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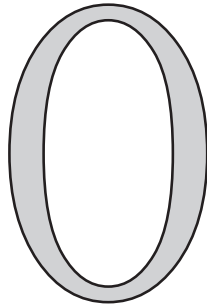
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PRESIDENT'S MESSAGE



On November 11, 1994, 21 year old Hisham Ismail Hamad drove his bicycle into an Israeli army checkpoint in the Gaza Strip, blowing himself up and killing three Israeli army officers.

Six days earlier Hisham had explained to journalist Kenneth R. Timmerman, at a clandestine meeting of a group of activists who claimed allegiance to the Islamic Jihad, that one of his colleagues who had perished in a suicide attack on Jews was not dead because "he had given himself to Allah". Timmerman did not know that when he would publish his account of the meeting in the Los Angeles Times, Hisham's portrait would be proudly carried in the streets of Gaza by his family and friends, who would claim that another "martyr" had given himself to Allah.

Other "martyrs" like Hisham had previously blown up a bus full of civilians in the middle of Tel-Aviv; kidnapped and later shot in cold blood Nachshon Waksman, an Israeli soldier who had been trying to catch a ride to his military base; stabbed to death a girl in army uniform waiting for a bus in Afula, injured 12 innocent bystanders near a bus station in Jerusalem, and committed many other atrocities against innocent Israelis.

Lately, the Hamas has made it a practice at its public gatherings to put on a show reconstructing the kidnapping and the shooting of Waksman. When the "actor" playing the role of the victim begs for his life, the crowd laughs. The latest of these shows was presented on December 16, 1994, in front of T.V. cameras and to the cheers of 50,000 participants, at a rally commemorating seven years since the founding of Hamas.

Islamic Fundamentalism seems to be the most total, the most totalitarian, the most uncompromising and the most dynamic form of anti-Jewish hostility today. There seems to be no chance of dialogue with a fundamentalist movement whose their charter attributes to Jews, by their nature, every conceivable evil, and proclaims that Moslems are under an obligation, by order of their Prophet, to fight Jews and kill them wherever they can find them.

But Jews and Israel are not their only target; at the same Hamas meeting, attended by Timmerman, one of the participants explained that "Islamic Jihad considers that Israel, Nazi U.S., Britain, France and the others are a cancer that must be removed". He warned that the Buenos Aires explosion was only one of the actions of the Islamic Jihad, and would be followed by others.

Gaza is not the only meeting ground of the Islamic Jihad. They meet in cities around the world and publicly declare their intentions. Their bombs have killed and injured hundreds of innocent victims not only in the Jewish community centre in Buenos Aires but also in the towers of the World Trade Center in New York. They have proved that they mean to implement their threats.

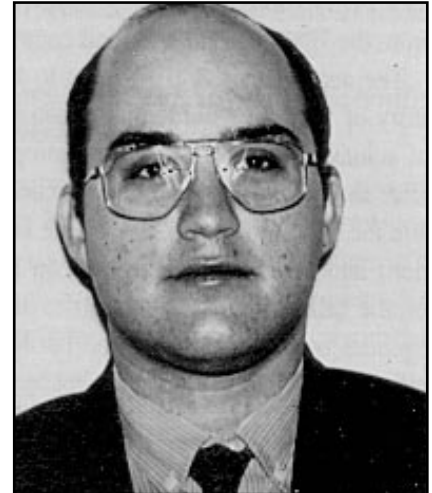
Under the protective umbrella of constitutional rights to free speech and assembly, these terrorists operate openly, preaching their murderous doctrine, inciting their followers, recruiting new members and training them in terrorist warfare. They cynically use the freedoms and rights protected by democratic societies to undermine the fabric of these same societies. They use democracy in order to liquidate it. It has been done by others with tragic results which are still part of our collective memory.

We cannot fight them with their own weapons, for we are sworn to uphold the law. We must therefore adjust our laws to the dangers facing us, and we must implement them fearlessly and effectively. Lawyers and jurists, legislators and courts, have an important part to play in this battle. From now on it will be a permanent item on the agenda of our Association.

Hadassa Ben-Yitro

Peace on the Jordan

In accordance with the practice established by JUSTICE so far in providing our readers with a legal insight into the Middle East Peace Process, JUSTICE is proud to publish this first authoritative analysis of the recently signed Israel-Jordan Peace Treaty. JUSTICE will endeavour to bring more analyses of the Peace Process as it develops.



Daniel Reisner

Introduction



The Israel-Jordan Treaty of Peace, signed October 26, 1994, marks the culmination of three years of delicate and often difficult negotiations between representatives of both countries. In spite of the fact that the Treaty of Peace is, strictly speaking, a stand-alone legal document, it would be both beneficial and "legally correct" to take the intentions of the Parties into account when interpreting its provisions. In this context, the purpose of this paper is to provide the professional reader a brief overview of the main provisions of the Treaty, with special emphasis on the legal issues raised and (where possible) resolved therein and on the respective intentions of the Parties in this regard.

The Treaty in the Context of the Middle East Peace Process



Before entering into detailed discussion of the specific Treaty provisions, it is important to understand the role of the Israel-Jordan Treaty of Peace in the wider context of the Middle East peace process. Subsequent to the signing in 1979 of the Israel-Egypt Treaty of Peace, it would appear that the Middle East Peace Process entered into a period of prolonged stupor, only to be awakened, 12 years later, with the convening of the multi-national Madrid Peace Conference on October 30th 1991.

The major practical result of the Madrid conference was the commencement, in Washington D.C. , of bilateral negotiations between Israel and three of her Arab neighbours (Jordan, Syria and Lebanon) as well as with the representatives of the Palestinians. Due to political considerations the "Israel-Jordan Track" was merged with the "Israel-Palestinian Track" (as these were commonly known) in the framework of a joint Jordanian-Palestinian delegation.

In January 1992 a procedural arrangement was agreed upon, which enabled the functioning of both tracks, and as a result Israeli and Jordanian negotiators soon managed to formulate, in October 1992, a draft Common Agenda. This Agenda contained not only a "checklist" of the outstanding issues but also a brief understanding of how these specific issues would be approached and a reference to the intended culmination of the talks in a Treaty of Peace.

The interconnectedness of the various "Tracks" is best exemplified by the fact that the Jordanian negotiators refused formally to finalize this Common Agenda until the surprise signing of the Israeli-Palestinian Declaration of Principles of September 13th 1993 ("the Oslo Agreement"). The Jordanians initialled the Agenda on the following day (September 14th), and from that

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date negotiations with the Jordanians were formally separated from the "Palestinian track" and commenced apace.

The second half of 1994 was to be the main chapter in the story of the Israeli-Jordanian negotiations, against the backdrop of achievements in the other ongoing "Tracks". Barely a month after the signing of the Gaza-Jericho Agreement between Israel and the PLO (on May 4, 1994), the Israeli and Jordanian delegations announced in Washington, on June 7th, 1994, the moving of the talks to the two countries and the attainment of sub-agendas on security, water and borders, in the framework of an effort leading to a Treaty of Peace. The following month, the King of Jordan and the Prime-Minister of Israel achieved the historic "Washington Declaration" of July 25th, 1994, which led, in three short but hectic months, to the formulation and signing of a Treaty of Peace between the two countries.

Another factor, the importance of which should not be discounted, is the effect of the Israel-Egypt Treaty of Peace on its Israeli-Jordanian successor. In addition to its being the forerunner of the Middle East Peace Process on a general basis, the Israel-Egypt Treaty of Peace served also as a potential source for Treaty formulations which could be utilized by Israel and Jordan, safe in the knowledge that these formulations had withstood the test of fifteen years of peace in the context of the Middle East. One example of this principle in action is Article 29 of the Israel-Jordan Treaty of Peace, dealing with "Settlement of Disputes". This Article, which provides that all disputes "shall be resolved by negotiations" and that any such disputes which cannot be thus resolved "shall be resolved by conciliation or submitted to arbitration" is a word-for-word copy of the equivalent Article in the Israel-Egypt Treaty. Initial Jordanian hesitance to accept this phrasing, based on the contention that it leaves the method of choice between conciliation and arbitration unclear, was overcome by the argument that this text had proven both suitable and effective between Israel and Egypt, the well-known "Taba Arbitration" being satisfactory proof of its successful implementation.

The Peace Treaty - General Remarks



Within its 30 Articles, 7 Annexes and multitude of Appendices and Attachments, the Israel-Jordan Treaty of Peace touches upon a variety of issues and subjects too numerous to discuss in the limited context of this paper. While all these issues are undoubtedly impor-

tant and play a prominent role in the framework of Israeli-Jordanian relations, three issues may be identified as having been the main cornerstones of the negotiations: security; the international boundary; and water. Only once agreement had been reached on these three subjects, which were being discussed concurrently in three separate negotiating committees, could the Treaty of Peace be finalized and agreed upon.

Prior to discussing these three issues in detail it would be best to take notice of several of the general principles laid down by the Treaty of Peace, applicable to the entire Treaty and to Israeli-Jordanian relations as a whole.

First and foremost of these principles is the statement, in Article 1 of the Treaty:

"Peace is hereby established between the State of Israel and the Hashemite Kingdom of Jordan..."

At first glance it may appear strange that no mention is made in this Article of the cessation of the state of belligerency between the two countries. The reply to this possible question is to be found in the Preamble to the Treaty, which states that:

"Bearing in mind that in their Washington Declaration of 25th July, 1994, they declared the termination of the state of belligerency between them;"

In other words, Israeli-Jordanian relations had evolved, within the framework of three months, from a state of belligerency to formal peace, with the Washington Declaration forming the conceptual bridge between the two states.

Another general subject of major importance is the effect of the Israel-Jordan Treaty of Peace on other international or multinational agreements to which either country is party. In this regard, Article 25 of the Treaty contains the following provisions:

"The Parties undertake to fulfil in good faith their obligations under this Treaty, without regard to action or inaction of any other party and independently of any instrument inconsistent with this Treaty." (First sentence of Article 25(2));

"Both Parties will also take all the necessary steps to abolish all pejorative references to the other Party, in multilateral conventions to which they are parties, to the extent that such references exist." (Article 25(4));

"The Parties undertake not to enter into any obligation in conflict with this Treaty." (Article 25(5)).

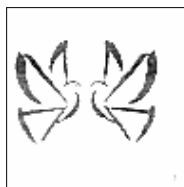
The Jordanian negotiators were initially reluctant to agree to the part of Article 25(2) quoted above referring to instruments "inconsistent with this Treaty", due to their contention that no such instruments exist. In the spirit of compromise it was finally agreed to leave the above sentence unchanged, but to add a second sentence which states:

"For the purposes of this paragraph, each Party represents to the other that in its opinion and interpretation there is no inconsistency between their existing treaty obligations and this Treaty."

It is interesting to note that a similar issue arose during the Israeli-Egyptian negotiations, finally solved in the eventual Peace Treaty by the addition of agreed minutes.

The question of what were to happen if one country's opinion or interpretation concerning such inconsistency was not accepted by the other Party was left unanswered, and would probably be referred to the procedure established under Article 29 of the Treaty for the settlement of disputes, discussed above.

Security



The subject of security is dealt with in Article 4 of the Treaty, encompassing two and a-half pages (out of a total of eighteen). It was initially assumed by Israel that, in addition to the general Article, a special Annex would be required in order to regulate the specific security relations between the two countries. As the negotiations advanced, it was agreed that such an Annex would not be necessitated, and that any additional security-related subjects requiring further clarification and agreement would be addressed as part of the implementation process of the Treaty.

The basic understanding underlying both countries' undertakings in the field of security is best found in the provisions of Article 4(1)(a) of the Treaty, which states:

"Both Parties, acknowledging that mutual understanding and co-operation in security-related matters will form a significant part of their relations and will further enhance the security of the region, take upon themselves to base their security relations on mutual trust, advancement of joint interests and co-operation, and to aim towards a regional framework of partnership in peace."

Within this framework, the Parties addressed four main issues in the field of security:

- a. The prohibition of the use of force and of any other hostile activity between the two countries;
- b. The taking of all necessary measures "to ensure that acts or threats of belligerency, hostility, subversion or violence against the other Party do not originate from, and are not committed within, through or over their territory (hereinafter the word "territory" includes the airspace and territorial waters)" (Article 4(3)(b) of the Treaty).

The importance of this provision to Israel is obvious in light of her past painful experiences in this regard, including the Iraqi missile attacks against Israel's population centres during the 1991 Gulf War.

- c. The prohibitions concerning - "joining or in any way assisting, promoting or co-operating with any coalition, organisation or alliance with a military or security character with a third party, the objectives of which include launching aggression or other acts of military hostility against the other Party..."

and regarding - "allowing the entry, stationing and operating on their territory, or through it, of military forces, personnel or materiel of a third party, in circumstances which may adversely prejudice the security of the other Party" (Article 4(4) of the Treaty).

While it is probably true that any activity in contravention of these provisions would also constitute a breach of the provisions of Article 25 of the Treaty (discussed above) the specific inclusion of these prohibitions in the field of security was intended to guarantee to both countries (and especially to Israel) that neither country would evermore be a party, whether active or passive, to hostile activities against the other.

- d. The co-operation and the taking of all necessary measures in the prevention and combating of terrorism of all kinds, including cross-boundary infiltrations.

It is interesting to note that, as has been previously mentioned in other contexts, the formulation of these provisions was influenced by the provisions of the Israel-Egypt Treaty of Peace, which included similar prohibitions and undertakings, albeit in different language.

The International Boundary



In order to understand the provisions of Article 3 of the Israel-Jordan Treaty of Peace and the three Annexes and six Appendices dealing with the delimitation and demarcation of the International Boundary, it would first be best to summarize the legal and historical

background to the boundary issue.

The first (and from a legal perspective - only) attempt at the definition of the boundary between Israel and Jordan was made in 1922, approximately twenty-five years prior to the establishment of the two States, by the British Government, then in control of both Mandatory Palestine and Trans-Jordan.

The boundary envisaged by the British administrators was a line commencing from a point on the Gulf of Aqaba some two miles west of the town of Aqaba, continuing through the centre of the Wadi Araba (known in Hebrew as "Emeq Ha'arava") and the centre of the Dead Sea, and from there along the centre of the lower Jordan and Yarmouk rivers, up to the boundary with the (then) French controlled Syria.

Both of the subsequent delimitations of lines between the two countries: the 1949 Armistice lines and the 1967 cease-fire lines, fell short of acquiring any legal significance vis-à-vis the delimitation of the international boundary, due to the fact these were never intended by the Parties to signify the location of the aforementioned boundary. (As an example of this fact, the 1949 Israel-Jordan Armistice agreement specifically provided that the Armistice lines would **not** constitute the permanent International Boundary between the two countries).

From a legal viewpoint, the 1922 Mandatory boundary definition raises an interesting question concerning the applicability of boundaries delimited by Mandatory governments to states established pursuant to the dissolution of the Mandatory government.

This question notwithstanding, in light of the above shown lack of other viable definitions of the Boundary, it is not surprising that both delegations recognized the 1922 definition, from the onset, as the basic reference-point for the current delimitation (and the resultant demarcation) of the international boundary.

In this context, Article 3 (1) of the Treaty, which is based on formulations agreed upon between the Parties during the negotiations on the Agenda concerning the boundary, states as follows:

"The international boundary between Israel and Jordan is delimit-

ited with reference to the boundary definition under the **Mandate** as is shown in Annex I (a) . . . " (Emphasis added - D. R.).

The role of the 1922 definition as a "reference-point", and not as a binding legal source for the location of the boundary, was necessitated primarily by two factors:

- a. The two Parties disagreed concerning the interpretation of the 1922 definition regarding the actual location of the boundary in the Wadi Araba area;
- b. Both Parties recognized the fact that due to the changes which had occurred on the ground since the establishment of the two States, any attempt at strict adherence to the Mandatory definition would probably not be viable and would form an insurmountable obstacle in the pursuit of a negotiated peace.

Due to its central role in the negotiations concerning the international boundary, the Wadi Araba issue deserves further clarification.

As has been previously explained, the Mandatory boundary definition stated that the boundary crosses through the centre of the Wadi Araba. While both Parties were willing to accept this definition, the words "centre of the wadi" were given differing interpretations. The Jordanians, based on an interpretation adopted by several members of the British Government during the 1920's and 1930's, claimed that the "centre of the wadi" meant the line connecting the points of lowest levels in the wadi. The Israeli position, on the other hand, based on historical, geological, geographical, legal and cartographic evidence, was that the words "center of the wadi" should be given their ordinary and plain meaning - the median line of the wadi. The "line of lowest levels" doctrine, Israel contended, was both legally unfounded and practically impossible to implement (due, in part, to the fact that the Arava is actually comprised of two watersheds, connected by a divide in which "lowest points" cannot be discerned or conceived). The British interpretation on which the Jordanians based their claim was shown as being only one of several different interpretations adopted by British officials, none of which were authoritative or conclusive.

