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*President's Keynote Address at the Opening of the Eleventh Congress of the Association held in Jerusalem, December 28-31, 1998.*

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hen the Presidency of our Association decided that I should be the keynote speaker tonight, marking the fiftieth anniversary of Israel, I knew I had a problem. What can you tell this particular audience about Israel, on the very last days of the Jubilee year, that they don't already know. For a whole year the media, both written and electronic, has presented Israel and discussed it from every possible angle. For days on end all our problems have been aired on every television screen in the world. What else can be said?

At the time I did not even know how big my problem was. How do you speak about the past 50 years without speaking of the present? For weeks not only Israelis, not only Jews, but virtu-

ally the whole world has been watching the set of dramas unfolding in our small country: first President Clinton's dramatic visit to our region and everything it entailed; then Operation Desert Fox which once again brought back the pictures of ugly and scary gas-masks, and then the unprecedented political upheaval, live on television, resulting in the fall of the government and the upcoming elections.

How can you sum up 50 years of Israel's independence, and ignore all that, I asked myself again and again. How do you address such a subject without sounding partisan, without saying something, even inadvertently, which might be misinterpreted at this very delicate period in our national existence?

In the end I decided to share with you some personal thoughts and reflections. My only excuse for doing so is the fact that I belong to a group of people who saw it all happen, a group which participated in the exciting events which both preceded and accompanied the establishment of the State of Israel; a group which has become a small minority in the Israel of today, and which, for reasons of age, is quickly becoming almost extinct.

Long before Israel was officially established on May 15, 1948, it existed as a dream and a hope. We cannot mark 50 years of Israel without beginning with 100 years of Zionism. What had been a dream and a hope since the first Zionist Congress which convened in Basle in 1897, became a political reality 50 years later by a ceremonial declaration in the old museum building on Rothschild Boulevard in Tel-Aviv. Before that date, for 50 years, the Jewish people, both in what was then Palestine, and around the world, created the tools, supplied the means and established the institutions which later made the dream come true.

Today, at the close of the Jubilee year, it behoves us to look back and take stock, and it is no secret that we are not always pleased with what we see. We are going at this time through a very difficult period in our history, and all of us, Israelis and Diaspora Jews alike, tend to be very critical of almost everything in Israel today. To listen to Israelis talk, to read the newspapers, to watch the numerous talk shows on television, there is nothing right about our country. People on the right criticize those on the left, and vice versa; everybody criticizes the economy and we are fed daily prophecies of doom; former generals, and we have many of those, constantly appear on television telling us what is wrong with this or that military operation. The most popular question posed to partic-

## PRESIDENT'S MESSAGE



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ipants in every television and radio program is: “how do you feel about this or that”, even if the person is absolutely unqualified to respond intelligently on the subject under discussion; and of course there are subjects which touch upon sensitive nerves and are always good for an extreme reaction, like a terrorist act, a recent bereavement, relations between secular and religious groups, the treatment of new immigrants, or the constant kindling of the ongoing controversy between Ashkenazim and Sephardim. We live in an environment in which the media does not limit itself to reporting, and is busily creating news. We are exposed daily to a barrage of polls which are supposed to reflect the mood of the public, but actually create it.

And, indeed, “mood” is the keyword, for we Israelis are given to extreme moods, ranging sometimes from euphoria to doom. We tend to extremes, we exaggerate, we know best, we are emotionally involved in everything which is happening in our public life, and we are judgmental and very intolerant and impatient towards government in all its forms. The tolerance, even servitude, and extreme patience, which for centuries marked Jewish behaviour towards foreign rulers, vanishes completely when we deal with our own. To listen to us lately you would think that everything is wrong.

Indeed, these are difficult times, but we sometimes forget that in the history of nations there are ups and downs, good times and bad times, and above all, one must remember that no people and no State should be measured or judged by examining one or two generations. Yes, there are great problems facing us; there are many areas which justify our concerns, even our fears. And I shall mention some of those in a minute. But at the close of this Jubilee year we do deserve some moments of Naches, because the sum total of everything that took place here, on this tiny sliver of land, still seems like a miracle, an almost unprecedented phenomenon in human history. We must not forget, for one minute, that the sum total, the bottom line, is very positive and favourable.



There are so many things in our national existence which we take for granted, forgetting where it all began. So, I tried in these last few days to reconstruct some of our dreams and hopes in those far off days, when we hardly dared speak about a State of our own. Little did we dream that after 50 years Israel would be so strong; that its armed forces would be respected not only in our region but around the world; little did we dream that we would become experts in agriculture, consulted by most developing countries on how to grow vegetables and how to irrigate arid land; who would have believed that we would develop in such a short period a defense industry of such volume. I have just returned from China where experts regularly visit a model Israeli farm near Beijing, established and operated by Israeli experts, as part of an education program established by the Chinese government; who would have dreamt that Chinese planes would be taken apart, and sent to Israel for repair; who foresaw that patients from various countries, including leaders, would come to be treated in our hospitals, and important scientific innovations would be made by Israeli scientists, in prestigious institutes to which students from the most sophisticated countries beg to be admitted; could we even imagine that Israeli high-tech would figure so high on the list of the most developed countries?

And who would have believed that in such a short span of time we would take in and absorb millions of new immigrants, who are quickly taking their place in our society, and playing a growing role in the life of the country. The 1,000,000 Russian Jews who made Aliya in a short period of 5 years, equal in numbers 20% of the Israeli population, and

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after only a very few years their representatives have had the most remarkable success in the recent elections to a large number of municipal councils.

Hebrew was a dead language until it came to life here, but who could have known that growing numbers of Israeli writers would be translated into many languages, some of their works becoming best sellers in other lands, and an author who wrote only in Hebrew would be the recipient of the Nobel Prize for literature.

Let us not forget that when Israel was born its very survival was in doubt, let alone its emergence as a strong flourishing State, a haven for every Jew who wants, or needs, to make this his home. We must remind ourselves again and again that all doors were closed to Jews fleeing from the Nazi horrors, including the portals of all the countries with which we fought, shoulder to shoulder, to free the world from the beast which was planning to devour it. We should never forget boats like Exodus, which has become a symbol, or like Patria and Struma, sunk on our shores by the British ruler. How can we forget that refugees from the European hell were sent back to be exterminated, or, at best, placed and held behind barbed wire in camps in Cyprus, not by enemies, but by allies.

We take for granted a fact, which we should never ignore: that any Jewish community which faces danger, has today a choice. There is one door which will always be open to Jews, one country where they will always be welcome, not as refugees, not as objects of mercy or compassion, but as free citizens, as full partners from the very first day, with full rights to elect and be elected to every office, and, what is more important, with full rights to criticize, to grumble, to advocate change, full partners in the process of shaping our democracy. Indeed, we encourage Aliya, for this is the *raison d'être* of the establishment of this State, but after 50 years we have come to terms with the fact that many Jews choose to live abroad and practice their Jewishness within established Jewish communities. Yet, it is an indisputable fact that Jews, wherever they choose to live, proudly identify with the State of Israel, which has become central in their lives. We may not share a common citizenship but we all know that we share a common destiny, common goals, common responsibilities for the future of our people.

So, on this day, let us all unite in saluting this wonderful phenomenon in Jewish history, the State of Israel which has not only survived for 50 years, but has proudly taken its place in the family of nations.



Yet, even on this Jubilee occasion we must remind ourselves that in historical terms this is a very young State, the struggle is not over and we still have a long way to go. The problems which face us do not allow us to rest on our laurels, and we would therefore be gravely amiss if we do not face squarely, frankly and courageously, grave matters which are so much on our agenda these days.

For it is not only the good things which we would never have imagined. Who could foresee the Holocaust? Who could have known that we would have to fight so many wars, and that after 50 years we would still be fighting for peace; young lives being sacrificed almost daily on a battlefield, children for whom sleeping in shelters has become part of their everyday existence? How could we know that after 50 years of statehood we would still be prone to terrorist attacks in our streets, our markets and our buses?

And who could have believed that the bitter political controversy raging in the country would bear such poisoned fruit, cause crazy acts committed by Jews, culminating in the murder of a Prime Minister who, in his lifetime, had become the prototype of a modern Jewish hero?

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In the beginning we believed that we had left the “galut” behind us, that we were establishing a new modern society, based on equality, on tolerance, on common ideals and goals, practicing the high moral tenets of Jewish heritage, without importing various phenomena which were the product of Jewish life in closed ghettos where Jews were compelled to separate themselves and protect their Jewishness against a hostile environment. We naively believed that immigrants from 70 countries could be thrown into one big melting pot and after some vigorous stirring the new Israeli would pop out. We are paying dearly to this day for this naive belief, and the second and third generation of immigrants still holds a grudge for wrongs inadvertently done to their fathers and grandfathers whom we foolishly tried to make over, not showing enough understanding and respect for their culture, their customs and their heritage. Could we have imagined that the Jewish religion and tradition, practiced and respected for 2000 years in Jewish communities around the world, would become a matter of bitter controversy, not only between religious and secular groups in Israel, but also between Israel and Jewish communities in the Diaspora, which have proven again and again their loyalty and freely offered their full support? For 2000 years there was no question of “who was a Jew”. Suddenly, we are compelled to re-define our Jewish identity, and we are faced with questions to which there is no ready answer. Who would have believed that a court of law in the State of Israel would have to decide “who is a Jew”, a ruling which has outstanding moral, political and social consequences; who would have foreseen that the rift between groups of Jews in the Jewish State would result in whole groups separating themselves in closed impenetrable communities, protecting their children from any contact with other Jews, to a greater extent than Jews used to do in ghettos surrounded by non-Jews? Who could have known that there would be Jews here who even refuse to sit with other Jews and serve with them on various official bodies? How do we deal with the phenomenon of groups which do not even recognize or respect the democratic process, or do not submit to the rule of law?



We have always been the people of the law, so it is not surprising that our legal system and our courts are among the finest achievements of this young democracy. I was very privileged to be part of this legal community for the best part of my adult life, and to be party to the ongoing process of developing a body of law which defines the character of this new democracy and sets the norms of our public as well as our private behaviour. Without the benefit of a written constitution, our courts have struggled for years, slowly and patiently, to establish a set of rules which secures for the citizens of Israel all the freedoms which are entrenched in the constitutions of the most free and modern democracies, first by relying on natural law, and then by interpreting the emerging set of Basic Laws, which will one day comprise the whole body of our written constitution. Yet, the courts did not have the privilege of ruling in a vacuum. The more complex the problems facing us, the more the courts were compelled to take a stand on the most controversial issues tearing our society apart. We have always had great pride in our absolute commitment to upholding the human rights of the individual as well as those of groups and minorities. But what do you do when you are compelled to balance those freedoms against grave security concerns, matters of life and death; how do you set the right balance between human rights as interpreted by a secular society, and the rights of religious individuals and groups which advocate the supremacy of the tenets of their faith and tradition above

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any secular set of rules? How do you deal with groups which refuse to submit to the rules set by a secular authority, when they clash with those set down by their religious leaders? Dealing with these and similar delicate issues our courts are walking a tight rope, their solutions often drawing unprecedented criticism from all sides.

Although they have always strived to stay away from the political arena, unfortunately, our courts do not enjoy that privilege anymore. Our High Court of Justice, which has become the recognized guardian of the rights of the individual against any kind of mistreatment by government, has been increasingly compelled to rule on issues which have grave political connotations. Our law enforcement authorities, known for their impartiality and professionalism, have again and again been under attack when their professional decisions have been unfavourable to this or that political group.

We, as a group of lawyers and jurists, are particularly interested in these issues and we take every opportunity to study and discuss them both at our congresses and in our publication. Throughout this Jubilee year we have been publishing interviews with the most eminent judges and jurists in the country, and so the readers of our publication JUSTICE have a unique opportunity to learn about our legal system as it is viewed from every possible angle.

One lesson which we have all learned is the inseparable community formed by Israel and Diaspora Jews. Israel may be a separate political entity, but we have a common destiny with our brethren around the world, and we share many problems which concern us all alike and to which we should all seek solutions.

Israel as a State, and not only Israelis as Jews, must view with concern the growing phenomenon of anti-Semitism and Holocaust denial. There was a time when we thought it did not concern us here. We even believed that the very existence of the State of Israel would guarantee the virtual elimination of Jew hatred and Jew baiting in other countries. Now we all know how wrong we were. Not only is this phenomenon spreading to a dangerous point, but the anti-Semitism of today cannot be separated from anti-Zionism, and so it touches us not only as Jews, but also as Israelis. The scores of sites on the Internet libeling Jews and inciting against them, are a matter of concern to us all, and we should all seek ways and means to confront this dangerous phenomenon. When a Russian general rises in the State Duma and incites against Jews, suggesting the creation of quotas - the same general who in open demonstrations called "All Yids to the grave", without the Russian Parliament even seeing fit to censure him, or to pass a resolution divorcing itself from such racist expression - it is a matter of grave concern to us all. When the Protocols of the Elders of Zion are openly distributed around the world, in millions of copies, accusing Jews, and by implication, the State of Israel, of a criminal conspiracy to dominate the world, it is a matter for all of us to consider and to take action.



And last but not least, the Peace Process. Tonight, of all nights, we shall not engage in controversy. But engaged as we all are in constantly arguing our personal views on the Oslo and on the Wye Plantation agreements, on who lives up or does not live up to his commitments, on how much land should be given up and in return for what, let us keep in mind one basic fact: for most of this century, and for the first 30 years of statehood, we faced a hostile Arab world which would not budge from its absolute denial of our right to exist and to establish here, in this region, a homeland for the Jewish people, let alone a sovereign State. When people ask me whether it is not too dangerous to visit Israel, I

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always reply that I have lived here since I was a little girl and I don't remember one period when we were not subject to some kind of danger from our neighbours, be it terrorist attacks or full scale wars. But with all our reservations and controversies, one matter should be made very clear: for the last 20 years, since the visit of President Sadat to Jerusalem, little by little, stage by stage, our Arab neighbors have recognized and publicly admitted that Israel is here to stay. This recognition, first by Egypt, then by Jordan, then in stages, by most of the Arab world, and finally by our Palestinian neighbours, is, to my mind, the biggest event in our history since the establishment of the State.

We in this generation are witnessing great changes.

The world is changing around us at a much quicker pace than ever before. In the time of our grandfathers, time seemed to move much more slowly. Processes of change would take decades, sometimes centuries. Now it is as if we are living at an accelerated pace and things that happened a few years ago, sometimes a few months ago, seem like old history. Indeed, the world has always been changing, but when changes were slow we did not feel them as much. Yet now that change is all around us, both without and within, we must react to it. Change and transition is the very essence of life, but rapid change is sometimes confusing, even frightening. We feel safer in a situation of "status quo". Many cling to the existing state of affairs not because it is good but because who knows what will come next.

You need courage to abandon the status quo and opt for change, but you also need the wisdom to draw the boundaries of change, to keep what is good in the old ways and change only what needs to be changed. In this century we Jews have undergone one of the biggest and most extensive transitions in our history, moved partly by external evil forces and partly by those who courageously undertook to prove that Herzl was right when he said "if you wish it is no legend".

We have indeed shown great courage in opting for drastic change, yet we have not always shown enough wisdom in setting the right balance between the old and the new. But who is perfect? How many nations can boast of having attained so many goals in one generation? How many peoples have succeeded in turning the tide of history against such tremendous odds, in taking control of their national existence and in one generation redeeming the land from which they had been exiled 2000 years before, and the language which, in a way, had also been banished to holy books and academic studies. Show me another example where a population of 600,000, waging a war of life and death, surrounded by massive enemies, opened their doors and their hearts to millions of their downtrodden brethren, and succeeded in building, in the short span of only 50 years, such a beautiful and flourishing State.

So my friends, we are all united today in celebrating Israel's fiftieth anniversary, and we have good cause for celebration. But without spoiling the festive mood we must recognize that the future of this young State, and our future as a people, compel us all to face our responsibilities, and to work together in seeking solutions to the problems which confront us. We cannot afford to minimize the dangers, or to delude ourselves by vain hopes for instant remedies. On this fiftieth anniversary we can indeed look back with pride, but at the same time we should take a good frank look in the mirror, so that when our grandchildren celebrate another anniversary, fifty years from now, they will have good reason to be proud of us

*Hadassa Ben-Zur*

## The 11th International Congress

The 11th International Congress of the Association on “Judaism, Humanism, Democracy and Political Culture Towards the 21st Century”, was convened in Jerusalem on December 28-31, 1998, to celebrate the 50th Anniversary of the State of Israel. It was attended by hundreds of members from all continents. Some of the presentations delivered during the Congress are reported in this issue of *JUSTICE* (pages 2-24).

# Democracy in our Times

Aharon Barak

**O**n behalf of the Israeli Judiciary - welcome to the Eleventh International Congress of Jewish Lawyers and Jurists. Welcome to Jerusalem and to Israel. At this Congress and in Israel we are celebrating the 50th anniversary of the State. One of the main issues discussed at our anniversary is Democracy. If you should approach an Israeli public figure, and perhaps even “the man on the street”, and ask, “What is democracy?”, his answer would probably be: Democracy is the type of political system whereby the people freely elect their representatives, who in turn determine the nation’s direction by way of majority decision.

This, of course, is a correct answer. There is no democracy without free elections and majority rule. Nevertheless, this is but a partial answer. Democracy is not only majority rule. Democracy is also the rule of basic values, such as justice, morality, the separation of powers, the rule of law, independence of the judiciary, and above all - human rights. Majority rule which infringes upon basic values; majority rule which infringes upon the separation of powers; majority rule which infringes upon the rule of law and the independence of the judiciary; majority rule which infringes upon human rights - majority rule of this kind violates the notion of democracy. Indeed, the proper understanding of democracy maintains that there are values upon which the whole democratic structure is built, and which even

the majority cannot touch. There are principles - such as the rule of law and the independence of the judiciary - which even the majority is not permitted to touch; there are human rights, which cannot be affected by the long arm of the majority.



