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# PRESIDENT'S MESSAGE



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embers from over 20 countries participated in our 10th International Congress, which took place in Jerusalem and in Tel Aviv last December. We celebrated 3000 years of Jerusalem, we discussed the challenge of a new economic Middle East, and we visited Jordan, witnessing the blossoming of this relationship in the wake of the newly signed peace agreement.

Alas, only weeks later, we were confronted in Israel with the most brutal terrorist suicide attacks, killing more than 60 people, including children, and wounding many more. Among the victims was Tali, the daughter of Margalit Gordon, killed while crossing the street near Dizengoff Centre in Tel Aviv, her body disfigured beyond recognition. For years Margalit Gordon has been organizing our congresses both in Israel and abroad, and Tali used to assist her, while working on her thesis for a Master's degree in Political Science. She was a beautiful person and her loss is felt by all of us who knew her. Her murder has also emphasized, if any of us needed reminding, how indiscriminate and personal the effects of terrorism.

International terror has become the most frightening phenomenon of our time, widely condemned by leaders of the world. No country is safe from it, and no person is immune. Boarding a plane in an international airport, crossing a street, going on a bus, taking a vacation, visiting a tourist site, exposes each and every one of us to this terrible danger.

Suicide attacks are hardest to prevent. We have no way of knowing in advance the identity of the next fanatic seeking to blow himself up, believing that the greater the number of his victims the more secure his path to paradise. But we do know who brainwashes him, who instructs him, who supplies his funds and who prepares the explosives. Not only terrorist groups like the *Hamas* and the *Islamic Jihad*, but also terrorist governments like that of Iran, make no secret of their aims and their involvement. Yet, corporations in various countries supply terrorist states with dangerous and sometimes illegal weapons; terrorist acts are financed by funds collected under thinly disguised cover, and in many countries terrorists incite and train their disciples and send them on their deadly mission, misusing broadly interpreted constitutional rules, which protect them but fail to protect their victims. Parliaments are uneasy in legislating necessary anti-terrorist laws, and governments are failing to implement even the existing ones.

It is time that leaders who proclaim their unequivocal condemnation of terrorism in international conferences and on television screens, start acting accordingly. The international gathering in Sharm-A-Sheik, in which so many heads of state participated, made a forceful and impressive declaration condemning terror. We are all waiting for them to act.

*Hadassa Ben-Yitvo*

# Legal Options in the War Against Terror

Daniel Reisner

**T**he late Prime-Minister Yitzhak Rabin was often quoted as saying: "We shall make Peace as if there is no terror, and we shall fight terror as if there is no Peace." In fact, Israel has been combating Palestinian terrorism for far longer than the beginning of the current Peace process.

During the 1970's and the early 1980's, Israel had to contend with terrorist actions instigated by the myriad Palestinian organizations and factions, with *Fatah/PLO* playing a prominent role in such activities. After a period of relative quiet during the first half of the 80's, the second half of the last decade saw the re-emergence of organized terrorist activities, sponsored by all the major Palestinian movements.

December 1987 is generally accepted as the starting date of the popular Palestinian uprising in the West Bank and the Gaza Strip, known today as the "*Intifada*". With hindsight, the *Intifada* can today be seen to have been comprised of several different phases:

First - an initial popular uprising, characterized by mass demonstrations and public disturbances;

Second - as the various Palestinian organizations overcame their initial surprise at the outbreak of the *Intifada*, they managed gradually to take control of the process, thereby utilizing it to further their own (political and terrorist) agendas. This period is characterized by mass organized stone-throwing by children and



increased use of Molotov cocktails against Israeli targets. In addition, this phase also saw the emergence of large scale internal Palestinian terrorism, as those suspected of having collaborated with the Israeli authorities were ruthlessly hunted down, tortured and often publicly murdered and mutilated.

The third and final stage of the *Intifada*'s evolution is best characterized by two concurrent processes - the emergence of the fundamental Islamic terrorist groups, backed by various foreign sources, and the movement from large scale public disturbances to small-scale, more professional, terrorist activities utilizing firearms and explosives. It should be stressed that, at

this stage, such terrorist activities were organized and sponsored by all the Palestinian factions, each vying for supremacy and Palestinian public support.

Concurrent with the above process, between 1993 and 1995 Israel and the PLO signed and implemented several historical peace agreements, paving the way for a possible reconciliation between the two peoples. Today, the effects of these agreements on the ground are obvious to all, with the Palestinian Council, elected in democratic elections, responsible for the day-to-day life of the vast majority of the Palestinians in the West Bank and the Gaza Strip. However, it should be understood that not all Palestinian factions support this peace process, as has been made painfully clear during the last months.

It is generally contended that the *Intifada* ended at some unspecified date, as the focus shifted from the Israeli-Palestinian armed struggle to the Israeli-Palestinian peace process. Be that as it may, the *Intifada* has left us a "legacy" in the form of the current wave of Fundamental Islamic based terrorist actions,

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initiated by those Palestinian organizations who, aided by known foreign sources, oppose the very existence of the State of Israel and vehemently oppose the peace process.

The current wave of terrorist attacks differs from our previous experience with terrorist activities in two extremely important factors:

- a. These acts of terror are based on the fanatic religious belief in the “*Jihad*” against Israel;
- b. A large majority of these terrorist actions are suicide attacks, perpetrated by fanatic Muslim youths, members of the “*Hammam*” or “*Islamic Jihad*” movements, duped into believing that by their actions they shall be attaining the highest possible honours in the promised afterlife.

The magnitude of the problem faced by Israel in this regard is made evident by the fact that since April 1993 there have been 32 suicide attacks against Israeli targets (12 of which have occurred since 1995) causing 150 deaths and 668 injuries. Thus, in the space of one week (February 25 - March 4, 1996) *Hammam* and *Islamic Jihad* terrorists carried out four separate suicide-attacks, two in buses in Jerusalem, one near the city of Ashqelon and the last in Tel-Aviv, killing a total of 58 persons and injuring 218. The last in this nefarious chain of events was the suicide bombing on March 4th outside one of Tel-Aviv’s main shopping malls, resulting in 13 dead and 125 injured. This attack, aimed at a totally civilian target, exemplifies the tactics employed by the Fundamentalist Islamic groups in implementing their “*Jihad*”.

In light of these facts, it is not surprising that the Government of Israel saw fit to officially proclaim, on March 3rd, 1996, a “state of war” between Israel and the *Hammam* and the other terror organizations. In spite of the fact that the legal significance of such a declaration is far from clear, this act is a testament to the gravity of the situation and the understanding that severe measures may be required to combat it effectively.

The purpose of this paper is to outline, in brief, the legal aspects of some of the measures which could be utilized by Israel in such an effort.

### **Administrative Measures v. Criminal Proceedings**

The basic premise of law enforcement in democratic societies is that offenders should be brought to trial before a qualified court, be given full opportunity to defend themselves on the

basis of the evidence presented by the State and, if found guilty, should be subjected to the punishment decided by the court. Thus are satisfied the two main goals of the criminal proceeding (punishment and deterrence) whilst preserving the defendants’ right to fair and impartial trial.

Unfortunately, not in all cases can criminal proceedings form an effective or even viable option. One of the basic principles of criminal law is that all evidence upon which the charges are based must be disclosed to the accused. This requires witnesses to come forward and give evidence and that all other sources of information be disclosed as well. But what is one to do if the witnesses are unwilling to come forward for fear of their life? Or what if the disclosure of a specific source of information would permanently bar future intelligence-gathering from that source, thereby enabling terrorist groups to plan their next attacks at leisure and at much reduced risk? And what if we are not dealing with “normal” criminals or terrorists, but fanatic-religious suicide bombers, who as a result of their death at their own hands cannot be brought to trial, and therefore cannot be punished for their actions so as to deter others from repeating them?

In recognition of these legitimate concerns, customary international law, as well as numerous State’s laws, acknowledge the existence of an alternative legal option - administrative measures. By use of this term one refers to a list of preventive and deterrent measures which can be utilized by a State against individuals, without requiring a court conviction and further without prejudicing the State’s vital security interests.

As a specific example of the implementation of this concept in international law, Article 78 of the Fourth Geneva Convention of 1949 (Geneva Convention Relative to the Protection of Civilian Persons in Time of War) states that -

“If the occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”

In other words, even the Geneva Conventions consider imperative security reasons as sufficient grounds to justify the employment of personal administrative measures, without requiring normal criminal proceedings. (For the sake of completeness it should be stressed that the Article contains additional provisions, including a requirement that a right of appeal be given to those concerned).

## Administrative Measures in Israel and the Territories

Israel, the West Bank and the Gaza Strip were all subject to the British Mandate between 1922 and 1947. The British authorities, well versed, on the basis of their vast previous experience, in the intricacies and problems of military occupation, were great advocates of the use of administrative measures.

A prime example of the British experience in this regard is the Defence (Emergency) Regulations enacted by the British Mandate in 1945. These regulations, still generally in force today both in Israel and in the West Bank, contain numerous provisions empowering military commanders to utilize both criminal proceedings and administrative measures in the enforcement of law and order. Administrative measures under these regulations include, amongst others: restriction orders (regulation 109); police supervision orders (regulation 110); administrative detention (regulation 111); deportation (regulation 112); forfeiture and demolition of houses (regulation 119); forfeiture of property (regulation 120) and closure of premises (regulation 129).

Due to the extensive nature of the British legislation in this regard, it is unsurprising that the vast majority of measures contemplated by Israel today are based, either directly or indirectly, on these Mandatory sources.

In light of the increased public exposure and interest concerning the utilization of such measures in combating the *Hamas* and *Islamic Jihad* movements, the following is a brief legal analysis of three of the most important measures: administrative detention, deportations and house demolitions.

### Administrative Detention

Under regulation 111 of the British Defence (Emergency) Regulations, a military commander could "... by order direct that any person shall be detained in such place of detention as may be specified by the Military Commander in the order".

The regulation did not specify a time-limit for the detention, but did grant the person in question the right to appeal the decision before an advisory committee, the role of which shall be to make recommendations to the military commander concerning any such objections.

It should be stressed that the authority of the military commander in this regard was not totally unlimited, as a result of the provisions of regulation 108, which states:

"An order shall not be made by ... a Military Commander under this Part in respect of any person unless the ... Military Commander... is of the opinion that it is necessary or expedient to make the order for securing the public safety, the defence of Palestine, the maintenance of public order or the suppression of mutiny, rebellion or riot."

Current legislation in force both in Israel and in the West bank, which has replaced regulation 111, continues to acknowledge the right of military commanders (or in the case of Israel - The Minister of Defence) to issue administrative detention orders, but has added several stringent safeguards to better balance the security needs of the many with the rights of the individual in question. Thus, today an administrative detention order may be issued in Israel for a maximum period of six months; the individual in question must be brought before a judge both within 48 hours of his detention and again within 3 months; and finally - decisions of these judges, who are shown all the relevant security information, may be appealed to the Israeli Supreme Court. In the West Bank, due to the different circumstances, the provisions are somewhat less limiting, but still require military commanders to issue orders of up to 12 months duration and grant a right of appeal before a military judge, who is shown all the relevant security information (in accordance with the requirements of international law, as shown above). In addition, decisions of the military court in such cases may be further brought before the Israeli Supreme Court, presiding as the Israeli High Court of Justice.

Administrative detention is utilized only in those cases in which there exists secret information proving that a specific individual poses a significant security danger which cannot be neutralized by other, less severe, means. It should also be stressed that administrative detention is applied only for reasons of prevention of future crimes, and not as a punishment for past actions, which are dealt with by normal criminal proceedings.

### Deportation

Regulation 112(1) of the 1945 Defence (Emergency) Regulations states:

"The High Commissioner shall have power to make an order... for the deportation of any person from Palestine. A person in respect of whom a Deportation Order has been made shall remain out of Palestine so long as the Order remains in force."

As in the case of administrative detention, the person

concerning whom the deportation order has been issued is entitled to appeal before an advisory committee, and, if his appeal is denied, he is further entitled to bring his case before the Israeli High Court of Justice.

The deportation order is, arguably, the most severe of all the preventive measures incorporated into the British regulations. In fact, on more than one occasion have individuals, concerning whom a deportation order had been issued, proclaimed that they would prefer life imprisonment to deportation.

Recognizing its sensitive nature, the Israeli authorities in the West Bank and the Gaza Strip have utilized this option sparingly, limiting it only to individuals whose incessant activities against the security of the region have left Israel with no other effective recourse. Usually, such individuals have already been imprisoned pursuant to convictions for various security related offences and have been held under administrative detention, all of which have failed to prevent their continued unlawful activities, thus convincing the authorities that their continued presence in the area poses a significant security danger.

In December 1992, following a series of *Hammam* attacks against Israeli targets, Israel deported 415 senior *Hammam* and *Islamic Jihad* activists to Lebanon. This deportation differed from previous implementation of regulation 112 by the fact that the specific deportation orders in this instance were issued, in advance, for periods of between 18 and 24 months (these were later shortened to 9 and 12 months, respectively).

One of the main arguments raised against Israel's employment of regulation 112 has been that deportation is in contravention of international law. The Israeli High Court of Justice, in its decisions concerning petitions in this regard, has repeatedly rejected such claims, ruling that international law prohibits only arbitrary mass deportations, meant to serve as collective punishment. Under the court's ruling, Israel's practice of deporting individual activists, on the basis of specific security information, not only does not contravene customary international law, but is a legitimate implementation of the British Mandatory legislation still in force in the West Bank today.

For the sake of completeness it should be mentioned that regulation 112 was repealed in Israel in 1979, and remains in force today only in those areas subject to military administration (the West Bank and the Gaza Strip).

## Forfeiture and Demolition of Houses

Regulation 119 of the 1945 Defence (Emergency)

Regulations, entitled a military commander to direct the forfeiture:

“... of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed...any offence against these Regulations involving violence or intimidation...; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything in or on the house, the structure or the land.”

As can be seen from the above, the language of regulation 119 is very wide, theoretically empowering the military commander to destroy an entire village, an inhabitant of which committed a severe security offence.

The Israeli authorities, guided by the principles of Israeli administrative law and the decisions of the Israeli High Court of Justice, have limited the implementation of this measure significantly. Thus, regulation 119 is only employed in the most serious cases; it is utilized only against the house in which the terrorist in question actually resided; even in such cases, an attempt is made to limit the extent of the forfeiture only to that part of the house which served the terrorist himself; in many cases, instead of destroying the house, the Israeli authorities limit themselves to a full or partial sealing of the house's portals, thereby leaving a future option for remittal of the forfeiture and cancellation of the measure; the residents of the house are entitled to appeal the decision before the military commander; and finally - all such decisions can also be brought before the Israeli High Court of Justice.

At this point it should be stressed that, in accordance with the decisions of the Israeli supreme court, the main rationale underlying the use of regulation 119 is not to punish perpetrators of terrorist actions, but to deter potential future terrorists. Deterrence is especially important in the context of the current Hammam suicide bombings, as there exists a significant difficulty in preventing the attacks once the perpetrator has set out on his suicidal course.

As regards international law - the Israeli High Court of Justice has repeatedly ruled that the utilization of regulation 119, subject to the limitations detailed above, does not contravene customary international law and constitutes a legitimate implementation of legislation in force in Israel and the territories.

*continued on page 43*

## The 10th International Congress

In the Tenth International Congress of our Association, which took place in Jerusalem and Tel Aviv in December 1995, workshop discussions focused on a new economic Middle East; Islamic Fundamentalism; disarmament and non-proliferation treaties; and Jews as a “politically correct” scapegoat. In this issue of JUSTICE we are publishing highlights from each of these workshops; the other addresses will be reported in the next issue of JUSTICE.

# “The use of Jewish Law as an alibi for murder is an insult to our tradition”

Hadassa Ben-Itto

**W**e are convening today in honour of the celebrations commemorating 3000 years of Jerusalem, which has seen our people in their times of glory and in times of disaster; this city which is sacred not only to us but also to other religions, which has never, in all its history, been designated the capital of any other people but the Jews, and is now and forever the undivided capital of Israel; this city of which our forefathers, scattered around the world, constantly dreamed, to which they always turned in prayer, swearing to remember it as they would their right arm; this city where prophets preached and of which poets sang, this city which has fired the imagination of philosophers, of historians and of archaeologists, whose labour is daily rewarded by the ancient secrets which the city grudgingly yields up; this glorious city, which has seen terrible wars not only between nations but also between brothers, but is still called **עיר השלום** - the city of peace, for it is from this city that the message of peace must go out to the world, a message of tolerance, a message of non-violence. The last message proclaimed by Itzhak Rabin before the bullet of a coward hit him in the back.

