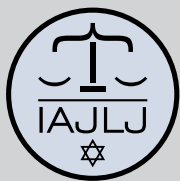


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הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

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President's Message

This issue of *Justice* is published a few months before the IAJLJ international conference on "Fifty Years of a United Jerusalem." During the conference, elections will be held for executive positions in our Association, pursuant to our By-Laws, and I will hand over my honored position to the newly elected IAJLJ President. I would like to briefly outline the activities of the Association during my tenure.

The IAJLJ is an apolitical organization – the members of which hold widely differing views on a range of topics. Accordingly, during my presidency, I have tried to develop a pluralistic dialogue with opposing opinions, even when these were not always consistent with the declared principles of our Association or not always politically correct. Given the fact that our Association is devoted to fighting for human rights, we are commanded to exercise vigilance about *everyone's* human rights, something that we have indeed attempted to do and that I consider to be a vital tenet of our existence.

I begin by referencing how we addressed the atrocities perpetrated against the Syrian civilian population, in the Human Rights Council in Geneva. The world is silent. We and others have asked many questions about the role of the United Nations, the great Powers, and others. Hundreds of thousands of men, women and children have been slaughtered, yet the Security Council is unable to reach a decision to end this impossible situation because of cynical political considerations regarding Syria's Bashar al-Assad regime, Russia, Iran and Hezbollah.

In a sharp transition, I note the side events we conducted in Geneva and at the UN in New York on terrorism and UNRWA. We held rallies on behalf of Gilad Shalit, near Red Cross institutions around the world, and championed his rights as a captive. We engaged in the activities of the "Davis" UN Committee of Independent Experts responsible for following up on the Goldstone Report by giving voice to the citizens of Sderot, who were then suffering from frequent Qassam attacks; we brought witnesses from the Gaza environs to explain their plight to the committee examining the conduct of Operation "Protective Edge," UNRWA's activities, the fight against antisemitism and more.

The International Association of Jewish Lawyers and Jurists is an institution of immense importance to me, and as the years pass, its significance increases. This is especially true today, as we witness the rise of extreme

right-wing forces capable of posing a real threat to democracy and human rights.

The spread of antisemitism around the world needs no elaboration. I recently heard Katharina von Schnurbein, European Commission Coordinator on Combating Antisemitism, who stated that, in the final analysis, what we see in Europe is the old antisemitism, which, of course, must be fought. I highlight this fact because we identified a strong connection between events in Israel, for example, Operation "Protective Edge," and the rise of antisemitic activities against the Jewish citizens of various countries where harsh criticism was directed at the actions of the State of Israel. These activities have been described as "the new antisemitism," but a deeper examination reveals



all the hallmarks of the old antisemitism, as noted above by the EU representative.

In pursuing our work against antisemitism, we must not forget that a campaign of de-legitimization of the State of Israel has been waged for several years through the BDS, and consequently, during my tenure, our Association turned its attention to the BDS movement as well.

As part of the overall fight against antisemitism, we collaborated with Professor Dina Porat of Tel Aviv University's Kantor Center for the Study of Contemporary European Jewry, in activities aimed at persuading European countries to adopt a working definition of antisemitism, which, we considered, could serve as a basis for formulating offenses in the domestic laws of countries. Ultimately, a uniform definition would have made it easier to fight the many antisemitic phenomena taking place across Europe and elsewhere. Our first seminar was held in Austria with the participation of the Austrian Ministry of Justice and Ministry of the Interior. We were pleased to note that Austria had indeed adopted that working definition. We are now in contact with the German Ministry of Justice to conduct a similar seminar.

During the course of my tenure, we also placed an emphasis on attracting legal delegations to Israel, where they could have the opportunity to gain a first-hand impression of Israel's legal system. These are similar to IAJLJ delegations abroad, such as the delegation to Spain during my predecessor's tenure, which significantly advanced the debate about Salah Shehade – a Palestinian terrorist, Head of the Military Arm in Gaza killed during the second Intifada – following the submission of complaints against senior Israeli military officials in respect

of alleged war crimes.

Thus, the IAJLJ brought to Israel a delegation of judges from France, organized by veteran member Joseph Roubache, and only recently collaborated with the AJC – Global Jewish Advocacy – to bring a delegation of European prosecutors to Israel – as reported in this edition of *Justice*. I believe that hosting delegations is an essential component of our mission to increase foreign jurists' familiarity with the Israeli legal system and is a process that should be continued with vigor.

In addition, during my tenure as President, emphasis was placed on the Association's character as a human rights organization, a principle enunciated by its founding fathers, René Cassin, Haim Cohn and Arthur Goldberg.

In this context, the IAJLJ joined the petition submitted to the Israel High Court of Justice by a number of human rights organizations and private individuals regarding the book *The King's Torah*, which in our view, deviated dangerously from the right to freedom of expression towards incitement against non-Jews. The views of our Association, among those of others, were heard, and an order nisi was issued. Though ultimately the petition was rejected, Supreme Court Justice Elyakim Rubinstein, who wrote the decision, expressed great concern regarding the way in which the author's opinions had been set out in the book.

Our Association worked with other organizations on the problem of refugees in Israel; a painful phenomenon, which regrettably, to this day, has not been resolved in a proper manner, even though the State of Israel is a party to the Refugee Convention.

The phenomenon of radicalization in the world has not by-passed the State of Israel, where, to our sorrow, we encounter intolerance towards "the other," to the point of racism. Despite the provisions of the Declaration of Independence, we remain unfortunately far removed from a situation of equal human rights between Israeli Arabs and Jewish citizens of the state. In fairness, it should be noted that in recent years considerable resources have been allocated by the Israeli government to the Arab population, with the aim of integrating women into the employment market, introducing proper public transportation into Arab localities and more. There has also been a shift in construction plans for the Arab villages. Had we also witnessed declarations by our leadership regarding acceptance of "the other," we might have believed that we were at the beginning of a new path. Unfortunately, such declarations have not been heard, and the current state of affairs is still far from satisfactory. Therefore, the IAJLJ is now examining possibilities of assisting the Israeli Arab population on appropriate issues.

In order to present a balanced picture, I would like to stress that I have encountered the welcomed activities of

numerous private organizations in which many young forces have initiated a variety of cooperative initiatives between the Arab and Jewish populations in Israel. I regard this as a hopeful sign that the right course may still be taken.

A different issue of considerable importance is the worldwide deployment of organizations and law firms that are members of the IAJLJ. Their presence and contribution enables rapid action on any subject on the global agenda necessitating our attention.

Noteworthy in this context is the initiative of a law firm in Vienna with lawyers who are members of the organization, that asked the IAJLJ to hold a joint seminar on legal enforcement against antisemitic incidents, and particularly the issue of antisemitism on the Internet.

I would like to encourage other law offices around the world to initiate similar joint activities with the IAJLJ on issues of mutual concern to us.

Recently, I visited Santiago, Chile, and Rio de Janeiro in Brazil, where I spoke to local lawyers as well as community members. I think that such events are important, and contacts should be maintained wherever possible with members around the world.

During my tenure, I tried to encourage the recruitment of young people from Israel and the world. I believe that I have succeeded in a certain sense, but there is still much work for the next IAJLJ President to do.

Before concluding, I would like to refer to our legal journal *Justice*. I am sure you have noticed that there has been a significant improvement in the latest issues. I would like to take this opportunity to thank Dr. Mala Tabory for her professionalism and the great amount of work she invested as Editor of the publication, which have produced the excellent results we see today.

As I am summarizing a period, I wish to express my heartfelt thanks to Ronit Gidron, CEO of the organization, for her great work and commitment to our causes, as well as to the office manager Iris Zilberman for her enormous dedication and great investment in ensuring the efficient management of our work.

Last but not least, I cannot end without mentioning two dear people with whom I have worked a great deal, and who, to my great sorrow, are no longer with us: Dr. Daniel Lack and Dr. Meir Rosenne. They each helped me tirelessly day and night, believing unhesitatingly in the righteousness of the road and I miss them very much.

Finally, my thanks go to retired Judge and former President of the Association, Hadassa Ben-Itto, who listened attentively to questions and opinions and provided me with assistance on a variety of issues with her usual unstinting wisdom.

Irit Kohn

Some Reflections on Security Council Resolution 2334(2016) that Condemned Israel

Ruth Lapidoth

Security Council Resolution 2334 is usually referred to as the resolution that condemned the Israeli settlements in the West Bank. However, the resolution also deals with other, quite important, issues. An analysis of some of its main provisions will be followed by an examination of its legal effect.

After a few introductory remarks, the text of the resolution deals with four different subjects: condemnation of Israel; condemnation of all acts of violence against civilians; promoting peace based on the two-state solution; and the search for means to ensure the implementation of this resolution. Already in its preamble, Israel is severely condemned, not only because of the settlements:

Condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, *inter alia*, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions...

Each of these items merits an in-depth discussion, but that would be beyond the scope of the present article. The settlements are condemned because they are allegedly illegal according to international law and because they are "a major obstacle to the achievement of the two-State solution" (para. 1).

It should be noted that this is not the first time that Israel was condemned by the Security Council. In 1980, the Council reacted strongly to the adoption of the Basic Law: Jerusalem, Capital of Israel. However, the term used in the relevant Resolution 478(1980) was not "condemns" but "censures in the strongest terms."

Another object of condemnation are acts of violence: "Condemning all acts of violence against civilians, including acts of terror, as well as acts of provocation, incitement and destruction..." In this regard, Israel is not mentioned as the object of condemnation. This provision does not

mention a specific addressee, thus applying to everyone.

Of great interest are the provisions that deal with the peace process. On the one hand, the text urges the parties to resume their negotiations. It even calls upon "all parties [whoever that may be]...to exert collective efforts to launch credible negotiations..." (para. 8). The negotiations are to deal with "final status issues" – a term used in the Oslo Agreements of 1993 and 1995¹ – and include Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of "common interest."² The parties should be inspired by the "Quartet Roadmap"³ (the U.S., Russia, the UN and the EU) and by the Arab Peace Initiative.⁴ The resolution itself does not indicate a time-limit for the negotiations, but it refers to the time frame included in the Statement of the Quartet of September 21, 2010: the negotiations "can resolve all final status issues within one year."⁵

The freedom of choice of the negotiators is, however, rather limited since the Security Council has established certain principles for the future settlement: The solution of the two-state system; and the border between Israel and Palestine should be the June 4, 1967 line, except for changes agreed upon by the parties. These principles raise some important questions. Security Council Resolution 242(1967), which has been the "building block" of all treaties of peace and other peaceful agreements between Israel and her neighbors since 1967, speaks of "withdrawal

The author wishes to express her thanks to Dr. Ofra Friesel and to Tomer Treger, LL.B.

1. Declaration of Principles on Interim Self-Government Arrangements, 1993; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 1995.
2. The Declaration of Principles, *supra* note 1, art. V.
3. Summary in text below.
4. Summary in text below.
5. Quartet Statement, Sept. 21, 2010, available at http://www.un.org/News/dh/infocus/middle_east/quartet-21sep2010.htm (last visited April 24, 2017).

of Israeli armed forces from territories occupied in the recent armed conflict.” Namely, not all the territories,⁶ whereas Resolution 2334 “*Underlines* that it [i.e. the Council] will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations.”⁷

Does this mean that Resolution 2334 intends to override Resolution 242 and its successor 338(1973)? Most probably, this is not the intention of the drafters. First, in its preamble Resolution 2334 reaffirms its previous resolutions, including 242. Second, and perhaps more important, it recalls several documents which encourage negotiations on the basis of Resolution 242, e.g. the “Madrid terms of reference”⁸ and the Quartet Roadmap.⁹

Moreover, both resolutions favor “secure and recognized” boundaries, i.e. agreed ones. Last but not least, the provisions of 242 (and 338) had been accepted by Israel and her neighbors, thus having gained the status of an agreement.

One can imagine several explanations for the difference between the two resolutions. First, maybe the drafters of 2334 have adopted the Arab interpretation of 242, namely, as if the resolution had called for full withdrawal from all the territories.¹⁰ A more reasonable explanation would recognize that the two texts actually differ only slightly. According to 242, there should be intensive negotiations on the borders, without any starting point. According to 2334, the starting point is the 1967 line, but this can and will be changed by common agreement.

The June 4, 1967 line calls for some background information. In the West Bank, this line is based on the armistice demarcation line of 1949 established by the Israel-Jordan General Armistice Agreement.¹¹ It was not intended to be a political border. The armistice was intended to be a step towards peace, as ordered by the Security Council,¹² but the Arab states refused to continue on the road to peace. Thus, the armistice line continued to exist, until the armistice broke down in 1967. Much later, in 1994, the relations between Israel and Jordan were settled by the peace treaty. Thus, the legal foundations of the 1967 line have long ago disappeared. Nevertheless, the international community treats it as the boundary between Israel and “the Palestinian Occupied Territories,” as evident by the International Court of Justice¹³ and Resolution 2334. The armistice demarcation line was based on the cease-fire line of 1948, a military fact. But political boundaries have to take into account considerations of geography, demography and economics.

The authors of Resolution 2334 did not limit themselves to describing the situation and recommending future developments. The Council also reaffirmed its “determination to examine practical ways and means to

secure the full implementation of its relevant resolutions” (para. 11). The Council thus did not restrain itself to the mere implementation of Resolution 2334, but required also the implementation of its other relevant resolutions. The resolution mentioned the intensification of international and regional diplomatic efforts (para. 9) and asked to be informed every three months by the Secretary-General about the progress on the implementation (para. 12). There is perhaps a hint about possible means of implementation in the provision that all states should “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967” (para. 5). It is not stated what kind of dealings are envisaged, but one can assume that they are probably mainly economic.

Since Resolution 2334 relies particularly on the Quartet Roadmap (2003) and on the Arab Peace Initiative (2002 and 2007), a short summary of these two documents follows.

The Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict envisions the creation of a Palestinian state as a solution to the

6. *Ibid.* para. 3.

7. According to some Arab commentators, the provision actually means full withdrawal. The issue has been discussed in Ruth Lapidot, *The Misleading Interpretation of Security Council Resolution 242 (1967)*, in ISRAEL'S RIGHTS AS A NATION-STATE IN INTERNATIONAL DIPLOMACY (Alan Baker ed., 2011), 85-95.

8. Text of the United States-Soviet Union Invitation to the Madrid Peace Conference, 1991, published, *inter alia*, in, THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS (R. Lapidot and M. Hirsch eds., 1992), 384-385.

9. A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, U.S. Department of State (2003), available at <https://2001-2009.state.gov/r/pa/prs/ps/2003/20062.htm> (last visited April 24, 2017).

10. E.g., John McHugo, *Resolution 242: A Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict between Israel and the Palestinians*, 51 INT'L & COMP. L. Q. 851-882 (2002), reprinted in THE PALESTINE QUESTION IN INTERNATIONAL LAW (Victor Kattan, ed., 2008), 357-387.

11. Israel-Jordan General Armistice Agreement, 1949, art. V, VI and Annex I.

12. S.C. Res. 62 (1948).

13. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004.

conflict which is to be settled in three stages, with reciprocal and parallel steps to be taken by the parties in the field of security, politics, economics, humanitarian issues and institution-building matters. The passage from one phase to the next will depend on confirmation by the monitoring body – i.e., the Quartet – that the obligations under the preceding phase had been fulfilled.

The Arab Peace Initiative (2002-2007) is based on an initiative of Prince Abdullah bin Abdul Aziz of Saudi Arabia. According to this proposal, Israel must withdraw from all the areas occupied in 1967 including East Jerusalem, the Golan Heights and Southern Lebanon; an independent Palestinian state with East Jerusalem as its capital should be established; a just solution to the Palestinian refugees should be reached by agreement on the basis of General Assembly Resolution 194(III); and peace between Israel and all the Arab States would be established.

Having studied the main issues discussed in Security Council Resolution 2334, it is now time to examine its legal effect. As is well known, the Security Council has been authorized by the UN member states to adopt recommendations as well as binding decisions. Chapter VI of the UN Charter deals with the pacific settlement of international disputes, the continuance of which is likely to endanger international peace and security. Chapter VII of the Charter deals with more dangerous situations – threats to peace, breaches of the peace and acts of aggression. When acting under either of these two chapters, the Council can adopt recommendations and binding decisions. Actually, most resolutions under Chapter VI have been recommendations, while most of the binding decisions were adopted in the framework of Chapter VII.

In the 1971 *Namibia* case,¹⁴ the International Court of Justice laid down four criteria that should be taken into consideration in finding the nature of a resolution: (i) the Charter provisions invoked in the resolution; (ii) the terms of the resolution; (iii) the discussions leading to it; and (iv) other relevant circumstances. However, state practice is to regard only resolutions under Chapter VII as binding.