Another point of disagreement in this regard was the exact geographic definition of the "Wadi Araba". While the Jordanians held that this term refers only to the relatively narrow watersheds mentioned above, Israel claimed (based, in part, on

Jordanian maps) that this term, should also be given its plain and natural meaning, and should therefore be understood to denote the entire Arava valley which is a continuation of the wide rift extending from Syria in the north to Africa in the south.

As was common throughout the negotiations, the final result of the negotiations on this point was a compromise, according to which both Parties, without forgoing their above detailed legal arguments, agreed to delimitate the boundary in the Arava on the basis of an agreed map-line, similar (but not identical) to the British interpretation mentioned above, further incorporating minor deviations necessitated by the changes which had occurred on the ground throughout the years.

In this regard it should be stressed that in all cases in which the Parties recognized the desirability of minor deviations from the base-line in a manner which would cause one Party to "lose" land, it was agreed that this fact would be taken into consideration further along the boundary.

The end-result of the ground boundary negotiations may be summarized as follows:

- a. The boundary commences from an agreed point on the Gulf of Aqaba and continues in a northerly direction through the "centre" of the Arava, in accordance with the agreed line detailed in Annex I(a) and its Appendices.
- b. The boundary in the Arava sector shall be demarcated by the establishment of jointly located and erected boundary pillars. Between each two adjacent boundary pillars the boundary line shall follow a straight line. The exact location of these boundary pillars will be defined in a list of geographical and UTM (Universal Transverse Mercator) coordinates jointly prepared by the two Parties using Global Positioning System (GPS) measurements. This list of coordinates, once prepared,

shall be binding as regards the location of the boundary in this sector.

- c. From the Wadi Arava the boundary continues in a northerly direction along the Salt Pans situated at the southern end of the Dead Sea and from there through the centre of the Dead Sea, in accordance with the agreed line detailed in Annex I (a) and its Appendices. Once again, the exact location of the boundary will be based on a list of geographical and UTM coordinates which, once prepared, will have precedence over all other sources concerning the location of the boundary in this sector.

- d. From the northern end of the Dead Sea, the boundary between Israel and Jordan becomes a river boundary, following the middle of the main course of the flow of the Jordan River, up to its confluence with the Yarmouk river, and from there along the middle of the main course of the flow of the Yarmouk river, up to the Syrian boundary.

It was further agreed that the boundary line shall follow gradual natural

changes in the course of the rivers (accretion or avulsion). Sudden natural changes in the course of the rivers (avulsion or the cutting of a new river-bed) would be the subject of discussion in the Joint Boundary Commission established under the Treaty. And finally, artificial changes in the course of the rivers would not affect the location of the boundary, unless otherwise agreed between the Parties.

Two areas which required specific and unique attention during the boundary negotiations were the areas of Naharayim and Zofar. The former is an Israeli owned area situated in the vicinity of the confluence of the Yarmouk and Jordan rivers. The Zofar area is an agricultural area situated in the mostly-desert



Medal issued to mark the signing of the Peace Treaty between Israel and Jordan

Arava, cultivated by Israelis. In both cases, the new delimitation of the international boundary caused these areas to fall under Jordanian sovereignty. Due to this fact, and in light of the agreement between the two Parties to respect the Israeli private land ownership (Naharayim) and private land uses (Zofar) in these areas, whilst also respecting Jordanian sovereignty, a special regime was implemented concerning these two areas.

The main principles of this special regime (detailed in Annexes I(b) and I(c) of the Treaty) are as follows:

- a. The landowners, land users, their invitees and employees would continue to enjoy unimpeded freedom of entry into, movement within and exit from these areas;
- b. Uniformed Israeli police would be authorized to enter the area for the purpose of investigating crimes or dealing with other incidents solely involving the Israeli landowners and land users, and their invitees and employees;
- c. Jordanian law will apply to the areas, subject to the following:
 - 1) Israeli law applying to extra territorial activities of Israelis may be applied and enforced by Israel in these areas;
 - 2) Jordan will not apply its criminal laws to activities in the areas which involve only Israeli nationals.
- d. The special regime will remain in force for a period of 25 years, upon which time it shall be renewed automatically for additional periods, each of 25 years duration. Either Party retains the right of submitting a notice of termination of the above special regime, one year prior to the end of the 25 year period, in which case consultations shall be entered into between the two Parties concerning the future of the areas. At this point it should be stressed that the Treaty specifically provides that Israeli private land ownership rights in the Naharayim area will not be prejudiced by the fate of the special regime.

Another question which arose during the boundary negotiations was how to deal with that portion of the boundary, the western part of which falls within the West Bank, which is currently the subject of negotiations between Israel and the Palestinians? The solution to this problem was, once again, based on the Israel-Egypt Treaty of Peace, in which a similar problem arose concerning the status of the Gaza Strip. As a result, Article 3(2) of the Israel-Jordan Treaty reads as follows:

"The boundary, as set out in Annex I(a), is the permanent, secure and recognised international boundary between Israel and Jordan, **without prejudice to the status of any territories that came under Israeli military government control in 1967.**" (Emphasis added D.R.).

The Parties further agreed (Article 3(7) of the Treaty) that negotiations concerning the delimitation of their maritime boundary in the Gulf of Aqaba would commence upon the signature of the Treaty, to be concluded within 9 months.

Water



The last, but definitely not least, of the substantive issues to be discussed in this article is the subject of water, dealt with in Article 6 and Annex II of the Treaty.

Perhaps the best expression of the fundamental problem underlying the Israeli-Jordanian water issue is the statement, in Article 6(3) of the Treaty:

"The Parties recognise that their water resources are not sufficient to meet their needs."

In other words, in the current situation water is a "sum-zero game", whereby any attempt to solve water shortages by transferring water from one Party to the other, results in an automatic equivalent shortage of water to the transferring Party. Recognizing this fact both Parties agreed, in Article 6(3) above:

"More water should be supplied for their use through various methods, including projects of regional and international cooperation."

With these facts in mind, the mutual goal of the Parties was to find an acceptable solution to the water problem, whilst minimizing the negative impacts of such a solution on both Parties.

Before entering into a detailed discussion of the Treaty of Peace provisions concerning water, two points of a general nature are worthy of our attention.

First, during the last several decades, numerous attempts have been made, by international organizations and jurists, to codify the rules applicable to the utilization of shared water resources. These attempts, which have yet to obtain general international approval, have given birth to a plethora of legal terms associated

with water use ("equitable utilization", "appreciable harm", "water rights" *etc.*). From the onset of the negotiations it was evident that any attempt to resolve the Israeli-Jordanian water problem through strict reliance on such legal terminology would be doomed to failure, due to the fact that, in the final analysis, water disputes can only be resolved by the specific determination of quantities and quality of water to be allocated, and not by means of general legal concepts. This rationale explains why the provisions of the Treaty of Peace dealing with water issues tend to be more practical and operational, rather than legal, in nature.

Secondly, since the 1950's, several unsuccessful attempts have been made to establish an agreed water regime for Israel and its neighbours, the most notable of which being the 1955 "Johnston Plan", named after the American mediator Eric Johnston. One important facet of the negotiations leading up to the Treaty of Peace was that these past attempts played no significant part in the formulation of the Treaty provisions.

In this regard, it is important to take note of the preamble to Article 6 of the Treaty, in which it is stated that the goal of the Parties was:

"... achieving a **comprehensive** and lasting settlement of **all** the water problems between them. " (Emphasis added - D.R.).

The use of the words "comprehensive" and "all" in this context is important, signifying the intent of the Parties that the Peace Treaty provisions are to be considered final and that no additional water issues remain open between them.

The specifics of the agreements concerning water, laid down in Annex II, are relatively complex and too numerous to be detailed in the confines of this article. Nevertheless, several key-features of the agreed arrangements can be identified.

The first issue worthy of the reader's attention is the subject of water allocations from the Yarmouk and lower Jordan rivers. The agreement may be summarized, in this regard, as being comprised of three distinct quantities to be allocated to Jordan, each totalling 50 million cubic meters (mcm) of water .

"The First 50 mcm" (as it was known during the negotiations) is intended to address the "short-term" problems and is comprised of the following:

- a. Israel will reduce its annual use of the Yarmouk river waters from 65 mcm to an agreed 45 mcm; (Article I (1) of Annex II).
- b. Israel agrees to transfer to Jordan, during the summer, the amount of 20 mcm from the Jordan River, immediately upstream from the Deganya gates.

It should be noted that this commitment is contingent on Israel's ' pumping an equivalent 20 mcm from the Yarmouk in the winter (which is a part of Israel's above mentioned 45 mcm). (Article I(2)(a) of Annex II).

- c. Israel will transfer to Jordan an annual quantity of 10 mcm of desalinated water from the desalination of saline springs. Until the desalination facilities are operational, Israel agreed to supply Jordan with an equivalent quantity from the same location on the Jordan River as (b) above, during the winter months. (Article I(2)(d) of Annex II).

"The Second 50 mcm" is intended to address the "medium-term" needs and contains two projects:

- a. Israeli-Jordanian cooperation in the establishment of a diversion/storage facility on the Yarmouk river directly downstream of the existing diversion point; (Article II(1) of Annex II).
- b. Israeli-Jordanian cooperation in the establishment of a water storage system on the lower Jordan River, between its confluence with the Yarmouk and its confluence with Tirat Zvi. (Articles I(2)(b) and II(1) of Annex II).

As has been stated above, the concept underlying these two projects was the making available to Jordan of an additional 50 mcm of water. As regards the lower Jordan River project (b) above, the Treaty specifies the minimum average storage for use by Jordan as 20 mcm. It is important to note that the Treaty also acknowledges potential utilization by Israel of these facilities. An additional fact which must be taken into account is the high estimated cost of these projects (approximately 100 million U.S. Dollars), which will have to be raised from foreign sources.

"The Third 50 mcm" is intended to address the "long-term view" and is dealt with in Article I(3) of Annex II, which provides:

"Israel and Jordan shall cooperate in finding sources for the supply to Jordan of an additional quantity of (50) MCM/year of water of drinkable standards. To this end, the Joint Water Committee will develop, within one year from the entry into force of the Treaty, a plan for the supply to Jordan of the above mentioned additional water. This plan will be forwarded to the respective governments for discussion and decision."

Another issue of major importance is the subject of the Arava wells. As a result of the international boundary delimitation

discussed above, approximately 15 wells currently operated by Israel in the Arava will, subsequent to the planned Israeli withdrawal in February 1995, be situated within Jordanian territory. As these wells are of prime importance to the Israeli settlements in the Arava, the two countries agreed to implement the following special arrangements, laid down in Article IV of Annex II:

- a. These wells, although under Jordanian sovereignty, will continue to supply water to Israel. For this purpose, they shall be operated and maintained by Israeli selected companies, contracted by Jordan, at Israel's expense;
- b. In case of any of these wells failing in the future, Israel will be entitled to drill, operate and maintain an equivalent replacement well, in Jordan.
- c. If found to be hydrogeologically feasible, Israel will be entitled to increase its pumping from wells and systems in Jordan by an additional 10 mcm/year. This increase is to be carried out within five years from the entry into force of the Treaty.

An additional provision worthy of note in the water Annex to the Treaty is Article V, which states that artificial changes in the courses of the Jordan and Yarmouk rivers may only be made by mutual agreement. The Article further provides that each country is obligated to inform the other, six months ahead of time, of any intended projects which are likely to change the flow, or quality of the flow, of either of these rivers along their common boundary. Such projects will be discussed in the Joint Water Committee "with the aim of preventing harm and mitigating adverse impacts such projects may cause." (Article V(2) of Annex II).

Additional topics addressed in the water Annex include: protection of water resources and facilities; prohibition of the disposal of wastewater into the Yarmouk and Jordan rivers; co-operation and exchange of relevant data and the establishment of the Joint Water Committee.

As a final point it is worth mentioning that while the Treaty does contain several provisions concerning the potential uses of unused waters flowing in the Yarmouk and Jordan rivers (Articles I(2)(b) and (c) of Annex II), this subject may also be relevant to the future negotiations with the Palestinians concerning the West Bank.

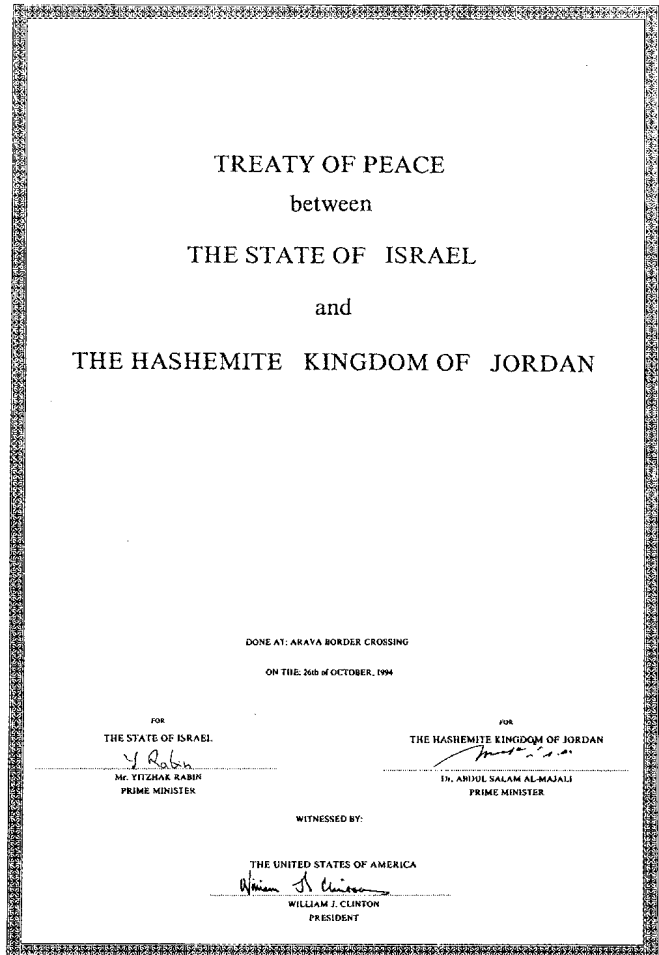
Conclusion

The Israel-Jordan Treaty of Peace is, undoubtedly, a milestone in the history of Israeli-Jordanian relations and in the history of the war-plagued Middle East, in general.

In this regard, it is only fitting to quote the words of the King of Jordan, on the occasion of the initialling of the Treaty of Peace in the Royal Palace in Amman:

"In this Treaty there are no losers, only winners."

As the countries embark on the lengthy process to implement the provisions of the Peace Treaty, it is only to be hoped that the same atmosphere of goodwill and mutual co-operation will continue to prevail between them.



The original signatures to the Peace Treaty.

The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas)

The Charter of the Hamas has 36 articles, supported by quotations from the Quran. To gain an insight into the program of the Hamas movement, it is necessary to look at its publicized platform:

- * The Hamas is committed to Holy War for Palestine against the Jews, until the victory of Allah is implemented.
- * The Land must be cleansed from the impurity and viciousness of the tyrannical occupiers.
- * Under the wings of Islam, coexistence is possible with members of other faiths. When Islam does not prevail then bigotry, hatred, controversy, corruption and oppression prevail.
- * The Muslims are under obligation, by order of their Prophet, to fight Jews and kill them wherever they can find them.
- * The Hamas strives to establish an entity where Allah is the ultimate goal, the Quran its constitution, Jihad (Holy War) its means, death for the cause of Allah - its most sublime aspiration.
- * The Land of Palestine is a holy Islamic Endowment (Waqf) until the end of days. Thus, no one can negotiate it away.
- * It is the personal religious duty (Fard' Ayn) of each individual Muslim to carry out this Jihad in order to bring redemption to the Land.
- * The Hamas is opposed to all international conferences and negotiations and to any peaceful settlements; for sovereignty over the land is a religious act and negotiating over it means yielding some of it to the rule of Unbelievers.
- * The Jews have taken over the world media and financial centers. By fomenting revolutions, wars and such movements as the Free Masons, Communism, Capitalism and Zionism, Rotary, Lions, B'nai B'rith etc., they are subverting human society as a whole in order to bring about its destruction, propagate their own viciousness and corruption, and take over the world via such of their pet institutions as the League of Nations, the U.N., and the Security Council. Their schemes are detailed in the Protocols of the Elders of Zion.
- * The Hamas opposes the PLO secular state in Palestine because it would be anti-Islamic in essence. But if the PLO adopts Islam as its path, then all members of the movement will become soldiers of Liberation and will "produce the fire that will smite the enemy".

This material was supplied by Doctor Raphael Israeli of the Hebrew University, Jerusalem.

In the last issue of JUSTICE we reported on the Jewish-Christian dialogue within the framework of the World Council Meeting of our Association held in Rome in June 1994. In this and the next issue we report on the other subjects of debate: anti-Semitism worldwide, restitution of Jewish property and legal and economic aspects of investment in Israel.

Anti-Semitism in the UN: Religious, Racial or Political?