Indeed, the concept of democracy is a complex concept. It contains a formal aspect - formal democracy - whose essence is majority rule. This is a *sine qua non*. Yet democracy also contains a substantive aspect - substantive democracy - whose essence is the rule of basic values and, at their center, human rights. Take away one of these aspects from the political system, and it ceases to be a democratic system.

Yet how can the two aspects of democracy - the formal aspect and the substantive aspect - exist side-by-side? Do we not have before us an internal contradiction which is irreconcilable? If democracy is majority rule, how can one prevent the majority from infringing upon basic values and human rights? If democracy is the rule of basic values and human rights, how can one

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Justice Aharon Barak is President of the Supreme Court of Israel. The above remarks were delivered at the Opening Session of the Eleventh International Congress of Jewish Lawyers and Jurists, Jerusalem, December 28th, 1998.

preserve these basic values and human rights, if a critical condition for democracy is the recognition of the power of the majority? Indeed, democracy is a complicated political system. It lacks the simplicity of a dictatorship.

Still, the internal contradiction between democracy's formal aspect and its substantive aspect is reconcilable. The solution to the contradiction lies in balancing. On the one hand, one recognizes the power of the majority. Free elections are necessary, and the majority in the legislature is what decides. However, this power is not absolute. The majority cannot do whatever it pleases. Here enters the other hand. The other hand is safeguarding the strength of basic values, and recognizing human rights. To be sure, such values and rights are not absolute. There is no comprehensive prohibition against infringement of human rights. They can be infringed, but only if the infringement conforms with the basic values, is directed toward a proper purpose, and does not exceed what is necessary.

How can one guarantee this delicate balance? The answer of the twentieth century is by constitutionalising democracy; by having a written constitution and by empowering the courts to exercise judicial review of legislative action. This is one of the lessons learnt from the Second World War and the Holocaust.

With the founding of the State - and in wake of the English influences - there prevailed in Israel a constitutional structure based on the formal democratic model. The majority of the *Knesset* was able to infringe upon basic values and principles. It was empowered to infringe upon human rights. A transformation took place with respect to all of this in 1992. With the legislation of Basic Laws dealing with human rights there occurred a "constitutional revolution". The Basic Laws dealing with human rights were raised to a constitutional, supra-statutory level. We do have a constitutional bill of rights. The Court saw itself as authorized to exercise judicial review on the constitutionality of a statute. We do have judicial review, like America, Canada, Germany or Italy.

Not everyone has internalized this constitutional shift. The transition from formal democracy to substantive democracy was not understood by all. Many and good people still continue to think in terms of formal democracy only. In their eyes, judicial review over the constitutionality of a statute looks like an infringement of democracy itself.

This state of affairs is regrettable. It does not ease the work of the court in general, and of the Supreme Court in particular. However, one should not forget that we are facing a transition

period. I do feel that a change is taking effect in our political culture. The political culture is coming closer and closer to the legal structure. I am convinced that, slowly but surely, awareness is seeping in that there is no democracy without the recognition of the effect of the values of justice and morality; no democracy without recognizing the effect of principles regarding the separation of powers, independence of the judiciary, and the rule of law; and no democracy without safeguarding human rights. Slowly but surely, the public is becoming convinced of the necessity of constitutional democracy. They do understand that the Basic Laws are an expression of substantive democracy; they do sense that judicial review is the classic expression of democracy. Indeed, if a constitution is democratic, and if the Basic Laws are democratic, so too judicial review of the constitutionality of statutes is democratic.

I am convinced that there is no turning back. A society which has breathed the air of liberty; a society which has begun to internalize values of tolerance; a society aware of the need to protect human dignity - for every human being, in that he or she is a human being; a society which has lived with an understanding that mutual existence is not about "all or nothing", but about balancing between competing values and compromise - compromise, which may sometimes be painful; a society whose basic conception includes freedom of religion and freedom from religion; a society which is starting to realize that there is no democracy without majority rule, but also no democracy where the majority acts arbitrarily and violates the minority's human rights and basic values; a society loyal to the commitments it undertook in the Declaration of Independence - which was endorsed by many, time and again - such a society - and this is Israeli society - will not agree to go back on its tracks.

I am convinced that Israeli democracy, in its rich and broad sense, will strengthen; that the status of the courts as the guardians of human rights will strengthen. I am convinced that the Supreme Court will continue to fulfill its role in our society; that it will continue to be the stronghold of the individual; that it will protect human rights and the needs of the State. I am convinced that we will realize the vision of being "A Light Unto the Nations" and, above all, I hope that peace will prevail; peace between us and our neighbours, and peace amongst ourselves.

# The Strategic Environment Toward the Next Millennium

David Ivry

I would like to begin with a few *caveats*:

First, to state the obvious, it is impossible to review the strategic situation of the next millenium within a few sentences.

Second, predicting the future is still not within the capabilities of mortal men. This leaves no other option but to combine our knowledge of past trends and developments with the creativity needed to intelligently plan for the future.

Already at the end of this century, we have witnessed how economic, social, and historical rivalries can cause instability. Taking the Middle East as an example, we can see that:

- Natural population growth far outpaces access to natural resources, providing a definite cause for instability.
- Accelerated urbanization continues to lead to social gaps and the lack of ability to provide social services.
- Historical antagonism along ethnic, tribal, and class lines exacerbates tensions and encourages xenophobia.
- Globalization is already making its mark on the region and it seems like things will get worse before they get better, as economic crises in one region influence other ones.
- Oil prices have influenced the economies of oil states as well as those of their allies.
- Water scarcity will become increasingly acute as the demand for water, due to population growth, outstrips the region's water supply.

In the light of these data, is democratization possible in the region? This is a difficult question to answer.

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Major General (Res.) David Ivry is the Principal Assistant to the Minister of Defense for Strategic Affairs, Israel Ministry of Defense. This article is based on his presentation at the International Congress of the Association, Jerusalem, December 29, 1998. He was recently appointed by the Prime Minister of Israel to head the newly established Council for National Security.

But on the face of it, it does seem that we can conclude that the economic and social problems in the Middle East spur radicalism, not moderation or improvement. Thus, the overall chances for democratization are slim indeed.



Cultural differences also influence stability in the region. At the same time, globalization and the omnipresent mass media will expose different cultures to different values and can be perceived as a threat to prevailing culture and norms.

How will the region's cultures vent their frustration and dissatisfaction? This is another difficult question, but it seems to me that radical elements will become more radical and that terrorism will become more potent, precisely as a result of the opportunities that globalization offers.

In my talk today, I would like to focus on two main issues: first, international arms control treaties and suppliers' regimes and second, the proliferation of ballistic missiles.

As for the first issue, since the end of the Cold War, a number of developments have taken place in most democratic countries:

Economic and social issues have gained importance on national agendas while security and defense issues have been continually on the decline. The most tangible result has been felt in reduced defense budgets. When defense issues receive short

shrift in democratic elections, the result is almost inevitably reduced military capabilities.

Concern that reducing military capabilities will influence the strategic postures of democratic countries has given rise to the development of doctrines and planning processes that take into account defense budget cuts. These include Revolution in Military Affairs (RMA), information warfare (IW), building small, intelligent armies, and trying to take full advantage of quality in the face of quantitative inferiority.

Yet all these doctrines do not provide an adequate response to dwindling forces and growing Weapons of Mass Destruction (WMD), ballistic missile, and terror threats. Thus, democratic countries try to compensate for these developments by implementing international treaties to prevent proliferation of weapons, especially WMD and their related technologies, but also of conventional weapons such as APLs and small arms.

These States are, of course, attempting to acquire "life insurance" *in lieu* of their dwindling forces.

As for non-democratic States, the end of the Cold War has on the whole left defense budgets intact. Non-democratic regimes view military force as a basis for stability and regime preservation. Some regimes even view force as an essential pillar of their regional status.

In contrast to democratic States, there has been no change in the national agenda of these countries and defense budgets have not been affected. On the contrary, there are a number of countries that - despite growing economic problems including poverty and unemployment - continue to invest increasing resources in acquiring WMD.

A number of non-democratic States join non-proliferation treaties to reap the benefits granted to treaty members, namely the acquisition of civilian technologies, some of these being dual-use. These States violate treaties by secretly building military programs with these technologies.

On the other hand, democratic States that join treaties, assure their implementation and disarm themselves accordingly. In this way, they expose themselves by limiting their means of reaction. Yet, even worse, is the illusion that advances are being made on the WMD counter-proliferation front through these treaties combined with the tendency to ignore the failures of treaties and count only what seem to be their accomplishments.

The "life insurance" that these countries bought is not tenable. This has been proven by Iraq, North Korea, and Iran. And we can expect more surprises in the future, particularly when

democracies cannot reach agreement on their reaction to treaty violations. It is difficult to arrive at consensus because national or regional interests are decisive in the decision making process. We saw an example of this in February 1998 when backing of US efforts to impose UNSCOM inspections on Iraq was limited. As a result, today, the US is not reacting like it did back then to the present crisis.

Between the First and Second World Wars, Germany violated the commitments it agreed to at the end of World War One by producing offensive weapons like tanks and fighter jets. European intelligence agencies that followed and reported these developments faced a situation not unlike the one that we face today. The political leadership cannot reach consensus in time to react to threats. If we do not learn from the lessons of World War Two, inability to reach consensus can prove costly.

A lightning (*blitzkrieg*) war today would look very different. Chemical and biological weapons - if used in war - will present a much larger threat in scope than World War Two weaponry. It is no wonder that these weapons are called weapons of mass destruction.

In the light of the fact that chemical and biological weapons can be hidden far more effectively than tanks, jet fighters, and ships and that seven years of particularly intrusive UNSCOM inspections could not expose all of Iraq's chemical and biological weapons, we face especially serious consequences for this lack of international consensus.

Assuming that democratic countries will not change their priorities in the light of these facts, we must work on a close, ongoing basis to improve treaty monitoring and verification procedures, sensors, and intelligence cooperation, as well as convince countries that treaties cannot provide a packaged solution to the problem of WMD proliferation.

The second issue I wanted to touch on today was that of ballistic missile proliferation.

The goal of the MTCR is to monitor and limit the proliferation of capabilities and technologies associated with ballistic missile to problematic countries.

In practice, success has been minimal. The MTCR has done little to stop countries determined to develop and arm themselves with ballistic missiles. Even MTCR members, but especially non-members, provide assistance in missile-related transferring technologies and hardware and thus damage this supply regime.

For a long time, leaders of armed forces considered conventional warheads a limited threat. This was because accuracy was

a function of distance; that is, ballistic missiles were relatively useless for pin-point and military targets (such as military airfields).

Until recently, there was a tendency to ignore the influence of conventional ballistic missile attacks on civilian populations for a number of different reasons. The Battle of the Cities between Iran and Iraq exposed the potency of ballistic missiles once again after being largely neglected since World War II. It will be remembered that Germany attacked Britain with V-2s effectively, attacks that stopped only once the Allies invaded at Normandy.

All offensive activities against the V-2 launchers proved unsuccessful, as they did against SCUD launchers during the Gulf War of 1991.

Hence, conventional ballistic missiles have become a strategic threat. Nations that attempt to arm themselves with ballistic missiles coupled with large ORBATs and indigenous production capabilities are simply trying to substitute for limited air capabilities.

However, it seems that the ballistic missile threat is much more serious. Now, in order to attack a country, there is no need to share a border with it. It sounds simple enough, and we saw an example of this during the Gulf War, when Iraq attacked Israel and when Israel was limited in its ability to react.

Lack of ability to react or play a decisive role in conflict once being attacked is indeed significant. Herein, the importance of maintaining deterrence capabilities.

Without a common border, an attacked country must cross the air space of uninvolved parties with air forces, presenting a sensitive political problem; reaction time is relatively long; intelligence is less available because of the distance; and the size of the air forces needed for the mission is limited and very expensive.

But, the most crucial problem stems from the fact that, without a common border, ground forces cannot play a role in the deterrence equation. These ground forces were once a main element in conventional deterrence. Air and naval forces were never considered as decisive forces in war fighting doctrine; they were rather considered assisting forces that can play a role in influencing which side is victorious. Air superiority may have embodied a dominant element in granting ground forces mobility, but they never were decisive forces in themselves; aside, of course, from the nuclear strikes on Hiroshima and Nagasaki.

This implies that there is a need to find a substitute for ground forces in the deterrence equation. The reasonable solution would be the construction of a missile force as a counter-balance to the hostile force. But the sensitivity to missile attacks varies according to the size of the country and its population. It is also reasonable to assume that missile attacks cannot, by themselves, lead to the end of hostilities. Hence, the drive to acquire non-conventional warheads (especially biological and chemical) that appear today to be more available or within technological reach. In such circumstances, the deterrence equation may rely on the substitution of land forces with non-conventional force.

The solutions sought are as follows:

- Early warnings, through bilateral and multilateral cooperation aimed at providing sufficient preparation time to the victim of the attack.
- Active defense - such as the Arrow, Patriot, and the THAAD systems. Active defense can neutralize, at least partially, the damage caused by missile attacks, minimize public pressure, and enable a more efficient offensive response. Such a response may then reflect a more calm damage assessment as well as more cautious political considerations.
- Boost-Phase Interception (BPI) - This capability is needed to re-institute deterrence. A potential aggressor will presumably hesitate before firing a missile that may explode upon launch in its own territory.
- Intelligence - Requires continuous, updated, long-range collection capability under conditions of heightened political sensitivity. Space and UAVs appear most attractive to carry these intelligence sensors.

## Conclusion

We are at the beginning of a ballistic missile arms race which, in turn, pushes the non-conventional race. Relying on treaties to prevent proliferation of weapons and technologies of mass destruction carries with it the danger of illusion and delusion. At the same time, much must be done to increase the effectiveness of these treaties.

The difficulty of arriving at consensus in the treatment of treaty-breaking States encourages them to carry on with their violations. Hence, there is a growing importance to promote active defense and offense capabilities against ballistic missiles, so as to maintain deterrence against the usage of such missiles.

## Panel: Pluralism, Religion and State

# Pluralism by Consent

Meir Shamgar

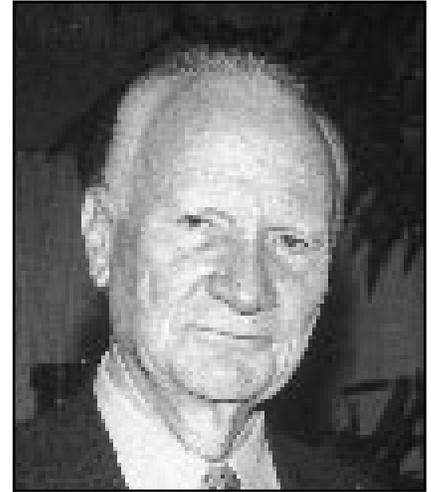
**F**irst, I would like to introduce our panel: **Rabbi Shear-Yashuv Cohen** is the Chief Rabbi of Haifa and had a very illustrious career before entering that office. He served in the Israeli army and fought in the Old City in 1948. He was seriously injured and made a prisoner of war. Later on, he served on different academic bodies and was also Vice-Mayor of Jerusalem. He has held the post of Chief Rabbi of Haifa for several years, and I would like to add he was also a candidate during the last elections to serve as Chief Rabbi of Israel. **Rabbi David Rosen** is now the Director of Israel's Office of the Anti-Defamation League. Born in Britain, he undertook his Rabbinic studies and his "Smicha" (Ordination) in Israel, and served in the Israeli army, in the armored corps. He was senior Rabbi of one of the largest Jewish congregations in South Africa and a member of the "Beth Din", and later on served as Chief Rabbi of Ireland and had important duties as member of the councils which dealt with meetings of Christians and Jews. He has taken up academic duties as a lecturer in the Irish

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Justice Meir Shamgar is a former President of the Supreme Court of Israel. He acted as chairperson and moderator of the Panel on Pluralism, Religion and State, the highlights of which are presented on pages 13-22.

*School of Ecumenics and is Dean of the Sapir Center for Jewish Education, since 1988 serving as the Director General of the ADL office in Israel. Mr. Joseph Roubache is a member of the Bar of Paris, he has engaged in important duties in different legal bodies in France and is a very active member of this Association and member of this head council.*

This panel deals with a very important and sensitive topic; it has two connotations or two implications. It has a general universal meaning, because it applies to every part of the world and it has also a specific, unique Israeli meaning, which is very important and sensitive because it touches upon the structure of our system, our culture, government and society within the framework of our country. It has already raised many important problems, debates, and discussions. If I start with a universal meaning of the topic which is the subject of our panel, we are living in a liberal democracy, or so we believe. Democracy is a term which is commonly used by every governmental system which likes to be regarded as adopting the system, but we know that there are different kinds of democracies, and not all of them are identical in their meaning. It was the Frenchman de Tocqueville, who stated that use of the term "democracy", is confusing, because it has a large array of meanings and



therefore the term should be clarified before we start to deal with its components.

The hallmarks of democracy which I would like to propose and which are commonly accepted, are twofold: democracy is a system according to which sovereignty is in the hands of the entire people. This means, that they, in their entirety, rule the people, whether by direct rule, as was the case in Athens thousands of years ago, or by representatives, as is commonly known and accepted in modern times. This is the first component. But the rule of the people by itself does not define "democracy"; "the rule of the people" means that the people elect their representatives and there is always a majority and a minority. One of the components of the system of election is that by dividing the opinions of people, one always has different groups, some of which are superior in numbers. There have been other uses of the word "democracy" which have based themselves only on this fundamental principle of rule by majority, but they do not reach our aspi-

ration of a liberal democracy and this is because there is a second important component, which is applicable to everyone, whether that person belongs to the majority or to the minority, namely - the equality of all people in this society.