Itzhak Rabin was born in this city and he fought in its defense. It is only proper that we speak of him here. But it is not enough to remember Rabin and to mourn him. We realize today that after the initial period of mourning we must all face, frankly and courageously, certain issues.

For the first time an elected political leader has been murdered in Israel, in an attempt to subvert the democratic process. We

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Judge Hadassa Ben-Itto is President of our Association. These are extracts from her opening address at the Congress.

must wonder whether the political climate in our young and vulnerable democracy has not served, even inadvertently, as a breeding ground for fanatics like this assassin, and whether we have not been amiss by at least ignoring, and thus, suffering, extreme fanatics to flaunt every democratic rule, almost openly giving notice of their criminal intent.

We must also ask ourselves whether the time has not come to redefine more clearly the boundaries between protected free expression and what we came to describe as “fighting words”, words that can and do become dangerous weapons in the hands of fanatics, as we Jews, of all people, can best bear witness.

Jewish law and tradition have been from time immemorial a shining example of enlightenment, compassion and strict observance of human rights and the sanctity of human life. We are taught that to take the life of one human being is tantamount to destroying the whole world. Yet here is a murderer who declares that he acted not only for political ideological reasons, but also in execution of what he deemed to be the will of God. Here is an assassin who uses religious codes; he and his comrades quote opinions from which they purport to have drawn spiritual guidance in their acts of conspiracy and subversion. As Jews we must confront this abhorrent phenomenon lest our spiritual heritage be presented both to our young generation and to the world at large, in a perverted light.

We as Jewish jurists and lawyers have a particular role to play in this respect. We are all experts in the laws of our respective countries, but sadly, most of us have to confess to complete ignorance of the laws which comprise such a large part of our national heritage. We have always been, first and foremost, the people of the law. We have given the world its most basic laws,

beginning with the Ten Commandments. For many centuries our scholars have been busy elaborating on those initial commandments and by a fascinating process of intellectual discussion and writings, have given us a body of law which is as complete, as rich, as versatile, and as respectful of the rights of men, as that of foreign legal systems to which we all bow. Historically, there has always been a linkage between our laws and our religion, and so, the interpretation of the laws, even those which deal with completely secular issues, has been left almost exclusively in the hands of religious leaders and religious courts. We lawyers, who are particularly equipped to interpret laws and adapt them to the needs of modern society, have allowed ourselves to be shut out and have thus, out of sheer ignorance, given up the right to our own heritage. It is with a deep sense of shame that we, who could quote chapter and verse from laws of many nations, cannot confront a misguided youth who uses legal terms as a basis for his crime, for we do not speak his language, we are not familiar with his codes.

A public discussion is suddenly taking place concerning the true interpretation of *dinim*, laws, like *din rodef* and *din moser*, and although these particular laws do not deal with religious but rather with secular matters like the right to self-defense of an individual and a community, we cannot participate in this argument due to our collective ignorance. I suggest that this is no longer an academic exercise. It has become a necessity. Even as we firmly insist that the only binding laws in a democratic society are those enacted by its legislature, we cannot allow our

Jewish laws to be misinterpreted and presented as those of a barbaric society, which we have never been.

The use of Jewish law as an alibi for murder is not only an insult to our tradition, it is not only a blot on our reputation as Jews, but it may well serve as a powerful weapon in the hands of those who use every means to attack us as a people. We must be equipped to confront this absurd allegation in the intellectual sense, at the same time as we strongly confirm the supremacy of the laws enacted by the legislature as the only binding laws in a democracy such as Israel.

Justice Haim Cohn once explained to me the difference between an *apikores*, from the Greek *epicaurus*, a non-believer, and an *am haarez*, an ignoramus. It is the personal choice of each of us whether to be a believer or an *apikores*, but where our heritage is concerned, none of us should be an *am haarez*.

I propose that our Association undertake a special project to encourage and enable our members to familiarize themselves with the riches of our Jewish laws.

We are convening in Jerusalem at a very important juncture in our history and in that of the whole region. Peace, for which we have hoped for so many years, is becoming a reality. Even though there are differences of opinion as to the details, we must all unite in a prayer that the young generation of this region, of all its peoples, be no longer called to sacrifice their lives to the *molekh* of war, but may look forward to a new future of peace and prosperity.

Opening Ceremony: (l-r) Front row: Adv. Roubache, Adv. Hoter-Ishai, Adv. Nener, Sir Martin Gilbert, Judge Ben-Itto, President Barak, President Limbach, Justice Landau, Adv. Gabay. Back row: Adv. Lewin, Adv. Tory, Adv. Wolfe, Adv. Klugman, Prof. Shapira, Prof. Cotler, Adv. Sadot, Adv. Raphael, Adv. Ben-Artzi.







Historian Sir Martin Gilbert delivers key-note address at opening session.



Delegates visiting the Supreme Court of Israel premises in Jerusalem.



Israel Bar hosts delegates at a reception in its Tel Aviv headquarters.



Tel Aviv Mayor Ronnie Milo addresses delegates at Enav Cultural Center.

Workshop on the New Middle East in progress.



Participants visit the site of late Prime Minister Itzhak Rabin's grave.



# Repression and Reform in the Fight Against Islamic Fundamentalism

Martin Kramer



I bear good news and bad news. The good news is this: The current Islamist wave may have crested, and Islamists are on the defensive across the Middle East and North Africa. Repression is working. But the bad news is that deep problems remain, and if they are not resolved the next wave may not be so easily broken.

What is true for Islamist movements generally is also true for those Islamist movements most active against the Arab-Israeli peace process. They too are entering a defensive mode, but if the peace process falters they come roaring back. They are a threat, not only or even primarily to the west and Israel, but above all to Muslims themselves.

Sixteen years have passed since an Islamist movement overthrew the Shah of Iran and installed an old man in robes as leader of an Islamic state. The experts were taken by surprise and many rushed to predict more Islamic revolutions.

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Professor Martin Kramer is the head of the Moshe Dayan Centre for Middle Eastern and African Studies, Tel Aviv University. This talk was given during the workshop on Islamic Fundamentalism, moderated by Prof. Bernard Lewis.

Since then many more Islamic movements have appeared. Some of these movements have even become household words in the west. There is the *Hizbullah*, but there is also *Hamas*, the *Islamic Jihad*, and they have been responsible for plenty of violence, assassinations, uprising, bombings. And yet, almost seventeen years later, there has been no second Islamic revolution. Despite the violence, the regimes are still there. The men who ruled the Middle East seventeen years ago still rule it today.

This too has taken many of the experts by surprise. Since the Iranian revolution, and again after the outbreak of the Algerian civil war, many of them argued that the triumph of Islamic movements is inevitable. The Middle East, they claimed, was like Eastern Europe, a set of dominoes set to fall before Islamic movements. Algeria would go first and its fall to Islamists was predicted with confidence.

But have these predictions of an Islamist sweep come true? Not even in Algeria. Not only has the regime survived. At the beginning of the year it took a major offensive against the Islamists, and now its president has

secured an undeniable vote of confidence from the majority of Algerians. What is true about Algeria is even more true about Egypt. Two - three years ago, various experts were warning that Egypt could go Islamist, that terrorism would replace tourism. But today the most violent Islamists have been pushed back into the remotest parts of Egypt; many languish in prison. The Muslim Brothers are crying foul but also crying uncle, and the tourists are coming back.

Elsewhere, Islamist movements are almost everywhere on the defensive, in Tunisia, in Morocco, in Saudi Arabia. At this moment no additional Islamic revolution is in sight. Why? Where did so many of the experts go wrong this time? Above all, they underestimated the power of the state. The lesson of the Iranian revolution was not that Islamist movements were all powerful, it was that rulers could fall if they showed weakness. The Shah, despite his omnipotent image, had become a weak ruler. He had been diminished by his cancer. He thought America had abandoned him. But this did not mean that other rulers

would show the same weakness or repeat the Shah's mistakes, and they have not. They have understood that the preservation of their power is tantamount to their physical survival. Faced with Islamist opposition, they have fought back. They have used their intelligence apparatus and security forces, their courts and their prisons. It has not usually been done in accord with western notions of human rights or democracy. But the sum of it is that every ruler threatened by an Islamist opposition has found a way to contain it or confront it.

Some rulers have ground their Islamist oppositions into dust, for example, Syria's Hafez Assad and Iraq's Saddam Hussein. Some have brandished the whip whenever necessary and with results, for example, Ben Ali of Tunisia, Hosni Mubarak of Egypt. And others, like Jordan's King Hussein, have so much credibility when it comes to repression, for example, Black September, that their Islamist opponents have become docile, accepting indignities which demonstrate their abject vulnerability. In other words, repression is working.

In a talk given two years ago, the present Ambassador to Syria said that:

"Left to their own devices, the region's discredited regimes are likely to try to muddle through and repress opposition, and its extreme Islamists can be expected to become the next agents of change".

This is a diplomat's reworking of the tired academic saw horse that repression only strengthens its victims. It is just not true. Anyone who has had an introductory course in Islamic history knows that it is strewn with dissident groups and revolutionary sects which were repressed

out of existence. Those Islamists who understand this, who now bend in the wind, are likely to survive to fight another day. The others, the so-called extreme Islamists, seem bound to be extinguished. Nothing succeeds like suppression.

The recent trouble of Islamist movements is due not only to the resolve of rulers to repression. It is due to the mistakes and weaknesses of the Islamists themselves. For an Islamist movement to make a bid for power, Islamists need secular allies, others who are not Islamists but who are prepared to join

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them against the rulers, and here lies the great structural weakness of the Islamists. They cannot tolerate those who differ with them, certainly not long enough to acquire power. Impatient for that power, they begin to purge society even before they have it, with results that are disastrous to themselves. We all know the symptoms of this intolerance, violent Islamist excesses which alienate potential followers and potential allies. In Algeria, when a struggle developed between the regime and the Islamists, the Islamists began to strike at the regime's supporters. In practice this meant killing intellectuals, blowing up journalists and

slitting the throats of unveiled women. Whole segments of society learned to fear the Islamists more than the regime. The regime has an upper hand in the conflict today in Algeria. This is largely because of the grievous mistakes of the Islamists.

The Islamists decided to attack foreign tourists. Tourism would drop off, this would deprive the Mubarak regime of a source of revenue and weaken it, so the theory went.

But Islamists overlooked the essential point. Tourism revenues do not go straight to the Egyptian state. They go to millions of individual Egyptian households which depend on tourism for their livelihood. It was broader Egyptian society which was harmed by the Islamist terror and it was broader Egyptian society which turned against the Islamists. So it is not only repression which has isolated Islamist movements. They have isolated themselves. Some movements do exercise self-control, but it is remarkable how readily many of these movements descend into indiscriminate violence against other Muslims who do not share their vision. The flaw may be structural. It may set an intrinsic limit on the ability of these movements to forge alliances over time, alliances without which Islam must remain weak and vulnerable.

Is this also true about the movements which pose the greatest challenge to the Arab-Israeli peace process, *Hamas* and *Islamic Jihad* in Gaza and the West Bank, *Hizbullah* in Lebanon? Both the *Hamas* and *Jihad* have actively worked to undermine the peace process by campaigns of violent *jihad*, as they call it. Both have jolted the Israeli public repeatedly by their suicide attacks. Yet



arguably these movements, despite their violence, are entering a defensive mode.

During the winter we saw a major effort by the Islamists to seize the initiative away from Arafat and put the peace process on ice. Each suicide bombing, from Tel Aviv to Beit Lid, set the peace process reeling. With each bombing the pundits said that one more bombing like that the process would be finished, and as often as not these statements were indeed followed by more bombings. And yet 1995 saw Oslo 2 and much of its implementation. What happened?

Once again repression has done its job. After the terrible winter Israel and the Palestinian Authority moved to retake the initiative. At first Israel imposed a closure on the West Bank and Gaza. The closure had the specific purpose of breaking the momentum of the Islamist attacks, to open political space for the peace process itself, and this is just what happened. A stretch of calm time was opened which was filled with diplomacy and produced Oslo 2.

But the closure did more than that. It placed the onus for the economic deprivation of the Palestinians in the wake of that closure squarely on the heads of *Hamas*. *Hamas* began to pay a political price. The polls of Palestinian opinion over 1995 show that the suicide bombings did nothing to bolster the popularity of *Hamas* and the closures did much to diminish it.

At the same time Israel brought pressure to bear on Arafat to rein in the Islamists. The thesis behind Oslo, has always been that Arafat can control the Islamists, either by force or by guile, if he wishes to do so. It is Arafat who has the most surplus political capital, he can do the most to delegitimize the Islamists.

It is Arafat whom the Islamists fear confronting directly. This thesis has yet to be proven but it is not groundless. There have been more and more instances of police measures against *Hamas* and *Jihad* activists, and today both Islamist organizations hesitate to plan and launch attacks from areas under Arafat's control. Part of this is their desire not to be the cause of any delay in the Israeli withdrawal, but part is also a growing grudging respect for the Palestinian police.

*Hamas* and *Jihad* have lost ground. Their position as an enforcer of social norms in Gaza and the West Bank has been seriously eroded as the Palestinian Authority has established its authority. The veils have come off many women. Night life has returned. The Israeli withdrawal from the major cities has carried Arafat to new highs, and *Hamas* to new lows. Support for *Hamas* is down to under 10 percent, which is a remarkable decline, about half of what it was in 1994. Weakened *vis-à-vis* the Palestinian Authority and the Palestinian public, *Hamas* is seriously reconsidering its position, demonstrating that it is weakness that gives rise to moderation, not power. When *Hamas* operated in a vacuum and exercised a kind of power, it became menacing and violent. If there is talk of accommodation, of putting down the gun, of playing straight politics, it is because they fear the strap. Repression has made its point. *Hamas* will survive, but against its will it will also have to change.

Today, in the Middle East and North Africa, the Islamists are on the defensive. In Algeria and Egypt, the Islamists are opposition. But even in Iran, the bastion of Islamic revolution, all reports indicate

the total failure of the regime to transmit Islamic values to the next generation. Teheran is covered with the forbidden satellite dishes for picking up Oprah Winfrey and the young people are perhaps the most punk in the Muslim world today. At least for now, and for most places, the Islamist wave has subsided. In some places this is because repression has worked. In others it is because Islamism has failed.

Does that mean that Islamism is a spent force? In the spring of 1991, after Iraq was crushed in the Gulf war, many Islamists supported Iraq, the foreign report of *The Economist* ran a lead article entitled "The Islamic Wave Recedes". The Islamist parties had failed, Iran was turning inward, Saudi Arabia had cut off Islamists because they had supported Saddam Hussein. But later in the year came the Algerian elections, the first round, after which *The Economist* itself ran this headline: "Islam Resumes its March". Had the march ever really stopped? Had the wave ever receded? We are dealing here with dynamic forces and much of that dynamic is difficult to read.

In the very short term Islamism has been checked and contained, but in the middle term it could well rebound. The Islamist surge has been a symptom of much deeper problems. The undermining problems are still there. This is a part of the world where population is outstripping resources, where the unemployed grow larger in numbers each year, where illiteracy is high, where governments are dangerously deficient in legitimacy. And on top of that, the men who rule the Middle East are the same ones who have ruled it for two decades or more. With each passing year the leaders grow one

year older, while the population grows ever younger. As those gaps grow, some form of protest must fill them.

The peace process might close some of these gaps; it is doubtful that it can close them all. The Arab-Israeli conflict did not create the ills on which Islamism feeds. The resolution of that conflict will not end this deep crisis of identity which afflicts Islam, so that there is still probably no substitute for a mix of repression and reform if the Middle East is to be spared an upheaval.

What about *Hamas*? Could it also rebound? *Hamas* seems destined to be part of Palestinian politics for a long time to come, and it will wait for the peace process to falter. If it did, there is little doubt that *Hamas* would be the principal beneficiary. Next year *Hamas* will be tempted to test the limits. They learned

something crucial this past year, that their violence is enough to move Israeli opinion. It might even be enough to unseat Israel's government if that violence were to come on the eve of Israeli elections.

Israel's elections are scheduled for October 1996 and timed differently such violence, for example, dramatic suicide bombings during the last month before elections, could leave a lasting imprint on Israeli politics, and place a much larger question mark beside Israel's agreement with the Palestinians than the one that already exists. The temptation for *Hamas* will be very great indeed, they will only resist it if they are confronted with the same fierce determination they themselves have sometimes shown.