Morris B. Abram



Anti-Semitism is like a mutating virus, changing form but never purpose. Anti-Semitism, challenged as a religious manifestation due to the decline of the Age of Faith and changes in Church doctrine, and discredited as a racial epithet by the exposure of the Holocaust, is alive and well and even respectable in a political form disguised as anti-Zionism in the UN. I see time and again in the UN so-called "good people" who mask anti-Semitism in the form of anti-Zionism, an ultimate expression of Jewish aspiration.

The political disguise of anti-Semitism has been unmasked. Per Ahlmark, the former Deputy Prime Minister of Sweden and UN Watch board member, has said that "My main concern has always been that the anti-Zionist campaign has in fact merged with traditional anti-Semitism." Martin Luther King, Jr. has said, "When people criticize Zionism they mean Jews; you're talking anti-Semitism."

Permutations of Anti-Semitism

Religious anti-Semitism has its early roots in monotheism, which inherently repudiated the ancient pagan gods. In ancient times, Moses - hailed for his ideas - was also viewed as the creator of a form of religion that was strange and which imposed

a very heavy moral burden. Jews' religious practices separated them from other peoples.

As the place of religion declined in the 19th century, and the role of science elevated, anti-Semitism needed a new form. It is argued that the term anti-Semitism was coined in Germany in the 1870's because intellectuals were searching for a secular, pseudo-scientific term to express animosity against the Jews but one that avoided the term "Jew". The term, "anti-Semitism" was non-religious and therefore, more acceptable.

Anti-Semitism is distinctive. It is defined in the Encyclopaedia Britannica as "hostile expressions or actions against Jews which has been a more or less constant feature of Jewish life in the Diaspora." The term itself is a misnomer because it has nothing to do with Semites; the term has never been used to describe discrimination against Arabs. The contemporary argument by Arab diplomats that anti-Semitism embraces Arabs as well is merely an attempt to dilute the significance and distinctiveness of anti-Semitism.

In the 19th and early 20th centuries, after centuries of segregation, Western European Jews were finally admitted into mainstream society. Some became assimilated and ancient charges of the peculiarities of the Jews based on their religious practices or their engagement in "dishonourable" trades were no longer valid. How then to justify anti-Semitism? By constructing a scientific, genetic argument that could not be disproved. Thus, the Nazis' theory of racial superiority. Unlike past anti-Semitism, Jews could not escape persecution by conversion. As one of a handful of Jews in Fitzgerald, Georgia, I knew that all I had to do to become accepted was to convert.

Ambassador Morris A. Abram, an active member of our Association, is the former U.S. Permanent Representative to the United Nations and other international organizations in Geneva and is the Chairman of UN Watch.

Genetic anti-Semitism is still prevalent, demonstrated by the physical caricatures of Jews that permeate the media. But racism has become a dirty word, especially after the fight to eradicate apartheid in South Africa. Much of the democratic world and international bodies have passed anti-racism laws and conventions.

Today, the only form of anti-Semitism acceptable in the "best circles" is political. Of course political attacks on nations are commonplace and of course Israel has its flaws; but no one who dislikes Britain proposes to eradicate it. Anti-Israel statements in the UN, however, are often a cover to express anti-Semitism.

Political Anti-Semitism

For fifty years, the UN, founded in the wake of Hitler's crimes has been a center for criticism of Israel, the democratic state founded by and for Hitler's victims: the Jewish people. From the date of its establishment, Israel has been subjected to aggression in three wars, in none of which has the UN Security Council ever condemned the true aggressors while repeatedly overlooking condemnable conduct by Israel's Arab neighbours. Rather, the UN Security Council has treated Israel so as to elicit repeated vetoes by the United States, if not for which Israel would have become an enfeebled pariah. In an era of self-determination and decolonization, Israel is portrayed as the victimizer.

The UN has become the center of modern attack on the Jews despite the fact that the modern human rights movement was a reaction to Nazi bestiality in World War II characterized by the persecution and genocide of the Jews. Yet, the closest the UN came to condemning the Holocaust was in a 1960 Security Council resolution criticizing Israel for the abduction of Adolph Eichman. The resolution noted "the universal condemnation of the persecution of the Jews under the Nazis" and concern that Eichman be brought to appropriate justice for his crimes. Notwithstanding, Israel was denounced for its violation of Argentine sovereignty. We heard not one word from the Security Council when the U.S. abducted Panamanian dictator Manuel Noriega.

The Holocaust gave rise to the incorporation of human rights principles into the UN Charter and resulted in the International Bill of Rights and the principal human rights conventions. Yet, no single UN human rights declaration, covenant or convention condemns explicitly or even refers expressly to anti-Semitism. The Jews were probably the first minority in history, and they

have consistently come to the assistance of other minorities and yet they are still denied equal treatment themselves.

One should not underestimate the importance of the UN particularly in shaping world public opinion; its words are weapons. If the world had heeded Hitler's words in *Mein Kampf*, it would have known they were to be translated into action. The UN is the only world-wide institution and, however weak it may be at "sav[ing] succeeding generations from the scourge of war", it remains a respected organization. If an automatic majority can condemn Israel and Zionism, even good people will ask "what kind of people comprise the Jewish state?" and evil people will merely add "I told you so." Israel is thereby isolated from normal political life much in the same fashion as were the Jews segregated from civil life from ancient times until fairly recent history. As a young student recently told me, "Israel has become the Jew of the United Nations."

And the UN's anti-Israel bias is unfortunately echoed by highly acclaimed non-governmental organizations.

Since 1948, well over five pounds, 2.3 kilos, of resolutions condemnatory of Israel have been adopted by various UN organs despite the democratic traditions and the rule of law maintained by Israel during wars, terrors and even scud missile attacks during the Gulf War. There are two special committees of the General Assembly and a division of the UN Secretariat dedicated exclusively to the pillorying of Israel and often of its liberating ideal, Zionism. Special sessions, special rapporteurs, and special investigators expend millions of scarce UN dollars to undermine the reputation of the Jewish state.

Indeed, it has been subjected to far more unfavourable treatment than any state in the UN, including the most brutal dictatorships and states in which savagery is rampant, contrary to the equality of nations guaranteed by the UN Charter. And Israel cannot serve on the UN Human Rights Commission because Israel has been denied membership in any regional group, the formal system by which UN member states participate in shaping UN policy, while Libya, Iraq, Iran, Syria and Cuba sit in judgment of the human rights records of others.

Traditional Anti-Semitism Persists

Sometimes even undisguised anti-Semitism erupts in the UN. I believe that the UN's failure to label anti-Semitism an anathema, as it has other forms of discrimination such as apartheid, has contributed to the toleration of outright anti-Semitic expressions in UN chambers.

In 1993 in the UN Human Rights Commission, the PLO representative circulated a letter which said "It would appear that Israeli occupation authorities, who are today celebrating the Day of Atonement, are never fully happy even on religious occasions unless their celebrations, as usual, are marked by Palestinian blood." There was no condemnation of the PLO letter, either from the Commission's Chairman or from the Western democracies represented in the Commission proceedings.

In 1992, the Syrian representative to the Commission waived a book authored by its Minister of Defence which repeated the infamous Damascus blood libel of 1841 declaring that Jews use the blood of Christian children to make Matzot, a charge denounced by the Sultan 150 years earlier. The Commission did not react, the Western caucus refused to become involved and it required intense consistent pressure by the U.S. over months to obtain a weak statement of disapproval from the Commission's Chairman.

Imagine a UN body calling all Africans cannibals?

Indeed, the ancient lies of anti-Semitism are now permanently stamped on the UN's consciousness, pronouncements and actions.

The Final Declaration of the 1993 Vienna Conference on Human Rights condemned every form of racism and discrimination, but refused to condemn anti-Semitism.

In March, 1994, the UN Human Rights Commission, at the initiative of UN Watch, found its voice to expressly condemn anti-Semitism as a contemporary form of racism. The Commission resolution appointed a special rapporteur to investigate incidents of anti-Semitism and governmental measures to overcome them. Now we have the beginnings of a mechanism to institutionalize the battle against anti-Semitism at the world body.

The ultimate outrage at the UN was the passage of the "Zionism equals racism" resolution in 1975 with the support of 67 member states, equating Jewish aspirations with condemnable racism.

This is not surprising because in 1972, the murderer Idi Amin Dada, tyrant of Uganda, received a standing ovation at the General Assembly when he called for the expulsion of Israel from the UN and the destruction of the Jewish state. Not unlike today, even European states did not rise to the defense of Israel from scurrilous attack by a political monster.

The repeal of the "Zionism equals racism" resolution is not, however, an endorsement of Zionism.

Treatment of Israel at the UN Following the Israel/PLO Agreement

Now, "Zionism equals racism" has been repealed, the peace negotiations are moving forward and Israel's bilateral relations are good. Have these milestones translated into change in the UN's treatment of Israel?

It is encouraging that the General Assembly and the UN Human Rights Commission adopted resolutions endorsing the Israel/Palestinian peace process. There has been some moderation of the vituperative language in some traditional anti-Israel resolutions and the annual sum of these is not as great as in 1991. However, at the last General Assembly, convened immediately after the Rabin-Arafat handshake, there were 21 anti-Israel resolutions on which the US felt obliged to vote in the negative on 16 and abstain on 4.

In November 1993, the Arab states signed an International Telecommunications Union Conference declaration indicating that their signature did not imply recognition of the "Zionist entity"; the Human Rights Commission in March adopted five resolutions denouncing Israel; and the Security Council's reaction to the Hebron killing is contrary to its silence on acts of terrorism against Israelis and other similar attacks worldwide such as in India and very recently in Iran, where a bomb in a crowded Muslim shrine killed 70 people.

The Hebron killing is now the focus of studies by NGOs and the UN Committee on the Elimination of Racial Discrimination intends to convene a special examination of Israel on the incident. The UN reaction comes despite Israel's immediate appointment of a high level, independent commission to investigate.

The recent International Labor Organization Conference convened a special session on the conditions of Palestinian workers, the Conference's only special plenary session on a particular issue. Over twenty representatives of workers, employers and governments castigated Israel as if the peace process and Palestinian autonomy were mere footnotes in current affairs. The UN is simply lagging far behind present events.

Israel's Bilateral v. Multilateral Relations

The establishment of diplomatic relations with Israel does not mean that underlying prejudices have been scuttled. At the

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Czechoslovakian Association of Lawyers Apologizes to the Jewish Community

In 1939, following the invasion of Czechoslovakia by Germany, the Association of Czech Lawyers "Vsehrd" expelled their Jewish colleagues from the organization. In the following letter dated 31 October 1994, sent to the Chief Rabbi of Czechoslovakia, the Czech Association formally apologizes for this action. Vsehrd has also undertaken to confer honorary membership on living and deceased Israeli lawyers of Czech origin who were expelled from the organization. Those wishing to regain their membership should apply to the Czech Association of Lawyers.

Mr. Karol Sidon,
Rabbi of Prague and the Czech Lands,

Dear Sir,

Would you kindly accept our apology to you and all the people of the Jewish nation and religion living in the Czech Republic for the fact that in the grim period of the second Czechoslovak Republic our predecessors in the Association of

Czech Lawyers "Vsehrd" expelled their Jewish colleagues from the Association, which we consider an immoral action.

The above-mentioned exclusion cannot be excused either on the grounds of errant ideology of certain individuals, or by the majority who gave up under pressure. The decision of our predecessors has to be condemned even more strongly if we bear in mind that they were lawyers and that it was therefore their duty to adhere to the fundamental legal principles.

We ask for your forgiveness and at the same time we would like you to kindly inform all the relatives of our expelled colleagues, whether they live in the Czech Republic, Israel or anywhere in the world, about the position that we assume towards the exclusion.

In the future we will always act against any discrimination of our Jewish colleagues. We hope for a lasting cooperation on principles of democracy, humanity and respect for every individual.

Yours truly,
Petr Polák
Chairman of the Association

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Second Vatican Council in 1962-65, the Roman Catholic Church formally repudiated the charge that Jews are responsible for the death of Christ and condemned genocide and racism as un-Christian. But even the recent and welcomed Vatican recognition of Israel cannot wipe out thousands of years of anti-Semitic tradition.

The better test is the behaviour of states toward Israel in multi-lateral bodies. Bilateral relations may reflect trade and similar purposes which are not necessarily carried over into the UN and other multilateral forums where political opinions are formed. The true test is multilateral - actions in public. Unfortunately, the United States often stands alone in the Security Council and other UN forums in its defence of Israel. Other states must speak out, not hide behind abstentions.

The flourishing of anti-Semitism and its transmission through the UN pulpit is of deep concern to all mankind, for as Minister Ahlmark has explained "Anti-Semitism always starts with the Jews; it never stops with the Jews... and finally [it] destroys democratic institutions and the rule of law."

Anti-Semitism has endured for 3000 years. It is not likely to be overcome by any enlightenment, the revulsion of the Holocaust, by granting autonomy to the Palestinians or by passing UN resolutions. Anti-Semitism defies reason; it is too much to expect that it can be eliminated, but it surely can be considerably contained.

“One must Answer the Madman in the Marketplace lest the Madman be Believed”*

Irwin Cotler

This is a critical historical juncture in the struggle for human rights, a "Dickinsonian" universe, where, on the one hand, there has been a literal explosion in human rights, where human rights has emerged as the organizing idiom of Catholic-Jewish discourse, or, to paraphrase, as the "secular religion" of our times. Witness some of the examples of the past five years: where democracy is on the march from Central Asia to Central America; where the unification of Germany, spoken of as being unthinkable five years ago, has now become a reality; where Mandela has been liberated from a South African prison and South Africa itself has now been liberated from apartheid; where the Zionism equals racism resolution has been repealed and the Vatican and Israel have entered into diplomatic relations and more than 140 countries have also taken the same step.

Yet, at the same time, in a type of Dickinsonian dialectic, the violations of human rights continue unabated. The homeless of America, the hungry of Africa, the imprisoned of Asia, can be forgiven if they believe that the human rights revolution has somehow passed them by, while the silent tragedy of the Kurds, the ethnic cleansing of the Balkans, the horror of Sarajevo, the agony of Sudan and Rwanda, are metaphor and message for the assault upon, and indeed abandonment of, human rights in our times.

What is true of the violation of human rights and the human condition generally also continues to find expression in what may be called the "graffiti of the Jewish condition": of Jew hatred, and Holocaust denial.

Some examples:

Professor Irwin Cotler of McGill University, Montreal, Canada is a distinguished human rights activist. He is Special Counsel of our Association.

* UN Secretary-General Doug Hammerskjöld.

- In Russia - the new extremists, the Russian right, blame the Jews for bringing about communism, and the old extremist communist left, blame the Jews for bringing about the fall of communism, and both right and left anchor their arguments in Holocaust denial.



- Coded anti-Semitic discourse enters the framework of Western political culture and conversation - be it the words of Le Pen of France speaking of the Holocaust as a "detail", or the words in America of David Duke on the right or Farrakhan on the left, or be it the characterization in England of Holocaust denier David Irving as a "distinguished British historian".
- In United Germany neo-Nazis stalk the street in search of *l'etrangers* (foreigners), torching Holocaust memorials in their path.
- In neutral Sweden, "the most scurrilous anti-Semitic poison since *de Strummer*", to use the words of former Deputy President Per Ahlmarck, continues to find expression in the radio broadcasts of Radio Islam.
- In Duke University, in the U.S., the University newspaper published an advertisement denying the Holocaust and the University President said that the University had no other choice because of the First Amendment and protected

speech, while the same newspaper refused to publish an advertisement which was discriminatory against women. Holocaust denial is protected speech, discrimination against woman is not.

What is common to the Holocaust deniers Keegstra and Zundel in Canada, to Le Pen and Faurisson in France, to Felderer and Radio Islam in Sweden, to Smirshnov Ashtosvili in Russia, to David Duke and Farrakhan and Khalid Muhammad in the United States, to David Irving in England is that they are all part of the endemic enduring Jew hatred with Holocaust denial as its contemporary idiom and cutting edge.

Just as the Holocaust was not only a tragedy of the Jews but a tragedy of civilization in which the Jews were victims, so too is denial of the Holocaust not just an assault on Jewish memory but an assault on Jewish values and on the history, the truth, the integrity, and the memory of civilization itself.

It may appear to some that we are addressing an issue that is not so serious: Why give the Holocaust deniers the credibility of the subject-matter for discussion?

Well, public opinion polls indicate that one-third of all Americans are either ignorant of, or have mistaken views about, the Holocaust; *i.e.*, one-third of all Americans are potentially vulnerable to the Holocaust-denial movement. The same polls also show that one-third of Americans believe that Jews have too much power, carp too much on the Holocaust and seek to make political capital out of the Holocaust. So the support with respect to the understanding of the Jewish experience may be said to be vulnerable to the Holocaust-denial movement.