Thus, we have two main components: sovereignty in the hands of the people and equality of all those who belong to the people and live within a certain framework political, social or otherwise.

Equality touches upon the rights of the individual. One could add additional components such as the separation of powers, but in all cases one will always fall back to the important question - what are the rights of the individual within the framework of a political society. The rights of an individual, are laid down, in constitutions, or, as we have it, in separate basic laws which are only parts or chapters of a constitution, or, within the framework of a tradition of law, like the common law, which does not have a comprehensive constitutional system - although the British Parliament is currently working on the Bill of Rights which will adopt the ideas of the European Community. Indeed, I am afraid that we in Israel will remain the last country which does not have a comprehensive constitution, because even Britain will join the family of nations which have a written constitution. This, at least, is the proposal of the present Attorney General of Britain in the new government of Tony Blair.

The safeguarding of rights of the individual is a permanent, continuing duty of the governmental system under which people live. We know that every society has a different approach to the problems which arise in society or the political institutions, and one of the ideas which

relates directly to the problem before us, which has been defined lately by John Rawls in his last book, concerns what he regards as a component of liberal democracy, namely, the adoption of pluralism, the adoption of rights, of having different opinions, voicing them, fighting for them, and being accepted and recognized by the governmental system as equals - pluralism by consent. This may be compared to pluralism which has been forced upon the people, when one says, "you must behave in a certain way, otherwise you will be arrested or punished or oppressed". This is not the right system. The right system is that all groupings in a certain country accept the fact that if you have a free country, you have different opinions and you must leave space and time and the right to voice your different opinions and to have equal rights in voicing your different opinion. This is called "**pluralism by consensus**", namely, that all agree rationally, that from the rational point of view, the best way to adopt the society of freedom, is to accord the freedom to everyone, because this will, in return, be mutual and reciprocal. If you accord freedom to everyone, you also accord to yourself, by way of a rational approach, the freedom you are asking or looking for. Therefore, pluralism should be "pluralism by consent". This is the idea which I have been voicing lately.

Thus, democracy or liberal democracy, is based, as we said, on the liberty and on the equality of people, and on the recognition of the fact that there are pluralistic ideas, that society is composed of different components with different approaches. The main factor in according to people the right to live together and to create together a political system or a

social system is to regard everyone as owning or possessing the right to have equal standing in this difference. We differ, but agree, and as Voltaire said, "I disapprove of what you say but will defend to the death your right to say it". He even mentioned the possibility of death, in the fight to accord to everyone the equal right to be different. This is a comparatively short description of the universal factor.

But I would like to turn to our specific Israeli equation. Israel started its existence formally, and factually, by publishing a Declaration of Independence. This Declaration of Independence stated that there would be equality of rights to people of all faiths. In other words, the equality or equal rights of every group, having a different religion, faith or ethnic composure, are safeguarded by the declared intention of those who founded the State of Israel. We must be aware of the fact that so far the Declaration of Independence has not been regarded as part of our constitutional system. It has been described by our Supreme Court as being "declaratory of the spirit of the laws", of the ideas which are the corner stone of our State. The Declaration of Independence does not have the force of law, in other words, one cannot safeguard rights by basing oneself on the Declaration and turn to the Court as was done in 1948, when these judgments were given, which described the declaratory status of the Declaration of Independence. Nevertheless, a certain change of heart did take place in 1992, when our Basic Law: Human Dignity and Freedom was passed, forming one of the chapters of our constitution which is being created step by step by the *Knesset*. This Basic Law states that the values of

the State of Israel have to be interpreted in the spirit of the Declaration of Independence. Thus, the Declaration of Independence received an additional statutory legislative status, by being turned into part of the Basic Law, which is part of our constitution. The special status is achieved by the norm laid down in Article 8 of the Basic Law that ordinary legislation cannot be enacted except if it fits the basic values of the State of Israel, is for valuable purpose, for a recognized purpose, and does not exceed the extent needed in order to achieve the aims of this legislation. Accordingly, to a certain extent, ordinary legislation has been turned into legislation which has to obey the norms laid down in the Basic Law and therefore, the mentioning of the Declaration of Independence, in connection with the basic values of the State of Israel, has accorded to it special status, strengthening the spirit of the basic intention of the founding fathers of our country.

The Declaration of Independence provides for equality. The equality is based on a society which recognizes and accords equal rights to different people. Further, the Basic Law: Human Dignity and Freedom mentions that Israel is a Jewish and democratic State. Thus, one has two components which have to live together, which somehow have to be fused into one meaning, or balanced. This certainly is another expression of the acceptance of Israel that there are different components which have to be obeyed or recognized or honoured by ordinary legislation and by all the governmental bodies - all the three arms of government, the legislative, the judiciary and the executive. This is, I would say, a hint at pluralism, as one of the basic factors of our State.

How do we live together in a society which is so divided? We have a society which is very open-minded; having different opinions, and not agreeing, is an expression of freedom. One must not

exaggerate, there is a certain point where one must reach some conclusions which are accepted, but Israel certainly is a society where one can voice every opinion. It is not always accepted, it is not always agreed upon, one would not call it consensual, but the difference of opinion has a very large and wide array. How does one live in a society and how does one really turn the theory into practice? Because when we talk about constitutions and States and governments, there is always an idea and there is not always a practice. There is a difference between the idea and the practice. There are countries which had great constitutions, such as the Soviet Union, but the practice was, much to our regret, quite different. Practice, therefore, is very important and one of the questions we are posing in this panel is how do you turn the idea of pluralism, of freedom, of liberty, of the equality of every individual into practice.



Panelists discussing "Pluralism, Religion and State" (from left to right) Rabbi S.Y. Cohen, Justice M. Shamgar, Rabbi D. Rosen, Adv. J. Roubache

# “The Separation of Church and State... is Impossible in Israel”

Shear-Yashuv Cohen

**A** very wise and veteran politician and statesman in Israel, Dr. Yosef Burg, who this year celebrates his 90th birthday, and for many years was a member of different cabinets in different coalitions, has remarked that, when you write about the State of Israel being democratic and Jewish, the most important part is, what he described as “the hyphen”, or, “the connecting”, the “and”. How you put it together. I will try not only as a Rabbi but also as a jurist. I will try to approach the most important and rather heated issues, of the relationship between State and religion from the point of view of a Jew and a Rabbi, and a jurist at the same time.

I believe that we, as Jews, should reflect on the nature of our covenant with God, which is represented in the very name of “*Bnei Brith*”. A “*Brith*” - a covenant. Is it a national covenant? Is it a religious covenant? One cannot escape the conclusion that basically it is a religious covenant that binds the Jewish people together. If we regard the State of Israel as a Jewish State - we face a very unique situation in the delicate and

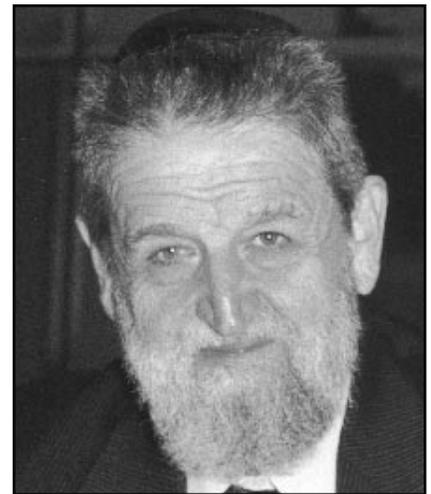
complicated relationship between State and religion.

Can a Jewish State be at the same time a democracy? Should we or can we try to find a compromise between the basic commandments of the *Torah* and *Halacha*, and life in a modern democratic State? Can they coexist? Many say “No”. My reply is “Yes”, but not in their current forms; a change must come. Democracy does not mean that democracy always rules; even in a democracy, a majority vote does not legitimize an undemocratic principle. To ensure that the State of Israel will be a Jewish State, and not only a State of the Jews, as Herzl predicted, or a State of all its citizens, as many advocate - some axioms of behaviour, I suggest, have to be adopted. We need to decide what will make it Jewish and how to solve the contradiction between its being a Jewish State and its being governed by democratic rule that grants equality to all. Indeed, I believe that democracy in itself is indeed a Jewish principle (“You will have one law, a convert like the citizen”).

Of course, “one law” means equal rights. At the same time, equality is not necessarily identity, and this is our problem.

Running away from this issue will not help us!

The State of Israel was created by the



Zionist movement as a continuation of a Jewish tradition which includes a *Mitzvah* - a fundamental, positive commandment, to live in the Holy Land. Prayers were said and are still being said three times a day, by observant Jews, for the return of the exiles to Zion. Secular Zionism could not have come into being without that tradition. Those who do not understand it, do not understand what motivated the Zionist movement, what made it happen and what is the future of this process.

The religious commandment to live in Israel is a very basic *Torah* commandment. The *Talmud* says that the *Mitzvah* of living in the Land of Israel outweighs all the other commandments put together.

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Rabbi Shear-Yashuv Cohen is the Chief Rabbi of Haifa. This article is based on his remarks during the Panel on “Pluralism, Religion and State”.

Every conscientious Jew has this tradition imbedded deeply in his soul. The modern phenomenon of the return of the exiles to Zion is indeed part of a prophetic, messianic vision, in which Islam also believes.

At a conference of leaders of faith, I met with leaders of Islam from Egypt and other countries including personalities like Sheik Tantawi, who is the head of Al Azhar University. To the best of my knowledge, the most important religious figure in the Islamic world. I asked him to explain the opposition to the process of the return of the exiles to Zion, when the Prophet, who is the founder of their religion, said that he did not come to annul the vision of the *Torah*, but to add to it. How could Islam be one of the religions to fight against it? Islam should be one of the religions to help the Jews to return to their land because this is a basic part of the Biblical tradition. Why should this be regarded, or must this be regarded, as an obstacle to Palestinian desires to have their own identity and control their own destiny? I claim that if it is done in a wise forum of tolerance and understanding, we can coexist. I received an astonishing response. Sheik Tantawi told me: "You claim to represent the Bible and the Jewish religion? Do you observe a Jewish lifestyle in the State of Israel? Is it a Jewish State? Is a majority of its inhabitants religious? They are secular Zionists, and therefore, cannot claim the right to represent the historical Biblical Judaism, and the visions of the "day to come" because they do not represent that phenomenon - it is a secular movement".

This, I believe, is a mistake! Despite efforts to paint modern Zionism as a secular movement, founded in the 19th

century in Europe, it is in fact a deep religious movement that moves the Jews to want to return to the Land of Israel and rebuild it. Without this tradition, we would not be here, and those who refer to it as a secular movement only, are confusing religion with observance.

While it is true that many Zionists, and maybe most Jewish citizens of the State of Israel, are not observant Jews, they all carry deeply religious convictions about the foundations of the State. The late Yitzhak Rabin, viewed by many as the epitome of the secular Israeli, quoted from the Bible when signing the peace treaty with Jordan and at another occasion spoke about hearing "the footsteps of the Messiah".

So for Rabin too, the inspiration for coming back to Israel was Biblical and, while his way of life was not that of an Orthodox, observant Jew, he was not secular. Every one of these Jews, while secular as far as their daily life is concerned, deeply in his heart, looks at the return of the Jews to the Holy Land as a part of a religious vision. Further, even the strong movement for peace, for peaceful coexistence with other peoples, that motivated the late Yitzhak Rabin and his friends, stems from a prophetic Messianic vision of living together in peace, that we as Jews bring to the world.

The conflicts between State and religion comes from a basic misunderstanding of the Jewish religion and what it demands. Some Orthodox leaders believe that it is their duty to make others practice Jewish tradition. They trust that this is a part of their religious duty. However, they seem to forget, that one of the basic principles of Judaism is "freedom of choice". "I present to you good and bad, life and death. You should

choose life." Take away the principle of free choice, and there is no Jewish practice of religion.

So, the basic challenge is to maintain freedom of choice as far as the individual is concerned, and at the same time to maintain a Jewish public image of the State, while preserving human rights of equality, tolerance, understanding and peaceful coexistence with secular Jews, and between Jews and other peoples. Can it be done? I do not have a ready solution, but it must be sought mutually by both sides, the so-called secular and the so-called religious Jews.

The present tension between State and religion is very loaded and one of a continuous strife, quarrels and even bloodshed, based on the conflict between religious practice and national, democratic existence. It seems to me to be a real tragedy!

I believe that the separation of church and State, which for our American guests is such a basic issue, is impossible in Israel, because there is no Israeli church; a Rabbi is not a clergyman, he is a teacher! The idea of establishing a Chief Rabbinate was started by the Zionism movement 80 years ago and was laid by the late Chief Rabbi Kook, with a vision of returning the crown of prophecy and religious belief to the people of this country; not, by all means as rabbis who tell others what to do, but as teachers who teach others how to behave.

Unity among Jews means that we find, we try to find, a common denominator: not that we simply tolerate each other. That is not enough. There are other basic principles that should bind us together - here, I come to the delicate issues of certain laws, with which we have lived for 50 years in the State of Israel, and

seem to be now a subject of contention - the laws of marriage and divorce, the laws of the Rest Day, equal rights for men and women and minorities. The basic unity of our people depends on finding a way to coexist within the basic principles of Jewish law that should bind us together and not make us into different nations. I was never conscious of the fact that I am an Orthodox Jew, until I came into contact with American and Western Jewish communities.

This entire issue, when we speak of pluralism, of Orthodox, Conservative, Reform, is not an Israeli issue. Of course I am Orthodox. However, the very idea of dividing Jews into denominations is very foreign to me. Jewish *Sephardi* communities never had these divisions, nor, of course, did Eastern Europe. The majority of Jews in Israel are either Oriental Jews or Jews that came from Eastern Europe. There should be basic unity and then we can tolerate pluralism in practice. Let us respect each other but retain the basic unity for future generations to come. This was what, I believe, motivated the founders of this State to accept the basic laws of marriage and divorce and conversion, which is now also a subject of discussions in the Supreme Court, namely, to try to retain our unity without coercing each other.

I know that my next sentence may arouse some deep arguments, but I believe the definition of the State of Israel appears in the Bible. As part of the laws of Moses before the Ten Commandments were given, it says: "You will be unto me a kingdom of priests and a holy nation". This is not a vision for the days to come but rather an instruction given to people in their own time. And since the days of Moses, there

was always tension between the prophet and the king. Maintaining a balance of power is the name of the game. And the Prophet Ezekiel already said during the Babylonian exile that the "Jewish nation will never be like any other, because God did not choose it to be like other nations".

I believe that the trend in secular circles, to run away from Jewish religious foundations is doomed to fail. Judaism is not a religion. It is not even a faith. It is a unique combination of a religious and national definition. Israel's most basic document, the Declaration of Independence, says that "In the Land of Israel arose the Jewish people" and indeed there is no doubt that it is in the Land of Israel where the Jewish people solidified, in antiquity, into a nation.

True, Herzl, founder of political Zionism, sought to "keep the Rabbis in the synagogue", but he also sought to "keep generals in the barracks". Just as the vision regarding rabbis was not realized, so too was Herzl's vision about generals not realized, and military men of every stripe are vying for political power.

Ben Gurion too wrote about prophetic destiny and about becoming a light unto the nations. If we can become a light unto our own people through a deep commitment to Jewish values, by understanding the problems of human frustrations, solving problems in a tolerant way without running away from basic Jewish values, we will be able to coexist. A democracy which recognizes that it stems from Biblical and *Talmudic* tradition, that does not believe in discriminating against or coercing others - will be able to continue for many years to come.

The foundations of the State of Israel are very complicated. We believe and we speak about equal right for all its citizens, and we want it to stay Jewish. We look at the Law of Return as a basic constitutional law of the State of Israel, yet at the same time we do not recognize this right for others, who claim and try to copy the idea, and speak of their right to return to their homes and to their land. I believe that without looking at our religious Biblical foundations, there is no justification for secular Zionism. The only justification that we have, our "Bill of Rights", is the Biblical vision of this country as being the home of the Jewish people.

I agree that there is a difference between the secular definition of Zionism and the religious definition of Zionism, but that argument does not take away the right of every Jewish believer to live in this land, and the human right of every non-Jew, Arab, Moslem or Christian, to live here in freedom and equality. This attitude should remove the loaded feeling of occupation and its political significance. I also believe that we live in an age of ecumenism when it comes to holy places - just because Jews, Christians and Moslems regard the same place as holy and pray there, each according to his own tradition, should not make us necessarily enemies. Love of the same thing can make us friends - it depends on how, and if, the leaders educate the believers towards tolerance and love and not hatred.

Finally, I do not know of any other nation, where in order to become a member of that nation or that people, one has to convert. Which type of conversion, is a subject of dispute but we all agree, all Rabbis from different denom-

inations, that in order to become a Jew one has to convert, not just join. Perhaps this is also the reason for the Law of Marriage and Divorce being religious in the State of Israel. I believe it was the famous English Supreme Court Judge, Lord Denning, who wrote about marriage that it is the most private institution because it binds a man and a woman agreeing to live together, and at the same time it is definitely a public institution

because it is the basic cell of society.

Therefore, there must be a law that governs marriage and divorce. It has to be a part of the code of this country and a solution can be found that would grant equality. I do not believe that the majority of Jews would seek not to be married by a Rabbi even if civil marriage was to be established in this country. It may be wise for us, as Rabbis, to allow for freedom of choice regarding

marriages and divorces and prove that a majority will anyhow choose the religious system - just as in the case of circumcision, where despite the absence of a statute, the vast majority of parents arrange for a circumcision because they feel it is a basic Jewish duty.

