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PRESIDENT'S MESSAGE



T

he theme of our meeting is the rule of law at the millennium's end: tonight, however, I shall limit myself to addressing the closing century of this millennium.

A century is but a moment in the history of mankind. Some centuries, more than others, have left their impact and meaningfully changed the world we live in. The twentieth century can truthfully be said to be such a time.

When I was little, we travelled in horse drawn buggies. I was born in a house which had no water supply and very primitive plumbing. Few homes had telephones. To hear music we manually activated a gramophone, we travelled overseas by boat, shovelled coal to heat and cook, and boiled our laundry on an old-fashioned stove. To write, we dipped our pens in inkwells.

We also had very little idea what the rest of the world looked like.

In our lifetime the world has become a global village. We fly to the moon-, our children construct virtual reality on personal computer screens, and we communicate by fax, Internet and e-mail. The explosion of communication allows us to look into each other's countries and even into each other's homes. The world has come into our living rooms, and daily involves us in global events. But what we are witnessing begs the question whether, in any sense, the world has become a better place, or only one in which we enjoy more creature comforts, in which our physical existence has become easier. Do television and Internet make us happier people? Will these changes contribute to making the next century less traumatic for our children and our grandchildren?

Technology has wrought a great impact on social developments: conditions in the working place have changed dramatically; modern medicine and better living conditions have lowered the rate of infant mortality; it is doubtful if women's role in society could have changed in such a drastic manner without washing machines and microwave ovens, without the pill. With the available information, we have become more conscious of our individual rights and better equipped to realize them; we are in a better position to protest abuses of human rights around the world, and international legal conventions have given us the right to intervene and the proper forum for complaints.

But we have also lived through two of the most horrendous world wars in human history. We have seen the explosion of atomic bombs and we have witnessed the Holocaust, in which a third of our people were systematically exterminated in a process which went on for years.

We are helpless to undo the past. But have we learned the lesson?

Unfortunately I cannot be optimistic. Dictatorships still flourish, mass atrocities are still being perpetrated on human beings, bloody wars are waged despite the short-lived hopes raised by the end of the Cold War. With new means of enforcing obedience of human rights, we thought that we were becoming our brothers' keepers, in a global sense, yet the world is witnessing the dangerous growth of extreme fundamentalism which completely ignores most basic human rights, and gets away with it. Foreign workers who seek a livelihood in some of the most civilized countries, are often compelled to live in sub-human conditions and are sometimes in actual danger of their lives.

Keynote address delivered by President of the Association Judge Hadassa Ben-Itto at the opening of the World Council Meeting held in London in 1997.

In blatant contravention of international law, unconventional weapons of mass destruction are being manufactured, sold on the international market by cynical individuals, corporations and states, and used on helpless human beings. We have found no effective ways to deal with sophisticated crime and with international terrorism.

The most vile hate propaganda is freely disseminated and even countries which try to control it are helpless in the face of the growing number of addicts of the Internet, which is uncontrollable. Young people in many countries gather and listen to fundamentalist preachers, who are protected by freedom of speech. Sometimes they even undergo military training by known terrorist groups, protected by freedom of association. Persons who are known to be dangerous terrorists are often freed to hijack another plane, to blow up another office building, because we guard their rights more than those of their potential victims, or because they are freed as part of a cynical political deal.

One may ask why I have chosen to speak of all this at the opening of a lawyer's conference; why start our proceedings with a sense of gloom? I do so because it is precisely for this reason that we convene here: to discuss some of these problems honestly and frankly.

We men and women in the law have a particular responsibility, because our professional expertise, our standing in the community and our daily exposure to the problems facing society, mean that we can and must try to make a difference.

More than ever lawyers and judges are involved today in shaping society, in the fields of private as well as public law. Courts, which have traditionally limited themselves to the task of solving disputes and the interpretation of laws, are more and more actively involved in the legislative process. Some praise this phenomenon, others criticize it, but it seems that this has become a moot issue. Judicial review of acts of state, in the broad sense, has become so entrenched in our way of life that it is now irreversible. Political leaders, and even military commanders, in free democracies, are learning that they cannot avoid supervision by the courts. Sometimes this supervision accompanies their actions and directs them. Other times it is carried out post factum,, Maybe too late concerning certain events, but not too late to provide directives for the future.

That is why the role of lawyers has become so important, not only in the representation of their clients but in the field of public affairs. Courts of law have become the arena where major national issues are decided. Governments, vested with the power to lead nations, bow before decisions of learned judges. Groups and individuals seek and receive urgent relief in courts that have learned to act decisively and swiftly where the need arises. Legislators know that the courts took over their shoulder. This role, which has been thrust upon us by developments which are sometimes beyond our control, has not always found us ready.

One sometimes wonders whether other disciplines are not adjusting more easily to modern needs, quicker to adopt and apply innovative solutions. Medical research, for example, is constantly seeking to confront new diseases, combat viruses which are immune to available antibiotics, or adapt technology to improve surgical procedures.

The difference between us and medical doctors is that the latter are less bound by concepts and more open to change, in their quest for cures. The invention of Prozac has revolutionized modern psychiatry and in a short time benefited millions of patients. Even unconventional cures are gaining a legitimate foothold in mainstream medicine.

Unlike other professions, we in the law are confronted by a distressing dilemma. Change for us does not mean prescribing a new medicine or replacing bricks by steel in the building industry. For us, change often means imposing limitations on rights and

freedoms which have not been easily attained. In seeking a cure for some modern evils, we may endanger the very soul of our democratic existence, we may compromise the very essence of the rule of law.

But now, at the close of this century it is time for some soul searching. We may have been too careful, too conservative in the interpretation and application of rules, of which we are justly very proud. We must be ready to closely scrutinize the effectiveness of these rules in today's world, and the justification for the religious adherence to them, which most of us advocate. We are afraid that any major change will bring the whole edifice down upon our heads. We pay lip service to the need for limitations on some of our most cherished freedoms, but recoil from the effective and necessary application of those limitations. We feel so bound by our traditional adherence to existing laws and precedents, that we even refuse to entertain the idea that in guarding some rights and freedoms, we are ignoring the urgent need to confront new dangers to our developing society.

In spite of the horrible lessons which we should have been taught by the effects of the Nazi propaganda-machine, we have been applying tests of "clear and present danger", or "high probability", in our reluctance to stop hate-mongers, ignoring the cumulative effect of hate speech. Instead, we advocate open discussion in the famous "Marketplace of ideas". But how many of us have lately rolled up our sleeves and gone down to this famous marketplace to have it out with the racists? We write articles in prestigious publications and speak at panels in academia. but this is not where it is happening. The real marketplace is somewhere else, and we have very little effect on the distribution of dangerous ideas in that marketplace. We are paralyzed by fear of the proverbial "slippery slope", hiding behind sacred concepts, reluctant to scrutinize them frankly, and if need be, to adjust them to a fast changing world.

International terror has become one of the greatest dangers to our society. We do not feel safe boarding a plane, or even riding on a bus or entering an office building. We are subjected to body searches entering a department store or a supermarket. Yet we are reluctant to come up with effective rules for interrogating suspected terrorists, even when they are caught red-handed. We prefer to turn a blind eye and leave our security services to do their job, at the risk of criminal prosecution. We do not have the courage to give them clear directives how they should obtain information which may save lives. We know that an open neo-Nazi rally fires the imagination of racists and may incite them to burn a building full of foreign workers, but we have not found effective ways of stopping them without compromising their constitutional rights. We have not even begun to seriously confront the damage caused to the young generation by material coming through the Internet.

As Jews, we should be particularly vigilant, and, in my view, we should also be particularly worried. Two years ago we marked 50 years to the end of World War II and the Holocaust; this year we mark the 100 year anniversary of the first Zionist congress; next year we shall mark 50 years to the establishment of the State of Israel. We had every reason to believe and hope that we would no longer have to deal with what is known as "the Jewish problem". It is not the Jews who have invented it. Others have coined this term.

In his memoirs, Count Witte, the famous Minister of Finance in Czarist Russia, describes a confrontation with Czar Alexander III, in which he advocated some liberalization of the discriminatory laws against the 5 million Jews in the Russian empire. The Czar accused him of being too sympathetic to this race.

"The only way I can answer this question" Witte replied, "is by asking Your Majesty whether you think it possible to drown all the Russian Jews in the Black Sea. To do so

would, of course, be a radical solution of the Jewish problem. But if Your Majesty will recognize the right of the Jews to live, then conditions must be created which will enable them to carry on a human existence. In that case, gradual abolition of the discriminatory laws applying to Jews, is the only adequate solution of the Jewish problem." His advice was, of course, ignored.

In a 1934 trial of a Nazi group in South Africa, a defence witness who introduced himself to the court as a personal friend of Hitler, told in open court of a meeting with Hitler in the year 1921. I am quoting from the court record:

"I said to him 'how do you propose to deal with the Jews', because naturally that was the subject, and he said 'I have made up my mind ... we are going to send all our Jews to the Allies', and I said 'I think they thoroughly deserve it'. But, I said 'That won't cure the disease, if you have a mad dog and you tie him up in your backyard that does not get rid of the mad dog'. And then Hitler became more reasonable".

A Swiss Nazi leader, who was instrumental in conducting the defense in another trial which took place in Bern Switzerland, also in 1934, explained in his interrogation, in all seriousness, the plan promoted by a pan-Aryan world organization, which aimed to rid all countries of their Jews. At that time the plan for the total extermination of the Jews had not yet been finalized - this was to come a few years later - so he explained that they wished to secure a state for the Jews, and as Palestine was partly inhabited by Arabs and therefore could not absorb all the Jews of the world, the island of Madagascar would be ideal for that purpose.

Most of our people would like to believe that there is no "Jewish problem" today. I believe that they simply choose to be misinformed. True, we should beware of exaggeration, but we cannot afford to minimize the facts. More than half a century after the Holocaust, which is probably one of the best recorded events in human history, there are some 200 publications denying that it ever existed. Today there are still survivors who can bear witness, but what will happen in later generations'?

The Protocols of the Elders of Zion are being published in millions of copies, in many languages, and are distributed at public gatherings. They were openly distributed to African Americans at the Million Men March in Washington. They are sold at metro stations in Moscow and in major bookstores in Arab countries. In the last issue of our journal JUSTICE we published a list of more than 50 sites on the Internet spreading anti-Semitic and Holocaust denial material. Anti-Semitic events, some of them violent, are mentioned in every annual report of various research groups. Anti-Israeli propaganda often appears in clearly anti-Semitic terms.

This is why our Association has a special interest in seeking innovative means to confront this situation. It is a formidable task, and it is not all up to lawyers and judges. But we have an important part to play. The bad guys are out there and they are gaining ground. It is up to us to find ways to confront them effectively and courageously, without compromising the basic concepts of the rule of law in the broad sense. We are here to discuss these matters and to make our small contribution, so that we may Give our children a better chance in the coming twenty-first century.

Hadassa Ben-Yahu

The Tradition and Culture of the Israeli Legal System

Aharon Barak

To which family or tradition does the Israeli legal system belong? What is the nature of the Israeli legal culture? For the purposes of this article, legal systems are grouped into families or traditions, each with its characteristic "style", according to five criteria: history, legal institutions, tendency towards abstract or concrete thinking, sources of law and ideology. Legal culture may be defined as the basic attitude of a legal tradition towards the concept, structure and purpose of law.

Jewish Law and Western Culture

To which legal culture does the Israeli legal system belong? Were Israel to follow Jewish law, the answer would be relatively simple: the Israeli legal system would be part of the culture of Jewish law. In practice, of course, Jewish law applies in Israel by virtue of secular legislation.

Even the application of Torah law in the areas of marriage and divorce among Jews derives from a secular law. The secular roots of the legislation's power is even clearer in other areas, in which the influence of Jewish law is clearly expressed in the content and language of the law, but is not the source of its binding application. From the standpoint of the law of the State, the secular legislature is empowered to adopt a given set of religious law norms and to reject others. The application of religious law derives, then, from its absorption by the secular law. By this process of absorption, the religious law becomes a law with a secular source.

Other features of the Israeli legal system distance it from the

Prof. Aharon Barak is President of the Supreme Court of Israel and Professor of Law. The full version of this article, with references, may be found in *European Legal Traditions and Israel, Essays on Legal History, Civil Law and Codification, European Law, Israeli Law*, edited by Professor Alfredo Mordechai Rabello, Hebrew University, 1994. Justice is grateful to Professor Rabello for allowing us to publish this article.

culture of Jewish law. For example, the principal legal institutions are not taken from Jewish law. Nor is our ideology Jewish in the religious sense. It is interesting to note that the Foundations of Law Act, 198" which refers to the heritage of Israel as a source for filling lacunae in the Knesset legislation, refers to the principles of liberty, justice, equity and peace as Israel's heritage. It does not refer to the basic principle of worshipping God, but rather to universal values. Moreover, the law as a whole lacks an underlying religious ideology. It should be clear, then - whatever one's position on this issue is that the Israeli legal system is not part of the culture of Jewish law, although the latter does influence it.

The Israeli legal system would seem to be part of Western legal culture. The State's ideology is governed by laws and the rule of law; the basic approach is secular, liberal and rational; and a secular legislature creates and may change the law on a rational basis. The social system aspires to solve problems by means of law and the courts; law is understood as a concept that ensures social progress and change: and the individual has rights as well as obligations. Israel's way of thinking, her legal institutions and their roots, and her secular ideology are all characteristic of Western legal culture. While Israel is a "Jewish and democratic State" its Jewishness does not make it part of the Jewish legal culture, since it is expressed in a secular rather than a religious manner.



Common Law Influences

Western legal culture includes several legal traditions, such as the Romano-German, the common law and Scandinavian "families".

There are undoubtedly considerable similarities between the common law family and the Israeli legal system. First, they share a common history. During the Mandate, the law of Palestine was "Anglicized" through legislation enacted in Palestine, which often adopted the content of parallel British laws, and through judicial decisions, which by means of Art. 46 of the Palestine Order in Council, 1922, brought common law principles and the doctrine of equity into the law of Palestine.

As a result many of Israel's legal institutions are common law ones. Among these are: the estoppel doctrine, the laws of admissibility of evidence, undisclosed agency, trust and the adversarial method in criminal trials. Israel's law contains the principle of interpretation and the special status of the judiciary of the common law countries. Finally, Israel shares with these nations a court system with a pyramidal structure which has at its apex a Supreme Court consisting of a small number of judges. Also drawn from the common law family are the principle of binding precedent and the view that the judge is empowered to create law beyond statutory interpretation. The view that judicial decisions are a binding source of law may be considered the central contribution of the common law tradition. The Israeli legal system recognizes the legitimacy of judicial activity in creating a common law, in which no legislated legal norms are interpreted. An "Israeli common law" is recognized. One may ask: where does an Israeli judge get his authority to create legal norms that are not derived from the interpretation of an unclear, ambiguous piece of legislation? The answer is that this authority is part of the legal tradition over sixty years old, which hinds the fate of the Israeli legal system to the common law tradition. By virtue of this tradition, the Israeli legal community sees new judge-made laws as legitimate. Just as it is accepted that judges make common law even without express legislative authorization in England, such activity is deemed legitimate in Israel.

Romano-German Influence

The Israeli legal system also bears certain, weaker resemblances to the Romano-German family. This relationship began with Ottoman law, which applied in the Middle East for over 400 years. Ottoman law itself was deeply influenced by European law during the nineteenth century. For example, Section 64 of the Ottoman Civil Procedure Law (covering the validity and enforcement of various types of contracts), for many years a fundamental provision, was influenced by the Roman tradition.

This tie to the Romano-German family continued after the founding of the State, when the process of codification of Israel's civil law was initiated. The characteristics, purpose and content of the Israeli codification process were heavily influenced by Continental law. During the course of codification, many Continental legal concepts were adopted, such as the principle of good faith (both in negotiations and the performance of obligations), prohibition of the misuse of a right, contracts for the benefit of a third party and even the codification itself. Moreover, under the Continental influence, the principle that a judge may fill lacunae in legislation, which underlies the Foundation of Law Act, was adopted. This principle had been articulated previously in Art. 46 of the 1922 Order in Council, but Art. 46 required lacunae to be filled by the common law itself. Judges were not allowed to extrapolate from a legislative provision to fill a lacuna. This is not so in the Foundations of Law Act, which provides for a statutory lacuna to be filled by analogy, or, in its absence, by the principles of Israel's heritage - liberty, justice, equity and peace. The structure and substance of this provision was influenced by the Romano-German legal tradition.

As in Romano-German systems, the supplementary law of the new Israeli statute was made by analogy to initial sources. This was a minor revolution for the Israeli legal system as it authorized the judge to fill gaps by analogy to other legislation. A statute was no longer confined to its own "four walls" but could project its principles, which heretofore constituted a legitimate source of supplementary law, into the rest of the legal system. This was a most substantial change. A statute's application was no longer limited to the matters it dealt with directly, but, as in the common law tradition, it had general application, providing a security net for the judge searching for laws to fill in gaps in the legislation. Just as an English judge turns to the common law in case of statutory lacuna, an Israeli judge, like his Romano-German colleague, turns to the entire legal edifice to derive such solutions. This development brought the Israeli legal system closer to the Romano-German tradition.