In the meantime it would be well to see the peace process as open-ended, as

an ongoing struggle with no V-Day, no final surrender of its opponents. Despite its progress, we may be only midway in the struggle against the fundamentalist alternative to peace, and that alternative on both sides, Muslim and Jewish, is a grim one: the transformation of the Arab-Israeli conflict from a national struggle which might be resolved through compromise into a war of religion which must be waged until the end of time. However flawed this process is in the eyes of some Israelis and Arabs alike, most of them see it as preferable to a fundamentalist Armageddon. But as the fundamentalists have demonstrated themselves, words are not enough, and whether the peace-makers can match the peace-breakers deed for deed remains an open question indeed.

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# Islamic Fundamentalism: A Threat to Whom?

Uri Lubrani

**T**he paradox of the current situation is that while the Israeli-Syrian peace talks are proceeding we have a sizzling front to the north, from the Mediterranean to Mount Hermon and the border of Syria, where for the last fifteen years we have had to confront a group of terrorist organizations headed by *Hizbullah*; a group which is dedicated to subverting the peace process, doing what it can to create mischief along our border, killing as many Israelis as possible, and in the main to serving as an extension of the foreign policy of Iran.

We face a number of dilemmas. On the one hand, we have nothing against Lebanon. I was head of the Israeli delegation to the bilateral peace talks in Washington which lasted for two years and which were totally useless. But I had occasion to meet my Lebanese counterparts and we agreed, primarily with body language, that had we had the ability to discuss matters freely we could have settled them within a week. Basically, we have nothing of overwhelming dimensions to overcome in our relationship

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Mr. Uri Lubrani is the Israeli Government Coordinator for Lebanese Affairs. He was speaking on the eve of the second meeting of the Israeli-Syrian peace talks at Wye Plantation in Maryland. The talk was given in the workshop moderated by Prof. Bernard Lewis.



with Lebanon. The only issue is security.

Ever since 1982, when the campaign on the northern border called "Peace for Galilee" ended, we have been confronted with a new phenomenon: the presence of an Iran financed, orientated, guided, and trained force which is arraigned against us. The *Hizbullah* is the major terrorist organization operating against us and it has been and continues to be the major threat on our northern border.

When the revolution in Iran began to flex its muscles outside Iran, Lebanon became a target in which this revolution could operate. This was evident immediately after Iran began to build up its capabilities; its finger prints could be seen in whatever happened in Lebanon. We were still deep in Lebanon, in Beirut,

when the attacks on the American Marines occurred. The *Hizbullah* were trained by Iran, their attacks were planned by Iran, and they were executed at Iran's behest.

Why do I accentuate this? Because it should be understood that Iran is engaging in long term planning. The Iranians know that in Lebanon, in the long run, the *Shi'ite* community will become predominant, a community which will decide the future of Lebanon. It will not happen today, it may not happen in another two years, but it will happen.

The Iranians decided that they must try and penetrate the ranks of this community; they must become the pace-makers and pace-givers, and they have been doing this in a very consistent and planned way. Iran spends between 80 and 100 million dollars a year in Lebanon. This is a great deal of money in Lebanon. It is a great deal of money anywhere, but in Lebanon it goes a very long way. It is used in order to make the military capabilities of *Hizbullah* effective. It is used in order to penetrate the *Shi'ite* community. And it is used for social purposes; to build schools, mosques, community centres, establish pharmacies and hospitals. This is how the Iranians are moving into this community. They expect that once the *Shi'ite* community is given the opportunity to lead the political constituents in Lebanon, Iran will be there to call the shots. *Hizbullah* will be there at the pinnacle, at the head of this community. This is what they are aiming at. An additional objective, of course, is to subvert the peace process. I believe that today they already know that this is unattainable. But in order to stake their claim

inside the *Shi'ite* community in Lebanon, they must continue to be consistent in this regard.

The Iranian dimension within *Hizbullah* is not very visible. There are members of the Revolutionary Guard in Lebanon but they keep a low profile. They give the religious and political leadership of *Hizbullah* the ability to appear to make their own decisions but if one looks at the details, one sees the *modus operandi*, the way these operations are being prepared, one sees Iranian fingerprints everywhere: this is not Arab, not Syrian, not Lebanese, this is Iranian planning.

Israel must contend with this and it does so subject to a lot of constraints. The first constraint is that we would not like to be sucked into a situation where we are forced to take our divisions back into Lebanon. Secondly, we must ensure that our population along the northern borders, from Rosh Hanikra on the Mediterranean to Mount Hermon, is able to lead a normal life; that people are not forced to go into bunkers and be alerted all the time.

In 10 years, 6 civilians have lost their lives in the north. 152 Israeli soldiers and 395 soldiers of the South Lebanese Army, which is financed and guided and which is the offspring of the population in the security zone we are husbanding, have been killed. These figures show that the major objective which Israel has set itself - to let civilians lead a normal life up north - has been achieved. Not that there has been no provocation; at times, when we suffer a very severe blow, our desire for retribution is such that it takes a lot of containment, patience and power not to take action which will generate dynamics which will then lead to some-

thing much more violent. There is a saying in Hebrew: *Zehu gibor ha kovesh et itzro* (he is a hero who is able to contain himself), very frequently this is exactly what we have to do.

The anomaly is that Syrian and Israeli delegations are sitting in the United States, presumably talking peace while there are elements fighting against us which are totally under Syrian control. One must not be deluded. Had President Assad the will to contain *Hizbullah's* operations he could do so within a very short time. He does not want to do so, primarily because he uses his influence with *Hizbullah* as a bargaining chip on the Syrian-Israeli track. Assad believes that by hitting us, by causing us to bleed, he will lead us to feel that we have to make concessions on the other track so as to be relieved of this burden.

I think that by now Assad understands that this is not going to happen and that we are going to sit put, with all the problems, with all the dangers, with all the perils, with all the pain that this is causing. There is not one Israeli family which does not have one of its members, remote or closer, serving in Lebanon. And there are many thousands of mothers who go to bed and wake up asking, what has happened to my boy? This has become routine. But it is a burden which we will continue to carry until we have an alternative which will assure that such an arraignment against us is no longer possible.

We hope that once we reach a basic understanding with the Syrians, the Lebanese will be allowed to negotiate their own peace. At the moment, however, the Lebanese are openly prohibited from doing so. Syria says Lebanon will only be permitted to nego-

tiate peace with Israel when Syria so decides and only when it is satisfied that the Syrian-Israeli track is on track, on their terms, of course. Nevertheless, there are three major problems which are on the Lebanese mind:

First, they quite naturally want to have their territory in south Lebanon fully under their own control. That is quite legitimate and we repeatedly state that we have no territorial claims on Lebanon.

Second, they would like to emerge from this process as a country which is free from the presence of foreign elements, be it the Israeli presence which is the easiest to achieve, if we have security arrangements, or a Syrian or an Iranian presence.

Third, they would like to be assured that Lebanon will not be a bargaining chip between us and the Syrians, *i.e.*, that no facet of Lebanese integrity, territorial integrity or sovereignty, will be sold to anybody as a result of this set of negotiations.

Israel for its part states that once it has a security arrangement with Lebanon, it sees no reason whatsoever for anything to emerge which would be a stumbling block to a full normalization between Israel and Lebanon. Israel will not tell the Lebanese what to do or whom to choose as its friends, and Israel will not want to be involved in Lebanese internal politics. This is not what can be expected on the Syrian side but for the moment we have to be very patient, persevering, and extremely strong, in order to continue what we are doing now and not allow the use of the Lebanese front to be exploited on the Syrian track. Our efforts are devoted to this at this point and I hope we will succeed.



# Arms Control and the UN Experience in Iraq

Charles Duelfer



**F**ive years ago Iraqi forces occupied Kuwait. They were wreaking enormous damage on that country and city. By this date in 1990, we have been told, Iraq had completed filling Scud warheads and aircraft bombs with both biological and chemical agents. These weapons were dispersed to hide sites in Iraq and ready for use. This action was begun immediately following the passage by the Security Council of Resolution 678 on Thursday, 29 November 1990 which authorized the use of force to expel Iraq from Kuwait if they did not do so voluntarily by 15 January 1991. It paralleled a crash program which gave them a good technical and knowledge base to launch this crash effort.

We have now established that Iraq had an infrastructure dedicated to the production of weapons of mass destruction that was huge by any standards. Rough estimates of their investment in nuclear, chemical, biological and long range missile systems are in the tens of billions of dollars. The sites involved in these programs are huge and bring to mind some of America's largest space and military facilities.

The Iraqi chemical weapons program produced tens of thousands of chemical artillery shells, rockets, Scud warheads and aerial bombs. They had a sophisticated biological weapons program including Scud warheads, bombs, spray systems, and

artillery rockets for the delivery of such agents as Anthrax, Botulinum, Aflatoxin, and others. Iraq had a nuclear weapons development program that was advanced and pursuing multiple routes to its objectives. The Iraqis could have constructed a single nuclear weapon as a result of their crash program by the end of 1991 had the war not intervened. Its long range missile developments were obvious to the residents of Tel Aviv.

Iraq did all this while it was a party to the Nuclear Non-proliferation Treaty. Iraq had signed, although not ratified, the Biological Weapons Convention. Iraq was also subject to the obligations of the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Warfare signed in June 1925. Clearly, Iraq is an example of the failure to restrain the proliferation of so-called weapons of mass destruction. There are a lot of reasons for this. They had a large and talented pool of scientists and technicians. They had access to much western technology and assistance.

Offensive operations ended at midnight 28 February 1991. On 2 March, the Security Council adopted Resolution 687 demanding that Iraq implement the series of resolutions passed before the war and spelling out the measures necessary for Iraq to take to definitively end hostilities. On 3 April 1991 following a month of intensive consultations, the Security Council passed Resolution 687. In this Resolution, the Security Council set the specific terms for a formal ceasefire to end the war. It is worth remembering that today, there exists a ceasefire only.

Resolution 687 sets out a broad range of requirements for Iraq to meet. Section C pertains to weapons of mass destruction. The

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Resolution banned Iraq from further work in these programs, required them to declare all elements of them and required them to be eliminated. Further, the Resolution created the Special Commission for the purpose of assuring that Iraq met these obligations (working with the International Atomic Energy Agency in the nuclear area). The Council explicitly sought to address the Iraqi weapons of mass destruction programs by linking their verifiable destruction to any lifting of the oil embargo against Iraq. The Resolution gave special leverage to the Special Commission and IAEA by tying the completion of those tasks to lifting the oil embargo.

In a subsequent Resolution 715, the Council established a requirement for the long term monitoring of Iraq to assure that it does not reconstitute those prohibited programs. The Commission has had the responsibility, with IAEA, to implement these resolutions. It has been a long and difficult task which is not yet complete.

### What have we done?

Between April 1991 and November 1993 the Commission focused its work on the identification and rendering harmless of Iraq's past programs. Iraq, needless to say, did not reveal their weapons of mass destruction programs. In fact, they took great pains to conceal them from UN inspectors. Further, until 26 November 1993, Resolution 715 directing the monitoring system was not acknowledged by Iraq. Therefore, the Commission could not begin the design and construction of the monitoring system until then.

Thus, for the first two and a half years, the Commission and IAEA worked on its task of identifying the prohibited weapons and facilities located in Iraq. Some of these were easy to identify, though not necessarily easy to destroy. For example, the nuclear facilities were identified with relative ease, but removing hot nuclear fuel was a complicated procedure requiring the negotiation of a contract with Russia to provide airlift and processing. The IAEA working with UNSCOM located the major sites involved in the nuclear program and took steps to assure the end of this program.

Similarly, the identity of the Muthana State Establishment - a

huge facility dedicated largely to the production of chemical weapons, was well-known. The Commission took control of the facility and began the task of destroying the remaining chemical weapons in Iraq. The Commission established a Chemical Weapons Destruction Group whose purpose was to safely destroy these munitions and bulk agents. The Commission directed the destruction of over 28,000 chemical munitions (including bombs and rockets filled with nerve agent mustard gas, and other agents). This was a very difficult task requiring two years of dangerous work - often in extremely hot weather with staff in full individual protective suits. The fact that so many weapons - often in unstable form - were safely destroyed is something the Commission is quite proud of.

The Iraqi long range missile program was also a matter of particular focus during the early years of the Commission's work. The focus was on the Scud and modified Scuds called Al Hussein missiles. Our experts located remaining missiles and facilities in Iraq and proceeded to direct their destruction. Since the resolution permits Iraq to retain missiles of a range less than 150 kilometres, the Commission must keep a close scrutiny on such permitted missiles and the facilities used to develop them.

During the two and a half years from the end of the war until Iraq finally accepted the resolution on monitoring, the Commission conducted roughly 65 inspection missions into Iraq. Some of these were quite confrontational, while most were more of a more routine nature. The Commission's and Iraq's tactics were evolving throughout. It is important to note that the Commission has extensive authority given to it by the resolution. In effect, the Commission can go anywhere at any time to do almost anything it deems necessary to accomplish the tasks directed by the Security Council's resolutions.

In the area of biological weapons, less was accomplished. Until the end of 1993, there were only two full-fledged biological weapons inspections. The reason is that while there was intelligence of Iraqi activities in this area before the war, the only site identified to the Commission was one which was bombed and had little residual worth. The Iraqis denied

**Rough estimates of Iraqi investment in nuclear, chemical, biological and long range missile systems are in the tens of billions of dollars.**

adamantly any work beyond a minimal research effort of a defensive nature only. As a result, while by no means believing the Iraqis or that the issue was closed, the Commission focused its efforts in the other areas where more was being yielded.

A major step forward was taken by Iraq in acknowledging the requirement of the monitoring system prescribed by Resolution 715. There was no way to assure the Council or the world that Iraq would not reconstitute its programs in the future without it. Nevertheless, Iraq did not want to yield further concessions of sovereignty without attempting to acquire something in exchange - such as commitments to lift the embargo. This has been a persistent quality of their actions towards the Commission and Council. Iraq seemed to believe - mistakenly - that there was room to negotiate about the resolutions passed by the Security Council. As much as anything, this has delayed the progress of the Commission and the IAEA. The requirements are clear and without flexibility. For its part, Iraq has been concerned that they would not obtain a lifting of the embargo no matter how much they did regarding the resolutions. Hence they have sought to have some small steps or acknowledgments made for each positive action they take. In fact, they have to do everything before any step is taken to lift the embargo.

In any case, with Iraq finally acknowledging the monitoring resolution, the Commission and IAEA began an intensive effort to design and put in place a monitoring system to assure that Iraq did not recommence its prohibited programs. The result is the most intrusive and extensive arms control monitoring system yet implemented.

The first step was to require Iraq to provide detailed descriptions in set formats of all sites related or potentially related to activities that could have relevance to weapons of mass destruction. These included obvious sites such as the missiles production plants and Tuwaitha nuclear reactor facility. But it also included such places as university microbiology labs, drug production plants, and a range of chemical facilities. Each of these sites (and there are over 200) was then surveyed by teams to assure the data were correct and assess the priority of the site

for monitoring. Judgments were also made regarding whether camera or sensor monitoring were appropriate. Individuals responsible at each site were identified and points of contact established.

Eventually, sites were classified as to their priority and each site had an inspection plan designed specifically for it, called "site protocols". These protocols form the basic building blocks for the monitoring system and are loaded into a computer system. Experts can call up a site and review its history, inspection reports, and all associated data with that location.

The process of establishing these protocols was very tedious - especially in the biological area.

Monitoring had never really been done like this before and the number of sites which could be used for prohibited biological warfare activity was very large - over 100. The missile area was the easiest since the number of sites was more finite, and the nature of the missile work is more readily observable. Hence the missile monitoring system was completed first in August 1994. The chemical area began operating in October 1994 and biology not until April 1995.

One additional feature of the monitoring system will be essential when the sanctions are lifted. This is the export-

import mechanism which obligates both supplier and governments and the Iraqis to notify the Commission of shipments to Iraq of items of a dual-use character. These are things which could have use in either civilian programs or which could be instrumental in prohibited activities. For example, certain chemicals could be used for pesticides or chemical warfare.

This notification to the Commission will greatly aid in keeping track of Iraqi activities. Moreover, it is important to note that if equipment is found by the Commission in Iraq which has not been notified it may decide to destroy it.