### Judge Hadassa Ben-Itto the Recipient of the 1999 Zeltner Award

Judge Hadassa Ben-Itto, President of the International Association of Jewish Lawyers and Jurists was awarded the Ze'ev Zeltner Award for 1999.

Dr. Omri Yadlin of the Law Faculty of Tel Aviv University was the recipient of the 1999 Zeltner Award for the Young Researcher.

The prestigious Zeltner Award is named after the late Judge Prof. Ze'ev Zeltner, one of the leading jurists in Israel, who passed away in 1977, and was established by the Zeltner Foundation to encourage studies in law and social sciences. The Zeltner Award is jointly sponsored by the Zeltner Foundation of the Rotary Club, Israel, and the Law Faculty of Tel Aviv University.

The Awards granting ceremony was held at Tel Aviv University on 9 March, 1999, and was conducted by Judge Salim Joubran of the Haifa District Court who also chairs the Zeltner Foundation. The recipients of the 1999 Zeltner Awards were introduced by District Court Judge Shulamit Wallenstein and by Prof. Eli Lederman, the Dean of the Law Faculty of Tel Aviv University. The Award Committee was chaired by Judge (Ret.) Yitzhak Shilo.

Judge Ben-Itto delivered a lecture on "One Hundred Years After Emile Zola, the Jewish People still cry: *J'Accuse!*"

Leading figures from Israel's legal system, including former Supreme Court Presidents and Judges, attended the ceremony.

## Public Trial: Boundaries of Political Speech



**The Public Trial on Boundaries of Political Speech** was one of the main features on the agenda of the 11th International Congress of the Association, held in Jerusalem on 28 December, 1998.

*The Case, the proceedings and the judgment will be brought in full in a special issue to be published soon.*

The Presiding Judges were: (front row, L-R) Judge **David G. Trager** (U.S.A.),

Lord **Philip Caplan** (Scotland), Justice **Gabriel Bach**, President (Israel), Justice **Vera Rottenberg-Liatowitsch** (Switzerland), and Judge **Isi Foighel** (Denmark).

Back row:

Pleaders for the Defence: Adv. **Floyd Abrams** (U.S.A.); Dr. **Ilana Dayan** (Israel).

Pleaders for the Prosecution: **Jonathan Goldberg**, Q.C. (U.K.); Adv. **Alain Jakubowitz** (France).

# “Genuine Pluralistic Choice Provides for the Greater Unity of Judaism”

David Rosen

**T**he question of the definition of terms is one that immediately confronts us when dealing with the issue of pluralism and the separation of State and religion, and it is interesting that as Chief Rabbi Cohen indicated, there are very significant Jewish writings and sources on this topic.

I am sure that many of you will be familiar with the writings which define the system of the *Torah*, of Judaism, as democracy. These assert that Judaism is a democracy because it honours equality and has law and justice as its rulers; in other words, everyone is equally subject to the rule of law. This emerges from some of our oldest “*Midrashic*” sources. The “*Mechilta*”, on *Exodus* 14, 31, indicates that Moses’ own status, and obviously there is no more charismatic personality in Jewish tradition than Moses, depended upon public acclaim. In other words, the democratic principle was perceived by traditional Rabbinic Judaism as already rooted in the initial workings of communal life, and of course, the *Talmud* teaches in triptych “*Brachot*”, 55A, that no public appointee



may be appointed without public approval. Finally, on the question of Judaism and democracy, one should see the very incisive article by Solomon Schechter, in which he coins the term “Catholic Israel”, because the concept is all embracing, of people, and points out that as the *Talmud* indicates in triptych “*Menachot*” and the famous quotation in “*Sanhedrin*” 44 A, that even the sinner, in Jewish perception, is part of the community, and therefore has a role as part of the community.

So, the value of the individual as part of the community, in a decision-making process, that relates to governance, is a very fundamental principle within Jewish tradition and it relates, of course, to the

question of pluralism. Again, looking at it conceptually, we could bring many different sources. I would just like to quote one - the first *Ashkenazi* Chief Rabbi of the *Yeshuv* in the Land of Israel, Rabbi Avraham Yitzhak Hacohen Kook. Rabbi Cook wrote these words 90 years ago, I quote:

“The Jewish ideal of governance involves toleration of each individual and group, and each its own opinion. This essential toleration, consideration and freedom of expression of each group, is both essential for correct and enlightened governance, but also crucial for the created energy of society”.

The ability for this ideal to be realized in a manner that serves democratic society at large, does not, I believe, necessitate the separation of religion and State. There are many that believe that it is crucial for the well being of a society and those who maintain this, generally speaking, come from the American perspective, or with a profound appreciation for it. As one responsible for representing a leading American Jewish organization, and also in terms of my own personal conviction, I would be the last to question the wisdom of that particular system which I think has proven itself in the American context but there

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Rabbi David Rosen is the Director of Israel’s Office of the Anti-Defamation League and former Chief Rabbi of Ireland. This article is based on his remarks during the Panel on “Pluralism, Religion and State”.

are plenty of examples in contemporary society where there is no total separation of religion and State, without the same necessarily compromising the liberal democratic functioning of that society. The United Kingdom is one example and most Scandinavian countries do not have a separation of religion and State.

So long as we define Israel as a Jewish State, obviously the total separation of religion and State is impossible. The problem in Israel is not the relationship; the principle of whether there should be any relationship between religion and State. It is, I believe, not only the exclusive control of religion on matters of personal status, which Chief Rabbi Cohen has defended here, and in relation to which I seek to present an alternative position, the problem is, above all, the politicization of religion in the State in Israel. This is something which is profoundly compounded by socio-cultural norms.

Israel, as has been alluded to, has maintained the Millet system, which was the *modus operandi* of the Turks. Under this system, the different religious communities have exclusive control over matters of personal status - marriage, divorce, membership of the community. Israel continued an extant procedure, which was, in its time, very wise. The problem today, however, is that we have, as Chief Justice Shamgar indicated, come a certain distance in the course of the last few hundred years, and even in the last 50 years and it is simply not true to say that this system caters adequately for the diverse reality of modern democratic life in the State of Israel.

The monopoly on matters of marriage and personal status by religious denominations, creates serious problems in

terms of civil rights, highly anomalous procedures, and sometimes, quite ridiculous activities to circumvent it. Israel is a modern State even though it has no facility for marriage outside the recognized religious groupings, that is to say, if a Moslem and a Christian fall in love and wish to get married in Israel, there is no facility to accommodate them. One has to convert to the religion of the other in order to get married in Israel. There is no civil marriage. However, as a modern State, Israel recognizes marriages performed by other modern States. Therefore, every year, we have hundreds if not thousands of people, taking short boat trips or plane trips to Cyprus, in order to get married in Cyprus and thereafter have their marriages registered by the Ministry of the Interior of Israel, which as a modern State it will do.

In fact, something even more simple and absurd is going on, namely, marriages in the mail from Paraguay! Send off to Paraguay and you get a "*Mazel Tov*" in the mail. The State recognizes it and endorses it.

I was Chief Rabbi in Ireland. In my time in Ireland, it was the democratic choice of the majority to allow divorce in Ireland. Not everybody was happy with their partners in Ireland. What happened? Every year, thousands of people would take a boat trip or a plane trip over to England, get divorced in England, and come back to Ireland, and live with another partner as bigamists. Irish law turned a blind eye to bigamy, as long as one did not get divorced. This was what they called "an Irish solution to an Irish problem" and it just made a mockery of the system. The situation at the moment makes a mockery of the democratic rule of law and therefore of the rights and

facilities available to people.

Of course, this does not just relate to the question of inter-marriage. Within religious traditions too, there are limitations placed by the religious tradition. Indeed, one of the most distinguished jurists in Israel, who held a very high position at that particular moment, could not get married in Israel because he is a Cohen, and his wife was a divorcee. So there are limitations that actually restrict even those within the community. The situation is even more difficult for those who simply do not want a religious marriage. Why should they have to go through with the procedure, if they do not wish a religious marriage? The situation leads to absurd manifestations, often seen, where a couple is required to go through a procedure, a Rabbi comes along who is not overly educated, wise and sensitive, because the vast majority of institutional Rabbis in Israel do not have a proper secular education, let alone a proper resonance and understanding of the norms of modern society, and there is complete alienation between the couple and the gentleman who is performing the ceremony. It reaches the point where the couple is paying no attention, all the guests are already eating, and the poor Rabbi has to go through with this procedure, which is made a complete mockery. Is this good for Judaism? It is not just a question of democracy, it is a question of a procedure, of a monopoly on the part of religious systems, which undermines the long-term interests of those religions themselves.

Therefore, the present system simply does not serve a pluralistic reality where, on purely pragmatic grounds, the monopoly of religious authorities needs to be changed. For the democratic norms

of Israeli society, for the health of Judaism in Israeli society and to avoid the on-going alienation from the body politic and Jewish religious tradition, it is necessary to introduce alternative forms of marriage within Israeli society. This means, authentic pluralistic options on the matter of choice; an introduction, at least in some limited form, and I personally would not even limit it, of civil marriage. I reject the claim that this undermines the unity of the Jewish people. On the contrary. My contention is that providing genuine pluralistic choice, precisely provides for the greater unity of Judaism, because coercion alienates. When people do not have choices, they are alienated from the institution which represents that particular tradition. I would, however, in parenthesis say, that seeking to be a responsible Orthodox Rabbi, it would be desirable, in fact I would say, essential, for the State, to still require that there be religious divorce, so as to avoid the problem of “*mamzerut*”, of those who are not able to participate in the community character of the people as a whole, in other words, not able to get married themselves, according to religious tradition, if they are considered to be the issue of adulterous or incestuous marriages. There would also be a problem in the event of a second marriage, where the previous marriage had not received a religious divorce.

Accordingly, I think it is in the interest of the human rights of the members of the Jewish body politic in Israel to require that there be a religious divorce, but I believe that insistence on religious marriage is totally counterproductive and countervailing to the democratic values and aspirations of the society at large.

There are many other issues we could

raise here. The politicization of religion in Israel leads to many other serious injustices and disturbing discrimination. I do not have the time or the scope here to deal with the subject of the Law of Return, which is a very significant and serious issue. Further, there are the problems of definition of identity and whether the State should be involved in such definitions to begin with. In my opinion it should not. I am also avoiding the question whether the rationales, principally on security grounds, still justify utilizing religious categories of definition on identity cards, which I think is also a serious problem in terms of civil liberties within Israeli society. However, I would just note one final issue as an example of where we need at least a de-politicization of religion, even if we cannot have a total separation of religion from State, and that is the question of the Ministry of Religious Affairs.

The establishment of religion in Israel means that there is a Ministry of Religious Affairs, with a very large budget, which is meant to serve all the religious communities in Israel. The politicization of the Ministry, which is totally politicized, not only involves substantial fiscal misappropriation, and therefore itself encourages what may be

called, in what should be a tautology - religious corruption, but it has meant, that the non-Jewish population which forms 20% of this country has never ever received as much as even 2% of the budget of that Ministry. Never! In Israel, democratic equity, and indeed the integrity of religion, will be served by the abolition of the Ministry of Religious Affairs. It should not exist! We can place the operation and the servicing of religious courts under the authority of the Ministry of Justice. Municipalities and regional councils should be responsible for providing religious buildings and essential services according to local needs. What is needed for the health of democracy and religion in Israel, is not the separation of religion and State, but the de-politicization of religion. These two recommendations alone, that I have made here, and we could go on for much longer, would facilitate this substantially. They would facilitate the healthy, organic and pluralistic growth of religious life in Israel, through voluntary association and institutions that will genuinely reflect and cater to the real needs and choices of its citizens.

Participants attending the Congress plenary.



# IAJLJ Statement

The International Association of Jewish Lawyers and Jurists (IAJLJ) meeting at its 11th International Congress in Jerusalem on December 28-31, 1998, adopted the following statement:

## 1. Manifestations of Anti-Semitism in the Russian Federation:

The IAJLJ expresses its grave concern at recent manifestations of blatant anti-Semitism, in particular by a Communist Party member of the Duma, General Albert Makashov. It expresses its sense of outrage and unreserved condemnation of his call for the murder of Jews at a public demonstration on 7th October 1998 in the city of Samara.

It further condemns continued prevarication by governmental, judicial and parliamentary procedures, thereby enabling the Russian Communist Party and extreme political elements to continue the campaign of exploiting anti-Semitism as a political weapon.

This process has been confirmed by the most recent publication of an open letter by the leader of the Communist Party, Gennadi Zyuganov (*IHT 26-27 Dec. 1998*), declaring his belief in a Zionist conspiracy to seize power in Russia and affirming that "Zionist capital" has wrecked the Russian economy and that "Zionism has revealed itself as one of the varieties of the theory and practice of the most aggressive imperialistic circles striving for world supremacy".

The IAJLJ accordingly calls on the competent Russian governmental authorities in conformity with their obligations under the relevant provisions of the UN International Covenant on Civil and Political Rights and the UN Convention on the Elimination of All Forms of Racial Discrimination, to take immediate and effective legal, administrative and other necessary measures to prosecute the authors of these repeated and deliberate acts of anti-Semitic incitement to hatred and violence which are in clear violation of the Russian Criminal Code.

## 2. Discriminatory Treatment of Israel at the United Nations

1. The IAJLJ is deeply concerned at the continued discriminatory treatment of Israel at the United Nations contrary to the principle of the sovereign equality of all nations enshrined in the UN Charter.

Due to the fact of the exclusion of Israel from membership in a regional group of Member States, Israel is prevented from serving in the Security Council, the Economic and Social Council or any of its Commissions, notably the Commission on Human Rights where the essential UN human rights issues are decided and on the

various judicial bodies of the UN. Israel is thus denied effective participation as a Member State of the UN.

The IAJLJ urges the Western European and Others Groups composed of democratic UN Member States in different geographical regions to admit Israel as a member having regard to the fact that it is a parliamentary democracy governed by the rule of law, thereby ending the discrimination to which it is subjected through arbitrary exclusion from the Asian Group.

2. The IAJLJ deplores the decision of the UN Commission on Human Rights at its 1998 session to institutionalize under the reorganized agenda the ongoing practice of singling out Israel as the only State to which a separate agenda item is devoted for examination of alleged violations in the Territories, whereas all other countries in which the human rights situation is examined, are dealt with together under another agenda item. This grossly disproportionate and unfair treatment of Israel over three decades, now formally endorsed by this year's decision in the context of reforming and rationalizing the Commission's agenda, undermines and discredits the Commission's authority as the principal UN forum for the promotion and protection of human rights. The IAJLJ calls on all members of the Commission to put an end to this unjust and discriminatory practice and resolves to renew representations to this end.
3. The IAJLJ has noted with deep regret the application of politically motivated double standards in the examination of reports filed by Israel with the Committees of Experts appointed under the provisions of the UN Human Rights Covenants and Conventions to which it has become a party. Despite the good-faith efforts of Israel to comply with its reporting obligations in the context of the "*sui generis*" conditions resulting from the ongoing Arab-Israel conflict and the emerging peace process, the trend has increased over the last two years - during the course of the oral presentation of the detailed written reports supplemented by comprehensive explanations and replies in response to the questions raised by the Committees' experts - to inject political considerations and criteria of judgment and evaluation of a considerably more critical nature than those applied when commenting on the reports of other States parties to these human rights treaties. This tendency has been particularly marked in the most recent comments and conclusions on Israel's reports under the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture, the International Covenant on Civil and Political Rights and especially with respect to the Concluding Observations of the

Monitoring Committee of the International Covenant on Economic, Social and Cultural Rights issued on 4th December 1998.

The latter Committee's conclusions, conflicting with Israel's detailed report and extensive oral explanations during its presentations, *inter alia*, questions the status of Israel as a "Jewish State" allegedly discriminating against its non-Jewish citizens, misconceives and queries the status of the World Zionist Organization, the Jewish Agency and the Jewish National Fund as being of an allegedly discriminatory nature against "Palestinian land and property" in breach of Israel's obligations under the Covenant and recommends to Israel "a review of re-entry policies for Palestinians who wish to re-establish domicile in their homeland, with a view to bringing such policies to a level comparable to the Law of Return as applied to the Jews".

These conclusions virtually seeking to negate the status of Israel as a homeland for the Jewish people, thereby calling into question its right to exercise self-determination, enshrined in both Covenants, by the establishment of Israel as a Jewish State in the Jubilee year of its existence, constitutes an unacceptable breach of the boundaries of its competence and an apparently wilful misapprehension of Israel's report.

The IAJLJ profoundly deplores these comments and calls on the ESCR Committee to revise its contents in line with its mandate, so as to render further dialogue possible with the State Party concerned.

4. The IAJLJ also notes with consternation and disquiet two recent incidents involving the UN High Commissioner for Human Rights, Mrs. Mary Robinson. It expresses its keen surprise and deep regret that the High Commissioner should have seen fit at an Experts Meeting convened to review the general questions regarding implementation of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, to have her representative disregard the rules governing the meeting, reaffirmed by the Chairman at its outset as binding on the participants, and included in the invitation they received, specifying that this meeting should not devote itself to any specific situation of territories under occupation. This notwithstanding, the High Commissioner's representative, contrary to the requirement that her office respect the principle that "the promotion and the protection of all human rights be guided by the principles of impartiality, objectivity and non-selectivity in the spirit of constructive international dialogue and cooperation" (A/Res/48/141) and in apparent defiance of the Chairman, chose to confine his statement to Israel's presence in the Territories and called for economic and other sanctions under Article 41 of the UN Charter "against the State Party responsible for the violations".