The Israeli Legal System is not Part of the Common Law Family

Thus the form or style of the Israeli legal system is similar in some matters to the common law family, but in others to the Romano-German families. If a choice had to be made between these two families, Israeli law would seem to belong, to the common law system, but at its fringes, the Israeli system is moving away from the English centre of gravity towards the American one. Actually, there is a third possibility, which seems to describe the normative reality in the Israeli legal system more accurately: it does

not belong to any of the conventional Western families. Despite the similarity between the Israeli system and the common law family, it should not be classified as part of it. The historical union of the systems was too brief to give rise to a familial relationship; Israel's fundamental legal concepts, such as good faith, the prohibition against misuse of rights and specific performance as a principal form of private law relief, are unknown in English law; the status of legislation in the Israeli system is substantially different from that in the common law family; the principle of codification, which lies at the root of civil law, is not accepted in the common law family.

Also the way of thinking of the Israeli jurist differs from that of his Anglo-American counterpart, who goes from the specific to the general. In Justice Holmes' famous saying, the life of the law has not been logic but experience. The common law jurist distances himself from generalizations and focuses on concrete judicial decisions. The Israeli jurist does not fully share this way of thinking. It would seem that many Israeli jurists think in more abstract terms. They generally derive specific rules of law from the general principle of good faith: develop concrete duties from the general concept of duty of care in torts and base the rules of proper behaviour for the individual and government on the general principles of reasonableness. Moreover, the formal approach to law that characterizes much of the common law is not Israel's legacy. In my view, the Israeli legal system has a characteristic tendency towards substance, and not form. Freedom of contract and the autonomy of private will dominate private law and not rigid formal requirements. Procedural law, both civil and criminal, also adopts a nonformalistic approach, for example, the laws of evidentiary weight take the place of admissibility; and the non-formalistic approach also holds for public law: it is sufficient to mention the easing of standing requirements in non justiciability, and the decline of the laches doctrine in administrative law.

Thus, although the influence of the common law family is considerable, Israeli law is not squarely located within its ambit. Actions specifically intended to cut the formal link have been taken, and, in my view, have removed the Israeli system from the common law tradition.

The Israeli Legal System is not Part of the Romano-German Family

Just as the Israeli legal system does not fit squarely into the common law family, neither does it belong to the Romano-German family. The history of the two systems is fundamentally different, and the language barrier impairs cross-fertilization. The developments in Romano-German law, both in judicial decisions and in academic literature, are inaccessible to the vast majority of the legal

community. Many legal concepts, such as trust and estoppel are not recognized as such in the Romano-German family. Neither judicial decisions, a central source of law in the Israeli system, nor the doctrine of binding precedent, another of its major devices, is among the foundations of the Romano-German family. The judge's status in Israel is different from that in the Romano-German family; the structure of the court system, particularly the position of the Supreme Court at the head of the judicial pyramid is not accepted in the Romano-German family, which tends to have several supreme courts, with hundreds of judges.

Many Israeli jurists, both practitioners and academics, adhere to an abstract, systematic way of thinking, but favour the case-by-case method, and a formal approach toward law and adjudication characterizes broad areas of Israeli law. Many still accept the view that criminal and civil procedure are nothing but a "chess game in which one wrong move determines the outcome."

The Family of Mixed Systems

Thus the Israeli system has been influenced by, but is not part of, the common law and the Romano-German families. To which family does Israeli law belong then? In comparative law literature, legal systems of "mixed jurisdiction" influenced by both common and civil law are often mentioned. But it is doubtful whether these mixed systems can be grouped into a single family: the style of each system is so different that it is almost impossible and artificial to group them together in a coherent family. They certainly lack a common history and the legal concepts recognized by each are frequently different.

Aspects of the Israeli Legal Tradition

In my view the Israeli legal system has its own Western cultural style, which is very similar to that of the common law family:

Primacy of Legislation

Legislation holds primary status. The vast majority of the law is statutory. At the heart of private statutory law stands the civil codification, a legal regime designed to be comprehensive. Statutory law in Israel does not supplement or complete judicial decisions. On the contrary, statutory law is the cornerstone of the system, not only providing a solution to the problems it specifically addresses, but also serving as a source for the creation of new norms, by way of analogy. Fundamental statutory principles project themselves into the system as a whole, like the fundamental principles found in common law decisions, they constitute a source for filling gaps and developing the law. An Israeli judge adjudicating a statute does not see it as a body of statutory legal norms above a

safety net of common law. According to Israeli doctrine, the safety net under statutory norms is itself partly statutory, including all the specific statutory norms and fundamental statutory principles that serve as a basis for analogy and development of the law.

Centrality of the Judge

The Israeli system is founded on a basic philosophy according to the judge a major position. This central role is expressed in two main ways. First, the judge is empowered to fill any lacunae that arise in a statute. The supplementary law, laid down in the Foundation of Law Act consists of two stages: (a) the judge seeks to fill the statutory lacunae by analogy from the existing law, statutory or common law; (b) if an appropriate analogy is not found, the judge draws on the principles of Israel's heritage of liberty, justice, equity and the peace to complete the law. It stands to reason that if the second step is also unsuccessful, the judge proceeds to the third stage, which is not mentioned in the Foundation of Law Act, but arises naturally from the legal system: he fills the statutory gap by the general principles of the Israeli legal system. Second, this authority to fill the gaps is not the only power the judge has to create new norms. The judge's central role in the Israeli system also lies in his power to create an "Israeli common law". By virtue of this authority, the Israeli judge creates judicial rules that neither interpret statutory law nor fill its gaps, but are judicially created legal norms that go beyond the existing body of statutory law.

Status of the Academy

An important place in the making of law is given to doctrine, that is, to the legal academy. Especially in this initial stage of development of the legal family to which Israeli law belongs, the academy has the honourable roles of consolidating doctrine, of generalization and of abstraction, thereby directing the path of Israel's future legal development. The Israeli system has not reached the situation of the Romano-German family, in which the words of esteemed legal scholars are a formal source of law, but the status of Israel's legal academy is certainly more central than that of its counterpart in the common law family. Scholarly writings greatly influence judicial decisions. The judges read them with great care and quote them in their opinions. In this formative period, the Israeli legal academy seems to have a most important function in helping to mold the system structure of the country's legal tradition.

Custom

Alongside statutory and decisional law, the Israeli legal system recognizes custom as a source of law. This was so in the past, and despite the repeal of the *Mejelle*, which accorded custom statutory

force, it seems that it continues to be an accepted and binding legal source and part of the Israeli legal tradition.

Comparative Law

In the instances in which a judge has discretion, the Israeli system is influenced by comparative law. Jewish law, one of the Israeli legal system's most important cultural assets, is an important source of inspiration. Interpretive inspiration is also drawn from the other legal families.

Balancing Between Form and Substance

From an intellectual standpoint, the way of thinking of the Israeli jurist is neither wholly abstract and systematic, nor exclusively concrete and casuistic. In my view the distinctiveness of the Israeli family system lies in the combination of two ways of thinking: sensitivity to the practical function of norms together with consideration of experience and precedent. The legal ship, by its nature, moves from case to case. At the same time this system is also sensitive to the need to generalize and to be systematic: the passage from one specific case to the next is not made directly, but by abstract generalization. It draws its vitality from fundamental principles and from the desire to establish a systematic legal framework built along principled lines of policy from which individual solutions are derived. For example, the civil codification is based on a number of substantive principles, such as the autonomy of private will, the good faith principle, and the supercedence of substance over form. This perpetual struggle between substance and form is an example of the middle position: the system is not formalistic in its way of thinking, and does not maintain that understanding a text as a linguistic creation is a necessary and sufficient condition for the extraction of legal norms. The creation of the norm must give expression to its purpose, which is made up of both the historical intent of the legislature and objective current considerations, especially the system's fundamental principles. Nor does the system lack formal considerations, as it is based on a static, formal skeleton enveloped by substance, and only the delicate balance between the two preserves the function of the entire system.

The civil codification is now reaching a stage of consolidation and completion with the unification of all the laws into a single framework; a similar process is expected to occur in other areas of the law, such as corporation and labour law. The fundamental constitutional principles, which have been enshrined in basic laws and judicial decisions until now, are slowly becoming entrenched in a firm constitution and the judicial review of the constitutionality of statutes.

Civil and Religious Law

The Israeli legal system is built on the duality of civil and religious law. This duality was inherited from the Ottoman tradition and influences the content and development of the law. The status of religious law in the State of Israel is unique among Western legal systems. While it is a unitary legal system, adjudication in matters of personal status in the Israeli system introduces a sort of federative element that modifies its unified structure. As a result extreme tensions arise between various aspects drawn from Western tradition (mainly legalism, liberalism and secularism) and the special status of religious law. These are a time bomb, which if not dealt with properly - by taking proper account of the legitimate interests of all concerned - may yet have severe consequences for Israeli law and society.

The High Court of justice

In my view, the institution of the High Court of Justice is unique. Of course, the High Court of Justice is a court of law and not justice. Justice is done by the High Court, like that of any other court, is justice within the law. Even so, the High Court has a distinctive role in Israeli society. Its status and influence go beyond that of a court as such, as its decisions have a daily influence on the entire range of relations between citizens and the State, individuals and society. The Court's status reflects the centrality of the individual, and the need to protect his basic interests and those of the larger community from the State. The rulings of the High Court express a dual attitude towards the State. On the one hand, the State, after long years of yearning, was shaped through many sacrifices; the realization of the dream of many generations. On the other hand, the State is a governmental framework, which may harm the individual and his rights, and therefore requires broad judicial oversight. The gradual crystallization of the basic philosophy of the social order, reflecting the nation's independence both influences the rulings of the High Court and is itself influenced by them.

The jurisprudential Approach of the Israeli System

According to the view presented in this article, the Israeli legal system is part of Western legal culture, but while close to the common law family, belongs fully neither to it nor to the RomanoGerman family. Israeli law is an independent system or family. This situation raises the question: what is Israeli law's operative jurisprudence? This question does not refer to the philosophy of law, which deals with the universal nature and definition of law, but to the basic legal concepts actually accepted and applied in the

system. With regard to these issues, Israeli law has, in the past, drawn on both the common law and Romano-German systems without laying down its own jurisprudential philosophy. This was necessary as Israeli law lacked an operative jurisprudence of its own. Now, since Israeli law has established itself as an independent legal system, these basic concepts should be resolved. Since the Israeli legal system has its own distinctive style, having its own doctrine is justified. In normal circumstances, doctrine precedes and gives rise to legislation and judicial decisions. Here the process is the reverse. The legal plant creates the grounds from which it blossoms. Israeli jurists have to review the basic jurisprudential concepts to examine whether the conceptual frameworks are still appropriate. If they are not, they must be replaced to fit the unique features of the Israeli legal system. These changes must naturally be carried out with great care, but they should not be neglected for the very reason that they are so fundamental.

Conclusion

At the same time a young state and legal system, and an ancient nation with an overarching national tradition, Israel has been through crises and other catastrophes that other countries have not experienced. All this has left its imprint, for better or worse, and has put Israel on the world's legal map as a unique system-family. This uniqueness entails many difficulties. Israel has not yet developed an operative jurisprudence to serve as the basis for the understanding and the operation of the law. The creation of such a theoretical framework ex nihilo is an exceedingly difficult task, especially with the forces at Israel's disposal. To copy a foreign operative jurisprudence would not be desirable in view of Israel's political and legal independence. Israel is therefore in a rather difficult legal situation, and can probably not avoid a fairly long and arduous transitional period, in which a combination of independent creation and interpretive inspiration will develop alongside the day-to-day life of the law. This places a heavy responsibility on Israel's scholars, lawyers and particularly on her judges. The system is based on deep confidence in the judges as interpreters, as fillers of statutory lacunae and developers of an Israeli common law. The judges must set a course of action that fits the central characteristics of the system. The Israeli system must not become enslaved to other legal families, but should also not attempt to reinvent the wheel. Interpretive inspiration can be drawn from any proper source, national uniqueness should be developed, and the legal culture must be preserved.

The following articles (pages 11-34) are based on addresses delivered during the World Council Meeting of the Association held in London on June 1-3, 1997. Highlights from other lectures will be published in later issues of *JUSTICE*.

Immigration and Asylum, An English Perspective

Michael J. Beloff

The general rule of customary international law is that no individual may assert a right to enter a state of which he or she is not a national and this rule is normally accepted as applying to refugees as well as to ordinary migrants. In accordance with this rule asylum is not a right accorded to an individual refugee but is at the discretion of the state which may (subject only to international obligations or domestic constraints) grant or withhold it as it sees fit.

At common law the unfettered control of immigration was vested in the sovereign.

Early Legislation in the UK

The UK had a long history of affording asylum, in particular in the nineteenth century to such romantic figures as the father of the Italian nation: Garibaldi. Even the first statute to deal with immigration legislation relating to asylum in the UK, the Aliens Act 1905, contained provisions exempting political and religious refugees from refusal of entry. But when the Aliens Restriction Acts 1914 and 1919 - wartime legislation - replaced the 1905 Act, the exemption for refugees was not repeated, and subsequent immigration statutes followed this restrictive pattern. The

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ascertainment of refugee status and the response to claims for it was therefore not a matter for the courts but for the Home Secretary who exercised the historic prerogative powers on behalf of the monarch



Immigration Rules and the 1971 Act

During the 1960s the first Immigration Rules were published. In 1969 the Immigration Appeals Act provided for a statutory two tier system of appeal to specialist bodies, who could override the decisions of the Home Secretary where incompatible with the rules. The system was reincarnated in the Immigration Act 1971. The Rules gave primacy to the 1951 Geneva Convention relating to the Status of Refugees and the Protocol of 1967. However, the 1971 Act made no reference to the Convention and its provisions were not in complete harmony

with it. Notably while people who claimed asylum, **after** they had arrived and been given leave to enter the UK, had a right of appeal to an adjudicator against a refusal, those who claimed asylum on arrival were limited to judicial review only of the legality, rationality and procedural fairness of the decision, but not its merits, until they were removed to the place of feared persecution where their capacity to enjoy statutory rights of appeal was potentially very limited. The sole mitigating factor was that the Courts scrutinised the decisions of the Home Secretary with particular care in the light of the issues at stake. In *Bugdaycay* (1987 1 AC 54) Lord Bridge in a classic passage said at p. 53 1:

"The court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

The 1993 Act

Since July 1993, practical effect is given to the Geneva Convention by Part I of the Rules, (HC 395). These attempt to provide a coherent structure in which asylum applications will be considered and determined, and to make the Convention the mandatory point of reference.¹

1. The relevant provisions are:

"328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees ... 329. Until an asylum application has been determined by the Secretary of State, no action will be taken to require the departure of the asylum applicant or his dependents from the United Kingdom ... 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom: and (ii) he is a refugee, as defined by the Convention and Protocol: and (iii) refusing his application would result in his being required to go ... in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group. 335. If the Secretary of State decides to grant asylum to a person who has ... entered without leave, the Secretary of State will ... grant limited leave to remain. 336. An application which does not meet the criteria set out in paragraph 334 will be refused."

Moreover, under the 1993 Act, nearly all refusals of asylum carry a right of appeal to a special adjudicator whether the claim was made on entry **or after** a decision to deport had been taken **or** before removal as an illegal entrant with limited exceptions where:

1. A person has claimed asylum and is granted exceptional leave to remain without being recognised as a refugee.
2. A person has been previously refused asylum in the UK: the basic principle is one appeal per asylum application. [There is, however, nothing to stop a person making more than one application.]
3. National security grounds are relied on.

The 1996 Act

The final block in the statutory edifice is the Asylum and Immigration Act 1996. This Act has three main objectives: in the words of the then Home Secretary (Mr Michael Howard):

"first, to strengthen our asylum procedures so that bogus claims and appeals can be dealt with more quickly; secondly, to combat immigration racketeering through stronger powers, new offences and higher penalties: and thirdly, to reduce economic incentives, which attract people to come to this country in breach of our immigration laws".

Section 2 provides that Section 6 of the 1993 Act, which stipulates that an asylum claimant may not be removed from the United Kingdom while his claim is being considered, does not apply where the asylum-seeker is to be sent to a safe third country, the Government of which would not send him to another country or territory otherwise than in accordance with the Convention. Section 3 makes provision for appeals against the certification of safe third countries under Section 2.

These provisions seek to embody in the law what the Home Secretary described as the "we] I -established principle" that those in danger of persecution apply for asylum in the first safe country in which they arrive.

The Government considered that this "safe third country" principle could be made more effective by removing the delays inherent in an in-country right of appeal: since by the time such an appeal has been completed in the ordinary timescale, the third country was often no longer prepared to re-admit the appellant. The sections therefore make appeals against removal to certain third countries exercisable only after removal to those countries. The provision is restricted in its application to third countries

within the European Union, although additional countries may be added by the Home Secretary.

How the Home Secretary reaches his conclusions can be shrouded in mystery. In *Abdi* (1996 1 WLR 298) the House of Lords held (in relation to Somalian refugees threatened with removal to Spain) that a general duty on the Secretary of State to disclose all the material on which he had based a "without foundation" certificate under the 1993 Act (i.e. that there was no foundation for the Somalis claim that the Spanish authorities would not respect their Convention obligations) would be inconsistent with his obligations under Rule 5(6) of the Asylum Appeals (Procedure) Rules 1993 to disclose specific documents and, accordingly, could not be implied.

In *Regina v. Secretary of State for the Home Department and Another, Ex parte Canbolat* (TLR 6.5.97), the Court of Appeal held that in deciding whether a third country qualified for the purposes of Section 2 of the 1996 Act, the Home Secretary had to satisfy himself that there was no real risk that the country would send an asylum seeker to another country otherwise than in accordance with its international obligations. Despite the concerns of special adjudicators (who manned the appeal system) as to whether asylum seekers in France received a proper opportunity to have their claims determined in accordance with French law, the Home Secretary was entitled to conclude that France was a country to which he could authorise an asylum seeker's removal under the 1996 Act.