Characteristics of the Holocaust-Denial Movement

1. It is not a group of misfits although there are misfits among them. Rather, it is a highly organized, sophisticated, interconnected movement, which cuts across region, ideology, party, and border. It is linked by communications and the most sophisticated computer technology.
2. It is not just a national phenomenon in Canada or the U.S. Rather, it is an escalating international phenomenon in North America, Latin America, Europe, Asia, *etc.*, even finding expression in countries without Jews. It has become the new age metaphor for anti-Semitism in countries without Jews, such as Japan.
3. The Holocaust-denial movement seeks to use the legal

process as an instrument for amplifying and, indeed, validating the movement. The Holocaust-denial movement seeks to convert trials of Holocaust deniers into trials of the Holocaust itself. It converts these trials, in whatever countries they take place, into international gatherings of the Holocaust-denial movement, it seeks to have Holocaust deniers admitted as expert witnesses in the course of the trial itself (e.g., Swedish convicted felon Felderer testifying as an expert in the trial of Canadian Ernst Zundel, and describing Auschwitz as a "recreation center").

4. The most sinister feature of the movement has been the cultivation of an academic veneer. Its use of scholarship, publications and institutes in order to give itself a sense of offering an intellectual validation to the cause. It offers what is called an "alternative scholarship" posing as intellectual dissidents running against the establishment orthodoxy of Holocaust. It holds out to scholars, in a kind of subliminal, intellectual psychological appeal, that scholars and academics owe it to themselves to examine the real truth about the Holocaust.
5. In the former Soviet Union and Eastern Europe, right-wing anti-Semitic forces seek to rehabilitate old Nazis. At the same time they seek to resurrect the classic scapegoat of history, namely, the Jew, as the person accountable for the catastrophies in their countries. This leads to one of the most scurrilous features of the Holocaust-denial movement. Namely, the Holocaust-denial movement purports to be exposing an international criminal conspiracy of Jews when in effect it is asserting its own international criminal conspiracy to cover up the Holocaust. Thus, it not only describes the Holocaust as a hoax, but also maligns Jews for fabricating the hoax; accuses them not only of extracting but also extorting money, influence and power from innocent Germans. Soviets and the Allies are accused of having committed war crimes greater than Germans and so one has the "banalization" of the Holocaust; as the German philosopher Nolte put it, "you have to understand Auschwitz as really being a response to the Gulag".

What Must be Done by Way of Response?

1. It is incumbent upon governments and elite sectors to unequivocally condemn the Holocaust-denial movement in all its forms.

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The U.K. Branch: Report of Activities

The U.K. Branch of our Association held a series of lectures during 1994 on a variety of subjects. The distinguished lecturers were:

- * Lord Jakobovits, the Emeritus Chief Rabbi, who spoke on "Jewish Medical Ethics".
- * Sir Ivan Lawrence Q.C., M.P., who spoke on "Race and the Law".
- * Lord Lester of Hane Hill Q.C., who spoke on "Taking Human Rights Seriously".
- * Professor Jackson who spoke on "Judaic-Christian Contribution to the Law of Evidence".

A lively discussion followed each of these lectures.

The highlight of the year was the gala dinner held in October in the highly prestigious venue of the candlelit ballroom of London's Claridges Hotel. It was attended by over 300 members and guests, including many Judges, Queen's Counsel,

Barristers, Solicitors, Magistrates and academics. The Guest of Honour was the Lord Chief Justice of England, the Lord Taylor of Gosforth, himself a member of the Jewish Community. Lord Taylor praised the aims and work of the Association, but also stressed the impor-

tance of fighting against all forms of racism wherever it arises.

The spectacular event was hosted by the Rt. Hon. Lord Woolf - Honourary President of the U.K. Branch - and Lady Woolf. Judge Hadassa Ben-Itto conveyed greetings from the International Association.



From left to right: Patricia May Q.C., Hon. Secretary of the British Section; Rt. Hon. Lord Woolf, Hon. President; Judge Ben-Itto; Lt.Col. Mordechai Cohen; Judge Myrella Cohen Q.C.; The Lord Chief Justice Lord Taylor; Judge Israel Finestein Q.C., Chairman of the British Section; Mrs. Finestein.

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2. One must begin to take the necessary legal initiatives with respect to indicting incitement to racial hatred.
3. One needs a coalition of conscience where the struggle against anti-Semitism is not one fought by Jews alone but one fought as part of a common cause.
4. Anti-Semitism and Holocaust denial must be held out to be not just an assault on Jews or Jewish memory but an assault on the democratic process itself.
5. Making Holocaust denial a crime will protect its victims from the serious psychological if not physiological injury that results from this racial incitement.
6. We have to make the Holocaust a compulsory part of the curriculum. In many elementary schools and high schools in the United States, Canada and Europe only one or two

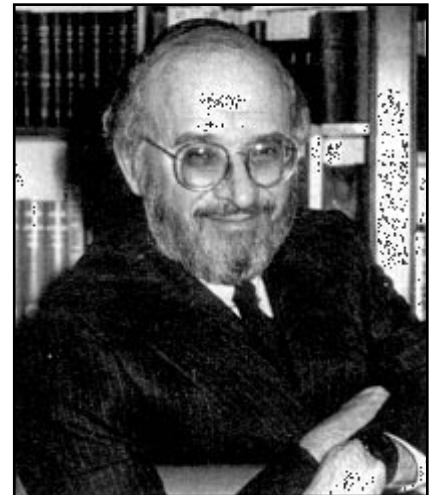
sentences are devoted to the historiography of the Holocaust, another instance of "banalization".

7. One has to press for restitution of Jewish communal property as part of the fidelity to history and to law.
8. Bringing Nazi war criminal to justice must be seen as part of Holocaust historiography. Every time we bring a Nazi war criminal to justice we strike a blow against the Holocaust-denial movement.

This must be our task: to speak on behalf of those who cannot be heard, to bear witness on behalf of those who can no longer testify, to unmask the industry of lies and the bearers of false witness as we protect the integrity of memory and of remembrance, so that the truth can be learned, justice served and human dignity realized.

Anti-Semitism and Politics in the Black Community in the U.S.A.

Nathan Lewin



A brief extract from a volume entitled *The Secret Relationship Between Blacks and Jews*, under the heading "Jews and the Rape of Black Women", reads as follows:

"Jews engaged in the widespread practice of the sexual exploitation of dependent female slaves, such was the practice of Jews since the Middle Ages..."

And under the heading "Jews, Blacks and the Law":

"Much like the Nazis of the concentration camps of Auschwitz, Treblinka or Buchenwald, Jews served as constables, jailers and sheriffs, part of whose duties were to issue warrants against and track down Black freedom seekers. They assiduously enforced the slave codes designed to safeguard against the possibility of rebellion".

This is a book with 1,375 footnotes. On the front page it says:

"Blacks and Jews have recently begun to question their relationship and its strategic role in their individual development. This report is an examination of documented historical evidence and is intended to provide an historical perspective for intellectual debate of this crucial social matter."

And the opening says that Jews:

"have been conclusively linked to the greatest criminal endeavour ever undertaken against an entire race of people, a crime against humanity, the Black African holocaust. They were participants in the entrapment and forceable exportation of millions of Black African citizens into the wretched and inhuman life of bondage for the financial benefit of Jews."

One may say to oneself: "this is a crazy book", "this is something nobody can believe and nobody can take seriously". This book has been out for 3 years. On July 20th 1992, the New York Times took the exceptional step, of

publishing a full page op ed article, written by Henry Louis Gates Jr., who is the Director of the African Studies Dept. at Harvard University. Professor Gates says of this book, "sober and scholarly looking, it may well be one of the most influential books published in the Black community in the last 12 months." At the same time, Professor Gates strongly attacks the book and calls it a "cunning, deceptive volume aimed at the Black intelligentsia and is an effort to encourage them in the direction of Black anti-Semitism".

The book, one of the most sophisticated instances of hate literature yet compiled, was prepared by the Historical Research Department of the Nation of Islam. It charges that the Jews were key operatives in the historic crime of slavery, playing an inordinate and disproportionate role and carving out for themselves a monumental culpability for slavery and the Black holocaust.

It is almost two years since this op ed article appeared in the New York Times and the book has had its impact upon Black colleges. Recently, a Jewish liberal concerned about the hate that has spewed forth from the Black community in connection with the Jews, published an article in *Moment* magazine, and he says "I received a call from a Black student who had read Farrakhan's *Secret History of the Jews*, describing how the Jews had

Adv. Nathan Lewin is a Deputy President of the Association and President of its American Section

financed the slave trade and controlled the civil rights movement, 'I had never really thought about it before', she said, 'it made sense to me'".

What we see in the United States is an amazing phenomenon. As another observer, wrote recently, "American Blacks are one of the few groups in which hostility to Jews increases with higher education and higher income". Farrakhan and his people have been speaking at Black college campuses. They have been propagating hate against the Jewish community to the growing body of Black middle class intellectuals and those who would be leaders of the Black community in the years to come.

This is a condition which calls for great alarm among the Jewish community in the United States and the Jewish community world-wide. There are Black intellectuals, such as Professor Gates, Professor Glen Loury of Boston University, Professor Cornell West of Princeton and others who have spoken out against it, but they are few and far between. What we have seen in recent years is the development of rabid, zealous hate speech by Blacks against Jews in the United States.

Speech ultimately leads to action. We saw the consequences, for example, when a former member of the Nation of Islam made an attempt on the life of Muhammad in California. The crowd that was supportive of Muhammad immediately assumed that the assailant was a "tool of the Jews".

Another consequence is the government paralysis subsequent to the Crown Height incident - the three days in New York a few years ago when the Black community in Crown Heights ran amok and ended up causing the death of an innocent person, with cries of "kill the Jew" before he was killed. The Department of Justice was repeatedly urged by Jewish Congressmen and Jewish interest groups to investigate and prosecute, but it took years before it did anything.

What is the cause of the growth of Black anti-Semitism?

It is not the Jewish religion. There are people who call themselves "Ministers" who are involved. For example, Louis Farrakhan of the Nation of Islam, and the Rev. Jesse Jackson, who compared to Farrakhan is not so rabid and extreme, but only because in comparison to Farrakhan he has suddenly become somebody whom the Jewish community has decided that maybe it should embrace. Indeed, in Israel as well, when he comes over, there is an attempt to justify him and his positions.

The basic situation in the United States comes down to economic interests and to power:

Economic interests: In the 1950s and the 1960s, at the time when Blacks in the United States were seeking to gain equal rights, it was the Jews who disproportionately supported what they were doing. The Blacks have now turned against the Jews. The reason may be, as Professor Gates stated, "we can rarely bring ourselves to forgive those who have helped us". Further, in the wake of the civil rights struggle whose purpose was to gain equality for Blacks, special rules were carved out for the Black community; the result has been affirmative action programs, in which the Black community has received an affirmative right not to be treated equally but to be treated better than others, and mainly at the expense of the Jewish community, in terms of college admission and other economic factors.

Power: The Voting Rights Act in the United States, which was designed to give the Blacks equal access to the polls, has been used to create districts which are racially designated so that minorities can be elected from those districts; the result here has been that Jewish legislators from places such as Florida and New York have lost seats that they have occupied to Black and minority communities.

What are the remedies?

Some Jewish organizations and Jewish leaders believe that the only action they can take is to get out of the way; to bend over backwards to the Black community. Some believe that the thing to do is to enter into greater dialogue with the Black community. This appears to me to be a form of racism. Black anti-Semitism should be treated like white anti-Semitism. There is no more justification for this kind of a book coming from the Nation of Islam and Farrakhan than from the Klu Klax Klan or any white hate group. Consequently, it is the job of the Jewish community to oppose those who support this kind of hate speech, to oppose the Black congressmen that said they were going to enter into a sacred covenant with Louis Farrakhan, and to support Black congressional candidates who have spoken out against it.

It is only under those circumstances by treating Black anti-Semitism as one would treat white anti-Semitism that we can deal with this phenomenon in the United States and deal with it effectively.

Restitution of Jewish Private Property in Eastern Europe

Paul Feher

The tragedy of the Jewish people, provoked by Nazi Germany, has not had any equal.

The European countries were allies of the Germans or were occupied by the German troops, and the ideological and racial persecution there took on a different intensity and savagery. The problem of compensation, therefore, was a problem which had to be faced by the Germans, and, of course, it applied first to those individuals who used to live in Germany.

On 29 June 1956, the Federal Compensation Law for the victims of persecution was enacted. It provided the possibility of compensation for injury to freedom, health, life, as well as economic loss and loss of profession. Compensation offices were set up by the various *Lander* in Federal Germany; the offices dealt with the people who lived on the 1st October 1953 in the area of the office. The Federal Law provided compensation on personal claims which had, however, to be presented



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within a certain period of time. The contentions were judged by civil courts, and by specialized chambers and there was also the possibility of appeal. The Law authorized the State to make arrangements with communities and states, and also, under certain conditions, to provide solutions where the claims were put in late.

The Law also provided for the possibility of compensation to refugees and people without nationalities, according to the definition in the Geneva Convention. It was a condition that these people could not have the protection of their own countries, and were stateless, and therefore had to address their claims to the state which was the heir to the Third Reich.

Further, the people who belonged to the German culture were considered to have equal rights to those who had been persecuted in Germany. Special cases, among which one should cite Austria, did not profit from this Law. Austria considered itself a country which was occupied by the Germans, the Germans considered Austria to be an enthusiastic partner.

The practice of these compensation offices and the case law of these various courts opened up a new specialization in the field of law, called restoration and compensation of the Nazi victims. Of course, not all the cases were foreseen by the Law, therefore it was up to these compensation offices and the courts to fill the legal void. For example, in France we were faced with the problem of the Jews who came from Turkey, whose compensation had been refused. While Turkey had been neutral during the Second World War it was obvious that there was an agreement between the Turkish consulate and the German commendaure. The consulate saw which Turks had been deported and then intervened the next day, thereby providing themselves with an alibi and enabling the Germans to deport these stateless Turks. This meant that we had to deal with these cases and consider them as persecuted people.

The King of the Gypsies wanted to start proceedings because 800,000 gypsies had been placed in Auschwitz and other camps. The gypsies had failed to put in a claim for compensation before the deadline; most of the gypsies were illiterate and could not pay lawyers' fees. The Germans did not accept their claim. They regarded the gypsies as having been interred not on racial grounds but as asocial people, who, at the time of the war, were most usefully put in camps. It was only much later that the rights of the gypsies were recognized by the German courts.

The Atlantic Wall in France was built by the Todt organization which utilized thousands of Spanish Republican refugees

who had been living in France since 1939, following the Civil War in Spain. The refugees were exploited on the pretext that an occupying power had the right to use unemployed persons for necessary work. There, again, there was a long struggle because we wanted them to be recognized as anti-Nazis who had been persecuted. It was seven years before the courts and the appeal courts recognized that these people were really persecuted.

The despoilation of moveables has concerned us over recent years. Many of the goods were taken to Germany and distributed there. Personal claims in this regard were based on the legal notion of "unjust enrichment" and Germany agreed, at least in principle, to provide compensation for the goods which had been pillaged. Nevertheless, it was almost impossible to find the proofs which we were asked to supply, because this would have meant asking someone in a concentration camp whose flat had been emptied to say on what train his property had been sent to Germany. As a result, we had to accept a compromise with the Federal Ministry of Finance in Bonn. The fundamental argument was that East Germany was not paying its share; while West Germany only represented half of pre-war Germany and therefore could not be expected to pay for everything. After the fall of the Berlin Wall we found ourselves in a new situation and we will now have to study the possibility of reopening these cases - since under the compromise solutions we accepted sums of money which did not correspond to the damage.

The German Federal Compensation Law recognized the fact that one could be compensated for damage to liberty but here one has to distinguish between two branches: "limitation of freedom" - this meant that one had to wear the Jewish star, live in hiding, *etc.*; and "loss of freedom" - which meant deportation, forced labour and military supervision.

This distinction has its own importance. If the conditions of living during the persecution had as their consequence that one lost 25 percent of one's working capabilities, this opened the way to compensation which was given on a monthly basis for the whole life of a person. This led to a presumption to the advantage of those whose freedom had been totally taken away and not limited. Damage to life meant that one could grant rights to

dependents of those who died during the period of persecution. Here again, a legal presumption applied, namely, a person dying within 8 months of the persecution was presumed to have died for reasons of racial persecution. This dependent was then entitled to a monthly income for life.

After 35 years of activity and following the implementation of the German Law of Compensation, we should have the knowledge to deal with the new situations relating to compensation for the Eastern European countries, Hungary, Poland, etc.

It is important to make a few comments in connection with the activities of the Jewish Restitution Organizations, and in particular to warn against the danger which we have come across in countries which look favourably upon compensation for commu-

nities but refuse to hear about personal compensation. Rumania, for example, has agreed to the return of 243 cemeteries and synagogues, but will not consider personal compensation. The agreement is therefore only a trap. The budget of the Rumanian community is insufficient to cover the maintenance costs of 243 cemeteries. The State, for its part, wants to rid itself of these cemeteries and pass to the community the duty of looking after them. Countries such as Rumania, start out by saying that they are

poor as if this justifies keeping the goods which were the result of theft. In Hungary, compensation is limited to 50,000 dollars irrespective of the extent of the damage. Compensation is not provided in money but in bonds or coupons, thereby automatically reducing its value by another 25 percent. This emphasizes the importance of proper coordination between the organizations dealing with personal and communities compensation.