The Statement of the UN High Commissioner exceeds the

authority of her office and represents an unprecedented attitude of hostility to a Member State by calling for Security Council sanctions in disregard of UN Charter principles.

The second incident involving the UN High Commissioner of Human Rights, arises out of the failure of her office to reply to a communication addressed to her by the IAJLJ's representative at the UN in Geneva on 4th November 1998, raising a query about the unusual and highly restrictive conditions applied by her office in respect of an invitation to the IAJLJ to attend a Seminar on Islamic Perspectives on the Universal Declaration of Human Rights, marking its 50th anniversary. Those conditions precluded free and open discussion.

Accordingly, the IAJLJ requests its Presidium to convey to the UN High Commissioner of Human Rights its disappointment and regret at these occurrences and to seek clarification of her office's position in their regard.

### 3. Holocaust Era Assets

The IAJLJ expresses its commendation of the World Jewish Restitution Organization and its constituent organizations as well as the contribution of distinguished Jewish as well as non-Jewish lawyers and jurists who have strived with diligence and conscience to obtain restitution or appropriate compensation for Jewish communal assets and the assets of private individuals which were spoliated, plundered or otherwise stolen or misappropriated during the Shoah.

The IAJLJ pledges its continuing support for these efforts to achieve a small measure of justice for Holocaust victims and their heirs despite the passage of more than half a century.

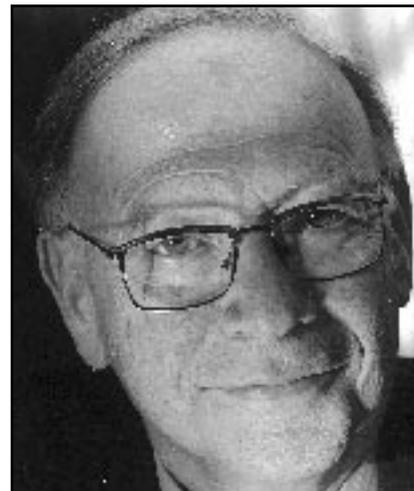
### 4. Argentina Bombing

Following the international conference of the IAJLJ recently held in Israel, and in view of the coming seventh anniversary of the terror attack on the Israeli Embassy and the fifth anniversary of the terror attack on the Jewish Community Center Building in Buenos Aires, the Presidency of the Association calls upon the Government of Argentina and its legal institutions to make special efforts to advance investigations into these attacks.

The Association, which is comprised of representatives of legal systems from around the world, is monitoring these investigations with concern and sincerely hopes that those guilty, including the "local connection", will be promptly apprehended, brought to justice and punished to the full extent of the law.

We are confident that this is a matter of common concern to the Government of Argentina and to its legal institutions since apprehending these terrorists will not only serve the interests of justice but it will also act as an important deterrent against similar terrorist attacks in the future.

# Three Judgments from the European Court of Human Rights



Isi Foighel

**O**n the 23rd of September 1998, the European Court of Human Rights handed down the judgment in the case of **Lehideux and Isorno versus France**. The Court found that France had violated the freedom of expression provided for in the Convention of Human Rights. The case had some very interesting features:

First, for many of the judges it reawakened memories of a time to which they had been party, or at least spectators in their youth; secondly, at the same time, the judgment underlined the debate, in recent years also conducted in France, concerning the French people's possible reevaluation of their own history during the Second World War. Thirdly, the judgment showed how far the Court of Human Right was willing to go to protect freedom of expression.

The background of the case was as follows:

After the defeat of France in 1940, Germany occupied only the northern part of France which included Paris. The southern part of France and the city Vichy evaded German occupation and was ruled by a government headed by the famous French soldier and hero from World War One, Marshal Phillippe Pétain. It was the French Parliament which urged him to take over the political leadership as Head of State and negotiate a cease-fire with the Germans.

After the war - the 15th of August 1945 - Pétain was condemned to death and forfeiture of his civic rights on grounds

of high treason and collusion with the enemy and among other things his anti-Semitism and racist policy.

In July 1984, the newspaper *Le monde* published a one-page advertisement bearing the title "People of France, you have short memories" in large capitals. It recapitulated, in a series of assertions, the main stages of Pétain's life.

In respect of the period 1940-45 it contained the following passages:

**"People of France you have short memories - if you have forgotten:**

- That he, in 1940, secured an armistice and prevented the enemy from camping on the shore of the Mediterranean, and thereby saved the Allies.
- That in the thick of difficulties... Nazi atrocities and persecutions, he protected them against German omnipotence and barbarism, thus ensuring that two million prisoners of war were saved."

Referring to the episode when, on the 24th of October 1940, he went to see Adolf Hitler and shook his hand - it stated:

"that, through his supremely skillful policy, he managed to send a personal representative to London thereby allowing France in defeat to maintain its position between the contradictory demands of the Germans and the Allies."

The advertisement continued in this way with assertions which pretended to underline Pétain's fantastic achievements for France and the French people. However, nothing was mentioned of the signing on the 3rd of October 1940 of the so-called Act

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relating to Aliens of Jewish race, who were later to be interned in camps set up in France for that purpose. The camps were created in order to facilitate the Jews' conveyance to the Nazi concentration camps, which were their intended destination. Modern historians have called this "the ugliest side of the Vichy government's abortive moral revolution, namely its vicious racism, and in particular its own special branch of anti-Semitism. Recent research has established beyond question that, far from being a Nazi imposition, Vichy's anti-Semitism was entirely home-grown and in certain respects even exceeded German requirements".

The advertisement also mentioned nothing of the execution of members of the French resistance-movement.

The advertisement was ordered and paid for by an organization which called itself "The Association for the Defence of the Memory of Marshal Pétain".

On the initiative of the National Association of Former Members of the Resistance, a criminal complaint was filed against the leadership of the Association for the Defence of Marshal Pétain. The latter consisted of two elderly men who had been respectively his Minister of Justice in the Vichy Government and his defense lawyer during the trial against Pétain.

The two were charged with having violated a French Act, which criminalized the public defence of a crime concerning collaboration with the enemy. We, in the Court, felt that this was a somewhat peculiar Act, which, however, was enacted in the special circumstances just after the Second World War. But this special Act was not our concern.

The Paris Court of Appeal and later the *Cour de Cassation* found that the Act had been violated, as the advertisement was in the nature of an "apologia", hailed Pétain, and made unsubstantiated assertions which had many times been discarded by scholars, namely, the story about the emissaries to London. The French judgment further underlined the fact that the advertisement omitted relevant information and thereby gave a distorted defence of Pétain.

The two accused were convicted and received a fine of one franc. They brought their case to the European Court of Human Rights claiming that their freedom of expression had been violated.

Because of the important principles involved in the case 21 judges took part in the deliberation. 15 of the judges found that France - by sentencing the two men - had violated their freedom

of expression. A minority of six judges wanted to acquit France. I belonged to the minority, and from the published dissenting opinion I gave together with the English and Cypriot judges, one can see, that I was satisfied with my dissent. I will come back to the reasons for this.

The majority underlined in the judgment that there was a lack of proportionality between the criminal conviction of the two men on one side and - on the other side - a paid advertisement to promote the rehabilitation of Marshal Pétain, which was the purpose of a legally constituted association. There existed, so the judgment continued, other means of intervention and rebuttal, particularly through civil remedies. In other words: the applicant's criminal conviction was disproportionate and, as such, unnecessary in a democratic society.

The gist of the judgment was emphasized by the Belgian judge who in a separate opinion said:

"Freedom of opinion implies as much the right to present a public figure in a favourable light as the right to present him in an unfavourable light. Similarly, it implies just as much the right to disapprove of a judicial decision concerning him as the right to approve of it..."

It is natural that those who wish to impart ideas of this kind should direct attention to the merits of the person concerned or what they consider to be his merits. They cannot be required to mention in addition his errors and faults, whether real or supposed, or some of them..."

The minority could not accept this. We underlined that our dissent from the majority opinion did not mean that it was in accordance with the Convention of Human Rights to curtail a genuine debate on controversial historical persons. Such a debate concerning Philippe Pétain had taken place in France for several years and would in all probability continue. The demagogic content and form of the advertisement, however, made it clear that it was not the desire for a debate, which was the aim of the advertisement.

Our dissent was dictated by two other reasons.

Firstly, we were dealing with a case which affected the history of France and that country and people's painful reconsideration of the events during and after the end of the Second World War. In such a situation we felt that the French government was in a better position than a European court to evaluate and regulate acts which stemmed from wartime. At the same time, it had to be understood that the French government could have a legit-

imate interest to demonstrate in a case like this, that racism and especially anti-Semitism should not be treated lightly.

Secondly, we found that in circumstances such as those of the present case full and sympathetic account should be taken of the extent of offensiveness of the publication to the sensitivities of groups of victims affected by it. In this case it concerned the veterans of the resistance movement and the survivors of those hundreds of thousands who, on the initiative of Pétain, were deported to concentration camps and who suffered the destiny which was intended for them.

Added to this it was obvious to the Court that no one had tried to create a hindrance to the future work of the Association for the Defence of the Memory of Marshal Pétain. The association could continue to publish books and other material but they had, in our view, of course to abstain from provocative and humiliating advertisements. All this led us to the conclusion that - in this case - the French authorities did not exceed the margin of appreciation, which every country enjoys. We found no violation of the Convention of Human Rights.

However, we could not convince our colleagues in the majority, and the judgment is therefore a new example of the widening of the freedom of expression found in the jurisprudence of the Court. In this respect the judgment followed the tendency expressed in the case of **Jersild versus Denmark** from 1995.

In that case the Court found that Denmark had violated the Convention. The Danish Supreme Court had convicted a Danish journalist who, in the Danish Television, had disseminated racist remarks, which is a crime according to Danish criminal law. He had interviewed some young neo-Nazis who, as such, were - in the eyes of the Supreme Court - of no significant importance. By bringing 2-3 minutes of this interview on Danish Television he had acted against the criminal law.

This judgment of the Court of Human Rights divided the interested part of the Danish population. There were those who found that the journalist's freedom of expression could celebrate an important victory, while others were anxious at the consequences of the judgment. Would it for example be possible in a TV-program to show parts of a video containing child pornography as an illustration of a report on the production of this kind of product?

To understand the judgment in the *Jersild* case it is, however, necessary to understand the thinking and experience of the 12-15 judges who have joined the Court since 1989, and who came

from the former communist East and Central European countries. They are of the opinion - and this opinion is undoubtedly shared by all of us - that one of the decisive reasons for the suppression suffered by them during the past 50 years was the fact that there existed no free press through which the journalists could freely and without risks tell their fellow citizens and the world what had taken place in other countries. As is well known: there was no freedom of expression.

The re-conquered freedom should not now be used to limit freedom of expression for journalists, which might involve the risk that new and corrupt regimes could obtain power. In balancing the relevant considerations - a decisive part of every judgment - considerations concerning freedom of expression outweigh considerations concerning the victimized individuals. In the new East and Central European democracies there is not yet enough confidence to leave it to the new regimes to administer any limitations to the freedom of expression.

In the Court's judgment in the *Lehideux case*, the majority went a step further. This case did not deal with a journalist who, in the name of freedom, retold what others had already said. Rather, it concerned persons who had directly published a humiliating manifesto. To limit the right of a government to stop such acts, in the name of human rights, was - according to the opinion of the minority and to me - unjustified.

I shall finish by mentioning a case which I believe is one of the most important cases in the last 10 years while I have been the Danish judge in the Court, namely, **Vogt versus Germany** from 1996. It concerns the so-called *Berufsverbot*.

Mrs. Vogt was an educated schoolteacher in a small town in Nieder Saxen. She taught French and German and after some satisfactory years she achieved tenure as a civil servant. In 1982, in the middle of the Cold War, a disciplinary case was opened against her. It became known that she was a member of the German communist party. According to German jurisprudence in several other cases, this was enough to hold that she did not possess the loyalty towards the Constitution, which was necessary for a civil servant. She was suspended from her job in 1986 and eventually fired as teacher. During all the years in which the disciplinary case was being conducted, she continued to teach in the school where she was very much appreciated. She had never propagated her communist ideas in the school.

In 1994 she brought her case to the European Court of Human Rights. She alleged that the dismissal violated her right to have an opinion. The case was very difficult. It concerned the serious

fight of the new Germany against communist influence from the East. And the case was also an expression of the wish to show the world, that Germany would do its utmost to prevent extremist political movements -whether communists or Nazi - from gaining influence in the German administration. There were good historical reasons for that.

With a tiny majority, the Court held, that Mrs. Vogt's modest position in society and her membership of the communist party in reality were disproportionate to the serious reactions: dismissal and reduced pension rights. Germany had violated her human rights.

I regard this case as one of the Court's most important decisions not because Germany - on the balance of one vote - lost its case, but for more important considerations. It is the right and duty of every government to define who are the enemies of the people and to protect the population against those enemies. Governments have done that throughout historical times. During the Roman Empire, the Christians were the enemy of the people, and as is known they were thrown to the lions. In the Spain of the Middle Ages, the enemy was everyone who was not a Catholic. In ex-Yugoslavia, it is in some places the Muslims, in other places the non-Muslims. I certainly do not have to remind anyone of the history of Germany. If one looks at these very few examples from the history of mankind it is easy to appreciate to

what an enormous degree governments have been disastrously mistaken. It had cost the lives of millions of human beings.

And then on the 20th of April 1998, I experienced the government of the strongest power in Europe being taken to task by a schoolteacher and brought before a European Court of Human Rights. Here, in front of a group of international judges, the government had to prove that it was necessary in a democratic society to exclude this schoolteacher from society and prevent her from performing the only job she was able to perform, namely, to teach children in French and German in a small German town.

The German government was unable to provide this proof to the satisfaction of the Court.

Emphasis deserves to be given to what a distance this generation has covered. From centuries where every government could handle its own citizens as it saw fit, we have now created a European Court. One of the most important purposes of the Court of Human Rights is to protect the rights of the citizens and thereby control whom a government can exclude and persecute.

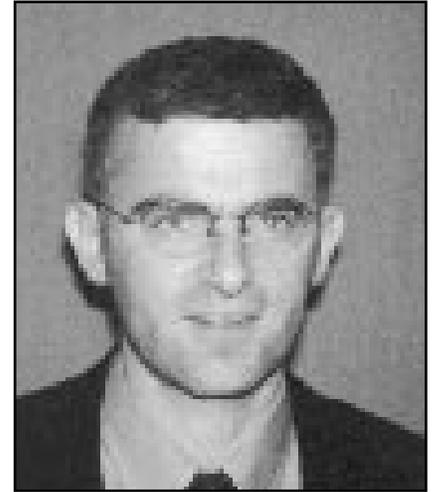
A utopian idea has become a reality.

This is a good thing to remember in a year, where people in Israel and all over the world celebrate an act of justice, which took place on the 15th of May 1948.



President of the IAJLJ, Judge Hadassa Ben-Itto at the Opening Session of the 11th International Congress. From Right - Israel Supreme Court President Aharon Barak, Speaker of the Knesset Dan Tichon, First Deputy President of the Association Itzhak Nener and Mayor of Jerusalem Ehud Olmert.

# Israel, the Territories and the Fourth Geneva Convention



**Daniel Taub**

**T**he Fourth Geneva Convention presents a terrible paradox: a Convention which has been acceded to by so many has been implemented by so few. In seeking to understand this paradox, and to offer constructive proposals to enhance the Convention's effectiveness, I propose to look briefly at the issue of the application of the Convention, the cessation of its application, and the practical difficulties involved in its implementation. I will go on to consider the significance of Article 1, the undertaking to "respect and ensure respect" for the Convention, and will try to offer some practical guidelines for improving the implementation of the Convention as a whole.

## Application of the Convention to Occupied Territory

Any attempt to define those situations in which the Convention applies is fraught with political difficulties. Many of these difficulties arise from the fact that the Convention was drafted with specific circumstances in mind. In particular, it

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On 27-29 October 1998, the contracting parties to the Fourth Geneva Convention met - for the first time in the 50 years since the adoption of the Convention - in Geneva to discuss the implementation of the Convention in occupied territories. Although the meeting was intended to be a general discussion, without reference to specific situations, a large number of States directed their remarks against Israel, criticising it for failing to apply the Convention on a *de jure* basis in the West Bank and the Gaza Strip. **Daniel Taub**, legal adviser to the Israeli delegation, presented Israel's interpretation of the Convention. The following article is based on his statements at the meeting.

envisaged the occupation of territory of one contracting State by another. This is the clear wording of Article 2, which refers to the occupation of the "the territory of a High Contracting Party", and is underscored by the International Committee of the Red Cross (ICRC) Commentary which states that Article 2 deals with the entry into force of the Convention "as between the contracting parties".

In trying to argue that the Convention intended to deal with cases of occupation not between contracting parties, it has been suggested that the reference to "contracting parties" in the second paragraph of Article 2 only applies to instances of occupation in which territory is occupied without a declaration of war or hostilities, all other cases being dealt with by the first paragraph of the article. But this reading does not accord with the plain meaning of the text which makes it clear that all cases of occupation are covered by the second paragraph. And in fact, despite its rereading of Article 2, the ICRC, in its report on the implementation of the Convention, itself describes occupation as being "a situation in which the occupying power takes over the territory's administration **from the sovereign State**" (emphasis added).

Accordingly, the Convention clearly had in mind the occupation of the territory of one State by another. As a result, the Convention has unintentionally discouraged States from declaring the Convention applicable in situations which are not a simple case of one party occupying the territory of another party, such as the occupation of territory not from a sovereign State but from an occupier. In such cases, the wording of the Convention

creates a concern that *de jure* application may be taken to imply recognition of the former occupier as sovereign. This is a legitimate fear, though it might be assuaged by amending the drafting of Article 2. In the meantime, encouraging such a State to implement the provisions of the Convention at least on a *de facto* basis is one way of ensuring humanitarian protection for the residents of the occupied territory.