In the case of Resolution 2334, the language used indicates that it is a recommendation, namely the terms used: “affirming,” “reiterating,” “underlining,” “stresses,” “urges” and “calls upon.” Only once does the word “decides” appear, in the provision according to which the Council “Decides to remain seized of the matter” (para. 13).

Concluding Remarks

Resolution 2334 has severely condemned Israel for several acts, in particular for the building of settlements beyond the “green line.” However, it has not marked them as criminal. It has outlined in strong terms the solution of the Israeli-Palestinian conflict, laying down two principles – the two-state solution and a complete Israeli withdrawal, subject to changes by agreement. A two-states solution is a very general concept that needs more details. What kind of states would they be? What would be the relations between them? Is there a possibility of a confederal relationship? Could there be possible cooperation, e.g. in matters of security and economics? The intention to look for means to make sure that this and other resolutions are implemented is enigmatic. Let us hope that the parties find a solution by sincere negotiations, irrespective of UN resolutions. It may be interesting to consider whether the parties may find a solution which does not include the principles laid down by Resolution 2334. ■

Ruth Lapidot is professor emeritus of international law of the Hebrew University of Jerusalem. She was awarded the Israel Prize for excellence in legal research in 2006, and was named prominent woman in international law by the American Society of International Law in 2000.

14. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), I.C.J. 1971, at 6.

Improving Legal and Other Protections for Europe's Jews

Michael Whine

Antisemitic incidents have risen continuously in some European states. While responses by inter-governmental agencies (IGOs) and some states have been designed to enhance protection of Jewish communities, they warrant recording and examination. These responses are being developed as states recognize that their Jewish communities face physical and political threats, and in some cases, the continued existence of several Jewish communities is becoming precarious.

In a recent *Justice* article, I noted that judgments by the European Court of Human Rights (ECtHR) and European states' case law have improved legal protections for Jews, and that European negotiations with U.S.-based social networks have been designed to reduce online antisemitism, where Internet content crosses the criminal threshold.¹

European law against racism and xenophobia, notably the EU Framework Decision 2008/913/JHA, has established a minimum legal level for incitement based on racial or religious grounds, and denial or gross trivialization of the Holocaust. The EU 2012 Victims Directive has improved protections by requiring member states to place the rights of victims at the heart of the criminal justice response to crime.²

Likewise, the Additional Protocol to the Convention on Cybercrime and the ECtHR judgement in *Delfi AS v Estonia* offer further protections. The former requires signatory states to criminalize online racial and religious incitement and denial of genocide including the Holocaust, and the latter held an Internet news portal responsible for criminally offensive comments published on its platform. Other important judgments by the ECtHR, and in domestic courts, have also strengthened protection against antisemitic incitement and Holocaust denial, including online incitement.³

This article updates the measures noted in my previous article and analyzes recent changes, which taken together now provide greater protection for European Jews. This is not to predict that antisemitism will decline immediately or that anti-Jewish terrorism will cease. But, recognition of the increasing number of incidents and crimes against Jews and Jewish institutions, and terror groups' plots to attack Jews, have spurred the European IGOs and

European governments to translate their former declarations and well-intentioned statements into real action.

Jihadi terrorism targeted against general populations, and Jewish communities in particular, by Islamic State (IS) and Al Qaeda affiliates in Belgium, France and Denmark, stimulated the European Union (EU) and its agencies, the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) to recommend

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1. Michael Whine, *Combating Antisemitic Incitement through the European Courts and Online*, 57 *JUSTICE*, International Association of Jewish Lawyers and Jurists, 2015-2016, available at <http://intjewishlawyers.org/justice/no57/files/assets/basic-html/page-4.html> (last visited April 19, 2017).
 2. Council Framework Decision 2008/913/JHA of 28 Nov. 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, O.J., (L328/55), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF> (last visited April 19, 2017).
Directive 2012/29/EU of the European Parliament and of the Council of 25 Oct, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, O.J., (L315/57), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2012:315:TOC> (last visited April 19, 2017).
 3. Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Council of Europe, Jan. 28, 2003, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008160f> (last visited April 19, 2017).
For a useful summary of cases, including *Delfi AS v Estonia*, see *Hate Speech*, Press Unit, E.C.H.R., (March 2017) available at http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (last visited April 19, 2017).

that member states improve their understanding of contemporary antisemitism and enhance the security of their Jewish communities.⁴

In recalling these new initiatives, I shall proceed chronologically before making an assessment of their potential effectiveness. Other proposals focus on the wider range of racism and hate crimes, but they clearly also benefit Jewish communities.

Chronology of Initiatives

In November 2014, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) convened a conference to review progress ten years after the Berlin High Level Conference on Antisemitism. Participants noted the continuing high levels of antisemitism and growing Jewish concerns.⁵ The conference recommendations were referred to the OSCE Ministerial Council meeting in Basel in December 2014, which proposed to offer member states a set of best practices to combat antisemitism.⁶

A series of consultative meetings was then held in Warsaw at ODIHR, and at the European Parliament in Brussels, which ultimately led to the creation of the "Words into Action" program. Preliminary consultations were held with European police representatives during 2016 to test the strategies and objectives of the program, which is being finalized as this article is being written. These will be presented in mid-2017 in the German parliament in Berlin, because the program is funded by the German government, as well as in Vienna, where the OSCE is headquartered, to diplomatic delegations representing their governments. It is expected that the two-year program will constitute an effective and focused response to antisemitism by proposing practical security, educational and other measures for governments and their law enforcement and security services to adopt.

In March 2015, the newly formed European Parliament Working Group on Antisemitism held a meeting for Members of the European Parliament and European Commission (EC) staff, at which high priority was accorded to the enforcement of existing European mechanisms, and the strengthening of cultural and educational programs that are designed to reduce racism. A second meeting held a month later focussed on the rise in antisemitism within Muslim communities. At the meeting, prominent moderate Muslim campaigners against Islamist extremism noted that they were also engaged in combating antisemitism within their own communities.⁷

The adoption of the Working Definition of Antisemitism by the 31 member states of the International Holocaust Remembrance Alliance (IHRA) in Bucharest in March 2016 will help governments, their law enforcement

agencies and civil society to understand contemporary antisemitism.⁸ The Working Definition was first formulated in 2005 at the request of the European Union Monitoring Centre (EUMC), when some of its monitoring agents indicated that they did not see antisemitism, because it was no longer expressed in medieval-era or Nazi-like tropes. The Working Definition is not a legal definition and it is not designed to replace domestic laws. Rather, it provides guidance on the contemporary nature of antisemitism for police officers and criminal justice agencies, as well as for the human rights community. However, the European Union Agency for Fundamental Rights (FRA), the EUMC successor agency, removed the Working Definition from their website in November 2013, despite protests from Jewish bodies, insisting that it provided an agreed upon and authoritative explanation for antisemitism in the current era. IHRA has since adopted it and now recommends its use alongside its definition of Holocaust denial. These two definitions now provide a set of tools by which to measure contemporary antisemitism and aid analysis and policy formulation. This becomes ever more important as the EC and other European IGOs seek to approximate laws and judicial responses to hate crime.

Annual reports and surveys by FRA indicate that Jewish experiences of antisemitism are substantially under-

4. Reactions to the Paris attacks in the EU: fundamental rights considerations, FRA-European Union Agency for Fundamental Rights, Jan. 2015, available at <http://fra.europa.eu/en/publication/2015/reactions-paris-attacks-eu-fundamental-rights-considerations> (last visited April 19, 2017).
5. 10th Anniversary of the OSCE's Berlin Conference on Anti-Semitism, Final Report, OSCE, 12-13 Nov. 2014, available at <http://www.osce.org/odihhr/136561?download=true> (last visited April 19, 2017).
6. Declaration on Enhancing Efforts to Combat Anti-Semitism, OSCE, Ministerial Council, 2014, MC.DOC/8/14, Dec. 5, 2014, available at <http://www.osce.org/cio/130556?download=true> (last visited April 19, 2017).
7. Antisemitism in Europe, European Parliament Working Group on Antisemitism, 14 April 2015 Statement, available at <http://www.antisem.eu/antisemitism-in-europe/> (last visited April 19, 2017).
8. Working Definition of Antisemitism, International Holocaust Remembrance Alliance, June 26, 2016, available at <https://www.holocaustremembrance.com/media-room/stories/working-definition-antisemitism> (last visited April 19, 2017).

recorded by police and other agencies because they fail to recognize the evolving contemporary manifestations of antisemitism and therefore measure them adequately. The *Survey on Perceptions of Antisemitism* also indicated quite starkly that many European Jews have little confidence that criminal justice agencies are prepared to investigate antisemitic incidents and crimes, or prosecute the culprits (see below).

Spurred by the IHRA decision to define antisemitism, the UK government adopted the Working Definition in December 2016.⁹ The Scottish government later endorsed the decision in March 2017.¹⁰ Shortly after, the UK Secretary of State for Communities and Local Government, Sajid Javid MP, “strongly encouraged” local authorities in England and Wales to adopt the Definition in his letter sent to them on January 30, 2017, and several have done so since.¹¹ The British police had already adopted it in their Hate Crime Operational Guidance sent to all police forces in 2014.¹²

In March 2016, the German Parliament and Foreign Ministry hosted a joint conference with the Inter-parliamentary Coalition for Combating Antisemitism in Berlin, which was addressed by German Chancellor Angela Merkel, EU Vice President Frans Timmermans, UNESCO Director General Irina Bokova, UK Justice Secretary Michael Gove MP and other eminent public figures.¹³

A second inter-parliamentary initiative, by the Parliamentary Assembly of the Council of Europe a month later in April 2016, occurred when Resolution 2106 on “Renewed commitment in the fight against Antisemitism in Europe” was agreed upon.¹⁴ Prior to passing the resolution, a substantial report on antisemitism was published by the Council of Europe Committee on Equality and Non-Discrimination, which in turn was examined by the Council of Europe Committee on Political Affairs and Democracy.¹⁵ This protracted but necessarily thorough process noted *inter alia* that Jewish communities are threatened by violent attacks, that states have an obligation to build trust with Jewish communities, encourage them to report antisemitic attacks and hate crimes, provide police forces with appropriate training, ensure security by cooperating with Jewish communities and their representatives, and that parliamentarians should establish cross-party parliamentary groups to combat antisemitism in their legislatures, etc.¹⁶

In May 2016, the EC signed a Code of Conduct on illegal online hate speech with the major social networks. European states have become increasingly frustrated by the social networks’ policy of allowing almost complete freedom for antisemites and other extremists to publish what they want on the different platforms, often in contravention of European and national domestic laws.

Despite successful prosecutions at the state and European level, it was felt necessary to persuade the main networks to agree upon a code whereby they would remove illegal content, and do so within a specified time limit.¹⁷

The Code owed its genesis to the Best Practices for Responding to Cyberhate declaration, to which the major social networks had signalled assent in 2014, and which

9. Press Release, Government leads the way in tackling antisemitism, UK Gov., Dec. 12, 2016, available at <https://www.gov.uk/government/news/government-leads-the-way-in-tackling-anti-semitism> (last visited April 19, 2017).
10. Response by Angela Constance MSP, Cabinet Secretary for Communities, Social Security and Equalities, Scottish Parliament, March 2, 2017, available at <http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5W-07668> (last visited April 19, 2017).
11. Adoption of the IHRA working definition of antisemitism, Letter to Local Authority Leaders from the Rt. Hon Sajid Javid MP, Secretary of State for Communities and Local Government, Jan. 30, 2017, available at <http://www2.guildford.gov.uk/councilmeetings/mgConvert2PDF.aspx?ID=7358> (last visited May 8, 2017).
12. Hate Crime Operational Guidance, College of Policing, Coventry, at 36- 38, available at <http://library.college.police.uk/docs/college-of-policing/Hate-Crime-Operational-Guidance.pdf> (last visited April 19, 2017).
13. Landmark German Parliamentary Conference, March 13-15, 2016, Inter-parliamentary Coalition for Combating Antisemitism, available at <https://www.facebook.com/Inter-parliamentary-Coalition-for-Combating-Antisemitism-ICCA-363913460650/> (last visited May 8, 2017).
14. Eur. Parl. Ass., Renewed commitment in the fight against antisemitism in Europe, Resolution 2106, 20 April 2016, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22716&lang=en> (last visited April 19, 2017).
15. Eur. Parl. Ass., Renewed commitment in the fight against antisemitism in Europe, Report, Committee on Equality and Discrimination, Doc. 14008, Parliamentary Assembly Council of Europe, 31 March 2016, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22576&lang=en> (last visited July 12, 2017).
16. Eur. Parl. Ass., Renewed commitment in the fight against antisemitism in Europe, Doc.14023, Committee Opinion, Committee on Political Affairs and Democracy, April 19, 2016, available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=22599&lang=en>.
17. European Commission, Code of Conduct on Countering Illegal Hate Speech Online, May 2016, available at http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf (last visited April 19, 2017).

was noted in my previous article in Justice. The earlier document, however, had little public impact and its provisions were not binding on the social networks, although it had for the first time brought them together to discuss the mounting concerns of Jewish groups and others who joined in later meetings, including legal, academic, Muslim and womens' groups.¹⁸

The EC Code of Conduct, however, has a built-in monitoring mechanism, whereby expert civil society organizations, including my own, Community Security Trust, at a meeting in February 2017, were tasked with recording the speed and effectiveness with which Facebook, Google and Twitter remove material containing criminal content.¹⁹ The processes are transparent and the conclusions are publicized. They include that, overall, only 28.2% of notifications by selected civil society groups of criminal content were removed by the three main social networks: 28.3% of cases by Facebook, 19.9% by Twitter and 48.5% by Youtube, and that 40% of criminal content was removed in less than 24 hours after notification (as agreed), but that 43% took up to 48 hours to remove.²⁰ A second monitoring round started as this article is being written, and therefore, it is too early to say if the social networks' performance has improved at this stage in the monitoring process.

In June 2016, efforts to combat antisemitism picked up further momentum when the European Union High Level Group on Combating Racism, Xenophobia and Other Forms of Intolerance was launched in Brussels. This new initiative was designed to exchange and disseminate best practices between national authorities. It was followed six months later by a second meeting that reviewed progress, and in turn identified the need to improve hate crime standards and practices for law enforcement agencies, to better implement existing legislation and provide better protection for victims of hate crime.²¹ The High Level Group has spawned other initiatives. One is an expert sub-group focused on methodologies for recording and collecting data on hate crime, organized by FRA in cooperation with the EC.²²

Another initiative is the thematic discussion on hate crime training, which led to the publication in February 2017 of ten guiding principles that member states are encouraged to implement after recognition that more than half of EU member states provide some form of hate crime training for law enforcement and other criminal justice agencies, and that best practices could be identified.²³ At the same time, it published a review of existing resources available to support such training.²⁴

The European Union Agency for Law Enforcement Training (CEPOL), formerly the European Police Agency, has been given new strategic direction after its 2014

transfer to Budapest from Bramshill. The former UK Police Staff College was tasked with creating new training programs on hate crime. They include an online module and a "train the trainers" Hate Crime Certified Training

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18. Best Practices for Responding to Cyberhate, Anti-Defamation League, available at <http://www.adl.org/combating-hate/cyber-safety/best-practices/#.WKr9wekae74> (last visited April 20, 2017).
 19. First meeting of countering hate speech online subgroup, FRA, Oct. 12, 2016, available at <http://fra.europa.eu/en/news/2016-first-meeting-countering-hate-speech-online-subgroup> (last visited April 20, 2017).
 20. European Commission Code of Conduct on countering illegal hate speech online: First results on implementation, Dec. 2016, available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiLgc6m24jTAhWKL8AKHXHYDLMQFggAMA&uI=http%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc_id%3D40573&usq=AFQjCNEL6trtMzPJWNOh316C243-bLooTg&sig2=QoqquKfmhENMUR0Dh3V2tA&bvm=bv.151325232,d.bGg (last visited April 20, 2017).
 21. A EU High Level Group on combating racism, xenophobia and other forms of intolerance, European Commission, Feb. 27, 2017, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51025. (last visited April 20, 2017). European Commission, Minutes of the second meeting of the EU High Level Group on combating racism, xenophobia and other forms of intolerance, Dec. 7, 2016, available at <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=29734&no=1> (last visited April 20, 2017).
 22. Subgroup on methodologies for recording and collecting data on hate crime, FRA, Oct. 2016, available at <http://fra.europa.eu/en/project/2017/subgroup-methodologies-recording-and-collecting-data-hate-crime> (last visited April 20, 2017).
 23. European Commission, Hate Crime Training for Law Enforcement and Criminal Justice Authorities: 10 Key Guiding Principles, Feb. 2017, available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjyY-Myf7SAhVBKMAKHZe8ChEQFgghMAA&url=http%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc_id%3D43050&usq=AFQjCNEHJF1C00RfX7y-vTLA3mvH3zUFiQ&sig2=dJjOzST2kTdzHufr1ziBIA&bvm=bv.151325232,d.d24 (last visited April 20, 2017).

