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## PRESIDENT'S MESSAGE



In May 4, 1994, an agreement was signed in Cairo between Israel and the PLO concerning the establishment of selfrule by the Palestinians in Gaza and Jericho, and the withdrawal of Israel from these areas.

The Palestinian leaders have insisted on a number of symbols of statehood, such as border guards, passports, stamps, an international dialing code, etc. They claim that their paramount desire is to establish an independent Palestinian democracy, governed by their own laws and culture. They promise that their aim is to create an open society, living in peace and good neighbourhood with Israel, whose borders and safety would be respected.

Israel has agreed to undertake formidable risks for the chance of peaceful relations. Israeli authorities are doing their utmost to assist Palestinians to overcome the difficulties facing them during the interim period, to facilitate the smooth transition of power and responsibility.

Unfortunately, the period preceding the signing of the agreement has been marked by an increase in acts of violence, perpetrated by extremists who oppose the agreement, on both sides. But, while the murder of Arabs by an individual Jew, acting on his own initiative, was condemned in very strong language by Israeli leaders from all parties, and a commission of inquiry has been appointed, headed by the President of the Supreme Court of Israel, holding public hearings, Palestinian leaders have been reluctant to utter unambiguous condemnations of brutal acts of violence committed by Arabs against Jewish civilians.

We therefore expect the Palestinian leadership to reaffirm in deed as well as in written agreements, their determination to live in peaceful coexistence with Israel. We are still waiting for them to expressly condemn acts of violence and terrorism, and prove their unconditional determination to stop them. We also demand that they legally and formally repeal the articles of the PLO Covenant which call for the annihilation of the State of Israel, in compliance with their obligations under the Declaration of Principles. The time for evasive tactics is long past. Both sides must show that they are acting in good faith. The Israeli government has done so most courageously, in the face of strong opposition. The Palestinians must follow suit in a determined and positive manner. Only then will the foundation be laid for the long process of instilling confidence in the hearts of both peoples, that there is a real chance for peace in this troubled area.

The refusal of the United Nations to expressly condemn anti-Semitism as a form of racism, has been, for many years, a blemish on that international organization. We therefore welcome the resolution adopted in March of this year by the Human Rights Commission of the UN, which finally and belatedly recognized, more than 50 years after the Holocaust, that indeed anti-Semitism is a form of racism and should be condemned as such. This resolution is particularly important in the light of burgeoning anti-Semitism and racism worldwide. Among the most disturbing phenomena that have lately come to our attention, is the ongoing effort of some black leaders in the United States to ferment a breach between the Jewish and black communities in that country. Thus, a senior spokesman of Louis Farrakhan, one of the most blatant exponents of racism and anti-Semitism in America, last February described the Jews as "sucking our blood in the

black community" and called for black South Africans to "kill everything white" in South Africa. Such phenomena are ignored at our peril for they form a frightening threat not only to Jews but to every democratic society. Every law abiding and decent person should do his utmost to uproot this ugly phenomenon and prevent it from spreading its poison. Lawyers have a special responsibility to combat such vicious propaganda, for they have at their disposal legal means which have proved on many occasions to be most effective.

Denial of the Holocaust is unfortunately spreading and gaining momentum. None of us has the moral right to be silent in the face of this horrendous lie, aiming to rob us of our memory after having exterminated one third of our people. This is more than an attempt to rewrite history. It is an attempt to rob the dead of their death, to deny that they had ever existed.

This movement - for a movement it is, with funds and publications in an ever-growing number - must be prohibited and punished. We therefore mark with satisfaction a recent decision of the German Federal Constitutional Court, which stated that denial of the Holocaust is not to be considered protected free speech.

The French war criminal Paul Touvier has finally been convicted by a French court for murdering Jews during World War II, and sentenced to life imprisonment. The court has recognized his acts as crimes against humanity which are never prescribed. This judgment, long overdue, has touched upon a controversy of many years concerning French collaboration with the Nazis under the Vichy regime.

As formerly reported in our publication, our Association was party to mediation proceedings against L'Oreal for contravention of French law prohibiting surrender to the Arab boycott. The mediation was interrupted by the sudden death of the mediator, Jean Louis Bismuth. He was replaced by Professor David Ruzie, extracts from whose decision we are pleased to publish in this issue. This decision is important especially in the face of the stubborn refusal of Arab states to repeal the boycott despite the ongoing peace process in the Middle East.

Finally, we congratulate South Africa on the abolishing of apartheid and the free elections that have just taken place there. This is a gigantic step in the process of making this a better world to live in. At the same time we are shocked, like the rest of the world, at the ongoing war in former Yugoslavia and the massacre of countless people in Rwanda. We must all unite not only in condemning but in actually fighting these inhuman acts and help bring to justice the criminals who perpetrate them.

Many of these and other issues will be discussed at our World Council Meeting which will convene in Rome on June 26 and which will be attended by members of the Association from about 20 countries. We are looking forward to welcoming you there.

*Hadassa Ben - Yitro*

# Denial of the Holocaust: legal aspects

Stephen J. Roth

**T**he denial of the Holocaust is among the most insidious forms of anti-Semitism and among the most potent weapons in the neo-Nazi arsenal. Undoubtedly, the most serious condemnation of the Nazi regime is the Holocaust. It is true that the Nazis were also responsible for aggression and war crimes, but these could be, and often have been levelled against many other regimes, including the German Empire during the First World War. It is the crimes against humanity that have marked Hitler's regime as especially odious. If these crimes can be wiped off the record of history, and if the Nazis can be portrayed as somewhat disciplinarian and tough on law and order, but otherwise harmless and more efficient than our allegedly lax Western democracies with their growing crises of crime, violence and riots, then the neo-Nazis would have won a great victory. The ideological resistance to Nazism, largely based on the awareness of the horrors of the past, would be undermined particularly among young people who have no personal experience of the Nazi period.

This is an aspect of the denial of the Holocaust that goes far beyond the Jewish interest. It should be a matter of grave concern to all democratic forces that view the rise of the extreme right as a potential menace, or at least, as a serious political irritant. They should, therefore, not allow this obscene historical deceit posing as "revisionism" to be practiced with impunity.

In my view, the way to blunt this weapon is not to debate with the falsifiers of history. Although their writings use all the para-

phemia of scholarly works, they are, in fact, beneath the level of scholarly argument.<sup>1</sup> Intellectual debate simply bestows upon them a degree of legitimacy they do not deserve. Nor does the simple denunciation of the distortion of historical evidence, even on the part of the highest moral and political authorities, have sufficient effect. For these reasons, an increasing number of states have decided to approach the problem through the medium of the law.

## The difficulties of the legal approach<sup>2</sup>

There can be no doubt that the falsification of history, and particularly the distortion of facts about historical crimes, is abhorrent to all fair-minded people. In the case of the Holocaust, it is regarded as a crime in the moral sense because it is offensive to the belief in truth and justice. Moreover, it is deeply hurtful to the survivors of the Holocaust and to all Jews and other groups whose members were victims of the Nazis. The denial of the Holocaust is also regarded as a crime politically because of the aid it gives to the neo-Nazi movement. However,

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Dr. Stephen J. Roth is a long standing member of our Association, an international lawyer, the former Director and now Consultant on International Law of the Institute of Jewish Affairs and Chairman of the Standing Council on Central and East European Jewry of the Board of Deputies of British Jews. This paper was given in abbreviated form during the Ninth International Congress of the Association in Tiberias held in December 1992 and was later published as a pre-publication of the Israel Yearbook of Human Rights.

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1. Characteristically, of the practitioners of so-called "historical revisionism" only David Irving is a recognized, although controversial, historian. Of the others, Richard Verall, the person most likely to hide behind the pseudonym Richard E. Harwood, author of *Did Six Million Really Die?* (1974), is a journalist; Professor Arthur R. Butz, author of *The Hoax of the 20th Century* (1976), is a professor of mechanical engineering, the French Professor Robert Faurisson, author of many books and articles, is a professor of French literature; Ditlieb Felderer and Ernst Zundel are journalists or publicists; and the "gas chamber specialist", Fred Leuchter, author of the infamous *Leuchter Report*, is an engineer.
  2. For an earlier analysis of the problem, written before the adoption of any "denial" laws, see S.J. Roth, "Making the Denial of the Holocaust a Crime in Law", *IJA Research Reports*, No. 1, 1-12 (1982).

the position is more complicated if one considers whether the negation of historical truth is a crime in legal terms.

Legislation against anti-Semitic propaganda or activities usually takes the form of criminalizing incitement to hatred, discrimination or violence on racial, ethnic or religious grounds; sometimes such legislation also bans the dissemination of views based on the racial superiority of one group of the population over another or expressions of contempt towards a group which imply racial inferiority. The international provisions on the subject are phrased similarly;<sup>3</sup> in fact, most domestic legislation has been modelled on the language and scope of the international texts.

The neo-Nazis and the Holocaust-denying publicists and historians usually claim not only that the "so-called Holocaust" never took place; that nowhere near six million Jews died; that there were no gas chambers and no systematic extermination. Most of them add that the whole matter is an invention, a great "hoax" fabricated by Jews or Zionists for the ulterior motive of extorting compensation money from Germany and political sympathy from the world, in particular in relation to the State of Israel. There can be no doubt that this additional allegation which presents Jewry as the perpetrator of a most despicable swindle, is tantamount to incitement to hatred or contempt of the Jews. This was well expressed in the following words by the 17th Chambre Correctionnelle of Paris in one of the cases against the notorious French denial activist Professor Robert Faurisson:

In publicly accusing the Jews of being guilty of a particularly odious lie and of a gigantic swindle... Robert Faurisson could not

be unaware that his words would arouse in his very large audience feelings of contempt, of hatred and of violence towards the Jews in France...<sup>4</sup>

However, it is clear from this judgment, and similar cases, that the conviction has been based not on the denial of the Holocaust, but on the concomitant allegation of Jewish turpitude. Without that additional slur against the Jews (or Zionists) the mere negation or distortion of historical events would not have been considered a crime.<sup>5</sup>

Of course, even denial statements, pure and simple, made without any reference to a Jewish invention or fabrication, will appear highly anti-Semitic to anyone who reads them in their political context. There is often strong circumstantial evidence that will indicate the author's anti-Semitic motive. But that is not always the case. The technique of the Holocaust-denier is reminiscent of the skill of the card-sharp: "Now you see it now you don't." In such situations, the decision on whether to prosecute or convict will depend on the correct assessment by the prosecution authorities or the judges of the denier's *arriere-pensee*. Since this is too feeble a legal basis for the suppression of the dangerous evil of Holocaust denial, some states have adopted specific and explicit legal measures against it.

## Laws prohibiting denial of the Holocaust

Four countries have adopted specific "anti-denial" laws.

### France

French Law No. 90-615 of 13 July 1990 concerning the suppres-

3. Article 20(2) of the 1966 International Covenant on Civil and Political Rights (999 UNTS 17 1); Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (600 UNTS 195); Article 13 (5) of the 1969 American Convention on Human Rights (OATS) No. 36 (1970)). The various documents of the Conference on Security and Co-operation in Europe (CSCE) also have somewhat similar provisions but they are only politically binding. On the CSCE provisions see the chapter by T. Buergenthal, "The CSCE and the promotion of racial and religious tolerance", *Israel Yearbook on Human Rights* (1992) 31-48 (1992); S.J. Roth, "CSCE standards on incitement to hatred and discrimination on national, racial or religious grounds", in S. Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992), 55-60, and "The CSCE and the new increase of national, ethnic and racial tensions", *Helsinki Monitor*, No. 4,5-15, 1993.

4. Judgment of 3 July 1981. Faurisson was found guilty of the concurrent offences of defamation and incitement to racial hatred and violence under the French law of 1 July 1972 on the Fight against Racism. See "Verdicts on Professor Faurisson" in *Patterns of Prejudice*, Vol. 15, No. 4, 51-5, 1981.

5. This was, for instance, clearly expressed in a German judgment by the Appeal Court, Oberlandesgericht Celle on 17 February 1982 (35 *Neue Juristische Woehenschrift* (NJW) (1982)), 1545, which stated that a simple denial of mass extermination which is not accompanied by a specific or at least incidental charge for originating the gassing lie would not give ground for conviction. The leading German commentary to the German Criminal Code, Lenckner in Schonke/Schroder, *Strafgesetzbuch*, Kommentar, 24 ed. 1139, n. 5 (1991) expresses the same view.

sion of all racist, anti-Semitic or xenophobic acts:<sup>6</sup>

Article 9: After Article 24 of the Law of 29 July 1881 on the freedom of the press, the following Article 24b is inserted:

Article 24b. The punishment provided by the sixth paragraph of Article 24<sup>7</sup> shall be applied to anyone who contests, by any of the means set out in Article 23<sup>8</sup> the existence of one or several crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945<sup>9</sup> and which were committed either by members of an organization declared criminal in the application of Article 9 of the said Statute, or by a person found guilty of such crimes by a French or international court.

The tribunal may order:

1. The public display [*l'affichage*] of its decision under the conditions foreseen by Article 51 of the Penal Code;
2. The publication of its decision or its insertion, in a communique under the conditions foreseen by Article 51 of the Penal Code but the cost of the publication or insertion may not exceed the maximum fine imposed.

### Austria

Austrian Law No. 148: Federal Law - Amendment of the Prohibition Law, 1992<sup>10</sup>

The Constitutional Law of 8 May 1945, StGBI. No. 13 concerning the prohibition of the National Socialist German Workers party (NSDAP) ("Prohibition Law"), as amended by the Constitutional Laws StGBI. No. 127/1945 and BGBI. Nos. 177/1946, 25/1947 and 82/1957 and by the Federal Laws BGBI.

Nos. 285/1955, 74/1968 and 422/1974, is herewith amended as follows:

...

4. After the new Paragraph 3g the following Paragraph 3h inserted:

Paragraph 3h. A person shall also be liable to the penalty according to Paragraph 3g<sup>11</sup> I if in print, over the radio or through another medium or otherwise in a public manner accessible to many people denies, grossly trivializes [*groblich verharmlost*], approves or seeks to justify the Nationalist Socialist genocide or other National Socialist crimes against humanity.

### The Federal German Republic

The Federal German Criminal Code<sup>12</sup>

Paragraph 185 Insult

Insult shall be punished by a term of imprisonment of up to one year or by a fine...

Paragraph 194 Formal Complaint

(1) An insult shall be prosecuted only upon formal complaint.

No formal complaint shall be required if the crime was committed by the distribution of writings (11(3)), by making such writings accessible to the public, or in a meeting, or by broadcasting a program on the radio, and if the victim, as a member of a group, has suffered persecution under National Socialism or any other form of despotism and tyranny, if the respective group is part of the population, and if the insult is connected with the persecution.

However, the crime cannot be prosecuted upon official intervention if the victim objects to the prosecution. The objection may not be withdrawn. If the victim dies, his right to file a formal complaint as well as his right to object to the prosecution passes to the relatives indicated in 77(2).

(2) If the memory of a deceased person is blackened, the surviving

6. Journal Officiel de la Republique Francaise, 14 July 1990, 8333-34 (author's translation).

7. Imprisonment from one month to one year, or a fine between 2,000F to 300,000F, or both.

8. These means are: "speeches, cries or threats uttered in public places or meetings or by writing, printed matter, drawings, engravings, paintings, emblems, pictures or any other medium for writing words or pictures sold, distributed, offered for sale or exhibited in public places or meetings, or any media of audio-visual communications".

9. The definition is as follows: "Murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any

civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

10. Bundesgesetzblatt (BGBI) No. 57/1992 of 19 March 1992 (author's translation). (The expression "verharmlost" could also be translated as "making appear harmless").

11. Paragraph 3g stipulates a penalty of one to ten years imprisonment. Paragraph 3j provides that the offence is to be tried by jury.

12. Einundzwanzigtes Strafrechtänderungsgesetz (Twenty-first Law Modifying the Criminal Law) of 13 June 1985. [1985] BGBI 965.

relatives indicated in 77(2) shall be entitled to file a formal complaint. If the crime was committed by the distribution of writings (11(3)), by making such writings accessible to the public, or in a meeting, or by broadcasting a program on the radio, no formal complaint shall be required if the deceased lost his life as a victim of National Socialism or any other form of despotism and tyranny, and the defamation is connected therewith. However, the crime cannot be prosecuted upon official intervention if the person entitled to file a formal complaint objects to the prosecution. The objection may not be withdrawn.