But the issue here is more than simply semantic. The aim of the Convention with regard to occupied territory is twofold: to ensure the humanitarian protection of the residents of the territory, and to maintain the *status quo ante*. But where the occupied territory was not formerly held by a sovereign but by an occupier, what exactly is the *status quo ante*? Especially when the former occupier did not apply the Convention, many practical questions arise: What legislation, for example, is the new occupier to retain in force? Is the occupying power obliged to prevent individuals ousted by the former occupier from returning to their homes? If, as the ICRC has suggested, the aim of Article 49 (6) of the Convention prohibiting the transfer of civilian population to occupied territory is to avoid a change in the character of the territory, it would seem inappropriate to prevent the return of ousted residents since the intention is not to change the character of the territory but rather to restore it. But these are issues which the Convention, focused on the occupation of the territory of a sovereign State, did not consider and fails to address.

## Cessation

As regards the end of the application of the Convention in relation to occupied territory, Article 6 provides that application shall cease one year after the general close of military operations. (In 1949 this provision was adopted by a narrow vote over another proposal under which the Convention would actually have ceased to apply on the end of military operations, *i.e.* with no waiting period.)

Notwithstanding the end of the application of the Convention, Article 6 provides that a number of key provisions continue to apply for the duration of the occupation. However, the ICRC's representation of this position is not entirely accurate. In its report on the implementation of the Convention, it states that the occupying power will be bound by these provisions "if it exercises the functions of government in the territory". The Convention actually provides that the occupying power will be bound not "if" but "to the extent" that it exercises these functions. The difference here is more than semantic; it is the

difference between a territorial and functional approach. In fact in practice, the ICRC does adopt the functional approach: in cases where there is a transfer of powers and responsibilities to an occupied population the ICRC in practice does follow the wording of Article 6 and treats the occupying power as being responsible only for those powers and responsibilities which it continues to exercise.

With this in mind, it is hard to understand the suggestion made by the ICRC that the fact that the one year provision was not included in Article 3 of Protocol 1 to the Geneva Convention effectively eliminates this provision from Article 6 of the Geneva Convention. This assertion is highly problematic, both in law and in practice.

On the legal plane, since Protocol 1 has not achieved the status of customary international law, its provisions could only take effect with relation to the States parties to the Protocol. But the provision is also problematic in practice. If indeed the third paragraph of Article 6 has been eliminated, then all provisions of the Convention continue to bind the occupying power until the end of the occupation. In other words, the occupying power remains responsible for breaches of the Convention, even if those powers have been transferred to the occupied population. This is not only impractical but also not desirable, since it would actually deter an occupying power from transferring powers and responsibilities to the local population. In addition, this reading does not accord with ICRC practice which, as I have noted, is to hold the party actually exercising the powers concerned responsible for the conduct.

## Practical Difficulties in the Implementation of the Convention

There can be no doubt that the Fourth Geneva Convention was a radical and far-reaching step forwards when adopted in 1949. It reflected the intensive rethinking of the laws of war following the Second World War that established the principle of individual human rights flowing directly from international law, on the one hand, and the broadening of the legal regime, on the other.

But as forward thinking as the Convention was, it could not help but be a child of its time and today it can be seen to fail to take account of a number of developments in the half century since it was adopted. One notable example is the silence of the Convention concerning the operation of the educational system in occupied territory. Another is the fact that the Convention

makes no provision concerning the movement of the local population to and from occupied territories or economic issues such as enabling trade abroad, which are of special importance in the case of long-term occupations.

In other areas provisions were included in the Convention which may have seemed acceptable at the time but now seem outdated. The provision permitting the use of capital punishment in certain circumstances may well fall into that category.

Just as the Convention has not been able to take account of developments in humanitarian standards in the last fifty years, so it has been prevented from relating to developments in the nature of armed conflict over this period. In particular, the stark developments since the drafting of the Convention in the nature and *modus operandi* of terrorist organizations, including the appearance of fanatic and fundamentalist terrorists who are willing to sacrifice their own and countless other lives, places a new and difficult dilemma before security authorities faced with the responsibility for preventing further acts of terror. In such cases it may not even be fair to view the tension as being between military necessity and human rights, but rather as a conflict of human rights - the rights of the terrorist suspect to humanitarian protection against the rights of innocent civilians not to be killed in terrorist attacks.

With the appalling rise in the number and brutality of terrorist acts, the dilemma of finding the right balance is one that is becoming increasingly acute in many different situations, but it is a dilemma which the Convention provides little guidance in resolving.

But not all the problems in the Convention can be attributed to the historical context of its drafting. Other provisions are drafted so as to be practically unworkable. Article 49, for example, provides that individual or mass deportations or transfers are prohibited, regardless of their motive. A strict reading of this paragraph would prohibit, for example, the forcible return of an illegal infiltrate to his country of origin or even the extradition of a criminal to a foreign country for trial. The patently unintended consequences of the drafting of this paragraph suggest that it should be read in the context indicated by the ICRC Commentary, as being directed at "mass arbitrary deportations such as those practiced in the Second World War, for the purpose of subjugation, slave labour and extermination".

### **Article 1 - the Undertaking to "Respect and Ensure Respect" for the Convention**

Considerable attention has been given to the undertaking

contained in Article 1 of the Convention, common to all four of the Geneva Conventions, to "respect and ensure respect" for the Convention. The provision has been cited as a basis for concerted international action and the ICRC, in its report, has gone as far as to suggest that "the Conventions' universality and the intrinsic value of the humanitarian principles they enshrine have given the obligation an *erga omnes* character". This interpretation would seem to be clearly overstating the case.

The importance or value of the principles contained in a Convention is not, perhaps unfortunately, a basis for determining whether such obligations are *erga omnes*. And the Convention's universality is also open to question. While 188 States are formally party to the Geneva Conventions the survey conducted by the ICRC makes it abundantly clear that the Conventions are far more honoured in the breach than in the observance. In the face of the failure of States to actually apply the Conventions, it would seem difficult to assert that they have acquired a true degree of universality.

The ICRC also interprets the phrase "ensuring respect" as referring to an obligation of States with respect to other States. But this is only one interpretation of the Article. And as the final record of the 1949 Geneva Conference indicates, the ICRC interpretation was actually the minority interpretation. The majority of States which stated their interpretation of this provision considered that the object of this article was to require a State to ensure respect for the Convention by its own population. As one authoritative commentary put it, the words 'to ensure respect' "have the effect not merely of requiring States to issue requisite instruction to the service and civil departments of government but also of ensuring that their instructions are carried out" (Draper).

While Jean Pictet included the official ICRC position in the ICRC Commentary to the Convention, in an article published in his own name in April 1951 in the *American Journal of International Law* he made no reference to this 'external' interpretation. Instead he understood the Convention as stating "it is not enough to enact appropriate legislation: it must be effectively applied and respected; any infringements must be clearly recognized and their authors duly punished".

Not only is this the understanding of the Article that has received most support but it is also arguably the most logical. Under the ICRC interpretation, when one State fails to comply with the provisions of the Convention, then all other States are automatically in breach for having failed to ensure its respect. If

the even broader interpretation of the ICRC concerning the 'universality' of the Convention is adopted, such an arrangement is not simply the case with regard to States party to the Convention but all States. If we overreach ourselves with good intentions we risk stretching the Convention to the point of meaninglessness.

### Ensuring Respect for the Convention

Any State concerned to respect and ensure respect for the Convention as required by Article 1 faces enormous practical difficulties. But in its attempt to overcome these practical difficulties, it has at its disposal some powerful tools:

The first tool is education. Humanitarian law is not and cannot afford to be an expert field. Every participant in a conflict is charged with its implementation and must be aware of his or her responsibilities. Accordingly, a commitment to the Convention requires constant dissemination and education. This can take many forms, foremost among them in our view making the Convention part of military training and including its provisions within staff orders.

The second essential tool is legal process. This requires that legal advice and representation should be available to all, and that anyone aggrieved by administrative decisions should have the right of redress. All States should consider adopting Israel's policy of giving any resident of occupied territories the right to challenge the actions of the military authorities, subjecting them to judicial scrutiny.

Effective process of law is vital not only for victims of armed conflict, but also for those charged with the implementation of humanitarian provisions. They cannot act effectively without the confidence that behind their actions stands the conviction that no-one, even in times of urgent military necessity, is above the rule of law.

Alongside education and legal process, and perhaps just as important in safeguarding the rights of the individual, is the principle of freedom of access. Bitter experience shows that for victims of war visible protection is invariably the only protection and that not washing dirty linen in public all too often becomes an excuse for never doing the laundry.

Clearly the party to a conflict which opens its sensitive operations to outside scrutiny may provide ammunition for those with hostile agendas. Openness and candour on the part of the authorities of a State, do not in themselves guarantee objectivity on the part of those reporting on humanitarian issues. But it is better to

risk disproportionate criticism than to lose this essential check on the protection of human rights.

### Politicization

If education, process of law and freedom of access are the greatest allies of humanitarian protection, its greatest foe is surely politicization.

The principles of international humanitarian law are our common ground for protecting the victims of war. Attempts to pick and choose on grounds of expediency or in accordance with a political agenda can only destroy the common basis for our actions. Moreover, it is frequently the case that those who attempt to turn the spotlight of humanitarian attention towards one area of concern are, in fact, simply trying to divert it from another. As soon as we permit our priorities to be dictated by anything other than the needs of the victims and the resources available, we cease to be a protector of human rights and become another party to the conflict.

The fundamental basis for humanitarian protection is objectivity and neutrality. But looking back over the repeated politically motivated attacks on Israel during the course of this meeting, one is compelled to ask: Is there any objective or impartial standard by which one country, one specific situation, could justify the disproportionate attention given to it by so many in these discussions?

Even were Israel not the only party ever to have implemented the provisions of the Convention concerning occupied territory in practice;

Even if it was not engaged in a peace process which has resulted in **97%** of the Palestinian residents of the territories living under Palestinian - not Israeli - rule;

And even if Israel did not have to confront on a daily basis the threat of fanatical terrorists blowing up buses and shopping centers;

Even if this were not the case, is there any legitimate perspective that could justify the singling out of Israel above and beyond the many many cases of occupation in the last fifty years?

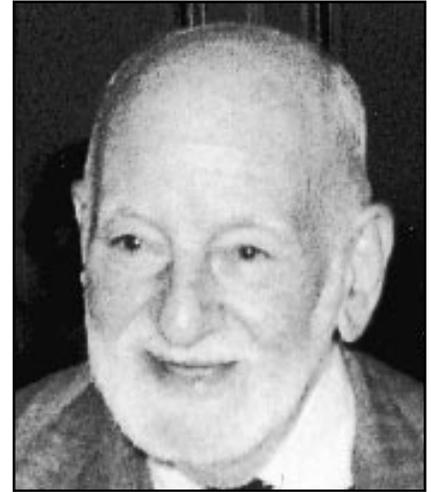
This meeting, the first meeting of the parties to the Convention in its 50 years, was convened with the victims of armed conflict in mind. But having seen the concerted efforts of so many to abuse this forum for narrow political gains, one can only wonder whether we really done anything at all to alleviate the plight of these victims. Or have we not simply further undermined the instruments and bodies of humanitarian law that are their only hope of protection? ■

# The Association Commemorates 1968 Nobel Prize Laureate René Cassin

*On the occasion of the 50th anniversary of the Universal Declaration of Human Rights adopted by the UN on December 10, 1948, the Association remembers René Cassin, Nobel Prize Laureate, participant in the drafting of the United Nations Charter and chairman of the legal drafting committee responsible for drafting the Universal Declaration of Human Rights. We are proud that René Cassin was also an Honorary President of our Association. The role played by Cassin was best described by **Justice Haim Cohn**, former President of our Association, in his contribution to "Hommages à René Cassin" published in honour of Cassin's 80th birthday. Thus wrote **Justice Haim Cohn**:*

"It is one of the most pleasant and encouraging lessons of the history of civilization that every generation produces its own Grand Old Man: René Cassin is the Grand Old Man of our generation of lawyers. There is nobody like him among the lawyers of the world - and each and every one of them can look upon him as the living example of integrity and erudition and legal craftsmanship. The grandeur of these Grand Old Men lies, it seems to me, first and foremost in that, though being old, they keep abreast of their generations, nay precede them as pioneers: their old age may be physiological, but in no way does it characterize their mental and spiritual make-up. René Cassin, the octogenarian, bears the burden of his years not only with perfect grace and a rare beauty - he excels in a vigour and a vitality which belie his years. His youthfulness in spirit and in bearing stems from an invincible inner optimism, a deep and sincere faith in the future of mankind; and it is this optimism, this faith, which marks the grandeur of his personality. Ours is the genera-

tion of survivors of Nazi atrocities the like of which the world has never seen before; of witnesses, dumb-founded and paralyzed, to ever recurring and ever aggravating forms of oppression and totalitarianism; of routine perpe-



trators and hapless victims of all sorts of self-perpetuating discriminations and prejudices - and we have, naturally enough, taken up a desperate struggle for a better world, for a more effective recognition of individual liberties, for an effective revival and reactivation of fundamental human rights. But, priding ourselves on being realists, we are apt to give up in despair and disgust when we encounter the indifference of the mighty, the animadversion of the sophisticated, and the outright animosity of the vested interests. It is because of men like René Cassin who never give up that there is some hope left - if not for our own, at any rate for the next generation. Any renunciation born of realism is wholly alien to his character: the forces that move him are born of an idealism strong enough to shatter all strongholds of sceptical restraint. Every setback is for him but a new cause, a freshly installed springboard, to start again and lead the way to ever better, ever more courageous endeavours. Ancient Jewish legend goes that there never was and never will be any peacemaker in the world greater and longer-lasting than the prophet Elijah - and of Elijah it is said that he was lifted up into heaven on a chariot of fire by a whirlwind. Our own Peace Laureate provides the fire and the whirlwind from his own resources - and truly divine it is.

## Some Biographical Notes

A jurist, humanitarian, and internationalist, René Samuel Cassin (October 5, 1887 - February 21, 1976) was one of the world's foremost proponents of the legal as well as the moral recognition of the rights of man. Cassin was born in Bayonne,

South of France, the son of a prosperous wine merchant. Having established a record of intellectual brilliance at the Lycée of Nice, he added to it in his advanced studies at the University of Aix-en-Provence where, in 1908, he received a degree in the humanities, along with one in law. He took first place in the competitive examination given by the Law Faculty and in 1914 received the doctorate in juridical, economic, and political sciences.

Cassin made his career in law as practitioner, professor, scholar, administrator, and promoter. The legal career which he began in 1909 in Paris, where he was a counsel at the Court of Paris, was brought to an end when he was inducted into the infantry in 1914. He was severely wounded in 1916 by German shrapnel, and thereafter returned to his legal career as a professor of law at Aix late in 1916.

He moved to a professorship in law at Lille in 1920 and in 1929 to the chair of fiscal and civil law at the University of Paris, where he remained until his retirement from formal teaching in 1960. His lecturing career took him all over the world: He lectured at the National School of Overseas Territories; undertook academic missions in Europe, French Africa, the Middle East, and the Far East; lectured at the Academy of International Law at The Hague, and at the University Institute of Advanced International Studies in Geneva. He wrote numerous legal treatises on contracts, inheritance, the conception of domicile, and the inequality between men and women in civil legislation and various aspects of human rights.

Cassin joined the French government-in-exile during World War Two, and upon the liberation of France in 1945, became President of the Council of the National School of Administration, and in 1960 President of the French National Overseas Center of Advanced Studies. He was a member of the Permanent Conference of Allied Ministers of Education (1942-1945), and promoted education and law by serving as the president of numerous organizations.

Cassin occupied high posts in the judiciaries of France and Europe. From 1944 to 1960, he was Vice-President of the Conseil d'Etat, a body which exercises ultimate jurisdiction in cases involving administrative personnel and administrative law. For the next ten years he was on the Constitutional Council, ruling on questions of the constitutionality of laws passed by the legislature. He was President of the Court of Arbitration at The Hague from 1950 to 1960 and a member (1959-1965) and

President (1965-1968) of the European Court of Human Rights at Strasbourg.

From 1924 to 1938, Cassin was a French delegate to the League of Nations, serving at the Disarmament Conference and supporting various moves in the Assembly to advance the formulation and application of international procedures for reasonable accommodation of problems arising out of clashing national interests.

Cassin is said to have been the first civilian to leave Bordeaux to join General de Gaulle in response to his appeal from London after the armistice of June, 1940, between Germany and the capitulating French government. He drafted all of the legal texts of de Gaulle's incipient government and conducted delicate negotiations with Great Britain. He held important positions - among them, permanent secretary of the Council of Defense of the Empire (1940-1941), National Commissioner of Justice and Public Instruction (1941-1943), president of the Juridical Committee of the Provisional Government (1943-1945) and vice-president of the Upper House; he was a delegate to the United Nations Commission on Inquiry into War Crimes (1943-1945) and chairman (1944) of the legislative committee for the Consultative Assembly set up as part of the government-in-exile in Algiers in 1943.

In the period following World War Two, Cassin continued the international work he had begun in the League of Nations. On five occasions - 1946, 1948, 1950, 1951, 1968 - he was a French delegate to the Assembly of the United Nations, and for many years between 1945 and 1960 a delegate to the UNESCO conferences.

In his work on human rights, Cassin fused his legal knowledge, his humanitarian instinct, and his belief in internationalism. He was a member of the United Nations Commission on Human Rights from its creation in 1946; vice-chairman from 1946 to 1955, a period which included Eleanor Roosevelt's chairmanship (1946-1953); chairman from 1955 to 1957; and again vice-chairman in 1959. One of the most active members of the Commission, he was the one most responsible for the draft of the Declaration of Human Rights approved by the General Assembly on December 10, 1948.