The International Context

Under the English unwritten constitution treaties do not form 2. part of domestic law unless specifically incorporated.

I want to examine briefly three distinct sources of international obligation.

EU Law

"The creation of a Community without internal frontiers implies the development of common policies at the external frontier, or else migrants could avoid relatively restrictive immigration rules in State A simply by entering that state via the more generous state B" (*Weatherill and Beaumont, EC Law*, p. 505).

Uniformity rather than generosity is required. The Treaty of European Union, Article 100 EC, established a new procedure for adopting directives relating to the external borders of the Community and identified in its third pillar nine areas of activity which member states regard as being of "common interest".

These include aspects of free movement of persons, such as asylum policy. The Treaty of Amsterdam (1997) has elaborated these themes.

But while EU law, subject to certain preconditions, can be relied on by individuals in English Courts, certainly against organs of the State, there is as yet no relevant EU law to assist the asylum seeker,

ECHR

Article 3 of the ECHR provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Although on its face limited to action by and in a member state its reach has been extended by the European Court of Human Rights to cover expulsion by a member state to a receiving country where such torture, treatment or punishment is threatened.²

While the ECHR is not part of English law; the new Labour Government have recently announced that it will be incorporated in a way not yet identified.

The Geneva Convention

The key international instrument is the Geneva Convention. As noted, the 1993 Act incorporated the Convention into UK

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2. In *Chahat* (1997 23 EHRR 413), the Court summarised the position in this way
 "73. Contracting states have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover it must be noted that the right to political asylum is not contained in either the Convention or its protocols (*Vilvarajah v. UK* (1992 14 EHRR 248) at para. 102).
 74. However it is well established in the case law of the Court that expulsion by a contracting state may give rise to an issue under Article 3* and hence engage the responsibility of that State under the Convention. where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances. Article 3 implies the obligation to expel the person in question to that country (*Soering v. UK* (1989 11 EHRR 499), paras.90-91: *Cruz Vavas v. Sweden* (1992 14 EHRR 1) paras.69-70: *Vilvarajah*: to(- cit. para. 103."

law: it would be unlawful for Immigration Rules to be made that are inconsistent with the Convention. [Asylum and Immigration Appeals Act 1993, Section 2.]

In broad terms the Convention provides a definition of refugees, subject to identified exemptions and circumstances when a person may cease to satisfy the same. Where someone is recognised as a refugee and granted asylum, signatory states are under a duty to secure equal treatment (with the State's own nationals) in respect of religion, personal status, property, freedom of association, gainful occupation, welfare, administrative measures and the issue of special travel documents to be used in place of the refugee's national passport. Under domestic law refugees obtain indefinite leave to remain after four years, whereas those granted exceptional leave must generally wait seven years. Refugees are entitled to immediate family reunions those with exceptional leave normally have to wait four years.³

The states that are signatories to the Convention have agreed to abide by Article 33 which prohibits refoulement (i.e., the expulsion or return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedoms would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion). If there is no safe third country to which a person can be sent, the principle of non-refoulement effectively requires a state to determine an asylum claim made by someone within its territory.

Article 32 gives refugees lawfully within the territory of a contracting state a right not to be expelled save on the grounds of national security or public order. Even then, expulsion is only possible following a decision reached in accordance with due process of law with attendant rights of appeal and of representation before a competent authority. Interestingly in *Chahal* the ECHR said:

3. However wide the definition of refugee, there will be those deserving protection under other international instruments who may fall outside it. The Rules make no provision for this class of persons despite obligations. Although the Home Office may grant exceptional leave to remain in such cases, this would be a decision to depart from the Rules and would not be the subject of an appeal against a refusal of asylum. People may be fleeing torture and inhuman or degrading treatment even though such treatment may not be on the grounds of race, religion, membership of a social group or political opinion. *Expulsion of such persons in circumstances where there are substantial grounds to conclude that they face such treatment would be contrary to other international obligations of the UK: and is not in fact effected.

"80. The prohibition provided by Article 3 of the ECHR against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 of removal to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations Convention on the Status of Refugees."

Practice on Applications

In the UK asylum applications made after 1 October 1994 are dealt with in accordance with the Rules paras.327-352 HC 395. An asylum application is defined as a claim that it would be contrary to the UK's obligations under the Convention and Protocol for the person to be removed from or required to leave the UK. The asylum application will be determined in accordance with the UK's obligations under the Convention but it will only be granted if the applicant is in the UK or has arrived at a port of entry in the UK, is a Convention refugee, and refusing his or her application would result (whether immediately or after the expiry of leave) in refoulement contrary to the Convention. In all other cases the application will be refused.

Fairness

The Rules are silent on the procedural safeguards to be adopted during investigation with the exception of specific provision for unaccompanied children.

The Rules are also silent on the actual practice of obtaining relevant information, how detailed reasons for refusal should be, and what criteria are used for ascertaining whether the UK is the most suitable country of asylum.

Some ground rules have however been established as a result of litigation. In *Bugdaycay* Lord Bridge found it:

"strange that such an important interview as this should be entrusted to an immigration officer at a port of entry with no knowledge of conditions in the country of origin of a claim for asylum."

The Home Office still use immigration officers for interview, but there is now greater consistency in the interview technique since the introduction of standard form questionnaires.

In *Thirukumar (1989 Imm AR 402)*, the Court of Appeal, in application of the primary precepts of natural justice quashed a decision on grounds of unfairness, and added that if an opportunity to make representations was to be meaningful an applicant should be informed of the matters to which his or her attention needed to be directed, and, where time had elapsed since the initial interview, to be reminded of what had been said.

The procedures have changed again with the introduction of a right of appeal in July 1993. There is no longer any provisional decision to refuse inviting observations as to why a different course should be adopted. The right of appeal has obviated its necessity.

The Home Office however, will habitually give full reasons for rejection of asylum claims.

The Jurisprudence

General

Section I of the 1993 Act for the first time defines "asylum" as meaning refugee status within the meaning of the Convention and Protocol. In consequence, the case law in the English Courts is concerned very substantially with interpretation of the Convention.

Its construction is complex.

Refugees

The definition of refugees for the purposes of the Convention is contained in Article 1(A) as amended by the Protocol. A refugee is any person who:

"owing, to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it."

Fear of Persecution

There must be a genuine fear of persecution that has caused the asylum seeker to be outside his or her country of residence or nationality.

In *Adan (1997 2 All ER 723)* it was held:

"For the purposes of Art. 1A(2) of the convention, to be recognised as a 'refugee' it was not necessary for the applicant to have

a current well-founded fear of persecution if he were returned to his country of origin, provided only that the fear or actuality of past persecution still played a causative part in his presence in the United Kingdom and he was currently unable to avail himself of the protection of his country of origin."

The reasoning of Simon Brown LJ included the observation:

"And there must surely have existed in the authors of the Convention a feeling that those displaced from their homelands by the horrors of the Holocaust years, and were still unable to return, were particularly deserving of refugee status and the protection and security that that would bring." (p.732)

Persecution by whom

The security forces of the country do not cease to be agents of official persecution because it is not the policy of central government to persecute the victims in question. It is equally persecution where the authorities condone or are complicit in persecution conducted by one section of the population against another. In the case of *R. v. Secretary of State for the Home Department, ex p. Jeyakumaran (1994 Imm AR 45)*, Tamils resident in Colombo were the victims of reprisal by the local Sinhalese population and received no protection from the state. The High Court held it to be irrelevant to the merits of the claim that the victims were not "singled out" for persecution by the government.

In *Adan* it was also held that:

"In the context of a civil war, where the state authorities had lost all control and so were unable to offer protection against those threatening or inflicting harm on convention grounds, all those who could be identified with the interests of either side, **even if active participants in the conflict, as opposed to innocent spectators, targeted by neither side but equally at risk, were potentially refugees** within the meaning of the Convention".

Social Group

A group has to be more than a disparate collection of individuals, but it is uncertain whether the group has to be linked by political or social status. The case law is variable in its application of this principle.

* In *Sarchanhov (1996 Imm AR 28)* it was held that a Russian security guard, threatened with death and assault by gangsters in his native country was not a member of a particular social **group** for convention purposes.

- * In *Adan* it was held that opportunistic draft evaders were not members of such a group.

By contrast:

- * In *Shah* (TLR, November 12 1996) it was held that pregnant Pakistan women who feared stoning on account of adultery as punishment under sharia law could be capable of being held a member of a social group where there was a well-founded fear of persecution.
- * In *Binbasi* (1989 Imm AR 595), the court assumed, without deciding, that homosexuals could form a social group, and it is submitted that subsequent case law demonstrates that they can.

Burden and standard of proof

The burden of establishing a well-founded fear is on the applicant, *R. v. Secretary of State for the Home Department*, ex p. *Sivakumaran* (1988 AC 958). In the same case the House of Lords established that for a fear to be well-founded the Secretary of State was entitled to look at objective facts and ask whether there was a real and substantial risk or a real likelihood of persecution for a Convention reason - a lesser standard than proving that persecution will occur on the balance of probabilities. There need not have been actual persecution in the past. It is sufficient if there is a wellfounded fear of it occurring in the future.

The general human rights background of the country in question is important in assessing the objective foundation for the fear.

Evidence

"The debate about standard of proof is inextricably linked with issues of credibility." (*Macdonald and Blake: Immigration Law* 4th ed.).

The Rules set out the circumstances when adverse inferences may be drawn on an applicant's credibility, namely:

- (a) delay in applying for asylum;
- (b) making of false representations; (c) destruction of evidence;
- (d) the undertaking of activities in the UK inconsistent with previous beliefs in order to create or substantially enhance an asylum claim.

In *ex p. Patel* (1986 Imm AR) noted the dangers of adverse

findings against a person from a different cultural background speaking through an interpreter.⁴

Tensions

The case law recognises that the exercise of balance of the interests of the potential host national against those of the applicant for asylum has been complicated by four major factors.

- * The first is numbers. The admission of the occasional asylum seeker is one thing; the admission of large groups another.
- * The second is the nature of the asylum seeker. The admission of the political radical is one thing; the admission of the bomber another. The latter have been held to fail outside the concept of a political refugee.⁵
- * The third is the motives of the asylum seeker. Increased mobility, on the one hand, and awareness of the disparity of living standards between the developed and developing (or more robustly - underdeveloped) world on the other, the by

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4. In *M. v. Secretary of State for the Home Department* (1996 1 WLR 507), it was held:

"that in an exceptional case circumstances might exist where the act of making an asylum application could itself create the possibility of an applicant being persecuted if returned to his country of origin, and the making of a fraudulent claim could not act as a total barrier to reconsideration of an applicant's status as a possible refugee;"

5. In *ex p. T* (1996 AC 742), it was held:

"(per Lord Keith, Lord Browne-Wilkinson, Lord Lloyd) For a crime to be a political crime for the purposes of article 1 F(b) of the Convention it had to be sufficiently closely and directly linked to the political purpose and not too remote from it, regard being had to the means used to achieve the political end, in particular whether the crime was aimed at a military or governmental target on the one hand or a civilian target on the other and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public; that the means used in the attack on the airport had been indiscriminate and almost bound to involve the killing of members of the public, and therefore the link between the crime and the applicant's political objective had been too remote to constitute it a political crime; that (per Lord Mustill and Lord Slynn of Hadley) acts of terrorism likely to cause indiscriminate injury to persons having no connection with the government of the state were outside the concept of a political crime: also within the meaning of the Convention and the attacks on both the airport and the barracks had properly been characterised by the appeal tribunal as terrorist offences; and that, accordingly, the appealtribunal had been entitled to hold that there were serious reasons for considering that the applicant had committed a serious non-political crime outside the United Kingdom and was therefore excluded by article 1 F(b) of the Convention from the protection of article 33(1)."

products of technological change in transport and communications has produced that late twentieth century phenomenon the so-called economic refugee.'

- * The fourth is the race of the applicants. The case law on the subject is a mirror or map of the conflicts of our times. Sri Lanka, Somalia, Zaire, Algeria - these are the kind of countries, whence the pressure comes.

Discouragement

Unable to stem the flood of persons claiming asylum, the former Conservative Government sought to impose blunt pragmatic disincentives. As a result the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996, certain types of asylum seekers lost the right to claim income support. They included persons who failed to claim asylum immediately on arrival in the United Kingdom and people who were appealing against the refusal of asylum - a substantial proportion of asylum-seekers. The Government perceived these groups to be constituted substantially by bogus asylum seekers: whether this was an accurate perception is obviously a matter of controversy.

A Zairean woman, known only as B, argued that the Regulations were ultra vires in putting to asylum seekers in those groups a stark choice whether to remain in the United Kingdom destitute and homeless until their claims were finally decided or to abandon their claims and return to face the very persecution from which they claimed to have fled.

By a majority, the Court of Appeal agreed. Lord Justice Simon Brown said they indeed rendered the rights of asylum seekers "nugatory".

The same three judges delivered another powerful judgment on asylum law in *R. v. Westminster City Council, ex p. Kihara* (1996).

The Ministers disagreed with the judicial interpretation of Parliament's will in the first case (the second is under appeal to

the House of Lords). They said their policies had been endorsed by substantial majorities in both Houses of Parliament. And they enacted the 1996 Act to restore the status quo ante.

But asylum-seekers' lawyers had spotted a provision in the National Assistance Act of 1948. Broadly speaking the Act obliges local councils to provide temporary accommodation for people in need of care and attention. That provision was still in force, unaffected by the 1996 legislation - but it may be doubted that Parliament in 1948 had asylum seekers from third world countries in mind as the beneficiaries of the legislation.

Could it be used by destitute asylum-seekers to obtain accommodation from local authorities? The High Court said it could. The Court of Appeal, presided over by the President of the UK Branch of the IAJLJ Lord Woolf MR a-reed. If the courts were right the Government in 1996 which had tried to block all sources of support, had negligently left unblocked an important one.

The Judges' rulings may say more for their humanity than for their deference to the will of the people's representatives, expressed in legislation.

The advent of a new Labour Government may produce fresh laws, revised rules, altered practices. But the need for judicial vigilance is unlikely to disappear.

6. In *M. v. Home Secretary* (CA [1996] 1 WLR 5) Millett LJ said at p.514: "Such persons do not necessarily hold any particular political opinion. Large numbers of persons in Third World countries seek admission to the United Kingdom because of a desire to improve their conditions of life, and they falsely claim asylum because this gives them a means of admission."

Adv. Neal Sher Elected- as President of the American Section of the Association

The Association wishes to congratulate Adv. Neal Sher on his election as President of the American Section of the Association.

Neal Sher was formerly the Director of the Office of Special Investigations (OSI) in the U.S. Department of Justice, responsible for bringing Nazi war criminals to trial.

Immigration and Asylum - An American Perspective



Phyllis E. Oakley

Immigration

In both Europe and the U.S. the rise of nativist, anti-foreign sentiment has pushed immigration to the top of the political agenda. There is a fear that immigrants threaten the economic and political security of countries.

They are seen to change radically the ethnic and cultural mix of a nation - taking jobs from the native-born, costing billions in welfare, overwhelming schools, putting heavy demands on health systems, and adding to crime.

Today, with the huge increase in easy movement of people, most countries must rethink and reshape their policies toward immigration.

The United States begins with the premise that legal, controlled migration is beneficial. This is what our nation is about and it is what defines Americans. This is not the general European view, nor the view throughout most of the world. Canada, Australia, and New Zealand - and to some extent many countries of Central and South America - share the U.S. view, as is evident by their populations.

Most Americans are unwilling to give up their tradition of welcoming immigrants. We are a people - a nation - formed by refugees and immigrants.

The United States encourages the creation of legal channels

for migration. It encourages cooperation among states to devise mechanisms for permitting the orderly movement of people between states.

This includes the establishment of border control and alien registration systems that respect both the rights of governments to control their borders and the human rights of migrants, including the right to protection of refugees.

The U.S. advocates the rapid integration of legal migrants into host countries' societies.

The Clinton Administration recognizes the immigration challenge and seeks in a comprehensive way to stem the tide of illegal entry into the country. The U.S. is a nation of immigrants but it is also a nation of laws.

As a nation with a long history of immigration and commitment to the rule of law, the United States must set limits on who can enter and enforce its immigration law.

What must be done in the United States is to close the back door to illegal immigration in order to keep the front door open to legal immigration, and particularly to the admission of refugees who qualify for resettlement.

Sound immigration policy must set out clear goals. The U.S. is looking at enforcing the responsibility of the sponsor, holding sponsors accountable for keeping immigrants from becoming burdens on the American taxpayer, and at ensuring a properly regulated system that will provide protection to American workers.

In Europe, on the other hand, migration traditionally is regarded as an expedient, a temporary measure to respond to

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labour shortages or, more recently, as the consequences of international obligations respecting asylum-seekers.

Asylum

What is of greater interest to me as head of the State Department Bureau for Refugees is to ensure that the right to asylum, the right to refuge is not lost in any restricting of immigration.

Already, the increased numbers of people on the move are having a serious impact on countries' willingness to provide asylum.

When the first UN High Commissioner for Refugees was appointed in 1951 to protect, assist and find solutions for one million refugees remaining, from the Second World War, his task was considered a temporary one.