At the same time the Commission was establishing this system, efforts were continuing to attempt to obtain a full understanding of the Iraqi past programs. A fundamental point of our monitoring confidence is that we need to have a firm baseline knowledge of where Iraq is starting from. For example, if we

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know Iraq could build its own liquid fuel missile engines before the war, it changes the type of activity we would look for in monitoring. The process of peeling back the layers of what Iraq actually did and could do, has been a long and difficult process. Iraq has only provided information when it believed that it had no option to further conceal it.

During 1995, we gradually gained more confidence in our assessment of the Iraqi missile and chemical programs, albeit with some specific areas of concern. We continued to have little firm knowledge of the biological warfare program. In the spring of 1995, Tariq Aziz stated explicitly that the Iraqis would only discuss their biological warfare efforts after the Commission gave a clean bill of health in missiles and chemical warfare. They stated to us, and anyone who would listen, that they have revealed everything. In April, the Commission provided a carefully caveated report on the level of understanding in the chemical warfare and missile areas. Iraq took this as a sufficient step forward on our part and it, after four years, admitted it had an offensive biological warfare program. During the summer Iraq made an initial presentation that was, nevertheless, illogical and clearly wrong. For example, they stated they never weaponised the agent they produced and that immediately before the war they destroyed all agent. We appeared headed for another long tortured process of gradually trying to dig for the truth.

On August 8, Hussein Kamel defected. This was an inflection point in our work. He was an individual with direct authority over most of these programs. Clearly, he knew much of the information the Commission needed. He also knew what Iraq was concealing. Iraq reacted by seeking to preempt any revelations he might make and avoid having credit go to Hussein Kamel. Hence, the Iraqis suddenly began providing new information on their programs and even began providing documentation which they had heretofore steadfastly denied having. Throughout the fall of 1995 experts conducted further inspections and reviewed the information received. We still find Iraq is trying to conceal programs and efforts, but the number of revelations has been significant. The major ones have appeared

widely in the press including the crash nuclear program, the extensive biological weapons program, the radiological weapons effort, and the indigenous Scud missiles engine production.

While we are much closer now to an adequate understanding of the Iraqi past activities, the revelations themselves have left some areas of doubt which have yet to be clarified. We cannot yet tell the Council that we have confidence that weapons (including missiles) with chemical warfare or biological warfare warheads do not exist in Iraq. We still need to be able to verify the Iraqi claims that all such items have been disposed of. We need further documentation and other evidence which we believe still remains in Iraq.

Nevertheless, we have accomplished a great deal of what is required under Resolution 687. We have eliminated huge amounts of weapons in Iraq and put in place an extremely intrusive and extensive monitoring system. Nothing exists even remotely likely this anywhere in the world. It has implications for regional security and may serve as a useful example for other areas.

**The process of peeling back the layers of what Iraq actually did and could do, has been a long and difficult process. Iraq has only provided information when it believed that it had no option to further conceal it.**

### **Observations on the Commission's Experience in Iraq**

Iraq's resources were both a prime cause of the proliferation problem and a key part of the solution. Iraq could not have progressed so far without the availability of virtually limitless resources to apply to the development of weapons of mass destruction. By the same token, these resources will be tapped to fund the long term monitoring and pay for continuing inspections. They will also be required to pay other compensation which will be quite sizable.

More disturbing for their future, is the fact that if Iraq had not invaded Kuwait, their programs would not have drawn the consolidated outrage and action on the part of the international community. Their nuclear program may well have progressed to conclusion. The lesson will not be missed by other countries seeking their own weapons of mass destruction.

Iraq lost the war and had to accept the constraints imposed upon it by the international community with no room for negotiation. They could not argue to protect their sovereignty. In

addition, the sale by Iraq of its vast oil resources is directly linked to their meeting the requirements of the Commission regarding weapons of mass destruction.

The Commission's monitoring of Iraq is conducted with unprecedented access to the country. We can go anywhere at any time. Iraq must answer our questions and produce whatever documents or information we require. They must abide by our rules as we decide them. Obviously, our actions are limited to the accomplishment of the objectives of Resolution 687 and we specifically avoid interfering with their legitimate industrial and conventional weapons activities. It is notable that the Iraqis are not constrained in providing for their defence with conventional weapons.

Our activities set a new standard for arms control intrusive-ness. Its effect on confidence building in the region will be seen over time. It is clear that our presence certainly reduces some uncertainty for defence planners in the region and limits to a sizable extent the threat assessed by countries in the region. However, translating such intrusive monitoring to other countries would be problematic. Nevertheless, the Commission's experience will show that monitoring can take place on a very intrusive scale and still protect national interests and activities.

With respect to other international arms control regimes, the monitoring of chemical warfare and biological warfare facilities is an important precedent. Again, we have very intrusive measures and access, but we believe they do not inhibit Iraq's legitimate industrial activities. Iraq has become accustomed to the visits of our inspectors and their required reports are now accepted as part of the regular part of the work of the sites under monitoring. International arms control experts have looked to our methods as examples of one type of system which could be applied to future arms control agreements. The situation in Iraq is an example of the trade-off between sovereignty and confidence in the monitoring system.

The export-import mechanism is perhaps one of the important new elements. While we have no operational experience yet, the fact that supplier countries have agreed to it is an important step. Previously, strong commercial concerns inhibited supplier countries from agreeing to share information. We have established a precedent whereby it is agreed that information will not only be shared, but shared in advance of the transaction. The fact that we are an independent body receiving the information with no authority to decide on the transaction prior to the entry of the goods into Iraq is important. Curiously, the Commission's pres-

ence may make some transactions easier for governments to approve. With the reassurance that the Commission is in Iraq and monitoring Iraq closely, it may make it easier for some governments to approve the sale of dual use items.

On the other side of the ledger, many of the circumstances of our experience in Iraq make applying lessons to other areas difficult. The lever of the oil embargo is unique. We must assume that without that, the cooperation of Iraq, especially in the future would be doubtful. The ability to pay for this elaborate system is also unique. It is difficult to imagine a similar source of resources in other future situations.

Finally, the surrender of sovereignty by Iraq following the war is not likely to be duplicated in any voluntary arrangement.

## Conclusion

The experience in Iraq highlights some essential points:

1. Inattention or the inability to deal with the Iraqi proliferation problem before the war was ultimately very expensive to the international community. It highlights the problem of proliferation both in regional and global contexts.
2. Intrusive monitoring can be accomplished and can serve as an important way of building confidence. The Iraqi experience may be extreme in terms of its intrusiveness and not replicable in a voluntary arrangement, but it does set a new standard for consideration.
3. The export-import mechanism is an essential element of monitoring. Broad cooperation by supplier countries is essential.
4. Paying for international systems of monitoring is no simple feat, but in the long run may be offset if resulting confidence can reduce defence expenditures.
5. An international monitoring system staffed by experts can work within the UN context, but must have great flexibility and independence. Reporting directly to the Security Council is a strong feature of the Commission and avoids the bureaucratic problems of being associated with the rest of the UN administrative structure.

# The New Economic Middle East

Ashraf Nadouri

**I**n the post Gulf war climate, Egypt has benefited from considerable foreign debt forgiveness and is forging ahead in a real and substantial form in its domestic economic policy. The Egyptian government is advancing its plans to privatize much of public industry. Joint ventures with foreign firms are being cultivated with increasing interest. New investment laws provide for smoother acquisition of project approval and licensing, with easier import and export procedures and an expansion of the exemptions and privileges available to investors. Egyptian trade, tourism and private industry are booming. A recent edition of *The Economist* predicted that Egypt could emerge as the fastest growing Mediterranean economy.

However, as a developing nation in a sometimes politically volatile region of the world, Egypt suffers from an unfounded perception of instability. There are reports of political extremism in the country which, assimilated together with major events in the Middle East, are seen anxiously by some potential investors. In reality, Egypt boasts the longest and deepest democratic tradition in the Middle East. It enjoys a free press, strong ties to the West and cordial relations with all of its neighbours.

Egypt came to the peace process which was started by our President, Mr. Sadat who had a far reaching vision. He came to Israel after the 1973 war and spoke with Israeli representatives in the Parliament. Mr. Sadat's initiative was received very warmly



by the Israeli people. However, the Arab people did not see what he saw at that time.

The passing years however have proven that Mr. Sadat's vision for peace was correct. Thereafter, came this peace between the PLO, and Israel, which we call the Oslo Agreement, and after that the peace signed between Israel and Jordan; and we are now going through the procedures that will achieve peace between Syria and Israel.

It is not important to have a document, a paper between the two countries, signed by their presidents, stating that they will start peaceful relations. More important is the feeling between people, the relations between Israelis and others. Some Israelis

feel that the Egyptians, after signing the Camp David agreement, did not react to the Israelis with the same feelings as they did.

I have my own point of view about this, not only in defence of the Egyptian people. When Mr. Sadat started his peace initiative, every Egyptian backed him. By every Egyptian, I am not referring to those who are fanatic in their religion. What happened after Mr. Sadat started the Camp David agreement, for one reason or another proved, in the eyes of the Egyptians, that the Israelis or the government of Israel at that time was not willing to have real peace - for example, the invasion of Lebanon - and that is why the Egyptians were negative about the peace process.

The development of economies in the Middle East depends on achieving a real peace in this area; if we can eliminate those people on the two sides who are fanatic. They interpret the words in our holy book, and in your holy book, completely wrongly. I think this is something which we as lawyers, as intellectuals, have to fight very forcefully and very strongly.

The economy in this area can boom:

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Mr. Ashraf Nadouri is a prominent Egyptian lawyer. These are highlights from his presentation at the Congress.

- If every country in this area will have democracy, and a democratic government; and
- If every person in this area will just follow his religion in his home and not apply it to achieve political aims.

The most important obstacle to a good economy in this area is in how the fanatics define Islam.

Islamic law is misinterpreted and misunderstood not only in the western world but also in the Islamic world. That is due in general to a universally errant attitude towards religion, and in particular to three major elements:

- There is no precise definition for the term "Islamic";
- There is lacking a true comparative study between law as it is applied in Egypt, Europe, America and other countries, and Islamic law;
- Islamic law is used as a political issue or as a slogan or tool for agitating masses rather than a true method of application.

Many people are trying to use Islam as a political tool to achieve political votes.

The term "Islamic law" is the English translation of the Arabic word *sharia*. *Sharia* in Koranic terminology and in Arabic dictionaries does not mean law in the sense of legal rules. Its real meaning is path, method, way and the like. It could mean law in the general meaning of law, as if to say the law of gravity, the law of supply and demand, the law of life. The word *sharia* was initially used by the first generation of Muslims in its proper meaning. Then it was extended to include the legal rules in the Koran, and expanded again to cover the legal rules either in the Koran or in the prophetic tradition. Finally, it incorporated legal rules in all Islamic history and all the interpretations and opinions which constitute jurisprudence. Today, Islamic law really refers to Islamic jurisdiction and the historical Islamic system.

With regard to the use of religion as a political tool, Egyptian law applies Islamic law as legal rules and jurisprudence. The roots of this great teaching and rules can be traced in recent history. Almost all Islamic countries were colonized by European countries after the 18th century. The colonists did not act only as colonists, but they also acted as crusaders. People in the Islamic countries sought liberation and felt the need to assure their identity to face this invasion as well. The first movements looked for the renaissance of the Egyptian character through civilization, culture, education and democracy. Its main aim was

to obtain power first, and then reform through politics. It lacked a sense of time.

Further, there were some people in Egypt and also in other countries, those who had the power to interpret the religion, who also had the authority to give interpretations to the words of the Koran which were completely different to what should have been. If we can eliminate those people who have wrongly interpreted the religion, and try to eliminate the fight between religions in this area, this region can achieve good economic development.

Another factor is tourism. Unless tourism takes off in this area, and also in Jordan, the Middle East peace process could be in serious danger.

Jordan faces a political problem as its population largely comprises Palestinians. While the door to freedom may be slowly opening for Palestinians living under Israeli rule, it is radically closing for the majority of Palestinians living elsewhere. It is not surprising that popular opposition in Jordan to the peace process should be so considerable. In effect, King Hussein is racing against time. He has to prove that peace could yield rapid economic benefits, rather than to compensate those Jordanians who still regard themselves as Palestinians for the loss of their chance to return home. The quickest way this could be done is through tourism, most controversially through Israeli tourism. It would appear that as many as 100,000 Israelis visited Jordan in 1995. Israeli officials estimate they spend more than \$500 each. An additional 100,000 Israeli tourists are expected in 1996, and some senior Israeli officials believe that the figure could total more than 300,000 Israelis during the course of the year. This alone would add more than 2.5% to Jordan's GDP, because this money is spent directly in Jordanian shops. The way in which most Jordanians will benefit will be indirect, through the construction and service industries. In particular, Jordan hopes to add no fewer than 300,000 rooms between mid 1995 and the end of 1996. So tourism can also help to bring prosperity to our area.

I would conclude by saying that if we would like to see our area developed economically, we have to find out which features are most important in every country. Israel has the technology, and the money, to some extent. Egypt has the workers and the efficient workshops. The Arab Gulf states have the petrodollars. If they and we will see some democracy in this area, which can make use of all the powers available in our area and the raw material, we could see a kind of EEC here in the 21st century.

# The Right of Minorities to be Equal and Different

**A prominent feature of the Congress was a public trial, focusing on principles of equality in a democratic state. The presiding judges were Justice Meir Shamgar (Israel), Justice Rosalie Abella (Canada), Justice Menahem Elon (Israel), Justice Richard Goldstone (South Africa), Justice Myriam Ezratty (France), Justice Stanley Mosk (U.S.A) and Justice Ellen Peters (U.S.A). In this issue of JUSTICE we are reporting the facts of the case and short judgment. The full pleadings and full judgment of the Court will be published separately.**

Pandora is a country with a population of 6 million people, which is located on an island in the south-east corner of the Indian Ocean.

Pandora is a relatively young democracy, whose guiding principles were established in a Constitution adopted in 1994 following a referendum.

*Inter alia*, Pandora's Constitution provides as follows:

Section 4 - Every man has the right to freedom of belief, freedom of worship and freedom of expression.

Section 5 - All are equal before the law. There shall be no discrimination between persons on grounds of sex, race, religion or nationality.

Section 6 - Equal opportunities for free education shall be given to all residents studying in state primary and secondary schools in the country.

Section 10 - A) No rights provided for in this Constitution shall be infringed save by a law which is enacted for a proper purpose, and to an extent no greater than is required.

B) The Supreme Court sitting with a bench of seven judges shall act as a Constitutional Court. The Constitutional Court is empowered to annul a law if it violates a right provided for in this Constitution for an improper purpose or to an extent which exceeds what is required.

The majority of the residents of Pandora, some 4.5 million people, are atheists and the remainder, some 1.5 million people, are affiliated to a religious sect known as "Servants of the Soul". This sect is founded on the belief in reincarnation. Its members believe that control of the universe is given to the souls of the dead and that in order to guarantee the continuation of life in the

universe, they must maintain continuous contact with these souls by means of prayers and seances carried out twice a day. Members of the sect are obliged to perform the morning seance at 11:00 a.m. precisely, and the evening seance after sundown. Each seance takes at least 15 minutes. Members of the sect are accustomed to garbing themselves in white, in a robe made of thin linen cloth, as in their view ordinary clothing smothers the spirit and interferes with its interaction with the souls floating in space.

Prior to the enactment of the Constitution, the "Servants of the Soul" sect established a network of independent schools in order to allow sect children to carry out their religious obligations during school hours.

Following the enactment of the Constitution, the administrators of the sect arranged a special meeting which considered the ramifications of the Constitution for the education of the sect's children. The administrators decided that there was no need to continue maintaining an independent educational network as the new Constitution provided clear norms, in accordance with which the sect children could now comply with their religious obligations without interference even in state schools.

## ● The Case

In the beginning of 1995 serious disturbances erupted in the high school in Akadia, the capital of Pandora. At the root of the disturbances were two decisions taken by the school board. Under one decision, students who were members of the "Servants of the Soul", and who numbered a quarter of the



school population, were prohibited from engaging in the traditional prayer and seance ceremonies in the school yard, at 11:00 in the morning during the 15 minutes of the recess. The second decision forbade the students from presenting themselves for studies dressed in white robes instead of the blue uniform customarily worn at the school.