In Israel, there are 400,000 people who originally came from Rumania. None of these understand why Rumania refuses to pay their pension. Many are professional people who worked for many years in Rumania before making Aliya. Their rights and the return of their money has to be discussed and receive the support of official organizations. The public has to be informed of the magnitude of the problem and the difficulties facing the restitution organizations. While the poverty argument must be taken into account, it cannot be accepted as an excuse. ■

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International Trade Agreements: The Uruguay Round

Stuart E. Eizenstat



The Uruguay Round Agreement is an historic accord. Signed on April 15 in Marrakesh, it represents the largest negotiated tariff reduction in history - nearly a 50 percent cut between the United States and the European Union, over one-third world-wide. It will open global markets and enrich the global economy by over 5 trillion dollars in the next decade. It will create millions of jobs around the world, and raise standards of living. It will bring new areas, such as agriculture and services, under GATT rules, and halt the piracy of intellectual property rights.

But the value of the overall agreement exceeds any specific benefits. By modernizing and expanding the world trade rules, we have ensured that the multilateral trading system will continue to play a central role in world trade liberalization. With the great progress that has been made on a bilateral and regional basis around the world in recent years, it was particularly important that the multilateral system keep up and bind the different regional systems into a coherent whole.

As the U.S. Representative to the European Union, I might add that for U.S.-EU trade relations, too, the Uruguay Round was vitally important. Ambassador Kantor has frequently said that the entire world has changed with the fall of communism: we have moved from mutually assured destruction to mutually assured prosperity. Within the realm of trade, the same can be said of the Uruguay Round itself.

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Had the U.S. not agreed on the GATT Round, the parties would have headed directly toward a serious trade conflict, complete with mutually destructive retaliation and counter retaliation. The United States and the EU had fundamental disagreements on everything from oilseeds to paper tariffs, many of which threatened to lead to retaliatory measures.

With the Round, we have:

- * Successfully resolved a myriad of problems;
- * Put in place a series of negotiations to address those difficult issues that were not finally resolved in the Round;
- * Created a dispute settlement procedure for resolving our future problems.

The result is that the U.S.-EU trade relationship - so large a part of the global trading order and so vital to its continued prosperity - has been returned to a normal, manageable footing. The resolution of trade disputes and the expansion of trade achieved through the Uruguay Round Agreement will help us forge a more prosperous and stable world.

Important Elements of the Round for the United States

The successful conclusion of the Round involves the following major steps:

- * Slashing industrial product tariffs between the U.S. and the EU in half and eliminating tariffs altogether on many products.
- * Worldwide, cutting tariffs by a third. Within the next 6 years, tariffs will be reduced in some 40 major markets around the

world. Among those major markets, U.S. tariffs on a broad range of industrial products will be among the world's lowest.

- * Agreeing to cut trade-distorting farm subsidies and gradually to open previously closed markets in agriculture.
- * Beginning the process of liberalizing trade in services.
- * Establishing a new World Trade Organization (WTO) to oversee the comprehensive new set of trade rules.
- * Establishing an integrated, efficient, and binding dispute settlement procedure that will help us solve future disputes rapidly and definitively.

Our task then became to ratify and implement the agreement before the end of the year, so the WTO could go into effect on January 1, 1995. On the European side, ratification became a major political issue, involving all of the EU institutions. The European Commission proposal to implement the Round primarily under Article 113 of the Treaty establishing the EEC, would give the EEC competence over virtually all trade issues, including intellectual property rights, services and investment. The Council, by contrast, suggested approval of the agreement in a way that gives no new competence to the EEC at the expense of the Member States.

Under either the Commission or the Council approach, the European Parliament would have to assent to the Uruguay Round result. This is a new responsibility for the Parliament.

Finally, the European Court of Justice (ECJ), too, had a major role to play in the Uruguay Round approval game. The Commission asked the Court to rule on the legal consistency of the Uruguay Round with the Treaty, a case that resulted in judicial guidance as to which Treaty articles should be used by the Council to approve the Round.

Essentially, the ECJ ruled that while industrial goods were solely within the jurisdiction of the European Commission, trade in services and intellectual property issues were of mixed competence and Member States had substantial rights.

The Commission-Council dispute over the legal basis of Uruguay Round ratification led to considerable delay in the EU's Uruguay Round approval process. The Council's deadlock over bananas prevented the Uruguay Round approval documents from reaching the Parliament in time for the Parliament to act at its final plenary before the June Parliamentary elections. Thus, the Parliamentary vote did not occur until December.

In short, internal EU politics pushed EU ratification to the end of 1994. Once the Court, the Council, and the Parliament have acted, the Member States plan to ratify the Uruguay Round agreements.

In the United States, ratification hinged in part on Congress's finding a way to offset the approximately \$13 billion in revenue losses expected to result from U.S. tariff cuts mandated by the agreement. There are also concerns that the Round would legitimize certain types of subsidies and fears that the creation of the WTO and its improved dispute settlement procedures could represent an erosion of U.S. sovereignty. This latter fear is, in my view, greatly overblown. Members of the WTO will not lose the sovereign right to take whatever trade actions they want. The only changes from the current situation under the GATT will be that the dispute settlement procedures will be more effective and the trade rules will be extended into a number of new areas. The United States has supported these negotiating objectives under both Democratic and Republican administrations because the new rules will manifestly make for a better world trading system.

After an intense effort led by President Clinton, Congress overwhelmingly adopted GATT in an unusual post-election session.

Ongoing and Future Negotiations

The Round is a historic achievement, but it is also a work in progress, setting out an ambitious work plan for further liberalization of international trade beyond the implementation of the Round results. Areas of ongoing negotiations include financial services, telecommunications services, maritime services, steel and large civil aircraft.

Looking beyond these particulars, we will need to turn our attention to a new generation of trade issues likely to affect not only U.S.-EU but also international relations for years to come. The future success of the global trading system to a large extent will depend on our ability to ensure that the Round helps build a better world. Certainly, we must continue to reduce trade barriers to expand market access. But we also must address policies that have an important relationship to trade, even though they are beyond the traditional trade agenda.

When the Uruguay Round started in 1986, the world was a very different place from what it is today. The Round was incredibly ambitious in addressing a range of what were then new and untried trade issues. In the end, that experiment has

proven tremendously successful. During the seven years of the Uruguay Round negotiations, however, other trade issues emerged or were reinvigorated in a way that could not have been anticipated in 1986. It is now time to turn to this new generation of issues. President Clinton in his January discussions with European Commission President Delors suggested that "the successor agenda to the Uruguay Round should include issues such as the impact of environmental policies, competition policies and labour standards."

The most advanced of the new issues is trade and the environment. This issue was explicitly identified in the Uruguay Round conclusion as an area for further work under the WTO, and a special committee of the WTO will be formed to address the subject. Another next generation trade issue, competition policy, was covered in the Agreement on Trade Related Investment Measures (as was future work in investment itself). Article 9 of that agreement calls for a review of the Agreement within five years of its entry into force "to consider whether it should be complemented with provisions on investment and competition policy."

As the European Union has learned, the reduction or elimination of government-imposed trade barriers between countries makes the elimination of privately imposed barriers extremely important. The international trading system has advanced to the point that, there too, competition policy may be becoming as important as trade policy in achieving a free international flow of goods and services. More and more, trade disputes involve an element of competition policy, whether the issue is penetrating the Japanese glass market or dealing with floods of Russian aluminium onto world markets. With the further trade liberalization achieved in the Uruguay Round, competition policy will only become more important as a trade issue.

Another vitally important issue involves the intersection of trade and internationally recognized labour standards. All nations have a stake in improving labour standards that will support higher standards of living everywhere, because a broad distribution of the gains from trade will fuel global growth and ensure public support for expanded trade. Therefore, addressing labour standards will strengthen the global trading system and foster sustained prosperity.

In this "virtuous cycle", expanding trade begets more trade and growth as long as the expansion of trade and productivity results in rising living standards. Improving labour standards is good for business because it contributes to higher levels of productivity and quality, raises worker morale, and creates a new class of consumers. Acceptable labour standards are especially

important to support growth in developing countries that have adopted market-oriented policies. Growth is simply not possible if workers are neither willing to accept the costs of change, nor given an incentive to do their best. To complete the cycle, enforcement of international labour standards in turn helps to maintain support for trade liberalization.

For these reasons, the United States seeks to achieve broad support for trade-expanding policies at home and abroad by assuring that benefits from trade are widely shared and that rising standards of living in all trading countries fuel a balanced expansion of trade. We are convinced that these objectives can best be obtained through improved labour standards.

Since the area of trade and international labour standards has been the most controversial - and the least understood - of the new generation trade issues, I would like to make it plainly understood that U.S. motives are not protectionist. Our aim is not to erect barriers against exports of developing countries. Rather, we must find a way to promote labour standards through the trading system without seeking to counteract legitimate comparative advantage.

The relationship of international labour standards to trade has been part of the Congressional mandate for the last two rounds of multilateral trade negotiations. The Trade Acts of 1974 and 1988 called for the adoption of international fair labour standards and of public petition and confrontation procedures in the GATT. The Trade Act of 1988 stated that our principal negotiating objectives regarding workers rights are (a) to promote respect for worker rights; (b) to secure a review of the relationship of worker rights to GATT articles and related instruments with a view to ensuring that the benefits of the trading system are available to all workers; and (c) to agree, as a principle of the GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade.

U.S. efforts in the Tokyo Round failed to obtain the necessary international support, and a similar initiative in the Uruguay Round generated considerable controversy. At the Marrakesh Ministerial Meeting closing the Uruguay Round, however, Ministers agreed that the inclusion of labour standards in the future work program of the World Trade Organization would be discussed in the Preparatory Committee. This means that this important issue can now be discussed in an internationally approved form, thereby recognizing the efforts of successive U.S. Administrations of both parties to begin a rational discussion of this vitally important subject.

The United States supports the work on all of these "new generation" trade issues in the OECD and the WTO. We strongly supported the successful creation of a committee on trade and the environment in the WTO. We are working closely with the EU to establish a work program for that group that will be broad, non-exclusive, and flexible, yet sufficiently focused to achieve concrete results within a reasonable period. We will continue to support inclusion of the other trade issues of the 90's - competition, labour standards, and investment - on the list of issues to be considered for the work program of the WTO.

I know that some may have concerns about addressing these issues. I can assure these people that the goal of the United States is to tear down walls, and not to build them. We will steadfastly resist any effort to use these initiatives as an excuse for protectionism. Instead, we will work together with our trading partners to ensure that the global trading system works for the benefit of all people. By ratifying the Uruguay Round, we have done exactly that.

Association marks 100 years of the Dreyfuss Affair

In a meeting convened on the 6 November 1994 in Tel Aviv, by the Council of our Association, the 100th anniversary of the Dreyfuss Affair was marked by a lecture given by Adv. Gideon Hassid, former Deputy State Attorney.

Participants included members of our Association, Heads of National Sections and invited guests.

Dr. Jacob Robinson Prize

In the amount of \$2000.- will be awarded to a person for a paper on the subject : **The Jew as Individual and National Minority in International Law.**

The Jury: Prof. H. Cohen, former Deputy President of the Supreme Court of Israel (Chairman). Prof. S. Rosenne, Ambassador, Israeli Foreign Ministry. Adv. A. Tory, Chairman, Lithuanian Jewish Academicians.

Papers (50 pp. folio at least, 3 copies) to be submitted by 30 June 1995 to: **The Robinson Prize Committee.**

C/O Tory, P.O. Box 37795, Tel-Aviv 61376, Israel.



Prime Minister's New Legal Advisor

The Association congratulates Col. Ahaz Ben-Ari on his recent appointment as Legal Advisor to the Prime Minister's Office.

Col. Ben Ari served until recently as IDF Assistant Military Advocate General for International Law. He is a member of our Association.

Books Just Received

- **Israel Law and Business Guide**, by Alon Kaplan, General Editor, Kluwer Law and Taxation Publishers, 1994.
- **The Law of the State of Israel: An Introduction**, by Dr. Ariel Bin-Nun, Rubin Mass Ltd., Jerusalem, 1992.
- **The Boundaries of Liberty and Tolerance: The Struggle Against Kahanism in Israel**, by Raphael Cohen Almagor, University Press of Florida, 1994.
- **A Guide to the Sources of Jewish Law**, by Prof. Nahum Rakover Dr. Jur., The Library of Jewish Law.
- **Modern Applications of Jewish Law**, by Prof. Nahum Rakover, Dr. Jur., The Library of Jewish Law.

Legal and Economic Aspects of Investments in Israel

Joseph H. Gross

Since 1990, the Israeli economy has expanded rapidly, and has become one of the fastest growing economies in the world. The massive new wave of immigration started at the end of 1989, had a major impact on the overall economy. The average yearly real growth of Gross Domestic Product (GDP) in the last four years was 5.5 percent. The yearly average growth of the business sector in the same period was 6.5 percent.

In the first two years since 1990, growth was led by massive construction initiated by the government, in order to provide housing for the former Soviet Union immigrants.

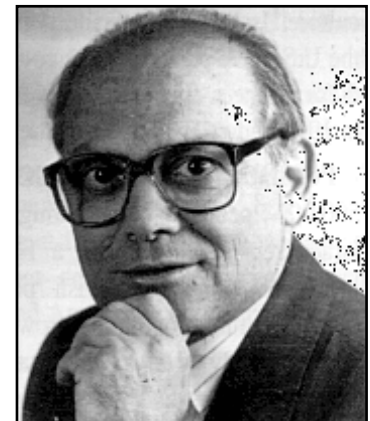
The year 1993 was a turning point. Trends which appeared in 1992 persisted in 1993; the expansion of industries producing tradeables, especially for exports, and the contraction of the construction industry. Business sector product, excluding construction, continued to grow rapidly at a pace of 6.7 percent. The influx of immigrants continued at the 1992 level; their number was 80,000.

The high growth rate of the business sector product (excluding construction) is presumably the result of several factors which have been at work in the last few years:

1. First of all the immigration which induced demand for housing and for consumption goods. Later, immigrants pushed up supply by offering highly skilled workers.
2. The second factor of growth was the restructuring of the economy due to reforms which took place, especially the introduction of new financial tools supplying opportunities to entrepreneurs and offering special aid to small and medium businesses.
3. The third major factor was the reduction of government involvement in the economy, characterized by diminishing government expenditure as a percentage of GDP.
4. Finally, the price stabilization which took place after a long period of high inflation. All these factors contributed towards supply expansion.

Some of the many factors which have transformed Israel's economy from a hyper-inflationary, low-growth state to that of a leading economic engine, include:

- * Highly educated, low cost workforce
- * Strength in exports
- * Immigration led population boom
- * Declining inflation and interest rates
- * Privatization
- * Expanding domestic capital markets
- * Free Trade Agreements with Europe and the U.S.
- * Active foreign investment
- * Potential peace dividends



Economic Growth Factors

Highly Educated Workforce - Israel has one of the highest *per capita* concentrations of engineers and scientists in the world. This wealth of human capital has enabled Israel to successfully penetrate many high technology niches. Additionally, Israeli companies have been very successful in commercializing military technology and thus absorbing a whole generation of military engineers. The addition of Russian immi-

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grants, a good percentage of whom are engineers and scientists, has enriched this already fertile group.

Export-Oriented Industry - Israel's economy is export driven, with exports of goods and services accounting for over 30 percent of GDP. The largest contributor to this export strength is the high technology sector. Israeli companies have carved out niches in certain areas such as telecommunications, software and local area networks, in which they have gained meaningful market share position in Europe and the U.S. Other areas of export strength include chemicals, apparel and agriculture. Israel's Free Trade Agreements with both Europe and the U.S. have positioned the country for continued penetration of these markets. Exports rose over 10 percent in dollar terms both in 1992 and in 1993, as compared to the prior year's results.

Population Boom - Over the past three and half years, over 500,000 people have immigrated to Israel, representing nearly a 14 percent increase in Israel's Jewish population (Israel's natural population growth rate is approximately 1.5 percent annually). This inflow has had two major impacts on Israel's economy. The most obvious effect of this increase in population has been on domestic consumption. Initially, the biggest growth was seen in the construction sector as the country geared up to shelter these newcomers. The positive impact on other aspects of the domestic economy, such as spending on non-durables and services, continues.

The second major impact of the massive wave of immigration has been on Israel's workforce. The average age of these immigrants is 34. These new citizens have added tremendously to the country's workforce, which totals about 1.7 million people. These immigrants are highly educated with a significant minority being engineers, scientists and doctors. This has boosted Israel's already substantial pool of human capital.