Four and a half decades later, UNHCR is protecting and assisting some 26 million refugees and displaced persons in more than 110 countries around the world.

Cold War ideas and institutions did not envision such humanitarian crises as those facing us today nor did they prescribe how nations should deal with them.

In asylum policy, temporary protection for refugees is becoming common practice, whether in off-shore safe havens (Guantanamo for the Haitians and the Cubans) or as an alternative to admission with access to asylum proceedings.

Europe, particularly Germany, has been very concerned with the 750,000 Bosnians who fled to Europe following the outbreak of war in the former Yugoslavia.

The United States is trying to work out how to maintain the U.S. as a country of refuge and asylum while faced with the political necessity of controlling illegal immigration and discouraging the magnet effect.

Other countries around the world, many long welcoming asylum-seekers and refugees, are beginning to close their doors - not only Western countries - but countries like Tanzania which has long been hospitable to those in need of first asylum.

And yet, the need for asylum remains. And many refugees have enriched our society. Einstein was a refugee, Secretary of State Madeleine Albright was a refugee.

In a recent speech given at the Holocaust Museum in Washington D.C., the UN High Commissioner for Refugees posed the question: if the international community is unable to prevent the massive human rights abuses taking place in the

world, is it prepared to offer safe haven to those escaping and knocking at our doors?

She noted that while some desperate Jews were admitted to safety abroad during the rise of Nazism, there were many more who were refused help. Many who reached safety did so by using fraudulent documents issued by sympathetic officials. Yet, today, the tendency in U.S. legislation is to view fraudulent documents as a reason for exclusion.

From our vantage point today, this haunting memory of people trapped behind borders is seen as the world's moral failure to confront persecution and genocide.

Yet at the time, the issues seemed to governments and others to be as complex as they appear to us today: high rates of unemployment, suspicion towards foreigners, exaggerated fears of floodgates being opened, and foreign policy considerations which had a higher priority than the lives of the persecuted - the same concerns as are facing us today.

Refugees and asylees are a small percentage of the total number of people admitted to the United States for permanent resettlement each year. Last year, 75,680 refugees and a small number of asylees were admitted to the U.S. compared to over 900,000 immigrants.

The recent U.S. Immigration Reform Act has had a major effect on our asylum procedures.

In 1993, the United States asylum system was in crisis. Chronically overburdened, relative to the available staff, the program had become a magnet for abuse. Many who were not legitimate asylum seekers clogged the system with false applications.

Reforming the system was one of the first immigration challenges facing President Clinton's first term administration. In 1993, the President mandated that the Justice Department undertake reform and that the Immigration and Naturalization Service establish asylum reform as a top priority.

Reforms which took effect at the beginning of 1995 limited the availability of work permits, structured the system for a quick 'yes' where appropriate and a full judicial review of questionable cases. Since then, there has been a 57 percent drop in the number of incoming applications.

The dramatic drop in applications is directly attributable to limitations on work authorizations for those with pending applications and to the efficiency of the new system.

The immigration reform legislation which Congress passed last fall included significant additional changes to the asylum

system. An especially important change was the creation of expedited removal procedures.

This new procedure includes critical safeguards ensuring that legitimate asylum seekers are identified but it also facilitates the prompt removal of persons who appear at U.S. ports of entry without valid documents and who are not in need of protection.

Persons who indicate a fear of persecution or an intention to seek asylum are given a screening interview by an asylum officer who determines whether the asylum claim has sufficient merit to be passed on to an immigration judge in the regular process.

An asylum applicant found to have a "credible fear of persecution" will be allowed to enter the country on a temporary basis to pursue his asylum claim.

Asylum cannot be granted until the applicant's identity has been checked out against all appropriate records to determine if there are any grounds that would make the person inadmissible to the United States.

If credible fear is not found, the asylum officer will issue an expedited removal order. The officer's finding is subject to prompt review by an immigration Judge. If the judge concurs with the asylum officer's decision, the alien will be removed.

Today, the framework for asylum in the U.S. is what it should be, a model of fairness and efficiency in which those deserving of protection can receive it quickly, while incentives for fraud and abuse have been minimized.

We are pleased with the progress we have been able to make in protecting the tradition of asylum in the United States. An important corollary to fair adjudication, however, is the ability to return failed asylum seekers. We believe the return of unsuccessful asylum seekers is essential in order to maintain the integrity of the refugee protection system.

Conclusion

The U.S. is not alone in grappling with these problems. Most European countries have little immigration. Hence, asylum is the door used and often abused by migrants seeking to stay, to work, and to gain access to social welfare programs. Consequently, most asylum processes are being tightened.

In Britain, for example, the requirements for documentary proof of persecution are extremely stringent and that there have been moves to tighten the law further. Germany is still trying to plug its eastern borders as people from many different countries

try to slip in illegally through Czechoslovakia. Italy is faced with outflows of Albanians.

These issues will become even more important and politically charged. We all must keep in mind the international principles covering refugees and asylum seekers.

While acknowledging domestic political pressure and the rights of states to control their borders, we must ensure that refuge and asylum are available to those in need.

Letter to the Editor

In JUSTICE No. 12 (March 1997) we published an article entitled: "Working to Retrieve Lost Jewish Assets in Europe". That article focuses on legal aspects relating to the activities of the World Jewish Restitution Organization in various countries in Eastern Europe and in Switzerland. In order to present the historic background for the legal aspects of the said activities of the World Jewish Restitution Organization we relied upon, and reproduced from, material written by Dr. Laurence Weinbaum of the Institute of the World Jewish Congress which we had in our files in a draft manuscript form. That material was published by the Institute of the World Jewish Congress as Policy Study No. I Righting (in Historic Wrong: The Restitution of Jewish Property in Central and East Europe in 1995. We wish to thank Dr. Weinbaum and the Institute of the World Jewish Congress for this material and to apologize to them that due to our error we did not publish an acknowledgment of this source in our article.

Sincerely,

*Aaron Abramovich,
Yehouda Ofrath*

Anti-Semitism and Holocaust Denial in the Internet Era

Michael Whine

Many will have read the recent article in JUSTICE on Propagating Anti-Semitism on the Internet.¹ Whereas this and other recent works have tended toward the purely discursive, for example the ADL reports of 1985, 1995 and 1996, and my own in 1996 and 1997, it 'is now possible to analyse developments and make some preliminary assessments.'²

The growth in Internet use is phenomenal. A recent major report for the British Department of Trade and Industry estimated that there are now 60 million people using the Internet in 150 countries.³ The number of web pages held in the laboratories of search engine developer Alta Vista, has grown to 30 million, from a standing start in December 1995.⁴ Over 200 million email messages traverse cyberspace daily.⁵

This rate of growth is set to continue until the end of the century, and in theory, the whole world will have access by the first decade of the new millennium.

Contemporary society now relies on the Internet. In the words of one Internet engineer "We're talking about building the underpinnings of everyday society on the Internet, not just the techno things".⁶

Internet usage is still heavily orientated towards America, The DTI survey estimated that 75 per cent of traffic takes place in the US, with perhaps 10 per cent in the UK. Clearly this balance will alter as the rest of the world enters the cyberspace age.

The Far Right on the Internet

The volume of anti-Semitic material on the Internet however represents a minute percentage, only, and it is important for our analysis to get this into perspective. A recent American study estimated that white supremacists represented less than .000002 per cent of the material on the World Wide Web. The actual

number of politically extreme 'cyber-activists' is also very small.⁷

Anti-Semites in cyberspace are therefore currently few and far between: whilst we must not underestimate their influence, we must not overstate their size, number or importance.

What is important however is to see how and why they have seized upon the opportunities offered by the technological age, where they are going with them, and what effect they are having.

The Far Right, white supremacists and the neo-Nazis, were the first of all the extremist ideologies to seize on the opportunities provided by the Net. Four characteristics define their Internet usage. First, for them, and now for others, it provides a means of communication that is direct, immediate, targeted and one which evades state surveillance or disruption. Since the mid-1980's German neo-Nazis have communicated with one another and

1. David Sitman, "Propagating Anti-Semitism on the Internet", JUSTICE, March 1997. Tel Aviv
2. "Computerised Networks of Hate". ADL. New York. 1985
"Hate Group Recruitment on the Internet", ADL, New York. 1995
"Anti-Semitism Worldwide 1995/6", Tel Aviv University. Tel Aviv, 1996
"Danger Extremism - The Major Vehicles and Voices on America's Far Right Fringe", ADL, New York, 1996
Michael Whine. "The Governance of Cyberspace: Racism on the Internet", JPR, London, 1996
Michael Whine, "The Far Right on the Internet", chapter in The Governance of Cyberspace, ed. Brian Loader. Routledge, London. 1997
3. "Controlling Unsuitable Material - DTI Internet Study". Sema Group Consulting. London, 1996
4. Karlin Lillington, "Send in the search party". The Guardian, London, 27 March 1996
5. Richard Behar. "Who's reading your e-mail". Fortune. USA, 3 February 1997
6. Brian Reid, Digital Network Systems Laboratory, quoted in Lillington.
7. Lycos search data-base, Web Developer, Spring 1996. quoted in Devin Burghart. "Cyberh@te: a reappraisal". The Dignity Report, Vol. 3 No. 4. 1996, Seattle

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organised their activities via the Thule Network, baffling the police by the precise military-style planning of their actions.⁸

"Provided with passwords such as Germania or Endsieg (final victory), from a post office box, personal computer schemes will display a calendar of forthcoming neo-Nazi events and list contact numbers of leading right-wingers... On Remembrance Sunday, police saw in action, for the first time, computer planned co-ordinated neo-Nazi action, involving the widespread use of secret codes and radio communication... The advantage of electronic mail boxes is that they are free of censorship and bugproof", said Karl-Heinz Sendbuhler of the National Democratic Party!⁹

It is now estimated that more than one hundred German Nazi groups are posting on the Net regularly, some using encryption, in a German variant of 'Pretty Good Privacy' called Kryptografil.¹⁰

Another example was the killing in Essex in March 1997, of Combat IS member Christopher Castle, allegedly by two of the group's leaders, news of which was posted on the Internet site of the American National Socialist White People's Party within 12 hours, as were details, accusations and counter accusations of the bombing campaign which preceded it.¹¹

The recent simultaneous raids in America and Canada on the offices of Resistance Records, the major producers of white supremacist and skinhead music and tapes, and the home of George Burdi its founder, were reported on the Net within hours, giving a warning to their supporters.¹²

Second, the Net is the perfect vehicle for propaganda. It reaches the youthful and impressionistic audience extremists most want to influence.

"In this age of the controlled mass media, the enemies of freedom thought they had secured every last vestige of expression available to white revolutionaries. Until the emergence of the computer network known as the Internet, they had. Now, with Government restrictions encroaching steadily upon our avenues of resistance, the Internet has blown a hole in the web of lies spun by the system. If you have a computer, or plan on acquiring one soon, be sure to blast into cyberspace, perhaps the greatest opportunity that has ever presented itself to the white resistance. The rules of the game are changing rapidly, and we must be the first to master this new dimension".¹³

The Net strategy of Milton Kleim, a former leading member of the American neo-Nazi National Alliance, has been well publicised, but it bears repeating in this context.

"USENET offers enormous opportunity for the Aryan Resistance to disseminate our message to the unaware and the ignorant. It is the only relatively uncensored (so far) free-forum mass medium which we have available. The State cannot yet stop us from 'advertising' our ideas and organisations on USENET, but I can assure you that this will not always be the case. NOW, is the time to -rasp the WEAPON which is the Net. and wield it skillfully and wisely while you may still do so freely. Crucial to our USENET campaign is that our message is disseminated beyond our' groups: alt politics. nationalism. white, alt: politics. white-power, alt. revolution. counter, alt. skinheads. and to a certain extent. alt: revisionism We MUST Move Out beyond our present domain and take up positions on 'mainstream' groups. Each USENET 'cyber guerrilla' must obtain a listing of all Net News groups that are available on their system, and search through the list on groups suitable for our posts. Don't overlook foreign-orientated and language news groups. Find groups that require 'tailored' messages: rec. groups concerning food will be suitable for our 'kosher tax' message: alt., soc., and talk groups concerning politics and society would be suitable for our message about the Jewish-controlled media.... Remember our overall USENET strategy must be to repeat powerful themes OVER AND OVER AND OVER. We cannot compete with the Jewsmedia, of course. as our propaganda dissemination is but a very small fraction of the everywhere pervasive leftist propaganda. However, our ideas possess an energy that truth alone contains".¹⁴

Holocaust denial 'Is the link which birids many on the Far Right. The denial of history, and the Nazi crimes against humanity, have been made a priority by today's neo-Nazis, who, fifty years after the end of the War, seek once again a political legitimacy. The Nazis' crimes deny them this legitimacy and therefore they deny the crimes, or belittle them, in order to gain the political support a new generation. The Internet has enabled

8. Verfassungschutzbericht 1994, Federal Ministry of the Interior. Bonn, July 1995
9. "Neo-Nazis go hi-tech with electronic mailboxes". The Guardian. London, 19 November 1993
10. Birkhard Schroder (German journalist) 'Outlook'. BBC World Service broadcast, 24 January 1996
11. nswpp@earthlink.net, 10 March 1997
12. "Resistance Records raided". mlemire@interlog.com, 9 April 1997
13. Tony McAleer, "Plug into the freedom of the Internet", Resistance. Spring 1995, USA
14. Milton John Kleim, Jr, "On tactics and strategy for USENET". bb748@FreeNet.Carlton.CA, 1995

white supremacists to reach across national boundaries and bypass laws on the publication of Holocaust denial material as in France, Germany and Austria.

The Net has therefore become a priority for the main Holocaust deniers: the Institute for Historical Review in California, Ernst Zundel in Canada, and Bradley Smith's Committee for an Open Debate on the Holocaust. They have been joined by Dr Frederick Toben's Adelaide Institute in Australia and Arthur Butz in America. Many Holocaust denial publications now appear on other sites. For example, Zundel's 66 Questions and Answers on the Holocaust and Fred Leuchter's pseudo-scientific Report, which attempts to prove that Auschwitz could not have existed as a gassing facility, have been widely disseminated and now appear on Radio Islam's site.

"For several years now, individual revisionists - often posting materials published by the Institute for Historical Review - have been reaching hundreds of thousands if not millions. Recently, an important new breakthrough was achieved on the Internet that enables information from the Institute.... to reach an enormous, world-wide audience. IHR materials can be reached 24 hours a day from any of the 146 countries served by Internet through the World Wide Web".¹⁵

The Net provides a system of information exchange, and in the 'information age' the speed and sophistication of their output is second to none.

The Net provides interconnectivity. Surf Stormfront and you can down-load postings from the Spanish affiliate of the New World Order, most of the Canadian neo-Nazi sites, the German Thule Net, and former Ku Klux Klan leader, David Duke. Look up Moroccan 'migr' Ahmed Rami's Radio Islam site, which originates in Sweden, and you find neo-Nazi postings, from America.¹⁶

David Irving's writings and speeches can be found on the home page of Bradley Smith's Committee for Open Debate on the Holocaust, as well as the Australian Adelaide Institute, and the British national revolutionary group, International Third Position, brings together postings from Polish, Flemish, Romanian and Slovakian as well as -American extreme nationalist groups.

The Net is a vehicle to promote race hatred and to harass (usually Jewish) opponents: American neo-Nazi Tom Metzger publishes anti-Jewish cartoons which would probably be illegal in most European countries.

The invasion of the net site of international Jewish charity ORT, by someone claiming to be from Hamas, is but one example of attempts to infiltrate or mail bomb Jewish sites. Others have occurred in America and in Britain. In February 1997 an American Internet activist against Holocaust denial reported that his e-mail address had been given as the return address to a commercial advert and that his computer was unable to cope with the avalanche of postings.

One respected commentator recently observed that the Far Right was solving its problem of attracting a new audience by denying many of its links with the Fascist tradition and by learning new forms of racism which focus on culture rather than biology or conspiracy theory. Its growing sophistication, through the tailoring of messages to different audiences and the use of the most modern technologies, is essentially a reversion to the tactics of classical Fascism.¹⁷

Other commentators have remarked on this employment of new cultural mechanisms and technologies in disseminating neo-Nazi ideas. They suggest that what 'is being produced is a globalised racist and neo-Fascist movement and culture that draws on international electronic networks whilst simultaneously rein-

forcing old xenophobic ideas embodied in traditional racism and anti-Semitism. They further suggest that a new 'virtual racism'

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15. "Revisionist Global Computer Outreach: IHR Cyberspace Connection Reaches Millions World-Wide. Generates Widespread Attention. Provokes Bigoted Rage", Journal of Historical Review, Calif, Vol. 15. July/August 1995
16. See 'Links to other wells sites', Stormfront. White Nationalist, Resource page <http://204.18i.176.4/stormfront>. *Radio [slam goes surfing] and Radio Islam's News Agency: <http://flashback.se/nristam/english/english.htm>
17. Roger Eatwell, "Surfing the Great White Wave: The Internet Extremism and the Problem of Control". Patterns of Prejudice, Vol. 30 No. 1, 1996, JPR. London

has evolved through the medium of the Internet, that the interpenetration of various nationalist movements are amplified within cyberspace, and that it is possible for Far Right groups of markedly different types to establish common networks, and ideological alliances, particularly around a shared anti-Semitism.¹⁸

Islamists on the Internet

Little attention has been paid hitherto to Islamists on the Internet, but the potential for growth, given the size of the Muslim world, and the freedom it offers, to post offensive and anti-Semitic material is far greater than for the Far Right. The prospect of the Iranian government-linked Muslim Parliament purchasing a computer for every Mosque in Britain, and eventually elsewhere, is a concern, although there must also be positive benefits to their community.¹⁹

Islamists, commonly misnamed Muslim fundamentalists, believe that Islam is incomplete without its own state, a state moreover in which the most rigid and uncompromising interpretation of Shariah lays down the rules of governance. Many Islamists believe in one transnational state. Others have placed anti-Semitism at the heart of their anti-Western world outlook. Among those now posting are Hizballah, Hamas, and their support groups in Britain and the US. Much of their material is concerned with Israel/Palestine, but anti-Semitic material appears on the postings of Hizbut-Tahrir and al-Muhajiroun, Islamist groups that originated in the Middle East, but which are mostly active in Europe and North America.