Thus the German law has adopted a different approach from that of other jurisdictions. It did not adopt a special provision against the denial, but it made "insult", if related to the persecution and directed against its victim, a crime to be prosecuted *ex officio* (*Offizialdelikt*). It thereby indicates that the state has acknowledged a particular "public interest" in remedying such an insult. Moreover, the new provision has to be read in the context of preceding German case law which repeatedly declared the denial of the Nazi regime an attack on the honour of (i.e. an insult to) every Jew in Germany, irrespective of whether he personally suffered persecution or was born later.<sup>13</sup> It is worth quoting from the leading judgment of the Supreme Court of 18 September 1979:<sup>14</sup>

In calling the racist murder by the Nazis an invention, the incriminated statements deny the Jews the inhuman fate which they have suffered on account of their origin... This means an attack on the personality of the people who have been singled out by the anti-Jewish persecution in the Third Reich... Whoever tries to deny the truth of past events denies to every Jew the respect to which he is entitled.

## Israel

On 8 July 198-6 the Knesset passed the following law:

## Denial of the Holocaust (Prohibition Law) 5746-1986<sup>15</sup>

1. In this Law, "crime against the Jewish people" and "crime against humanity" have the same respective meaning as in the "Nazis and Nazi Collaborators Law, 5710-1950".<sup>16</sup>
2. A person who, in writing or by word of mouth, publishes any statement denying or diminishing the proportions of acts committed in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, with intent to defend the perpetrators of those acts or to express sympathy or identification with them, shall be liable to imprisonment for a term of five years.
3. A person who, in writing or by word of mouth, publishes any statement expressing praise or sympathy for or identification with acts done in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, shall be liable to imprisonment for a term of five years.
4. The publication of a correct and fair report or a publication prohibited by this Law shall not be regarded as an offence thereunder so long as it is not made with intent to express sympathy or identification with the perpetrators of crimes against the Jewish people or against humanity.
5. An information for offences under this Law shall only be filed by or with the consent of the Attorney-General.

## Switzerland

Switzerland is in the process of adopting legislation against incitement to racial hatred. The National Council (*Nationalrat* - one of the chambers of the legislative Federal Assembly (*Bundesversammlung*)) - discussed the bill submitted by the government and adopted it with the following provision included:

Article 261 b (of the Penal Code of 21 December 1937)

Whoever... publicly through utterances, writings, gestures, assaults [*Taetlichkeiten*] or in any other form injures the honour of a person or group of persons for reasons of their race or their belonging to

13. Federal Supreme Court (BGH) of 8 May 1952 - 5 StR 182/52 in 5 NJW 1183 (1952); BGH of 18 September 1979 - VI ZR 140/78 in 33 NJW 45 (1980); Court of Appeal (OLG) Koln of 28 October 1980 - I Ss 650-651/80 in 34 NJW 1280 (1981).

14. Federal Supreme Court (BGH) of 18 September 1979. On this judgment see also S.J. Roth "German Supreme Court Landmark Decision: Denial

of the Holocaust is an Offence against Jewish Dignity", IJA Research Reports, No. 79/7 (1979).

15. [19861 Sefer Hahukim (Statutes of the State of Israel), (No. 1187) 196 (Hebrew). The English text is an authorized translation prepared by the Israel Ministry of Justice.

16. 4 Laws of the State of Israel 154 (1949/1950).

an ethnic or religious group or for one of these reasons defames the memory of deceased persons, or, for the same reason, grossly minimizes or seeks to dispute genocide or other crimes against humanity... shall be punished by imprisonment or a fine.

At the same time, it was decided that Article 171c of the Military Penal Code of 13 June 1927 shall be amended by adding the identical text, but with the addition: "Minor cases shall be dealt with by disciplinary punishment".<sup>17</sup>

The texts adopted by the National Council came before the Council of States (*Staenderat*, the other chamber of parliament, consisting of representatives of the Cantons) in March 1993.<sup>18</sup> Owing to minor changes by the Council of State in the text, a conciliation session between the two chambers had to take place in June 1993. The bill has thus been accepted by parliament, but, by demand, is now subject to a popular referendum, as is usual in Switzerland, which will take place in 1994. If adopted, Switzerland will be the fifth country with provisions against the denial of the Holocaust.

### International support for legislation

The initiatives taken by the above-mentioned countries to legislate against the denial of the Holocaust have received international support.

On the inter-governmental level, the European Parliament of the European Community adopted, on 21 April 1993, an unprecedentedly tough resolution on racism, which, after "emphasizing the insidious nature of revisionist theories, some of which go so far as to claim that the Holocaust did not take place", also demands in very clear terms, among a series of other legal measures against racism, "the adoption by the Member States of appropriate legislation condemning any denial of the genocide perpetrated during the Second World War..."

Another relevant demand in the resolution is "the introduction

of national legislation designed to combat racism, xenophobia and anti-Semitism on the basis of the most stringent measures existing in the Member States..."<sup>19</sup>

Considering that, in two Member States - France and Germany - legislation against the denial of the Holocaust exists and is designed to combat anti-Semitism (the French law says so in its title), this demand for legislation based on the most stringent existing norms in the Community, amounts to a call to follow the pattern of the French law (as "the most stringent one").

Somewhat earlier, on 11 February 1993, the European Parliament adopted a "Resolution on European and international protection for Nazi concentration camps and historical monuments" which, *inter alia*, declares that "it is the duty of the Commission, the Council and the European Parliament... to combat all manifestations of neo-Nazism in the Community and any denial of the fact that extermination took place in the camps."<sup>20</sup>

Almost at the same time, the Council of the Socialist International, meeting in Athens on 9-10 February 1993, resolved:

In a period when xenophobia and racism is growing in Europe, the Socialist International calls on all its constituent organizations to outlaw incitement to racial hatred and introduce formal and informal education at all levels to encourage tolerance of minorities and refugees and opposition to racism and xenophobia including the denial, trivialization or glorification of genocide.<sup>21</sup>

### Are other legal remedies available?

Before attempting to draw any conclusions on how to deal, in legal terms, with the denial of the Holocaust, all possibilities offered by conventional law should be considered. A number of approaches come to mind.

17. *Referenz-Beschluss*, Nationalrat, Aml Bull. NR 1992 VI 2650.

18. *Referenz-Beschluss*, Staenderat, Aml Bull. SR 1993 190.

19. Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-wing Extremist Violence, No. A3-0127/93 (European Parliament, Minutes of the proceedings of the sitting of 21

April 1993, Item 19).

20. Resolution No. B3-208, 0218, 0219, 0228 and 0283/93 (European Parliament, Minutes of the proceedings of the sitting of 11 February 1993, Item 3).

21. *Socialist Affairs*, No. 1, 1993.



### Prohibition of spreading falsehood

The desire to protect society against the possible harm caused by spreading false news has led to criminal provisions against it in several countries. Thus, for instance, the Canadian Criminal Code included Section 181, possibly the most explicit prohibition of spreading false news:

181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Ironically, despite this strong language, it was in Canada that hope that the denial of the Holocaust could be banned simply as an offence of spreading false news suffered the most serious setback. This happened in a recent judgment of the Supreme Court of Canada in the case of Ernst Zundel.<sup>22</sup>

Zundel, a Canadian of German origin, was charged with spreading false news by publishing literature which denied the murder of six million Jews and claimed that the Holocaust was a myth created by a world-wide Jewish conspiracy. The charge against Zundel was based on the proposition that the term "in the public interest" used in Section 181 includes, in present-day thinking, racial equality and harmony, and consequently its projection is aimed, *inter alia*, at combatting hate propaganda and racism. However, the Supreme Court, in a 4:3 ruling, regarded Section 181 as too vague, possibly restraining legitimate forms of speech, serving no objective of pressing and substantial concern and declared the provision unconstitutional.

In spite of the various provisions against spreading of falsehood in different countries, it would appear from the way they are formulated and construed, particularly following the Canadian interpretation, that they do not offer a safe and satisfactory remedy against the denial of the Holocaust.

### Glorification of a crime

It should be noted that in some of the anti-Holocaust-denial

provisions of the laws reproduced above not only the outright "denial" (as in the Austrian and Israeli law) or the "contestation" (as in the French law) is prohibited, but also what may be called partial denial such as that which "grossly trivializes" (as in the French law); or "diminishes the proportions" (as in the Israeli law). Two of the laws quoted also ban the attempt to "approve" or "seek to justify" (as in the Austrian law) or "praise", "express sympathy with" or "identify with" (as in the Israeli law) the crimes of the Holocaust.

The outlawing of such an approving approach to crimes, their glorification or even their mere approval, is not unknown in criminal law. Below are cited a few examples.

In the Penal Code of Norway glorification of an offence, and even being accessory to such glorification, is declared a punishable offence.<sup>23</sup>

According to the Danish Penal Code, a person who merely "expressly approves" certain offences thereby commits an offence, but this is limited to offences of a treasonous or seditious nature.<sup>24</sup>

The German Penal Code's provision against racial incitement also outlaws glorification of "cruel or otherwise inhumane acts of violence against persons".<sup>25</sup> Another clause of the same Code penalizes the "public approval" (*offentlich billigt*) of certain crimes which include high treason, endangering public safety, murder, manslaughter, crimes against the liberty of a person and a "felony entailing public danger", if done "in a manner capable of disturbing the public peace".<sup>26</sup>

Italy has a provision against "public praising" of genocide which is closer to the subject of the Holocaust.<sup>27</sup>

Evidently, some of these provisions are restrictive, applying to certain major crimes only or in the German case making them conditional on danger to public order. The main problem in applying such laws to the denial of the Holocaust, however, is something else. How does one apply the ban on approval or glorification of a crime to statements, as is the case in Holocaust denial, which actually deny that a crime has ever been

22. R. v. Zundel, judgment of 27 August 1992.

23. General Civil Penal Code of Norway of 22 May 1902, Article 140.

24. Penal Code of Denmark of 15 April 1930 (as repeatedly amended), Article 136(2).

25. German Penal Code, *supra* note 12, Article 13(1).

26. *Ibid.*, Article 140(2).

27. Law No. 962 of October 1967 on the Prevention and Punishment of the Crime of Genocide, Article 5.

committed? Of course, it is possible to argue that, in the light of the overwhelming evidence of the truth of the Holocaust (and the consequent "judicial notice" taken of it by various courts), the person engaged in the denial must have known he was consciously covering up a crime, and that is tantamount to its approval. But to let the matter depend on this construction by courts or juries would make the application of the "approval" provisions to the "denial" phenomenon rather doubtful.

### Whitewashing of a crime

Some jurisdictions outlaw the "whitewashing" of a crime. The strongest provision of this type is probably Article 131 of the German Criminal Code, to which reference was made above as outlawing "glorification" of certain acts. The same provision also makes it an offence to "present cruel or inhuman acts" in a manner that "makes them appear harmless" (*Verharmlosung*).<sup>28</sup>

Attempts to make Nazi acts appear harmless are indeed a frequent form of so-called "revisionist" literature. The "deniers" may not, for instance, dispute that the concentration camp of Auschwitz existed; but they will claim that it was an orderly labour camp, that there were no gas chambers and that although some people died there, it was because of starvation or typhus caused by the conditions of the war.

The difficulty with this kind of provision is that it is applicable only to a limited type of "revisionist" literature, which admits some facts but claims they were harmless. It is not applicable to outright denials. Moreover, whenever these "whitewashing" provisions are framed to apply to any past inhuman act (as in the German law), they need to be subject to qualifications that are not required in the case of the Holocaust, where the facts are clearly established.

### Offending the "honour or the "rights" of people

Reference has already been made above to the German criminal provision on "insult" and to the German caselaw recognizing the denial of the Holocaust as an insult to the personal honour of individuals belonging to the group of victims.<sup>29</sup>

Three cases of Holocaust denial have come before an international forum, the European Commission of Human Rights. The Commission found that the statements questioning the reality of the Nazi extermination of the Jews offended "the rights of others" or "the reputations of others".<sup>30</sup>

However, these instances do not give sufficient assurance that

Holocaust denial would be outlawed on the basis of protecting the victim's honour. The concept of "protecting honour" in this way is not familiar in every jurisdiction.

### Conclusion

Analysis of the legal problems connected with legislation against the denial of the Holocaust has shown the following:

Where denial statements are not accompanied by other anti-Semitic remarks that constitute incitement to racial hatred, one cannot rely on the denial statements by themselves to be judged as incitement. Although the anti-Semitic motive and purpose of the denial may often be fairly obvious, judges may feel bound to base their decision on the strict verbal content of the statement. An attempt to ban Holocaust denial on the basis of incitement would, therefore, often fail; at best it would lead to differing case law, probably even within one jurisdiction and certainly between different jurisdictions.

To rely on provisions regarding the spread of falsehood, glorification of crimes, "whitewashing" of crimes or protection of personal honour is unsafe for the reasons explained above. In any event, such general provisions apply to a wide range of factual situations and, in order to avoid being vague or too broad, they include many restrictions and qualifications. These may thwart the effective application of the general provisions to the phenomenon of Holocaust denial.

Those who regard the legal restriction of Holocaust denial as politically desirable and urgent ought, therefore, to resort to a *lex specialis* as the most desirable course of action. By restricting itself to the limited historical facts of the Holocaust, such a special law or provision could be specific and simple, would not require all the qualifications that are inevitable in more general rules, and would, on the evidence in this paper, be legally effective. The laws reproduced here can serve as models. The fear that they would lead to "trials of history" is unwarranted because the facts of the Holocaust (or of well-defined crimes against humanity) are well established and, accordingly, most courts would apply to them the doctrine of "judicial notice". ■

28. German Penal Code, Article 13(1).

29. See above, notes 13 and 14 and related text.

30. *X. v. Federal Republic of Germany* (No. 9235/81) DR 29, 194 (December 1982); *T. v. Belgium* (No. 9777/82) DR 34, 158 (December 1983); and *Felderer v. Sweden* (No. 11001/84), 8 EHRR 45 (1986).

# Screening of neo-Nazi film cancelled in Germany

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In the first issue of *JUSTICE* we reported the contents of a letter sent by our Association to Mrs. Leuthauser Scharrenberger, Minister of Justice of the Federal Republic of Germany, in which the Association called for the removal of the neo-Nazi film "Beruf Neonazi" ("Profession: Neo-Nazi") from German screens. Minister Scharrenberger responded with the following letter (translated from German):

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"I received with great understanding your expressions of astonishment in respect of the film "Profession: Neo-Nazi", which you shared with me in your letter of the 15 December 1993. I, too, was shocked by this film, produced with the financial support of public bodies.

The film was intended to serve a supposedly documentary purpose. It was supposed to indicate the risks of right-wing extremism. However, it is clear that the film makers did not consider the possibility that influences contrary to the aim of the film would ensue.

As far as I know, to date the film has been publicly screened in only a few places. In the places in which it was screened, it gave rise to vigorous protests on the part of the local residents. A large number of criminal complaints have been filed against Ewald Althans, the director of the film, as well as the producers and distributors. A large number of state prosecutors have initiated preliminary proceedings on the suspicion of incitement against a people, injuring and defaming the memory of deceased persons, and other criminal offences. In the meanwhile the states of the Federation who supported the film have unanimously called for the film no longer to be shown without an explanation and without a clear statement of their reservations as to its contents.

German law has at its disposal a wide range of measures which can be used to prevent the distribution of neo-Nazi propaganda in films and on television. However, teaching, performance and supervision of the appropriate methods, is generally within the authority of the states. Under our constitution, the German Federal Minister of Justice has no powers in this matter. Nevertheless, I am certain that the proper state authorities are aware of their great responsibilities and where necessary will take the steps which are available and appropriate for each specific case.

I take this opportunity to attach here a short report on the measures taken and planned against the violence and propaganda of the extreme right-wing.

In addition, I attach a Memorandum which has just been issued by the Federal cabinet, in connection with the interim report of the Federal Government in respect of "The fight against violence and xenophobia"...

Faithfully,

**Mrs. Leuthauser Scharrenberger**  
Minister of Justice of the Federal Republic of Germany

# Xenophobia and anti-Semitism in Germany

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Following are extracts from a report issued by the German authorities in December 1993, which was supplied to the Association by Mrs. Scharrenberger, the German Federal Minister of Justice, in respect of the suppression of right-wing extremist activities, particularly of a xenophobic and anti-Semitic nature in the Federal Republic:

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## Manifestations of right-wing extremism

### Right-wing extremist organizations

According to the information of the Federal Office for the Protection of the Constitution (BFV), in 1992 there were a total of 82 right-wing extremist organizations and other groups as against 76 in 1991). Once deductions are made for those who belong to more than one group, a combined membership of some 41,900 emerges (in 1991 the figure was 39,800). This does not include the Republikaner Party (REP), which reputedly has 23,000 members. The Republikaner have been under nationwide scrutiny by the BVF since mid-December 1992.

The BVF considers 6,400 of the aforementioned 41,900 persons to be militant right-wing extremists, mainly National Socialist skinheads (3,800 in East Germany, 2,600 in West Germany).

### Right-wing extremist criminal offences

From 1 January to 25 November 1993, the BVF registered a total of 1,674 violent offences with proven or assumed rightwing extremist motives (compared with 2,584 in 1992 and 1,483 in 1991).