The reason given by the school board for its decision was that the prayer and seance ceremonies interfere with the conduct of the school and its regulations. According to the board, sect students do not go out during the recess but engage in prayer and thereby are prevented from developing socially and releasing tension generated by their studies. The board pointed to the fact that conducting the ceremonies at the school affects the other, atheistic students. Some of these show an overwhelming desire to join and become integrated in the sect, whereas others ridicule the sect members and claim that these ceremonies are foreign to them and injure their feelings. The board added that the white clothing of the sect members infringes the uniformity of appearance of the students and stresses the difference between them and the others.

As a consequence of the stormy events and the public dissension which inflamed Pandora, the Pandoran Parliament enacted a law prohibiting the conduct of prayers or ceremonies of worship in state educational institutions in the country, and the appearance of students in clothing which does not conform to the school uniform.

The new law caused great anger among members of the sect. The sect leaders decided to press the parents of the sect students in the Akadia state high school to petition the Constitutional Court to declare the law to be null and void. The sect leaders and parents petitioned the Court. The grounds of their petition to annul the law were that the law violates their right to maintain a unique way of life based on their beliefs and religion - which is not a missionary religion. They argued that the law deprives the minority of its rights as it prevents it from realizing its right to free education. Further, they claimed that the law violates the general principle of equality, the wider significance of which is the recognition of the right of the minority to be different.

On the other side, representatives of the state and parents of

the atheistic students (who were joined as parties to the action with the consent of the Court) argued that the law should not be annulled as it does not conflict with the Constitution. They argued that conducting the ceremonies of worship within the school premises and the appearance of students in school out of school uniform, infringes school regulations, its conduct and customs. Additionally, they argued that the ceremonies and white clothing directly injure the atheistic students, some of whom tend to imitate their sect friends, and some of whom take offence and develop opposition and hatred for religion while ridiculing the sect students. The students who are sect members are also injured by the fact that they do not go out during the recess in order to play and release the tensions accumulated during their studies. Representatives of the state and the parents added that these ceremonies, as well as the white clothing of the sect members, also violate the principle of equality embodied in the Constitution, as they lead to the perpetuation of disparities between different groups. In the light of these contentions, the Respondents asked the Constitutional Court to dismiss the appeal and uphold the law.

How will the Constitutional Court decide?

## ● Judgment

**President Meir Shamgar** delivered the unanimous judgment of the Court.

The legal problem posed to this Court rose in Arcadia, the capital of Pandora, an independent state which adopted not long ago a Constitution safeguarding basic human rights, including freedom of expression, freedom of belief and freedom of worship.

The pertinent facts center around the question of freedom of worship and freedom of expression. One of the religions of the inhabitants of Arcadia is the faith called Servants of the Soul. The children of the members of this sect study in state schools. The members of the sect are obliged to perform the morning prayers of their belief, at 11:00 a.m. precisely. Each seance takes at least 15 minutes. Members of the sect are accustomed to garbing themselves in white, in a robe made of thin linen cloth, as in their view ordinary clothing smothers the spirit and inter-

feres in the interaction with the souls floating in space. The members of this religion had a network of independent schools before the Constitution was adopted but they closed these schools considering the ramifications of the Constitution on the sect's children; they decided that there was no need to continue maintaining an independent educational network. They reached a free decision to close their separate schools and therefore all the sect's children are now studying in government run schools.

There were disturbances in the capital of Pandora, Arcadia, because of the decision of the school board to prohibit pupils, children of the religion, from holding their prayers at 11:00 a.m. in the school, dressed in this white garb. The reason given by the school board for this decision was that the prayer and seance ceremonies interfered with the conduct of the school and its regulations.

After the stormy events and public dissension, the government enacted a law prohibiting the conduct of prayers or ceremonies of worship in state education institutions in the country, and secondly, the appearance of students in clothing which does not conform to the school uniform.

The Petitioners turned to this Court asking that the law be annulled as it contradicts the provisions of the Constitution. This brings us to the Constitution, particularly Section 10(b).

Section 10(b) states that "the Supreme Court sitting with a bench of seven judges shall act as a Constitutional Court. The Constitutional Court is empowered to annul a law if it violates a right provided for in this Constitution for an improper purpose or to an extent which exceeds what is required".

In other words, whenever there is a right which has been accorded by this Constitution - as mentioned every man has the right to freedom of belief, freedom of worship and freedom of expression, all are equal before the law, there shall be no discrimination, *etc.*, - then the Supreme Court of Pandora, sitting in a bench of seven judges, shall act as a Constitutional Court and this Court is empowered to annul a law if one of the two following conditions exists, namely:

- It is a law enacted for an improper purpose; or
- It is law which violates a right to an extent which exceeds what is required.

The two reasons can be cumulative. There can be a situation where both reasons exist side by side.

Two distinct questions had to be considered by the Court, sitting as the Constitutional Court of Pandora. First of all, there is the question of the prayer at 11 o'clock precisely at the school. The second question is the white dress worn by the members of the sect. And there are two issues which must be taken into consideration when dealing with these questions: the proper purpose and the proper extent.

To the first problem. We have to consider that we are dealing with prayer which is mandatory. Every member of this religion must say this prayer at 11 o'clock precisely. This is not unique, there are many religions where a person is required to pray several times a day. In this case, it is not several times a day, but at an hour laid down precisely, presumably by some religious code. The law obliges a person to waive this right of worship. He is prohibited from doing an act which is demanded by the code of his religion. If we address the question of the purpose of the law, or the general purpose of the neutrality of the school system, on questions of religion, the law intended to create schools which are secular and which have no discrimination or kind of separation.

Accordingly, we do not think we can arrive at the conclusion that the purpose of the law as such is unconstitutional. This does not solve the problem before us concerning the question of prayer. Because when we refer to the prohibition of a prayer which is obligatory, a mandatory demand of religion to have a prayer at 11 o'clock, the question arises whether this total prohibition, instead of making alternative arrangements, is not a provision which exceeds what is required. The intent and purpose of the Constitution is to enable people to profess their religion. Is it necessary to prohibit totally every prayer at school? Arrangements could be made for the prayer to be held in a separate corner, room, or even in a separate place, in the school which does not interfere in the normal life and behaviour and customs and beliefs and disbeliefs of the children of 75% of the population. We hold that the prohibition in this context and referring to this law is a prohibition to an extent which exceeds what is required. We are certainly aware that there are institu-



**Counsel for the Petitioners**

**Counsel for the Respondents**



Top row: Mr. Nathan Lewin, Attorney-at-law, Washington DC, and Professor Arnold Enker, Bar-Ilan University, Israel.

Bottom row: Mr. Jonathan Goldberg, Q.C., England, and M. Michel Zaoui, Advocate, France.



**The Presiding Judges:** front row (left to right) Justice Myriam Ezratty, Premier President Cour d'Appel de Paris, France; Justice Meir Shamgar, former President of the Supreme Court of Israel; Justice Ellen Peters, Chief Justice of Connecticut, U.S.A. Back row (left to right) Justice Stanley Mosk, Supreme Court of California, U.S.A.; Justice Richard Goldstone, Supreme Court of South Africa; Justice Rosalie Abella, Court of Appeal, Ontario, Canada; and Justice Menahem Elon, former Deputy President of the Supreme Court of Israel.

tions which deny the right to any ostentatious expression of religious beliefs, manifestations or demonstrations of religion whether for the purpose of proselytizing or for other reasons. But here we have people who are ready to worship in a place which is separate and is not within the view of those who are atheists and do not accept the religious beliefs and principles of the sect of the Servants of the Soul. So such a prohibition is far reaching, against the principle that every person has the right to freedom of worship, and denies the right of freedom of worship to an extent which is not necessary.

Then there is the problem of the garb, the white linen dress used in their prayers. We think that in the context of this law the prohibition referring to the wearing of this dress during prayers is again to an extent which exceeds what is required. There is nothing wrong from the point of view of the purpose of the law.

There certainly can be laws of uniform garb in schools, we do not deal with the matter here because it is not the question posed to us. The question here is whether one can prohibit the children of the faith from dressing in white dress while having their prayers in a separate part of the school yard - whatever is provided for by the school authorities. There could be administrative arrangements which would not offend the basic principle of the freedom of worship which is laid down as a Constitutional right and therefore such a law carries provisions which exceeds what is required as a matter of Section 10(b) of the Constitution.

Therefore, we have decided that as this law prohibits prayers at 11:00 which are mandatory for members of the sect and prohibits wearing dress during prayers, the law is unconstitutional. ■

# Statement of the 10th Congress

**Statement adopted by the International Association of Jewish Lawyers and Jurists during the Tenth International Congress in December 1995.**

1. The International Association of Jewish Lawyers and Jurists, meeting at its Tenth International Congress in Israel, expresses its profound concern at the recourse to the threat and use of violence to which increasing resort has been made by advocates of extreme positions both in Israel and the Diaspora, culminating in the assassination of Itzhak Rabin. In mourning his tragic loss, the IAJLJ condemns any expression of intolerance and incitement to hatred and violence from whatever source and calls on all political parties and segments of public opinion including secular and religious, to abandon resort to excess, intolerance and violent expression in political discourse. It expresses its confidence that as a democratic society imbued with Jewish values, the Israeli body politic will, in a spirit of national reconciliation at this critical time, reaffirm civil liberties including specifically freedom of speech and expression for all; freedom of the press including all media easily accessible to all opinions permissible by law in a democratic society and freedom of assembly including the right of peaceful demonstration under the rule of law, which has characterized all national institutions since the creation of the State in 1948.
2. The IAJLJ congratulates its President for her successful initiative in securing the grant of consultative status with the United Nations in August 1995. It decides to rededicate itself to combatting continued manifestations of anti-Semitism and denial of the Holocaust through appropriate action in the UN Commission of Human Rights and in its Sub-commission on Prevention of Discrimination and Protection of Minorities. It urges its national associations and membership in States where this has not already been achieved, to strive for appropriate legislation barring all forms of racial and religious discrimination, xenophobia and intolerance including specifically anti-Semitism and the denial of the Holocaust. It has noted with dismay the continuing policy of discrimination and hostility directed against Israel in the General Assembly and the Commission on Human Rights as well as in other UN *fora*, notwithstanding the considerable advances in the peace process, more recently in the agreements reached with the Palestinians and the Treaty of Peace concluded between Israel and Jordan this year. The IAJLJ urges its membership and national affiliates in member States of the UN in association with other like minded bodies, notably the UN Watch, to call upon governments to instruct their delegations in the appropriate UN organs to abandon this policy of discrimination against Israel. In particular, the IAJLJ deplores the continued exclusion of Israel from regional groups of member States of the UN which constitutes violation of the UN Charter rules based on the equality of all States and effectively denies Israel election to UN bodies. It decides accordingly to support efforts currently being made to reverse this policy of exclusion and discrimination against Israel and to ensure respect for the principle of sovereign equality of all UN member States.
3. The IAJLJ calls upon its members particularly in jurisdictions where Jewish communal and institutional property has been seized or otherwise wrongfully expropriated by successive Nazi and Communist regimes during and following the Second World War, to place at the disposal of national Jewish communities, their professional skills and experience in securing national legislation and legal measures as appropriate for restitution of such property as well as private property.

It resolves to explore with the World Jewish Restitution Organization how it can best make available the expertise of the IAJLJ in the negotiations being conducted with the national authorities concerned to ensure that the necessary measures are taken so that restitution and/or compensation is secured for such wrongful seizures for which no redress has been provided for more that fifty years after these tragic events.

4. The unending threat of war in the Middle East has been the source of major economic problems in the area. The peace process should hopefully be a source of economic development, which may in turn open the door to much investment and trade. Lawyers may assist that process by regional cooperation in such areas as preparing a common commercial code or the establishment of a regional system of arbitration.
5. The IAJLJ calls upon the Jewish world to exercise vigilance against the growing menace of Islamic extremism and through the mechanism of education to promote at all levels, the peace process in the Middle East.
6. The IIAJLJ calls for the establishment of special projects and the raising of funds therefor, for example a project to chal-

lenge through the medium of the law, that is through the courts, or through the lobbying of government or other agencies, the denial of the Holocaust and to this end to coordinate the efforts of all bodies worldwide in achieving this objective.

The IAJLJ mourns the passing of Dr. Stephen Roth, counsel to the Institute of Jewish Affairs, and in this context acknowledges his lifelong efforts and dedication to secure national legislation in many countries to combat anti-Semitism and the denial of the Holocaust.

7. The IAJLJ views with favour a proposal to establish an international Jewish law students association affiliated to it and will consider how this objective can be achieved.
8. The IIAJLJ will consider a proposal to establish a legal archive in Israel as a repository of records of legal proceedings or trials concerning the defamation of or crimes against individual Jews or Jewish communities, constituting a threat to the Jewish people.



## Markus Pardes Awarded the Ordre de Leopold

The Association congratulates President of the Belgian Section, Mr. Markus Pardes, former President and Founder of the Coordination Committee of Jewish Organizations of Belgium and Deputy President of our Association, on being made an Officer of the Ordre de Leopold by His Majesty King Albert II of Belgium (left), in recognition of services rendered. The decoration was awarded to Mr. Pardes, by royal decree on 17 November 1995 on the recommendation of the Minister of Foreign Affairs. Right: Belgium Premier, Jean-Luc Dehaene, awards the decoration to Markus Pardes.



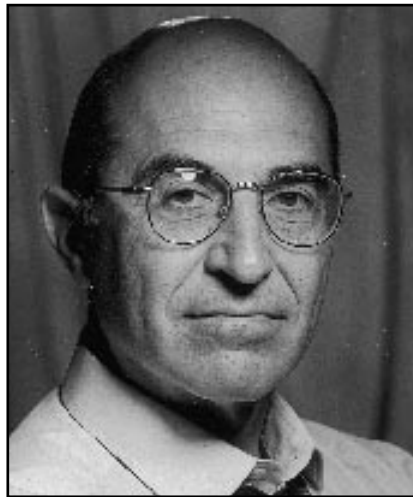
# “The Jews Cannot Defeat Me”: The Anti-Jewish Campaign of Louis Farrakhan

Robert A. Rockaway

**L**ouis Haleem Farrakhan was born Louis Eugene Walcott on May 11, 1933, in the Bronx, New York. He grew up in Boston as an Episcopalian and graduated from Boston Latin School with honours. He spent two years at Winston-Salem Teacher’s College in North Carolina. Farrakhan’s first love, however, was music. He sang and played guitar, and after leaving college appeared in night-clubs. He dreamed of a career in show business.

Walcott was recruited into the Nation of Islam by Malcom X in the early 1950s. However, he did not entirely abandon entertaining when he joined the Nation. During his early years he wrote and recorded *A White Man’s Heaven is a Black Man’s Hell*, a favourite black Muslim anthem.

Farrakhan became a soldier in the Fruit of Islam, the Nation’s security force. He proved an apt disciple and Elijah Muhammad appointed him minister of the Nation of Islam’s temple in Boston. When Malcom X broke with Elijah Muhammad in 1964, Farrakhan succeeded him as minister of the Harlem temple. After Malcom X’s assassination, Farrakhan’s star rose rapidly. Within a few years, he became prominent in the black urban community and “national spokesman” for the Nation of Islam.



Farrakhan’s Harlem rallies drew thousands and his Sunday sermons were carried live on radio. By 1975, Farrakhan was a leading figure in the Black Muslim movement. The Black Muslim author Sterling Hobbs admirably described Farrakhan as being:

“a better orator than the late Dr. Martin Luther King. He sings better than Marvin Gaye. He is a better writer than Norman Mailer. He dresses better than Walt Frazier. He is more of a diplomat than Henry Kissinger, and he is prettier than Muhammad Ali.”

For two years after the death of Elijah Muhammad, Farrakhan remained with Wallace Muhammad. Immediately after assuming authority, however, Wallace began to institute reforms in the Nation. He decentralized authority, sold off or leased many of the organization’s property holdings, and disbanded the Fruit of Islam security force. He also declared that Farad was not Allah but a mortal man and that the memory of Elijah Muhammad needed to be reconsidered in the perspective of his time and his limitations. Instead of continuing the policy of total separation from whites, Wallace advocated cooperating with them. He also changed the name of the Nation to the “American Muslim Mission”.