Program that aims to establish higher common standards for European police officers and prosecutors who investigate hate crime, including antisemitism. The program was constructed during 2016 as an offering to police forces and prosecution agencies within the 2017-2019 Work Program.²⁵

Although the European Union Agency for Fundamental Rights (FRA) has published its authoritative annual report on antisemitism since 2005, it was the FRA Survey on “Discrimination and hate crime against Jews in EU Member States: experiences and perception of antisemitism” that may finally have persuaded governments that their understanding of antisemitism, if they had any, was inaccurate or outdated. Large scale polling of Jews in eight EU member states demonstrated that Jews are unwilling to report antisemitic incidents because they believed that criminal justice agencies were unable or unwilling to investigate or prosecute the perpetrators, and that consequently, substantial numbers in the worst affected states were contemplating emigration.²⁶

Dispiritingly, the latest annual report, published in November 2016, notes that twelve years “after the first report on the manifestation of antisemitism in the EU, there is little progress to report with regard to data collection on antisemitism in the EU.”²⁷

However, the Survey is to be repeated and in March 2017, FRA hosted a stakeholders and academics meeting to set the research parameters for the second Survey to be conducted during 2018.²⁸

At the wider European level, and following consultation with a small group of European experts, the Council of Europe Commissioner for Human Rights, Nils Muižnieks, in October 2016, issued a public statement warning against Holocaust denial, minimization and trivialization. In it, he noted that denial and associated activities were on the rise, and that despite strong international and European sanctions, states were failing to prosecute such crimes. He further noted that their own populations had played an active role in the persecution and mass murder of Jews and that some states were attempting to relativize the crimes committed by their own collaborationist wartime regimes. In doing so, he noted that remembrance lies at the heart of the Council of Europe, which existed to remember the crimes of the Nazi era. Member states ignored the evidence of rising antisemitism and Holocaust denial at their peril. European states should encourage Internet media providers and social media to take action to prevent and combat hate speech, accede to the 2003 Additional Protocol to the Convention on Cybercrime and recall that they are bound to sanction racist hatred and violence under the terms of Article 4 of the

International Convention on the Elimination of all Forms of Discrimination, and are required by the 2008 EU Framework Decision to criminalize Holocaust denial.²⁹

The final initiative worth recording is that of the European Commission against Racism and Intolerance (ECRI), a human rights agency of the Council of Europe. The Commission advises member states in matters relating to combating racism, xenophobia and antisemitism by

24. European Commission, Overview of resources and initiatives to support hate crime training programs in the EU Member States, Feb. 2017, available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj8OqwyP75AhXKJMAKHZKyDsQQFggaMAA&url=http%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc_id%3D43147&usq=AFQjCNG49CC6Ymk7RS4LpD6mV-g6XMAHmQ&sig2=uPGdPrCJIUE-rEj9MPzrPQ&bvm=bv.151325232,d.d24 (last visited April 20, 2017).

25. CEPOL – Single Programming Document: Years 2017-2019, at 2427, European Union Agency for Law Enforcement Training, Nov. 2015, available at <https://www.cepol.europa.eu/sites/default/files/31-2015-GB.pdf> (last visited April 20, 2017).

It should also be noted that the author is part of a small team creating the training programs.

26. Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism, FRA, 2013, available at <http://fra.europa.eu/en/publication/2013/discrimination-and-hate-crime-against-jews-eu-member-states-experiences-and> (last visited May 8, 2017).

27. Antisemitism – Overview of data available in the European Union 2005-2015, FRA-European Union Agency for Fundamental Rights, at 5, Nov. 2016, available at http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-antisemitism-update-2005-2015_en.pdf (last visited April 20, 2017).

28. Stakeholders discuss FRA’s second antisemitism survey, FRA, March 2017, available at <http://fra.europa.eu/en/event/2017/stakeholders-discuss-fras-second-antisemitism-survey> (last visited April 20, 2017).

29. Nils Muižnieks, Why remembering the Holocaust is a human rights imperative, Council of Europe, Oct. 18, 2016, available at http://www.coe.int/de/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/why-remembering-the-holocaust-is-a-human-rights-imperative/pop_up?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB (last visited April 20, 2017).

publishing five yearly country reports, policy guidance notes on related general themes, convening regular meetings with "specialized human rights bodies" (i.e. national human rights commissions and Ombudsman's offices) and "round table" meetings with civil society organizations. During 2016, ECRI revised its 2004 General Policy Recommendation No. 9 on The Fight Against Antisemitism, as part of a project to publish attractively produced, short versions of its lengthy general policy recommendations to governments, and to disseminate them to the media and civil society. Previously, they tended to be seen only by member states and other IGOs. The publication on antisemitism is to be disseminated, as part of a series of shortened general policy recommendations, during 2017.³⁰

In parallel to these activities, European Jewish institutions have also established new response mechanisms to rising tensions and threats. The European Jewish Congress Security and Crisis Centre, which opened in Vienna during the course of 2016, offers advice and training on managing crises, and the World Jewish Congress created a similar institution for communities elsewhere.³¹

A two-day conference on crisis management and community resilience-building was held in Barcelona in November 2016 for European Jewish leaders organized by the European Council of Jewish Communities, in partnership with the American Jewish Joint Distribution Committee, at which community leaders were coached on leading their communities during crises.³²

Conclusion

The European IGOs' understanding of the evolving nature of antisemitism has been developing since 2003, when the OSCE held its first High Level Meeting on Antisemitism in Vienna. At that time, the international community was disinclined to label the meeting a full conference, for fear of singling out antisemitism among other forms of intolerance, and suggesting that any hierarchy existed. This has never been the argument advanced by Jewish organizations. What they have argued for is the singularity of antisemitism, due to its longevity, evolving nature from religious to racial and finally, to political hatred, culminating in genocide, which warrants particular attention and remedies.

The antisemitic core at the heart of Islamism and jihadi terror, which has led to IS and Al Qaeda attacks against Jews, has added weight to Jewish claims, and is finally receiving the particular attention it deserves. The IGOs and European governments now appear to recognize their responsibilities towards their Jewish citizens, and are pledged to improving their protection. Of course, the threats arise at a time when racist violence has risen as a consequence of other factors, including economic, political

and populist reactions to economic distress and large scale migration to Europe from the Middle East, Asia and Africa.

Now for the first time, commitments to take coordinated and effective action are being given some meaning, with the recognition that Jewish communities require extra attention. European leaders have also been worried that Jews no longer trust European or national institutions to understand or deal professionally with the threats that confront them, or that states are capable of overcoming their political reservations and inertia to take effective counter action against antisemitism. But the threat of thousands of Jews leaving states which are pledged to guarantee human rights and uphold basic freedom, strikes at the heart of post-war Europe and undermines many of the lessons that might have been learned from the Holocaust.

The Words into Action program refocused hate crime training for EU police officers and prosecutors and the disciplinary measures agreed upon with the social networks by EU Code of Conduct indicate the seriousness with which European policy makers now view threats to Jewish life. They see that these are also threats to everyone, undermine European cohesion and security and risk undoing the positive gains made since 1945.

It remains to be seen whether states pursue these new initiatives with appropriate commitment and funding, at a time when Europe faces political and economic challenges that threaten the very nature of Europe. The prospects now however appear to be better than they were previously. ■

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30. Council of Europe General Policy Recommendation No.9, ECRI, 2004, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/Rec.09%20en.pdf (last visited April 20, 2017).

31. SACC by EJC opens its first office in Vienna to meet European Jewish community's security challenges, European Jewish Congress, Sept. 26, 2016, available at <http://www.eurojewcong.org/EJC%20In%20Action/15627-sacc-by-ejc-opens-its-first-office-in-vienna-to-meet-european-jewish-communitys-security-challenges.html> (last visited April 20, 2017).

32. Building Resilient Communities, European Council of Jewish Communities, available at <http://www.ecjc.org/building-resilient-communities> (last visited April 20, 2017).

Media Regulation in the UK

Jonathan Turner

Should there be regulation of the media? If so, what, how and by whom? Should the media regulate itself, so as to be independent of any state intervention? Or is self-regulation likely to be insufficiently rigorous and objective?

Should there be a free marketplace of information and ideas, in which truth will emerge from competition? If so, how can distortion of the competition by deception or by subsidy, private or public, be prevented?

And should some media be financed by public revenue to set a high standard, or to avoid discontinuity? Or is this undesirable in economic terms and incompatible with full independence of the media?

The UK has not developed a consistent answer to these difficult questions. Several different regimes are in force for different media or organizations. But one common factor is that they have rarely been invoked successfully against biased or inaccurate coverage of Israel. This article describes the main regimes and considers possible reasons why they have been ineffective to secure true and fair coverage in this area.

The BBC

The UK's most influential media organization is the BBC, the largest broadcaster in the world. Since the 1920s, it has been financed primarily¹ from revenue raised by requiring all those using equipment in the UK to receive broadcasts by any broadcaster to pay for a license. In the 1920s, this may have been an effective way of developing a fledgling industry, but it has been retained ever since, despite the introduction of competition by services financed by advertising and more recently, by subscription. The discontinuity that would be occasioned by requiring the BBC to be financed by its own subscribers has apparently been regarded as insurmountable. This puts the BBC in a privileged position, which has until recently been regarded as justifying a special system of regulation.

As matters stand,² the BBC has legal obligations to do "all it can to ensure that controversial subjects are treated with due accuracy and impartiality in all relevant output."³ "Relevant output" is defined as "the output of any UK Public Service which (a) consists of news, or (b) deals with matters of public policy or of political or industrial controversy."⁴

"UK Public Services" are defined as all services provided by the BBC except commercial services, BBC Monitoring,⁵

the World Service, special services requested by government departments, and services aimed primarily at users outside the UK.⁶ However, the BBC World Service is required to "maintain high standards of editorial integrity and program content and quality, including observing any particular content standards applicable to the UK Public Services, to the extent that the [BBC] Trust considers those standards relevant to the circumstances of the World Service."⁷ These content standards include due accuracy and impartiality, and the BBC Trust considers them fully applicable to the World Service.⁸

In addition, the UK public services "must not contain any output which expresses the opinion of the BBC or its Trust or Executive Board on current affairs or matters of public policy other than broadcasting or the provision of online services."⁹ The BBC interprets this requirement narrowly as applying only to the formal positions of the

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1. For a considerable period until fairly recently, foreign services of the BBC were funded separately by a grant from the British Foreign Office.
 2. At the time of preparation of this article in November 2016.
 3. An Agreement between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, July 2006 (as amended) ("BBC Agreement") §44(1), available at downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf (last visited Feb.17, 2017).
 4. BBC Agreement, *supra* note 3, §44(8).
 5. BBC Monitoring is an operation that monitors and translates other media around the world, BBC, available at <http://www.bbc.co.uk/monitoring/about-us> (last visited Feb., 17, 2017).
 6. BBC Agreement, *supra* note 3, §100.
 7. BBC Agreement, *supra* note 3, §64(10).
 8. Operating Licence: BBC World Service, Jan. 2014, §§4.1, 4.2, available at downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/other_activities/wsol/operating_licence.pdf (last visited Feb. 17, 2017).
 9. BBC Agreement, *supra* note 3, §44(3). So the BBC can broadcast its opinion as to e.g. the level of the licence fee, but not as to e.g. what should be agreed between Israel and the Palestinians.

BBC as a corporate body, but the wording¹⁰ may support the argument that it extends to institutional opinions of the BBC.

The BBC's UK public broadcasting services must also comply with the Broadcasting Code of the Office of Communications (Ofcom).¹¹ This covers unjust or unfair treatment, unwarranted invasion of privacy, protection of persons under the age of eighteen, material likely to encourage or incite any crime or disorder, religious programs, offensive and harmful material, and subliminal messaging. However, as matters stand, the BBC is not required to comply with the Broadcasting Code to the extent that it concerns accuracy or impartiality.¹²

The BBC Trust is required to provide a code giving guidance as to the rules to be observed in connection the BBC's obligations of accuracy and impartiality, and to do all it can to secure that this code is observed.¹³ This code is contained in chapters 3 and 4 of the BBC's Editorial Guidelines.¹⁴ Other chapters of the Editorial Guidelines address matters covered by the Ofcom Broadcasting Code and general legal obligations such as defamation law. The Editorial Guidelines contain a large number of overlapping and often conflicting requirements, but are regarded by the BBC as a definitive code.

The BBC Trust is also required to establish frameworks for handling complaints which "must ensure that all appeals that raise matters of substance are subject to a right of appeal to the Trust."¹⁵ The procedures must "so far as practicable ... place a complainant on an equal footing with the BBC" and "give detailing information on how complainants can expect to be treated (including, for example, in terms of timescales)."

Despite the exemplary terms of these provisions, in practice, those complaining about the BBC's coverage of Israel have faced massive obfuscation and delay. Those handling complainants at the BBC appear to have regarded it as their job to find ingenious ways of rejecting or avoiding decisions on complaints, rather than examining them promptly, objectively and fairly. Evidence given to the British government's recent review of the BBC's regulation revealed a catalogue of misconduct in the handling of complaints.¹⁶

Examples

In one case (which concerned a straightforward issue of how a report would be understood by the audience), the timetable went as follows:¹⁷ the Stage 1A response¹⁸ to the complaint took 65 working days, against the target of ten days. The Stage 1B response was not forthcoming until the complainant wrote to the Director of News to inquire why there was no reply to his letter. The complainant eventually received it approximately 250

working days after his submission, in contrast to the target of 20-35 working days.

The BBC's Editorial Complaints Unit (ECU) sent an undated provisional finding to the complainant, indicating an intention to uphold the complaint in part, approximately 60 working days after he asked them to investigate. This was about twenty working days later than he had been advised he could expect to receive a response. Three months later, having received no further notification, the complainant wrote to the ECU to inquire about the final outcome of his complaint. The Head of the ECU responded promptly, stating that he would respond fully within a week.

Two weeks later, the Head of the ECU wrote again to the complainant saying he should not have received the undated provisional finding he was previously sent, explaining: "What seems to have happened is that a draft of my provisional finding which was intended for internal consultation was sent to you in error. I should explain that the procedure, when we are minded to uphold any aspect of a complaint, is to allow a period for the BBC

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10. In particular, the words "or its Trust or Executive Board" indicate that the BBC is viewed as an institution separate from its governing bodies.
 11. The OFCOM Broadcasting Code, May 2016, available at stakeholders.ofcom.org.uk/binaries/broadcast/code-may16/Ofcom_Broadcast_Code_May_2016.pdf (last visited Feb. 17, 2017).
 12. BBC Agreement, *supra* note 3, §§45, 46.
 13. BBC Agreement, *supra* note 3, §44(5). In fact, the Trust delegated the drawing up of the Editorial Guidelines to the BBC Executive, subject to the Trust's Approval: see BBC protocol B2 – Editorial standards §A1.1. This delegation is of questionable legitimacy, but difficult in practice to challenge.
 14. Editorial Guidelines, BBC, available at <http://www.bbc.co.uk/editorialguidelines/guidelines> (last visited Feb. 17, 2017).
 15. BBC Agreement, *supra* note 3, §89.
 16. BBC Watch, available at <https://bbcwatch.org/2016-bbc-charter-review/uklfi-submission-to-bbc-charter-review/> (last visited Feb. 17, 2017).
 17. Editorial Standards Findings: Appeals to the Trust and other editorial issues considered by the Editorial Standards Committee, Jan. 9, 2014, available at downloads.bbc.co.uk/bbctrust/assets/files/pdf/appeals/esc_bulletins/2014/jan.pdf (last visited Feb. 17, 2017).
 18. The procedure is characterized by a large and increasing number of stages.

Division responsible for the item complained of to make any representations”

The Head of the ECU went on to say that he had received representations from the BBC’s Jerusalem Bureau and the BBC correspondent, which had caused him to change his initial view that the item had been misleading in one respect. He was now not intending to uphold the complaint.

The substantive Stage 2 finding was eventually issued six months after the complainant had first written to the ECU and almost two years after he had initially lodged the complaint. The complainant challenged this finding within the timescale he had been provided. He heard nothing, and five months later wrote to the ECU inquiring what had happened.

The Head of the ECU responded: “I must apologize profusely for my long silence. An office move in July caused some disruption, and it appears that our correspondence was one of the casualties of it. I have now retrieved the papers, and am reviewing the issues and arguments afresh.”

The Head of the ECU wrote again to the complainant nearly four weeks later advising that he remained of the view that the complaint should not be upheld. He again apologized for the delays that had beset the process.