In 1968 he received the Nobel Peace Prize. With the money he established the International Institute of Human Rights at Strasburg, known as the René Cassin Foundation.

# Military Enlistment of *Yeshiva* Students to be Reconsidered

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H.C.J. 3267/97; H.C.J. 715/98

Amnon Rubinstein and others v. Minister of Defence  
Before President Aharon Barak, Deputy President Shlomo Levin; Justices Theodor Or; Eliahu Matza; Mishael Cheshin; Itzhak Zamir; Tova Strasberg-Cohen; Dalia Dorner; Yaakov Tirkel; Dorit Bainish; Itzhak Englard  
Judgment delivered on 9.12.98

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## Precis

This judgment concerned the highly controversial issue of the deferral of military service of *Yeshiva* students and the ways of best coping with this growing phenomenon. President Barak analyzed the legal framework in which this deferral takes place and held that the matter should no longer be left to the exercise of the Minister of Defence's discretion but should be regulated by primary legislation. The consequences of the Court's decision were suspended for a period of one year to give the Minister of Defence and the *Knesset* time to deliberate and establish a new normative arrangement. Extracts from the lengthy leading judgment of President Barak follow.

## President Barak

Deferral of military service of *Yeshiva* students [Jewish Orthodox students] whose "study of the law is their craft" [*Toratam Omanutam*] was considered by the High Court in H.C.J. 910/86 *Ressler v. Minister of Defence*, 42(2) P.D. 441 ("the *Ressler case*"). According to the data presented to the Court in that case, out of those enlisting in the Israel Defence Forces ("IDF") in 1987, 1,674 *Yeshiva* students (comprising 5.4% of the total) received a deferment. The total number of *Yeshiva* students in that year falling within the deferral arrangement numbered 17,017. Against this background it was held in the *Ressler case* that the Minister of Defence was empowered to defer the enlistment of *Yeshiva* students, and that the exercise of his discretion was within the scope of what was reasonable. In that case Justice Barak held:

"Ultimately, importance must be placed on the numbers of *Yeshiva* students whose enlistment has been deferred. There is a limit which a reasonable Minister of Defence is not entitled to cross. Quantity makes quality" (*ibid.* at p. 505).

Since that case more than a decade has elapsed. The number of *Yeshiva* students participating in the deferment arrangement has grown. According to the data presented to the Court, in 1997 about 8% of those subject to enlistment received a deferment on the grounds that they were *Yeshiva* students whose "study of the law was their craft". The total number of students benefiting from the arrangement that year equalled 28,772. President Barak noted that the social repercussions of this arrangement are far reaching: a deep rift has been created in Israeli society, accompanied by growing feelings of lack of equality; some *Yeshiva* students - who have not succeeded in this form of study - have been drawn into a situation from which there is no way out - they do not study as the arrangement does not suit them; they do not work, as they do not wish to disclose the fact that they do not comply with the requirements of the arrangement; and the result is a continuing breach of the law, reduction of manpower and injury to the labour market. Accordingly, the question which the Court had to consider was whether these and other repercussions cross the boundaries in which "quantity makes quality"? Does not the complex situation facing Israeli society lead to the conclusion that the normative regulation of the entire issue should not be provided by the deferment of enlistment granted by the Minister of Defence? Should not the issue as a whole be resolved through legislation which can contend with all the complexities of the problem?

## Facts

Justice Barak reviewed the historical background to the deferral arrangement and noted that it had commenced under Israel's first Minister of Defence, David Ben-Gurion. At that time a fixed number of 400 *Yeshiva* students "whose studies were their craft" received a deferment on those grounds and this number continued until 1970. In 1975, the quota was increased

to 800; however, following a coalition agreement in 1977, the quota was removed and the definition of those entitled to the deferment was expanded. At that time the rationale for the deferment also changed from memories of the destruction of the *Yeshivot* during the Holocaust in Europe and the desire to prevent the closure of the *Yeshivot* in Israel because of the enlistment of the students to a desire to enable the students to continue with their studies and doubts as to the utility of military service on their part in view of the difficulties which they would find in coping with the Army and the Army with them.

President Barak also noted that these issues gave rise to widespread public controversy and numerous attempts to petition the Supreme Court had been made in this respect. The latter had failed in view of the Court's position that the petitioners had no *locus standi* and the matter was not justiciable. The Court's position changed in the *Ressler case*, with the findings referred to above. The public debate continued, the sub-committee of the *Knesset* on Foreign Affairs and Defence recommended that a new arrangement be instituted combining studies and military service, similar to the "*Yeshivot Haahesder*" model [applicable to the *yeshivot* of the National Religious movement]. These issues were also the subject of reports by the State Comptroller in 1988 who concluded that no suitable supervision was being exercised over the arrangement or over the students, and this criticism was repeated in a report in 1997. The issue was also debated on innumerable occasions in the *Knesset* with many private bills being tabled, none were enacted.

President Barak review the conditions which must be satisfied before a *Yeshiva* student may enjoy the benefit of the arrangement today, one of which is that the student does not otherwise engage in any work for which it is customary to receive remuneration, save for teaching work. A *Yeshiva* student who leaves the categories of entitlement becomes eligible for military service in accordance with the needs of the Army, his age and family status.

## The Petitions

The first petition before the Court was brought by three *Knesset* members, requiring the Minister of Defence to give reasons why a reasonable maximum quota of *Yeshiva* students should not be established. The second petition by a number of military reservists, the Student Union and others required the Minister of Defence to give reasons why it should not be held that he had no power to defer the enlistment of the *Yeshiva*

students. Both petitions claimed that the existing arrangement infringed principles of equality, was unreasonable and lacked immediacy. The second petition also contended that the Minister of Defence was not competent to regulate this matter through statutory regulations but that it should be regulated under primary legislation. In his response the Minister of Defence relied on the legal framework established in the *Ressler case* and the factors weighed by his predecessors which continued to be applicable. The Minister noted that military considerations were paramount in his decisions and that balancing all considerations, no significant harm was being caused to military needs. Further, he argued that in a situation where there was no national consensus but the issue was subject to sharp dispute, no steps should be taken which might lead to difficult results both for individuals and for the military disposition, where no clear benefit to national security would be achieved by such steps. The Minister of Defence also emphasized the legal and public difficulties of establishing criteria if quotas were to be re-established but stated that he had decided to adopt the *Knesset* sub-committee recommendations in relation to increased supervision of the existing arrangement.

## The Legal Framework

President Barak analyzed the conclusions reached in the *Ressler case*, the most important of which were that as a matter of principle the arrangement could be regulated under secondary legislation; that the considerations relating to the *Yeshiva* students came within the matters listed in Section 36 of the Defence Services Law, enabling the Minister of Defence to exercise his discretion to defer or discharge a person from compulsory military service; and that the Minister of Defence was exercising his discretion reasonably. The Court in that case emphasized that its decision was based on existing realities in Israeli society but that changes in that reality could lead to a change in the legal conclusions.

President Barak noted that a new reality was now before the Court. The number of students receiving deferrals had risen significantly, public opposition to the arrangement had increased and the rift between different sections of the public had deepened. In the light of this, the three above points had to be reconsidered. Nevertheless, President Barak noted that in view of his ultimate conclusion that in the new circumstances the issue now had to be regulated by primary legislation, he would leave the other questions relating to Section 36 and the reasonableness of the decision of the Minister of Defence, open.

President Barak analyzed the need to anchor in primary legislation what he described as ‘primary arrangements’ relating to general policy and fundamental standards underlying governmental action. The reasons for this were to be found first in the concept of the separation of powers - in terms of which the enactment of legislation is the function of the legislature. This principle is now to be found in Basic Law: The *Knesset*, which states in Section 1 that the *Knesset* is the parliament of the State. Nevertheless, the principle of the separation of powers faces a dilemma between the aspiration to limit administrative powers and the need to enable swift and efficient resolution of social needs, otherwise than through the slow operation of parliament. One solution to this dilemma was referred to by Justice Rhenquist in the United States:

“The most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, ‘fill the blanks’ or apply the standards to particular cases” (*Industrial Dept. v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980))”

The possible dangers posed by inadequate supervision by the legislature over the primary arrangements instituted by secondary bodies was noted by the German Constitutional Court:

“If [a statute] does not adequately define executive powers, then the executive branch will no longer implement the law and act within legislative guidelines but will substitute its own decisions for those of the legislature. This violates the principle of the separation of powers” (8 BVerfGE 274 (1958) trans. D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*” (2nd. Ed.,1997)).

President Barak noted that the principle of the rule of law also requires that legislation set the standards and principles for the activities of the executive branch, whereas secondary legislation (statutory regulations) provides for the details of implementation.

“Without such standards, there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities” (*Rapp v. Carey*, 44 N.Y. 2d 157, 164 (1976)).

Additionally, the concept of democracy itself require this result. As a parliamentary democracy, the substantive decisions

relating to the policies of the State and the needs of society have to be made by the elected representatives of the people. The elected representatives are elected to legislate and as such enjoy societal legitimacy. The policies of the State have to be crystallized by the legislative body which is both answerable and responsive to the will of the people. Further, it is for the legislature to determine which interests justify impairment of the freedoms of the individual. Thus, the German Constitutional Court has held:

“The democratic legislature may not abdicate this responsibility at its pleasure. In a governmental system in which the people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining the public will by weighing the various and sometimes conflicting interests” (33 BVerfGE 125, 159 (1972) trans. By D. Currie, *The Constitution of the Federal Republic of Germany*” (1994)).

Thus, secondary legislation and the administrative decisions of the executive branch must be anchored - formally and substantively - in primary legislation. Further, the importance of preserving the superior status of the legislature requires that where parliament is able to engage in swift and routine legislation, the legislative powers of the executive branch must retreat.

Apart from the principles of the separation of powers and the rule of law, a central tenet of democracy concerns human rights. The separation of powers is not a purpose in itself, it is intended to ensure efficiency. Its purpose is to increase freedom and prevent the concentration of power in one governmental body in a manner which may impair an individual’s freedom. Justice Brandeis noted in this regard that:

“The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy” (*Myers v. United States*, 272 U.S. 52, 293 (1926)).

The same is true in relation to the principle of the rule of law which is not only intended to ensure the legality of the administrative regime but also to protect the freedom of the individual.

President Barak noted that there is no democracy without human rights. Human rights are not absolute. Substantive democracy may impair them in order to realize its purposes, provided, however, that the impairment is anchored in statute,

promotes the values of the State, is for a proper purpose and does not exceed what is necessary (Section 8 of Basic Law: Human Dignity and Liberty and Section 4 of Basic Law: Freedom of Occupation).

This sensitivity to human rights leads to the conclusion that impairments of it should be established in primary legislation and not left to the executive branch. This approach may be seen in a line of cases in Israel and abroad as well as in Article 1 of the Canadian Charter of Rights and Freedoms. In this spirit it was held in Germany that:

“Today it is firmly established by the decisions that - without regard to any requirement of an incursion [into individual freedom] - in basic normative areas, and especially when the exercise of basic rights is at stake, the legislature is required... to make all essential decisions itself” (49 BVerfGE 39, 126-127 (1978)).

### Primary Arrangements -What are they?

President Barak reiterated the basic rule that secondary legislation or individual acts of the administration, anchored in primary legislation, must be determined in executive regulations (secondary arrangements), whereas the general policy and fundamental standards (primary arrangements) must be determined in primary legislation. The distinction between the subject-matter of these arrangements is not sharp. This was recognized as early as 1825 when Chief Justice Marahall of the United States Supreme Court held that:

“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details” (*Wayman v. Southard*, 10 Wheat. 1 (U.S. 1825)).

Secondly, recognition has to be given to the room for manoeuvre needed by the legislature. Reality requires that compromises sometimes be reached between the basic rule and other needs and considerations, and in particular considerations of efficiency.

President Barak analyzed the legal status of the basic rule relating to primary legislation within the Israeli legal system and referred to the periods before and after the enactment of the Basic Laws relating to human rights and their interpretation in the leading case of *C/A 6821/93 United Mizrahi Bank Ltd. v.*

*Migdal Cooperative Farm* 49(4) P.D. 221. In the earlier period, the rule was one of the rules of public law in Israel, part of the “Israeli version” of the common law, and was primarily a rule of interpretation. The main question which arose during that period was not whether the legislative branch was entitled to empower the executive branch to determine primary arrangements. The answer to that was clearly in the affirmative. Rather, the critical question was whether the legislative branch had, in practice, empowered the executive branch to do so. The answer in such a case depended on the interpretation of the empowering statute, on the basis of the presumption that the legislature had not so empowered the executive branch. The case law during that period developed the rule that where the legislative arrangement impaired the various freedoms of the individual, the empowering statute had to be clear, express and categorical.

In the period following the enactment of the Basic Laws relating to human rights and their interpretation, a significant change took place to the status of human rights. They received a constitutional, supra-statutory status, and this in turn affected every other branch of the law and legal norms. They also affected the legal “status” of the basic rule relating to primary arrangements and strengthened them, although President Barak held that it was not necessary to consider this relationship in any depth as the powers of the Minister of Defence in relation to the matter at hand were anchored in primary legislation which preceded these constitutional changes and retained their validity as part of the old law.

Notwithstanding this, an effort had to be made - where possible - to give the interpretations of the empowerment under the old law, a restrictive interpretation so as to enable it to be operated within the spirit of the basic rule relating to primary arrangements. In this spirit the executive branch had to refrain from fundamental decisions relating to basic social issues which are subject to acute public controversy, and leave the matters to the decision of the legislative branch. Such issues include the desirability of women being conscripted for military service in principle as opposed to discharging them in any particular year for logistical or other reasons.

President Barak noted that the Court will generally give a narrow interpretation to a power granted by the law to the executive branch, and this is the case even in systems where the basic rule has constitutional effect and not only interpretive effect:

“The question whether a delegation is so broad that its constitu-

tionality becomes doubtful, depends first on an interpretation of the exact scope of the statutory conferred powers. Here, it is of course possible for a court to accept a very broad interpretation, and then to declare even this maximum to be constitutional. Today, however, the Court takes the opposite path. The Court circumvents possible delegation problems by making a narrow interpretation of statutory language, thus using the delegation doctrine as an *Ashwander* like principle” (Kischel, “*Delegation of Legislative Power to Agencies: A comparative Analysis of United States and German Law*” (Kischel)).

Israel too adopts the *Ashwander* principle, which provides that every legitimate interpretive effort must be made to prevent the abrogation of a law.

### From the General to the Particular

The National Defence Service Law sets out the provisions relating to compulsory military service, its scope and means of implementation. The statute also sets out the powers of the Minister of Defence to defer or discharge a person from service. In the *Ressler case*, President Barak had held that the abstention of the *Knesset* from determining primary arrangements in relation to the deferral of service of *Yeshiva* students and supervision thereof, did not negate the general empowerment of the Minister of Defence. President Barak held that under the new circumstances the Minister of Defence retains the power to defer the service of *Yeshiva* students within the framework of his general powers, however, his discretion must be exercised while taking into consideration the basic rule relating to primary arrangements. While he has the power to make the determination, the determination must be part of a national decision in which the *Knesset* establishes the position of the State of Israel relating to this highly controversial social issue. Thus, in view of the special character of the question of the enlistment of *Yeshiva* students whose “study of the law is their craft”, the determination in principle must be made by the elected body and not by the Minister of Defence. The discretion of the Minister of Defence must be confined to particular issues within the framework of the fundamental determination made by the *Knesset*.

Finally, President Barak considered the controversial nature of the issue at hand in Israeli society in general and within the Orthodox community itself; the fact that the rift in society is not only ideological but also concerns conflicting human rights and the clash between principle of equality in serving the defence needs of society and freedom of religion; as well as the complex-

ities which would be faced by the IDF upon the enlistment of *Yeshiva* students.

The balancing and resolution of these issues is not simple and is the function of the legislative body. Only in this way will it be possible to express the “optimum consensus which enables pursuit of life together”.

In view of the above and the changes taking place since the *Ressler case*, President Barak held that the deferral of service of *Yeshiva* students whose “study of the law is their craft” as carried out by the Minister of Defence is unlawful; the power to make these decisions being the province of the *Knesset*.

### Relief

While the exercise of the Minister of Defence’s discretion is now unlawful in the light of the above analysis, President Barak held that in practical terms, however, it was not possible to change the existing state of affairs on an immediate basis. The Minister of Defence or the *Knesset* had to be given the opportunity to engage in a proper and thorough debate of the matter and all its repercussions. Moreover, if it was decided to make changes to the existing arrangement, new structures had to be put in place. Thus, President Barak held that it was not possible to hold that the existing arrangement was void on an immediate basis and the Court would suspend the consequences of its decision. The Court would do so for a period of twelve months, terminating on 9.12.1999.

The other Justices of the Supreme Court agreed with the judgment of President Barak, **Justice Cheshin** adding his own analysis of the legal situation and social implications of the deferral arrangement.

*Abstract prepared by Dr. Rahel Rimon, Adv.*

# The Presidency and Heads of Sections

**The meeting of the Presidency and the Heads of Sections of the Association was held during the Eleventh International Congress of the International Association of Jewish Lawyers and Jurists, December 28, 1998.**

In attendance: Judge Hadassa Ben-Itto (Chairman); Itzhak Nener; Justice Vera Rottenberg-Liatowitsch; Baruch Geichman; Meir Gabay; Neal Sher; Judge Myrella Cohen; Joseph Roubache; Dale Cohen; Igor Ellyn, Q.C.; Isidor Wolfe; Dr. Mario Feldman; Dr. George Ban; Leslie Wolfson; Prof. Irwin Cotler; Daniel Lack; Jonathan Goldberg, Q.C.; Robert Weinberg; Matthew Kaliff; Haim Klugman; Aliza Ben-Artzi; Etya Simcha; Dr. Ovadia Soffer; Dr. Mala Tabory; A few invitees also attended the meeting.