Not every Black Muslim approved these alterations and the movement began to lose members. In 1977, Farrakhan left Wallace Muhammad and formed his own branch of the Nation of Islam in Chicago. He reaffirmed the doctrines of Elijah Muhammad and his vision of what the Nation of Islam should

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Dr. Robert Rockaway lectures in the Department of Jewish History in Tel Aviv University. These extracts are part of a larger work published in November 1995 by Tel Aviv University.

be. These tenets included the belief that whites are “devils” and that blacks are racially superior to whites and are God’s chosen people. Farrakhan also reaffirmed Muhammad’s policies of economic self-help and the absolute racial separation of blacks from whites. Farrakhan expected Muslim men to lead lives of strict self-discipline. This meant that they were to live soberly, work hard, devote themselves to their family’s welfare, and deal honestly with others. Farrakhan revived the paramilitary unit, the Fruit of Islam and reinstated a strict code of dress: dark suits, white shirts and ties for men; and no provocative or revealing dresses for women.

Farrakhan proved to be a talented, charismatic and inspirational leader. He published a newspaper, *The Final Call*, which reached thousands of readers. He began to be featured on black talk shows. And he travelled round the country lecturing to black college audiences. By 1984, Farrakhan was well-known in the black community, but little recognized outside of it. His dispute with the Jews made him a public figure.

### Farrakhan’s Perception of Jews

Farrakhan, and his spokesmen, claim that his specific antagonism toward Jews began during Jesse Jackson’s race for the 1984 Democratic Presidential nomination - although there are reports that Farrakhan made statements alleging Jewish control of the media as early as 1972 and during Farrakhan’s tenure as minister of the Nation of Islam’s mosque in Harlem, the mosque’s bookstore displayed and sold copies of the *Protocols of the Elders of Zion*, the nineteenth century czarist anti-Semitic forgery. The bookstore also sold *A History of Jewish Crime*, a virulently anti-Semitic book published in Pakistan.

Up until 1984 the Jewish community paid scant attention to Farrakhan. The Jackson campaign changed that. On February 13, 1984, the *Washington Post* carried an article on the relationship between Jesse Jackson and the American Jewish community. At one point the article stated that:

“In private conversations with reporters, Jackson has referred to Jews as ‘Hymie’ and to New York as ‘Hymietown’”.

Jackson’s remarks created a furor. Jewish communal leaders, as well as editorials in the general press, criticized Jackson. At first Jackson denied making the statements. He then claimed he could not recall them. Finally, he admitted that he had made the remarks and apologized.

At the beginning of Jackson’s campaign, Farrakhan had provided him with bodyguards from the Fruit of Islam until the U.S. Secret Service took over. After Jackson made his statements about the Jews, he began to be shadowed by the militant Jewish Defence League. Jackson also received some death threats and his family began to be harassed.

When he learned about this, Farrakhan was outraged. Introducing Jackson at a Nation of Islam meeting in Chicago on February 25, 1984, Farrakhan tried to intimidate Jackson’s harrasors.

“I say to the Jewish people who may not like our brother, when you attack him you attack the millions who are lining up with him. You are attacking all of us. If you harm this brother, I warn you in the name of Allah, this will be the last one you do harm.”

To many, the speech seemed to be a threat. These remarks appeared in the leading newspapers and generated widespread criticism of Farrakhan. However, it also gave Farrakhan national exposure. From then on, Farrakhan and his pronouncements received careful analysis from the Anti-Defamation League and other Jewish defence organizations.

Once he was construed as being anti-Semitic, Farrakhan alleged that according to “reports” he received “Israeli hit squads” had been sent to the United States to assassinate Jackson. The Israeli consul general in Philadelphia quickly and vigourously denied the charges, denouncing them as “outrageous”.

Two days later in a radio broadcast, Farrakhan attracted further attention when he advanced his views about Adolf Hitler:

“The Jews don’t like Farrakhan,” he said, “so they call me Hitler. Well, that’s a good name. Hitler was a very great man. He wasn’t great for me as a black person, but he was a great German. He rose [sic] Germany up from nothing.”

This statement evoked a firestorm of condemnation.

Farrakhan responded to his Jewish critics by elaborating on this statement and appending another threat and accusation:

“What is it about Hitler that you love to call every black man who rises up with strength a Hitler? What have I done? Who have I killed? I warn you, be careful, You’re putting yourself in dangerous, dangerous shoes. You have been the killer of all the prophets. Now, if you seek my life, you only show that you are no better than your fathers.”

In the May 14, 1984 issue of *New York Magazine*, Michael Kramer reported that Farrakhan “told Jews celebrating Passover that unless they believed in Jesus ‘then maybe the death angel will stop at your door and kill the firstborn out of your house.’”

It is noteworthy that in their diatribes against Jews, Farrakhan and his spokesman - who identify as Muslims - continually refer to the Jews’ alleged killing of Jesus. Most Black Muslim were raised as Christians. Consequently, their religious perceptions of Jews is based on Christian, rather than Moslem, teachings.

Farrakhan also reviled Judaism as a faith in a June 1984 address at the National Press Club. He informed his audience that the State of Israel had not had peace in 40 years and would never have peace, “because there can be no peace structured on injustice, lying, thievery, and deceit using God’s name to shield your dirty religion or practices under His Holy and Righteous name.”

The controversy surrounding Farrakhan resulted in increasing the media attention he received. Farrakhan’s announcements and appearances merited coverage in major newspapers and magazines. He began appearing on network television programs and spoke at the UN Correspondents Club in New York and the National Press Club in Washington.

By the end of 1984 Farrakhan had become a media “star”. As a result of his growing national recognition and notoriety, Farrakhan’s stature among African-Americans rose and he became one of the most sought after speakers on college and university campuses around the country. Farrakhan’s message now reached the eyes and ears of millions of Americans.

At some of his forums, Farrakhan invited others to sit on the stage with him. At one symposium, he featured Arthur Butz, a professor of electrical engineering at Northwestern University, who had written a book claiming that the Holocaust never happened. And Farrakhan invited white racist and former Klu Klux Klan leader Tom Metzger to attend his September 15, 1985 Los Angeles speech.

Also in 1985, Farrakhan invited Kwame Toure, formerly known as Stokely Carmichael, to speak at the Nation of Islam’s Savior’s Day celebration. From 1966-1967, Toure led the Student Nonviolent Coordinating Committee (SNCC), an organization of college-educated young black men and women, founded in 1960 to achieve racial justice by non-violent means. After 1966, SNCC became increasingly more radical, anti-Jewish and anti-Zionist. Toure proclaimed that “the worldwide criminal Zionists must be uncovered... We must smash Israel

and Zionism.” Appearing via satellite, Libyan leader Muammar Qaddafi exhorted Farrakhan’s followers to “destroy white America”. That same year Qaddafi gave the Nation of Islam a \$5 million interest-free loan.

Perhaps the Farrakhan speech that received the greatest attention at this time took place at New York City’s Madison Square Garden on October 7, 1985. A crowd of 25,000 people came to hear him speak. Anti-Semitism formed the core of his address and his words mesmerized his audience. Farrakhan’s statement that “the Jewish lobby has a stranglehold on the government of the United States,” elicited responses of “Yes!” and “Tell ‘em Brother.” When Farrakhan asked, “Who were the enemies of Jesus?” the audience responded, “Jews, Jews, Jews!”

Julius Lester, who was then director of the African-American Studies program at the University of Massachusetts, sat in the audience.

“The audience greeted each anti-Semitic thrust by rising to its feet, cheering, arms outstretched at 45 degree angles, fists clenched,” he later wrote. “As this scene repeated itself throughout the evening, I wondered, is this what it was like to be at the Nuremberg rallies in Nazi Germany.”

### The Anti-Jewish Campaign, 1985-1995

In the years after 1985, Farrakhan’s campaign against the Jews proceeded unabated. He continued to spread his message of hate in high schools, in college campuses, on radio and television talk-shows, in speeches to black audiences, and through his newspaper *The Final Call*. His themes remained the same: there is a Jewish conspiracy to run the world; Jews exert undue influence and control over black leaders and black politicians; Jews exploit the black community economically; Jews control the media; Israel is an outlaw state; Jews were prominent in the slave trade; and Jews aim to destroy Farrakhan and the Nation of Islam.

Sometimes, Farrakhan laced his comments with taunts and threats. On May 21, 1988, Farrakhan spoke at a dinner in Flushing, New York. According to columnist Doug Feiden of the *New York Post*, Farrakhan referred to the “narrow-minded common Jew,” and stated that “The Jews cannot defeat me. I will grind them and crush them into little bits.”

In the 1980’s comparing the Holocaust to the black experience in America became a recurring ploy for Farrakhan and his spokesmen. Although they acknowledged Jewish losses, they insisted that the “black Holocaust” was infinitely worse. For



instance, at a September 1985 speech in Los Angeles, Farrakhan admonished Jews not to “push your 6 million down our throats when we lost 100 million to slavery”.

By the 1990s, Farrakhan’s spokesmen proffered a harsher perspective on the Holocaust. In his infamous talk at Kean College, Khalid Abdul Muhammad complained about how “everybody always talks about Hitler exterminating 6 million Jews. That’s right,” he said. “But don’t nobody ever ask what did they do to Hitler? What did they do to them folks,” he asked. He then answered his own question. “They went in there, in Germany, the way they do everywhere they go, and they supplanted, they usurped, they turned around and a German, in his own country, would almost have to go to a Jew to get money. They had undermined the very fabric of society.”

In 1994, the Nation of Islam began sponsoring a travelling road show of speakers, who went to black communities, high schools and college campuses to spread their message. Programs featured among others, Dr. Khalid Muhammad, who would speak about the “Conspiracy to Destroy Black Men,” and Steve Cokely - who had achieved notoriety by accusing Jewish doctors in South Africa of injecting black babies with the AIDS virus.

Despite the fiery oratory there is no evidence that the Nation has ever physically attacked Jews. Although his appearances and pronouncements on college campuses have led to demonstrations and some shouting matches, they have not created any serious clashes between students. Nonetheless, the hostile preachments of Farrakhan and his spokesmen combined with their ability to whip crowds into a frenzy, creates an atmosphere which could easily explode into violence.

During these years, Nation of Islam publications continued to promulgate hatred for Jews. Almost every issue of *The Final Call* and local Nation publications, such as the Brooklyn and Philadelphia editions of *Blacks and Jews News*, contained defamatory items about Jews.

At almost every Farrakhan appearance, speech or rally, his followers display and sell copies of the *Protocols of the Elders of Zion*, and Henry Ford’s *The International Jew: The World’s Foremost Problem*, as well as other anti-Semitic publications. These works continue to be peddled at Nation of Islam bookstores in Atlanta, Detroit, Chicago, Washington and New York.

In 1991, the most serious and damaging publication of the Nation of Islam appeared. Entitled, *The Secret Relationship Between Blacks and Jews: Volume I*, it was compiled by the Nation of Islam’s “Historical Research Department.” The book is presented as a scholarly text containing 1,275 footnotes in the

course of 334 pages. According to the authors, the information in the book “has been compiled primarily from Jewish historical literature” and “from the most respected of the Jewish authorities.” They operated in this manner, they said, so as to exclude every source “considered anti-Semitic and/or anti-Jewish.”

Despite the authors’ professions of objectivity, chapter titles, such as “Jews and the Rape of Black Women,” and “Jews of the Black Holocaust,” indicate the polemical nature of the book.

Labeled as “one of the most sophisticated instances of hate literature yet compiled,” by Henry Louis Gates, Jr., the book has become enormously influential in the black community. Through a clever use of selective quotations, quotations taken out of context, generalizations unsupported by evidence, and distortions of original sources, the book purports to document the Jews’ alleged domination of the American slave trade.

The book has been denounced as filled with bias, shoddy scholarship, distortions, inaccuracies, and untruths, by eminent American historians and scholars of American slavery, such as Eugene Genovese, C. Van Woodward, Winthrop Jordan, and David Brian Davis.

In a highly unusual move, the American Historical Association (AHA) condemned “as false any statement alleging that Jews played a disproportionate role in the exploitation of slave labour or in the Atlantic slave trade.” The organization felt obligated to do so, said one of the resolution’s framers, because the media has given the charges “wide currency while failing to dismiss them as spurious.” This was only the second time in its history that the AHA has taken a position on a specific historical topic. The other time was to condemn the deniers of the Holocaust.

Nevertheless, professors of African-American Studies, such as Leonard Jeffries, of the City College of New York, and Tony Martin, of Wellesley College - both of whom display antagonism toward Jews - consistently assign the *Secret Relationship Between Blacks and Jews* to their classes. Given its scholarly format and appearance, the volume can have a deleterious impact on the opinions of a generation of impressionable college youth. The book has also become something of a bible for Louis Farrakhan and his spokesmen. They carry it with them wherever they speak and point to it as authenticating their claims about the duplicity and evilness of the Jews.

### Why the Jews?

In trying to understand why Minister Farrakhan and his

spokesmen have chosen to assail the Jews, it would be easy to simply label them irrational and paranoid anti-Semites and racists, and leave it at that. The answer, however, is more complex.

The situation amongst the majority of black Americans is desperate. Their communities are rife with crime, drug addiction and AIDS. African-American are progressively falling further behind whites in wages and employment rates. The unemployment rate for black males is double that of white males. And unemployed black professionals are far less likely to get hired than their white counterparts. Over 25% of black men and women live below the poverty level, compared to less than 10% of white Americans. The largest causes of death among young black men is either murder or suicide. Nearly half the black male Americans from 15 to 19 years old who died in 1988 were killed by guns. In 1994, 30% of black men between the ages of 20 and 29 were in some phase of the criminal justice system - either in prison or jail, or on probation or parole. The infant mortality rates in inner city black ghettos approaches that of most third world countries. In Harlem, the infant mortality rate matches that of Bangladesh.

Black Americans cannot find a satisfactory explanation for this situation. Their high expectations of the Civil Rights movement have not been fulfilled. In fact, racism has become more acceptable over the past decade. More and more blacks have come to believe that America does not care about them; does not care how black people live, and does not care *if* black people live. As a result, African-Americans see themselves as a people under siege. This despair makes black Americans ripe for the easy answers of demagogues.

Enter Louis Farrakhan. Farrakhan speaks to these people. He relates to their despair and hopelessness. His oratory feeds on an undeniable history of black denigration at the hands of Americans of every ethnic and religious group. Farrakhan also knows who is to blame for the black condition: "the white devils," especially the Jews.

African-American culture is already permeated with jaundiced views of the Jew. For many years anti-Jewish sentiment among African-Americans has been consistently higher than among white Americans. So when Farrakhan accuses the Jews, he is resurrecting a familiar scapegoat, one that black Americans can relate to and accept.

The goal of the Nation of Islam is to uplift the black community. One of their programs involves fighting against substance

abuse in the black ghetto. To this end, they have gone into the black community and established clinics that help drug addicts and those infected with AIDS. This effort gives the blacks the sense that the Nation of Islam endeavours to help them and brings the Nation credibility and standing among blacks. When Farrakhan attacks Jews, he already has an audience that respects him and is willing to listen to what he says.

Furthermore, the Nation has displayed an excellent sense for communicating their ideas and has created an effective propaganda network - newspapers, radio and cable television broadcasts, video and audio cassettes. They use these to publicize their work and their ideology. They also use their propaganda apparatus to castigate the Jews.

Farrakhan knows that Jews respond readily to these onslaughts. He also understands that Jews are especially sensitive to accusations of racism, indeed more so than many other groups. It sometimes seems that Jews are the only group who actually react to Black Muslim charges. Farrakhan's attacks bring him and the Nation of Islam ongoing publicity. It keeps them in the news and in the public eye. Because of his anti-Semitic attacks, Farrakhan has appeared on numerous prime-time television talk shows, such as Phil Donahue and Larry King, and has been written up in the *Washington Post*, *The Washington Times* and *Newsweek*. This generates even more publicity and invitations to speak.

There is presently a leadership vacuum and confusion in the black community. No single African-American or organization commands the allegiance and following enjoyed by the late Dr. Martin Luther King, or the NAACP of past years. Consequently, there is a struggle for power within the African-American community.

Farrakhan is a separatist hardliner, who wants the blacks to segregate themselves from white society. "We want our own flag, our own nation, our own government, and our own law," admits Khalid Abdul Muhammad. Opposing Farrakhan are the pluralists, who advocate black integration and cooperation with whites.

Farrakhan uses anti-Semitism as a tactical weapon in the fight over who will speak for black America. By being more rhetorically militant than the established national black leaders, he attracts a large following among discontented and alienated blacks. Even more so, because he is willing to take on the Jews, whom blacks (and some whites) perceive as the most successful sector in the white community. In addition, it is easier to single

out the Jews for attack than it is to attack the entire white community. This is because Jews are a small minority within the larger American community (2.5%) and because there is a resonance of anti-Semitism in the white community.