Eventually and exceptionally, the Editorial Standards Committee of the BBC Trust (ESC) upheld the complaint some five months later,¹⁹ finding that the report was not duly accurate and was not duly impartial. They also upheld a complaint of undue delay in the handling of the complaint. However, it appears that no correction of the original report was ever made.

In another case,²⁰ a BBC television news report by Orla Guerin during the Protective Edge operation in 2015, opened with the words: “Israel’s big guns, pounding Gaza again today. Israel calls this Operation Protective Edge, but this massive assault has now killed more than 1,300 Palestinians – the vast majority of them civilians.”

This theme was constantly repeated in the BBC’s coverage of the operation and was a major reason for the highest-ever recorded number of antisemitic incidents in the UK during this period.²¹

The complainant pointed out that it was not accurate and impartial to say that the vast majority of Palestinian casualties were civilians, when there was substantial evidence that nearly half of them were terrorists.²² The BBC rejected the complaint and the ESC refused to consider an appeal, on the ground that it had no reasonable prospect of success.

The ESC “agreed that the adjective ‘vast’ had not been an appropriate adjective to use” but “judged that the difference between ‘substantial’ and ‘vast’ in this context was not so significant as to amount to a material inaccuracy

19. In accordance with its standard procedure, the decision was reached at an earlier meeting of the Editorial Standards Committee of the BBC Trust, but there was a further delay before it was written up, finally approved and published.
20. Editorial Standards Findings: Appeals to the Trust and other editorial issues considered by the Editorial Standards Committee March, June & July 2015, 58, available at downloads.bbc.co.uk/bbctrust/assets/files/pdf/appeals/esc_bulletins/2015/june_july.pdf (last visited Feb.17, 2017).
21. Report of the All-Party Parliamentary Inquiry into Antisemitism, Feb. 2015, §151 available at http://www.antisemitism.org.uk/wp-content/themes/PCAA/images/4189_PCAA_Antisemitism%20Report_spreads_v9%20REPRO-DPS_FOR%20WEB_v3.pdf (last visited Feb. 17, 2017).
22. See Annex to The 2014 Gaza Conflict – Factual and Legal Aspects, May 2015, Israel Ministry of Foreign Affairs, available at <http://mfa.gov.il/ProtectiveEdge/Documents/PalestinianFatalities.pdf> (last visited Feb. 17, 2017); Jodi Rudoren *Civilian or Not? New Fight in Tallying the Dead from the Gaza Conflict*, N. Y. TIMES, Aug. 5, 2014 available at http://www.nytimes.com/2014/08/06/world/middleeast/civilian-or-not-new-fight-in-tallying-the-dead-from-the-gaza-conflict.html?_r=0 (last visited Feb. 17, 2017); Reporting of Casualties in Gaza, CAMERA, July 13, 2014, available at http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=2762 (last visited Feb. 17, 2017); Anthony Reuben, Caution needed with Gaza casualty figures, BBC, Aug. 11, 2014, available at <http://www.bbc.co.uk/news/world-middle-east-28688179> (last visited Feb. 17, 2017); Lenny Ben-David, *Gazan Casualties: How Many and Who They Were*, Jerusalem Center for Public Affairs, 2015 available at <http://jcpa.org/casualties-gaza-war/#sthash.KvyEUG6n.dpuf> (last visited Feb. 17, 2017); Additional findings in the examination of the names of Palestinians killed in Operation Protective Edge – Part Eight, Meir Amit Intelligence and Terrorism Information Center, Dec. 29, 2014, available at http://www.terrorism-info.org.il/Data/articles/Art_20753/E_200_14_172393803.pdf (last visited Feb. 17, 2017); <http://www.bbc.com/news/world-middle-east-28688179>; org/2014/07/13/bbc-watch-uncovers-the-sources-of-jeremy-bowens-cited-casualty-figures/ (last visited Feb. 17, 2017); Hamas Interior Ministry to Social Media Activists: Always Call the Dead 'Innocent Civilians,' Don't Post Photos of Rockets Being Fired from Civilian Population Centers, The Middle East Media Research Institute (MEMRI) Special Dispatch No. 5799, available at <http://www.memri.org/report/en/0/0/0/0/0/8076.htm> (last visited Feb. 17, 2017); War of the Casualties, Meir Amit Intelligence and Terrorism Information Center, Aug. 6, 2014. http://www.terrorism-info.org.il/data/articles/Art_20698/E_140_14_976270999.pdf (last visited Feb. 17, 2017).

and it was therefore duly accurate.” This conclusion seems difficult to reconcile with the Editorial Guidelines which state that “all BBC output ... must be based on sound evidence, thoroughly tested and presented in clear, precise language.”²³

Judicial Review

In principle, a dissatisfied complainant can apply for judicial review after exhausting the BBC’s complaints’ procedures. However, (a) this has usually taken upwards of two years and a multiplicity of steps; (b) a complainant must show error of law, irrationality, abuse of power or procedural impropriety, and the height of these hurdles is increased by the general respect held for the BBC; (c) the application has to be brought in England within three months of the final decision, save in exceptional circumstances;²⁴ and (d) the legal costs are indeterminate and can be very high if the claim fails, since the applicant will normally be ordered to pay the BBC’s costs. In these circumstances, it seems that no pro-Israel benefactor has been persuaded to put up the funds required to take on the BBC.

Forthcoming Changes

Following the recent review, the government accepted that the BBC complaints system is unsatisfactory and decided to change it so that (a) “In the first instance the BBC will handle the complaint. Where a complainant is unsatisfied with the response, or where the BBC fails to respond in a timely manner, the complainant will then be able to complain to Ofcom”; and (b) “Ofcom will be able to consider complaints about all BBC content, including accuracy and impartiality in BBC programmes.”²⁵

Unfortunately, the proposed new BBC Framework Agreement²⁶ fails to give effect to the government’s expressed intention in two important respects. In the first place, according to the current draft, a complainant will not be entitled to complain to Ofcom on the ground that the BBC has failed to respond in a timely manner, unless the BBC has failed to comply with the time limits indicated in its own procedures.²⁷ On past form, these will be insufficiently clear or specific to secure a timely response.

Secondly, under the current draft, Ofcom will not consider complaints of inaccuracy in content other than news, for example, documentaries.²⁸ This is in line with Ofcom’s powers in relation to other broadcasters (discussed below), but it is a significant gap in the regulatory scheme, which is particularly serious in relation to the BBC, in view of its privileged position. If this draft is adopted, it will mean a significant reduction of the BBC’s current obligations regarding content, inconsistent with the government’s intention expressed in the White Paper.

In addition, the requirements of accuracy and impartiality will cease to be direct legal obligations of the BBC. Requirements will only be enforceable by the courts indirectly by judicial review if there is an error of law, irrationality, abuse of power or procedural impropriety on the part of Ofcom on a complaint of lack of due accuracy (in news) or lack of due impartiality (in news and some other content).

Other Broadcasters

Other broadcasters are required to observe the provisions of the Ofcom Broadcasting Code²⁹ established under sections 319-320 of the Communications Act 2003,³⁰ and Ofcom is responsible for examining compliance and complaints.

In accordance with the 2003 Act, the Code specifies that news in television and radio services must be presented with due accuracy and due impartiality.³¹ The Code adds that “significant mistakes in news should normally be acknowledged and corrected on air quickly. Corrections should be appropriately scheduled.”³²

In addition, due impartiality on the part of the broadcaster must be preserved in respect to matters of

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23. *Supra* note 14, §3.2.2. As noted above, the BBC Trust is required to do all it can to secure that this code is complied with.
 24. In Scotland, there is no specific time limit but the application must be brought without undue delay.
 25. U.K. Department for Culture Media & Sport, A BBC for the future: a broadcaster of distinction, May 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524864/DCMS_A_BBC_for_the_future_rev1.pdf (last visited Feb. 17, 2017).
 26. Draft BBC Charter and Draft Framework agreement, U.K. Department of Culture, Media and Sport, Sep. 15, 2016, available at <https://www.gov.uk/government/publications/draft-bbc-charter-and-draft-framework-agreement> (last visited Feb. 21, 2017).
 27. *Id.* §57(1)(a)(iii).
 28. *Supra* note 26, §49; draft Framework Agreement §59 Schedule 3 §§2-3, Communications Act 2003, secs. 319-320.
 29. The Ofcom Broadcasting Code, Ofcom, May 9, 2016, available at <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code> (last visited Feb. 21, 2017).
 30. Available at <http://www.legislation.gov.uk/ukpga/2003/21/contents> (last visited Mar. 5, 2017).
 31. Communications Act 2003, *supra* note 30, sec. 319(2)(c) and (d).
 32. Ofcom Broadcasting Code, *supra* note 29, §5.2.

political or industrial controversy or relating to current public policy. Expressions of the broadcaster's views on these matters (except the provision of program services) must be excluded.³³ However in the case of local radio services provided by broadcasters other than the BBC, the requirement of due impartiality is replaced by a requirement not to give undue prominence to the views of particular persons or bodies on these matters.³⁴

As noted above, under the Ofcom Code, the requirement of due accuracy does not extend to content other than news, even if it concerns a matter of political controversy.

Ofcom's procedures do not in general suffer from delays and obfuscation similar to the BBC's. They have not been invoked as intensively as the BBC's in relation to coverage of Israel, but where there have been complaints of anti-Israel bias, Ofcom has generally rejected them, favoring what it sees as freedom of speech. A striking example was Channel 4's documentary, "Dispatches": Inside Britain's Israel Lobby,³⁵ where an obvious lack of impartiality with regard to Israel was brushed aside on the grounds that the program was not about Israel, but about Britain's Israel lobby.³⁶

Newspapers and Magazines

Newspapers and magazines used to be self-regulated in the UK by the Press Complaints Commission (PCC) by reference to requirements set out in the Editors' Code of Practice.³⁷ The PCC consisted of representatives of the major publishers and was found to be insufficiently robust in many cases. Inaction or ineffective action in response to a series of scandals, unrelated to Israel, in particular concerning the interception of telephone calls and messages, led to an inquiry chaired by Lord Justice Leveson, which recommended that the PCC be replaced by an independent body.

Following this recommendation, the PCC has been wound up but it has not been replaced by a comprehensive alternative. Government proposals were fiercely opposed by publishers and the government decided to offer inducements to encourage independent regulation instead of compelling it. However, the publishers have declined to participate within the framework offered by the government and have set up their own arrangements.

The main successor to the PCC is the Independent Press Standards Organisation (IPSO). Its participants include a considerable number of local newspapers, and most of the national newspapers, but not *The Guardian*, *The Observer*, *the Independent* or *the Financial Times*. IPSO continues to apply the Editors' Code of Practice, which basically requires accuracy, but not impartiality. More specifically, it says:

1. i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.

ii) A significant inaccuracy, misleading statement or distortion, once recognised must be corrected, promptly and with due prominence, and—where appropriate—an apology published. In cases involving the Regulator, prominence should be agreed with the Regulator in advance.

iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

2. A fair opportunity for reply to inaccuracies must be given when reasonably called for.

The Financial Times accepts the Editors' Code of Practice but does not participate in IPSO; it has appointed its own Complaints Commissioner to determine complaints of non-compliance.

The Guardian and *The Observer* also accept the Editors' Code as "a sound statement of ethical behavior for journalists" and have appointed a "Reader's Editor" to consider complaints. A complainant can appeal to a review panel appointed by the publisher.

The Independent has its own code of practice which states, "It is our primary endeavour to publish information that is accurate and will not mislead readers. You must take care not to distort information either by disingenuous phrasing or by omission." It is possible to complain about the content, but there does not appear to be any separate panel to review complaints.

Defamation

In contrast to the disparate systems of regulation outlined above, the law of defamation applies to all media.

33. Communications Act 2003, *supra* note 30, secs. 320(1)-(3).

34. Communications Act 2003, *supra* note 30, sec. 320(1)(c).

35. Dispatches: Inside Britain's Israel Lobby, available at <https://www.youtube.com/watch?v=0E70BwA7xgU> (last visited Feb. 21, 2017).

36. Dispatches: Inside Britain's Israel Lobby, 154 OFCOM Broadcast Bulletin, March 22, 2010, 17, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0022/46534/issue154.pdf (last visited Feb. 21, 2017).

37. Editors' Code of Practice, IPSO, available at <https://www.ipso.co.uk/editors-code-of-practice/> (last visited Feb. 21, 2017).

However, English defamation law³⁸ does not protect nations, states or public authorities.³⁹ Individuals and businesses are in principle protected. However, with the notable exception of Ariel Sharon (who brought a case against *Time* magazine in New York⁴⁰ as well as Israel), it appears that Israeli politicians have not pursued defamation claims outside Israel.

English defamation law was considered too generous to claimants, and significant changes were made to address this in the Defamation Act 2013.⁴¹ Section 1 of this Act provides that “a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.” Furthermore, for this purpose “harm to the reputation of a body that trades for profit is not ‘serious harm’ unless it has caused or is likely to cause the body serious financial loss.” However, it does not appear that there is any requirement that the serious harm to the claimant’s reputation must occur in England and Wales.⁴²

Coverage of Israel

The question remains: why have the systems of regulation of the media in the UK not been more effective in securing more accurate and impartial coverage of Israel? One possible answer is that the systems of self-regulation of the BBC and of newspapers have generally lacked robustness and objectivity because they have not had the security and distance provided by independence; while the independent regulation of other broadcasters by Ofcom has been insufficiently used and tested.

This theory would appear to be supported by data on complaints about the BBC obtained by a freedom of information request. Nearly 1.2 million formal complaints were made in the five years down to the end of financial year 2012/2013. Data was not kept on the number of complaints upheld in the initial stage, but anecdotal evidence is that very few are upheld at this stage. During the same period, 166 complaints (0.014% of the total) were upheld on appeal to the BBC Executive’s Editorial Complaints Unit and a further 30 were upheld by the BBC Trust (0.0025%). This does not look like a system that places “a complainant on an equal footing with the BBC” as required by the BBC Agreement.

A second problem is that complaints are liable to be assessed by reference to the same material that led to the inaccuracy or distortion in the first place, such as reports of UN bodies and NGOs. Regulators are inclined to take the view that a broadcaster is justified in relying on an official UN document or a report of a highly reputed NGO such as Amnesty International, even though this material is often based on highly suspect information supplied by persons acting for or under the control of terrorists, who

believe that their goals justify the use of false propaganda.

Thirdly, free speech is generally favored and regulators seem to have accepted the fallacy that upholding a complaint of lack of due accuracy or impartiality is an interference with free speech. This is not correct where there is no prior restraint and no penalty; it is then merely an adjudication regarding the accuracy and impartiality of the content that was published. Regulators have also failed to appreciate the particular need for such adjudications where a nation, state or public body is defamed, since its reputation cannot be protected by a claim for defamation.

Fourthly, it is possible that a preponderance of the individuals who determine complaints under these regimes have a “soft-left” political outlook in which they tend to see Zionism as an expansionist, settlement-colonialist enterprise, rather than the national liberation movement of the Jewish people. ■

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Since the completion of this article, on November 29, 2016, the new BBC Charter and Agreement have been finalized and came into effect on April 3, 2017; see http://www.bbc.co.uk/bbctrust/governance/regulatory_framework/charter_agreement.html (last visited May 9, 2017). In addition to the deficiencies indicated in the article, Ofcom will not have jurisdiction to consider complaints in respect of the BBC website, world service or commercial services.

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38. Scotland and Northern Ireland have separate defamation laws. For a summary of the differences between Scots law and English law, see the Note by Brodies LLP available at <http://www.brodies.com/node/4120> (last visited Mar. 5, 2017). As to the law of Northern Ireland and proposals for reform, see Dr. Andrew Scott, *Reform of Defamation Law in Northern Ireland*, Department of Law, London School of Economics and Political Science, June 2016, available at <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/report-on-defamation-law.pdf> (last visited Mar. 5, 2017).
39. *Derbyshire County Council v. Times Newspapers* [1993] AC 534.
40. *Behind the Sharon Verdict*, L.A. TIMES, Jan. 27, 1985, available at http://articles.latimes.com/1985-01-27/opinion/op-9876_1_ariel-sharon (last visited Feb. 21, 2017).
41. U.K. Defamation Act 2013, available at <http://www.legislation.gov.uk/ukpga/2013/26/contents> (last visited Mar. 5, 2017).
42. This point may be addressed in the forthcoming appeal in *Lachaux v. Independent Print Ltd* from the decision of High Court [2015] EWHC 2242 (QB).