Although not strictly Islamist, it is Ahmed Rami's multi-language Radio Islam site in Sweden which is the largest publisher of anti-Jewish material. Here you can read the Protocols of the Elders of Zion, and why the Jews have 'conspired' against Gentiles over the ages. Holocaust denial is again important for Islamists: if the Holocaust did not happen then one of the Jews' claims to the land of Israel, and particularly to Quds (Jerusalem) is invalidated.²¹

How Effective are They?

But if the Net provides anti-Semites with a previously unknown freedom to circulate their message, it also allows us a new opportunity to monitor their activity.

Without the Net we would not have known that the British writer David Irving was speaking to the Ku Klux Klan or the National Alliance during his 1996 and 1997 tours of America, nor that his presentation to the Nation of Islam in Oakland, California, was so well received. We would not be so well informed about the growing links between neoNazis and white

supremacists in Western Europe and the emerging democracies of the former Communist Bloc. We would not have known that Troy Southgate of the tiny neo-Nazi English Nationalist Party, was seeking contacts in America with Far Right terrorists, and we would not be able to trace the connections between neo-Nazis and Islamists, and their exchange of information and ideas.

But the Internet has not replaced other communications media. No marked shift in newsletter, short-wave radio or other propaganda forms has been observed. In fact, the largest use of the Internet has been to advertise the sale of nonInternet related white supremacist material such as books, audio tapes and videos. Nor has the Internet led to an increase in mobilisation. The Seattle-based Coalition for Human Dignity observed that Far Right events in the US which were heavily promoted on the Internet only were in fact failures. The same observation might also be made for events organised by British-based Islamist groups. Most organising activities still need to occur using face to face social networks rather than the Internet.²¹

It is possible to challenge the extremists although those with the predisposition to extremism are not necessarily open to rational arguments or the presentation of rational facts. It is even possible that some of them believe that the volume of evidence against the existence of a Jewish conspiracy is itself proof of a very clever conspiracy.

Therefore, Holocaust deniers generally ignore their challengers. Ernst Zundel and Greg Raven have both backed off from challenges by Nizkor, the Christian Jewish Internet group which seeks to challenge Holocaust denial, although Zundel has provided a mirror site.

For many anti-Semitic groups the Internet is the last arena free from Government interference. Efforts to introduce the laws of the real world are seen as part of the external campaign by a Zionist controlled government to destroy free thought.

In a recent essay Louis Beam, among the Far Right's foremost contemporary ideologues, saw regulation thus:

"The Internet, perhaps the last truly free means of information

18. Les Back, Michael Keith and John Solomos, "Technology, Race and neo-Fascism in a Digital Age: The New Modalities of Racist Culture". *Patterns of Prejudice*, Vol. 30, No. 2, 1996, JPR, London
19. "British Mosques on the superhighway", <http://www.ethic.com/ig/muslimedia/mosque.him>, 30 September 1996
20. Radio Islam
21. Devin Burghart, "Cyber@te: a reappraisal", *The Dignity Report*, Vol. 3 No. 4, 1996, Seattle

exchange in the Western World. may soon be choked by censorship and governmental controls. The circumscribing of the Net may cause the death of what has become the first people-to-people exchange of ideas and information on a world wide basis. The forces behind this effort appear at first glance to be an unlikely coalition of conspirators, the CIA, some Jewish religious groups, and various foreign governments".²²

Counter-Action

Major site providers are however beginning to succumb to public pressure to bar offensive material. The Simon Wiesenthal Centre- sponsored National Task Force Against Hate and the Anti-Defamation League have now begun to persuade providers who host race hate sites to close down offenders, and to seek from universities and colleges what rules they have established for the use of on-line services. The bottom line is that while bigots may have the right to put their ideas in cyberspace, institutions of higher learning, supported by tax payers and public -rants, have no obligation to provide them with access and legitimacy.²³

Stormfront founder Don Black was recently pushed to warn that service providers America On Line and Geocities were seeking to delete racist pages on their systems when they found them, and that some site providers have also recently called for subscribers to vote on allowing neo-Nazis onto their sites.²⁴

In Europe. governments are now committed to legislating hate off the Net. The European Parliament's Committee on Civil Liberties and Internal Affairs met on 19 March 1997, to consider the Report of the Pradier Commission on Communication of Illegal and Harmful Content on the Internet.²⁵ Having defined the problem, the Report recommended the use of filtering software, national regulations, a definition of harmful content, and called for police action. This has now been followed by the Parliament's Resolution of 24 April 1997 and subsequently by a European Commission and Europol communication to European police forces which requests that they monitor illegal content on the Internet, seek out 'reporting' points, investigate cross border links, exchange information, reconcile national laws, co-operate on investigations, and generally encourage self regulation.²⁶

The British Government's views have been forcefully put during the past year. In responding to a Parliamentary question in October 1996, on behalf of the President of the Board of Trade, Ian Taylor MP, stated that "The basis for the Government's approach is that the Internet is not a legal vacuum: the law applies on-line as it does off it".²⁷

Later, the former Junior Home Office Minister, Timothy Kirkhope. stated the Internet was being monitored for incidents of minority groups being threatened.

"The activities of neo-Nazi groups are an increasing worry... Their use of the Internet is a particular concern, because it means that links can be made between these groups and information can be exchanged".²⁸

The Police view was given by Sir Paul Condon. Commissioner of the Metropolitan Police in an address to the Inter- Parliamentary Council Against Antisemitism in February 1997, when he stated that the Telecommunications Act 1984 was among a battery of laws which would provide a basis for prosecuting anti-Semitism which incited race hatred on the Internet.

The German and Austrian authorities have gone further still, and it is perhaps understandable that they have sought to clamp down hardest on all forms of neo-Nazi activity.

Without the Net we would not have known that the British writer David Irving was speaking. to the Ku Klux Klan or the National Alliance during his 1996 and 1997 tours of America, nor that his presentation to the Nation of Islam in Oakland, California, was so well received.

22. LR Beam. "The Conspiracy to Erect an Electronic Iron Curtain", Stormfront, <http://204.181.176.4/stormfront/iron-cur.htm>. 1997
23. Simon Wiesenthal Centre press release
24. rec.music.white power, 1996
25. "Report of the Commission on Illegal and Harmful Content on the Internet", Committee on Civil Liberties and Internal Affairs (A4-0098/97), Rapporteur - M. Pierre Pradier, European Parliament, 20 March 1997
26. European Commission/Europol communication on Criminal Use of the Internet. 9 April 1997
27. Response by Ian Taylor MP, President of the Board of Trade to Parliamentary Question by John Marshall MP, DTI. 17 October 1996
28. A J McIlroy, "New moves to curb racists on Internet", Daily Telegraph, 20 February 1997

"The Internet should not and will not be used as an electronic rendezvous point for right wing extremists" summarised the official view.²⁹

In December 1995 the Bavarian government closed down Compuserve, and in April 1997 forced it to cut off worldwide access to offensive sites. They subsequently indicted its local head for the distribution of pornography and Nazi propaganda. In January 1996 Deutsch Telekom, the largest provider of Internet services in Germany, cut off access to Web Communications, which rents space to Ernst Zundel. This also resulted in subscribers losing access to another 1500 web sites.

In March 1997 the Viennese police raided the offices of the Internet service provider Burgerform, and at least twenty private homes, seizing computers for evidence that they had downloaded and distributed Nazi material originating in America. It is now generally believed that the spate of letter bombs sent to Austrian politicians two years ago, some as retaliation for the imprisoning of a neo-Nazi activist convicted for promoting Holocaust denial, were built according to plans downloaded from the Net site of Gary Lauck, who in turn had obtained them from an American anarchist group's Net site.

At the end of May 1997, the Canadian Human Rights Tribunal began proceedings to indict Ernst Zundel under section 13(1) of the Canadian Human Rights Act. The complaint refers to Zundel's web page, the Zundel site, which is written by Ingrid Rimland in California.

Police action must therefore inevitably focus on the fact that the overwhelming majority of offensive and illegal material does not originate within Europe but in America, where the First Amendment to the Constitution protects all free expression of opinion except that which directly incites violence. However, even the delay in passing the Telecommunications Act, with its stringent penalties of up to 2 years in jail for improper use of a modem has already been overtaken in some states. The law in California now treats electronic words in the same way as written or spoken ones, and speech that "seriously threatens" is a crime. The State of Maryland has now introduced a draft bill to make it illegal to send "annoying" or "embarrassing" e-mail, and violators will attract fines of up to \$500 and three years in jail.

Clearly, the problem is not now that governments will not legislate; it is one of jurisdiction. Who do you indict, the site provider who will surely claim his position in analogous to that of a common carrier, and not a publisher; the sender of the message who lives in another jurisdiction, or the one who down-

loads the material with the intention to distribute it. European laws will now increasingly lay the onus of guilt on the latter, while seeking international cooperation to regulate, preferably, self-regulate, the first, leaving the second beyond the jurisdiction of the law, at least in America. We could then remove the problem of what Simon Gallant of lawyers, Mishcon de Reya, recently called "NIMBY (not in my back yard) policing" pushing the problem away.³⁰ In France, a court threw out a case brought against nine French Internet providers over Holocaust denial originating elsewhere by an association of French Jewish students, on the basis that the claim was too remote.

In Britain existing laws can and will be used to prosecute offensive material on the Internet. The real challenge lies in policing offensive material originating outside the UK or Europe.

As the DTI study put it, "International co-operation is essential if there is to be effective control on material circulating on the Internet... UK criminal law can only apply to offences which are committed in this country, whereas most offending material originates abroad. The same applies elsewhere in Europe".³¹

Summary

In summary then, anti-Semites and Holocaust deniers were among the first to seek out the possibilities afforded by the Internet. They are able to exchange information and news, harass their enemies and forge links with new political allies. They were able to move beyond narrow politically unimportant worlds of extremist politics and emerge into the mainstream where they can treat with others as equals. The dangers that they pose are there, and the harm that they can cause, both direct and indirect is great, but there is now evidence that governments as well as the public are beginning to take action, to prevent them spreading their messages of hate.

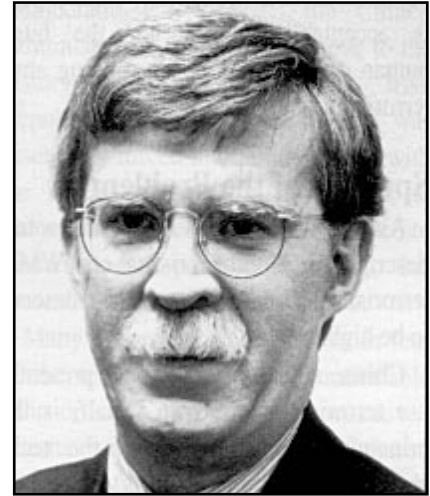
29. "Germany Calls for Action on Internet Nazis". statement by German Foreign Minister Klaus Kinkel, The Times. London. 28 January 1997.

30. Simon Gallant, "Law and the Internet - Privacy, Libel and Obscenity", Lecture to the Department of Journalism Studies, University of Sheffield, 13 February, 1997

31. "Controlling Unsuitable Material", DTI

Terrorism: Law, Rhetoric and Reality

John R. Bolton



Although we conventionally think of terrorism as the isolated action of individuals or small groups, the very concept of terrorism has recently changed dramatically. Today, the earlier model of relatively small-scale acts of murder or destruction is changing to large-scale attempts at homicide. Instead of acts intended to change policy by the threat of even more destructive acts, terrorists now can resort to massive acts of destruction in the first instance. Increasingly, terrorism is not simply "State sponsored," but increasingly the conscious policy of choice, especially of rogue and fanatic regimes. Indeed, for the most part, States alone are capable of taking advantage of this new terrorism.

Even more disturbing, the chosen weapon for today's terrorist is likely to be a weapon of mass destruction ("WMD"), delivered by ballistic missile or other sophisticated delivery system. Using nuclear, chemical or biological warheads, such missiles can wreak enormous havoc, and kill hundreds of thousands in

urbanized areas. Even without missiles, terrorist use of WMDs, rather than "conventional" explosives, could massively magnify the death toll from homicidal acts such as the World Trade Center bombing.

Both these developments dramatically increase the costs of misguided anti-terrorism policies, and narrow the range of error for democratic foreign policy makers.

The Role of Law

Freed from the Cold War gridlock of nuclear standoff, the world's industrial democracies have too long ignored the risk of WMD blackmail from rogue regimes such as Libya, Iran, Iraq or North Korea. They have preferred to believe that the end of superpower deterrence based on massive nuclear-weapons exchanges, and treaties such as the Chemical Weapons Convention, recently agreed to by the U.S. Senate, have solved the WMD problem for the foreseeable future. Unfortunately, the new threat of international terrorism means that the world is not nearly so safe as it just recently seemed.

In particular, it is a mistake for the democracies to fall into complacency by placing too much reliance on international agreements and legal structures. While the individual criminal systems of, for example, the OECD members, may

be adequate to deal with the domestic apprehension and prosecution of terrorists, the existing (and likely) multilateral structures are wholly inadequate. Across the international spectrum, there is simply not an adequate underlying consensus of values and beliefs to create a workable structure.

This lack of international consensus creates two risks in relying excessively on simply "criminalizing" terrorism, especially of the State-directed, WMD variety. First, reliance on "law based" solutions can obscure the need for decisive politico-military actions to combat terrorism at its source. Especially among lawyers, the temptation to succumb to the "certainties" of familiar legal structures can divert attention from the harsh reality of those who do not care a whit about our nice legal theories. Second, even worse, reliance on the law can be used, including by terrorist supporters, to restrict or cripple our ability to defend ourselves. The restrictions which some theorists have tried to insinuate into "just war" theory in recent years, for example,

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demonstrate this propensity. Neither risk is acceptable, considering the huge human cost of adopting the wrong anti-terrorist policy.

Specifics of the Problem

Although space does not permit a full description of the risks of WMD terrorism, several problem States deserve to be highlighted.

China, although it does not presently use terrorism on its own behalf, is the principle global supplier of the technology for weapons of mass destruction and their delivery systems. China is a major provider of WMD technology, advice and even weapons systems to Iran, Pakistan and North Korea, and possibly to Syria, Libya and the Sudan. Such sales advance China's interests by contributing to instability in areas beyond China's periphery - in the Middle East, the former Soviet Republics of Central Asia, and the Indian Subcontinent - where major rival powers, such as the United States and the other Permanent Members of the UN Security Council themselves have major stakes.

At present, the other "Four" of the "Perm Five" lack coherent national policies, and are far from forming a common front against Chinese WMD transfers. In the United States, we debate the relative merits of "Most Favored Nation" trade status with China versus the poor Chinese record on human rights and democratization. As a result, the potentially far more serious issue of WMD exports is lost. Russia is consumed with preserving peace and stability on its long land border with China, and in the newly independent Central Asian republics. Britain has been absorbed in making a success in handing over sovereignty in

Hong Kong, and the French pursue commercial advantage with China to the virtual exclusion of all other issues.

Iran is the principle beneficiary of Chinese WMD technology transfer, and constitutes a menace not only in the Middle East, but around the world. However, even faced with so unambiguous a threat, the West has been utterly unable to forge a common policy. While the U.S. has adopted a bipartisan policy of unilateral economic sanctions against Iran, and pursues a policy of diplomatic isolation, Europe moves in the opposite direction. Under the guise of a "critical dialogue," Germany leads the European Union in seeking to do business with the ayatollahs, supplying them with potentially beneficial "dual use" equipment and know-how. Although allegedly intended to persuade Iran to moderate its policies, the European approach is simply appeasement by another name. History has already passed judgment on this approach.

Libya could pose a direct threat of WMD terror to every major city in Europe if it had intermediate range missiles. And yet, the United States had immense difficulty in obtaining Security Council approval for even limited economic sanctions against Libya for the destruction of Pan Am 103 - difficulty from many of the very European nations Libya directly threatens. One wonders what level of threat would be necessary to convince the Europeans to take more active measures in their own defense.

Iraq, even after the massive destruction of its forces during the Persian Gulf War and aggressive efforts by the UN Special Commission to find and destroy its remaining capacity to utilize weapons of mass destruction, continues trying to

amass such an arsenal. In the Gulf War, Iraq previewed the future of terrorism by launching SCUD missiles against Israel, a non-combatant in that struggle. Imagine the potential for mass death had the Iraqi SCUDs carried gas or germ warheads. Iraq, moreover, seeks to purchase "loose nukes" from the leaking former Soviet arsenals (as do other rogue regimes, such as Iran), in open defiance of the Security Council terms which concluded the Gulf War hostilities.