Anti-Semitism is also part of the wider Black Muslim suspicion that whites are bent on destroying them and their aspirations for self-sufficiency. The white goal, says Farrakhan, is to keep blacks under their control and in a position of servitude. He sees the "Jewish lobby" as participating in this scheme. "The Jews are the most organized, rich and powerful people, not only in America, but in the world," asserted Farrakhan in a January 1994 speech. "They're plotting against us even as we speak".

Farrakhan and his spokesmen direct much of their hostility against the Anti-Defamation League. This results from the fact that the ADL has long maintained that the Nation of Islam is a racist organization, whose hatred for whites permeates its operation. As such, the Nation of Islam should be ineligible for federal funds. Consistent with this position, the ADL has exposed the Nation of Islam's racial and religious bigotry and has lobbied against its receiving government recognition and money.

Black Muslims voice the opinion that Jews (led by the ADL) interfere with their agenda and prevent them from getting support, private or governmental, for their inner city programs. Jews do this so that they can continue to dominate them.

Farrakhan has said many times and in many forums that Jews hold "control over black professionals, black intellectuals, black entertainers and black sports figures". He declares that "My ultimate aim is the liberation of our people." Jewish hands hold us back, he says. To be a free people "we need to sever those hands from holding us... The black man will never be free until we address the problem between blacks and Jews."

Farrakhan sees Zionism and Israel as part of this problem, and Jewish support for Israel figures prominently in his rhetoric. Black Muslims explain Jewish success partly as a result of their power and sway over the darker peoples of the Earth. Israel is seen as part of this conspiracy. The Nation of Islam views Israel as a white, European imperialist nation which oppresses the black American's dark skinned Moslem brothers, the Palestinian Arabs.

Black Muslims compare their own predicament to the plight of the Palestinians and identify with them. When Farrakhan and his spokesmen claim that there is an international Jewish conspiracy and that Jews are racists, they point to Israel's treat-

ment of the Palestinians to support their contention. After all, did not the United Nations itself declare that Zionism was in fact racism? These indictments strike a chord among his listeners.

Farrakhan's castigation of Israel has its practical side as well. According to knowledgeable sources, Farrakhan has received monetary support from Libya.

Many responsible black leaders do not condemn Farrakhan or they hesitate before repudiating him. They cite his "positive side" - such as the Nation of Islam's counseling program for prisoners, drug addicts, alcoholics and street gang members - as reasons not to do so. This has led to Farrakhan gaining increasing acceptance and respectability with quite a number of individuals in the mainstream black community. Farrakhan has also been honoured by cities across the United States for his anti-drug efforts. In 1989, the District of Columbia passed a resolution extolling the work of Farrakhan and the Nation of Islam for closing down a drug market in an apartment complex. In 1989-1990, Farrakhan was honoured by the cities of Philadelphia; Tacoma, Washington; Compton, California; and Prairie View, Texas for his work with drug addicts.

Despite these accolades, a number of African-American leaders recognize the danger Farrakhan poses and have spoken out publicly against him. On February 3, 1994, Congressman Major R. Owens, of Brooklyn, New York, delivered a forceful statement condemning Louis Farrakhan and his anti-Semitic attacks on Jews. He urged African-American leaders to leave Farrakhan and his hate group and "let them march off to their own destruction."

## Jewish Perspectives

Is the anti-Jewish campaign of Louis Farrakhan dangerous? Is he succeeding in spreading it in wider circles? Some Jewish leaders suggest that Farrakhan's brand of anti-Jewish sentiment is not a major trend in the black community. They note that despite Farrakhan's obvious charisma and notoriety, his adherents remain a small percent of the country's Black Muslims. They concede, however, that Farrakhan's anti-Jewish activities generates distrust between Jews and mainstream black leaders, because not enough black leaders rise to defend the Jewish community.

Other Jewish leaders assert that Farrakhan poses a real danger because of the appalling conditions which presently exist within the black community. Hatred feeds on despair. They feel that the Nation of Islam is an organization that is steeped in hate. This

hate pervades their entire operation and prejudices everything they do. This could have dire consequences in the future.

Early in 1995, Farrakhan called for a "Million Man March" of black men, to be held in Washington, D.C. He announced that the themes of the march were black unity and that black men should become more self-reliant and take responsibility for their lives. The March took place on October 16, 1995. An estimated 400,000 African-American men participated. During the weeks leading up to the event, Farrakhan received widespread coverage in the press and on television. Although Farrakhan concentrated his utterances on the purpose of the March, his appearances generated controversy. In an interview with Reuters Television, Farrakhan elaborated on why he refers to Jews as "blood-suckers" of the black community. "Many of the Jews who owned the homes, the apartments in the black community, we considered them bloodsuckers because they took from our community and built their community, but they didn't offer anything back to our community," he said.

Despite these comments and Farrakhan's reputation as a separatist, racist and anti-Semite, numerous black personalities and leaders sanctioned the March. Others, such as former General Colin Powell, supported the theme of the March, but distanced themselves from Farrakhan. Many whites exhibited a similar ambivalence.

Nevertheless, a number of black and Jewish leaders displayed no such reticence. For example, Mary Frances Berry, chairwoman of the United States Commission on Civil Rights, censured Farrakhan because he "routinely expresses the most despicable, anti-Semitic, racist, sexist and homophobic attitudes imaginable."

Despite the reactions of like-minded leaders - both black and white - the widespread publicity and support the March received brought Farrakhan nationwide exposure and strengthened his position as a black leader who cannot be ignored. This increased status gives Farrakhan added influence and power. Louis Farrakhan has never repudiated or apologized for his anti-Jewish remarks. Until he does he so, Jewish leaders stress, no dialogue between him and the Jewish community is possible. Until real progress to alleviate the terrible plight of black Americans is made, Farrakhan's anti-Jewish allegations will continue to find a receptive audience among African-Americans and remain an unsettling problem for American Jews.

## Clarification

In the last issue of JUSTICE (No. 7, Dec. 1995) we reported the case *Alice Miller v. The Israeli Air Force*. We would like to clarify an error which occurred in the translation of the decision delivered by Justice Dalia Dorner.

In the article, Justice Dorner's opinion is presented as stating that although controversial, United States case law has regarded classification according to gender as a "suspect" classification which requires the application of the standard of "strict scrutiny". Such was not the conclusion presented in the opinion and such is not the applicable standard in the United States.

Justice Dorner's decision quoted the opinion of Justice Brennan in *Frontiero v. Richardson* (1973) where he did indeed claim that gender should be granted suspect status and strict scrutiny. However, as Justice Dorner stated, on this matter he was only joined by three other Justices, thereby not forming a majority consensus with binding precedential authority.

What Justice Dorner did present as the current standard was the more recent holdings of the U.S. Supreme Court in *Craig v. Bowen* (1976) and *Mississippi University v. Hogen* (1982). In these opinions, the Court granted "quasi-suspect" status to gender and applied "intermediate" scrutiny which inquires whether a "substantial relationship to an important governmental objective" has been established.

*The Editor*



# Ethnic Tolerance in Australia

Colin Rubenstein

**I**n terms of ethnic diversity and multicultural tolerance, Australia has made a complete turnaround since the days of the official and blatantly racist and discriminatory “White Australia” policy. In the 50's and 60's, ethnic differences were openly ridiculed and condemned, non-White immigration, especially Asian immigration, was completely unwelcome, and the near universal term for a member of a visible minority was the derogatory word “Wog”. Today, Australia probably has as good a record as any country in the world in implementing multiculturalism and endeavouring to establish ethnic tolerance.



One major sign, and in some ways, the culmination, of that turnaround, occurred with a piece of legislation passed just recently by the Australian parliament. On 31 August 1995, the Australian House of Representatives agreed to an amended version of the Racial Hatred Bill 1994, with support of both government and opposition. This Act, which became law through the assent of the Governor-General, on 15 September, was designed to provide “an avenue of complaint through the Human Rights and Equal Opportunities Commission for people who suffer offence or who are insulted, humiliated or intim-

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idated because of race, colour or national or ethnic origin”. (The Hon. Michael Lee, MP).

The law which was eventually passed was a watering down of the original government proposal. The Australian Senate deleted the proposed amendment to the federal Crimes Act, which would have provided for offences of threats against people and property together with the incitement to racial violence because of race, colour or national or ethnic origin. In the Senate, Opposition senators argued that the State governments were the appropriate legislators for introducing criminal law.

The bill, the first federal legislation in Australia was the culmination of a process whose beginning can be dated back at least 20 years. In a sense, one can see the bill as the latest peak of a process that began with the scrapping of the racist “White Australia” policy in 1972, and the gradual move to make Multiculturalism a part of official government ideology. More specifically, one can trace the basis of the current bill to Australia’s decision to ratify the International Convention on the Elimination of All Forms of Racial Discrimination in 1975. Article 4(a) of that Convention called for attempts to justify or promote racial discrimination to be prohibited by law, but Australia lodged a reservation to its adherence, stating that Australia is “not at present in a position” to implement such but promising to implement them “at the first suitable moment”.

Australia’s adherence to the Convention was actualized through the 1975 Racial Discrimination Act, Australia’s first federal law outlawing discriminatory practices. Early drafts of this bill included prohibitions of racial incitement, but these were removed in the face of hostility from an opposition-controlled Senate.

Australia lodged a similar reservation to its 1980 ratification of its UN Covenant on Civil and Political Rights, which also called, in Article 20(2), for racial incitement to be illegal. Little was done over the next few years, though Australia’s Human Rights Commission recommended a law prohibiting incitement in a report in 1983.

In the late 1980's, there were increasing calls for a racial vilification law from human rights and ethnic groups. In 1989, NSW became the first state to pass landmark legislation mandating criminal penalties for public racial incitement which threatens violence, and providing civil means of redress for publicly inciting hatred on racial grounds. Similar laws were passed in Western Australia in 1990, the Australian Capital Territory in 1991, and Queensland in 1992.

The federal government was moved to take action following

no less than three separate federal reports published in 1991, all recommending some form of federal racial vilification legislation, the Royal Commission into Aboriginal Deaths in Custody, the Review of Commonwealth Criminal Law, and most importantly, the National Inquiry into Racist Violence. The last was a major attempt to come to grips with the problems of racism in Australian society, which was set up in 1988 in response to community concern over a series of attacks, acts of harassment and attempts at intimidation directed towards church and ethnic leaders, as well as those involved in anti-racism work.

The federal government responded to these reports with a bill in 1992 which, similar to the NSW legislation, mandated both civil and criminal penalties (despite the fact that of the three reports mentioned above, only the National Inquiry into Racist Violence had recommended criminal penalties). The bill was, however, allowed to lapse from the parliamentary agenda following a federal election in March 1993.

When a similar bill was finally reintroduced to parliament in October 1994, it touched off considerable, often quite vehement, public debate. Media comment was overwhelmingly negative, with both editorialists and political commentators overwhelmingly attacking the bill as an affront to freedom of speech. Even more worrying was frequent portrayal of the bill, in letters and among some of the less responsible columnists, as a minority conspiracy to deny rights to the Australian majority. Despite the fact that the bill enjoyed wide support among ethnic leaders, Jewish groups were particularly targeted as authors of the bill who had demonstrated that they were "too powerful".

The opposition response to the bill was somewhat confused, reflecting deep internal divisions on the issue, especially as it concerned criminal sanctions. A compromise solution was worked out whereby the opposition was to oppose the government's bill, but propose their own counter-bill, something of a futile gesture, given the government's majority in the House of Representatives.

The government's bill passed quickly through the House of Representatives on party lines, but was stalled for many months in the Senate, where the opposition has a blocking majority with the support of a small party with two sitting Senators, the Australian Greens, who opposed the provision for criminal sanctions. The opposition was able to delay the bill, and despite government threats to call an election of both houses if the bill was blocked, when the bill was finally brought up for debate in August 1995, the opposition had the numbers to amend the bill to remove the criminal sanctions.

The government had little choice but to ratify the modified Senate draft in the House of Representatives.

The civil provisions that Australia eventually made part of its laws are much broader and provide a much lower threshold than in the NSW Act. Federally, an act only needs to be "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate". It does not only deal with the promotion of hatred but also with the acts themselves. This does not apply to private acts.

The process is victim initiated and falls within the general complaints procedure of the Human Rights and Equal Opportunities Commission.

The landmark NSW law of 1989 included criminal provisions to deal with incitement to vilification. The maximum penalty is for the criminal offence of serious racial vilification, *i.e.*, inciting hatred by means which include threatening physical harm, towards, or towards the property of, a person or group. The federal bill had had penalties of two years for threats to cause physical harm and one year for threats to property and for incitement of racial hatred, before they were removed by the Senate.

Unfortunately, the Act still does not resolve the question of Australia's unreserved accession to the two relevant international treaties. The Attorney-General, Michael Lavarch, answered a question on the Act on November 23, in which he said "I am advised that the withdrawal of the declaration/reservation [which Australia deposited with its instrument of ratification of the International Convention on the Elimination of All Forms of Racial Discrimination] is not possible at this stage as the Racial Hatred Act 1995 did not create 'an offence punishable by law' (namely, a criminal offence) within the meaning of Article 4(a)" of the Convention.

The Government has said that it will amend the Crimes Act after the next federal election to effect changes to the criminal law in the manner of the Racial Bill.

In any case, Australia has clearly come a long way since the days of "White Australia". Not only is racism out of fashion, there is every reason to hope that the Policy of Multiculturalism, combined with the 1975 Racial Discrimination Act and the 1995 Racial Hatred Act will help to keep it that way. The only thing lacking, as a final step, is criminal provisions for the severest forms of racial incitement to violence to place Australia in full compliance with the most advanced International Treaty Law on Human Rights relating to Racism and Racial Discrimination.





# Spain's Constitutional Court Endorses the Prohibition of the "Hitler - SS" Comic because of its Racist Nature

Alberto Benasuly

**I**n May 1990, Barcelona's Makoki publishing house launched a comic album (drawings and text) entitled *Hitler-SS*, compiled by Philippe Vuillemin and Gourio, both of whom are French citizens. The comic relates various episodes from the National-Socialist extermination camps during World War II, including sexual aberrations, using mocking, offensive and contemptible language towards the Jewish people and religion. Damián Carullá, the manager of the publishing house, decided to go ahead with the publication in spite of being informed about the prohibition against publication in France and the condemnation of the French Jewish community.

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B'nai B'rith de Espana, and Amical de Mathausen - an association of former Spanish inmates of Nazi concentration camps - each filed a criminal complaint against the people responsible for the editing and publication of the comic, on the grounds of grave insult and mockery of a religious belief. The Examining Judge in Barcelona decided to proceed with the criminal actions and to confiscate the publication and the printing

equipment. In his defence, Carullá maintained that his only intention was to parody and ridicule the so called "neo-revisionist" organizations which deny the Holocaust or genocide of the Jewish people, an "intention" which does not appear in the tales of the comic. In spite of this, on 29 January 1992, the Criminal Court acquitted Carullá on the grounds of lack of criminal intention.

An appeal was brought against Carullá's acquittal to the Provincial Court of Barcelona. This Court partially upheld the appeal and sentenced Carullá, as only author of the insult, to one month and one day of "major imprisonment" (*arresto mayor*), a fine of 100,000 pesetas and half of the legal fees. However, the Court acquitted him of the offense of mocking a religious faith. According to the judgment, the contents of the comic entail "contempt for an historical event in which [the Jewish] people is one of the protagonists". The Court held that the publication clearly contains the potential to hurt the sensitivity of the Jewish people, which was directly affected by the Nazi genocide. Referring to that genocide, the Provincial Court declared that:

"the existence of the concentration camps and what happened there is known to citizens all over the world... and that those facts must be respected and remembered by citizens all over the world, in order to avoid their possible repetition".

Carullá petitioned the Constitutional Court, the supreme interpreter of the Constitution, for protection, alleging the violation of his fundamental right to freedom of speech and to the free dissemination of thoughts, ideas and

views. The public prosecutor, as well as the Associations of B'nai B'rith and Amical de Mathausen, opposed this petition.

Accordingly, the issue under consideration was the conflict between freedom of speech, protected by the Spanish Constitution, and other rights and goods which are also protected, such as the inherent dignity of people who suffered the horrors of National Socialism's extermination camps during World War II.