Contemporary Antisemitism on the UK University Campus: A Case Study and Context

Lesley Klaff

Introduction

There has been a rise in campus antisemitism in the UK since 2001, when the UN Conference against Racism in Durban accused Israel of the five cardinal sins against human rights: racism, apartheid, ethnic cleansing, attempted genocide, and crimes against humanity. Since then, campus antisemitism has been cloaked in the language of human rights and promulgated in the so-called "fight for Palestine"; and student supporters of Israel have been labelled as "Nazis," "apologists for racism," "apologists for apartheid" and "racists" by student supporters of Palestine. Although student supporters of Palestine may not *intend* to be antisemitic, and vehemently deny their antisemitism, the *effect* of their rhetoric has incited harassment of students who support Israel, the overwhelming majority of whom are Jewish, and some of whom are Israeli. The creation and maintenance of a hostile campus environment for Jewish and Israeli students inevitably harms the quality of their student experience and jeopardizes their educational opportunities, because it causes them to suffer emotional distress and anxiety and puts them in fear of physical harm.

Campus antisemitism is especially acute in the aftermath of armed conflict in the Middle East, and the period following the start of Operation Protective Edge in the summer of 2014, particularly spurred increased demonization of Israel and Israelis by student Palestine societies. In this context, a campus antisemitism case involving a university in the north of England was referred to UK Lawyers for Israel (UKLFI).¹ Although the university concerned cannot be named, we may refer to it as "Any University UK," because the circumstances that gave rise to the complaint, the nature of the complaint, and the university's response to it, represent a fairly typical picture of the situation facing Jewish students in the UK university sector. Accordingly, this article will use the antisemitism complaint against Any University UK, the University's response to it, and the appeal decision by the Office of the Independent Adjudication for Higher Education, for illustrative purposes in order to shed light on the problem of campus antisemitism in Britain, and to place it in the context of the relevant law and the wider political issues.

I worked on the case along with a retired former solicitor named David Lewis who, like me, was affiliated with UKLFI at the time the antisemitism complaint was brought.²

Brian, a disabled student who identifies as Jewish, submitted a complaint to Any University UK in June 2014, concerning the social media activity of the student Palestine Society, which is approved by, and affiliated to his Students' Union. He complained that the University tolerated social media activity on campus that "crossed the line" from legitimate criticism of Israel into antisemitism and harassment. The University referred Brian's complaint to the Students' Union for resolution and the Students' Union dismissed it in November 2014 without any written reasons. Brian submitted a second complaint to Any University UK in May 2015. In that complaint he repeated the allegations in his original complaint and made it clear that he would not accept another referral to the Students' Union. Any University UK dismissed Brian's complaint in February 2016. Brian appealed to the Office of the Independent Adjudicator for Higher Education, known as the Office of the Independent Adjudicator or the "OIA," in May 2016. The OIA is a charity whose purpose is to review a student complaint against a university to decide whether it is "Justified," "Partly Justified," or "Not Justified." In October 2016 the OIA upheld Brian's complaint against Any University UK as "Partly Justified."

The Lack of a Working Definition of Antisemitism

In its October 2016 Report, the House of Commons Home Affairs Select Committee on Antisemitism in the UK ("Select Committee") acknowledged that it "it would be extremely difficult to examine the issue of antisemitism

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1. UK Lawyers for Israel (UKLFI) is a voluntary association of lawyers who support Israel and seek to ensure the proper application of the law in matters relating to Israel.
 2. A detailed outline of the antisemitism case against Any University UK is presented in the fuller version of this article which is available on the IAJLJ website.

without considering what sort of actions, language and discourse are captured by the term, and that defining the parameters of antisemitism was central to the question of what should be done to address this form of hate.”³ In other words, in order to investigate allegations of antisemitism and in order to identify clear protocols for addressing it, one first needs to define what is meant by the term “antisemitism.”

However, until February 13, 2017, UK universities did not have a working definition of antisemitism to guide them in identifying or addressing antisemitism on their campuses. To make matters worse, the university sector provides no education and training on the topic of antisemitism for university administrators, including those promoting equality, respect for diversity and inclusivity for minority students, and dealing with incidents and complaints of racism. Moreover, there is no education and training for students’ unions. The only anti-racism and diversity training provided in the university sector focuses on promoting educational opportunity for Black-Minority-Ethnic (BME) students; Jewish students are not included in that group, despite the fact that Jews are classed as a racial as well as a religious group under UK law.

In the absence of a working definition of antisemitism, and of education and training on antisemitism in the university sector, a student complaining of campus antisemitism would have to rely on the personal understanding, awareness and knowledge of the university administrator who happens to decide the outcome of his complaint. This could be a risky business, however, because there is a great deal of ignorance in the UK about antisemitism. There is very little knowledge of antisemitism’s pre-Holocaust history. Most people have never even heard of the “blood libel” or the “conspiracy libel” or the *Protocols of the Elders of Zion*. Most people are unaware of the history of antisemitism in Stalinist politics. Most people just associate antisemitism with the Holocaust and consider antisemitism, therefore, to be a relic of the past, a symptom of an outdated ideology.⁴ This ignorance makes university administrators illiterate with respect to antisemitic language and iconography, which is a typical mode of anti-Zionist expression. Further, it is inevitable that some university administrators are anti-Zionist and will share the same antisemitic and/or anti-Zionist assumptions and attitudes that form the basis of the student complaint.

In his May 2015 complaint, “Brian” (the student complainant) alleged, *inter alia*, that the University tolerated anti-Israel activity on campus that crossed the line from legitimate criticism of Israel into antisemitism and harassment. It listed appalling Facebook posts and

tweets by the University’s Palestine Society that went beyond the right to free speech and created a hostile environment for him. These posts accused Israel and Israelis of genocide, deliberately killing Palestinian children, deliberately killing other Palestinian civilians, war crimes, atrocities, using chemical weapons, ethnic cleansing, inhumanity, cruelty, behaving like Nazis, sexual and other abuse of Palestinian children (including abduction and human trafficking), stealing Palestinian organs, being racists and fascists, and rejoicing in Palestinian deaths. For example, one social media post was: “One of the most sophisticated armies in the world is committing monstrous atrocities; it has dropped bombs [on] disability shelters killing those seeking safety within, it has made targeted airstrikes on family homes killing entire families in cold blood, it is slaughtering children who are arriving to hospital ‘in bits’...”⁵

Brian complained that these posts contributed to “an intimidating campus climate”⁶ and that he felt “intimidated and afraid to mention Israel on campus or to wear my Star of David or my skull cap for fear of being picked on.”⁷ He said that “they are based on lies and half-truths about Jews, invoking blood libel motifs, stereotypes and defamations on campus and online, creating a threatening mob mentality.”⁸

He explained the EUMC (European Union Monitoring Centre on Racism and Xenophobia) Working Definition of Antisemitism and invited the University to formally adopt it in order to identify all forms of antisemitic expression on campus and to identify clear protocols for addressing it. The EUMC Definition, which in May 2016, was adopted by the International Holocaust Remembrance Alliance (IHRA), consisting of 31 member states including the UK, and in December 2016, was formally adopted by the UK Government, provides explicit examples of how antisemitism can be manifested, when context is taken fully into account with respect to the State of Israel. These include: denying the Jewish people a right to self-

3. The House of Commons Home Affairs Select Committee, *Antisemitism in the UK*, Tenth Report of Session 2016-17, para. 12.
4. Anthony Julius, *TRIALS OF THE DIASPORA: A HISTORY OF ANTI-SEMITISM IN ENGLAND* (2010), at 517.
5. Brian’s Complaint para. 68.
6. Brian’s Complaint para. 47.
7. Brian’s Complaint para. 188.
8. Brian’s Complaint para. 207.
9. *Supra* note 3, para. 12.

determination; applying double-standards by expecting from Israel a behavior not expected of any other state; applying the images and symbols of traditional antisemitism (e.g. the blood libel) to Israel; comparing contemporary Israeli policy to that of the Nazis; or holding Jews collectively responsible for the actions of the State of Israel. It emphasizes that criticism of Israel similar to that levelled against any other state does not constitute a form of antisemitism. This makes the Definition, which is now referred to as the IHRA Definition, particularly suitable for deciding the question of contemporary antisemitism because, as The Select Committee Report stated, the Definition finds “an acceptable balance between condemning antisemitism in all its forms, and maintaining freedom of speech – particularly in relation to legitimate criticism of Israel.”⁹

However, the University refused to formally adopt the EUMC Definition of Antisemitism as Brian requested, even to help it decide the outcome of his complaint. It preferred instead to conclude that the formal adoption of the EUMC Definition was a “policy matter” that was beyond the scope of the student complaints procedure. This allowed the University’s decision to be based on the subjective views of the administrator who decided Brian’s case.

Accordingly, despite an evidence file spanning 154 pages, the University found that evidence of antisemitism from Brian’s complaint was “not conclusive” and suggested that Brian was conflating criticism of Israel with anti-Jewish prejudice. The University stated that: “[Brian’s] complaint reflects a tendency to think that those who oppose the policies and actions of Israel as a state or government are antisemitic and prejudiced against Jews [...] The complaint appears to conflate being anti-Israel with being anti-Jewish and opposition to Israel on political or moral grounds with hatred on religious and racial grounds.”¹⁰ This separation of hatred of Israel from hatred of Jews is a typical mode of denial of antisemitism for someone on the anti-Zionist left.

The University’s claim that Brian appeared to be conflating criticism of Israel with antisemitism ignores his careful attempt to distinguish legitimate criticism of Israel from antisemitism in his complaint and suggests that he brought his complaint in bad faith. In fact, the University insinuated that David Lewis and I, who (as non-practicing lawyers) had assisted Brian throughout the process, had used Brian to pursue our own political and campaigning agendas. This is a common response of the anti-Zionist left who tend to believe that the “purveyors” of antisemitism are mobilizing a discourse of power for a self-serving purpose. Accordingly, the

University questioned Brian’s ownership of his complaint. This illustrates the practical application of “The Livingstone Formulation,”¹¹ which is a contemporary trope that is frequently deployed by anti-Zionists in the UK.¹² It is the allegation that those raising concerns about antisemitism are doing so in bad faith in order to silence criticism of Israel or for some other self-serving purpose. Its use allowed the University to refuse to engage with Brian’s allegation of antisemitism by responding with an ad hominem attack against him and his legal representatives. In effect, we were accused of playing “the antisemitism card” for an ulterior motive.

The lack of a working definition of antisemitism also presented a major problem for the decision-making of Any University UK’s Students’ Union, to which Brian’s original complaint, filed in June 2014, had been referred for resolution. The complaint, although relatively short when compared to the later one of May 2015, also argued that the Palestine Society’s social media activity crossed the line from legitimate criticism of Israel into antisemitism and harassment.

The Students’ Union, which had officially ratified the Palestine Society in September 2014, dismissed Brian’s complaint but gave no plausible reasons and no written decision was ever issued, despite Brian’s request for one. The decision-maker, who was Head of Student Engagement at the Students’ Union, merely said that she did not think the Palestine Society’s social media posts were antisemitic because she had seen similar statements on the internet. She admitted to having used no definition of antisemitism in coming to her decision. She was unable

10. Any University UK’s Complaint Response, 29 February 2016, para. 16.

11. David Hirsh, *Accusations of Malicious Intent in Debates about the Palestine-Israel Conflict and about Antisemitism: The Livingstone Formulation, ‘Playing the Antisemitism Card’ and Contesting the Boundaries of Antiracist Discourse*, TRANSVERSAL, 47- 76 (2010).

12. It is named after Ken Livingstone, the former Mayor of London, who in 2006 wrote in THE GUARDIAN, “[F]or far too long the accusation of antisemitism has been used against anyone who is critical of the policies of the Israeli government as I have been.” David Hirsh, How raising the issue of antisemitism puts you outside the community of the progressive: The Livingstone Formulation, available at <https://engageonline.files.wordpress.com/2016/04/livingstone-formulation-david-hirsh.pdf> at 6 (last visited March 26, 2017).

to give an example of antisemitism, whether classical or contemporary, and had never heard of the "blood libel" or the "conspiracy libel." Indeed, she admitted to knowing nothing about antisemitism.¹³ Not only was there evidence of profound ignorance about antisemitism on the part of the Students' Union, but it also became clear to me and David Lewis as we assisted Brian with his case that those who work for the Any University UK's Students' Union are pro-Palestinian in their political outlook and that this, presumably, colored their judgment and behavior. According to Jacob Williams, the Oxford University student who founded the free speech magazine *No Offence*, "[I]t's well known that students' unions are largely run by unrepresentative, politically extreme activist groups."¹⁴

The absence of a working definition of antisemitism allowed the University to conclude that there was no antisemitism on the part of the Palestine Society and therefore there was no basis for any specific action to be taken. The University categorized all of the Palestine Society's social media output as merely "controversial and provocative" and as "offensive to some people, in particular those who have strong opposite views about the issues involved."¹⁵ The characterization of blood libels as merely "offensive" trivializes antisemitism, denies its political importance, and constructs Brian as overly sensitive rather than as a victim of harassment.

The OIA, however, understood the importance of defining antisemitism. After reviewing Brian's case, it identified the EUMC Working Definition of Antisemitism as "of particular relevance" and described it as "more nuanced" than the University's approach.¹⁶ It found that the University ought to have engaged with Brian's request that it formally adopt the Working Definition, which was "relevant to the question of whether material that purportedly was criticizing the (alleged) actions of the Israeli state 'crossed the line' from being merely offensive or inflammatory to [Brian], to amounting (or potentially amounting) to material which might reasonably be perceived as anti-Semitic and likely to cause [Brian], as a student identifying as Jewish, to experience harassment." For this reason, the OIA found Brian's complaint of antisemitic harassment against the Any University UK to be "Justified."¹⁷

Lack of Constraints and Compliance

Campus antisemitism also persists in the UK because universities do not comply with the laws that limit free speech on campus. This is because they are either ignorant of the relevant law, or they misunderstand how it ought to be interpreted and applied. There is also the tendency for UK academics to believe that freedom of speech on campus is absolute. This is because they subscribe to the

traditional view that the university is a "marketplace of ideas" where views can be freely exchanged even if they cause offense.

However, the "marketplace of ideas" metaphor is outdated and free speech on campus, including free political speech, is circumscribed by several UK laws designed to promote racial, religious, sexual, and disability equality on campus, to prevent harassment and discrimination, and to promote equality of educational opportunity. Many universities fail to consider these laws, or misapply them, allowing campus antisemitism to flourish.

Much of the problem is due to the fact that UK academics tend to confuse the principle of "freedom of speech" with the principle of "academic freedom." Academic freedom means the right of universities to be free from state and political interference, the right of university academics to be free to test received wisdom and to express controversial views without being fired, the right of universities to be free to appoint staff and admit students, and to decide what to teach them and what research to undertake.¹⁸ It does not equate to absolute free speech as many academics think. The confusion between academic freedom and free speech means that views that are highly critical of Israel, Judaism, and Jews are regarded as merely "controversial" or "offensive" even when they are antisemitic, and are defended on the grounds of "academic freedom."

13. This conversation between the Head of Student Engagement and myself was recorded in the minutes of the meeting and was included with the May 2015 complaint submitted to the University and the May 2016 appeal to the OIA.

14. Javier Espinoza, *Anti-Rhodes campaign 'depleted' student union cash*, THE TELEGRAPH, Feb. 3, 2016, available at <http://www.telegraph.co.uk/education/educationnews/12139220/Anti-Rhodes-campaign-depleted-student-union-cash.html> (last visited March 26, 2017).

15. Any University UK's Complaint Response, *supra* note 10, para. 21.

16. All references to the decision of the Office of the Independent Adjudicator for Higher Education (OIA), which upheld Brian's complaint for environmental harassment, issued on Oct. 5, 2016, may be found at OIA reference number: OIA/611513/16

17. Further discussion of this aspect of Brian's complaint may be found in the fuller version of this article on the IAJLJ website.

18. The Education Reform Act 1988, Sec. 22.

Under The Equality Act 2010, Section 149,¹⁹ every university has a legal duty to exercise its functions with due regard to the need to eliminate harassment and to foster good relations between students of different ethnic groups and religious beliefs by tackling prejudice and promoting understanding. This is known as the Public Sector Equality Duty (PSED) and it applies to Jewish students who are protected as both a religious group and as an ethnic group under the law. In exercising its function of providing an educational environment, each university must seek to ensure that Jewish students can realize their full educational potential without fear, threat or intimidation. Compliance with this duty requires that each university place some limitations on free speech, and indeed this is recognized by each university's "Anti-Harassment Policy" and other codes, such as the Student Charter, which typically promises to provide students with a safe and supportive educational environment. The Public Sector Equality Duty is flouted whenever a university fails to take reasonable steps to prevent or remove campus expression that is antisemitic, thereby causing a hostile environment for Jewish students which harasses them.