Palestinian and other terrorists, backed by **Syria** and **Sudan** (and others), would dearly love to have WMD capability to give their suicide squads far greater impact. The fragile Middle East peace process would surely disappear completely in such an event.

These examples barely begin to touch the surface of potential WMD terrorism. **North Korea's** isolated rulers, fanatics in **Northern Ireland**, narcotics Mafiosi in **Columbia** and the **Caribbean**, and many more would all be vastly more threatening if they could move from isolated incidents of terror to mass murder.

International Responses and their Weaknesses

Many responses to terrorism have been proposed and implemented to one degree or another, but none have proven successful over the long term.

Although the major powers and their allies were at enormous risk during the Cold War, hindsight shows that nuclear deterrence was in fact a rational policy. Against a rational adversary, the threat of massive retaliation for first use of a nuclear weapon, resulted in neither side actually using such weapons. Unfortunately, the terrorist States and

their proxies are not necessarily "rational" in the Cold War sense, and, accordingly, deterrence may not be nearly so effective. First, the terrorists generally have far less to lose from massive retaliation than the superpowers and their allies. Second, precisely because the rogue nations share few common values with us, we cannot depend on them understanding or caring about the consequences of the first use of a weapon of mass destruction. Thus, as in other ways, in the war against international terrorism, we may come to miss some of the "certainties" that helped structure the Cold War.

Another aspect of the Cold War that, at least to some observers, provided an element of stability was arms-control treaties. Unfortunately, the reputations of these treaties probably exceeded their actual contribution. In the case of the Nuclear Nonproliferation Treaty, for example, we learned only through war that it had utterly failed to prevent a signatory power, Iraq, from engaging in massive violations to obtain a nuclear weapons capacity. Similarly, even the Chemical Weapons Convention is far from foolproof in allowing for inspecting and detecting chemical weapons manufacturing. Indeed, States most likely to adhere to such treaties are precisely those least likely to engage in the offensive conduct the treaties aim to prevent. Accordingly, international treaties against terrorism are not likely to stop the terrorists, and may well, psychologically and operationally, impair the efforts of those most at risk of terrorist attack.

Economic sanctions, whether bilateral or multilateral, have also not proven to be entirely effective. Both Iraq and Libya

demonstrate this point. Virtually all observers have now concluded that the sanctions against Iraq would not have produced a withdrawal from Kuwait, and that only resort to military force could accomplish that objective. Similarly, Security Council sanctions against Libya for the destruction of Pan Am 103 have not discernibly altered Libya's international behaviour.

Retaliation, including both destruction of terrorist facilities and the apprehension and national prosecution of terrorists themselves, is, by definition, only useful after the terrorists have struck. Given our concern with weapons of mass destruction, almost no conceivable retaliation could ever truly repay the terrorists for the holocaust which they could cause. Indeed, even though retribution may satisfy the requirements of justice, the most desirable effect of punishment is the deterrent effect that its threat creates. Yet, as described above, deterrence itself is not an adequate strategy against terrorists.

Finally, there is the emerging doctrine of "*counterproliferation*", exemplified by the Israeli strike against the Iraqi Osirak nuclear facility. Although condemned at the time, in retrospect, the Israeli military look truly prescient today. Whether, and to what extent, democratic nations are willing and able to engage in military actions in pursuit of counterproliferation goals, however, remains to be seen.

The problem with many of the foregoing options, especially the more muscular ones, is that the domestic politics of many democratic nations makes it very hard to rally sustained support for their use. In the U.S., for example, domestic political pressure within the Democratic Party caused the Clinton

Administration to turn a blind eye to the history and tactics of the Irish Republican Army. Great Britain was essentially forced into political talks with the IRA's political arm, Sinn Fein, to accommodate President Clinton's need to avoid an intra-party challenge to his renomination for President in 1996.

Many governments simply live in fear of the terrorists, or in the comfortable delusion that avoiding "provocative" actions will shield them from future terrorist acts. In some cases, this fear is exacerbated by large, resident immigrant populations, thought to be both breeding grounds and camouflage for terrorist groups.

Another motive is the commercial opportunities which might be lost to more compliant nations. This motive would make appeasement a way of life for some countries, which are, bluntly stated, hypocritically advancing their own business interests under the guise of a policy dealing with terrorism, but risking their neighbours and even themselves. If terrorists could truly be bought off, this policy might at least have the virtue of practicality, but in the real world, terrorists do not have a market clearing price.

Finally, many countries simply refuse to adopt policies which are championed by the United States. Thus, a tough line against Chinese proliferation activities, support for Israel in the Middle East peace process, and sanctions against Iraq are all identified with the U.S., and are all resisted to one degree or another by most of the European countries.

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Fighting Terrorism - An Insider's View

Jacob Perry

Fighting Palestinian terrorism was my main field of work for more than 30 years. I joined the General Security Service (GSS) in 1966.

Moving through the ranks since my days as field officer, I had first hand experience of the Six Day War, the waves of terror that came in its wake, the terror acts within Israel, the Territories, Lebanon and all over the world, then through the Intifada and up to the waves of Islamic terror.

The first attempted terrorist act by the Fatah organization, on Israeli territory, occurred in 1964. It was an attempt to blow up one of the pumping stations of the National Water Carrier in the Galilee. The waves of terrorist acts that followed came immediately after the Six Day War, waves that flooded the region of Judea and Samaria, as well as the Gaza Strip and Israel proper, in an avalanche of bombings, some of them with tragic consequences, as well as many others which were prevented.

In his striving to set up Fatah cells on the West Bank during the late 1960's, Yasser Arafat intended to build up a



guerrilla warfare mechanism of a primarily rural type, thus approximating the style of Che Guevara, Fidel Castro and their companions.

The purpose of Arafat, and those around him, was to stir up civil rebellion. However, he failed because the Cuban model can only succeed against a weak and internally rotten regime which is in the process of breaking down and lacks deep roots among the population, as was the case with Batista in Cuba. The terrorist organizations of the PLO, and first and foremost Fatah, soon reached the inevitable conclusion that any attempt on their part to stir up a civil rebellion in the Territories was doomed to failure. Along with other rejectionist

organizations, the terrorist formations of the PLO began to dispatch armed groups of terrorists into the Territories and to recruit large numbers of adherents in Judea, Samaria and Gaza.

Terrorism as a form of warfare, may be defined as follows:

"Use of actual or threatened violence to achieve a political end"; or 'maiming and murdering innocent people in order to spread fear for the purpose of achieving political ends".

Terrorism flourishes in modern times because of the difficulties encountered in rural warfare: hence the dubious distinction of terrorism as "urban warfare". Terrorism makes it possible for small groups of combatants to attract public attention which is out of any proportion to the magnitude of their acts. This form of warfare requires very modest means and can be carried out by a handful of persons. Terrorism delivers its message, loud and clear, in the affected country and to world public opinion. In contrast to guerrilla warfare, terrorist groups do not necessarily need popular support.

Terrorists tend to impart a moral colour to their acts. On 30 May 1972, the Popular Front for the Liberation of Palestine, headed by Dr. George Habash, caused mass casualties among a group of Puerto Rican pilgrims at Ben-Gurion Airport by using the services of Japanese terrorists (Kozo Okamoto). Those who had planned the act had no idea that the victims were going to be such persons. When the details came out, the victims were portrayed as collaborators of the Zionist criminals, their grievous crime was that they had dared to obtain a visa to Israel - a crime punishable by death.

The six years of the Intifada were

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extremely difficult for Israeli intelligence in its striving to contend with terrorism. Indeed, this was an uprising of the street, mainly using such means as stones, stabbings and other attacks, which are collectively referred to as "cold acts of terrorism".

The "wanted persons" phenomenon characterized the Intifada years, and traces of it persist to the present day. At various times during the Intifada there were more than 1,500 wanted persons in the Territories, and their capture necessitated laborious, sensitive and exhausting intelligence work. Many technological innovations were introduced over the years to this work: aerial and ground photography, listening facilities and observation means became extremely valuable tools in the fight against terrorism and the capture of wanted persons. Quite often, wanted persons of an "easier" character were allowed to escape from the area in order to diversify information sources on the manner in which wanted persons were spirited away and to catch really "big fish" as a result.

Another new-old development is the emergence of terror based on religious motives. Terrorism, driven by Shiite religious motives, has flourished in recent years in southern Lebanon, and is carried out primarily by the Hizballah.

The largest reservoir at the disposal of Islamic terrorist organizations, consists of terrorists who share the following traits:

Motive of vengeance against Israel.

This motive is derived from the personal background of the terrorist, such as arrests, interrogations, or measures against his relatives.

Stories of Eden

The terrorist's status as a Shahid, and the honours to be bestowed on his family, including its economic survival.

Strong commitment to the Islamic organization

The pool of potential suicides grows in direct proportion to the incidence and duration of blockades in the Palestinian territories, the extent of unemployment and inactivity that afflicts many young people, along with the skilled penetration

Quite often, wanted persons of an "easier" character were allowed to escape from the area in order to diversify information sources on the manner in which wanted persons were spirited away and to catch really "big fish".

of Islamic organizations into every space so created and their provision of economic assistance and spiritual support for the population. The fact that Hamas and the Islamic Jihad provide economic assistance, religious services, medical care and education, engenders a feeling of obligation and gratitude.

Suicidal mass casualty events should be considered in conjunction with another established phenomenon, namely the "single terrorist". Dozens of cases of lethal stabbings, planting of explosive devices, etc., have been perpetrated by

single terrorists, recruited in a secret, compartmentalized manner to act as individuals. One of the main reasons for this phenomenon is the difficulty encountered by intelligence services in detecting and apprehending the perpetrators before they commit the act. Naturally, the same difficulty also exists after the terror event.

Summing up the reasons, motives and categories of terrorism, the following additional conclusions may be reached:

- * The vulnerability of modern society. This vulnerability stems from the highly concentrated pattern of modern life. Indeed, modern society comprises junctions and other focal points (e.g. power stations, electrical installations, telephone and other telecommunication exchanges, radio stations, computer and information facilities), where a terrorist attack can inflict damage extensive enough to put economic and cultural life out of action.
- * The tactical nature of the problem. The Achilles' heel of terrorism stems from the strictly tactical nature of all terrorist acts - a state of affairs which makes it extremely difficult for terrorist organizations to achieve strategic gains.
- * A modern state can absorb a large amount of terrorist damage without becoming exhausted or falling to its knees in front of the political demands of the terrorist organizations. Irish terrorism keeps carrying out terrorist attacks, but there are no signs that it has subdued Britain to the point of accepting its demands, the same applies to the Basque region of Spain, Corsica, Puerto Rico and, of course, Israel.

* Under certain circumstances a state may succumb to terrorist demands on the tactical level, as in liberating terrorists from prison or paying ransom money. These concessions however do not weaken the rule of government.

This problem creates difficulties and occasionally despair in terrorist circles. Terrorism as a war of attrition also has the effect of wearing itself out. The narrow base of many terrorist organizations tends to shorten their life.

The International Character of Terrorism

Modern terrorism has greatly expanded the scope of its operation by attacking state assets located abroad: embassies, institutions, business interests, prominent personalities paying a visit abroad and citizens of the target country staying abroad.

This trend has led to the growing use of "subcontractors" such as Japanese and Germans against Israeli targets. Its most important feature, however, is the cooperation and mutual assistance which takes place between terrorist organizations of different countries in the form of training, documentation, logistic support, hiding places, etc.

Such international terrorist conspiracy does not mean that there is a world terrorist headquarters or center. Contacts remain sporadic and confined to the operational level.

No discussion of terrorism can be complete without dealing with the **governmental variety of terrorism** - terror operated by the rulers of a state for eliminating opponents of the regime (as was the case in Argentina) or political

adversaries residing abroad (Iran, Iraq).

Clandestine warfare units are being formed in various countries, mostly within the framework of the intelligence services. Such activities are widespread in non-democratic states.

The overt or covert use of state resources for threatening the interests of other states represents a political asset for such a state.

The advantage of state-sponsored terrorism lies mainly in the support it obtains from local state institutions for committing its acts.

Terrorism is attracting growing attention from researchers because of its diversity and the risks it creates. The extensive research done on the psychological aspects of terrorism in order to find out whether it is possible to define a "terrorist personality", "terrorist profile" or "suicide profile" has yielded some interesting results. However, it has not provided any means of preventive or preemptive action. A considerable body of research deals with legal aspects of terrorism - what provisions should be included in international treaties, etc. There is no single, all-powerful means against terrorism. Indeed the war against terrorism must be waged on a wide front, using an extensive arsenal of means and methods, acting in accordance with the constantly changing local circumstances. The war against terrorism must be waged without tactical compromises. The first and foremost way of combatting terrorism consists in reducing the propensity for terrorist acts. This measure is of a political nature. Although disgruntled groups or individuals will always exist, the deterrent effect against them can be enhanced by appropriate political measures. The second way consists in

reducing the ability of terrorism to organize and act. Such measures are of course being applied by the police, the military and intelligence organizations in a large variety of ways.

The war against terrorism must not be allowed to assume the character of terror against terror. The means applied by the intelligence services must be prudent and well considered. Further, legislative and legal aspects cannot be ignored, for example, terrorism has brought about legal change in the form of broader powers of the courts to try terrorists for their murderous attacks on citizens of the state, even if the act was committed abroad.

Effective war against terrorism requires a great deal of sophistication, brain resources and patience. It also necessitates a supportive governmental mechanism willing to invest the necessary resources and fully aware of the need to establish a propitious political climate capable of reducing the triggering factors of terrorism to a minimum. The prevention of terrorist acts must be regarded as a complete system capable of internal coordination and committed to action for long periods of time. All stages of the process, starting from the collection of intelligence, its analysis and implementation, on to the arrests and interrogations, then to trial and imprisonment, including a resolute stand by the state in support of this concerted effort, must be thoroughly planned and executed. This is the only way to ensure effective action against the breeding grounds of terrorism, and thereby reduce terrorism to a minimum.

Meeting of the Presidency, Heads of Sections and Country Representatives During the World Council, London, June 1-3 1997

Presiding:

First Deputy President, Adv. Yitzhak Nener

Present: Judge Hadassa Ben-Itto, George Ban (Hungary); Aliza Ben-Artzi (Israel); Judge Myrella Cohen (UK)-, Igor Ellyn (Canada - Ontario); Dr Mario Feldman (Argentina); Meir Gabay (Israel); Judge Semy Glanz (Brazil); Daniel Lack (Switzerland); Jonathan Lewis (UK); Marion Maissa (Greece); Elias Mansur (Mexico); Abraham Neeman (Israel); Joseph Roubache (France); Suzi Salo, (Israel)*, Wolfgang Schulz (Germany); Neat Sher (USA); Etya Simcha (Israel); Dr Mala Tabori (Israel); Dr Oreste Bisazza Terracini (Italy); Isidore Wolfe (Canada - British Columbia); Judge Ralph Zulman (South Africa); Ophra Kidron (Executive Director, Israel).

Mr Nener commenced by welcoming all present and extending a special note of appreciation to Judge Myrella Cohen and the members of the British Section for their efforts in organizing the Council meeting. Congratulations were also extended to Mr. Neal Sher, the newly elected President of the American Section of the Association.

President's Report

Judge Ben-Itto, in giving her report, referred to items on both the credit and the debit side. One of the most important activities is the publication of JUSTICE, which has been issued quarterly for the past three years. JUSTICE now has a major impact and is quoted on the Internet and in other journals. It is also our way of keeping contact with members.

A programme of international meetings is continuing with increased success, with triannual congresses in Israel and periodic Council meetings abroad.

Judge Ben-Itto noted that we should be doing more. We are not realizing our full potential. More Jewish lawyers could be reached if we organized better and engaged in an

energetic membership drive.

She was pleased by the role we play in the UN and commended Daniel Lack for his able representation of the Association.

Chapter Reports

Heads of Chapters and national representatives reported on the activities of their Chapters and discussed the future work of the Association.

Inter alia, the following proposals were raised:

- * To increase activity against the denial of the Holocaust.
- * To attempt to obtain funding for the renewal of the publication of JUSTICE in French and Spanish.
- * To make an effort to attract young, lawyers to the Association, possibly by holding a special international meeting for young lawyers.
- * To organize chapters in locations where none exist.
- * To establish Internet sites.
- * To publish a CD Rom containing all back issues of JUSTICE.

Summing Up:

Summing up the discussion, Mr. Nener stated:

The Presidency will prepare a plan for a worldwide membership drive. All the proposals made at the Meeting will be taken under consideration by the presidency, and efforts will be made to find ways and means to implement them. Top priority will be given to increase activities against the denial of the Holocaust by legal means.

Two resolutions were adopted by the Meeting concerning the death penalty for land sales by Palestinians and Israeli Arabs to Jews, and concerning legal representation of Azam Azam before the Courts of Egypt.

For the text of the resolutions, see page 34.

Resolutions Adopted by the Presidency, Heads of Sections and Country Representatives

Resolution on Death Penalty for Land Sales by Palestinians and Israeli Arabs to Jews

The IAJLJ condemns the recent statements made by leaders of the Palestinian Authority ("PA") concerning the imposition of the death penalty against Palestinians and Israeli Arabs found to have sold or attempted to sell land to Jews.

In particular, the IAJLJ deplores the May 5, 1997 public statement of Frekh Abu Midhen, a PA member in charge of the administration of justice, who Justified the death penalty for the sale of land by Palestinians and Israeli Arabs to Jews.