## Reports of Heads of Sections

**Neal Sher (U.S.A.):** The American Section has increased its activity since the appointment of its new Executive Director, Mr. Matthew Kaliff. The Section has been active in efforts to bring Nazi war criminals to justice, including efforts to extradite a Nazi criminal from Argentina, to remove the crosses in Aushchwitz, and on the latter subject working with the U.S. Holocaust Memorial Council. The Section is also involved, as *amicus curiae*, in a case relating to restitution of property of Holocaust survivors. Resolutions in meetings of the American Section were passed supporting the normalization of Israel's role in the U.N. and urging clemency for Jonathan Pollard.

The national conference held in the spring was attended by Elyakim Rubinstein, the Attorney General of Israel.

Another event was held at the Supreme Court where Nat Lewin, former President of the American Section, received the American Section's 1998 Pursuit of Justice Award. The next recipient of this Award will be Stuart Eisenstadt, Under Secretary of State, who has been active in issues of restitution and compensation for Holocaust victims.

**Leslie Wolfson (Scotland):** A Scottish Chapter has been established at the first ever convention of Scottish Jewish lawyers, held in Parliament House in Edinburgh - home of the Scottish Supreme Court, in the presence of Lord Caplan, a Senior Appeal Judge, Lady Cosgrove, the first female judge in the history of the Scottish Supreme Court and many lawyers and judges. A delegation of the British Section was headed by its Chairman, Judge Myrella Cohen, who read a message from the Hon. Lord Woolf, Master of the Rolls.

**George Ban (Hungary):** The Hungarian Section is still small, but plans to be active in the European Council of the Association.

**Dale Cohen (South Africa):** The South African Chapter has been rejuvenated. Five major functions took place in the past 12 months, among them presenting the records of the Eichmann Trial to the Constitutional Court, an event to honour Justice Cecil Margo (Honorary Deputy President and one of the founders of our Association), cultural events and discussions relating to anti-Semitism.

**Daniel Lack (Switzerland):** Welcomes Justice Vera Rottenberg Liatowitsch of the Supreme Court of Switzerland and Advocate Felix Liatowitsch, President of the Jewish Community of Basel. There are about 100 members in the Swiss Section

composed of the German speaking and the French speaking cantons but none from the Italian speaking cantons. The Section dealt with various topics including pre-nuptial settlements, followed the developments in the work of the commissions dealing with Switzerland's behaviour during World War II (articles on this subject appearing in *JUSTICE*).

Reports on the court case where distributors of Garody's anti-Semitic book denying the Holocaust were prosecuted and found guilty. They have appealed and we are awaiting the judgment. Two members of the Swiss Section were the pleaders in the case. The Swiss Section held meetings with lectures on legal subjects. The Section has a website and they hope to put in articles from *JUSTICE*.

**Mario Feldman (Argentina):** The Argentinian Section is examining the possibility of holding a conference to analyze relations between Israel and the Vatican.

**Myrella Cohen (England):** The British Section numbers 300 members and is now promoting a membership drive. The Section has participated in a number of joint meetings with other organizations: the British-Israel Law Association, the Anglo-Indian Jewish Association, the Jewish Association of Business Ethics, the Simon Wiesenthal Center in London and the Jewish Marriage Council. The Section also offers research and advice in a number of court cases dealing with anti-Semitic issues.

The highlight of activities this year was the visit to "Bet Shalom Holocaust Center" in Nottingham. The only memorial in the U.K. established by a non-Jewish religious family who came to Israel and visited "*Yad Vashem*" and decided to set up this centre

on their farm. Lord Millet, a Vice President of the British Section, planted a tree in the gardens in memory of those lawyers and jurists who did not survive the Holocaust.

The highlight of next year will be a prestigious dinner on July 27 at Mansion House hosted for our Association by the Lord Mayor, Lord Lewin. The guest of honour will be Lord McKay, the former Lord Chancellor. All members of the Association are invited.

**Joseph Roubache (France):** (1) The Section was active this year in the prosecution of Papon. It was the first time that a French court decided that a French civil servant was guilty of crimes against humanity. We supported two lawyers who pleaded in this case: Michel Zaoui and Alain Jakubovicz who is attending this Congress. The trial was very important because, for the first time, President Chirac said that France was responsible for all the good and all the bad they did during the war. (2) The Section was involved in the matter of confiscation of Jewish property during World War Two. A Commission is investigating what happened to this property and so far has given only one report and we are waiting for the second report. (3) We protested to the Minister of Justice about an anti-Semitic paper published by an Avocat General of the *Cour de Cassation* against Judge Levy who is fighting against the "Front National". An investigation has now started against this judge and a disciplinary trial may result.

**Isidore Wolfe (British Columbia, Canada):** Members of our Section have assisted other lawyers involved with the Canadian Jewish Congress, in a case where a non-Jewish person sued for libel and slander by some very anti-Semitic writers. The action did not go well at first instance but it is on appeal.

We provide legal aid to many Jews who are not covered by government legal aid, in

situations involving immigration, marital problems and criminal matters.

**Igor Ellyn (Ontario, Canada):** Gives credit to Bert Raphael who for many years provided services to the Association on behalf of Eastern Canada, started a Canadian Section and promoted interest in it. He has now decided not to continue in his role.

The Canadian Section plans to cooperate with the American Section and has already done so by participating in a number of events during the national convention of the American Bar Association which was held in Toronto in 1998: (1) A joint Shabbat lunch was attended by about 100 people. The Deputy Minister of Justice of Canada was the guest speaker on prosecuting war criminals. Neal Sher is now consultant to the Canadian Department of Justice on this subject. (2) A seminar jointly organized by the American and Canadian Sections and the American Bar Association was held on trade law and, in particular, trade law in the Middle East, with Jewish and Arab speakers. Some 75 people attended. Harold Ullman and Matt Kaliff of the American Section were instrumental in successfully organizing this meeting.

The forthcoming international conference of the Association will take place on August 13-16, 2000 at the Sheraton Hotel in downtown Toronto. An exciting programme is being prepared and we have the support of large firms in Toronto, in spirit and financially.

### Report on U.N. Activities:

**Daniel Lack (Switzerland):** This year marks the 50th anniversary of the Universal Declaration of Human Rights. This year also saw the creation in principle of the International Criminal Court at the Rome meeting. The idea as such is positive but the abuse of human rights institutions

of the U.N. is notorious and gives rise to concern. I am concerned on the Commission of Human Rights, the sub-commission on prevention of discrimination and the various other treaty bodies. The playing field is certainly not even so far as Israel is concerned. A number of examples are worth mentioning:

(1) The case where the P.L.O representative uttered the terrible accusation that Israel Defense Forces injected knowingly AIDS virus to Arab children and the chairman of the U.N. body (Commission on Elimination of Racial Discrimination) refrained from condemning this statement. (2) The case where Garody's book was praised by the Egyptian delegate who also condemned Switzerland for putting the book on trial. (3) Another example of Israel's uphill fight: recently at a U.N. body a suggestion was made that Palestinians should be readmitted to Israel on the same basis of the Law of Return to Jews and that the Jewish Agency and the World Zionist Organization should be revised as it is prejudicial to Arabs. Also an Arab university should be created in Israel to ensure the equality of the Arab language with Hebrew. Israel has been asked to report on the fulfilling of these human rights recommendations before the year 2000.

### In Memoriam

The Association, and in particular the Consistory of the Organization of the Jews of Bulgaria "*Shalom*", regret to announce the loss of **Prof. Doctor Vitali Ezra Tadjer**, who died on 26 February, 1999, at the age of 77. Professor Tadjer was a well-known Bulgarian jurist and an active member of the Jewish community. His help on juridical matters, including the restoration of Jewish property, will be warmly recalled by Bulgarian Jewry.

# Swiss Section: Alpine Law Weekend

**Daniel Lack**

Some thirty members of the Swiss Section of the IAJLJ convened at the Hotel du Parc, in Villars-sur-Ollons from January 29-31, 1999. The members predominantly from Suisse Romande and also from the German speaking part of Switzerland, as well as from France, Holland and Luxembourg, spent an idyllic week-end with stimulating legal content, provided by Professor Amos Shapira of Tel Aviv University. President of the Association Judge Hadassa Ben-Itto also attended on her way home from a professional visit to Zurich, as did the President of the Swiss Section, Judge Vera Rottenberg-Liatowitsch.

Following Shabbat dinner on Friday night, Professor Shapiro analysed the compatibility of Israel as a Jewish State inspired by *Halachic* principles and its Judaic heritage, with the concept of a pluralistic parliamentary democracy, governed by the rule of law and the separation of powers. His presentation ranged across the conflicting dilemma of the ethnic and cultural diversity of the State's Jewish demographic composition, without prejudice to the question of respect for the minority rights of the Arab and Christian minorities.

The analysis and ensuing discussion concentrated on how to find a workable *modus vivendi* in a climate of increasing polarization between the Orthodox

Jewish religious concept of the State's governance subordinated to *Halachic* precepts on the one hand and an increasingly articulated current of secular opinion on the other, questioning hegemony over religious institutions and courts by the political coalition of the Orthodox right wing religious parties, viewed as maintaining by this means an inflexible and fundamentalist interpretation of Jewish identity, marriage, divorce and related issues thereby negating basic human rights.

The burden of the exchanges in the ensuing discussion, recognized the increasingly creative role of the Supreme Court in reconciling Jewish values and fundamental democratic freedoms in the context of the *Knesset's* promulgation of the two Basic Laws of 1992, which was seen to give some grounds for optimism. The dangers of confrontation between extremist currents on both sides could be overcome by the forces of conciliation and mediation coupled with pragmatic realism and tolerance. An undoubtedly complicating factor was the parallel and simultaneous pressure of resolving internal Jewish majority and Arab minority relations, in the context of the search for a lasting political solution on the external front with the Palestinian Authority and Israel's other Arab neighbours.

Saturday evening tea was the occasion for resumption of the intellectual fare, this time in the form of Prof. Shapiro's

presentation how Israel responded to its commitments in complying with the International Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment which it ratified in 1991. Israel presented its second periodic report to the UN Committee Against Torture, the monitoring body created under the Convention's provisions, examined over two sessions during May 1998.

The comprehensive exposé of the problems of the effective prohibition of torture in the context of the repression by Israel's police and security forces of suicidal terrorist bomb attacks by extremist *Hamas* and other fanatic groups against population centres in the heartland of Israel, demonstrated the pitfalls of steering a course between respect for the international norms of the convention and shouldering responsibility for the elementary duty of protecting its citizens. Familiarity with the well established pattern of critical evaluation by the political hostility of members of the UN monitoring bodies, did not prevent confronting allegations of abuses in the course of procedures stated to involve shackling, shaking, sleep deprivation and hooding in a manner stated to be contrary to the conventions provisions and claimed to be sanctioned by the Landau Guidelines governing the methods of interrogation of terrorist suspects by the security authorities. Israel's representatives responded on the basis of the detailed and extensive information contained in its report reaffirming the effective enforcement of the categorical prohibition of torture under Israeli law and the introduction of additional safeguards to prevent any repetition of isolated instances of abuses by security

personnel duly prosecuted for such offenses.

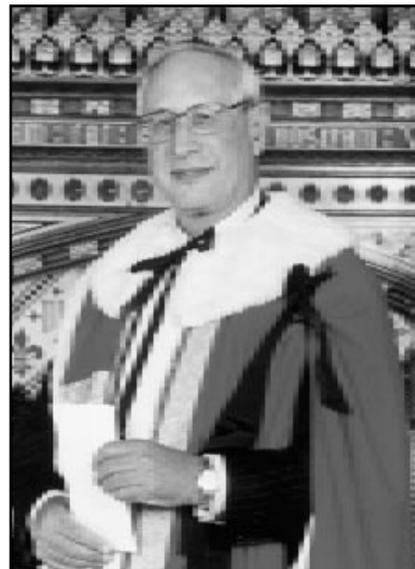
The use of moderate physical pressure against detainees in exceptional instances under rigorous control, was stated by Israeli officials not to exceed or otherwise violate the strict legal criteria by which the security officials were bound. The objective scrutiny of the regime for controlling security interrogation procedures by the Supreme Court in a series of cases brought on behalf of terrorist suspects seeking interim injunctions against the application of such procedures governed by the Landau regulations, has led to a comprehensive review of all the relevant issues by a panel of nine Supreme Court judges currently pending.

An extensive and frank exchange then ensued, including a discussion of how best to deal with the acute dilemma with which the security authorities are confronted in their fundamental duty of protection of the population by preventing terrorist outrages and detecting and apprehending their authors, prior to the commission of such attacks, while respecting the imperative norms of Israel's domestic and international law commitments prohibiting torture and the resort to cruel, inhuman and degrading treatment of detainees suspected of terrorism during the course of their interrogation. Points made included the questionable reliability of forced confessions including those made under admissible conditions of coercion not amounting to breaches of the provisions of the convention against torture, as distinct from modern techniques of electronic surveillance and counter-terrorist measures, as well as the recognition of the paramount principle by which Israel

recognizes it is bound, of the non-derogable nature of certain fundamental human rights to be adhered to in all circumstances even in times of national emergency, including specifically precluding the resort to torture, cruel inhuman or degrading treatment.

The concluding morning, found the participants assembled to hear an account by Hadassa Ben-Itto of her recently published book "*The Lie That Wouldn't Die*" or the history of the so-called "*Protocols of the Elders of Zion*". This unprecedented anti-Semitic myth based on a notorious forgery, has exerted on an incredible influence on events from the time of the Czarist pogroms, through Hitler's paranoiac genocidal obsession with the Jews as the authors of a world-wide conspiracy and in more recent times as the "vadamecum" presented to *Hamas* terrorists prior to leaving on their suicidal human bombing missions. This absurd canard based on primeval imagery and demonisation whose deliberate fabrication was disclosed in the implacable analysis portrayed by the author in the account of the Bern and Grahamstown trials, has marked the century now drawing to a close and threatens to extend into the next, unless the lessons of the past are fully learned. The questions put to the author demonstrated the important educational role this compelling and fascinating study can play in this context.

The Swiss Section is encouraged by the success of this event to renew the experiment by organizing another Alpine weekend with a judicious mixture of stimulating company and content, at the next suitable opportunity.



The Rt. Hon. the Lord Millet, M.A. (Cantab.), who has consented to become the Vice-President of the U.K. Section of the Association, has recently been appointed a Lord of Appeal in Ordinary.

## Annual Gala Banquet in London

The Chairman of the U.K. Branch of the Association, Myrella Cohen Q.C., reports that the Rt. Hon. the Lord Mayor of London, Lord Levene, has consented to host the U.K. Section Annual Dinner at the Mansion House, London, on Tuesday, 27 July, 1999. Participants will be able to meet the Lord Mayor, the Lady Mayoress and the Sheriffs of the City of London.

The guest of honour will be the former Lord Chancellor, Lord Mackay of Clashfern. Members of the Association who would like to attend should contact Patricia May, the Hon. Secretary, at 4 Brick Court, Temple, London EC4Y 9AD.

# Remember Berlin

**The Berlin Conference, June 3-8, 1999**

**On the publication of: "Anwalt Ohne Recht"**

**Venue: Federal Administrative Court**

**Hardenberg Street, Berlin**

Pursuing its announced project to commemorate Jewish lawyers and jurists who perished in the Holocaust and their contribution to the law in their respective countries, the Association will hold its next conference in this series in Berlin under the title **Remember Berlin**.

This conference, to be held jointly with the Berlin Bar Association and the German-Israeli Jurists Association, has special significance as it will deal with the role of Jewish lawyers in Germany before 1933, and their fate during the Nazi regime.

13:00-15:00 Lunch

15:00-18:00 Panel Discussion:

"Germany Approaches the New Millennium in the Shadow of the Past"

Evening Reception at the Excelsior Hotel hosted by the Berlin Bar Association

## Monday, June 7, 1999

9:30-13:00 The Fate of Jewish Lawyers in Berlin under the Nazi Regime

13:00-15:00 Lunch

15:00-18:00 Personal Memories of the Second Generation

20:30 Farewell Dinner

## Tuesday, June 8, 1999

Departure

## Programme

### Thursday, June 3, 1999

Arrival in Berlin

### Friday, June 4, 1999

09:00 Guided bus tour of Berlin

Evening Shabat dinner hosted by the Jewish Community of Berlin

### Saturday, June 5, 1999

Free

### Sunday, June 6, 1999

9:30-11:00 Opening Session

Greetings

Keynote Address

11:00-11:30 Coffee Break

11:30-13:00 Jewish Lawyers and Jurists in Berlin: Their Contribution to German Law

The Association has secured a limited number of rooms at the *Excelsior Hotel* in Berlin, centrally located and very close to the court house where the conference will be held. Members will make their own travel arrangements, but if they wish to avail themselves of the package which the hotel offers, they must fill out the enclosed form and send it directly to the hotel, copy to our office in Tel-Aviv, or contact directly the Excelsior Hotel, 14 Hardenberg Street, 10623, Berlin.  
*Tel: ++49-30-31550, Fax: ++49-30-31551053.*

If you contact the hotel directly, please emphasize that you are a participant in the Conference.

Rooms will be allocated on a first come first served basis.

The package will include hotel accommodation on bed and breakfast basis for 5 nights, two lunches and the farewell dinner. Price DM 950 for a person in a single room and DM 750 per person in a double room.