With respect to Brian's antisemitism complaint against Any University UK, the University demonstrated ignorance and misunderstanding of its legal responsibilities under section 149 Equality Act 2010, and of its obligations under its Student Anti-Harassment Policy and its Student Charter. Brian complained that in tolerating the Palestine Society's antisemitic, anti-Zionist behavior on campus, the University failed to have due regard to the need to eliminate harassment under section 149(1)(a) Equality Act; failed to have due regard to the need to foster good relations between Jewish students and the wider university community contrary to section 149(1)(c) Equality Act; facilitated the creation of an environment of harassment contrary to the Student Anti-Harassment Policy; and failed to provide Brian with an environment that fosters the inclusive, supportive and collaborative university community which he is entitled to expect under the Student Charter.

In support of these allegations, Brian stated that he felt that he could not be open about his Jewish identity, and was unable to attend classes during Israeli Apartheid Week in 2013 and 2014 due to a flare-up of his disability caused by stress and anxiety. He explained that:

Hate speech is recognised by the fear which it generates, and I feel threatened by the campaigning of PalSoc, and in particular its output on Facebook and Twitter [...] The nature of the behaviour that PalSoc engaged

in ... has been threatening, abusive and insulting and contributes to an intimidating climate where students feel they cannot speak their mind²⁰

Brian provided a statement from his personal caregiver in support of his complaint which stated that the activities of the Palestine Society had adversely impacted on his emotional wellbeing and had jeopardized his ability to study.

The University, however, misapplied section 149 of the Equality Act to Brian's case. It interpreted the civil tort and criminal offense of harassment as requiring the behavior to have been directed at the complainant in order for him to experience harassment. This is incorrect. It is the complainant's *perception* of behavior that is important, and not whether harassment was intended by the perpetrator. This is also the case under the University's Student Anti-Harassment Policy, indicating that the University also misunderstood and misapplied its own anti-harassment policy. As a result, and as noted and documented by the OIA, the University failed to adequately explore whether a hostile, intimidating, offensive or humiliating environment had been created for Brian and instead, focused too heavily on whether Brian had been personally threatened or whether there was an intention on the part of the Palestine Society to be threatening, abusive or insulting. This was entirely the wrong approach.

In considering whether Brian was a victim of unlawful harassment, the OIA further noted that the University had failed to take into account relevant sector guidance in the form of a document entitled, *Universities UK: Freedom of Speech on Campus*, which Brian had referred to throughout his complaint. This guidance, which advises universities on how they can reconcile their legal duties to promote good campus relations and avoid unlawful discrimination with their legal obligation to promote free speech, states that "it is often the manner and form in which views are expressed, rather than the opinions themselves, which take the relevant speech and conduct into unlawful harassment."²¹ The OIA stated that this sector guidance should have been used by the University to ask itself whether the blood libels and abusive posts were evidence of antisemitic behavior or material that

19. The Equality Act 2010, Sec. 149.

20. Brian's Complaint paras. 207 & 209.

21. Freedom of Speech on Campus: Rights and Responsibilities in UK Universities, Feb. 18, 2011, para. 43.

was likely to have harassed Brian as a student identifying as Jewish. The OIA also thought that, in accordance with its Public Sector Equality Duty, the University could reasonably have engaged in discussions with the Students' Union and the Palestine Society about the substantive issues raised in Brian's complaint, but it failed to do this.

Accordingly, the OIA recommended that the University compensate Brian to the tune of £2,500 for failing to deal properly with the blood libel charges. The OIA further recommended that the University work with the Students' Union to raise awareness across campus of the legal framework governing freedom of speech and the University's responsibility to ensure that staff, students and others are protected from harassment, discrimination and victimization.²²

Conclusion: The Educational Challenges Ahead of Us

As Brian's case illustrates, UK universities need to follow a definition of antisemitism that recognizes that antisemitism can manifest itself in hostility to Israel, conceived of as the Jewish collective, and this was recently acknowledged by the UK Government. Following the Government's formal adoption of the IHRA Working Definition of Antisemitism in December 2016, Universities Minister, Jo Johnson MP, wrote a letter to Nicola Dandridge, Chief Executive of Universities UK (UUK), underlining the obligation of all UK universities to tackle antisemitism on campus, particularly in the context of "Israeli Apartheid Week" (IAW). He said that the Government expected that the legal position and the guidelines of the IHRA Working Definition of Antisemitism "are universally understood and acted upon at all times" by UK universities, including policy towards events "that might take place under the banner of 'Israel Apartheid' events."²³

However, following her receipt of Jo Johnson's letter, Nicola Dandridge informed all UK universities that the IHRA Definition did not preclude IAW events on campus from going ahead, provided they were properly handled and remained within the law. This indicates that Ms. Dandridge has overlooked the antisemitic nature of the term "Israeli Apartheid Week" itself, and particularly when it is used in conjunction with captions such as "100 years of settler-colonialism."²⁴ These terms amount to an allegation that Israel is a racist endeavor, and that it has been since its very inception; and for that reason, they fall within the IHRA Definition. One challenge ahead of us, therefore, is to assist Nicola Dandridge in her understanding of the antisemitic nature of the term "Israeli Apartheid Week," and the associated captions and activities that take place on campus during that time, and to respectfully ask her to revise the advice she has given to UK universities.

Not only are these terms inherently antisemitic according to the IHRA Definition, but they promote real hostility towards Jewish and other students who support Israel.

Another challenge ahead of us is to require UK universities to adopt the MacPherson Report 1999²⁵ to decide the matter of antisemitism. The MacPherson Report, which reported on the mishandling of the Stephen Lawrence murder, stipulated that a racist incident should be defined by the victim. The principle is applied in the case of anti-black racism on campus but not in the case of antisemitism. The MacPherson Principle does not mean that a person who reports an experience of racism should necessarily be considered to be right; but what it does mean is that it should be assumed that they are right and should be taken seriously and listened to carefully until an informed judgment can be made as to whether or not they are right. The adoption of the MacPherson Report was recommended by both the 2006 All-Party Parliamentary Group against Antisemitism²⁶ and the 2016 Select Committee. While both stated that the starting point for deciding the matter of antisemitism is the perception of the alleged victim, the Select Committee went further and said that an incident which is "perceived to be racist by the victim or any other person" is a strong basis for

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22. There are several other laws that limit free speech on campus. These are discussed in the fuller version of this article on the IA|JLJ website.
 23. Universities Minister calls on UK Universities to tackle anti-semitism, particularly in context of 'Israel Apartheid week', CFI, Feb. 22, 2017 available at <https://cfoi.co.uk/universities-minister-calls-on-uk-universities-to-tackle-anti-semitism-particularly-in-context-of-israel-apartheid-week/> (last visited March 28, 2017).
 24. Letter from Jonathan Turner, Chair UKLFI, to Nicola Dandridge, Chief Executive of UUK, March 1, 2017.
 25. Report of the Stephen Lawrence Inquiry, Feb. 24, 1999, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf (last visited March 26, 2017).
 26. All-Party Parliamentary Group against Antisemitism, Sept. 2006, available at www.antisemitism.org.uk/wp-content/uploads/All-Party-Parliamentary-Inquiry-into-Antisemitism-REPORT.pdf (last visited March 27, 2017): "It is the Jewish community itself that is best qualified to determine what does and does not constitute antisemitism."

investigation.²⁷ The Livingstone Formulation, which was used by Any University UK, is a clear violation of the MacPherson Principle.

The MacPherson Report also introduced the concept of "unconscious" or "unintentional racism," and this allows us to focus on the act or speech rather than on the person's inner essence when deciding the question of antisemitism. This is important because much contemporary antisemitism is unconscious and unintentional and can be identified by the replication of antisemitic tropes without the need to consider any moral failing on the part of the individual(s) concerned.²⁸ This concept is particularly important in the university setting where student supporters of Palestine may not intend to be antisemitic and vehemently deny that they are antisemitic, and universities are not prepared to label student supporters of Palestine as "antisemites."²⁹

Another challenge is to design and implement a program of education and training about antisemitism and Jewish identity across the university sector. This has been recognized by Universities UK which acknowledged in its 2016 UUK Taskforce Report on Hate Crime in Universities, *Changing the Culture*, that there is a lack of understanding about Jewish identity and the antisemitism that manifests itself in anti-Zionist expression on campus. It identifies the need for "improved understanding of the broader ethnic and national dimension to Jewish identity" and recommends proactive training for university staff.³⁰ The Select Committee also recommended that Universities UK should work with appropriate student groups to produce a resource for students, lecturers and student societies on how to deal sensitively with the Israeli-Palestinian conflict, and how to ensure that pro-Palestinian campaigns avoid drawing on antisemitic rhetoric; and further, that this resource should be widely distributed via students' unions, university staff, and social media.³¹

In terms of other changes that need to be made, universities and students' unions need to regard Jewish students as an ethnic minority and to include them in the BME classification. Universities UK has been helpful in this regard, making it clear in its 2015 Taskforce Report that "under current legislation, Jews are identified as members of a race as well as a religion."³² Recognition of Jewish students as an ethnic as well as a religious minority would encourage universities to regard antisemitism as a form of racism and to thereby include it in their anti-racism and diversity training. Universities also need to be educated on the law that limits free speech on campus and on their legal obligations to Jewish students as well as to other minorities.

Finally, if we are to address campus antisemitism effectively, we need to form an organization in the UK

whose specific remit is to combat campus antisemitism. Such an organization could be modelled on the non-profit Louis D. Brandeis Center for Human Rights under Law in Washington DC, which was established to lead the fight against campus antisemitism by means of research, advocacy, education and training. It is envisaged that such an organization, which would need funding and full-time staff, including lawyers, would be responsible for designing, coordinating and delivering the required program of education and training to universities, for providing pro bono advice and representation to students experiencing antisemitic harassment, and for providing advice to university administrators with respect to their legal obligations to Jewish students. The organization would also liaise with bodies like Universities UK, the Equality Challenge Unit (an organization that works to further and support equality and diversity for students and staff in all UK higher education), the National Union of Students, the Union of Jewish Students, and the Jewish communal organizations. ■

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27. *Supra* note 3, para. 22: "...the perceptions of Jewish people – both collectively and individually, as an alleged victim – should be the starting point for any investigation into antisemitism."

28. David Hirsh, *Hostility to Israel and Antisemitism: Towards a Sociological Approach*, 5 JOURNAL FOR THE STUDY OF ANTISEMITISM, (2013), at 23-24.

29. Anglo-Israel-Association (AIA) Roundtable Discussion on Campus Antisemitism conducted under Chatham House Rules, House of Lords, Oct. 7, 2014.

30. *Changing the Culture*, Report of the Universities UK Taskforce examining violence against women, harassment and hate crime affecting university students, available at <http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/changing-the-culture.pdf> (last visited March 26, 2017).

31. *Supra* note 3, para. 94.

32. *Supra* note 30.

Jewish Interests in International Fora

Natan Lerner

The recent grotesque and harmful anti-Jewish resolutions adopted at one of the subsidiary committees of UNESCO raise, once more, the old issue of how Jewish interests and rights can better be defended in international organizations, and by whom. The political changes taking place in several countries add another serious dimension to the question.

As it is known, in virtually all the organizations composing the United Nations family, there is almost always an automatic majority for anti-Israeli and sometimes anti-Jewish steps and declarations. This is a consequence of the composition of the international community, where anti-Zionist, or anti-Israeli, or anti-Jewish blocs and coalitions prevail. I am making a distinction between anti-Zionist, anti-Israeli and anti-Jewish texts, although I am aware of the view of many observers who are reluctant to distinguish between those different measures. In some cases they are right.

Essentially, the issue I raise is contained in the question of who speaks for the Jewish people at international bodies. The dilemma is an old one and came up with great frequency since the establishment of the State of Israel.¹ The matter is mostly political, but it should be tackled in principle, taking into consideration the historical, sociological and of course, geo-political ingredients. The term "Jewish interests" is not too precise. It may refer to primitive antisemitic outbursts, organized campaigns against Jewish institutions or communities, attacks against individual Jews, offenses addressed to the Jewish religion, in any of its expressions, assaults on the State of Israel or its policies, behavior or manifestations, or even distortion of historical facts, such as the denial of the Holocaust,² as its most offensive form. Obviously, all such events have in common a similar anti-Jewish background, purpose or intention. They must be opposed, and the question is who should do so in each case, and how.

The dramatic changes in Jewish life that followed World War II and caused far-reaching consequences in Jewish collective existence were tackled very early by the Jewish leadership. Already in 1950, in the Ben-Gurion—Blaustein statements exchange, Ben-Gurion promised that Israel would not interfere in Diaspora affairs, and the State for the most part does not pretend to represent Jews who are not citizens of Israel.³ Also, Foreign Minister Moshe Sharett, speaking at a meeting of a world Jewish

organization, stated: "Israel's primary concern must, of course, be its own survival, and in that context Israel expected the Jews of the Diaspora "unquestioningly to accept its authority in determining its interests and policies."⁴ At the same time, Sharett said: "There is a wide margin of points at issue regarding which the Diaspora as a whole, or certain sections of it in particular cases, are in their turn entitled to expect consideration on Israel's part for their own interests, viewpoints, and susceptibilities." Moreover, Sharett continued:

There are functions of Jewish life and items in the program of Jewish public activity which lie outside the plane of Israeli affairs, such as most of the tasks assumed by Jewish organizations in defending Jewish rights in the Diaspora and tendering advice and assistance to communities in need thereof. Inasmuch as there are points of contact between the respective spheres of activity of the Israel government and Jewish organizations, co-ordination is perfectly feasible. What is eminently desirable in this

1. See, for instance, the report by Prof. Moshe Davis (Moshe Davis, *IM HAKUNTRAS*, Jerusalem, 1968-69 (Hebrew)) on the discussions of the group that met, under his leadership, in the Israeli President's residence. It includes Justice Haim Cohn's presentation on the "Jewish Interests in the Commission of Human Rights of the United Nations," and reactions to it, among them, by this writer.
2. There is an enormous amount of literature on the struggle against antisemitism. On the inclusion of references to antisemitism in international instruments, see Natan Lerner, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (reprint 2015) and *RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS* (2006).
3. *The 1950 Ben-Gurion-Blaustein Clarification Statements in VIGILANT BROTHERHOOD: THE AMERICAN JEWISH COMMITTEE'S RELATIONSHIP TO PALESTINE AND ISRAEL* (1964), at 54-56.
4. Proceedings of the Fourth Plenary Assembly of the World Jewish Congress, WJC, 1959, at 135.

regard is the prevention of unnecessary overlapping.⁵

As stated, the rather practical question of who should speak for the Jews was intensely discussed since the early years of the State. In the 1960s, I was invited to attend one of the regular sessions of a group working at the Israel President's home, under the direction of the late Professor Moshe Davis, devoted to that precise question. Several speakers voiced different views. Eminent scholar and jurist Haim Cohn took the view that the State was best equipped to defend Jewish rights at the UN and other institutions. Others, like Professor Benjamin Akzin, adopted a different stand, claiming that the State was riding too fast on the horse of sovereignty. There were also those who argued that a coordinated effort including State spokesmen and Diaspora officials, would be the most efficient and constructive way of dealing with general Jewish issues, in which the State, as well as Diaspora communities, were involved. The question still remains open, and good will and common sense should be guiding principles.

Presently, half a century after the debate in the President's home, new situations developed, requiring some fundamental thinking on the role to be played by Jewish factors outside Israel to provide the State with support that it may have lost in the international scene as a consequence of new political trends strengthening isolationism, with profound political repercussions. There is talk of "anti-system nationalism" that may explain such trends.

Such a review of the overall situation may induce the adoption of changes in the role to be played by Jewish international non-state agencies. In a world of rising nationalism and crude isolationism, a state like Israel may need to increase the role of Jewish NGOs as loyal allies tied by powerful historical and cultural affinities.

Leaving aside the practical problems of representation, some theoretical matters of principle have to be discussed. First of all, it is necessary to establish the character and nature of the human group called the Jews, or the Jewish People, or the Jewish Nation. The Jews are a group, unified mainly, but not exclusively, by religion or faith that developed a system of ethical values derived from their beliefs. They lost their independent state more than two millennia ago and since then, have been dispersed all over the world. There may be different views about the nature of the Jewish people – are they a religious, ethnic, or cultural group, or a civilization? Beyond doubt, though, Jews are a rather coherent, easily identifiable group or community. The judiciary of several countries have stated that it is less important to define precisely the nature of a human group than recognize the historical ties, self-

perception, and perception by others of the group – or community – as a group.⁶

Some sectors within Jewry may have a different, fundamentalist understanding of the meaning of being Jewish. For the purpose of this article, we shall adopt a wide, open, liberal view of Judaism or Jewry. The concept should englobe Ashkenazim and Sephardim, Jews of Ethiopian origin and all expressions of ethnic, cultural, linguistic or religious differentiations that are known features of the Jewish sector of humanity.

