then the entire body should feel shamed and pained [at the murder of Prime Minister Yitzhak Rabin] no matter which limb is responsible for this tragedy. We should feel deep shame that this method of supposedly solving conflicts has become part of our culture. But naturally, this shame should be felt by our camp, the National Religious camp, more than any other. [The assassin Yigal Amir] was a man who grew up in the best of our institutions. A day before the murder, he could have been cited as a shining example of success and achievement, and a source of communal pride. Coming from a “deprived” background, he studied in a *Yeshiva* High School, attended a great *Yeshivat Hesder*, and was accepted to the most prestigious division of Bar-Ilan University. Today, we hide behind the phrases, a “wild weed”, “from the outskirts of our society”. But if a day before the murder we would have said proudly, “See what we have produced”, we must say it now as well - “See what we have produced!” It is indefensible that one who is willing to take credit when the sun is shining should shrug off responsibility when it begins to rain. Let us face our responsibility not defensively, but as *Chazal* would see it.

Concerning one who worships the *Molekh*, the verse says, “I shall put my face against that man and his family” (*Lev. 20:5*). The *gemara* asks:

“If he sinned, did his family sin? This teaches you that there is no

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family that includes an extortionist where they are not all extortionists, and none that includes a robber where they are not all robbers - because they protect him” (*Shevuot 39a*).

Let us not fool ourselves - to a great extent we are all his family. Protection is not only after the fact, but also before; not only cover-up, but also nourishment and support. Can we honestly say that what the murderer did was “despite” his education, in the same way that some *yeshiva* graduates are no longer Shabbat-observers? In that case it is clear that the choice is “despite” the education. Is not here the choice, at least partly, not “despite” but “because”?

The *gemara* in *Yoma* (23a-b) relates

“It happened once that two *Kohanim* (priests) were running evenly up the ramp [of the altar in the Temple, in order to be first and thus be the one to perform the sacrificial service of the day.] One of them intruded within the four cubits of the other. He drew a knife and plunged it into his heart. R. Zadok stood on the steps of the Sanctuary and said: My brothers, the House of Israel, pay heed! It is written, ‘If one be found slain in the land [and it is not known who the killer is]... your elders and judges shall go out... [and the elders of the town nearest the corpse shall... break a heifer’s neck... and wash their hands... and declare: Our hands did not shed this blood...](Deut. 21:1-9).’ In our case, who should bring the *egla arufa* (broken-necked heifer), the city or the *azarot* (Temple courtyards)? And the people burst out crying. The father of the [slain] youth came and found him in his death-throes. He said, ‘May he be your atonement - my son is yet in his death-throes and the knife is not yet defiled!’ This teaches us that ritual purity was more serious in their eyes than bloodshed. And

thus it is written (2 Kings 21:16), 'And also Menashe spilled very much innocent blood, until Jerusalem was filled from end to end.'"

The *gemara* proceeds to ask: we know that *egla arufa* is not brought in Jerusalem, so what room is there for R. Zadok's question? Furthermore, is not *egla arufa* brought only in a case where we do not know who the murderer is? Here we all know - the deed was done in public! The answer is, R. Zadok said this "in order to increase the weeping". Is the *gemara* suggesting that R. Zadok distorted the law for emotional effect? No! R. Zadok is making a point. The principle behind *egla arufa* is collective guilt. When there is a known murderer, then on a technical-legal level, he takes the guilt. If not, it is attached to the whole city, to the community, to the elders. Collective guilt is not established in order to remove or excuse individual responsibility. Family, society, upbringing and climate do not remove personal guilt. Jewish tradition insists on personal responsibility. But *egla arufa* teaches that there is another level - that beyond the individual guilt, there also is a level of collective guilt.

One priest stabbed the other. Do the other priests say, "He was just a wild weed which somehow sprouted in our midst", and return to their everyday pursuits? Do they say, "He was a lone madman", and go home? R. Zadok is saying that this act was not **despite** us; this was, partially, **because**. Did the *Kohen* kill because he rejected sanctity and opposed the service in the Temple, or rather precisely because of his passion and love for the service of God? God forbid that we should say that his teachers taught him that killing another human being is an acceptable way to express devotion to God. But they were undoubtedly responsible for emphasizing one side the importance of competitiveness, of devotion, of striving and commitment, of zeal and ardor, without sufficiently emphasizing the corresponding importance of brotherhood, love, and respect, which must accompany the honest, pure, good, holy and exalted desire to serve God.

The *gemara* proceeds to relate that the father of the victim, himself a priest, demanded the removal of the sacrificial knife before his son was completely dead, in order to prevent its ritual defilement. "The purity of the knife was more important to them than murder". The *gemara* (23b) understands that there is an educational imbalance here and asks - did they overvalue ritual purity or undervalue the sanctity of life? Where was the educational flaw? The conclusion is that it was human life that they

failed sufficiently to value, and not that they exaggerated the value of ritual purity.