Eight people were killed as a result of these acts in 1993 (as against 17 in 1992 and 3 in 1991).

The Federal Criminal Police Office registered a total of 3,365 xenophobically motivated offences committed in the first half of 1993 (compared with 6,336 in 1992 and 2,426 in 1991), of

which 544 were violent offences (1,216 in 1992 and 574 in 1991).

Federal Criminal Police Office statistics also show a total of 327 anti-Semitic offences committed in the first half of 1993 (as against 289 in 1992 and 267 in 1991); five of these were violent offences (as opposed to 13 in 1992 and 10 in 1991). The violent offences do not include cemetery desecrations.

## Investigations and criminal proceedings

The Public Prosecution Office and the courts have reacted resolutely to the challenge of right-wing extremism.

In the first half of 1993, 11,543 investigations were opened. This compares with 12,030 investigations in the whole of 1992. The number of suspects under investigation in the first half of 1993 was 10,053 (compared with 11,515 in the whole of 1992). During this period, 209 warrants for arrest were issued (as against 705 in the whole of 1992).

Of the investigations opened in the first half of 1993, 66 were for homicide (84 in 1992), 710 for causing bodily harm (831 in 1992), 221 for arson (432 in 1992), 434 for civil disorder (847 in 1992) and 7,355 for propaganda offences (7,089 in 1992). 281 investigations were conducted in the first half of 1993 into anti-Semitic activities (compared with 220 in 1992).

In the first half of 1993, 9,634 criminal proceedings were completed (10,171 in 1992), while 4,743 cases had to be abandoned because the offender's identity could not be established (as compared with 4,734 such cases in 1992).

In the first half-year, 972 criminal proceedings ended in conviction (as against 1,490 convictions in 1992). In 415 of these criminal proceedings, a prison sentence or youth custody was imposed (514 in 1992). In 60 of these proceedings, a prison sentence or youth custody was imposed in excess of two years (61 in 1992).

## Legal instruments and organizational framework

The current criminal legislation and administrative provisions largely suffice as a means of effectively prosecuting and duly sanctioning xenophobic and anti-Semitic attacks and of dissemination of neo-Nazi propaganda.

In some areas, however, legal or practical problems have arisen for which additional legislative measures are necessary. The Federal Government and the parties in the governing coalition [prepared] a bill [which was] introduced in the German Federal Parliament in January 1994 [and passed the Bundestag in May 1994]. The following are the main measures envisaged in the bill:

### Criminal law

- \* Section 86a of the Criminal Code (use of symbols of unconstitutional organizations) to be extended to cover symbols similar enough to be confused with the symbols referred to in that provision.
- \* The offence of incitement to racial hatred as dealt with in Section 131 of the Criminal Code to be broadened into a general anti-discriminatory provision, combined with more severe penalties.

- \* Stiffer penalties for causing bodily harm (Sections 223 *et seq.* of the Criminal Code).

### Criminal procedural law

- \* Wider powers to order remand detention (Sections 112(3) and 112a(1) of the Code of Criminal Procedure).
- \* Wider powers to convict offenders subsequent to expedited proceedings.
- \* Establishment of a central register of proceedings at the Public Prosecution Offices.

### Administrative law

- \* Amendment of the Associations Act to make it clear that information obtained in the course of the preparation and implementation of a ban on an association may be passed on to the criminal prosecution authorities.
- \* Scope for individual postal and telephone monitoring to be extended to cover members of associations with (rightwing) extremist aims.

### Organizational measures

The criminal police and prosecuting authorities have special units to which they entrust the investigations and prosecution of right-wing extremist and xenophobic criminal offences.

At the suggestion of the Federal Ministry of the Interior, a "Federal/Lander Information Group for the Observation and Suppression of Right-Wing Extremist/Terrorist, especially Xenophobic, Violent Offences" (IGR) has been set up. This working group coordinates interdepartmental measures for the suppression of right-wing extremist and right-wing terrorist violence, and serves as an information exchange for the Federal Office for the Prosecution of the Constitution, the police and the judiciary.

# German Federal Courts consider denial of the Holocaust

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**In two recent cases German Federal Courts considered cases relating to the denial of the Holocaust. Both judgments are reported here extensively, in view of their importance in reflecting the attitude of the Federal Courts to such a sensitive and increasingly disturbing issue and in positioning the offence within the context of the German Criminal Code and German Constitution respectively.**

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## **Re Deckert, Federal Court of Justice, 15 March 1994**

The first case concerned an appeal from the District Court of Mannheim to the Federal Court of Justice in the matter of Gunter Anton Deckert.

In November 1991, Deckert organized a public NPD (German National Democratic Party) meeting, attended by some 120 persons and covered by a local television crew. Fred Leuchter, the main speaker, delivered a speech in English to the effect that after examining various concentration camps he had come to the conclusion that these had only been disinfection facilities and not gas chambers and that therefore there could not have been any mass extermination of Jews. Leuchter added that the crematoria were not of sufficient size to burn the large number of corpses claimed in such a short period of time. Deckert was accused of translating these and other political statements and adding a number of supportive remarks of his own.

The District Court of Mannheim convicted Deckert of the offences of incitement to racial hatred under Articles 130 and 131 of the German Criminal Code, defamation under Article 186 and defilement of the dead under Article 189. The Court imposed on him a suspended sentence of one year's imprisonment.

Both Deckert and the Public Prosecutor appealed. The

appeals were limited to procedural and substantive issues of law.

The Federal Court of Justice accepted both appeals and in a critical judgment referred the case back to a different bench of the District Court for reconsideration.

In giving judgment the Federal Court of Justice confirmed pre-existing jurisprudence in respect of denial of the Holocaust under German criminal law, but reversed the decision of the District Court on the ground that the District Court had failed to sufficiently state the legal reasons on which it based its decision to convict Deckert. The Court did, however, accept that in taking judicial notice of the fact of the Holocaust and in refusing to hear expert evidence on whether there had actually been a mass extermination of Jews, the District Court had acted in accordance with established judicial practice.

Distinguishing mere insult from an attack on human dignity, the Federal Court noted that in order for an offence to be committed under Article 130 of the Criminal Code, the person attacked must be denied the right to live with equal rights within the community of the state and he must be treated as a being of inferior value. Further, an attack on human dignity is deemed to occur when a person identifies with National Socialist racialist ideology or his utterances are related to that ideology.

According to the Federal Court, an attack on human dignity must be assumed if somebody expresses the view that the extermination of the Jews in the Nazi regime was a deliberately

fabricated lie intended to exploit Germany after World War II to the profit of the Jews. The Federal Court noted that while there was little doubt that the requirements of Article 130 were met if the accused, in organizing and chairing the meeting, had behaved in the way stated, the essential fault of the District Court decision lay in establishing the fact of the NPD meeting while failing to sufficiently develop and establish the specific conduct and statements of the defendant in the general context of the meeting. Put differently, the District Court had failed to provide a comprehensive evaluation of the circumstances which supported or negated the assumption that the accused had attacked the human dignity of the Jewish population currently living in Germany.

While the Federal Court noted that there may be many elements which support the assumption that the defendant was motivated by racial hatred, it was not for the Federal Court - which is limited to a consideration of points of law only to make such an evaluation. Further, with regard to the appeal by the Public Prosecutor against sentence, the Federal Court held that had the District Court established the facts fully, the accused may well have become liable to more severe sanctions. As noted, the case was therefore referred back to the District Court for reconsideration.

In its indications to the District Court the Federal Court also noted with regard to the conviction for the offence of defiling the dead, that no violation of human dignity be permitted after the death of a person but that after death human dignity continues to require protection. The Court held that one of the conceptual elements of the dignity of a person is the circumstances of his death. If a person is deprived of his life in a cruel way organized by the state, exclusively for reasons of race, such as occurred in the gas chambers of the concentration camps, this harsh fate is an essential element of his individual dignity and his memory among the living. The right to respect for this fate is undoubtedly violated when the mass extermination of the Jews is denied as a mere fabrication, and where these facts are stated with a negative connotation or in abusive terms. The Court continued that the same is true for an attempt to ridicule the number of victims, which exceeds all imagination, by pseudo-scientific calculations. Such representations have nothing to do with an objective fact-orientated discussion of historical events and they disregard in the severest possible way the dignity of the victims that continues to exist and needs to be protected beyond the time of the victims' death.

### **Re National Democratic Party District Branch - Munich, Upper Bavaria. Federal Constitutional Court, 13 April, 1994**

The second case concerns an NPD organized meeting in Munich, where the main speaker was David Irving. Under Article 5(4) of the German Law of Assembly, the organizers were required to obtain a permit - which may only be refused where the competent authority is of the opinion that criminal acts are likely to be committed during the course of the gathering. In this instance, the municipality of Munich felt that criminal offences under Articles 130, 185, 186 and 189 of the Criminal Code were likely to be committed and therefore granted the permit subject to one condition. The condition imposed was that the organizers had to ensure, by appropriate measures, that during the meeting no mention would be made of the persecution of the Jews during the Nazi regime if the effect of such statements was to deny that such persecution had taken place. In particular, at the beginning of the meeting, the organizers were required to indicate that such statements were prohibited and an offence under the relevant articles of the Criminal Code, and that if made they would have to be interrupted immediately, failing which the meeting would have to be dissolved by the organizers.

The NPD appealed against this administrative order to the Administrative Court of Munich, the Administrative Court of Appeal and the Federal Administrative Court. The order was upheld throughout. The appellant thereupon appealed to the Federal Constitutional Court on the grounds that his fundamental rights under Article 5 (freedom of expression) and Article 8 (freedom of assembly) of the Constitution had been violated.

The Federal Constitutional Court held that it had jurisdiction to reject claims of unconstitutionality, without giving reasons, if it was unanimously of the opinion that the claim is "manifestly unfounded". In this case, the claim was "manifestly unfounded" and would therefore be dismissed; nevertheless, the Court was willing to explain the reasons for its decision.

The Federal Constitutional Court found that Article 5(1)(i) of the Basic Law (Constitution) gives a right to freely express and disseminate an opinion. The administrative condition imposed in the permit did not violate this fundamental right of the appellant. In coming to this conclusion, the Court drew a distinction between different types of fact and held that while incorrect facts are not protected free speech opinions are protected free speech.

**Statements denying the Holocaust were therefore examined in two ways:**

- A. As a denial of the facts. Statements to the effect that there had not been any persecution of the Jews - was an allegation of fact which is commonly known to be untrue (upon taking into account innumerable reports of eyewitnesses, documents, court statements in numerous criminal proceedings and the results of historical research). Taken by themselves, allegations with these contents do not enjoy protection as freedom of expression.
- B. As a statement of facts used as a basis for developing an opinion. In principle, incorrect statements of fact come within the purview of Article 5(1)(i) if inseparably linked to expressions of opinion. However, in this case the restriction imposed in the administrative order was not in violation of this section.

The reason for this latter finding was because both Article 5 (4) of the Assembly Law (under which the administrative order was given) and Article 185 of the Criminal Code to which it referred were constitutional, including in so far as Article 185 prohibits denial of the Holocaust. The Court found that according to existing jurisprudence, denial of the persecution of the Jews is an "insult" and quoted the following statement of the Federal Court of Justice:

"The historical fact that persons under the descendency criteria of the Nuremberg laws were singled out and deprived of their individuality with the aim of exterminating them, creates a special personal relationship between the Jews living in the Federal Republic of Germany and their co-citizens. Events that took place in the past continue to pervade this present relationship. It is part of their personal perception of identity to be

part of a group of individuals marked by one particular fate which entails a particular moral responsibility of others and which is part of their dignity. Respect for this perception of identity of each of these persons amounts to a guarantee against the reoccurrence of such discrimination and is a basic condition for their living in the Federal Republic of Germany. Those who try to deny those events deny the individual value of each of them to which they have a right. For those affected, denial of these events is equivalent to a continuation of the discrimination against the group of individuals of which he is a part, as well as of his individual personality."

Having established that - in terms of constitutional law denial of the Holocaust would violate personality rights of the Jews living in Germany, the Court was left to consider whether the freedom of expression might enjoy priority over the personality rights as protected by Article 2 of the Constitution. Given the falsehood of the allegations that were likely to be made, the restriction on Article 5(1) of the Constitution was not considered to be particularly severe. On the other hand, if such allegations were made, they would entail violations of personality rights of the Jews of considerable weight.

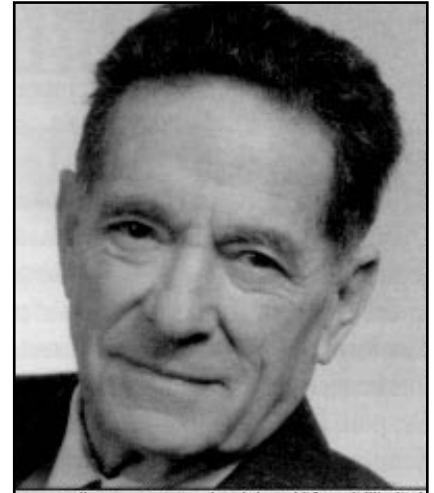
Thus, having balanced the right to freedom of opinion against the personality fights, the Federal Constitutional Court held that the decision taken by the municipality of Munich and Administrative Courts to give priority to the protection of the personality fights was not unconstitutional and consequently did not violate the fundamental rights of the appellant.

*The Association gratefully acknowledges the assistance of Mr. Wolfram Rainer, Councillor for Legal and Consular Affairs at the Embassy of the Federal Republic of Germany in Israel, in preparing this report.*



# Finally the UN condemns anti-Semitism

**Morris E. Abram**



Ambassador Morris Abram

**T**he UN Commission on Human Rights has adopted the first UN resolution denouncing anti-Semitism, bringing to fruition a campaign initiated by UN Watch. Until March 1994, the UN, created in the wake of the Holocaust, had never expressly condemned anti-Semitism, an ancient prejudice which has brought tragedy to humankind. The UN's 50 years of silence on this issue was not inadvertent; from early efforts to include anti-Semitism in human rights instruments to attempts to condemn anti-Semitism by resolution, the international community had ample occasions to collectively denounce anti-Semitism. Last year's Vienna World Conference on Human Rights refused to include anti-Semitism in the final Conference declaration that included

every imaginable form of discrimination.

The UN's failure to label anti-Semitism an anathema, as it has other forms of discrimination (e.g. apartheid), contributed to the toleration of outright anti-Semitic expressions in UN forums. In 1991, the Human Rights Commission refused to denounce the statement by the Syrian delegate to the Commission that Jews kill Christian children to take their blood for the Passover matzot. In 1993, the PLO observer to the UN circulated to the Human Rights Commission a letter stating that the Israelis celebrating their Day of Atonement are never fully happy unless their celebrations are marked by Palestinian blood. Once again, the Commission failed to act.

The adoption of this resolution was not easily achieved, demonstrating the extent to which political anti-Semitism still characterizes the UN, often wearing the cloak of anti-Zionism, anti-Israel expressions. As UN Watch Board member and former Deputy Prime Minister of Sweden Per Ahlmark, put it, "My main concern has always been that the anti-Zionist

campaign has in fact merged with traditional anti-Semitism." Many countries, willing to support a resolution condemning anti-Semitism, declined to take the lead in this effort. A common response was to query why anti-Semitism should be singled out, deliberately ignoring the routine listing of every conceivable type of discrimination in UN resolutions. The extremist Muslim states waged a coordinated battle to remove any reference to anti-Semitism or, if it was to be included in a resolution, distort its meaning or reduce its importance.

Auspiciously, reasoned voices prevailed. The Israel/PLO Declaration of Principles, building on the repeal of the 1991 repeal of the Zionism equals racism resolution, generated an environment in which, finally, the UN could remedy its 50-year conscious omission of anti-Semitism from the UN agenda. UN Watch and other Jewish NGO's, including the International Council of Jewish Women and B'nai Brith of Canada, seized the momentum to urge Commission members to support this

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Morris E. Abram is the former U.S. Ambassador to the UN in Europe. He currently holds the position of Chairman of UN Watch, founded to measure UN conduct by the yardstick of the UN Charter.

effort. At the request of the UN Watch, Turkey, responsible for drafting the resolution on contemporary forms of racism, would insert anti-Semitism into its draft if it could count on wide support. Indeed, Ambassador Gunduz Aktan, Turkey's permanent representative to the UN in Geneva, joined me in declaring that "anti-Semitism [is] the oldest form of racism, intolerance's original sin, as it were.,, Support for the inclusion of anti-Semitism in the Turkish draft was mobilized through extensive lobbying of Commission members and pressure exerted by Jewish NGO's on the governments of the United States and Canada.