The IAJLJ expresses its shock and horror at the recent brutal murders of three Palestinian land dealers, which were justified by PA Chairman Yasser Arafat and other PA leaders as legitimate in the circumstances.

The IAJLJ therefore calls upon the international community to proscribe these pronouncements of the PA as incitement to hatred, violence and murder in utter disregard of the sanctity of human life and in flagrant violation of universally accepted human standards.

The Association urges the United Nations Commission on Human Rights and other appropriate UN and inter-governmental bodies and national and international bar associations, to denounce such practices by the PA. Further, the Association calls upon the PA to cease forthwith advocating, encouraging and condoning these extrajudicial, summary and arbitrary killings and to apprehend the perpetrators of these criminal acts and bring them to justice.

Resolution on Legal Representation of Azam Azam before the Courts of Egypt

Azam Azam, an Israeli national and a member of the Druze community, is charged with capital offences and presently stands trial before the courts of Egypt upon allegations of spying on behalf of Israel;

Farid Al-Dib, an advocate of the court of Egypt and a member of the Egyptian Bar Association, has undertaken to

defend Azam Azam upon the charges and is conducting Azam Azam's defence at the trial;

The Egyptian Bar Association has publicly condemned and attacked Advocate Al-Dib for undertaking the defence of Azam Azam and has called him a traitor to his Egyptian heritage. Several members of the Egyptian Bar Association have brought ethical allegations against Advocate Al-Dib on the sole ground that he has undertaken the defence of Azam Azam and a disciplinary tribunal of the Bar Association has been convened for June 11, 1997, three days before the resumption of Azam Azam's trial at which Advocate Al-Dib is defending him.

Egypt is a state party bound by the International Covenant of Civil and Political Rights, Article 14 whereof obligates state parties to abide by principles of natural justice, including the right of persons charged with criminal offences to be defended by a competent advocate of the Court, freely chosen, who shall be permitted to conduct a full and vigorous defence of the accused, without fear or favour, intimidation or reprisal.

The IAJLJ urgently calls upon the Egyptian judicial and governmental authorities to ensure that the principles of international law to which Egypt is a state party are adhered to and that Advocate Al-Dib is permitted to defend Azam Azam, at a full and fair trial upon all charges pending against him before the courts of Egypt, and particularly, ensuring Azam Azam's right to be represented by a competent advocate of the Egyptian Bar, freely chosen, who shall be permitted to conduct a full and vigorous defence of the accused, without fear or favour, intimidation or reprisal.

The IAJLJ also urgently requests other national and international legal and human rights organizations to adopt similar resolutions calling upon judicial and governmental authorities in Egypt to ensure the right of Azam Azam to a full and fair trial upon all charges pending against him before the courts of Egypt, including the right to be represented by a competent advocate in accordance with the principles of Article 14 of the International Covenant of Civil and Political Rights.

The Position of Women in Israel

Ruth Halperin-Kaddari



In October 1991, Israel ratified five human-rights conventions: the International Covenant on Economic, Social and Cultural Rights (CESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These joined the list of other international conventions on human rights which Israel had previously ratified, among them the genocide convention, the slavery conventions and those dealing with refugees, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which Israel ratified in 1979.

One of the main obligations on the State Parties to the five conventions and CERD, on the international level, is to report on the implementation of the conventions within each country. Each convention has set up a reporting mechanism and established a committee of experts to which the reports must be

submitted. The experts are selected on the basis of personal credentials and not political considerations. Currently, three Israelis sit on these committees: Deputy Attorney-General Yehudit Karp (on CRC); Dr. Carmel Shalev (on CEDAW); and Prof. David Kretchmer (on ICCPR).

The reporting obligation usually includes presentation of a first report within a year of the ratification of the convention, followed by periodic reports every 3-4 years. The committees of experts convene between once and three times a year to review the reports submitted by the states and question the state representatives. Answers are supplied to the committees during these sessions. After the examination and the questioning, the committees usually prepare "concluding observations", in which they evaluate the level of compliance by the reporting state to the relevant convention, based upon the report submitted and the presentation of the report at the session. These observations are not legally binding, but they are significant for the reporting state's international standing and "appearance", as well as for its accountability to domestic Non-Governmental Organizations.

So far, Israel has only partially abided by its reporting obligations and is behind in most of the conventions. Israel has submitted reports relating to only two of

the conventions (CERD and CAT). The Ministry of Justice and the Ministry of Foreign Affairs are jointly responsible for these reports. Recently, a change of attitude in these ministries, which may also be attributed to changes in personnel, has led to a decision to engage in organized reporting, as exists in most advanced states; moreover, until a formal and organized reporting mechanism is established, external experts in every relevant field will be asked to write the reports. Since Israel has already been assigned a date to present its Report to CEDAW, the CEDAW report was given first priority, and I was honoured to be asked to prepare it.

The CEDAW convention, like most human-rights conventions is very broad in its scope, and in fact covers all areas of women's life. The topics range from legal issues such as the formulation of the principles of equality before and under the law and the elimination of gender discrimination; the adoption of governmental and other mechanisms for the advancement of women-, and specific expressions of substantive equality such

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as affirmative action and accommodation of motherhood in the workplace to the more sociological and descriptive issues of representation in public life; education; employment-, health; social benefits; rural women; media and messages; family; violence against women; prostitution and traffic in women. All topics contain a legal analysis as well as the sociological -factual description of the area. Soon after I started working on the Report, I realized that the breadth of the task necessitated extensive team-work, and I was fortunate to be able to assemble a team of excellent students from Bar-Ilan University. The ensuing document is a thorough and comprehensive portrayal of both legal and the sociological aspects of the situation of women in practically all areas of life in Israel. The examination is made primarily from an evolutionary perspective, describing processes and developments that have taken place along the way.

It is important to note that one of the main contributions of the reporting mechanism is in the reporting process itself. This procedure forces an internal examination and investigation of each topic that is dealt with by the respective convention. During this process of internal search and examination, the reporting state becomes aware of its exact standing regarding the International obligations which it has undertaken. The state supposedly discovers all its deficiencies in the areas covered by the convention. One general lesson which was clearly learnt from this project is the existence of a serious problem regarding the dissemination of information and data by governmental ministries and other organs. Not only is information and

data not disseminated on a regular basis, but it is also very difficult to obtain. In many of the ministries and organs there are no special offices designated for this purpose and in some cases it was necessary to contact numerous persons for different pieces of information. It seems that this problem reflects a much larger problem, namely, the lack of organization and coordination between various officials who deal with the same issues, or different aspects of the same issues, with no clear cooperation or attentiveness to the other's operation and activities.

This observation has particular significance in the areas discussed in the CEDAW Report. The general impression is that much progress has been achieved. Many government initiatives for the advancement of women have been taken, particularly in the last few years, showing a greater awareness of the problem. Nevertheless, a major impediment to this process has been the lack of a centralized plan that would coordinate all the different programs and initiatives and direct them toward carefully calculated realistic goals. The current situation demonstrates the obstacles that attend a great deal of a goodwill, enthusiasm and enterprise, unaccompanied by much calculation and systematized planning. The result is often confusion, concentration of efforts and resources in certain areas while neglecting others, and a general unjustified sense of an impasse. The establishment of a National Authority for the Advancement of Women, as proposed in the Authority for the Advancement of Women Bill - 1996 whose passage has long been anticipated, might be a move in the right direction. The proposal per se is very good and

extremely timely; however, the establishment of the Authority by the Bill is not sufficient to ensure its efficacy, and at least two further elements need to be guaranteed: first and foremost, the allocation of adequate resources in an independent budget is critical for the Authority to be effective and secondly, the specific qualifications of the appointees to the offices of the Prime Minister's Advisor on the Advancement of Women (who is to be the head of the future Authority), and the Ombudsman (Public Complaints Commissioner), who are designated in the Bill, and provisions for the procedure for appointing them, should be determined statutorily. In order for the Office of the Advisor and the National Authority to be truly effective and influential, it is extremely important that the appointments be strictly professional and free from political considerations. The independence of the Advisor and the Ombudsman is crucial for the success of these Offices.

Apart from these proposals for improvement, a general observation should be made: overall, from the legal perspective, and except in the area of family law and religious courts to which Israel made reservations upon ratification of the Convention, Israel is among the leading nations in the world in terms of the situation of women. Israel has passed some very progressive pieces of legislation in the area of employment, health-care and more. The Report does disclose the existence of a gap between the legal framework and the way things actually are in reality. Theoretical analysis of the reasons for this gap, and further suggestions for its eradication, are a subject for separate discussion.

First Expressions of Affirmative Action under Israeli Law

Israel Women's Network v. The Government of Israel and Others

High Court of Justice 453/94; 454/94

Decision given 11.11.1994

Justices Matza and Zamir for the majority, Justice Kedmi dissenting.

Four years ago, on March 16, 1993, the 13th Knesset passed Amendment No. 6 (Appointments) to the Government Companies Law - 1975, dealing with the manner of appointing directors to government companies. Among other new provisions, Section 18A mandated "proper representation" for both genders on every board of directors of a government company. The amendment further provided that until such representation is achieved, the responsible ministers are to appoint directors of the "less represented gender" - thereby explicitly affirming the temporary nature of the practice, i.e., until the "appropriate" level of representation is reached. It is noteworthy that Section 60A of the Law also applies the provisions of Section 18A to government appointments to administrative councils of statutory corporations.

In the explanatory memorandum to the proposed amendment, the drafters acknowledged the tiny minority of women on boards of directors (35 out of 1800, in March 1993, according to the background described in the IWN case, discussed below) and emphasized the need to eradicate this distortion, by any means possible. Further, the amendment, as proposed, contained two variations: one that included both parts of Section 18A, and another that only contained the first part, which was more declarative in nature. This was explained by acknowledging the innovative and revolutionary nature of the bill, and the consequent need to enable a thorough public debate as to the appropriate legislative measures which should be taken in order to correct the grim situation.

Currently, the most expansive formulation of the affirmative action mechanism under Israeli law may be found in the case of Israel Women's Network v. The Government of Israel (the IWN case). Apparently, little changed following the enactment of the amendment. Appreciating the deadlock, the Israel Women's Network (IWN) petitioned the High Court of Justice to void the appointments of three men as directors of two government corporations, where no women at all sat on their respective boards of directors. Justices Matza and Zamir upheld the petition, over the dissent of Justice Kedmi.

Justice Matza's opinion, for the majority, is of particular significance as it contains some rigorous statements and farreaching suggestions intertwined in the analysis of the practice of affirmative action. From the beginning Justice Matza takes care to clarify that Section 18A is not just a statutory embodiment of the well-entrenched right to equality, but creates a novel norm which positively requires proper representation of both genders on boards of directors and administrative councils of government and statutory corporations. Pointing to the explanatory memorandum, and to the alternative proposal which was rejected, Justice Matza emphasizes the remedial purpose of the amendment, which aims at correcting the social distortion arising out of the trifling representation of women, by means of positively imposing the norm of affirmative action. He then proceeds to describe the special legislative measures which were essential for the entrenchment of gender equality, in contrast to the general acceptance of the principle of equality, which did not need any express legislative embodiment. In a clear statement, Justice Matza concludes that the negligible representation enjoyed by women on boards of directors of government companies is but one expression of the discrimination against women in Israeli society, which is not specifically intended nor ideologically motivated, but is caused by internalized social norms and practices.

In an elaborate dictum, Justice Matza rejects the American approval of affirmative action as only a temporary extraordinary measure intended to specifically correct past discrimination

rather than maintain present and future social balance, and calls for its acceptance as an integral and primary guarantee of the principle of equality, similar to the Canadian approach. In the most far-reaching part of his opinion, after suggesting that discrimination against women on boards of directors is merely a reflection of a much broader social phenomenon, Justice Matza proposes to interpret Section 18A in the context of the social need to advance women's share in the labour market in general and in managerial positions in particular. This approach, together with the adoption of a broad interpretation of the Basic Law: Human Dignity and Freedom as also incorporating the right to equality in the private sphere, constitute a call for the introduction of a policy of affirmative action into every part of the labour market, whether public or private.

Concluding the practical part of his decision, while declining to give concrete guidelines for the implementation of Section 18A, Justice Matza also rejects the policy of implementation offered by one of the ministers, whereby a special effort to appoint a woman would only be made when the board is exclusively male, and the appointments in question are for the last vacancies. In addition, he raises the question of evaluation and comparison between men and women candidates, and suggests that the qualities and capabilities need not necessarily be identical in order for the woman candidate to be preferred over the man. Demand for identity of qualities could lead to perpetuation of the discriminatory situation, since many differences in qualities are the result of continuous discrimination. Thus, a female candidate should prevail over a male candidate even if he has some relative advantage, unless that advantage is significantly relevant under the circumstances to the appointment. Finally, Justice Matza concludes that the burden of proving that a woman's appointment was impossible under the circumstances lies on the appointing minister. This burden may include, for example, turning to external organizations - such as academia, professional unions, women organizations etc. - for suggestions as to suitable candidates, when the appointments are to be made from among the general public.

It should be clarified that although Justice Zamir objected to the definitive inclusion of the right to equality under the auspices of Basic Law: Human Dignity and Freedom, thereby adding to the general debate over the scope of that Basic Law, he did not reject the other broad statements contained in Justice Matza's opinion.

Implementation of the Government Companies Law

According to the Chairman of the Public Committee that was established by the above amendment to monitor and advise the ministers on their appointments, the number of women on boards of directories has increased from about 60 in 1993. to 312 in November 1996. This, however, reflects only one side of the picture. The full picture may be seen from research conducted by Prof. Dafna Izraeli of the Department of Sociology and Anthropology in Bar-Ilan University, who compared the number of women in all government corporations' boards of directors in September 1993 and in March 1996. This research shows that although Section 18A is indeed being implemented, its implementation is being carried out at a much slower pace than one could have hoped for. Thus, for example, while in nearly half (48.6%) of the government corporations which had no women directors at all in 1993 there is now at least one woman on the board, in two-thirds of the corporations (66.9%) there is still no adequate representation, when the term is defined as women composing at least 30% of the boards' members. Interestingly, the research clearly shows that the major part of the increase in women's appointments to the boards came from the assignment of "public designated directors", and not from within the civil service.

There is a basis for suggesting that the IWN case greatly contributed to hastening the process. As appears from the circumstances described in the case, very few women were appointed immediately following the 1993 amendment. It is therefore fair to conclude that the progress that has been made between 1993 and 1996, as described in Israeli's research, may be attributed primarily to events occurring in the time period following the Court's decision. On the other hand, it is not quite clear whether the full lesson of the IWN case has been learnt, since the policy that underlies the practice of appointments in the light of Section 18A. as delineated by the Chairman of the Monitoring Committee, appears to be less decisive and critical than it should be. In its communique to the ministers, the Committee regularly points out the affirmative-action provisions and obligations set out in the law, but it only disapproves and rejects the ministers' male-candidates when there are no women at all on the boards in question, and it refuses to approve such nominations only when they involve the last vacancy (or last two vacancies) on those boards. A similar policy that was described

to the Court in an affidavit by one of the ministers involved in the *IWN* case was strongly criticized by Justice Matza.

To supplement the picture and perhaps ease the impression of the less than satisfactory progress, the data presented above May be compared to other data from different research conducted by Prof. Izraeli concerning women on boards of directors in public corporations traded on the stock-exchange. That research revealed that in 1994, more than 61% of the corporations had no women at all on their boards of directors, and in 27% of the remaining companies, there was only a single woman on their boards. Among the government corporations, on the other hand, only 16.2% of the corporations were left in 1996 with no women at all on their boards. Leaving aside the sociological and critical explanations for this situation, the comparative data clearly shows the effect and the need for affirmative action as a crucial tool in the struggle for the advancement of women.

The Israeli legislator has indeed realized this, and the amendment to the Government Companies Law turned out to be only the first expression of legislative affirmative action in Israel. The civil service was the next to follow in the July 1995 amendment to the Civil Service (Appointments) Law, which may be regarded as an adoption of Justice Matza's broad dictum. The

amendment may be described as basically incorporating the practice of affirmative action into the civil service, in mandating appropriate representation of both sexes in the civil service, and in obligating the Civil Service Commissioner to act in so far as possible, under the circumstances, toward the achievement of this goal, through the use of the mechanism of affirmative action among other possible means. Affirmative action is defined in the amendment as giving preference to the candidate who belongs to the gender that is not appropriately represented, where the two candidates' capabilities are comparable. The data concerning women's representation in senior positions and ranks in the civil service is even less encouraging. However, the process of remedying past discrimination takes time. even with the temporary use of such means as affirmative action, which is nevertheless an imperative mechanism. It remains to be seen whether other public institutions and organizations will follow suit after the first two examples discussed in this note.

Case note prepared by Dr. Ruth Halperin-Kaddari, lecturer (at Bar-Ilan University, Faculty of Law

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Possible Solutions

The most straightforward solution is to create adequate defenses against terrorism where it is possible to do so. Such defenses might well include protection against missile delivery systems, such as the American Patriot program and the Strategic Defense Initiative. While none of these defenses are fool-proof, and although the depressing truth is that WMDs can be delivered in many ways, it is negligent at best for nations not to try to defend their citizens and those of their allies. Even in the United States, however, where missile defense has been developed most extensively, it

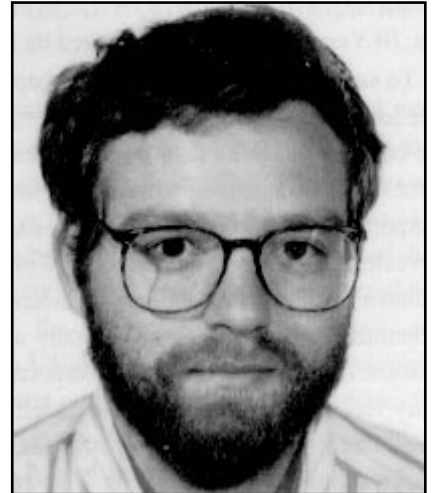
remains controversial and only funded to a limited degree.