In any event, and in either case, the youth was dead, and R. Zadok stands and says - we have educated properly for some religious values, but in the end this is murder. Don't fool yourselves into thinking that this is a case of one wild weed, that the murderer is known and bears all responsibility by himself. What has this to do with *egla arufa*? Even when technically the murderer is known, the principle of *egla arufa* still applies, because his actions derive from something we taught or failed to teach.

R. Zadok asked, "Who will bring the *egla arufa* - the city or the *azarot* (Temple courtyards)?" - and the people couldn't answer, but burst out crying. What is the meaning of "city" and "*azarot*"?

The murderer draws from two environments, two frameworks. One, wide and encompassing, is the city - society as a whole, verbal violence in the Knesset and wife-murder in the home, the lack of tolerance and a sense of arrogance. But R. Zadok was honest and moral enough to know that perhaps we cannot blame only the community at large. Perhaps we must also blame the Temple courtyards, the environment of the priests and *Levites*, the environs of holiness and sanctity. Why did the people burst out in tears? Not because they did not know which environment is responsible, but rather because they all knew, instinctively and intuitively, that the real answer is both - and neither can avoid responsibility. There are many of us for whom it is convenient to sever the connection of the city and the *azara*. The city is them: television, decadent music, pub-culture, and corruption; the *azarot* are us. To some extent, this is true. There does exist an element in general culture which is the opposite of Jewish values, which sees itself, today more than ever, as engaged in a campaign to uproot and destroy anything with a glimmer of holiness. But God forbid that we should try, or even want, to detach *azara* from city. There are some of us who rejoice at every chance to point out the drugs, the prostitution, or the violence in the wider community, so we can say, "Look at the difference between **us** and **them**" - look at the statistics, look at Dizengoff, look at their family lives. Remember - the people on Dizengoff aren't foreigners; they are our flesh and blood. It is our city and it should hurt; it cannot be a source of joy, of satisfaction, of self-congratulation and gloating. We should cry over the lack of values. And if, indeed, part of what has happened is the result of the culture of the city - and I think this is undoubtedly so - we

are also part of the city, and we too must take part in the city's *egla arufa*.

There is, of course, a difference between the city and the *azara*. We see ourselves, justly, as residents specifically of the *azara*, the keepers of the flame. But that is precisely why we have a special responsibility, because part of the zeal of that *Kohen* who murdered comes from his also having been a resident of the *azara*, from his desire to be first to the altar. Therefore, beyond our responsibility to bring an *egla arufa* as members of the city, we must also bring an *egla arufa* specifically as members of the *azara*. It is no wonder, then, that all the people burst out in tears.

One may ask, but what is wrong with our values? We try to educate people to strive for holiness, to love *Eretz Yisrael*, *Am Yisrael*, *Torat Yisrael* - shall we then stop adhering to and teaching these values? Shall we abandon the *azara*? God forbid! - not the *azara*, not *ezrat nashim* [Women's Area], not the *heikhal* [Temple], surely not the Holy of Holies, not *Har haBayit* [Temple Mount], not one rung of the ten rungs of holiness of *Eretz Yisrael*. But if we indeed strive for completeness, if we want to adhere to all these values, then we must at all times keep in mind the whole picture, the balance and interplay between these values. Have we done enough to ensure that our approach to each aspect of our sacred values is balanced? Perhaps even if we have indeed taught the evil of bloodshed - we have exaggerated, as that terrible *gemara* suggests, the value of ritual purity.

There are several points which are worthy of reflection. *First*: the self-confidence that arises from commitment and devotion to a world of values and eternal truths - whether in terms of *Torat Yisrael* or *Eretz Yisrael* - sometimes has led to frightening levels of self-certainty and ultimately to arrogance. This arrogance has sometimes led us to act without sufficient responsibility for other people, and at times even without responsibility to other values. "We are good, we have values, and they are worthless" - this attitude has seeped deeper and deeper into our consciousness.

Secondly, at times we have promoted simplicity and shallowness. Pragmatically, this has a greater chance of success than teaching complexity and deliberation. A simple direct message, appealing to one emotion and calling "After me!" will have more followers than the injunction to think, consider, analyze and investigate. Uncomplicated directives excite more passion than a balanced and complex approach, which confronts questions of competing spiritual values and of competing national interests. Because we wanted our youth to strive, to run up the

altar, we not only promoted simplistic slogans, but also a simplistic lifestyle.

Third, sometimes we taught our students to belittle and suspect others. One who doesn't agree with us is criminal, not merely mistaken. Any opportunity to credit a public leader with good intention was rejected in order to credit him with alienation, with hostility, with malice - not a suspicion of evil, but a certainty! From this way of thinking, horrible things can result. The *Sifre* (*Shoftim* 43) to the verse, "If there be a man who hates his fellow and he ambushed him and rose against him and mortally struck him and he died", states, "Based on this, it is said: If a man transgresses a minor precept, he will eventually transgress a major one... If he transgresses 'You shall love your fellow as yourself', he will eventually transgress 'You shall not hate' and 'You shall not revenge'...until he finally spills blood." From a sin of the heart, an attitude, from not enough love, *Chazal* see a straight path to the ultimate sin of murder.