When the resolution came to the Commission floor for a vote, the Commission easily approved the paragraph of the resolution's preamble noting the rise of anti-Semitism. Notwithstanding, an American proposal to include anti-Semitism in the operative paragraph, requiring a study of anti-Semitism, resulted in a two and a half week deadlock.

It was critical to include anti-Semitism in the operative paragraph so that the resolution would direct the special rapporteur on racism to report to the Commission about incidents of anti-Semitism and governmental measures to overcome them. The UN practice of appointing thematic rapporteurs (investigators) is the formal machinery by which the UN human rights organs search out and receive complaints about discrimination and report publicly on the same. Guilty nations fear these reports. Iraq has suffered an oil embargo for four years largely because of the findings of the rapporteur on its human rights practices. This mechanism is a powerful tool; it helped crush apartheid in South Africa.

Opinions shaped at the UN have often shamed victimizers into reform.

The resolution narrowly survived two and a half weeks of proposals, counter-proposals and political maneuvers in an effort led by Syria and Libya to strike out anti-Semitism from the operative paragraph, pervert its meaning, or neutralize it by overloading the paragraph with every conceivable form of discrimination. No other resolution considered by the Commission this year suffered the same indignity. Only by virtue of the commitment and perseverance of Turkey and the United States was anti-Semitism retained untarnished in the operative paragraph.

The resolution provides clear authority for including anti-Semitism in the UN struggle against discrimination. The UN human rights bodies and committees that deliberate and report on racism and discrimination must now reach out and

receive periodic reports on incidents of anti-Semitism and governmental measures to overcome them. Their findings will then be reported to the UN bodies in charge for evaluation and discrimination. It is further hoped that the actions and statements of member states in their home territory and in the UN chambers will be tempered by their formal expression, through this resolution, that anti-Semitism is despicable.

The global exposure of anti-Semitism is a first, but significant step towards eradicating an evil that threatens the entire human family. As Per Ahlmark has also said, "anti-Semitism always starts with the Jews; it never stops with the Jews ... [and] if not contained almost always develops into assaults on other groups and minorities and finally destroys democratic institutions and the rule of law."

## UN Human Rights Commission Resolution March 9, 1994.

Paragraph 4:

"Measures to combat contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

Requests the special rapporteur to examine according to his mandate incidents of contemporary forms of racism, racial discrimination, any form of discrimination against Blacks, Arabs and Muslims, xenophobia, negrophobia, **anti-Semitism**, and related intolerance as well as governmental measures to overcome them, and to report on these matters to the Commission at its fifty-first session."

# A propos Touvier, Papon and others

Joseph Roubache

The Cour d'Assises of Versailles has convicted Paul Touvier, former information chief of the Lyon militia, of ordering the execution of 7 Jews at Rilleux La Pape during World War II, in retaliation for the assassination of militia chief Darnand, and has sentenced him to life imprisonment.

This is the first time that a French citizen has been convicted of committing "crimes against humanity". The decision gives rise to mixed feelings of satisfaction and uneasiness.

From the legal point of view, there is satisfaction at the severity of the sentence and the rejection of any extenuating circumstances, including those of constraint by the German authorities or that Touvier had spared one of the tortured prisoners (believing he was Aryan).

Moreover, the judgment delivered by the Cour d'Assises rectifies the earlier judgment delivered by the Chambre d'Accusation of the Paris Court of Appeal which gave a ruling of "non-suit" in favour of Paul Touvier and held that his acts fell outside the scope of the "crimes against humanity" test, and were therefore prescribed under the statute of limitations.

Nevertheless, there is still cause for uneasiness. First, it is regrettable that Touvier was convicted only as an "accomplice" of the Nazis and not as a principal. One of the plaintiffs claiming damages raised the contention that Touvier and the militia had acted on their own authority and not as a tool of the German authorities. This contention, however, risked a finding that Touvier's crimes were prescribed, since the Vichy regime has been held by the Cour d'Accusation not to meet the criterion of an organization committed to the ideology of hegemony over others by reason of their race or religion. This criterion was established by the Cour de Cassation in the Barbie case as a precondition to charges being laid of crimes against humanity.

In holding that Touvier was guilty as an "accomplice", the Cour d'Assises achieved a clever compromise. It abstained from finding that the Vichy regime itself was the source of the crimes against humanity, but, on the other hand, recognized its active

complicity in the German orchestrated Holocaust.

Second, one can only wonder at the meanderings and delays of a justice system, which took 50 years to come to a decision. Initially, there was the presidential pardon granted by President Georges Pompidou. Thereafter, it took 20 years of legal proceedings before a decision of guilt was reached.

Beyond the issue of Touvier himself - a mediocre civil servant who was an instrument of a local French militia - the question at stake was really whether the Vichy regime, as such, participated in the Holocaust, and, if so, whether this regime was the expression of France.

The Chambre d'Accusation of Paris answered the first question in the negative; the Cour d'Assises of Versailles, for itself, answered it in the positive, but with the reservation that the regime had been an "accomplice" and not a principal. With regard to the second question, it is clear that the Versailles proceedings failed to give an answer. While regrettable, it is understandable that the judge did not wish to determine the responsibility of the French state for the deportation of Jews.

Since liberation, France has lived under a political fiction proclaiming the "illegality" of the Vichy regime, which was established in July 1940 following a vote by a parliament which had no power to delegate the mandate entrusted to it by the French people.

It is in the name of this "official truth" that France thought, until now, that it could find some kind of clear conscience, in the face of the deliberate crimes committed by Vichy policemen, who, on this theory, were nothing but usurpers. But paradoxically, time has not led to forgetfulness. It is under the pressure of public opinion that Francois Mitterand has ceased to lay a wreath every year on the tomb of Marchal Petain, or can now visit the Museum of the Children of Izieu, who were denounced by the French and deported by the Nazi Gestapo.

But will these symbolic gestures make us forget that the Vichy regime has not been the subject of official condemnation?

Will Maurice Papon, former top civil servant of the Vichy regime, responsible for the deportation of 1,690 Jews of Bordeaux, finally be judged, and when?

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M. Joseph Roubache is the President of the French Section of our Association.

# L'Oreal in breach of French anti-boycott laws

**On 2 November 1993, Professor of Law David Ruzie, gave his decision in the mediation between a number of Jewish organizations and L'Oreal which revolved around allegations that L'Oreal had submitted to the Arab boycott of Israel, thereby breaching French law.**

**The Jewish organizations which were party to the mediation were: CRIF (the Representative Council of Jewish Institutions in France), LICRA (the International League against Racism and anti-Semitism), and the French Section of the International Association of Jewish Lawyers and Jurists. Additional parties were the France-Israel Chamber of Commerce and the association "Lawyers Without Frontiers".**

**The facts and rationale for the mediator's decision holding that L'Oreal had failed to comply with French "anti-boycott" legislation, appear from the following extensive extracts (freely translated and paraphrased from French):**

## Facts and proceedings

At the end of 1990, the media publicized a suit filed by former shareholders against L'Oreal in connection with the boycott of Israel, in which L'Oreal was alleged to have participated.

In 1991, during the course of a search performed under a judicial search warrant in L'Oreal's premises, documents supporting these claims were seized. The newspapers and television reproduced some of these documents; L'Oreal did not deny their existence. Moreover, on November 1991, a press notice was distributed to the media by L'Oreal's Director-General of Communications, in which the company accepted that it had been requested to answer a questionnaire as well as other letters issued by the Arab League. L'Oreal claimed that it had had no choice but to answer these documents - "using trickery". L'Oreal acknowledged having been boycotted by the Arab League but explained that the boycott was thereafter lifted since L'Oreal had

been "wrongly boycotted". Further, L'Oreal claimed that it wanted "to save face vis-a-vis the civil servants of Damascus" by presenting the products of previous arrangements, fully agreed with its Israeli partners, as "concessions".

On the basis of various documents seized during the above-mentioned search, in November 1991 L'Oreal's former chairman was charged with racial discrimination. At the same time, several organizations considered bringing suit against L'Oreal on the basis of a French law of June 7, 1977, which, inter alia, prohibits compliance with the Arab boycott of Israel.

In this context, on December 18, 1991, L'Oreal's new chairman agreed that Professor Bismuth be entrusted with the task of "expressing a legal opinion with the aim of determining whether in these circumstances (i.e., the exchange of letters between L'Oreal and the Central Boycott Office of the Arab League), L'Oreal's attitude had or had not been consistent with the French legislation in force."

While not expressly stated, a pre-condition to this agreement was the withdrawal of the suit by the former shareholders of L'Oreal, and the waiver of the complaints of the other concerned organizations. The withdrawal of the complaints led to orders of non-suit.

During the course of his work, Professor Bismuth died. The interested organizations proposed that the undersigned take over. L'Oreal objected. This opinion is therefore given, against this background, at the sole request of CRIF, acting on behalf of the other above-mentioned associations.

## Legal considerations

L'Oreal's behaviour will be judged according to the following laws:

### **Law No. 77-574 of June 7, 1977 (the " anti-boycott law").**

Article 32 of this law incorporated the new Articles 187-2 and 416-1 of the Penal Code.

Article 187-2 deals with the behaviour of any public authority or citizen in charge of a public service ministry (e.g. the person

in charge of the Chamber of Commerce). This is not the case of L'Oreal; therefore, Article 416 only has to be taken into account.

According to this provision, penalties (imprisonment of two months to one year and a fine of 200 FF to 20,000 FF, or one of these two penalties only) will be imposed on:

"Anyone who has, by his act or omission, and save on legitimate grounds, contributed to making more difficult the exercise of any economic activity in normal conditions:

1. By any individual because of his national origin, ethnic affiliation or non-affiliation, true or supposed, race or religion;
2. By any legal entity because of the national origin, ethnic affiliation or non-affiliation, true or supposed, race or religion, of its members or some of them."

The purpose of this legislation is, as a matter of principle, to quash the primary boycott - which seeks to bring about the economic strangulation of the boycotted individual or legal entity - and the indirect boycott - which is used to apply pressure on the boycotted individual or legal entity in order to direct his behaviour in a given way.

Originally, the French legislator had no jurisdiction in respect of the primary boycott of Israel by the Arab states; however, it did have jurisdiction in respect of the secondary, indirect, boycott. By blacklisting some non-Israeli companies, the Arab League intended to make use of these companies within the context of the Arab-Israeli context. The French Parliament, for its part, in pursuance of its national sovereignty, took measures to prevent foreign states in this case, the Arab states - from directing French foreign policy by exerting pressure on French companies to adhere to boycott rules.

The indirect boycott directed against non-Israeli individuals or legal entities, was based on two considerations:

- \* Patrimonial considerations: two categories of companies are blacklisted - those linked by business relations to the State of Israel and/or to its nationals (the secondary boycott), and those which maintain business relations with members of the first group (tertiary boycott). In principle, this boycott only targets investments, shareholdings and technological assistance, but not ordinary business relations (imports/exports).
- \* Extrapatrimonial considerations: in these cases blacklisting is dictated by the Zionist sympathies or Jewish religion of the target company. In other words, racist considerations are sometimes behind the blacklisting of non-Israeli companies. This was the reason why the Helena Rubinstein company was inscribed on the blacklist of the Boycott Office of the Arab League.

#### **Law No. 80-538 of July 16, 1980.**

This law concerns the communication of documents and information of an economic, commercial or technical nature to foreign individuals or legal entities.

Article 2 provides as follows:

"Save as provided in treaties or international agreements, it is forbidden for any individual of French nationality, or usually residing on French territory, and for any leader, representative, agent or employee of a legal entity having its head office there... to communicate in writing or orally or in any other form, anywhere, to foreign public authorities, documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which may undermine the sovereignty, security, the essential economic interests of France or the public order..."

Penalties include either or both of 2 to 6 months imprisonment and a fine of 10,000 to 120,000 FF.

Needless to say, the Central Boycott Office (CBO), established at the beginning of the 1950's by the Arab League, and with which L'Oreal does not deny having communicated, is a foreign public authority.

The objective of the 1980 law is to prevent pressure being exerted on companies having their head office in France, with the intention of prejudicing the interests of France in the development of its international economic exchanges.

In the press notice of 29 November, 1991, L'Oreal does not raise its correspondence with the CBO in respect of companies other than Helena Rubinstein, some subsidiaries of which were acquired by L'Oreal at the beginning of the 1980's; the Israeli subsidiary was closed by L'Oreal in 1988. But from documents to which the undersigned has had access, it was confirmed that L'Oreal, through some of its subsidiaries, gave boycott guarantees against Israel long before the controversy linked to the conditions of the closing of Helena Rubinstein, in Israel, in 1988.

Thus, in April 1981, the chairman of Chimex, almost all the capital of which was held by L'Oreal, sent a notice to the Office of the Boycott against Israel of the Syrian Ministry of Defence, to the effect that the company had no interests in Israel.

Similarly, in May 1984, Gesparal, a holding company holding the majority of the shares in L'Oreal, answered a questionnaire of the same type sent by the Office of the Boycott against Israel of the Ministry of Finance of Kuwait. In July and October of the same year, L'Oreal asked for time to supply the required documents.

Starting in 1985, many letters were exchanged between L'Oreal and CBO representatives in the Arab states concerning the Helena Rubinstein company. These included:

- \* A document presented by L'Oreal to the Head of Customs in Kuwait, in December 1985, stating that "the principles and rules of the boycott do not apply to the claimant".
- \* In November 1986, the legal and financial manager of L'Oreal stated expressly in a letter addressed to the Head of the Boycott Office against Israel in the Syrian Ministry of Defence, that "neither our company, nor its subsidiaries and parent company have any relations with Israel, according to the rules of the boycott" and further that "L'Oreal has conformed to all the rules of the boycott against Israel".

Moreover, following a request for information which had been addressed to it in May 1986, L'Oreal indicated, concerning Helena Rubinstein, that "the directors of these companies (referring to the various subsidiaries of Helena Rubinstein) have been dismissed and new ones have been appointed."

The Syrian authorities seem not to have been convinced by these affirmations and in January 1987, the CBO asked for the presentation of official documents attesting that L'Oreal had given up all commercial brands in which the name Helena Rubinstein appeared.

In September 1987, the legal and financial manager of L'Oreal confirmed once again that after having acquired several subsidiaries of Helena Rubinstein (in Argentina, Brazil, Japan, Peru and Venezuela) L'Oreal had taken measures to eliminate the name "Helena Rubinstein" from the names of the companies acquired by it and that it had "dismissed the directors of these companies and appointed new directors". On this basis, the manager attested that "our company, its subsidiaries and its parent company respect the laws and by-laws applicable in the Arab states" and requested the removal of the boycott on the new subsidiaries of L'Oreal.

This letter too proved insufficient, and L'Oreal asked for more time to produce documents to the "satisfaction" of the boycott authorities. In January 1988, L'Oreal made it known that it was considering selling the company and brands that it had acquired from Helena Rubinstein Inc. in 1983, and, if not, it would prepare documents which would give the boycott authorities "cause for satisfaction".

Despite this, on March 17, 1988, the Syrian Minister of Economy and Foreign Commerce declared a boycott on L'Oreal, its 56 subsidiaries and parent company Gesparal. The boycott

was confirmed in June 1988 by the General Secretariat of the Arab League Office of Boycott against Israel, on the grounds that the company continued to violate the by-laws in force and that the documents supplied were unsatisfactory.

In July 1988, a former ambassador of France, who had become a financial consultant to L'Oreal, wrote to the Secretary-General of the Boycott Office that further to their conversations, he had asked L'Oreal to take certain steps and that L'Oreal was about to purchase the totality of the shares making up the capital of Helena Rubinstein in order to gain possession of the brand and all the commercial brands mentioned on the Helena Rubinstein products "for the entire world, including Israel". At the same time, he pointed out that Helena Rubinstein Company - Israel did not belong to Helena Rubinstein Inc., but to a local group and therefore it was "unfortunately" not possible for L'Oreal to purchase it. He also emphasized that, upon request, L'Oreal could get in touch with this company in order to ensure that "it ceases manufacturing Helena Rubinstein products by December 31, 1988 and that it cease exporting any product bearing the Helena Rubinstein brands, out of Israel", and finally noted that everything would be done to get this company to change its name as well as "L'Oreal wishes to find agreement with the Central Boycott Office and takes all the steps in order to achieve it".

These extensive extracts are necessary to show L'Oreal's concern to conform to the Arab boycott rules, not only from a formal point of view, but, indeed, substantially.

The Boycott Office, did not, however, seem willing to go into the details of the legal relationship between Helena Rubinstein Inc. and Helena Rubinstein Company - Israel. Thus, in his answer the Secretary-General of the Boycott Office noted that the main reason for the boycott of Helena Rubinstein Co. (USA), acquired by L'Oreal, was the existence of Helena Rubinstein Company - Israel, manufacturing products under a license of the American parent company with the technical know-how and assistance of the latter. The Secretary-General therefore asked for additional documents, including a letter attesting that neither L'Oreal nor any of its subsidiaries, including Helena Rubinstein Inc., had either investments in Israel or participated in Israeli companies, or was supplying or had supplied any technical assistance to any Israeli firm, etc...