Inflation and Interest Rates - After suffering hyper-inflation in the mid 1980's, the Israeli government was successful in lowering the country's annual inflation rate to the 20 percent level during 1986-1991. In 1992, for the first time in 20 years, Israel achieved single-digit inflation, with an annual rate of 9.4 percent and 11.2 percent in 1993. The government is forecasting

an 8 percent inflation rate for 1994. This lower level of inflation is obviously having a positive affect on interest rates, especially in the non-linked arena. The lower level of interest rates bodes well for continued high levels of capital spending.

Reduction of Government Involvement in the Business Sector - A number of factors have been moving Israel towards a more free-market economy. The loosening of import restrictions, the reduction of monopolies and cartels, a significant weakening of the main trade union, a more liberal attitude toward foreign exchange, and the privatization of state-owned companies, are beginning to eliminate the bureaucracy, waste, and inefficiencies symptomatic of a formally socialist-oriented economy.

Privatization - Israel's government seems to be taking a more serious stance on privatization. 1993 has witnessed the first steps in the privatization of the country's two largest banks, Bank

Hapoalim and Bank Leumi. The government sold approximately 20 percent of each bank in public offerings on the Tel Aviv Stock Exchange. Additionally, the government sold its 51 percent interest in Mivney Tassiyah, a major industrial real estate developer. The sale of a controlling interest in the country's fourth largest bank is the next item on tap. In 1994, Israel Chemicals, Bezeq, the country's telecommunication corporation and El-Al, should float their shares on the New York Stock Exchange. In total,

Israel has over 100 government companies that are slated for sale or public issues. The proceeds from these actions should help the government continue its aggressive spending on infrastructure while keeping its budget deficit under control.

Expanding Capital Markets - The securities of more than 500 companies are now traded on the Tel-Aviv Stock Exchange.

Capital Market Reforms

Capital market reforms are focused on the following:

- * The mandatory requirement for government securities imposed on institutional investors dropped from 92 percent to 50 percent and is now limited only to pension funds.
- * The government no longer intervenes in the issue of new stocks and bonds.

Israel's Free Trade Agreements with both Europe and the U.S. have positioned the country for continued penetration of these markets. Exports rose over 10 percent in dollar terms both in 1992 and in 1993, as compared to the prior year's results.

- * Liquidity requirements on bank deposits were drastically reduced from up to 100 percent on some saving accounts, to 4-8 percent, on a par with levels of other industrial countries.
- * "Preferred sectors" which benefited from "direct loans" have been abolished.
- * The forced segmentation of the market between long term *versus* short term loans and between indexed and non-indexed loans has practically been abolished.

Free Trade Agreements with Europe and the U.S. - During 1992 Israel signed a trade agreement with EFTA. This agreement, combined with previous agreements with the EEC and the U.S., position Israeli manufacturers to further penetrate these markets. For example, a number of major apparel retailers (The Limited, Gap Stores) have increased their sourcing from Israel at the expense of Asian countries, whose goods many times are restricted due to quotas and tariffs. Israeli high-technology companies have begun entering other market segments, such as digital television and semiconductors, where Israel's free-trade arrangements may give them substantial advantages over other manufacturers.

Unique Free Trade Status - We believe that Israel is the only country in the world to have signed free trade agreements with both the U.S. and the EEC. The free trade agreements signed between Israel and the EEC in July 1976 gives Israel's industrial exports to the EEC the same benefits from full tariff exemption received by EEC member nations trading among themselves. The free trade agreement between Israel and the U.S., which became effective in August 1985, is similar to the EEC agreement.

Preferred Status Exports - These agreements provide a unique opportunity for multinational corporations doing business in the US and Europe. Specifically, Israeli exports to the U.S. benefit from preferred status over direct European exports to the U.S., and similarly, Israeli exports to Europe enjoy preferred status over direct U.S. exports to Europe.

Lower Wage Structure - Although not at the level of Southeast Asia, Israeli businesses enjoy a competitive advantage in their wage structures *versus* their European and American counterparts. This is especially true in the areas of engineering

and science, where labour costs are generally about 30 percent below America. Additionally, the combination of government incentives, which can cover up to 50 percent of R & D costs, with the new low-cost labour pool of Russian engineers, have given Israeli companies the necessary leverage to compete with larger international companies. Manufacturing companies have also benefited on the labour cost side. On an inflation-adjusted basis, the average wage in Israel is lower today than in 1989.

Active Foreign Investment - American high-technology companies have continued to invest in R & D and manufacturing plants in Israel. Recently, Intel Corporation proposed a \$1 billion expansion plan for its already substantial development and manufacturing facilities in Israel. (The Israeli government subsidizes 38 percent of capital expenditures). Additionally, many

American companies have utilized the BIRD foundation (a joint U.S. - Israel government-funded organization) to help fund joint development work between Israeli and American companies.

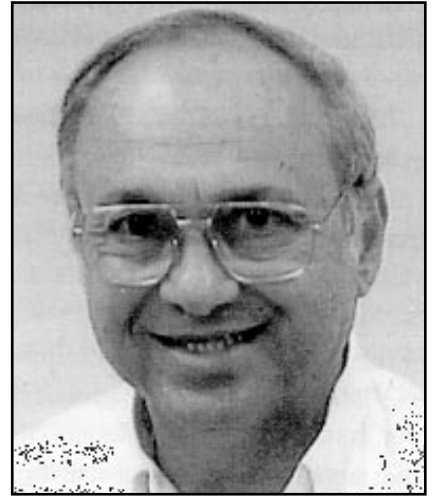
An increasing amount of capital is entering the country both through public offerings of Israeli companies on Wall Street and from venture capital firms targeting Israeli companies. Over the past two years, 18 Israeli or Israel-related companies raised over \$850 million of

equity on U.S. exchanges. Venture capital firms have also stepped up their investment in Israel. Currently, over \$200 million in venture capital funds have been raised for investment in Israel. Although small in absolute terms, this amount is very large relative to venture capital historically dedicated to Israel.

Peace Process - Israel and Palestinians are currently working on a preliminary agreement paving the way for limited autonomy. This in turn may push the Syrians, Jordanians and Lebanese closer to peace agreements with Israel. Although this will be just a first step in what most probably will be a long process, the implications for Israel's economy obviously are very positive. Given Israel's relatively advanced manufacturing infrastructure and its wealth of talent in key areas such as telecommunications, Israeli companies could conceivably reap a windfall from the new markets open to them. Additionally, the elimination of the Arab boycott would open up non-Arab markets that were previously closed to Israel.

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Tax Planning for Foreign Investors in Israel



Yaakov Neeman

The main theme of this article is that one cannot plan an investment in a foreign country, especially not in a complicated tax structure, without a joint venture and joint thinking between jurists and experts in the two countries - bringing together a scheme or an arrangement for an investment in the foreign country. Experience in recent years has shown that if one wants to perform diligent work for one's client or, if one represents the state, the state, one must consult and be in daily contact with the foreign expert and not rely on one's own expertise in the country in which one is planning the investment.

This thesis may be proved by two examples:

The best mode of investment in Israel for an American investor is through the use of what is known as an "S Corporation". This is a corporation which under U.S. law for tax purposes would be regarded as a partnership, so that the investment in Israel would be directly attributed to the shareholders, without bearing any tax consequences under the internal law of the United States, whereas under Israeli law the S Corporation would be regarded as a corporation for all purposes and would be entitled to the lower tax rates under the Encouragement of Capital Investments Law, 5719-1959.

A regular investment in the U.S. would give a net return of 39.26 percent, whereas an investment in a corporation in Israel

and in an Israeli subsidiary, would give a net yield of 54.36 percent. This comprises a major difference of one third in the net return.

In the case of an S Corporation - which is considered as a partnership for U.S. tax purposes, and as a corporation under Israeli law - whether it is an "Approved Enterprise" or a regular corporation, not having any tax benefits under Israeli law - the net return is even higher - 60.4 percent under the tax regimes of both countries.

This is the perfect example of where being conversant with the unique tax law of the United States, where special S corporations are being granted the status of a "Look Through", enables one to achieve a much better result in planning an investment in a foreign country, in this case - Israel.

But one may go even further to prove the thesis. After consulting with a U.S. expert one can achieve the same results in cases where the S Corporation is unavailable because of internal U.S. tax law. Under U.S. law, the S Corporation is unavailable if one of the shareholders is a non U.S. citizen or a non U.S. corporation. How does one overcome this problem if one wishes to plan an investment in Israel, where at least 10 percent of the investors will be non-U.S. shareholders, such as Israelis? Again, using the availability of consultations with the foreign expert, one can, under U.S. law, give the status of a partnership to a corporation. Under Israeli law, this corporation will be considered an Israeli corporation for all purposes.

Thus, if one creates under Israeli law a corporation which lacks at least two of the following characteristics:

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- * unlimited liability, or
- * centralized management, or
- * continuity of life, or
- * free transferability of shares,

then, under U.S. law, such an entity is considered for tax purposes as a partnership, whereas under Israeli law the same entity will still be considered a corporation.

If one takes a limited liability company in Israel, a possibility under the Companies Ordinance, or restricts the transferability of shares and requires the full consent of all shareholders for the transfer of shares, the resulting entity will be what may be called a "hybrid" entity. In Israel it will be considered as a corporation, able to receive all the benefits under the Encouragement of Capital Investments Law as a corporation, and would be regarded for U.S. tax purposes as a partnership, so that any tax paid in Israel would be immediately creditable in the United States.

Without the willingness of attorneys to consult and work together in both countries, the attorney will be failing to perform diligent, and what may be considered the required work to represent his client.

Free Trade Zones

In June 1994, a revolutionary law passed in the Israeli Knesset: the Israeli Free Export Processing Law.

The law is unique for two reasons:

- A. It eliminates all bureaucracy.
- B. More importantly, the law provides for a timetable for any request under the law, where, if the application is not approved within that timetable, the application is automatically

approved, unless there is an appeal to a higher administrative level.

Thus, Section 28 of the Law states that if within 15 days one does not receive an answer to an application to the Council of the Free Trade Zone, the application is automatically approved. This is an innovation long sought after in Israeli law; in this area

Israel is moving further ahead than any other country in the free world.

Moreover, the Law provides that in the Free Trade Zone:

- * No export or import permits will be required;
- * No foreign currency restrictions will apply on foreign investments;
- * Foreign investors will be able to employ foreign employees to the extent of 3 percent of their workforce;
- * It will be possible to negotiate private as opposed to collective agreements with employees;
- * In the Free Trade Zone there will be full exemption for 20 years (plus a further 20 years if extended) from all direct taxes, *i.e.* income tax, corporation tax, and land appreciation tax;
- * Zero tax rate on Value Added Tax;
 - * No import and export taxes whatsoever.
 - * Distribution of profits will be subject to only 15 percent overall tax in the State of Israel.

In other words, the Free Trade Zone law is more attractive to foreign investors than any other law in Israel. In consequence of this total exemption from taxes and administrative barriers the government will not grant any loans, grants, or any infrastructure in the Free Trade Zone. All those expenses will be borne by the investors.

Free Trade Zone laws world-wide have brought a lot of work and employment. It will be interesting to see whether this experience will also flourish in Israel.

Finally, it should be pointed out that today, Israel with the series of incentives under the Encouragement of Capital Investments Law and under the new Free Processing Zone Law, is considered by many specialists to be a tax haven country. Let us hope that in the near future the results of this modern tax legislation will become visible, so that Israel will also become a center for the high-tech investment it needs so much.

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The Tragedy of Divorce The Ways Forward - The English Way

Myrella Cohen



Divorce is an emotive subject. It can be a traumatic experience not only for the parties themselves, but also for their children. A child may have difficulty in adjusting into a one parent family; and may experience feelings akin to a bereavement when a much loved parent leaves the matrimonial home. Or he may have difficulty integrating into a step family or feel confused if he is used as a pawn by warring parents in selfish pursuit of their own concerns. It is in everyone's interest that a dead marriage

be buried quickly and painlessly. The English civil law recognizes this, and the recent changes in divorce law and procedure have made this possible, resulting in an alarming increase in the incidence of civil divorce among Jewish couples. What many Jewish couples still fail to appreciate is that a civil divorce in itself is not sufficient to terminate a marriage according to Orthodox Jewish law. There has to be a Jewish divorce (*Get*) as well. In Israel of course there is no civil divorce; so this problem does not arise.

The sanctity of marriage is central to the Jewish philosophy of life, but Judaism has always recognized the reality that some marriages do break down and provides for their dissolution if both parties willingly consent to this. In this respect Jewish law was well ahead of English law which has only recently accepted the concept of no-fault divorce. The Jewish divorce takes effect when the *Get* document freely given by the husband and freely accepted by the wife and specially written in Hebrew and Aramaic by a qualified scribe, and signed

by two witnesses, is physically handed over by the husband or his proxy to the wife (or on some occasions her proxy) usually at the premises of a *Beth Din*, a Religious Court.

In theory this adequate framework exists to end Jewish marriages. In practice, the system is falling down partly because some parties believe that they should postpone giving a *Get* until all questions of parental responsibility and contact to children have been resolved. This is no longer a relevant consideration. Since the passing of the Children's Act in 1989 the rights of not only parents but also grandparents are clearly defined. A Civil Court to which either party is at liberty to apply at any time, will resolve a dispute over children irrespective of any other consideration. The *Get* therefore need not be postponed, nor indeed should it be. It is immoral to bargain the lives and well-being of children in return for the giving or receiving of a *Get*. One does not hinge upon the other.

The tragic plight of countless women who are trapped in a "limping marriage"

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She was awarded the Honorary Degree of Doctor of Laws and elected a Fellow of the Royal Society of Arts for her contribution to the legal professional and communal welfare work.

She was a member of the *Get* and *Agunah* working party that reported to the Chief Rabbi for his review of Women in the Community.

i.e. where there has been a civil divorce but no *Get* so that the woman is not free to remarry according to Orthodox Jewish law, is well-known throughout the Jewish world. The number of human tragedies like this is escalating with the increase in civil divorce; and unless the root cause *i.e.* the absence of a *Get*, is treated as a matter of urgency it could affect the stability of the Jewish community because of the inevitable dilution of the community in the Diaspora. Those concerned with this escalating problem in England see a number of possible ways forward within the English Civil law, namely by:-

A. Legislation

Amending the civil law so that a decree of divorce would not be made absolute as long as there remained a religious bar to remarriage: this has been enacted in some states in Canada, the United States and Australia, and is being considered in South Africa.

A delegation representing the Chief Rabbi and the Board of Deputies of British Jews recently met with the Lord Chancellor and put the proposal to him that where *Get* proceedings are required to enable the parties to remarry in Jewish law, the Civil Court should be empowered to delay or withhold the divorce until the *Get* proceedings have been completed.

The delegation further brought to the attention of the Lord Chancellor the anomaly that whereas in English law a Jewish marriage ceremony is recognized by the Court, a *Get* is regarded as an extra legal action and is not recognized as dissolving a marriage according to English law (*Maples v. Maples* (1987) 2 All ER 188). However, it does not appear

likely that there will be any change in the civil law in the foreseeable future.

B. Get Clauses and Undertakings

Where the parties have been separated for a period of two years a divorce can be applied for and will be granted if both parties consent (Matrimonial Causes Act 1973 S. 1(2)(d)). Such consent may be conditional upon the granting and accepting of a *Get*, and if this condition is not fulfilled no order for Divorce will

By requiring a couple to enter into an agreement prior to or at the time of the marriage that in the event of the marriage breakdown they will refer their problems to and/or be bound by the decisions of the Beth Din or Religious Court.

be made. This follows the principle confirmed in the case of *Beales v. Beales* (1972) 2 All ER 661, that the Respondent's consent to a divorce may be conditional (in this case on not paying costs). However, only a relatively small number of cases fall into this category. Jewish couples are also encouraged to incorporate a "*Get Clause*" into an agreement for financial relief and/or children's arrangements, which then become part of a legally binding Court Order. In a contested case where parties give an undertaking regarding a *Get*, the undertaking has the same effect as a Court Order (*Livesay v. Jenkins* (1985) 1 All ER 106).

These agreements will certainly place moral pressure on the parties, but if one or other reneges on the agreement and attempts are made to enforce the Court Order some *Halachic* authorities contend that this would invalidate the *Get*. It would be a *Get Meusah* or coerced *Get* because it was not given or accepted freely.

C. Pre-Nuptial Agreements

By requiring a couple to enter into an agreement prior to or at the time of the marriage that in the event of the marriage breakdown they will refer their problems to and/or be bound by the decisions of the *Beth Din* or Religious Court.