After the destruction of the ancient Jewish State, Jews maintained coherent forms of collective life, sometimes in more or less autonomous forms of coexistence, with some degrees of self-administration. They always kept strong ties between the various geographical units. Frequently, the emphasis was on the religious aspect, but not exclusively. On the whole, Jews see themselves as a nation among the nations.⁷ For this reason, most of the problems that Jewish spokesmen have to deal with must be tackled from the political angles, more than as a matter of principle. Since practical considerations prevail in the actions of Israeli governments, the consequence is that all kinds of maneuvers are needed in order to take up the defense of Jewish interests in international fora.

The examples are many. But without surveying concrete cases, it seems reasonable to conclude that an empirical case-by-case approach is indispensable to ensure a reasonable level of protection of such interests. The matter also has tactical implications. Jews are not very good at unifying efforts or giving up sectorial interests. There are not enough serious reasons to justify the fact that international Jewish organizations were unable to create or develop the adequate instruments for a coherent, unified representation, except on limited grounds. Outstanding exceptions to this weakness were the major Jewish issues such as: defense of Israeli security; right to emigrate of

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5. *Id.* See also my chapter on the WJC and the State of Israel in *THE WORLD JEWISH CONGRESS 1936-2016* (Menachem Rosensaft ed., 2017).
 6. I have dealt with the issue of the nature of groups such as Jews, Arabs, Sikhs, and others in my *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (2003).
 7. As R. J. Zwi Werblowsky noted, Jews, despite their religious origin, consider themselves a people and a member of the "family of nations." See his *Religion and Peoplehood in THE JERUSALEM COLLOQUIUM ON RELIGION, PEOPLEHOOD, NATION AND LAND* (1972), at 17.

Soviet Jews; redemption of Ethiopian Jewry; and the eternal issue of antisemitic outbursts.

There are several Jewish bodies with consultative status at the UN and other bodies. A few of them are really federative, global entities such as the World Jewish Congress or WIZO. Others are merely practical coalitions led by one major but not international organization.⁸ Eight organizations have been admitted in the important category B and others only in category C.

The question may be asked if it is really important that individual Jewish organizations should give up their independent action for the sake of joining forces. It is a legitimate question, but it seems that in today's international climate, joint efforts may be more effective. Otherwise, those who claim that the independent State of Israel should take over the central role in the defense of Jewish interests may be proven right.

International life is presently undergoing far-reaching changes. The Trump factor, the Brexit phenomenon, the slowly progressing pacification attempts in Latin America, the evident growth of the right-wing – in some cases extreme rightist parties – all demand a readjustment of the foreign policy behavior of states. In the case of the Jewish people, the need to avoid an entanglement in conflictive situations is particularly evident. The local problems should be exposed or argued by local spokesmen, or those in which they have delegated powers. Again, this does not mean to interfere in the absolutely legitimate and natural rights of the Jewish State – whatever Jewish means – to assume a reasonable degree of action in favor of those Jews who need it. Of course, reason calls for coordination and consultation for the sake of more efficient action and better results.

A major question to be asked is if a systematic classification of issues is possible. First of all, there are major global issues, in one form or another, affecting all Jews. Examples are, of course; antisemitism and the existence and security of the State of Israel, leaving aside the crucial problem of its nature as a Jewish State. In these two cases, there is no doubt that the State as well as Jewish international organizations with a status in inter-state entities are fully entitled to speak-up and defend the attacked interest. At the other end, when a particular problem directly affects only a given Jewish community, common sense and political expedience dictate that the defense of the particular interest should be undertaken by a member of the community authorized to speak on its behalf. If, for example, separate Jewish education or any religious practice – say, *shechita* (ritual slaughter) – is restricted or forbidden, the organization of which the affected community is a member should represent the community's interest; it should certainly not be the State

of Israel, or any other state that might like to intervene.

Without doubt, certain cases do not fit clearly into one category. Common sense and understanding of international life and tensions should be the guiding principles.

Related to this issue, is the personal problem of Jews occupying diplomatic or other representative positions in states of which they are citizens. It is a delicate matter. An ugly incident with UNESCO (October 2016) provides an example of such a situation. A Jewish-Mexican diplomat felt that his conscience did not permit him to vote for the anti-Jewish resolution; instead, he opted to leave the room, though he was aware of the consequences of his action. Such personal problems are, of course, not too common, but they take place. They are not related to the issue of representation but indicate the complexity of some situations in international life.

A good number of Jewish organizations took advantage of the right proclaimed in Article 71 of United Nations Charter⁹ granting consultative status, in various degrees, to entities devoted to the ideals of the world body. A few Jewish organizations exercised this right actively and frequently. Others were not too efficient in using this prerogative. As noted, some Jewish organizations opted to associate themselves with other groups, so as to be able to enjoy the right established in Article 71. At some stages of the evolution of the United Nations, and under the influence of the Middle East conflict, there were attempts to limit the rights of some Jewish organizations. They were not successful thanks to the relations between the Jewish organizations and the major powers. Of course, the fact that the Jewish organizations were genuinely characterized as being international in nature, identified with United Nations purposes, and were not front entities for a particular state, was clearly helpful.

A cursory listing of issues dealt with by the world Jewish organizations will be useful. Such a list would include general human rights, racial and religious discrimination, antisemitism, incitement, genocide, war crimes, statelessness, migrations, minorities – as I described in a brochure in the 1970s, in connection with a seminar devoted to the Universal Declaration.¹⁰ As I argued in

8. For instance, two major Jewish organizations, the American Jewish Committee and B'nai B'rith, established coalitions to obtain consultative status at the UN.

9. U.N. Charter art. 71.

10. Natan Lerner, *THE WORLD JEWISH CONGRESS AND HUMAN RIGHTS*, Geneva 1978.

my exchange with Justice Haim Cohn, in the discussion which took place in the President's residence mentioned above, the integration of Jewish interests in the struggle for comprehensive, universal subjects facilitates the progress of proposals related to the Jewish issues. A good example is the case of the Convention on Racial Discrimination. The entanglement with political issues dividing states was a major obstacle to a clear-cut mention of antisemitism in the Convention.

The position and status of non-governmental organizations in the UN, expressed through the Third Committee and subsidiary bodies, do not reflect the

evolution of international law and the changes in international realities. It is therefore necessary to revise the relationship of NGOs in the UN and other interstate organizations, as well as the activities and programs of the several Jewish NGOs, some of which are just obsolete or inadequate. It is a task which the State of Israel should stimulate, support and take part in, but the safeguarding of the organizations' autonomy is an essential element in every attempt to update their role. This is eminently needed in the present state of the world. ■

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Legal Framework and Case-Law on Hate Speech in the Republic of Croatia, with Special Focus on Antisemitism

Daniel Benko and Ana Vargek

Rule of Law, Freedom of Expression and Criminalization of Hate Speech

The establishment of an independent and sovereign Republic of Croatia initiated the process of its development into a democratic society, based on respect of fundamental human rights and freedoms. Political and historical circumstances, as well as the desire to join the European Union, helped the country's democratic evolvement into a state where equality and equal opportunities of minorities represent the highest value of the constitutional order.

Today, freedom of expression is recognized as a fundamental human right in every democratic society. It was achieved as a result of mankind's historical struggle for the right to personal autonomy.¹ The basic principle is to ensure the possibility of individual or collective expression of not only ideas that are regarded as positive or neutral, but also of those that offend, shock or disturb society.² However, as is the case with all rights and freedoms, affirmation of the freedom of expression is not absolute. It ends where legitimate rights of other people begin, individual or collective, which at the very least, deserve the same attention and protection. Moreover, an individual act in the form of freedom of expression may be, in essence, something entirely different depending on its motivation and content. We are currently witnessing repeated instances of abuse of freedom of expression, which is reflected in the expression of ideas inciting violence and hatred towards individuals or specific social groups. The value of freedom of expression then becomes merely a formal excuse for violence and hatred conveyed by the message.

Violence means the use of physical or mental coercion against another person. It includes abuse and harassment, physical or mental, in a particular human environment in the broadest sense.³ Hate is a feeling of extreme aversion and hostility against an individual or group. It is manifested through hostile acts and actions that offend, degrade, belittle, humiliate, demean, despise or ridicule another person or persons.⁴ All forms of expression that

spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance are jointly referred to as hate speech.⁵ These include intolerance expressed by aggressive nationalism and ethnocentrism, and discrimination and hostility against minorities, migrants and people of immigrant origin,

The frequent abuse of freedom of expression has resulted in the need to create a legal framework that will prevent such behavior and ensure mutual tolerance and respect of the dignity of all human beings. Regarding Croatia, the need to create such a legal framework particularly came into focus during the process of its accession to the European Union, when it was necessary to align national legislation with *acquis communautaire*.

Today, Croatia has established legislation geared towards the prevention of hate speech in the public sphere, including the prevention of antisemitism as its manifestation. Antisemitism is a certain perception of Jews that may be defined as hatred. It includes oral, written and physical manifestations of that hatred directed toward Jewish individuals and/or their property, Jewish

1. Dirk Ehlers, EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS (2007).
2. *Erbakan v. Turkey*, Application No. 59405/00, Decision of July 6, 2006, Eur. Ct. H. R. [http://hudoc.echr.coe.int/eng#{"itemid":\["001-76232"\]}](http://hudoc.echr.coe.int/eng#{).
3. LEGAL THESAURUS (Vladimir Pezo ed., 2007).
4. KOMENTAR KAZNENOG ZAKONA, (Ksenija Turković et al., 2013).
5. Recommendation of the Council of Europe Committee of Ministers No. R (97) 20 on "hate speech" of Oct. 30, 1997 available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b> (last visited March 22, 2017).

community institutions and religious facilities.⁶ Despite the established regulations, we are currently witness to apparent examples of antisemitism in the Croatian public sphere, including display of Nazi symbols on buildings, chanting of Ustasha⁷ slogans during sport competitions, and distribution of materials aimed at minimizing, or even denying, the crimes committed by Usthas in Jasenovac and other concentration camps during World War II.

In Croatia, hate speech is regulated by both misdemeanor and criminal legislation. Whether hate speech will be treated as a misdemeanor or criminal offense depends on the circumstances of each individual case. The criteria for differentiating between them have been established by case-law.

Several questions are posed in relation to the issue of hate speech in the Croatian public sphere: Is the legislation governing hate speech adequate and complete? How does the case-law qualify different manifestations of hate speech in the Croatian public sphere? And, finally, is the established legal framework succeeding in adequately responding to hate speech in light of current circumstances?

Hate Speech as a Misdemeanor Offense - Legislation and Case-Law

In Croatia, hate speech is predominantly treated as a misdemeanor under three misdemeanor laws: (i) Misdemeanors against Public Order and Peace Act; (ii) Prevention of Disorder at Sports Competitions Act; and (iii) Public Assembly Act. The Misdemeanors against Public Order and Peace Act criminalizes hate speech in public places as a *lex generalis*, while the other two Acts are applied in specific cases, when hate speech is manifested exclusively at an organized sports competition and at an organized public event, respectively.

a. Manifestation of hate speech in organized sports competitions

According to the Prevention of Disorder at Sports Competition Act,⁸ its purpose is to create an environment which prevents, restrains and sanctions improper behavior, disorder and violence before, during and after a sports competition or a sporting event. Unlawful behaviors which in their essence constitute hate speech relate to: i) attempt to introduce, introduction and display of a banner, flag or another object containing a text, image, sign or other marking which expresses or incites hatred or violence based on racial, national, regional or religious affiliation, and ii) singing songs or hurling of messages to competitors or other spectators whose content expresses or incites hatred or violence based on racial, national, regional or

religious affiliation. Therefore, hate speech at sports competitions can be manifested passively – by possessing certain unacceptable markings, and actively – by articulating hate messages in song or words.

Sanctions for the above described unlawful behaviors have been increased with each amendment to the Act. According to the latest 2011 amendments, the perpetrator of the first-listed unlawful act (i) may be imposed a fine ranging from HRK (Croatian kuna) 2,000 to HRK15,000 (approximately EUR 266 to 1,998) or a prison sentence of up to 30 days, while the perpetrator of the second-listed unlawful act (ii) may be imposed a fine in the amount of HRK 5,000 and up to HRK 25,000 (approximately EUR 665 to 3,330) or a prison sentence of at least 30 days and not more than 60 days.

Despite the legislator's obvious intention to raise the awareness and exert a deterring effect on potential perpetrators of misdemeanors by raising the sanctions, based on the analysis of case-law, as well as insight into some of the more recent events in sports competitions in the Republic of Croatia, it is clear that hate speech is omnipresent among sports supporters. According to data of the High Misdemeanor Court of the Republic of Croatia,⁹ most final convictions were related to the disturbance of public order by hurling antisemitic slogans and wearing antisemitic marking. In July 2013, at the Croatia-Norway handball match, a 23-year old man carried into the sports facilities a shawl that read "Za dom spremni!" (For the Homeland Ready!).¹⁰ The misdemeanor

6. Working definition of antisemitism, European Forum for Antisemitism, May 26, 2016, available at <http://europeanforum-on-antisemitism.org/report/working-definition-antisemitism-ihra> (last visited March 22, 2017).
7. Ustasha movement is a fascist organization created in Italy in 1929 that established a puppet regime on the territory of German-Italian occupied Croatia. The newly formed puppet state was called "Independent State of Croatia" and existed until 1945. It is known for collaboration with Nazi and Fascist regimes and committing numerous atrocities on the territory of ex-Yugoslavia.
8. Prevention of Disorder at Sports Competition Act (2012) of the Republic of Croatia (Official Gazette No.: 117/03, 71/06, 43/09, 34/11 and 68/12).
9. Data obtained from the High Misdemeanor Court of the Republic of Croatia pursuant to authors' request.
10. *Za dom spremni* was the Ustasha salute, used by the supporters of the Nazi regime.

court ruled that the man committed a misdemeanor under the Prevention of Disorder at Sports Competitions Act, because he carried in and displayed, at an organized sporting event, a symbol of the crimes committed against the Jewish people during World War II in Croatia, whose purpose is to glorify the Nazi regime and the policy of its actors, thus causing the feeling of intolerance towards the victims of such policy. The man was fined under the minimum prescribed by the law. The most infamous case of hate speech at an organized sporting event occurred in November 2013, when the former national football team member Josip Šimunić, after the Croatia-Iceland football match, led the spectators in chanting "Za dom spremni." Thus, the aforementioned person was actively, in "cooperation" with spectators, spreading a message of hate. For this act, Josip Šimunić was imposed the minimum prescribed fine in the amount of HRK 5,000 (approximately EUR 665) in a first-instance decision; after the State Attorney's office lodged an appeal, he was finally imposed the maximum prescribed fine for this type of misdemeanor in the amount of HRK 25,000 (approximately EUR 3,330).

b. Manifestation of hate speech at organized public assemblies

Public assemblies, for the purpose of the Public Assembly Act,¹¹ refer to peaceful assemblies and public protests, public events and other types of organized gatherings. The purpose of the Public Assembly Act is to ensure public order and peace by regulating the behavior of all participants in public assemblies, including organizers and event hosts. Under the Act, freedom of speech and public expression is restricted by the prohibition of any calling for and incitement to war or to violence, national, racial or religious hatred or any form of intolerance. Thus, it is prohibited to wear uniforms, parts thereof, clothes, symbols and other markings that are calling for or inciting war or violence, national, racial or religious hatred or any form of intolerance. However, it is important to note that the Act only criminalizes passive manifestation of hate speech; any active manifestation of hate speech at organized public assemblies would fall under Misdemeanors against Public Order and Peace Act. The prescribed sanction for this misdemeanor consists of only a fine in an amount ranging from HRK 1,000 to HRK 3,000 (approximately EUR 133 to 400).

The case-law indicates that perpetrators of this misdemeanor have most frequently been sanctioned for wearing uniforms, clothes, symbols and other markings at public gatherings that express antisemitic messages. Almost all cases are related to displaying the slogan "Za dom spremni!" and the symbol of the so called eared "U,"

also an infamous symbol of the Ustasha movement. For example, in 2013, two men, during the organized celebration of the Victory and Homeland Thanksgiving Day, wore t-shirts that read "Za dom spremni!" and "Crna legija - za dom spremni" (Black legion - For the Homeland Ready). Considering that they wore markings at an organized public event, that incite hatred and disturb the public order, they were sanctioned before a misdemeanor court. Although the amount of fines imposed on the perpetrators in this case remains unknown, it should be noted that, according to the High Misdemeanor Court data, the highest imposed fine for this type of misdemeanor amounted to HRK 700 (EUR 93), which is below the minimum fine prescribed by law.

c. Manifestation of hate speech in other public places

The Misdemeanors against Public Order and Peace Act¹² is a *lex generalis* in relation to the two Acts described above. In fact, it is applied in all those cases when an individual disturbs the public order and peace by expressing unacceptable contents and when the Prevention of Disorder at Sports Competitions Act or the Public Assembly Act are not applicable. The purpose of this legislation is to prevent illegal disturbance of the peace, work or normal life of citizens, incitement of restlessness, gloominess, anxiety, or interference with the movement of citizens in the streets and other public places.