Far from protesting against these requests that come within the provisions of the French Criminal Code, L'Oreal supplied, in October 1988, a certain number of documents, which concluded

that "Helena Rubinstein subsidiary, Israel, does not exist any more. The manufacturing of the products will come to an end on December 31, 1988".

Following a further exchange of correspondence, in July 1989 the Arab Boycott Office struck L'Oreal off the blacklist and informed it that it could resume relations with the Arab states.

L'Oreal's efforts succeeded, in part, as a result of substantial financial payments to some Arab middlemen.

After the event, L'Oreal claimed that it had "pretended" to give satisfaction to the Damascus Boycott Office, while in fact it had not changed its commercial strategy.

If it is true that the closing of the Helena Rubinstein factory in Israel was planned, in the framework of a reconstruction program, why did L'Oreal not say so immediately, in January 1987, but only announced it in October 1988?

An examination of the various documents quoted above indicates a substantial adherence by L'Oreal to the secondary and tertiary boycott rules issued by the Arab League. Thus, this company acted in breach of the law of 1977, in letting itself become "intimidated" and by accepting that it had to follow the rules of the boycott against Israel. It should be emphasized that in some respects, L'Oreal even did its utmost to reassure the boycott authorities concerning the "extrapatrimonial" grounds of the boycott, when it felt it necessary to state that the directors in office, in the subsidiaries of Helena Rubinstein that it had purchased, had been "dismissed and replaced by new ones".

It should, however, be acknowledged that L'Oreal did not certify that the replacements were "pure Aryans".

With regard to the argument that the signatures of the authors of the different letters addressed by L'Oreal to the boycott authorities were certified by an official of the Ministry of Foreign Affairs, this does not constitute an absolute defence with regard to French criminal law, which prohibits surrender to boycott demands. Similarly, it is no defence that some of the middlemen were diplomats of high rank.

The offence committed by L'Oreal included a material element and a moral element.

With regard to the material element, more than a mere criminal thought is required. An examination of the different

negotiations and of the decisions taken by L'Oreal do constitute an "external fact by which the offence is revealed and takes shape".

The moral element which is required by the law of 1977, is constituted by an "action having its origin in a state of mind, a turn of mind, which is socially and morally reprehensible".

Incontestably, the leaders of L'Oreal clearly expressed their intention of following the rules of the boycott which the French legislation had as clearly condemned. The motive does not matter, as only the intention counts. Thus, the fact that L'Oreal claims *ex post facto* that actually, in negotiating with the boycott authorities, it was engaged in a pretense, has no bearing on the existence of the offence.

Finally, a prejudicial result occurred as a result of L'Oreal's decisions, notably, the closing of the Helena Rubinstein factory in Israel and the dismissal of the directors of the new subsidiaries. The fact that L'Oreal, during the entire period of negotiations with the boycott authorities, retained and developed commercial exchanges with Israel, is irrelevant to the issue of its "complicity" with the rules of the boycott, and in fact, these rules do not prohibit, in principle, sales to, but only investments in, Israel or in Israeli companies. On the other hand, the secondary boycott against Israel, which depends on the blacklisting of French firms, incontestably harms the essential economic interests of France, linked to its economic expansion abroad.

Therefore, L'Oreal's conduct also came within the provisions of the law of 1980.

#### **Upon these grounds,**

The undersigned concludes that L'Oreal violated French legislation, in particular, in respect of the boycott measures issued by the authorities of the Arab League.

**David Ruzie**

Professor of Law

Paris, 2 November, 1993.

# Comments on the Fundamental Agreement between the Holy See and the State of Israel

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Following the signing of the Fundamental Agreement between the Holy See and the State of Israel, *JUSTICE* conducted an interview with Adv. Eitan Margalit, who is the Advisor to the Israel Minister of Foreign Affairs on Inter-Religious Affairs, and is also a member of our Association. Mr. Margalit, who was closely involved in negotiating the Fundamental Agreement described the background and primary interests at stake in this Agreement.

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## **What is the status of the Fundamental Agreement and has any timetable been established for completion of negotiations?**

While the Fundamental Agreement has its own independent legal significance, as a matter of definition it is intended to be an initial agreement setting out basic principles to be followed by further understandings. While it is as yet unclear whether the Vatican will be ready to enter into a full concordat with Israel, similar to those enjoyed with other nations such as Italy, France and Spain, Israel aims at expanding the agreement at least in respect of a number of specific articles of the Fundamental Agreement.

Thus, two Bilateral Working Commissions are being established to deal with the issue of the legal personality of the Church and fiscal matters respectively. No time table has been set for overall negotiations, although within the framework of their good faith negotiations provided by Article 10(2)(c) of

the Fundamental Agreement, the parties have agreed to a maximum two year moratorium on the present situation with regard to economic and fiscal matters. A decision to continue negotiating beyond that period would require the parties to reach a separate agreement.

With regard to the second major issue of legal personality (Article 3 of the Fundamental Agreement), no time period has been set for the work of the Commission. Similarly, the other issues which will be subject to further detailed discussion between the parties, such as education, Christian pilgrimage, cooperation in the fight against anti-Semitism, and cultural exchanges, no target date has been set for the conclusion of negotiations.

## **What interest does Israel have in recognizing the Catholic Church's "legal personality at canon law" and giving it "full effect in Israeli law" as**

## **provided in Article 3(3) of the Agreement?**

The issue of legal personality is one of the most complex and sensitive aspects of this agreement. The issue of Catholic legal personality has not been conclusively determined by the Israeli courts. The law has not determined what legal personality, if any, is enjoyed by church bodies, including the Catholic Church. The Catholic Church, as such, does not have a recognized status in Israeli law; similarly, there are a number of Christian sects, some of which are Catholic, whose legal status is also unclear as a matter of law and as emerges from the decisions of the Supreme Court of Israel.

The Catholic Church itself initiated the request that the Catholic Church, as such, be granted the status of a legal person in Israeli law, and wanted this legal status to find expression in the Fundamental Agreement itself. This request was refused by the Israeli side, on the grounds that the Fundamental Agreement



could not overstep or deviate from the existing legal position, and that at most the Israeli side could undertake to engage in negotiations towards a final agreement the result of which might lead to a change in Israeli law and regulations, in the framework of giving effect to international agreements.

This point was accepted by the Holy See, with the result that it was agreed that the matter would be the subject of further negotiations. In any event, Israel has not undertaken to adopt the provisions of the canon law but to give legal effect or expression in Israeli law to such bodies as have legal personality according to canon law.

Israel too has a distinct interest in settling this issue. For example, if Christian monasteries or other church bodies wish to sell land, who has the right to sign in their name, to receive the money, or represent them? - at present the position is very unclear and problems have occurred in the past.

#### **How have the difficulties as to legal status affected the fiscal obligations of the church bodies in Israel?**

This too, is a complex problem which has not only affected the Catholic church but also other Christian churches in Israel.

The problem is especially severe in relation to French and Italian Catholic religious institutions which enjoy special privileges dating back to the Ottoman period. These make up the majority of Catholic institutions in Israel. Further, the Catholic Church has claimed that a number of international conventions or other international instruments apply granting them special rights and priv-

ileges, not granted to non-Catholic churches. The State of Israel has never expressly recognized these agreements, such as the Constantinople Agreement, or the 1948 exchange of letters between the representative of the Jewish Agency in Paris and the Director-General of the French Foreign Ministry, which the Catholic Church claims constitutes an agreement by the State of Israel to continue the privileges and exemptions obtaining during the British Mandate and Ottoman period to the existing institutions. The Israeli authorities, however, have argued that the exchange of letters does not constitute a final agreement but merely an agreement to conduct negotiations over whether pre-existing arrangements should continue to have effect. This issue has been pending between Israel and France for over forty years.

In practical terms, the result has been confusion. Some of the institutions have paid some of the taxes - income tax, property tax, VAT - others have not. Similarly, in respect of municipal taxes, some have paid the entire tax, others only a third - "for services rendered" in the manner of diplomatic legations, others have not paid at all. Complicating the calculations are claims to exemptions and partial exemptions - some of which are put into practice unilaterally and many of which are not recognized by Israel - as well as the need to return taxes out of a budget set aside by the Ministry of Religious Affairs for this purpose - particularly in respect of indirect taxes such as customs duty paid by the churches.

Israel's intention is to settle this matter in good faith and in line with the type of arrangements enjoyed by the Catholic

Church in other countries such as Italy, France and Spain where the Church owns large amounts of property but where, nevertheless, financial agreements have been reached in relation to taxes, privileges and exemptions.

The main problem in Israel, is that any arrangement with the Catholic Church will require the state to enter into a similar arrangement with the other religious sects. To a certain extent, the Catholic church has also seen itself as representing the other Christian religious sects in Israel in respect of particular issues, although representatives of the local churches such as the Latin, Greek Orthodox and Maronite churches do participate in the actual negotiating process.

#### **To what extent has the material (property) element motivated the parties to the Fundamental Agreement?**

There was no direct connection between this issue and the timing of the Agreement or even the parties' willingness to enter the Agreement. These are old problems which have even preceded the establishment of the State of Israel. While it is true that the parties have a direct interest in resolving the difficulties, that is not a new interest. However, once the Vatican made the fundamental decision to conduct negotiations with Israel, the existence of these problems was undoubtedly a spur to the speedy completion of negotiations, and from the Church's point of view, the benefit of such financial agreement was of such significance that perhaps it outweighed the value of not signing the Agreement.

**Does Article 3(1) of the Agreement confer on the Holy See any rights or powers beyond those listed in Article 3(2)?**

No. Article 3(1) provides the general principle, Article 3(2) the details. At the same time, Israel, as a state, has no intention of interfering in any matter which is within the spiritual province of the Church in managing its moral or religious affairs, its charities, the contents of its religious education etc. For its part, the Church tacitly accepts the authority of the State of Israel to perform the functions of a state, through its laws, even when these touch on matters affecting the Church. The Holy See, as a sovereign state, refused to put this tacit acceptance into writing in order not to grant recognition to the supremacy over it of another state.

**Can you point to issues in respect of which Israel or the Vatican waived their original demands?**

Many will say that only Israel relinquished demands while the Vatican succeeded in achieving all its aims. Others will say the opposite. In my opinion, from Israel's point of view nothing of significance was renounced. With respect to financial matters, it is true that Israel is not about to execute legal proceedings against the Church bodies but has agreed to a moratorium of two years and further negotiations leading to an agreed solution. Similarly, Israel has agreed to negotiate on the issue of the legal personality of the Church. While Israel has an interest in both matters, the interest of the Church in reaching a settlement is greater - does this mean that Israel waived its demands?

Others have claimed that Israel should have demanded an apology from the Catholic Church for all its past sins against the Jewish people. This is not expressly stated in the Agreement, and some may therefore call this too a waiver.

However, when we examine the entire Agreement and not the individual sections, it can be seen that the fact of the willingness to enter into a separate agreement with the Church at this time, with all the components of the Agreement discussed above, reflects a new legal situation which it is in the Israeli interest to establish.

From Israel's point of view, the most concrete result of the Agreement is the Vatican's shift away from its traditional position of refusing to enter into diplomatic relations with Israel.

Further, the long standing claim that the Vatican would not enter into negotiations with Israel unless the issue of Jerusalem was finally settled, or unless the Catholic Church was granted a special status in the city - has been dropped. The Fundamental Agreement does not mention the word "Jerusalem" save as the place of the signing of the Agreement.

Equally, the Vatican's express condemnation of anti-Semitism and undertaking to cooperate in the fight against anti-Semitism, while referring to the Holocaust, and the condemnation of terrorism have been basic targets of Israel for years and are an achievement of this Agreement.

Summarizing this point, one can say that not every gain of one party must be seen as a loss of the other. The suspicion felt in Israel towards the Vatican because of the past record *vis-à-vis* Israel and

because of the Catholic Church's historical attitude to the Jews is well-known. Equally, there are elements in the Catholic Church who are suspicious of Israeli intentions. However, this Agreement seems to incorporate formulas that bridge some of these problems.

**What is the background to Article 11 of the Fundamental Agreement, which refers to the Holy See being committed to "remaining a stranger to all merely temporal conflicts"?**

This passage was adopted from the concordat between the Vatican and Italy, dating from the 1920s when Mussolini was in power, and uses the same language with the addition of the phrase that this principle "applies specifically to disputed territories and unsettled borders".

The intention of the Holy See here is to draw a clear distinction between its willingness to enter into a concordat and its desire not to be seen to support certain political positions of the state with which it enters into the agreement. Thus, in the case of Italy the dispute related to the invasion of Ethiopia. With regard to Israel, disagreement centers on such matters as the status of the Golan Heights, the status of Jerusalem, return of Arab refugees, and territorial boundaries. The purpose of the Article is therefore to preserve the Church's religious and moral function as a spiritual leader while ensuring that it is not seen as having changed its traditional postures by no supporting Israel's foreign policy.

During the course of negotiations the Holy See wished to incorporate an express clause to the effect that signing

the agreement did not entail recognition of Israel's sovereignty over Jerusalem, or over the annexation of the Golan Heights, or indeed of any of Israel's territorial claims in the Middle East conflict. This attempt was rejected by the Israeli side, and in the event the general wording set out at the end of Article I I was agreed.

**Is the Fundamental Agreement the entire agreement between Israel and the Holy See or are there additional documents which have not been published?**

There are no secret agreements of any kind between Israel and the Holy See. The Fundamental Agreement does include an Additional Protocol relating to the immediate exchange of representatives and Agreed Minutes which defines the date on which the Fundamental Agreement will be implemented.

**What was the main aim of the Vatican in entering this Agreement and establishing diplomatic relations with Israel?**

From the point of view of the Holy See, the main achievement of the Agreement was Israel's willingness to conduct negotiations with it on the issues referred to in the Agreement.

The Agreement should be looked at on three different levels:

- \* State - State;
- \* Church - State;
- \* Religion - Religion.

On the first level (state - state): the Agreement aims to normalize relations between two sovereign states, the State

of Israel and the Holy See - which is regarded as a sovereign state under international law and is the government of the Catholic Church. On this level, the Agreement will lead to the establishment of full diplomatic relations, as well as a number of bilateral agreements in the international arena, such as cooperation in the fight against terrorism, anti-Semitism, etc.

On this level, the Agreement represents a good solution to a pre-existing anomaly.

On a second level (as a concordat): the Agreement is signed between the Holy See in the name of the Catholic Church and the State of Israel. The majority of the provisions of the Agreement come to resolve issues relating to this relationship between the Church and the state, for example fiscal matters, legal personality, education, freedom of worship, the status quo in the Holy Places, Christian pilgrimage, etc. The settlement of these issues was considered of primary importance by both sides, largely because of the confused nature of pre-existing arrangements which were a legacy from the Ottoman period and British Mandate. Until now, Israeli governments have not attempted a comprehensive resolution of these problems or given them the priority they deserve. Some of the solutions considered now, will be appropriate not only in relation to the Catholic Church but also to other religious sects in Israel.

The fact of the willingness of the State of Israel to negotiate on these matters and sign a fundamental agreement, the majority of the provisions of which relate to matters concerning the church as a church, is of immense importance to the Holy See.

At a third level (religion - religion):

the Agreement does not incorporate any specific provision concerning the relations between Christians and Jews. Nevertheless, one cannot ignore the difficult historical background to these relations, and this is expressly referred to in the Preamble which talks of the "unique nature of the relationship between the Catholic Church and the Jewish people and of the historic process of reconciliation and growth in mutual understanding and friendship between Catholics and Jews". The most important article in this context is Article 2 which refers to cooperation in the fight against anti-Semitism. From Israel's point of view this was one of the most significant achievements of the Agreement. The best evidence of this achievement emerges from a recent interview given by Pope John Paul II, who took a step beyond condemning anti-Semitism and declared that today there is no-one who can dispute the legitimacy of the existence of the State of Israel.

The Catholic Church now recognizes the State of Israel as representing the Jewish people; they condemn anti-Semitism in the most express terms and have undertaken to cooperate with Israel in the future in the fight against anti-Semitism in those places where the Holocaust took place. In other words, the Agreement is more than territorial in nature, it recognizes that there is room for "reconciliation" and will have a practical application. This is the aspect of the Agreement which has drawn the most international attention.

As yet no discussions have taken place as to what measures will in fact be taken, but Israel intends to follow this up quickly, and the setting up of a framework for cooperation in the fight against

anti-Semitism will undoubtedly be the primary issue dealt with by the first Israeli representative to the Holy See.