The Chief Rabbi Dr. Jonathan Sacks announced last year that he intended introducing such an agreement as a prerequisite of the marriage ceremony in respect of all marriages solemnized under his jurisdiction. This proposal has not to date been implemented but in the provisional draft agreement approved by the London *Beth Din* and drafted by Dayan Ehrentreu, together with the writer of this article and Judge Dawn Freedman, the Bride and Bridegroom would agree that in the event of the marriage failing they would both attend the Court of the Chief Rabbi (the London *Beth Din*) or such other *Beth Din* as that *Beth Din* shall direct when required to do so; and would co-operate with the instructions of that *Beth Din* in seeking to resolve all problems concerning the dissolution of their Jewish marriage; and the Bridegroom would further agree that in the event of civil proceedings being instituted in respect of the marriage he would continue to fulfill all his *Halachic* obligations to his wife as set out in the marriage contract (*Ketubah*).

It has always been possible for parties to enter into a legally binding contract upon their own terms.

This proposed pre-nuptial agreement differs from any other type of contract in two ways:

1. It will apply to every marriage irrespective of the status or age of the parties.
2. It will be mandatory.

Will it be enforceable in English law?

It is impossible to give a firm answer one way or the other until the agreement is tested in the courts, especially the higher and appellate courts, possibly even as far as the House of Lords, which will take a considerable period of time.

Among the judiciary there is a difference of opinion. Some Judges take the view that it is not enforceable. They say it would be held contrary to public policy to plan for a divorce prior to a marriage and in addition to order a person to submit to the authority of an ecclesiastical body is equivalent to compelling him to practise principles of a religion when freedom of religion is enshrined in the British constitution. However, other Judges including some Senior Divorce Judges take the view that the intentions of the parties demonstrated by their agreement or undertaking would always be honoured by the Courts. The Law Society which is the Professional Body of Solicitors in a recent report has proposed to the Lord Chancellor the enforceability of pre-nuptial agreements citing the *Ketubah* as an example of a marriage contract. They submitted the view that a pre-nuptial agreement, if presented to a Court today, would be approved by the Court. Further, in the case of *Shahnaz v. Riswan* (1964) 2 ALL

ER 993, a dower under Mohammedan law was held to be enforceable, the Judge in that case saying that the Court should enforce what was promised to the wife rather than that she should be bereft of a remedy in an English Court.

This decision is not binding but may be persuasive. Even if these undertakings were held to be legally binding further consideration would need to be given as to how they would be enforced. By an order for specific performance? With a sanction of fines or imprisonment for breach? A *Get* has to be given and accepted freely. Undue pressure or coercion might invalidate the subsequent *Get* so that it becomes a *Get Meusah*, or imperfect *Get*.

Parties to a dead marriage should be freed from all legal bonds and be free to start a new life which implies remarriage.

The pre-nuptial agreement may be on stronger ground if its financial aspects are considered. If a *Ketubah* is not strictly construed as a contract, but as a promissory note where a man is obliged in Jewish law to maintain his wife, and he binds himself that in the event of his death or divorce, she will not be left without support, then the pre-nuptial agreement is only confirming this. English law applied these same principles, but since the passing of the Matrimonial Causes Act 1973 and the Matrimonial Family Proceedings Act 1984 there has been a shift in thinking.

The 1973 Act set out a number of considerations to be taken into account on an application for ancillary relief (colloquially referred to as "main-

tenance") - one of these is the conduct of the parties - namely, if it would be inequitable to disregard such conduct it has to be taken into account. It has been held that conduct does not have to be related to the breakdown of the marriage, but may be conduct which occurs at any time even after Decree Absolute and the principle of the "clean break" has now been introduced into the criteria for determining the level of ancillary relief both in the statutes and by cases in the House of Lords.

The theory is that the parties should be encouraged to put the past behind them. Parties to a dead marriage should be freed from all legal bonds and be free to start a new life which implies remarriage. This will be reflected in the level of any maintenance awarded by the Court. You cannot achieve a "clean break" if one of the parties is prevented from remarrying because there is no *Get*. Again, this theory will have to be tested in the Courts, but if the Courts now act upon the principle that there must be a higher level of maintenance where there is no possibility of remarriage, this is precisely what this pre-nuptial agreement is confirming and could be taken into account accordingly by a Court. This is not coercion or a penalty. It is accepting the reality of a situation and providing for it.

These suggested initiatives are proof that consideration is being given to solving the problem of the *Agunah*. We are living in historic times which may well result in many tragedies being averted in the future. We may not be able to solve the plight of the present generation of *Agunot*, but we owe it to future generations of young women to ensure that they do not suffer a similar fate.

The Court's Authority to Impose Medical Examinations and the Right of Privacy

Sinai Deutch

Introduction

In many cases courts have had to decide on the basis of medical evidence. For instance, paternity suits may be decided by tissue analysis; sperm testing can prove infertility and be used as cause in divorce proceedings since the inability to procreate is a basis for Jewish divorce; psychiatric evaluations can have significance in divorce and other issues as well.

This article does not deal with the reliability of these tests on either a medical or a *Halachic* basis. Much literature has already addressed this topic. Several relevant articles are D. Frimer, "Establishing Paternity by Blood Test in Israeli and Jewish Law", *Shnaton Hamishpat Haivri*, 1978 and the series which appeared in *Asia*, Vol. 2, (1986) pp. 145-200. Our premise is that these tests are reliable and their results can be used as acceptable evidence.

We would like to pose the following question: What if one of the litigants refuses to be tested? Does the court have the authority to obligate him to be tested?

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Can such refusal be used against him? These questions present the conflict between two basic rights: the right of privacy *versus* the right to expose the truth. This article will examine the approach of Jewish Law to this conflict.

The Court's Authority to Impose Medical Examinations

A person is obliged by Torah Law to give all relevant testimony even when not called upon. This is a positive Biblical obligation: "He being a witness, whether he hath seen or known if he does not utter it, then he shall bear his iniquity" (*Lev. 5,1*) and thus the *Shulchan Aruch* (in *Hoshen Mishpat 28,1*) states:

"Anyone who knows any relevant information, which is worthy of testimony, and his friend could benefit by it, when called upon must testify in court".

Moreover, the obligation of testimony exists even when not called upon. This obligation is based on the Biblical precept "Neither shall you stand idly by the blood of your neighbour" (*Lev. 19,16*) which is the Good Samaritan principle. The duty to testify is part of the Jewish Law's obligation of charity and is not confined to oral testimony but



includes discovery of documents. The court has the right to force these obligations as *Maimonides* states:

"When one states to another, the document in your possession is mine, and the other answers: I will not relinquish the document... He is forced to relinquish it" (*Maimonides, Hilchot Toen Venitan, 5,7*).

Once the obligation to disclose documents was established, the duty to present evidence based on medical examinations was but a small step. Justice Menachem Elon explained in Civil Appeal 548/78 *Sharon v. Levi*, P.D. 35(1) 780:

"According to Jewish Law, the court's authority to require this examination is

based on the inherent authority of the court to require and order whatever it sees fit for a fair and just investigation of the problem at issue."

According to the aforementioned sources the court's authority to require the disclosure of evidence in Jewish Law is based on the witnesses' obligation to testify and on the litigant's obligation of discovery of evidence and not only on the inherent authority of the court. These obligations characterize Jewish Law which is not exclusively based on one's rights but also on one's obligations to society and the court system.

As time went on, Jewish courts assumed the authority to demand physical examinations of litigants even against their will. But this directive was not easily issued and the interested party had to convince the court that there was reasonable cause for such examination and these procedures were essential for proving his case (*P.D.R.* 331,338). The court's hesitation was based on its attempt to protect the right of privacy.

In Jewish Law the disclosure of truth and the individual's obligation to testify take precedence over the right to privacy. The court does not accept the claim that the breach of privacy takes precedence over the requirement of medical examinations for court proceedings. This should not be interpreted as a disregard of the right of privacy by Jewish Law. On the contrary, Jewish Law forbids any infringement of an individual's right of privacy. However, the court allows intrusions into an individual's privacy when necessary for the disclosure of truth for another's benefit. D.I. Frimer "Medical Examinations by Order and the Right of Privacy", 17 *Israel. L. Rev.* (1982) 100-102 (see also *P.D.R.* 14, 298-332).

In the following cases the court's

authority to obligate medical examinations was analyzed:

In a divorce case in Haifa's Rabbinical District Court the husband asked the court to obligate his wife to get a psychiatric evaluation from her attending psychiatrist and to present all medical records to the court. The husband claimed that his wife was mentally ill. The woman denied the allegation about her mental health and refused both to hand over her medical records or get treatment. The court dismissed the husband's charges contending that without evidence to the contrary, his wife is considered healthy and the onus of proof is his responsibility. The husband appealed. The Rabbinical Supreme Court reversed the lower court's decision. Rabbi Shlomo Goren states in the majority opinion:

"By *Halacha* the court may force the woman to submit her medical records and also to demand a professional evaluation if the husband has a valid claim that she is not stable" (*P.D.R.* 331, 337).

The decision is based on the aforementioned quotation from *Maimonides*. The court noted that in the present case the husband's claim seemed plausible. It was proven that the woman had had three nervous breakdowns which definitely cast a shadow on her present mental stability. The court ordered the practitioner to render all the medical records and accordingly the court would decide whether to request the woman to be examined by a psychiatrist. In order to ensure maximum privacy the evidence was to be submitted only to the court and for its exclusive consideration.

The balance between the right to privacy and the court's duty to reach the

truth was achieved by submitting the medical records exclusively to the court for its consideration and not to the opposing litigant or his counsel. The conduct of the litigants during the trial definitely also has a serious bearing upon the court's decision whether to impose medical examinations.

In another divorce case in the Tel-Aviv Rabbinical District Court where the husband also requested his wife to undergo psychiatric evaluation, the Rabbinical Court decided not to obligate the woman unless the husband was ready for reconciliation if his wife proved healthy. The argument was that there was no justification for infringing her privacy if in any case the husband was not ready to maintain the marriage. The husband refused to sign such a statement and appealed to a higher court.

The Rabbinical Supreme Court dismissed the appeal stating that the defendant had no obligation to disclose discriminating evidence unless there was a convincing argument that the document might help to decide the case in his favour. The Rabbinical Supreme Court decided (Appeal 1969/91 unpublished):

"In this case by virtue of the facts and evidence, the appellant did not even show *prima facie* evidence that the respondent requires professional evaluation. The *Rosh* (Rabbi Asher Ben Yechiel) stated that 'it is not reasonable to require someone to disclose documents without a reasonable cause...' let alone, that without a reasonable cause one cannot require someone to submit himself to unnecessary shame and anguish by undergoing such an evaluation, only to fulfill the appellant's whim, who had been unfaithful to his first wife and lives with his mistress."

Five years later this same case was brought to the court for reconsideration (Appeal 1973/150 unpublished), but this time the court reversed its previous decision. The decision reflects the wife's adamant refusal to appear before the court. The Rabbinical Supreme Court decided that her refusal gave substance to the argument that her husband's claim had a basis. Finally, because the former proceeding was held *ex-parte* the case was sent back to the Rabbinical District Court for reconsideration in the presence of both parties.

In a third case in the Jerusalem Rabbinical District Court a husband tried to force his wife into a divorce claiming that for the last 10 years she had not been able to bear him children. The wife filed a counter-suit for reconciliation and presented medical evidence that her husband suffered from infertility. The court suggested that the husband undergo sperm testing to prove that the sexual dysfunction was not his. The husband refused. Rabbi Eliezer Valdenberg decided that sperm testing is *Halachically* permissible under these circumstances. He concluded:

"It seems that under the present circumstances, when ordered by court, the husband has no right to refuse such an examination, especially when his refusal adversely affects his wife."

The court therefore decided to obligate the husband to undergo testing to check his fertility (see *Responsa Ziz Eliezer*, part 7, section 48, p. 190).

Implications of Refusal

A court's decision that a litigant has to undergo medical examination is not a decree to force him physically to undergo

such treatment. Forced medical evaluation is an infringement of human dignity which is a great value under Jewish Law. The few cases where medical treatment can actually be forced on a patient are cases of immediate danger to life or limb. Medical evaluations as part of a court's proceedings are not part of this exception.

What are therefore the implications of a litigant's refusal to submit medical documents or to undergo medical evaluation? Can the court conclude that a litigant's refusal to undergo medical examination can be held against him? There is a *Halachic* difference between a case where the plaintiff has one witness and a case where he has none. In the former case, whereas a single witness is insufficient to decide a case in monetary disputes, it is sufficient to force the other party to preclude the plaintiff's proof. The source for this argument is in *Kidushin* 66b. A witness testifies that the priest is handicapped (which has *Halachic* ramifications to his service in the temple). The priest denies the claim. In such a case the onus of proof is on the priest. This case shows that whenever facts can be proven, even one witness obligates the defendant to defend his position. But when neither party can support his claims, the requirement to undergo medical testing is weakened. Thus, the refusal of the defendant to submit to a physical examination or provide his medical records cannot be held against him.

Rabbinical courts in the past and at present tend to allow medical examinations upon request of a litigant when there is testimony to support it. However, there are cases where the court orders such a testing by power of the judge's

obligation to achieve a fair and just verdict, (see *Maimonides, Hilchot Sanhedrin* 24,1).

A litigant's refusal to reply to questions or disclose documents can be used as the basis for a decision against him by the *Halacha* as was decided by the *Rosh* (*Responsa Rosh* 33b):

A woman filed an alimony action. Her husband claimed that because of a genetic flaw she was not suitable for marriage. The woman denied the claim. The *Rosh* decided that under these circumstances the wife should be examined by decent and honourable women and if she refuses her husband should not be required to pay alimony.

Based on these sources and others, the Rabbinical Supreme Court decided that if a person refuses medical examinations for a long period - years, it can be held against him.

Conclusions

- A. The court has the right to require medical examinations of litigants even against their will.
- B. A litigant who requests the imposition of such a test on the other party must show convincing arguments to prove that there is a reasonable cause to his request and that such evidence could decide the case. Limitations on the imposition of medical testing are meant to protect an individual's right of privacy.
- C. When a litigant refuses court ordered medical testing, particularly in civil cases, it can be held against him.

Thanks are due to Rabbi Meir Batist, senior researcher in the "Shema" project and to Mr. Roni Kleiman and Ms. Brenda Idstein for their valuable assistance in preparing this article.

He who Pays the Piper Orders the Tune

Labour Appeal 23/3-223, Palestine Post Ltd. v. Joanna Yehiel

(Unpublished, 17th October 1994)

Before Judge Goldberg (President); Judge Adler (Deputy President); Judge Aliasof

Precis

The cause of the action was the cessation of Joanna Yehiel's employment, following a change in ownership of the "Jerusalem Post" newspaper in the beginning of 1990. The Plaintiff contended that she should be deemed to have been dismissed, because of her inability to continue working in the newspaper after the ownership change and consequential "shift" in the political line of the newspaper.

On 23rd April 1993, Judge Elisheva Barak sitting in the Regional Labour Court accepted the claim. Judge Barak focused on such fundamental issues as freedom of speech within the employment relations between newspaper owners and journalists, property rights, and the nexus between employer, employee and the workplace.

The "Palestine Post" (publisher of the "Jerusalem Post") appealed to the National Labour Court against the liability to severance pay and payment in lieu of sabbatical. In a cross appeal, Joanna Yehiel, *inter alia*, appealed against the refusal to include her thirteenth salary in the severance pay calculation.

The National Labour Court dismissed the appeal of the publisher to the extent that it pertained to liability to make severance payments and allowed it to the extent that it pertained to monetary payment in lieu of a sabbatical. The Court also dismissed the cross-appeal in relation to the incorporation of the thirteenth salary in the compensation calculation.

The Legal Issue

The underlying legal issue in this cases depended on the interpretation of Section 11(a) of the Severance Pay Law 5723-1963. Namely, to what extent the owner and publisher of a paper is entitled to intervene in the work of the journalists, and whether, even if it is legitimate for the publisher to interfere in their work,

that would constitute a change of circumstances, so that the plaintiff could not be expected to continue to work in the new circumstances.

The Judgment of the Regional Labour Court

Inter alia, Judge Barak held as follows: the owner and manager of a workplace has the prerogative to administer the workplace as he wishes. It is his right to try and alter the course and nature of the work. The employer is not entitled to change the conditions of work in such a way as to create a qualitative worsening thereof or create circumstances in which a reasonable worker could not be required to continue his work.

For their part, a newspaper's employees and its journalists have additional rights over and above the right to a place of work and the right that their work conditions not be worsened in a concrete way. They have the right to journalistic freedom. A balance must be struck between the freedom of the owner and publisher of the paper to decide on the political direction and the image which he conceives for his paper; the freedom of the editor and the journalists to guard their freedom of expression and the freedom of the press; and the public's right to know and be exposed to a wide range of opinions.