In other words, the issue was the limits of the right to freedom of speech, in the circumstances of a particular case. The constitutional values at stake are freedom of speech and the right to honour. The former has a preferential value, provided that it is used within constitutionally protected boundaries. If those boundaries are overstepped, the right to honour prevails. Any other issue, without a constitutional dimension, corresponds to the level of common legality and is not, therefore, within the Constitutional Court's competence, but belongs exclusively to the regular judges and tribunals.

The Second Chamber of the Constitutional Court rejected the petition for protection, in a judgment given on 11 December 1995, by Magistrate don Rafael de Mendiz bal Allende, on behalf of that Chamber.

In the judgment, the High Court legitimizes the collective defence of those who, like the Jewish people, are attacked as a collective. The Court states that:

“the Jewish people as a whole, its geographic dispersal notwithstanding, identifiable by its racial, religious, historical and sociological features, from the Diaspora to the Holocaust, is subjected as such a human group to invective, insults, and global disqual-

ification. It seems fair that if it is attacked as a collective, it should be entitled to defend itself in the same collective dimension, and it is legitimate for [the purposes of that defense], to substitute [the action of] individual persons or legal entities belonging to the same [Jewish] cultural or human field. Once and for all, that is the solution which... was accepted by this Constitutional Court in its judgment 214/1991.”

**The Constitutional Court legitimized the collective defence of those who, like the Jewish people, are attacked as a collective, and it is legitimate for that purpose to substitute the action of individual persons or legal entities.**

This is a reference to the memorable judgment of 11 November 1991, in which the Constitutional Court recognized the right of Violeta Friedman to her honour, in her dispute against Leon Degrelle, where the Court established a doctrine and filled a legal vacuum regarding the constitutional lawfulness of ideological freedom and the freedom of speech and information, in so far as they include racist, xenophobic or anti-Semitic manifestations.

The judgment indicates that:

“a reading [of the comic] reveals the global aim of the work, namely, to humiliate those who were prisoners in the extermination camps, primarily the Jews. Each vignette - word and drawing - is aggressive by itself...”

Further:

“in that context, it applies a pejorative concept to a whole people, the Jewish [people], because of its ethnic traits and its convictions. A racist approach, contrary to the ensemble of constitutionally protected values.”

The Court also considers its influence on the public of readers - which is supposed to be, because of the medium, a *tebeo* or “comic”, a public of children and teenagers not yet completely grown up - “about issues which may also deprave, corrupt and deform them”. (Judgment of the European Court of Human Rights, December 7, 1976, the *Handyside case*).

The Constitutional Court found that this publication contained an incitement to hate and violence.

“Throughout its almost one hundred pages the language of hate is spoken, with a heavy charge of hostility which incites, sometimes directly and sometimes by a subliminal gimmick, to sadistic violence”.

At this point, the judgment alludes to the Bill of Civil and Political Rights of New York, Art. 20.2 of which provides that the law shall forbid “any apology of national, racial or religious hate, which constitutes an incitement to discrimination, hostility or violence”. These are considerations of great and current interest. The new Criminal Code, which comes into force in May 1996, provides

for the offense of “provocation to discrimination, hate or violence, for racist, anti-Semitic or other reasons”. The punishment will be minor prison from one to three years and a fine.

Likewise, the Constitutional Court justified the dismissal of Carullá’s petition for protection, because:

“the pamphlet has a flavour of groundless cruelty, with or without charm, towards those who suffered on their own flesh the unprecedented tragedy of the Holocaust; many of whom - the

immense majority - are unable to complain, but others of whom are still alive; and also towards their relatives, friends or coreligionists, or towards any man or woman... A ‘comic’ such as this, which turns an historic tragedy into a funny farce, must be defined as a libel, because it seeks, deliberately and without scruple, the vilification of the Jewish people, with contempt for its qualities, in order reduce its worth in the eyes of others, which is the definitive element of the offence of defamation or disgrace”.

Once again, we have here a judgment of the Constitutional Court which confirms and consolidates its views on racism and anti-Semitism, on the eve of the new Criminal Code entering into force. The key to a democratic system of a peaceful co-existence is based on respect for other people. The use of freedom of speech, causing injury to human dignity, the irreducible core of the right to honour, is placed outside the protection of the Constitution.

## Jewish Trade and Communication Center in Berlin

On 19 December 1995, the new Jewish Trade and Communication Center project was initiated in Berlin-Mitte, Germany. Close to the new synagogue, the Center will offer a large site for Jewish commercial and cultural associations, including an amphetheatre, restaurant, Jewish bookshop and Judaica shop. Dr. Wolfgang Schultz, Advocate of Berlin, representing our Association, participated in the ceremony.



### Legal Options against Terrorism *continued from page 6*

#### Conclusion

Israel is in the midst of a historic peace process with its neighbours, hopefully leading to a final and peaceful resolution of the Arab-Israeli conflict. However, there are still numerous forces who oppose both the process and its goals, committed to return the middle-east to darker times.

In recognition of this state of affairs, the Israeli-Palestinian Interim Agreement of September 28, 1995 contains the following specific provision:

“Both sides shall take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against

each other, against individuals falling under the other’s authority and against their property, and shall take legal measures against offenders.”

It is to be hoped that, in the future, the Palestinian Council will fully implement its undertaking in this regard.

Irrespective of this fact, Israel continues, and shall continue in the future, to take all necessary steps for the protection of its citizens from hostile actions. The current “war” against *Hammas* and the other terrorist organizations is but an example of the implementation of Israel’s right and obligation in this regard.

For while it is true that no real security can be achieved without peace, it is equally true that no real peace can be attained without security.

# The Right to Privacy in Jewish Law

Emmanuel Rackman



**T**he Jewish religious tradition has been a principal source for democratic ideals and principles. It has been almost an obsession with me to demonstrate that the ideals of Judaism and democracy are not only compatible but also that the latter are rooted in the former. Recently, with the emergence in the world of philosophies of neo-conservatism, there are Jews who challenge my long-held thesis and urge upon us that “Judaism is anything but liberal”. Spiritually and intellectually they identify with the fundamentalists of all faiths. Yet no better illustration can be cited than its commitment to the equality of all human beings.

The fact that God created all creatures in the plural number while only two human beings were created from whom all of humanity is descended makes it impossible for one ever to claim superiority over another. The *Talmud* makes this argument. It is also found in the writings of Augustine. And Thomas Paine found that it was the only argument he had against Edmund Burke to justify the statement in the Declaration of Independence of the United States that all men are created equal. The equality to which the Stoics were committed was based on man’s possession of reason. The Jewish doctrine made them equal because all were created in the divine image.

In this article I shall deal with only one of the human rights that are the hallmark of democracy. That human right is the one most recently given constitutional protection in the United States: the right to privacy. Its source is unequivocally the Jewish religious tradition. It was only at the dawn of the nineteenth hundreds that an essay in the *Harvard Law Review* raised the issue. More than sixty years later the United States Supreme Court, in *Griswold v. Connecticut*, found in the nation’s Bill of Rights the bases for the protection they gave the right. Interestingly enough, its argument parallels the manner in which the right developed in Judaism.

Justice Douglas, of the Court, relied on three provisions of the

Bill of Rights in the federal Constitution. I quote:

“Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

substance. The Third Amendment in its prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner is a facet of privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures’. The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people’.

The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions of the sanctity of a man’s home and the privacies of life.

He added:

“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”

## Privacy in the Bedroom and Privacy in Religious Performance

Privacy in the bedroom was one of the earliest of Jewish rights and Jews were proud of it. The idea is encapsulated in one

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Biblical verse, “How goodly are thy tents, O Jacob, thy dwelling-places, O Israel”. It was pronounced by the non-Jewish prophet Bilaam and his praise was attributed to the fact that he saw that the openings of the tents of the Jews in the wilderness did not face each other.

With this in the background, the quartering of the king’s soldiers in private homes would have been unthinkable among Jews. But the privacy respected went beyond that.

The area in which one would want maximum protection of the right to privacy is the area of religious thought and religious performance. Yet here one encounters a paradox. On the one hand, Judaism is a faith that prescribes in a most comprehensive fashion what one shall think and what one shall do. Yet, despite that, even in ancient Judaism no attempt was ever made to invade the privacy of Jews by ferreting out information as to what they believed or how they behaved. The Jew was generally on his honour. And God was the sole judge. If the Jew misbehaved in public then he might be punished for his offence against the prevailing norm. However, the Jewish state was never a police state. The faith may pertain to every aspect of life and action. It may also be in a measure authoritarian because it has many dogmas and doctrines, and the active propagation of heresy is proscribed. But there never was surveillance by the state as to what one did in private or what opinions one held.

The very important Biblical source for this liberal approach which is too often overlooked, is found in *Leviticus*. Males and females became *temaiim* (ritually unclean) because of certain emissions from their genitals. To be relieved of such a state they must undergo immersion in water, but first they must count clean days. A man must count and a woman must count - there are separate commands for him and for her. And after each command to count there appears an added word meaning “for himself” and “for herself”. No one else counts for them. There is no supervision to make sure that they do not cheat and thus accelerate the process of becoming *tahor* (ritually clean). They are on their honour. Thus the *Talmud* interprets the verses. And in this way it expanded the right to privacy some two thousand years ago.

Unfortunately, there have been Jewish communities which did not fathom this beautiful feature of the Jewish heritage and in the facilities which they established for the prescribed ritual immersion they kept records that might reveal whether anyone cheated. This is not consonant with the authentic tradition. One ought rather associate the tradition with the decision of one of New York City’s Commissioners of Welfare to respect the mere statement of anyone seeking help that he needed it. There was to be no investigation. An investigation was only made when facts subsequently appeared that created doubts as to the integrity of the claimant. Otherwise the poor were on their honour, as are the rich with regard to their income tax returns. I do not now pass judgment on New York’s policy but I do marvel that so long ago Jewish law was very sensitive with respect to the privacy of males and females in matters of religious observance.

**Even in ancient Judaism no attempt was ever made to invade the privacy of Jews by ferreting out information as to what they believed or how they behaved.**

Another important aspect of this right to privacy is a point of Jewish law often overlooked. According to Jewish law, the status of bastardy is caused by the adulterous or incestuous relationship of male and female. For most crimes of incest the punishment is by God, and not by a human tribunal. Yet, although cohabitation between male and female when she is “unclean” is just as much offensive to God and punishable by Him as incest, the offspring do not suffer any stigma -

added protection against the invasion of the privacy of the bedroom.

In their religious performance in the bedroom Jews were on their honour *vis-à-vis* God. And thus privacy in religious matters was protected in other ways as well.

From Judaism’s attitude towards the confession of sins one can also glean how much Judaism stresses both the importance of privacy and the goal of self-directed obedience to God. Confessions were never made to anyone but one’s self. And it was not even necessary to confess in words audible to the self - one could do it in thought alone. Certainly no priest had to listen or be given even an allusion to the nature of the offensive act. The privacy of confessions became the basis for silent prayer in Judaism. A person might want to make a confession during prayer, but if prayers were to be recited aloud then he might be

inhibited from doing so. Therefore, all prayer was to be silent prayer. That a sinner should not be embarrassed was derived from a Biblical verse which directed that sin offerings should be brought in the Temple in practically the same place where voluntary offerings were brought in order that bystanders might never discern whether the offeror was seeking atonement for a sin. Concern for the sensitivity of the offender was paramount. Respect for his privacy and his dignity was maintained.

Judaism sought not only to protect privacy *vis-à-vis* others but also to encourage its exercise by making one's obedience to God and communication with Him a private matter. Thus privacy was not only a right but also a value. It was from Plotinus that we learn, in the formulation of Rabbi Joseph B. Solveitchik, that religion is essentially the flight of the "alone" in every person to the "Most Alone", God.

We will yet see how the practice of privacy expanded its application into several other situations. And that too is the product of religious thought and concern.

### The Inviolability of Person and Home

From the Bill of Rights of the United States Justice Douglas cited the prohibition against unlawful searches and seizures. The religious root for this protection is the Biblical verse prohibiting a creditor from forcefully entering the home of his debtor. He must stand outside while the debtor brings him a pledge for the debt. The *Talmud* applies the same prohibition to the sheriff. The Bible also denies the creditor the right to seize anything that the debtor requires to earn a livelihood, and even that which he uses in his home for the preparation of food. The list was extended in the *Talmud* to include virtually everything involving sustenance and survival.

When the creditor finally gets a pledge which he may lawfully hold, he must return it to the debtor whenever the debtor requires its use - the return of a blanket for sleep at night and the return of a coat to be used for daytime movement outdoors.

This unusual burden on the creditor is based on a religious foundation. It is God's demand of him in the following manner:

"You know, creditor, that like most people you are not a perfect man. Because you undoubtedly committed some sins by day you forfeit your soul to Me. I take it from you at night. But you need it in the morning. Therefore, I return it to you. Therefore, you must treat your debtor similarly".

A very imaginative but impressive justification for the unusual imposition on the creditor's use of the debtor's pledge!

And from a widow no such pledge may even be taken. One can visualize what would happen to her reputation if this daily taking and returning of the pledge was practiced!

One must also bear in mind that since so much of this is based on Biblical verses the persons who drafted the Bill of Rights were aware of them. The Bible was one of the principal books they knew well. Moreover, Justice Douglas referred to still

another constitutional provision: the privilege against self-incrimination. For this there is no Biblical source but the *Talmudic* provisions were well known to the British jurists as early as the seventeenth century.

A person may assume financial obligations and confess debts but his body is not his to waste away by volunteering for corporal punishment. His body was the Lord's - not his - and any confession of guilt was a nullity. The privilege could not be waived.

This rule was rationalized in several ways. First, as already stated, a man's

body is not his to mutilate. Second, he is his own closest relative, and relatives were incompetent to testify. Third, as *Maimonides* stated, Judaism does not tolerate a man's indulgence to himself of the death impulse.

In any event, self incrimination was opposed by the religious tradition.

Thus all of the reasons Justice Douglas cited to give constitutional protection to the right to privacy are rooted in the religious tradition known to the West and especially its clergy and jurists.

Yet the right was broadened in Jewish sources beyond the sources cited by Justice Douglas.

### Privacy in the Economic Sphere

One of the most interesting phenomena in the history of the

**The privacy of confessions became the basis for silent prayer in Judaism. A person might want to make a confession during prayer, but if prayers were to be recited aloud then he might be inhibited from doing so.**

right to privacy in Jewish law is the manner in which an item of folklore combined with an ancient religious tradition helped to develop moral behaviour and expand the scope of personal privacy into the economic area - including personal and intellectual property.

The ancient tradition is called *Tzeniuth* - modesty with regard to one's possessions and achievements and certainly minimum talk about them. The Rabbis had taught that when Moses had to climb Mount Sinai to receive the second set of tablets God asked him to go alone. The earlier set was ill-fated because it was given in a spectacular fashion - amid thunder and lightning, while that given in silence, with God communing with Moses, so to speak, *in camera*, endured.

The verse in *Exodus, XXIV*: is very specific. Moses was to go up the mountain alone. And the commentators, quoting earlier *Midrashim*, explained that that fulfilled the virtue of *Tzeniuth*.

The Rabbis also said that only private property which is hidden from the eye will be blessed.

However, this counsel was reinforced by an element of folklore - fear of the "evil eye".

It is difficult to believe that that superstition was really approved by the Rabbis. How could they have believed that God fulfills the wishes of a person with the "evil eye"!

They must have regarded the fear as one of the ways of the *Amorites* - pagans who knew no better. The Law prohibited the pursuit of the *Amorite* practices. Yet, fear of the evil eye became

means for encouraging privacy.

When a person feared the evil eye, he was mindful of the transitory character of life itself - not to mention wealth and health.

Second, by not being ostentatious he helped himself not to be arrogant and his acquaintances not to be jealous, and thus "violate one of the Ten Commandments".

Practical wisdom dictated that the fear of the evil eye should not be discouraged. It yielded several fringe benefits.

And consequently, the right to privacy in one's home and especially one's bedroom was extended in the *Talmud* to areas outside the home - one's garden, the common court where even cooking was done. Women's recipes could be kept private and certainly ways of creating one's wares, for sale to others.

The final step was the protection of one's writings, processes of manufacture, lists, *etc.*

Professor Nahum Rakover has made this clear in his study for Israel's legislature on patents and copy rights.

Thus, it appears that the morality Judaism encourages combined with its toleration of a false belief contributed to the protection of privacy with regard to one's personal and intellectual property. And the cycle is complete. From the privacy of belief and communication with God, through the privacy of person and home, to privacy with regard to all of one's property, real, personal, and intellectual is the tale of one human right in Jewish law. ■



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