**Reservations have been expressed about this Agreement - that it is narrow and does not bring about a historic reconciliation between Catholics and Jews. Will such reconciliation require a separate agreement?**

It is true that as a legal and political document, the Fundamental Agreement is not directly concerned with the relations between the Christian and Jewish religions. The Agreement also does not purport to be part of the final settlement which may eventually reconcile the Catholic and Jewish faiths. But the Agreement would not have been possible without developments in this area, particularly the *Nostra Aetate*, by which in 1965, the Second Vatican Ecumenical Council lifted the collective guilt of the Jewish people living to today, and indeed the guilt of some of the Jews of the time, for the crucifixion and death of Jesus, and recognized the validity of the covenant that exists between the Jewish people and the creator of the universe.

Thus, on both a theological and historical level, the Catholic Church now recognizes the inherent validity of the Jewish religion, thus paving the way for an agreement with the State of Israel which describes itself as a Jewish state. Therefore, while the Agreement has no religious significance *per se*, the very act of signing this Agreement is the best possible evidence of the theological change which has taken place in the Catholic Church's attitude towards the Jewish people and the State of Israel and

reflects the Church's desire to overcome charges of being entrenched in old anti-Semitic views.

**To what extent was the present pope personally involved in the engineering of the Agreement?**

We have no doubt that the pope was the architect of the agreement. He defined the aim and took the decision to open negotiations with the State of Israel, including the creation of bilateral working commissions and the establishment of diplomatic relations. Many sources have told us that he showed great interest in the details of the talks; the persons conducting them were chosen by him personally and he directed the negotiators on how to act. During the course of negotiations, he met with Foreign Minister Peres in October 1992 and later had a historic meeting with Israel's Chief Rabbi Lau, in both conversations he displayed great interest in specific details of the negotiations.

**Finally, was there any opposition to this Agreement by any elements in Israel, for example in relation to Article 8 recognizing the right of the Catholic Church to freedom of expression in carrying out its functions?**

On the Jewish side, there was some criticism that the Agreement did not include an express prohibition on missionary work. However, since the document reflects the existing legal position in Israel, it was not thought necessary to include such a provision, binding the Catholic Church beyond the extent of its current legal obligations. Israel is a

country which abides by the principle of freedom of religion, a principle recognized in the Declaration of Independence, and under existing law allows religious conversions under the terms of the Religious Conversions Ordinance. At the same time, the law prohibits the religious conversion of minors (Section 368 of the Penal Code) and prohibits religious conversions which involve the grant of material benefits.

In practice, since World War II, the Catholic Church no longer carries out missionary work among Jews, whether in Israel or abroad. Indeed, the present pope, when a priest in Poland, refused on a number of occasions to convert Jewish children, who were Holocaust survivors, to Christianity.

Other kinds of criticism were also expressed by representatives of other faiths. Thus, there was an initial letter of protest to the Vatican against any agreement with Israel, signed by five dignitaries, including the Mufti of Jerusalem, the Latin Patriarch and the Anglican Bishop of Jerusalem. At a later stage, the Christian sects changed their mind and supported the Agreement, whereas the Muslim authorities in Israel have not reacted to it. With regard to the Arab states there was some muted criticism, but not as much as the Vatican feared.

As a final note it should be said that this agreement with the Holy See is seen by the world as the final stamp of legitimacy for the State of Israel. Apart from a few Arab states, today there is no country, organization or religious body of any importance which has not recognized the State of Israel.

# Outlawing "Kach" and "Kahana Chai". On reasonableness and proportionality

Zeev Segal

**T**he Israeli government's decision to declare a "particular body of persons" to be a "terrorist organization" relies on the Prevention of Terrorism Ordinance enacted by the Provisional Council of State in 1948.

The Ordinance defines a "terrorist organization" as a body of persons resorting in its activities to "acts of violence calculated to cause death or injury to a person or to threats of such acts of violence."

The government's declaration in respect of *Kach and Kahana Chai* serves, in any legal proceedings, as proof that those bodies are indeed terrorist organizations, "unless the contrary is proved". This measure allows the organization and its members to be treated rigorously under the terms of the Ordinance, *inter alia*, through restricting their freedom of speech.

In a 1948 decision, the Supreme Court of Israel sitting as a High Court of Justice, dismissed a petition which called for the revocation of a declaration that *Lechi* ("Fighters for the Freedom of Israel") was a terrorist organization. In so doing the Court emphasized that the party interested in such a revocation carried a "heavy burden" of proof that contrary to the government's declaration the organization was not a terrorist organization. At the end of the 1950s the Supreme Court of Israel held that even if the government's declaration indicated the names of specific persons as members of a terrorist organization, the prosecuting authorities had to provide evidence of a connection between the persons named in the declaration and the terrorist organization.

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It should be noted that in the government's declaration issued in March 1994 relating to *Kach* and *Kahana Chai*, the names of the main activists were indicated.

A declaration that an organization is a "terrorist organization" carries with it severe consequences as a matter of criminal law. A person who performs a function in the management of such an organization, commits a criminal act and is liable to the maximum punishment of twenty years imprisonment. Ordinary membership of the organization also, including any participation in its activities, is a criminal act which carries with it a maximum of five years imprisonment. A person publishing praise or encouragement for the organization, and a person assisting the organization in its activities, is subject to criminal proceedings and a maximum penalty of three years imprisonment.

Under the terms of the Ordinance, a District Court may decide, following an application by the authorities, to confiscate the property of the organization. The property may be attached prior to the judicial decision, upon the written order of the Inspector General of the Israel Police. The Inspector General is empowered to close any place used by the terrorist organization or its members for their activities.

From the above it is clear that the government's decision must be attended by measures initiated by the Attorney General, namely, the bringing of criminal proceedings. The organizations which are declared to be "terrorist organizations" are not obliged to wait until proceedings are brought, they may petition the High Court of Justice against the declaration. Despite the judicial inclination not to interfere with a government decision declaring an organization to be a terrorist organization, it may be assumed that now, following new trends expanding the scope of judicial

review, the High Court **will** examine the reasonableness of the government's decision. The decision will be tested in the light of the unusual circumstances which are capable of justifying an extreme measure of this type, despite the special importance of freedom of expression and activity in a democratic society, which have been recognized in the past in decisions of the Supreme Court of Israel.

The government's decision in relation to Kach and *Kahana Chai*, and every legal proceeding relating to that decision, will also consider the judgment of the Supreme Court of Israel of October 1988, which confirmed the disqualification of the *Kach* list from participation in the elections to the 12th Knesset, primarily on the grounds that the party incited to racism. The disqualification of the *Khana Chai* list prior to the elections to the current 13th Knesset also has a bearing on the validity of the declaration, despite the fact that the decisions are of a different nature.

In a decision of the Supreme Court of Israel of June 1992, which confirmed the disqualification of *Kahana Chai*, publications of the movement were quoted, including publications tending to incite violence against Arabs. The Supreme Court affirmed the disqualification in a unanimous decision, given by five Justices. The material which was provided to the Supreme Court then, and in particular material concerning the use of violence, is also relevant to the decision under the Prevention of Terrorism Ordinance. This material also guided the government of Israel in its decision of March 1994, a decision which is both exceptional and rare.

Every legal proceeding concerned with outlawing *Kach* and *Kahana Chai*, will in essence consider the Supreme Court judgments confirming the prohibition on these organizations from participating in elections to the Knesset, judgments which have recognized that these organizations do not operate according to the democratic "rules of the game". The judgment of the Supreme Court relies on the Basic Law: the Knesset, as amended in 1985, which enables the disqualification of a list which incites racism or which denies the democratic nature of the state.

In the decision of the Supreme Court which confirmed the disqualification of *Kach* in 1988, the President of the Supreme Court, Justice Meir Shamgar stated: "the purposes and the actions of the appellant [*Kach*] are clearly racial: the methodical inflaming of passions on nationalistic-ethnic grounds which creates enmity ...; the call for a violent negation of rights; the methodical and deliberate disparagement of certain sections of

the population, defined on a nationalist-ethnic basis, and their humiliation in a manner frighteningly similar to the worst with which the Jewish people have had to contend, suffice, in the light of the substantial material presented to us, to support the conclusion of incitement to racism... all these make these purposes and actions... severely discriminatory".

It appears that the government of Israel's decision to outlaw *Kach* and *Kahana Chai* is open to debate. The decision was taken in the aftermath of the massacre in the Cave of the Patriarchs, when a Jewish resident of Kiryat Arba opened fire on Muslim worshipers, killing 29 of them. The government's declaration outlawing *Kach* and *Kahana Chai* was taken with the aim of displaying the government's determination to foil possible reoccurrences of acts of violence.

It is arguable that prevention of terrorism could have been attained without a declaration outlawing these organizations. Criminal proceedings could have been brought, based on sufficient evidence, without recourse to such an extreme measure. It should be noted that in the area of administrative law - in Europe, England and Israel - a special ground for judicial review has been developed, namely, "disproportionality". The disproportionality doctrine adopted by Justice Aharon Barak of the Supreme Court of Israel, in a leading decision rendered last year, requires a reasonable balance between the measure adopted and the danger that should be forestalled. In my view, the danger posed by extremist organizations can be overcome by adopting regular criminal proceedings in a court of law, based on an indictment. It is not necessary to apply administrative measures which are contrary to the nature of democracy.

A well known maxim states that hard cases make bad law. The disastrous case of Hebron has resulted in a far reaching decision which, while understandable in the special political context of the time, is inconsistent with the spirit of democracy in Israel.

**The Israeli Prevention of Terrorism Ordinance - 1948, referred to in this article, is set out in the following pages.**

## Prevention of Terrorism Ordinance - 1948

### The Provisional Council of State hereby enacts as follows:

1. "Terrorist organization" means a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence; "member of a terrorist organization" means a person belonging to it and includes a person participating in its activities, publishing propaganda in favour of a terrorist organization or its activities or aims, or collecting moneys or articles for the benefit of a terrorist organization or its activities.
2. A person performing a function in the management or instruction of a terrorist organization or participating in the deliberations or the framing of the decisions of a terrorist organization or acting as a member of a tribunal of a terrorist organization or delivering a propaganda speech at a public meeting or over the wireless on behalf of a terrorist organization, shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding twenty years.
3. A person who is a member of a terrorist organization shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding five years.
4. A person who -
  - (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence; or
  - (b) publishes, in writing or orally, words of praise or sympathy for, or an appeal for aid or support of a terrorist organization; or
  - (c) has propaganda material in his possession on behalf of a terrorist organization; or
  - (d) gives money or money's worth for the benefit of a terrorist organization; or
  - (e) puts a place at the disposal of anyone in order that that place may serve a terrorist organization or its members, regularly or on a particular occasion, as a place of action, meeting, propaganda or storage; or
  - (f) puts an article at the disposal of anyone in order that that article may serve a terrorist organization or a member of a terrorist organization in carrying out an act on behalf of a terrorist organization; or
  - (g) does any act manifesting identification or sympathy with a terrorist organization in a public place or in such manner that persons in a public place can see or bear such manifestation of identification or sympathy, either by flying a flag or displaying a symbol or slogan or by causing an anthem or slogan to be heard, or any similar overt act clearly manifesting such identification or sympathy as aforesaid;
  - (h) (repealed)
 shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties.
5. (a) Any property of a terrorist organization, even if acquired before the publication of this Ordinance in the Official Gazette, shall be confiscated in favour of the State by order of a District Court.
  - (b) Any property liable to confiscation under this section shall be attached by the Inspector General of the Israel Police.
  - (c) Any property being in a place serving a terrorist organization or its members, regularly or on a particular occasion, as a place of action, meeting, propaganda or storage, and also any property being in the possession or under the control of a member of a terrorist organization, shall be considered the property of a terrorist organization unless the contrary is proved.

6. (a) The Inspector General of the Israel Police may decide in writing to close any place serving a terrorist organization or its members, regularly or on a particular occasion, as a place of action, meeting, propaganda or storage; as soon as a decision as aforesaid has been given, it may be carried out by any police inspector.
- (b) Any person aggrieved by a decision given under subsection (a) may appeal against it to a District Court within fifteen days of the day on which the decision came to his knowledge.
7. In order to prove, in any legal proceeding, that a particular body of persons is a terrorist organization, it shall be sufficient to prove that -
- (a) one or more of its members, on behalf or by order of that body of persons, at any time after the 14 May, 1948, committed acts of violence calculated to cause death or injury to a person or made threats of such acts of violence; or
- (b) the body of persons, or one or more of its members on its behalf or by its order, has or have declared that that body of persons is responsible for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence, or has or have declared that that body of persons has been involved in such acts of violence or threats, provided that the acts of violence or threats were committed or made after 14 May, 1948.
8. If the Government, by notice in the Official Gazette, declares that a particular body of persons is a terrorist organization, the notice shall serve, in any legal proceeding, as proof that that body of persons is a terrorist organization, unless the contrary is proved.
9. (a) If it is proved that a person was at any time after the 14 May, 1948, a member of a particular terrorist organization, that person shall be considered a member of that terrorist organization unless he proves that he has ceased to be a member of it.
- (b) A person being in a place serving a terrorist organization or its members as a place of action, meeting or storage shall be considered a member of a terrorist organization unless it is proved that the circumstances of his being in that place do not justify this conclusion.
10. In order to convict an accused under this Ordinance and also for the purposes of the confiscation of property under this Ordinance, any matter which appears from its contents to have been published, in writing or orally, by or on behalf of a terrorist organization, may be accepted as evidence of the facts presented therein.
11. If it is determined by a final judgment that a particular body of persons is a terrorist organization, the judgment shall, in any other legal proceeding, be considered as prima facie evidence that that body of persons is a terrorist organization.
- 12-21. (Repealed).
22. The Emergency Regulations (Prevention of Terrorism) - 1948, are revoked, but their revocation does not affect any declaration or notice made or given or any other act done thereunder and does not exempt a person from punishment to which he has become liable thereunder.
23. The Minister of Justice is charged with the implementation of this Ordinance and may make regulations as to any matter relating to its implementation.
24. This Ordinance shall only apply in a period in which a state of emergency exists in the State by virtue of a declaration under Section 9 of the Law and Administration Ordinance - 1948.
25. This Ordinance shall be cited as the Prevention of Terrorism Ordinance, 5708-1948.



# Freedom of access and worship on the Temple Mount

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**Civil Appeal 67/93, "Kach" and the Jewish Defence League v. Minister of Religious Affairs, Minister of Police and others, 4.4.1993.**

**P"M 47(2) 1.**

**Before Justices Barak, Goldberg and Matz**

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## Precis

The Supreme Court has consistently held in the past that the right of Jews to engage in prayers on the Temple Mount is to be determined solely by the executive authorities responsible for public order and safety, headed by the government of the State of Israel. This case was an attempt to circumvent this ruling by asserting the right of Jews to conduct prayers on the Temple Mount, within the framework of their statutory right to freedom of access.

The Supreme Court confirmed that the right of access to holy places is enforceable by the courts but held that the decisions of the police to deny Jews the right to engage in prayers on the site, made in the context of the need to preserve public order, were not unreasonable and the Petition was therefore dismissed.

## Facts

The Petitioners argued that the Respondents (the Ministries of Religion, Police, Justice, the Chief Rabbis and the Muslim Wakf) customarily refused to allow Jews, carrying religious articles, to enter the Temple Mount. The Petitioners admitted that the Jews wished to enter the Temple Mount for the associated purpose of engaging in individual prayers but distinguished this from the conduct of public prayers.

The Respondents did not dispute the right of Jews to enter the Temple Mount. However, in their view, in the absence of a viable solution which would allow Jews to conduct prayers on the Temple Mount, there was a real fear that introducing holy books and prayers on the Temple Mount would be interpreted as provocation, which would lead to breaches of the peace and bloodshed.

The Petitioners further protested against the practice of allowing entertainments and games such as football to take place on the Temple Mount; the requirement that Jews be registered upon entering the site and the charge of admission fees to the mosques on the Temple Mount.

## The Supreme Court Judgment

In a unanimous judgment delivered by Justice Goldberg, the Supreme Court held that a number of substantive rights were created by the Protection of Holy Places Law-1967, which were therefore made subject to enforcement by the courts. The paramount right provided by Section I of the Law, is the right to freedom of access to the holy places.

Here, the Petition did not raise the issue of the right of access per se, but rather the question of freedom of individual prayer within the context of the right to access.

In the light of the exceptional sensitivity of the place, which could not be compared to any other site in the country, the position adopted by the Ministry of Police could not at this time be regarded as faulty, from the point of view of its reasonableness. The police fears were not baseless, and the factors taken into consideration by them were not so illfounded as to require the Court to interfere.

The Court also added that the police were under a duty to protect the sacred character of the place and prevent any violation of the feelings of members of any religion.