In the United States, the editor has the right to resign if the viewpoint of the paper is not to his liking, but the owner enjoys the strong defence of the First Amendment. This approach is anachronistic today when the liberty of the press has acquired an unshakable status in democratic society. The journalist is not an ordinary worker. In addition to the rights that every worker enjoys, the journalist has an additional liberty: the liberty of freedom of expression. Journalistic freedom is not merely freedom from interference or prior restraint. The publisher of a paper has the right, protected by his freedom of expression, to choose his editor and journalists as he wishes. Additionally, he has the right to dismiss them if their method of writing, their style, the extent and nature of their criticism of the governmental authorities, their political opinions, and their sense of balance - are not to his satisfaction. However from the moment that the publisher has made up his mind not to dismiss the editor, he is no longer at liberty to interfere with the editor's work unre-

strictedly. He is entitled to guide him along general lines; he is entitled to ask him to ensure that articles are more balanced but he cannot be allowed to deny or illegally restrict the editor's journalistic freedom by interfering daily with the manner of writing or commenting on the opinions expressed by the editor and the journalists.

Further, freedom of the press, from the public point of view, means that the public should not receive information, exclusively from, or hear only the views of he who pays the piper, *i.e.*, the individual who has the financial ability to run a paper.

The Judgment of the National Labour Court

In connection with these fundamental issues President Goldberg, giving the judgment of the Court, *inter alia*, held as follows:

The Regional Labour Court commences its judgment with the words "Is a journalist like any other worker?". The answer to this question, implied by the judgment, is that where a journalist is concerned special principles exist which must be considered when examining his rights under the employment laws, and in our case, the right to severance pay.

To us it appears that on the issue of the right to severance pay, the position of a journalist is the same as that of every other worker; though it is clear that the question whether there existed such matters in the labour relations in consequence of which it cannot be demanded of the employee that he continue in his work, depends on the profession, the nature of the work and the status of the employee in his workplace.

This is also true with regard to the matters in the labour relations which justify resignation. In every profession and type of work it is necessary to examine the specific circumstances of those labour relations prior to deciding, upon objective principles, whether those circumstances allow one to conclude that under these conditions the employee cannot be required to continue his employment.

It appears to us that it was far reaching in the extreme to refer to the approach prevailing in countries in which liberty of the press is a cornerstone of their government and their law, and which in the United States is protected by the First Amendment to the Constitution, as being "anachronistic".

The right to property and freedom of property, entrenched today in the Basic Law: Human Dignity and Freedom, enable owners to manage their businesses as they wish, so long as they do not infringe the law or a protected "basic right".

"The right of an employer in his workplace, whether it arises out of ownership or whether it arises out of the right to possession and management, is a property right, which is recognized as a basic right (Civil Appeal 377/79 *Feizer v. The Local Planning and Building Committee, Ramat Gan*, 35(3) P"D 645 at p. 656; Section 3 of the Basic Law: Human Dignity and Freedom; A. Barak, *Interpretation in Law*, Vol. 2, at p. 467). Within this framework, an employer is entitled to choose, subject to the provisions of the law, the legal structure of the business which he is to establish, and the manner of management of the business. Similarly, the employer is entitled to perform his obligations through his employees, by employing contractors, using sub-contractors' workers, or through workers lent to him by another employer..."

Nothing in the above is intended in any way to detract from the importance attached by the legal system as a whole and this Court to freedom of the press and freedom of expression; this Court, responsible for preserving freedom of organization in labour and management unions, freedom to strike and freedom of employment, is responsible, in equal measure, for the preservation and safeguarding of other basic rights.

The Supreme Court has more than once considered the obligation of **government** media to broadcast a range of views and opinions.

The Supreme Court has held as follows:

In H.C.J. 243/62 *Israel Film Studios Ltd. v. Grey* 16 P"D 2407 at p. 2416, his Hon. Justice Landau (as he then was) held:

"A government which takes upon itself the right to determine what is good for the citizen to know, ultimately, is determining what is good for the citizen to think; and there is no greater contradiction than this to true democracy."

This statement, and many others, were made in relation to "freedom of speech" and its limitations in connection with the Broadcasting Authority.

The question which stands before us is whether these principles apply even in **private** communications media. Is every private communications medium, which has received a licence to appear in accordance with the Press Ordinance, obliged to publish every article or letter to the editor? Is the newsheet of the largest labour federation in the country obliged to publish articles opposing the universality of the federation? Is a party newspaper obliged to publish articles which conflict with the party line? Must a newspaper belonging to a religious party publish articles objecting to "religious coercion"? or an item

supporting civil marriage? Must a newsheet of the settlers publish an article supporting the removal of settlements from the Territories?

"Freedom of speech" is not so far reaching.

And now to the case at hand. Must a newspaper, which has been purchased by private owners, provide a platform to the range of views in Israeli society, or, is it entitled to direct its articles towards a viewpoint which is acceptable to it?

Owners of a newspaper, public bodies or private companies, are allowed and entitled to direct their newspapers to channels favoured by them and to prevent adverse publications. The owner of a newspaper is entitled to determine the political, economic and cultural line of his newspaper, and is not obliged to publish in his newspaper contrary opinions. The owner of a newspaper is entitled, directly or through persons authorized for this purpose, to require a journalist employed by him to write an article on a subject which he regards as important, and he may instruct the journalist as to the general line to be favoured. A journalist is not entitled, within the scope of the subject-matter on which he writes, to refuse to write that article. A salaried lawyer is not entitled to choose which client he will handle and which he will refuse to handle, in the same way as a salaried accountant is not entitled to decide to which of the firm's clients he will provide his services. All this applies to every profession or business, so long as the instructions received by the employee do not conflict with the law, rules of ethics or conscience.

A newspaper, be it of whatever circulation, is not obliged to give "appropriate expression to different outlooks prevailing among the public" in the same way as is required of the Broadcasting Authority, by virtue of law. It is desirable and fitting that it should do so, but it is also its right not to. The reading public from whose purse it is sustained, will decide whether to continue to buy that newspaper, which is one-sided in its reporting and in its opinions. If the number of readers is lessened, advertisers will cease advertising in it, and it will not be able to survive. In the free journalism market - these are the considerations which must guide the owners.

The refusal of a newspaper to publish one or another article of an employee is not an interference in that journalist's freedom of expression. A journalist whose editor has refused to publish his writings, is entitled to find, or create, a different platform for himself, so long as the writing, even if it consists of an "unusual expression", does not infringe public safety, public order or the character of democracy. The circumstances and conditions under

which the resignation of a journalist, whose article has been refused publication, will be regarded as circumstances which justify resignation with a concomitant entitlement to severance pay, depends on the individual circumstances of each case.

We are aware that:

"Not only the speaker falls within the definition of one who exercises his liberties and enjoys the rights conferred upon a man in a free society. The audience of compulsory listeners or readers are entitled to hear and read the words of others, and the restriction on the hearing and reading of the words of others is not only an infringement of the rights of the writer or speaker but is no less an infringement of the rights of those to whom the words are addressed". (A.S.M. 5/86 *Sapiru v. The State Comptroller's Office* 40(4) P"D 227, 240).

Freedom of expression is not an absolute basic right, but is relative, as is every fundamental right. This is also the reason why the Court, despite its willingness to give full effect to this freedom, balances it against other basic principles of our system, and since it is not entrenched in a "basic law", "every law which restricts freedom of expression is effective from a constitutional point of view.

In this case, consideration must be given to the right to property, which is entrenched in the Basic Law: Human Dignity and Freedom. Where every person, including a journalist, may write almost anything he wishes in a range of publications, substantial weight must be given to the right to property, and in our case - to the right of private owners of communications media to decide what material should be published and what rejected.

Against the right of the owner to steer the course of his paper, stands the right of the journalist not to be compelled to write articles which are contrary to his thinking and his conscience. In appropriate cases - he has the right not to continue working in a newspaper which has been "transformed" in an extreme fashion. A journalist in a party newspaper, which is purchased by a private owner whose views differ fundamentally from the views of the party to which the newspaper belonged, is drawn into "circumstances in which the worker must not be required to continue his work". This is also the case where the journalist is in a non-party newspaper which is purchased by a political party or movement. In these extreme cases, the journalist acquires a cause to resign because of dismissal, by virtue of the final clause of Section 11(a) of the Severance Pay Law, and to receive severance pay at the rate determined by law.

Following is the legal provision considered in *The Palestine Post Ltd. v. Joanna Yehiel*, see p. 38 above.

Severance Pay Law 5723-1963

Section 11(a)

Where an employee resigns by reason of an appreciable deterioration of his conditions of employment, or in view of other matters of labour relations affecting him and because of which he cannot be expected to continue in his employment, the resignation shall, for the purposes of this Law, be deemed to be dismissal.

Fundamental Agreement between the Holy See and the State of Israel: A Dissenting Opinion

Haran A. Fainstein, Judge in the Magistrate's Court, Rehovot, Israel

I take reservation to the notion that the Israel-Vatican Agreement puts an end to two thousand years of bitter animosity on the part of the Catholic Church towards the Jewish people". In Prof. S. Simonsohn's book: *The Apostolic See and the Jews* (Tel Aviv University, 1993) one can find the Apostle's creed towards Jews, namely: Punishment, Humiliation, Social Isolation in order to protect the purity of the Christian faith.

In fact, Prof. Simonsohn states that the Canon Law contains various explicit Papal declarations which depict the Jews as Christians' slaves. This concept of Jewish slavery (*Servitus*) stems from

Paul's Epistle to the Galatians. This policy towards the Jews was implemented through law, regulations, taxes and boycott. Such legislation was applied to many aspects of daily Jewish life such as monetary disputes between Jews and Christians; discrimination against Jews in courts of law; denial of Jews' right to testify against Christians...

These discriminating laws have never been rescinded by the Church. Consequently, when the Holy See states in the preamble of the said Agreement that it is "Aware of the unique nature of the relationship between the Catholic Church and the Jewish people" one

cannot overlook the tremendous amount of cynicism on the part of the Holy See.

We, as Jewish Jurists, cannot disregard the fact that the Church has not taken any step in order to extract these anti-Jewish laws out of its Canon Law.

Thus, one cannot, and should not, join those who believe that the said agreement really puts an end to two thousand years of animosity.

We must remind the Holy See and its legal advisors of the maxim *Lex rejicit superflua, pugnancia, incongrua* (Law rejects superfluous, contradictory and incongruous matters).

Prohibition on Racial Discrimination in Switzerland

Philippe A. Grumbach

On June 18th 1993, the Swiss Federal Chambers voted on two new criminal provisions concerning racial discrimination: Article 261 *bis* of the Swiss Penal Code and Article 171c of the Military Penal Code.

Following a demand for a referendum from extreme right wing elements, the two criminal provisions were submitted to the vote of the Swiss people on September 25th 1994; the laws were approved. The two Articles will consequently come into force on January 1st 1995.

It should be noted that prior to the adoption of these two provisions, the Swiss criminal law did not punish racist acts as such. However, the provisions will now allow the Helvetic Confederation to adhere to the International Convention on the Elimination of All Forms of Racism of 1965 ("the Convention").

The new provisions punish:

- * Racist propaganda, in the wide sense of the term (1st and 3rd paragraphs).
- * Breach of human dignity (4th paragraph).
- * Refusal of goods or of a service publicly offered (5th paragraph).

Racist Propaganda

According to the 1st paragraph:

"Whoever, publicly, incites to hatred or to discrimination against a person or a group of persons for reasons of their race or their belonging to an ethnic or religious group... will be punished by imprisonment or a fine."

It should be noted that the legislator has retained the criterion of religion or belonging to a religious group. Here, Switzerland has followed the recommendation of the European Council,

which has inspired many European states. Originally, the criterion of religion was also intended to appear in the definition set out in the Convention, however, it was renounced as a concession to the Arab states, who wished to avoid the possibility of their conflict with Israel being judged in the light of this Convention. At the time, the representatives of the Arab countries argued that the difference between Arabs and Jews was one of religion and not of race (cf. FF. No. 20, Vol. III, 26 May 1992, p. 306).

According to the 2nd and 3rd paragraphs, every person who takes part publicly in an action of racist propaganda, in any form, is considered to be a co-author and not a simple accomplice. Nevertheless, he has to have actively taken a part. The paragraph does not aim at the simple spectator. It is irrelevant whether the propaganda is aimed at one or several persons; it is sufficient that it's author speaks to an indeterminate number of people (cf. *op. cit.* P. 307).

Breach of Human Dignity

This paragraph is of particular importance since the legislator intended to sanction the fabricators of history who disseminate their pseudo-scientific theories under the designation "the Lie of Auschwitz".

The law provides:

"Whoever publicly, through utterances, writings, images, gestures, assaults or in any other manner, lowers or discriminates in a way that breaches the human dignity of a person or a group of persons by reason of their race, of their belonging to an ethnic group, or to a religion, or whoever, for the same reason, denies, grossly minimizes or seeks to dispute genocide or other crimes against humanity... will be punished by imprisonment or a fine."

It is of comfort to see that the Swiss Parliament considers that the falsification of history cannot be regarded as a simple quarrel between historians. It has thus admitted that behind the "thesis"

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of the forgers of history, there often hides a tendency towards racist propaganda, which can be perverse and dangerous, particularly when it is targeted at young people in the form of education.

The Refusal of Goods or a Service Publicly Offered

In this paragraph the legislator penalizes:

"Whoever refuses a person or a group of persons, for reasons of their race, or their belonging to an ethnic or religious group, a furnishing intended for public usage."

In order to understand this paragraph, it should be noted that relations within the private domain are expressly excluded. This provision aims at the refusal of goods or a service occurring in the exercise of a professional activity, where, in principle, the offer was intended for the public. The provision is primarily concerned with relations at work, at schools, on public transport, in hotels, restaurants, theatres, public parks and swimming pools.

Sanctions

The legislator has provided the same sanction limits for all forms of the commission of the crime. As indicated above, these crimes will be punished with imprisonment or a fine.

In serious cases, the judge has discretion to sentence a convicted person to a maximum penalty of 3 years imprisonment, with a fine or suspended prison sentence in case of minor offences.

Conclusion

The campaign which preceded the vote of the 25th September 1994, was extremely spirited, since its opponents hoped to convince the Swiss people that the adoption of the two criminal provisions would constitute a breach of the freedom of expression and freedom of speech. Fortunately, the Swiss were not convinced by these fallacious arguments and reason has prevailed.

The Federal Tribunal has consistently held that as with any freedom, freedom of expression and freedom of the press, are not unlimited.

According to Swiss jurisprudence, restrictions are admissible in so far as they have a sufficient legal basis, respond to a public

interest and respect the principle of proportionality (*cf.* JDT, I, p. 280; ATF 107, 1a 49c 3).

In this case, the legal asset protected by Articles 261 *bis* CPS and 171c CPA is the public order and not solely the dignity of a person - targeted by the crime, but already protected under the breach of honour provision which specifically protects the good name of an individual. The provision relates to a crime of "abstract endangering", *i.e.*, the incriminating behaviour *per se* contains an increased risk of endangering, independently of its concrete effect.

The only criticism which may be made of these new provisions lies in the fact that the Swiss Parliament has refused to give those associations whose aims are to fight against racism or anti-Semitism - the right to lodge a complaint and become a civil plaintiff on behalf of those victims who dare not complain for fear of suffering reprisals.

Nevertheless, the provisions are an advance on many similar legislative texts now in force in Europe. It is noteworthy that the Swiss people are the only people to have been called upon to give their verdict by direct voting on a law prohibiting racial discrimination.

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Berlin Court: Neo-Nazi film to be withdrawn; Althans sentenced to 18 months imprisonment

In the first and second issues of JUSTICE we reported on the legal battle to remove the neo-Nazi film *Beruf Neonazi* ("Profession neo-Nazi") from German screens.

Since then in an October decision the District Court of Berlin has held that the film should not be shown in public, on the grounds that it is used for propaganda purposes. The Court has further held that the film may only be screened in schools, universities and similar institutions, within the framework of civil rights courses.

Attempts to seize the film have met with little success to date. According to the distributors, the film has been broadcasted on TV at full length, shown at 25 locations and almost 30 international festivals, all "with great public response".

In a separate December decision by a Munich court, one of the stars of the film, Nazi speaker Bela Althans has been sentenced to 18 months imprisonment for his part in the production. Althans had been convicted of the crimes of denial of the Holocaust, incitement against a people and disparagement of the memory of the dead. In giving its decision the Court emphasized that the Holocaust may not be denied.

In Memoriam

Professor Albert Paul Blaustein, 72, died suddenly on August 21, 1994.

Professor Blaustein was one of the few U.S. legal scholars who helped rewrite the national constitutions of Eastern Europe after the fall of communism. Among the 80 countries which sought his advice during his 30 year career were Russia, Poland, South Vietnam, Zimbabwe, Bangladesh, Liberia, Brazil, Fije and Tibet. Some of the constitutions of these countries were written by him personally. Professor Blaustein co-edited the 22 volume *Constitutions of the Countries of the World*, including every nation's constitution and critical essays on the history of each.

Professor Blaustein was professor emeritus at Rutgers University School of Law, Camden, New Jersey, where he taught constitutional law. He was an eager traveller and human rights activist, devoting tremendous energy to his many interests.

Our Association held a prominent place in Professor Blaustein's heart. He served as a longtime representative of the Association to the UN NGOs, and was active within the American Section.

The Association mourns his loss. We send condolences to his family and many friends.