The more general answer is that that industrialized democracies simply must form coalitions to defeat the terrorist threat. Such coalitions could be existing alliances - such as NATO - whose mandates could be enlarged to cover these new responsibilities, or ad hoc "coalitions of the willing" which share the same values and the same determination. In either case, the sine qua non of success is likely to be the willingness to use force, preemptively where necessary, to protect their populations.

Our recent experience gives us scant

reason to hope that the "West" as a whole has the resolution or the patience to follow a long-term strategy of coalition building. Perhaps it will take a horrible reminder of the consequences of ignoring terrorism via weapons of mass destruction before there is a sufficient public outcry. For those who see the danger now, we can only resolve to persuade as many as we can as soon as we can. secure in the knowledge that anti-terrorism is both a just and humane policy.

Reason as a Supreme Principal in Halacha



Amihai Radziner

In this brief review we wish to show that common sense and reason are supreme principles in the *Halacha*; in other words, principles in the light of which other considerations of *Halacha* are set aside.

Reason is one of the most important sources of *Halacha*. Reason and logic form an independent source which also accompanies and directs the *Midrash* [commentary] which in turn creates or reveals the *Halacha*; reason may also serve as a tool for defining, and in some circumstances even negating existing rules of *Halacha*. Reason is the element which gives authority and force to the logic of the Sage. It is an instrument for creating *Halachot* [principles of law] in every area of the *Halacha*. These different aspects of reason are illustrated below.

The Power of Reason in the Creation of Halachot and their Interpretation

As noted, reason is a source of various *Halachot*, as well as more general legal principles. Thus, for example, the principle of *Yehareg vebal Ya'avov* (i.e., that someone who is asked to kill another, should rather die himself), is learnt from reason, on the grounds that it is impossible to assess the value of human life. A man cannot conclude that his own life is worth more than that of another and that he may therefore kill that other so that he himself should survive.

General rules of law are also derived from the supreme prin-

ciple of reason-, for example, the concept that a person claiming something from another has the burden of proving his ownership of the claimed item, as well as the principle that a person who forbids a certain action is also the person who is entitled to permit it. These frequently applied principles are occasionally learnt solely from the exercise of the faculty of reason, and occasionally in conjunction with commentary sources (*Midrash*), however, the latter only have the effect of corroboration, and it is clear that the principles would apply even in the absence of the *Midrash*.

Reason was a driving force creating and steering the *Halacha* in numerous cases in *Talmudic* literature. However, the spirit of reason also shaped *Halachic* determinations in the era following the completion of the *Talmud*, including where such decisions originated from commentaries or rabbinic interpretations.

A famous example is the *Responsa* of Rabbi David IN Zamra (Egypt and Israel, 16th Century) concerning the question whether a man may permit a limb or organ to be severed in order to save another from death. His negative answer was based, *inter alia*, on the ground that it is inconceivable that the laws of the Torah should contradict what is regarded as reasonable, and accordingly it would be wrong to force a man to injure himself in order to save another.

In another *Responsa*, Rabbi David Ibn Zamra dealt with the status of a woman who suckles a child. According to the law, a woman who has a suckling infant and whose husband dies, must wait 24 months before remarrying, in order to preclude the possibility of her becoming pregnant again, with the result that her

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milk might become affected and her new husband might refuse to provide for the nurturing of the child of the previous husband. The question asked was whether such a woman, who had waited 24 months but whose child was weak and did not want to suckle from another, could be forced to suckle the child and not remarry, or whether she could enforce her desire to remarry. Rabbi David Ibn Zamra proposed four possible practical solutions, and ultimately concluded that in every case the decision had to comply with medical opinion and the doctors would decide whether there was a danger to the child. All the options considered conformed with common sense, without any reference whatsoever to the words of the Sages or the Poskim. This is an example of a Posek who relies solely on his common sense in determining a rule of law.

Reason is also a binding source of law in the context of public law. Thus, for example, Rabbi Itzhak Ben Sheshet (Spain and North Africa, 14th Century) held that public regulations would also apply to minors and would even bind those as yet unborn at the time of the promulgation of the regulation. The sole source for this determination was reason which proclaimed that it would not be feasible to renew regulations on a daily basis in order to apply them to those who reached maturity on the relevant day, and accordingly it was clear that a one-time promulgation of a regulation would bind all the residents of the city in the future, including those as yet unborn on the date of promulgation.

Harosh (Rabbi Asher Ben Yehiel) also finds that the majority may force the minority to abide by certain regulations to which the minority objects. Thus, while he also cites a Midrash to support this position, the primary stimulus for the rule is not the Midrash but reason, namely, the contention that if the view of the majority is rejected, the public would never be able to agree on any binding rules, as the minority would be able to negate any regulation under consideration.

Reason's role as the basis for numerous important aspects of Halachic norms has been the subject of even more far reaching views, for example the views of Rabbi Ya'akov Anatoly (Italy,

13th Century), who thought that reason was the principal basis for most Halachic norms. In his opinion, this was because human society could not exist without basic norms established by human beings in accordance with their understanding. He believed that most Halachic laws were the product of reason rather than the written Torah or the Oral Law.

Reason was applied to create new rules of law; however, even with regard to existing Halachot, it has been said that: "I have complied with Halachot which I have never heard of because I reached the same result by the exercise of reason, and in contrast, even old and accepted Halachot have been rejected because of reason." (Sternovitz, History of the Halacha, Part One, p. 15 1).

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Haim Sternovitz ("the Young Rabbi") attempts to show a long line of proofs to the effect that reason is the sole basis of most of the laws of the Halacha. He concludes that the contents of the Torah itself offer proof that reason was a strong foundation for the Halacha. This is because there are places in the Talmud where the verses are not explained literally in order to ensure their compliance with rules of Halacha which are based on reason; in other words, the text was "subordinated" to reason, or was brought as corroboration to a law which originated from reason.

Further expression of the supreme status of reason may be found in the words of Rabbi Yosef Inge] (East Europe, 1920th Century), who considered the position of a man who, by reason of duress, cannot abide by the commandments. The question posed was whether the duress meant that there was no obligation to keep

the commandments, or whether the duty to keep the commandments remained but that it would be recognized that the person was temporarily unable to keep them. Rabbi Inge] held that there are commandments which apply between man and G-d, i.e., "religious commandments", where the duty to abide by them only arises because of G-d's command. In such cases, in the event of duress, a man would be released completely, as G-d does not require the fulfillment of commandments by someone who is unable to do so. However, there are also commandments which

apply between man and man, i.e., "social commandments" where, apart from G-d's requirements, reason and common sense also demand that they be kept, and accordingly the duty to keep such commandments continues to bind a man even though he may be temporarily unable to do so.

The Preferential Status of Reason Compared to Other Principles of Law

Additional proof of the status of reason as a supra-principle of Halacha, may be found in the fact that it provides sufficient grounds, per se, for a judicial decision which is contrary to accepted judicial thinking within the Halachic framework. A. Berkovitz (U.S., 20th Century) illustrates this with a number of rules. Thus, for example, the Talmud occasionally makes a determination following the minority versus the majority, despite the rule that in the event of dispute the majority view is to be adopted. Such determinations are based on the fact that the grounds of the minority view are more reasonable. There are places where the Talmud comes to a conclusion in accordance with the majority view despite the fact that the reasons of the minority are stronger, but in such cases the Talmud expressly admits it, and does not rely on the rule that in general the decision should accord with the majority view; i.e., the Talmud indicates that the majority view is followed despite the fact that the minority view is more reasonable.

The Talmud even follows the views of Amora [Interpreter of the Tannaim] Shmuel, where reason so demands, against the majority views of the Tannaim, despite the fact that from a Halachic point of view the opinions of the Tannaim are preferred to those of the Amoraim. As the Talmud puts it: the Halacha follows Shmuel despite the different opinion expressed by the Tannaim, as the former view is more reasonable.

Thus, the Talmud also makes determinations which are contrary to other rules of law. For example, there is a rule that the Halacha always follows the views of the Tanna Rabbi

Eliezer Ben Ya'akov. Nevertheless, there are cases where the Talmud finds it necessary to expressly hold in accordance with his view and not to rely on the rule. The explanation of the Tosafot [annotations to the Talmud] is that in those cases where it is expressly stated that the disputed Halacha follows Rabbi Eliezer Ben Ya'akov, it must be assumed that the view of the disputing party is more reasonable, and that but for the express statement that view would have been followed - despite the rule that Rabbi Eliezer Ben Ya'akov's views should always prevail. This analysis shows that the general rule may be discarded where reason so demands.

These examples illustrate the limitations of Judicial rules. Notwithstanding their inclusive language, they too - like the entire Halachic framework - are subordinate to logic and reason.

The power of reason is also revealed elsewhere. The Radbaz, for example, 'is concerned with the Halachic question of the liability of a trustee for assets placed under his care. He is aware of the different opinions of the Poskim and suggests that the dispute should be decided on the basis of his own sense of reason, which adopts the middle way between the opposing views, and this opinion is the basis of his decision.

HaHazon-Ish (Israel, 20th Century) put it this way: the fundamental and decisive principle in determining the Halacha is based on a system where the evidence on which judgments rely are the most reasonable. This rule even prevails over

the rule requiring adherence to the principles set out in the Shulchan Aruch, as the latter are valid only where there is no view which is more reasonable. However, in any event, the views of later Poskim should be considered, in case their stronger reason means that their views are to be preferred. In such a case the principle set out in the Shulchan Aruch is to be discarded - as wisdom is the decisive factor".

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The South African Constitution: The Input of the South Africa Jewish Community

Solomon M. Kessler

It must surely be rare - if not unique - in Jewish history for a Diaspora community to have the opportunity, as a community, to express its views and make suggestions to the constitution-making body of the country in which the community resides.

In South Africa, following the agreement reached between the Government of then President FW de Klerk and the African National Congress for the peaceful establishment of a democratic regime in place of the apartheid regime, an Interim Constitution was drawn up by way of a multi-party negotiating process, with the assistance of constitutional experts. It came into effect on 27 April 1994 - the date of the first democratic election. Some of the negotiators and experts involved in that process were Jews.

Thereafter, in terms of the Interim Constitution itself, a parliamentary process was started for the formulation of the final Constitution. It was in the course of this process that the Constitutional Assembly (consisting of the members of the two chambers of Parliament) called for public input on every aspect, thus enhancing the democratic character of the Constitution. Thousands of written and oral submissions were made by individuals and by organizations of all sizes and kinds. Very many of the written submissions were even published on the Internet and were thus available for public scrutiny and response.

Mr. Kessler is a lawyer practising and residing in Cape Town and a member of the IAJLJ. He is the present chairman of the Constitution and Legislation Committee of the SA Jewish Board of Deputies, having succeeded Judge of Appeal Ralph Zulman. He has been a member of the Cape Committee of the SA Jewish Board of Deputies for many years, and also served as its chairman from 1981 to 1983.

It was in the course of the latter process that the organized South African Jewish Community, principally through the South African Jewish Board of Deputies, but also through the South African Jewish Board of Education, made several written submissions. These related to that part Rights.



The Constitutional Assembly finalized its draft in May 1996, and it was then submitted to the Constitutional Court (as required by the Interim Constitution) for certification that it conformed with certain principles enunciated in the Interim Constitution. In fact, the Court declined to certify, and the Constitutional Assembly had to reformulate certain provisions after which the amended draft was submitted to the Court, which certified it in December 1996. The final Constitution was signed by President Nelson Mandela later that month, and was brought into effect on 4th February 1997.

In 1994 the South African Jewish Board of Deputies set up a special committee to draw up submissions to the Constitutional Assembly in regard to the formulation of the Bill of Rights in the final Constitution. The committee was chaired by Mr. Justice

Ralph Zulman (Joint Chairman of the South African Chapter of the IAJLJ), now a Judge of Appeal. The other members were prominent Jewish lawyers and community leaders.

The submissions which the committee formulated for presentation by the Board of Deputies were not intended to achieve any sectional benefits or protection. The committee's point of departure was the view and concern that the Constitution should ensure a constitutional environment in which the Jewish Community as well as all other religious groups can flourish and freely and constructively maintain their religious identity. Thus, although its submissions relied on Jewish historical experience as the target of discrimination and hatred, the committee made general suggestions that, it felt, would be in the interests of all South Africans.

This approach was expressed in one of the submissions of the Board of Deputies as follows:

"For many centuries, the Jewish people has been the victim of racial, social, political and religious prejudice, discrimination, hatred and violence, even in the very recent past, and, accordingly, the Board wishes to ensure that all peoples, communities and groups in South Africa are adequately protected from such indignities and abuse.

In heterogeneous South Africa, and particularly in the light of South Africa's long history of racism, racial intolerance and violence, it is essential that the Constitution should not provide protection for those who would seek to revive such evils.

Jewish history has also taught us that the rhetoric of hatred is insidious, and that, though it may not lead to immediate violence, it can lead to insensitivity to others who are different, and ultimately to violence against them.

The lessons of apartheid South Africa and Nazi Germany suggest that spreading racial intolerance and religious hatred can triumph over free speech."

The belief was also expressed that the Constitution should both protect and promote diversity and equality by entrenching the right of religious and cultural groups to maintain and develop their own religion and culture, without impinging on the rights of others, and without disparaging other religions and cultures. A plea was also made that religious and cultural groups should be protected from exposure to indoctrination by other religious or cultural groups in state institutions.

In addition, the Board of Deputies suggested that the provisions of the Bill of Rights should also be applicable between private persons, that is, horizontally, to ensure that the entrenched rights should be exercisable not merely against organs of state but also against any other person who infringes such rights. This view was held by many others and eventually prevailed, so that the final Constitution, unlike the Interim

Constitution, now lays down that "a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

On the question of the interaction between State and Religion, the Board of Deputies suggested that, in contrast to the position under the former regime, preference should not be given to any particular faith, and that the common virtues and values of religion in general should be promoted.

The Board of Deputies also asked that the practice of religion be expressly protected. The Interim Constitution had guaranteed freedom of conscience, religion, thought, belief and opinion. As the Board put it, all of these are forms of cerebral or mental activity, protecting one's right to believe what one chooses to believe, but there was no express right to the free practice of religion or religious observance.

Ultimately, although the clause on freedom of religion was not expanded in the manner suggested, the following additional clause was included in the final Constitution, mainly at the request of some representatives of the Afrikaner community, incorporating a reference to the right of a religious community to practise its religion, and containing other elements that are not without significance for the Jewish Community:

"Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

As to the clause guaranteeing freedom of expression, the Board of Deputies supported the view, which had been put forward by the African National Congress, that the clause should be qualified so as not to protect -

- "a) propaganda for war
- b) the incitement of imminent violence, or
- c) advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm."

One of the political parties was opposed to these qualifications, and, because of the special majority that was required, would almost certainly have succeeded in ensuring their exclusion. As it considered the matter to be of great importance, particularly in the battle against hate speech, the Board of Deputies made oral representations to the political party concerned. Subsequently, the party withdrew its opposition, resulting in the adoption of the clause with the qualifications included therein.

Chaim Herzog

1918-1997

The sixth President of the State of Israel (1983-1993)

When Chaim Herzog, the sixth President of Israel, passed away on last Passover Eve, Tom Friedman wrote in the New York Times that "Chaim Herzog was one of the titan's of Israel's history". For in his lifelong service to the Jewish people and the State of Israel, as a soldier, statesman, diplomat and President of Israel, Chaim Herzog symbolized the generation that brought about the creation of the State of Israel.

Much has been said and written about his service in the British army in World War 11 and his participation in the liberation of the concentration camps; his long service as a commander in the Israel Defense Forces, being the founder of its Military Intelligence (in the rank of Major-General) and his service as governor of liberated Jerusalem and the West Bank in 1967; the national calmer and commentator of the Six Day War, and the heroic fighter against the infamous "Zionism is Racism" resolution as Israel's Ambassador to the United Nations (1975). In all of these capacities as well as in his decade long tenure as President of the State, Chaim Herzog showed leadership, vision and the pursuit of just and moral causes.

In the many tributes justly paid to Chaim Herzog following his death in April, comparatively little was said of Chaim Herzog the lawyer.

Having graduated with a Bachelor of Laws degree at the University of London, he was called to the Bar at the Inner Temple in 1942.

In 1972, after having served with distinction in the Israeli Defence Forces and followed a successful business career, he founded the Tel Aviv law firm of Herzog, Fox & Neeman. Except for his three year stint as Israel's ambassador to the United Nations between 1974 and 1977, he was



actively engaged in private law practice until his election to the Presidency of the State of Israel in 1983.

Whilst a member of the Knesset, Herzog was active in the Law, Constitution and Judiciary Committee and made substantial contributions to the work of that Committee.

Throughout his career, and particularly throughout his Presidency, Herzog was guided by his passionate belief in the rule of law. He was a particular admirer of the institutions that he had observed at close hand during his years in Britain. He was proud of the high standards of the Israeli judiciary and of its democratic system of government.

President Herzog was a member of the International Association of Jewish Lawyers and Jurists.