I am not coming to delegitimize our entire educational system or ideology - it certainly contains much that is wonderful. But I do mean to say that we cannot claim that this murderer was a "wild weed"; we must bring an *egla arufa* on behalf of the *azarot* as well.

The awesome, difficult question is - And now, what? Should we close the *azarot*, abandon our values? The *Shulchan Arukh* states: "*Yehareg ve-al ya'avur*" (commandments which may not be transgressed even at the cost of one's life) means that there are values greater than human life. The question is what is the balance, what are the *halakhic*, *hashkafic* and moral values which enable us to know when and how. In this sense, we need not be ashamed, nor need we erase one letter of our Torah. We will not surrender to any city, nor abandon a single one of our values. Our values are eternal, nothing can be given up or erased. But in terms of balance and application, of seeing the whole picture, of the development of the ability to think profoundly in order to know how to apply the Torah - here undoubtedly we must engage in a renewed and deeper examination. Priorities must be re-examined.

The same *gemara* in *Yoma* tells that there was another incident in the Temple which led them to change their procedures. Despite R. Zadok's speech, they hesitated about instituting a different procedure. But after a later incident, where one *Kohen* knocked another off the ramp, and the second one broke his leg, they realized that something was wrong with the system itself. They no longer said, "An exceptional case cannot change

ancient practice.” They instituted a new procedure, using a lottery to determine who should perform the Temple service. Why didn’t they do this right away, after the murder? The answer is simple. Ideally, which procedure is better - giving the prize to one who runs, strives, and makes the effort due to his commitment to values and to service, or the use of a lottery, without pursuit, without struggle, a simple mechanical system? Clearly, the old system is better, more educational, more imbued with value. But after a murder, “seeing it could lead to danger”, *Chazal* abandoned the method of individual initiative and competition, fully aware of the considerable educational loss, but willing to pay that price. Even things which are better in principle must be sacrificed if that is what is necessary to prevent terrible consequences.

I do not know what is the precise equivalent for us. But the process of examining the *azara*, of the problems which arise not despite its holiness but because of its holiness - that is clearly mandated. Not our principles, but surely our analysis of public policy and public needs, needs to be re-examined.

Our *Yeshiva* has no political credo, but we teach three things:

1. Even when sitting in the *beit midrash*, you have a responsibility to the community;
2. When addressing these problems, you have to think deeply and not simplistically;
3. Even when doing what is right, you have to know how to respect other opinions and the people who hold them.

This has to be our educational goal. The question is not just what are the particular values we hold, but through which spectacles we view values, through which eyes. A man, said Blake, doesn’t see with his eyes but rather through his eyes. What sees is the mind.

Finally, there is another facet to what we have been discussing, which relates to our community and leadership. We must remember the principle of the *gemara* in *Shabbat*:

“Anyone who can rebuke the members of his household and doesn’t do so is culpable for [the acts of] his household; [if he can rebuke] his townspeople, is culpable for his townspeople; the whole world - he is culpable for the whole world” (*Shabbat* 54b).

Everyone should tally his own accounts in this respect, but for all of us the degree of rebuke, of protest was not sufficient; for some, because they did not evaluate the evil properly, for others

because they were not willing to publicize wrong when they feared our opponents could use it to attack our whole system. The point of *Chazal* remains the same; their terrible words carry the same force in either case. That they could have protested and did not - this carries a particular responsibility beyond the “city”, perhaps even beyond the “*azarot*”.

We are today in a very difficult situation, partly practical, partly metaphysical. Practically, our struggle for our values within society has suffered a mortal blow. Among ourselves, there is a shocking atmosphere. The transformation from a healthy, organic, trusting society, a society of *azarot*, to one sundered by suspicions is an awful and terrifying one.

The *Ramban* in *Acharei Mot*, refers to the verse:

“From your seed you shall not give to pass before the *Molekh* and you shall not desecrate the name of your God.”

The *Ramban* explains:

“The verse states that the worship of the *Molekh* is a desecration of God’s name and in the next *parasha* it is added that it ‘defiles My holy place and desecrates My holy name.’ The reason may be that it defiles the people who are hallowed in My name... Perhaps it means that one who sacrifices to the *Molekh*, and subsequently comes to the Temple of God to bring a sacrifice, defiles the Temple, for his sacrifices are defiled and an abomination to God, and he himself is defiled eternally, as he has been defiled by the evil he did... It mentions desecration of God’s name because when the nations hear that he has given his children to the *Molekh* and an animal to God, this is desecration of God’s name.”

Today we must, out of the crisis, assume an educational and ideological task. Someone may say, “The *Rosh Yeshiva* says that *azarot* can lead to bloodshed - let’s close the *azarot*! Let us abandon the *Mikdash*!” I say, no! We will not close a single *azara*, nor will encourage tepid and unenthusiastic service. The challenge is, can we continue to inspire the yearning for sanctity, shake people out of complacency, get them to face the great call of the hour - to understand the importance of the State, to understand the historical process in which we live - without losing a sense of morality, of proportion, of right, of spirituality? Do we have to choose between *azarot* and morality? God Forbid! But we must purify our hearts and our camp in order to serve Him in truth.