Further, the registration of visitors to the Temple Mount, where required in order to preserve public order, had to be conducted without discrimination between the different visitors.

With regard to admission prices charged by the Muslim Wakf for entrance to the Islam Museum and mosques, the Court found that the Wakf did not discriminate between members of different religions but drew a permissible distinction between visitors and worshippers, where the former had no inherent right to visit these sites free of charge.

In view of these findings the Court dismissed the Petition.

# Business competition and ethics in Jewish Law

Sinai Deutch

**B**usiness competition law has not yet been regulated in Israeli law. In 1972, the Business Regulation Bill (*Halichot Mischar*) was presented to the Knesset. The Bill was not approved. However, the sections dealing with consumers later served as the basis of the Consumer Protection Law - 1981. The sections regulating business relations were omitted and never became part of the law. The attitude of Jewish Law to business competition can therefore serve as a model for legislation and interpretation. This paper is the first of two parts dealing with this issue.

In this paper I will show that the main stream of legal thought and practice in Jewish Law favours the system of a free and competitive economy which supports price competition, has a strong concern for consumers' interests, and enables almost free entry to the market.

Jewish Law as a religious system of law concerns itself with ethical issues, such as defending the interests of less viable businessmen and safeguarding them against the abuse of stronger and more violent competitors. In fact, Jewish Law has faced the problem of reconciling fair trading and maximization of wealth.

Although Talmudic law insists that first priority be given to free competition and to free enterprise these are not the only considerations. Two other principles are highly valued in Jewish Law: consumers' interests and prevention of unnecessary loss to dealers. When all three are balanced, there is no doubt that free play has been given to the principle of the open market. But when the direct benefit to customers is not clear-cut, when damage to existing sellers is evident and even ruinous, Jewish Law tends to prevent such damage by limiting uncontrolled competition.

Another significant issue in the study of Jewish Law is the fact

that it is an ancient system of law. The first rules of business competition appeared in the *Mishnah* early in the second century C.E. in Israel, a short time after the destruction of the Temple. These rules were later elaborated upon in the Babylonian Talmud in the third and fourth centuries. Moreover, most of the details and commentaries were formulated in the twelfth and thirteenth centuries by the leading commentators and codifiers of Jewish Law. In addition, there are more than sixty responsa and precedents on business competition, some dating from the thirteenth century and some that were decided by the rabbinical courts in Israel in this century. The ever-changing economic situation certainly had an effect on the legal thought and practice of Jewish Law, although the basic principles remained unchanged.

The influence of economic changes on the rules of business competition were mentioned by Rabbi Moses Schreiber (Hungary, early 19th Century, *Chatam Sofer, Choshen Mishpat, Resp. 71*):

There is no doubt that the rules of an alley (an issue concerning business competition) in exile are necessarily different from the same rules in the period when the people of Israel were living 'in their own land.

## The positive attitude to free business competition in Jewish Law

Although there are various views on free competition in the Talmud, the majority view which was accepted as the rule of Jewish Law, favours free competition in the market. In a *Mishnah* from the second century C.E., there is a dispute about certain business practices (*Baba Mezia*, 60a). This *Mishnah* is part of a chapter dealing with rules of business relations such as misrepresentation, exaggerated prices and consumer protection.

The *Mishnah* states:

Rabbi Judah said: A shopkeeper must not distribute corn or nuts to children, because he thereby accustoms them to come to him.

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The Sages permit it.

Nor may he reduce the price but the Sages say, he is to be remembered for good.

The Sages' view which encouraged free competition and competitive reduction of prices became the rule of Jewish Law since it was the majority view. *Rabbi Judah's* attitude which apparently appears as an extremely protectionist view can nevertheless be explained as limited to the specific case of distribution of small gifts to children. In such cases there is a danger of misrepresentation. The children may think that they are getting "free" prizes while, in fact, they are part of a sales promotion scheme. Even today "free" gifts are regulated in several systems.

The Talmud which interprets the Mishnah asks why the Sages permitted such competition and the answer is: "Because he (another shopkeeper) can say to him: 'I distribute nuts; you distribute plums.'" Therefore it is not a case of unfair competition. Although there is indeed some influence on the young customers, the competitors can use similar tactics by giving them similar inducements.

This answer is open to two different interpretations. It can be interpreted as an attitude which endorses unrestrained business competition. It can, however, also be construed as a view which favours competition when the means used by one competitor can also be used by others. But when a competitor uses illegal or unethical means of competition, then even according to the Sages such competition is prohibited. These two possible interpretations enabled commentators of later generations to adopt different attitudes towards business competition.

The second issue dealt with in the Talmud is the rule that a seller who reduces prices "is to be remembered for good." The Talmud asks why should he be remembered for good? The answer is "because he eases the market" namely, his lower price will eventually lead to price reductions in the entire market.

The leading commentators and codifiers of Jewish Law accepted the view of the Sages which endorsed and encouraged free competition.

*Maimonides* summarized this rule (*Rambam*, 1135-1204, *Book of Acquisition, Sales*, Chapter 17, Section 4):

A storekeeper... may sell below the market price in order to increase the number of his customers, and the merchants of the market cannot prevent him.

This view which overtly encourages free competition was later adopted by many rabbinical authorities. For instance, *Rabbi Solomon Kluger* of Brody (19th Century Galicia, *Chochmat Shlomo, Choshen Mishpat*, Article 228 at Section 18) presented

a case in which he was asked whether a merchant who lived in a village was allowed to sell in town at a lower price than the local market price. His answer was that there was no prohibition under Jewish Law to sell at a lower price. If someone who lived in town was allowed to sell at a lower price, why should not someone from out-of-town be allowed to do so? The economic explanation was that a seller who lives in the village has lower costs than one who lives in town. Therefore, the lower price represents his lower expenses rather than selling below cost for the purpose of predatory pricing. This decision clearly favours open business competition over protection over existing businesses.

Another Talmudic source in support of the above argument appears in *Baba Batra 21b*:

A man who opens a shop next to another man's shop or a bath next to another man's bath, the latter cannot object, because he can say to him, I do what I like in my property and you do what you like in yours.

Although this view is not the only view in the Talmud, the majority, authoritative rule is in favour of free competition. This rule appears in the *Maimonides Code*, as follows (*Book of Acquisitions, Neighbours*, Chapter 6, Section 8):

If there is among the residents of an alley [today's neighbourhood] a craftsman and the other residents do not protest, or if there is a bathhouse or a shop or a mill, and someone comes and makes another bathhouse opposite to the first, or another mill, the owner of the first cannot prevent him and claim that the second cuts off his livelihood. Even if the owner of the second is from another alley they cannot prevent him.

Relying on these sources it seems that business competition was endorsed and recommended in Jewish Law. Price reduction was welcomed ("remembered for good") and protectionist claims that competition cuts off livelihood of the less able seller were not accepted.

### **Moral restrictions on competition when other business are ruined**

Some Talmudic sources are apparently in conflict with the above stated rules. In *Makkot 24a*, the *Gemara* cites a saying that six hundred and thirteen precepts were communicated to Moses. David came and reduced them to eleven leading virtues (based upon Psalm 15). One of the principles was "Nor does evil to his fellow", which was interpreted by the Talmud as "that he did not competitively enter his neighbour's profession." From this

saying, it is evident that it is morally wrong to enter somebody else's profession by means of competition. We learn from this passage, which is repeated with some changes in *Sanhedrin* 8 1 a, that although free competition is allowed from a legal standpoint, under certain circumstances it might be unethical. In both sources it is clear that the principles and virtues prescribed refer to a pious person and are not the standard rules of commercial behaviour.

A third source in this direction appears in *Kiddushin* 28a. The Talmud says that if one calls his neighbour "*rasha*" (a wicked person) the insulted person may "strive against his very livelihood." This saying (repeated also in *Baba Mezia* 71a) was interpreted in two ways. Some commentators explain it as dealing with issues other than business competition. But other commentators like *Rabbi Nathan B. Yehiel* of Rome (11th Century) explain that when a person has insulted another, the insulted person is allowed to open the same type of store next to him in order to reduce his livelihood, which means that such competition is otherwise forbidden. This interpretation of the Talmud apparently supports a protectionist view which is in conflict with the opinions and rules expressed up to this point. It can indeed represent a protectionist school of thought. It may, however, be explained on different grounds, an interpretation which I prefer.

Business competition is allowed and even encouraged in Jewish Law since it promotes the welfare of the entire society. When competition exists, some retailers may be hurt, but this is

part of the normal behaviour of the market. That does not mean that it is ethical to enter into the market with the sole intention of ruining another dealer. Such an intention is unacceptable, unless the other person has committed an offense which can justify such an action.

One of the distinctions between moral obligations and legal norms is that the latter should be defined and clear while the former may be more flexible. The moral prohibition of unfair competition has no clear guidelines, but was implemented in cases where the competitor had a predatory intent.

## Summary

The basic attitude of Jewish Law to business competition is a free market approach in which free competition and the consumer's benefit have priority over the seller's interest. Competition can, however, be restricted on moral and ethical grounds. While the legal rules of business competition according to the majority are clear and defined in favour of free competition, ethical guidelines are less precise since they apply to the individual.

This situation is particular to a religious system of law which can establish its rules on two levels: legal rules and moral obligations. This approach which is unique to Jewish Law assumes that a great majority of the adherents to Jewish Law will follow not only the legal rules but also the moral obligations.

# Family law and jurisdiction in Israel and the Bavli case

Ruth Halperin-Kaddari

**F**amily law in Israel is characterized by two main features: the parties are governed by their personal law (as opposed to territorial law), and secondly, the law and jurisdiction in this area are divided in several respects.

These two features have created a problematic phenomenon in Israeli law known as the "race for jurisdiction". The race for jurisdiction develops when each side in a divorce suit seeks to gain advantages by petitioning either the religious courts or the civil courts, where the relief offered by the religious courts tends to favour the husband, and the relief offered by the civil courts tends to favor the wife. In a recent revolutionary decision (H.C. 1000/92 *Bavli v. Chief Rabbinical Court*) the Supreme Court of Israel sitting as the High Court of Justice changed a central component in this race by holding that the rabbinical courts must also rule in accordance with property principles applicable in civil law, and in particular must apply the rule of community property which gives the wife an equal share in the matrimonial assets.

## The Principle of Personal Law

The principle of personal law in Israeli family law is a legacy of the mandatory legal system, which in turn continued the system promulgated by the Ottoman Empire. Thus, Israel is one of the rare examples of countries in which the principle of personal law still governs the area of family law and personal status. Other countries which retain such a system include India, Pakistan and to some extent Egypt.

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## Resulting Division in jurisdiction and Law

The principle of personal law, as opposed to territorial law, means that matters concerning personal status are determined according to the religious affiliation of the parties involved in each case. Thus, similar situations involving parties from different religious groups may lead to different results. A second division exists between religious law and civil law.

Legal matters in the area of family law are indeed governed by religious laws, but only in so far as they are classified as "matters of personal status", and unless qualified by territorial legislation (*i.e.* civil laws that specifically provide for their own application in religious as well as in civil courts). The principle of personal law has also created a jurisdictional division between the various religious courts, and between religious and civil courts. Thus, the jurisdiction whether exclusive, concurrent, or by unilateral choice is divided between religious and civil courts, depending on the specific cause of action.

## Laws applicable in the area of family law

### Matters of personal status

As noted, matters of personal status are governed by the parties' religious law - whether the action is brought in a religious court or in a civil court. Originally, matters of personal status included, "marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors... successions, wills and legacies..." However, a gradual process of legislation has removed some of these matters from the list. Thus, for example, succession and wills are now regulated by the Succession Law - 1965, which provides for the law's application in religious tribunals as well. Supplementing the legislative trend to narrow the category of "matters of personal

status", Israeli case law has given a broad interpretation to such territorial legislation as the Women's Equal Rights Law - 1951. This broad interpretation has led to the exclusion of most monetary relations and matrimonial property matters from the category of "matters of marriage and divorce", an aspect of family law now governed by the Spouses (Property Relations) Law - 1973. Notwithstanding the gradual decline in the category of matters of personal status, the original rule providing for the administration of this area by religious law, has remained. The result is that the law governing matters of personal status, both in civil courts and in religious tribunals, is Jewish law, unless a specific territorial law regulates the subject. In the latter instance, both the civil courts and the religious tribunals should apply that civil law.

### **Beyond the matters of personal status**

The category of "matters of personal status" is not comprehensive of all the subjects that may be involved in legal controversies in the area of family law. Civil courts obviously apply the relevant civil laws when dealing with these additional issues. With regard to the religious tribunals, the issue is more complex. Interestingly, this question has rarely been confronted directly by the Supreme Court, until the recent Bavli case. Prior to the *Bavli case*, it was the conventional wisdom that religious tribunals naturally apply religious law in every matter, unless a territorial law specifically directs otherwise. This convention was explicitly approved in the leading 1982 decision of the former Deputy President Elon, *Viloz'ny v. Chief Rabbinical Court*.

This decision was overturned by the Bavli case.

## **Jurisdiction in the area of family law**

### **Various types of jurisdiction**

As explained above, various matters within the field of family law are dealt with by different tribunals, either religious or secular, depending on the specific subject matter or cause of action. Today, under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law - 1953, the jurisdiction of the rabbinical and civil courts is divided as follows:

- a. Rabbinical courts have exclusive, jurisdiction in matters of marriage and divorce (but excluding monetary or property claims between spouses). Matters that are properly "connected" (the term is explained below) with a divorce suit

by a Jewish spouse also come within the exclusive jurisdiction of the rabbinical court.

- b. Matters concerning maintenance of minor children or claims for their custody are under the concurrent jurisdiction of rabbinical and civil courts, *i.e.*, the rabbinical court has jurisdiction provided that all the litigants have consented thereto. Otherwise, jurisdiction lies with the civil court.
- c. A wife claiming maintenance has the choice between bringing an action in the rabbinical court or in the civil court. This is the only situation in which jurisdiction is conferred by unilateral choice, and is the result of a deliberate legislative attempt to benefit the wife, who generally stands in an inferior position in matrimonial disputes. This original intent was frustrated by the infamous rule of connection.

### **The rule of "connection"**

Section 3 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law - 1953, provides that every matter "connected" with a divorce suit shall be within the exclusive jurisdiction of a rabbinical court. Thus, the rabbinical court acquires exclusive jurisdiction over matters which are usually subject to concurrent jurisdiction, such as custody of children. Moreover, it may acquire exclusive jurisdiction over matters of maintenance, where the wife would otherwise have had the choice of selecting the forum most convenient to her. The wife's right of choice is thus frustrated. This situation may occur where the husband precedes the wife in commencing legal proceedings, since the jurisdiction is determined according to the time when the suit is filed before the particular tribunal. On the other hand, where the wife acts swiftly and files her claim for maintenance before the civil court (which is usually preferred by wives), the civil court retains jurisdiction, even if the husband later brings a divorce suit in the rabbinical court and "connects" to it the issue of maintenance. The same may occur with matters of monetary claims or property distribution, in which civil courts have original jurisdiction. If such matters are properly "connected" to a divorce suit brought in a rabbinical court prior to these claims being brought in a civil court, the rabbinical court ends up with exclusive jurisdiction over them. The rule of connection was created in order to promote efficiency, in the belief that the forum that handles the divorce action, *i.e.* the rabbinical court, should be able to settle all the disputes that are related to that divorce. However, the potential for abuse of the rule, has made these good intentions obsolete.

## The "race for jurisdiction"

### Different outcomes in civil courts and religious tribunals

From the above, one might have received the impression that at least in controversies limited to issues of personal status, the outcome should have been the same, whether adjudicated in civil courts or in religious tribunals. If this were true, there would obviously be no reason to abuse the rule of connection by engaging in a race between the forums. This impression, nevertheless, is erroneous. The outcome of each case depends upon the forum, or, as put by the late Justice Zilberg, "the law follows the judge". There are several reasons for this, and indeed, there are some differences between religious and civil courts which have been recognized and approved by the Supreme Court. These include application of religious laws of procedure and evidentiary rules by religious tribunals, as well as non application of rules of private international law by religious tribunals, which may lead to different outcomes of cases, even if the substantive laws that are applied are the same. In addition, the substantive laws themselves may occasionally not be applied in an identical manner by the two forums, due to differences over understandings and interpretations of those substantive laws.

Finally, religious tribunals occasionally ignore civil territorial legislation, even though they are clearly constrained by it. Such disregard may indeed lead to intervention by the High Court of Justice, but this solution only solves the particular case before the court. The situation is aggravated when issues going beyond matters of personal status, such as issues of matrimonial property, are at stake.

### The effect of the connection rule on the jurisdictional race

When each forum may arrive at a different outcome in the same case, the spouses will clearly have incompatible preferences as to which forum will adjudicate the case. If the ultimate selection depends upon prompt action being taken by each of the parties wanting to confer jurisdiction upon the forum that suits his or her interests best, a race for jurisdiction begins. The rule of connection, discussed above, induces the spouses to employ strategic behavior in order to maximize their prospects of achieving the desired results. Family-law practitioners, who must serve their clients' best interests, have no recourse but to draw them into the race, since the stakes are very high. Husbands generally prefer adjudication in the rabbinical court, while wives usually favor the civil court. Thus, in custody of

children cases, rabbinical courts tend to attach great weight to moral questions and to a religious outlook on life, while civil courts are guided by other sets of values.

Rabbinical courts may thus prefer the parent who can ensure a religious upbringing, even if that parent would not be considered the preferred custodian by professional standards such as those of social workers. Rabbinical courts are inclined to be very judgmental regarding a wife who has "misbehaved", and they may interpret her "misbehavior" as a sign of unfitness for the custodian role. A double standard is at work here, for this rationale would usually not operate in the opposite case. In matters concerning maintenance the wife usually fares no better in the rabbinical court. Report after report published by the National Insurance Institute leave no doubt as to the gaps between the maintenance rates awarded in each tribunal, those awarded by civil courts obviously being higher. Additionally, provisional maintenance is impossible to obtain in the rabbinical court, since the rabbinical court does not order payment without proof of right and scope of obligation.

### Different outcomes in matters relating to property

The race for jurisdiction in matrimonial and property matters was especially acute, since the difference in prospective outcomes could sometimes mean the difference between all (meaning half the matrimonial property) or nothing. Each forum applies different laws in this area. Since this area is beyond the scope of matters of personal status, civil courts apply the civil law, including the law of contract and of property. Rabbinical courts, on the other hand, adjudicate matters of property according to religious law, save where otherwise required by the Women's Equal Rights Law - 1951, and the Spouses (Property Relations) Law - 1973. The religious law on these matters differs from the civil law. A major point of difference revolves around the important rule of community property, specially developed by the civil courts to regulate the area of matrimonial property before the enactment of the Spouses (Property Relations) Law - 1973. This rule was considered inapplicable in the rabbinical courts. Inapplicability of this rule generally works to the wife's detriment and to the husband's advantage. The reason for this is simple. The rule of community property provides for equal distribution of matrimonial property between the spouses, regardless of the formal title to the property. The main condition for applying the presumption upon which this rule is based is the demonstration of "joint effort" by the two spouses in accu-

mulating the family assets, and a heavy burden of proof lies on the spouse wishing to rebut the presumption. This is the civil law. Jewish law, on the other hand, does not recognize a presumption of community property.

This area in Jewish law is governed by the regime of separate property, and rabbinical courts adjudicate these matters on the basis of the registered and formal title over property. The Supreme Court has recognized the grave consequences of this situation for wives. As Justice Barak wrote in the *Bavli case*:

The division [in the laws] generally prejudices the wife. The reason is that according to the typical way of life in Israeli society to date, the active process of acquisition of family assets is normally carried out by the husband, who acts "outwardly" while the wife usually runs the home... Immovable property is usually registered in his name. Civil courts recognize the share of the wife in all the assets (whether or not they are registered in the husband's name), provided that the conditions for the rule of community property have been met. Not so the rabbinical court. According to the rabbinical court, a life of sharing does not create a sharing in the assets.

This was the impossible situation which the *Bavli* case hoped to change.

### The *Bavli* case and its prospective effect

Justice Barak (who has since been appointed the Deputy President of the Supreme Court) opened his opinion with the question: "Does the rule of community property that was developed by the Supreme Court apply in the rabbinical court?". The answer given by all three justices (President Shamgar, Justice Barak, and Justice D. Levin) in the *Bavli* case was affirmative. This answer was contrary to prior rulings and conventions. The facts of the case were simple: The *Bavli* couple were married for thirty years. The husband had worked as a commercial pilot, while the wife, after a few years of marriage, had left her work as a school teacher in order to attend to the house and the couple's three children. After almost thirty years of marriage, the husband brought a divorce suit to the rabbinical court, to which he had properly "connected" issues of maintenance and distribution of property. The rabbinical court, as expected, rejected the wife's claim for half the marital property, stating that the rule of community property was inapplicable in the rabbinical court. Her appeal to the Rabbinical Court of Appeals was similarly rejected, and her only recourse was to the High Court of Justice. The High Court of Justice, exercising its supervisory powers

over religious tribunals, accepted her petition, voided the rabbinical courts' decisions, and sent the case back to the rabbinical court while instructing it to rule according to the rule of community property. Justice Barak, who wrote the main opinion, accepted the petition on two alternative grounds:

1. The first, based on the Women's Equal Rights Law - 1951, continues the judicial trend expanding the interpretation of this territorial law. Thus it does not depart from the accepted conventions in this area of the law, and its scope is confined to the question of marital property distribution alone.
2. The second ground, on the other hand, departs from the conventional understanding as to the laws that apply in rabbinical courts. *Prima facie*, it seems to be based upon the reversal of that understanding: the rule of community property applies in the rabbinical court as part of the general civil law which the rabbinical court ought to apply in every matter, save in matters of personal status. Evidently, this ground is much broader in its scope than the first, since it claims to pertain to every matter going beyond matters of personal status. Since President Shamgar addressed only this second ground in his concurrence, and Justice D. Levin did not specify the reasons for his concurrence, the broader second ground should be regarded as the *Bavli holding*.

On a deeper level, this case changes a great deal in the power-relations between the two parallel systems, the religious and the secular. The outcries heard from religious circles were not without cause. On the operational level too, at first reading, this holding does seem to be quite revolutionary and very far-reaching. A closer examination, which may reveal some ambiguities in the holding, is beyond the scope of this article. When taken at its face value, the holding has the potential of nullifying the "race for jurisdiction" element in controversies over property, since theoretically at least, from now on both tribunals are bound to apply the civil law in these matters. The weakness of the case is expressed in the qualifying word 'theoretically'. The future developments of the *Bavli case* and of others of its kind may produce major inconsistencies between what the rabbinical courts ought to do according to the *Bavli* holding, and what they will in fact do. Signs of future defiance are already present, and we may witness yet another struggle between the two systems, with cases moving back and forth between the rabbinical court and the High Court of Justice before the last word is said. And according to the current constitutional situation, the last word will be that of the High Court of Justice. ■



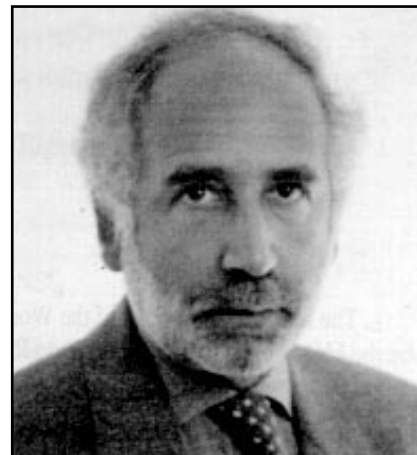
# The Association announces the opening of the Hungarian Chapter

The Association is pleased to announce that on the 6th April 1994, a new chapter was opened in Budapest, Hungary. The Hungarian Chapter was initiated by Dr. George Ban, attorney-at-law in Budapest, and was founded with the participation of 15 Hungarian lawyers and jurists who unanimously elected Dr. Ban to be the President of the Hungarian Chapter.

The Founders Meeting was attended

by Judge Hadassa Ben-Itto, President of the Association, and the Israeli Ambassador to Hungary, Mr. David Kraus. All the speakers at the Meeting expressed their gratification at being able to provide lawyers and jurists throughout Hungary with an opportunity to actively participate in the activities of the Association and to gain access to legal theoretical material.

For further information please contact



Dr. George Ban

Dr. George Ban, President of the Hungarian Chapter, Budapest 1052, Vaci utca 19-2 1, International Trade Center, Suite 607. Tel: (36-1) 266-9168/9; Fax: (36-1) 251-4237.

## ERRATA

1. Due to a regrettable error, the paragraphs of Landau's Opinion in the brochure containing the text of the Judgment in the Calamira Trial are wrongly numbered. The correct numbering should commence with paragraph I at the very beginning of the Opinion on page 4, paragraph I should read paragraph 2, and so on consecutively until the end of the Opinion.

Accordingly, paragraph 13 as printed should read 14, paragraph 18 should read 19 and paragraph 19 should read 20.

The assents of Judges Balcombe and Goldstone on page I I and the reference by Judge Kaye to paragraph 20 at page 12

all refer to the numbering as thus corrected.

2. The first sentence of the penultimate paragraph in the left column on page 4 of the Judgment should read as follows:

Relying on intelligence information, on August 1, 1992, a submarine of Calamira penetrated the waters of a Protekistanian harbour. A marine commando unit which emerged from the submarine overpowered a small cargo vessel flying a Protekistanian flag, which was still in the harbour but started to head towards the open sea. The cargo vessel was fired on by the submarine and was forced to sail towards the military port of Calamira.

# World Council Meeting

## Rome, Italy

### June 26 - 29, 1994

The sessions and events of the World Council Meeting will be held at the Hilton Cavalieri Hotel, Monte Mario, Rome. The reception by the Mayor of Rome, Mr. Francesco Ruttelli will be held on Monday evening, June 27, at the gardens of Villa Caffarelli, Campidoglio, Rome.

#### Sunday, June 26, 1994

##### Morning

09:00-14:00 Half day tour of Rome, including visit to Fosse Ardeatine, Jewish Memorial Site  
 14:00-17:00 Registration  
 16:00 Meeting of Heads of Sections and Representatives  
 18:00-19:30 Business Meeting  
 20:00 OPENING CEREMONY

Chairmen:

1. Mr. **Meir Gabay**, Chairman of the International Council, Israel;  
Judge of the United Nations Administrative Tribunal
2. Dr. **Oreste Bisazza Terracini**, Deputy President of the Association, Italy

GREETINGS:

Mrs. **Tullia Zevi**, President, Jewish Communities of Italy  
 Mr. **Avi Pazner**, Ambassador of Israel, Rome, Italy  
 Mr. **Francesco Ruttelli**, Mayor of Rome  
 Mr. **Igor Ellyn**, Q.C., Canada, incoming President, Canadian Bar Association, Ontario Section

**Keynote Address:**

Judge **Hadassa Ben-Itto**, President of the Association, Israel

21:30

RECEPTION

#### Monday, June 27, 1994

##### Morning Session

RELATIONS BETWEEN THE HOLY SEE (VATICAN), THE STATE OF ISRAEL AND THE JEWISH PEOPLE

**Chairman:**

Justice **Moshe Landau**, former President of the Supreme Court of Israel

09:00-10:30

**Greetings:**

Rabbi Professor **Elio Toaff**, Chief Rabbi of Italy.  
 His Eminence **Edward I. Cardinal Cassidy**, President, Commission for Religious Relations with Jews, the Holy See  
 Mr. Shmuel Hadas, Ambassador of Israel to the Holy See (Vatican)

VATICAN - ISRAEL RELATIONS - PAST, PRESENT AND FUTURE

1. The Jewish Perspective  
Rabbi **David Rosen**, Israel, Director of Inter-Faith Relations for the Anti-Defamation League
2. The Catholic Perspective  
His Excellency Archbishop **Andrea di Montezemolo**, Apostolic Nuncio, Special Representative to Israel.

10:30-10:45

Coffee break

10:45-13:00

## JEWISH-CATHOLIC COOPERATION

3. Rev. Dr. **Remi Hoeckman**, O.P., Secretary of the Holy See's Commission for Religious Relations with Jews
4. Cooperation Between Jurists  
Bâtonnier **Louis Pettiti**, France; Judge of the International Court for Human Rights
5. Solving Conflicts by Negotiation - The Carmelite Monastery in Auschwitz  
Me. **Theo Klein**, advocate, former President of CRIEF, France

## THE IMPLICATIONS OF THE SHOAH FOR CATHOLIC - JEWISH RELATIONS

6. Catholic Jewish Relations - Dialogue in the Shadow of the Shoa.  
Professor **Hans Herman Henrix**, Academy of the Diocese of Aachen, member of the German Bishops' Conference Work Group on "Questions of Judaism" and its representative in the international liaison committee between the Catholic Church and Jewish organisations.
7. Denial of the Holocaust  
Professor **Irwin Cutler**, McGill University, Montreal, Canada
8. Professor **Francesco Lucrezi**, University of Chieti, Institute of Roman Law. Italy

13:00-15:00

## LUNCH

Guest Speaker: Professor **David Libai**, Minister of Justice, Israel  
on: Legal Aspects of the Peace Process

**Chairman:**

Mr. **Yitzhak Nener**, advocate, First Deputy President of the Association, Israel

## Afternoon Session

## XENOPHOBIA, RACISM AND ANTI-SEMITISM EXPLOITED FOR POLITICAL AIMS

15:00-17:00

**Chairman:**

Me. **Joseph Roubache**, advocate, Deputy President of the Association, President of the French Section

1. "Ethnic Cleansing" in former Yugoslavia  
Mr. **Alexandre Adler**, France
2. Anti-Semitism in the Service of Political Groups in Eastern Europe  
Mr. **Yoel Sher**, Deputy Director General, Ministry of Foreign Affairs, Jerusalem, Israel
3. Anti-Semitism in the Service of Political Groups in Russia  
Dr. **Mala Tabory**, Tel-Aviv University, Israel
4. Anti-Semitism and Politics in the Black Community in the U.S.A.  
Mr. **Nathan Lewin**, Attorney-at-Law, Deputy President of the Association, President of the American Section

17:00-17:15

Coffee break

17:15-19:00

**Chairman:**

Mr. **Ivan Levy**, advocate, Deputy President of the Association, Co-Chairman of the South African Section

5. Israel Combats Anti-Semitism as Part of its Foreign Policy  
Ambassador **Elyakim Rubinstein**, member of the Presidency, Israel
6. Anti-Semitism in the U.N. - Is it Religious, Racial or Political?  
Ambassador **Morris B. Abram**, former U.S. Ambassador to the U.N. in Europe
7. Legislative Action Against Racism and Anti-Semitism  
Dr. **Joel Barromi**, Israel
8. Italian Legislation and Case Law - International Aspects  
Professor **Giorgio Sacerdoti**, advocate, Professor of International Law, University of Milano, Italy

20:00

RECEPTION by the Mayor of Rome, Mr. **Francesco Ruttelli**, at the gardens of Villa Caffarelli, Campidoglio, offered by Dr. **Oreste Bisazza Terracini**, Deputy President of the Association, Italy

## Tuesday, June 28, 1994

### Morning Session

#### LEGAL ASPECTS OF INVESTMENTS IN AND TRADE WITH ISRAEL

##### Chairman:

09:00-11:00

Judge **Meir Gabay**, Chairman of the International Council, Israel

1. Professor **Yaakov Neeman**, advocate, Israel
2. Professor **Joseph Gross**, advocate, Israel
3. Me. **Markus Pardes**, advocate, Deputy President of the Association, Belgium

11:00-11:15

Coffee break

11:15-13:00

##### Chairman:

Mr. Isidor M. **Wolfe**, **advocate**, Vice-President of the Association, Chairman of the British Columbia Section, Canada

#### INTERNATIONAL TRADE AGREEMENTS

1. GATT Uruguay Round Agreement  
Ambassador **Stuart E. Eizenstat**, U.S. Representative to the European Union
2. The New Pan-European Free Trade Area  
Dr. **Dan Horovitz**, advocate, Belgium
3. NAFTA Agreement  
Dr. **Marcos Berkman**, advocate, Mexico

13:00-15:00

Lunch break

### Afternoon Session

15:00-15:40

##### Chairman:

Mr. **Haim Klugman**, advocate, Director-General, Ministry of Justice, Member of the Presidency, Israel

#### ECONOMY IN A NEW MIDDLE EAST, FOLLOWING THE PEACE PROCESS

Dr. **Gil Feiler**, Tel-Aviv and Bar-Ilan Universities, Israel

15:40-16:00

Coffee break

16:00-17:00

#### CLAIMS FOR RESTITUTION OF JEWISH HEIRLESS AND COMMUNAL PROPERTY IN EASTERN EUROPE

1. Dr. **Eliahu Likhovski**, Legal Advisor, Jewish Agency and World Jewish Restitution Organization, Israel
2. Me. **Paul Feher**, advocate, Paris, France

17:00-17:30

#### CLOSING SESSION

20:30

#### GALA DINNER

**Host:** Judge **Hadassa Ben-Itto**, President

**Presiding:** Dr. **Oreste Bisazza Terracini**, Deputy President of the Association

## Wednesday, June 29, 1994

Morning - Depart for optional 4 day tour to Northern Italy: 2 days Florence and 2 days Venice

The Association wishes to record its special gratitude to the European Foundation for its contribution to the World Council meeting in Rome.