According to this Act, hate speech refers to creating a feeling of "anxiety" of the public by: i) publicly performing and reproducing songs, compositions and texts that disturb public order and peace and ii) publicly wearing or displaying symbols, texts, images or drawings that disturb public order and peace. The perpetrator of the unlawful acts described above may be sanctioned by a fine up to DEM 300 (EUR 153) or by a prison sentence of up to 30 days.

The case-law indicates that perpetrators of this misdemeanor have most frequently been sanctioned for disturbing the public order by publicly performing and reproducing songs and texts and by wearing and displaying antisemitic symbols. A case against the president of the Hrvatska čista stranka prava (Croatian Pure Party of Rights) attracted much public attention. It was established in misdemeanor proceedings that the said politician in 2014 organized a memorial service

11. Public Assembly Act (2012) of the Republic of Croatia (Official Gazette No.: 128/99, 150/05, 82/11 and 78/12).

12. Public Order and Peace Act (1994) of the Republic of Croatia (Official Gazette No.: 5/90, 30/90, 47/90 and 29/94).

commemorating the death of the Ustasha general Jure Francetić in Slunj. It was also established that he stepped in front of the group, described the establishment of the Nazi regime, black legion, and praised the war path of Jure Francetić. Upon completion of the speech, he yelled "Bog i Hrvati, za dom" (God and Croats, For the Homeland), while an unknown person from the group yelled "spremni" (Ready) raising his outstretched right arm in the air, thereby mimicking the Nazi salute. In this way, in the court's opinion, he referred to the unacceptable political messages in a public place, uttering cries that encouraged participants to "reply" within the meaning of shouting out "Ready." As the event took place in the town of Slunj, at the square, i.e. in an open public place with access to an unlimited number of people at any time, the court determined that all the characteristics of misdemeanor referred to in the Misdemeanors against Public Order and Peace Act were fulfilled in this case.

According to available data,¹³ in the period from 2010 to mid-2015, there were only thirteen final judgments of misdemeanor courts in which the perpetrators were convicted of hate speech under the described misdemeanor acts. More than a year has passed since then, and we have been witness to numerous similar manifestations of hate speech in the Croatian public sphere. These included engraving a swastika symbol on the pitch of the Poljud Stadium in June 2015 at the Croatia-Italy match, an initiative to introduce the salute "Za dom spremni!" (For Homeland Ready!) for official military use in August 2015, chanting Fascist messages during the Croatia-Israel match in March of 2016, painting Nazi and Ustasha symbols on buildings, etc.

For spreading hate speech, which is treated as a misdemeanor, perpetrators were regularly sanctioned by fines in the amount of only several hundred kuna (several dozen euro), i.e. well below the prescribed minimum amount. Taking into account the fines regularly imposed for hate speech, we can conclude that the courts do not consider hate speech to be a significant violation of public order. Sanctions for hate speech are regularly lower than sanctions for traffic violations, while no prison sentences were imposed in relation to the criminal offense of public incitement to violence and hatred. It should be noted that the courts make rulings in accordance with the established legal framework and are autonomous when deciding on the severity of punishment imposed in each specific case.

Hate Speech as a Criminal Offense - Legislation and Case-Law

Until the entry into force of the Criminal Code amendments in 2013, Croatia did not adequately regulate all aspects of hate speech in its criminal law. Thus, the

criminal offense of public incitement to violence and hatred was introduced into the Criminal Code in 2013 as a result of alignment of national legislation with the European Union *acquis communautaire*.¹⁴

The introduction of this criminal offense into the Criminal Code is certainly not only the result of complying with an obligation imposed by the European Union, but also the result of the creation of a social climate in which expressions of racist and xenophobic messages have become regular, even ordinary, occurrences.

Specific characteristics of a criminal offense of public incitement to violence and hatred are the act, the manner of perpetrating the criminal offense and the relevant degree of guilt of the perpetrator.

In criminal law, an act is defined as the person's willful behavior.¹⁵ In criminal acts of public incitement to violence and hatred, they can be manifested in two ways: (i) publicly inciting to violence or hatred, that is expressing hatred and intolerance against a larger group of persons or a member of the group because of their race, religion, national or ethnic origin, origin, color, sex, sexual orientation, gender identity, disability or any other characteristic, and (ii) publicly denying crimes of genocide, crimes of aggression, crimes against humanity or war crimes in a manner likely to incite violence or hatred. The act alone is not limited only to verbally expressed opinions and messages, but includes all other known forms of communication (pamphlets, leaflets, images, drawings, gesticulations, etc.).

The act itself may be committed through the press, radio, television, computer system or network, at a public gathering or in any other manner which makes the incriminated content publicly available, the message must be public or it must be intended to be disseminated to a large number of people. Guilt is the subjective attitude of the perpetrator towards the committed act, for which he can be reprimanded.¹⁶ A criminal offense of public incitement to violence and hatred shall be realized under the condition of establishing the perpetrator's indisputable

13. Data obtained from the State Attorney's Office pursuant to authors' written request.

14. The Criminal Code amendments enacted in 2013 were prompted by the Republic of Croatia's obligation to implement Council Framework Decision 2008/913/JHA of Nov. 28, 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

15. Cvitanović et al., *Kazneno pravo opći dio*, Zagreb, 2016.

16. *Id.*

intent to "create or strengthen the decision on the need to use violence, or to create a feeling of hatred, against a group of persons or a member of the group because of their race, religion, national or ethnic origin, origin, color, sex, sexual orientation, gender identity, disability or any other characteristic."¹⁷ For committing this criminal offense, the perpetrator may be sentenced to imprisonment of up to three years. Criminal proceedings against the perpetrator are instituted *ex officio* by the State Attorney's Office, which may initiate criminal proceedings based on a filed criminal complaint or otherwise obtained knowledge about a committed criminal offense.

In contrast to hate speech that is treated as a misdemeanor, in this case it is not enough to merely perform an act of expressing messages in the public sphere that disturb public order and peace, but it is also required that the relevant hate speech be expressed with intent to incite hatred and violence towards members of specific minority groups prescribed by the law. In conclusion, the primary purpose of criminalizing this offense under criminal law is to combat discrimination in order to protect the rights of individuals and society as a whole, by preventing especially serious forms of racism and xenophobia.

According to the State Attorney's Office,¹⁸ so far Croatian courts have issued about ten final convictions for committing this criminal offense. In most cases, convictions were imposed because of active public incitement to violence and hatred over the internet. A majority of convictions are related to committing this criminal offense against persons of homosexual orientation. In all those cases, the perpetrators received only a suspended sentence. According to available information,¹⁹ none of the verdicts were related to incitement to violence or hatred against members of the Jewish people or for denying the Holocaust. There is no regulation that explicitly prohibits Holocaust denial in Croatia and incitement to violence and hatred against members of the Jewish people, or that trivializes the Ustasha-Nazi crimes. For instance, we can find online blogs called "*Crna legija – ponos Hrvatske*"²⁰ (Black Legion – Croatia's pride) and "*=U=staša do groba*"²¹ (=U=stasha for Life), a web page of the so called *Association for research of the triple camp Jasenovac*, which denies the crimes committed during the Ustasha-Nazi regime.²² Probably the most extreme example of antisemitism at present may be found on the social network Facebook, i.e. on the page "*Veritas vos liberabit – Vijesti bez cenzure*" (*Veritas vos liberabit - News without censorship*). For illustrative purposes, we will list some of the texts published on that page: "*Holocaust is the greatest historical lie. Jews are laughing at the masses who accepted their wannabe lies and created various fabrications about non-existing victims,*

and yet fail to respond to this evidence," "*Jews have always been the aggressors, both parasites and aggressors. Considering that they have all mainstream media, film industry, money, politics, education and all other important sectors under their control, they have counterfeited and inverted our reality, our present and our history.*" Furthermore, the above-mentioned page glorifies Adolf Hitler on a daily basis and calls for "*freedom from the Jewish jaws.*" The above wording is a textbook example of the criminal offense of public incitement to violence and hatred, which is legally explained as follows: In this specific case, both principal acts from the description of the criminal offense were committed: (i) active incitement to violence and hatred: "*Jews have always been the aggressors, both parasites and aggressors. Considering that they have all mainstream media, film industry, money, politics, education and all other important sectors under their control, they have counterfeited and inverted our reality, our present and our history*"; and (ii) denying the holocaust: "*Holocaust is the greatest historical lie.*" The act was committed by making the relevant texts publicly available on the internet or, more precisely, on a social network that is publicly available to everyone. In view of the content and number of online posts, and considering the fact that the page in question is created on a social network only and exclusively for the purpose of publishing xenophobic and discriminatory posts directed against the Jewish people, it is clear that the perpetrator's only intent is to create or strengthen the desire to use violence, or to create a feeling of hatred against members of the Jewish people. In this particular case, we can conclude that all the characteristics of the criminal offense of public incitement to violence and hatred are present.

Despite the fact that the Croatian public sphere is still exposed to the above-mentioned posts and other similar content, none of those cases have been subject to criminal proceedings.

17. Ksenija Turković et al., *Komentar kaznenog zakona*, Zagreb, 2013.

18. Data obtained from the State Attorney's Office pursuant to authors' written request.

19. Data obtained from the State Attorney's Office pursuant to authors' written request.

20. <http://ustasa-vojnicar.blogspot.hr/2005/11/crna-legija-ponos-hrvatske.html> (last visited March 22, 2017).

21. <http://blog.dnevnik.hr/ustasadogroba/> (last visited March 22, 2017).

22. <https://drustvojasenovac.wordpress.com/> (last visited March 22, 2017).

For Efficient Rule of Law, Response of the Legal System Should Be Adapted to Socio-Political Circumstances

Croatia's accession to the European Union gave new wind to the combat against hate speech. The alignment of Croatian legislation with the *acquis communautaire* resulted in the adoption of higher legal standards in the field of human rights protection, and hate speech was for the first time incorporated in Croatian legislation as a criminal offense. However, in contrast to detailed legislation, there is almost no case-law regarding hate speech.

In order to answer the questions asked in the introduction regarding the adequacy of legislation and its enforcement, it is required to discern what its regulatory significance is, its expected and actual efficiency, and what measures should be employed to adequately respond to current issues.

Law is a system that regulates human behavior. Human behavior governed by legal rules can refer to positive acts, but also to failing to act. As a system of legal and social organization, law regulates individual behavior to the extent that it relates to other individuals. In doing so, those relations can be individual or collective.

Legal norms give individual actions the character of legal acts. The word "norm" denotes a thought that something should be done or shouldn't be done, especially when an individual needs to define his behavior in a certain way. The legal importance of the norm and the system of norms lies in expressing the desired behavior and incriminating the opposite behavior as harmful, both socially and individually. The behavior that conforms to the norm is the one in line with the desired behavior, explicitly or implicitly contained in the norm.²³

When a particular legal rule prescribes a particular human behavior, it does so because it is considered valuable and important for the community of people to which it relates. That behavior is deemed significant and valuable not only because its definition protects a right of some other person, but especially because such a definition protects the economic, social or other legal interest of the community as a whole.²⁴

The legal system acts as a coercive order, meaning that it is a system that uses coercive measures to respond to behaviors that are deemed undesirable and harmful for the community and its individual members.²⁵ Those coercive measures are sanctions which are applied when the assumptions for their application are met, used by a legal system to protect individuals and community against the arbitrary use of force and violence, both by the system and by individuals and groups in the society. When this protection has reached a certain minimum, we speak of

collective security. The aim of collective security is peace, defined as the absence of coercion and violence.

By applying this conceptual framework to Croatian legislation and practice, we come to the following conclusions: The normative significance of legislation and practice is mirrored in incriminating behaviors expressing and inciting to violence and disturbance of public order and peace. The behavior concerned is identified as socially harmful and undesirable and, as such, is subject to misdemeanor or criminal sanctions. In order to sanction, prevent and encourage individuals to accept behavior that does not in itself contain hatred, violence and disturbance of the public order and peace, the legal system resorts to the means of coercion, i.e. different forms of sanctions. For less severe offenses, coercion is expressed in material form through fines, while for more severe offenses coercion may also be physical in the form of imprisonment.

When it comes to legislation, the severity of sanctions prescribed by the legal system demonstrates a serious approach to the issue of hatred and violence. However, regarding enforcement, the system treats the incriminated behavior relatively mildly, and in most cases it fails even to react, which gives the impression of an easy-going approach to the problem.

This can be understood as a likely explanation of functioning in stable socio-political conditions, when a majority of committed offenses are of lesser severity and when perpetrators are a few insignificant individuals with deviant behavior. However, the question is whether this is still justified and sustainable if the number and intensity of incidents significantly increase, and hatred is systematically organized and promoted. In that case, does the lack of intensity of the system's response jeopardize its efficiency? Does the legal system stray from its purpose if it fails to adjust its response to circumstances in which violence is becoming an everyday occurrence and the number of people resorting to violence is constantly growing?

At present, both in Croatia and in its immediate international environment, we are witnessing an escalation of extremism and hatred, and the resulting crimes committed under the influence of hatred, sometimes of unthinkable proportions. The psychology of fundamentalism-related crimes today that we call terrorism is, in fact, hatred. And hatred, which is at the heart of

23. Hans Kelsen, *THEORIE PURE DU DROIT* (1999), at 17.

24. *Id.* at 39.

25. *Id.* at 41.

terrorism, takes antisemitism as the first step, as one of the deepest-rooted collective forms of hate, in order to gradually expand to hatred towards the entirety of what is today generally called Western civilization.

However, the system's adjustment requires the ability to ask and analyze the following additional questions: Is the system's response severe enough and are the incriminations contained in Croatian legislation adequate? In light of the circumstances, would it not be necessary to prescribe stricter sanctions, thus making the system's response to offenses more effective, and to extend the scope of behavior incriminated under misdemeanor and criminal law? Would it not be preferable to classify and separately regulate certain hate categories (e.g. Nazism, antisemitism, Islamic fundamentalism, etc.), thus establishing them individually in the public conscience

as particularly undesirable and dangerous?

Such analysis exceeds the limits of this article. It is noteworthy that non-sanctioning or inadequate sanctioning of hate speech potentially creates a social climate in which racism and xenophobia are normal and ordinary occurrences. Such circumstances can, and regularly do, have grave consequences. One of the ways to prevent this is to ensure the rule of law through an adequate and efficient response of the legal system. ■

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“So that We May Cease the Oppression Wrought by Our Hands”: About Exploitative Contracts and Basic Values in Jewish Law

Shahar Lifshitz

Introduction

In one of the moving expressions of the concept of "closure" recited at the end of the Yom Kippur service, the worshiper asks that "we cease our oppression." In other words, the worshiper asks God to help him personally, as well as the people of Israel as a group, to entirely stop the practice of oppressing or exploiting others. In the Jewish Bible, the term "oppression" (*oshek*) usually refers to situations of unilateral taking of property. But in the Israeli legal system, the term is also aimed to describe situations in which a contract, ostensibly based on consent, ultimately reflects oppression and exploitation.¹ In this article, I discuss an Israeli legal provision concerning exploitative agreements, and suggest a possible contribution of Jewish law to the interpretation of this provision. I pay special attention to cases in which spouses, mainly men, agree to cooperate with the religious divorce process in exchange for the consent of the other spouse to an exploitative divorce agreement.

I. INVALIDATING OPPRESSION BY EXPLOITATIVE CONTRACTS IN ISRAELI LAW

A. The Oppression Provision in Israeli Law

Article 18 of the Israeli Contracts Law states that a person who enters a contract as a result of distress exploitation, and if the contractual terms are unreasonably different from the customary ones, the person is entitled to cancel the contract. This provision is called "oppression."

The oppression cause of action consists of three components.² One component deals with the situation of the oppressed, and provides four alternatives: (a) the distress of the party; (b) his mental feebleness; (c) his physical feebleness; and (d) his lack of experience. A second component concerns the behavior of the oppressor, or the exploitation. A third component concerns the terms of the contract, which are unreasonably unfair.

The oppression cause of action appears in Chapter 2 of the Contracts Law, and concerns the possibility of cancelling a contract because of a flaw in its formulation. Against the background of the other causes of action in Chapter 2, the oppression cause of action stands out as unique:

First, it is customary to consider Chapter 2 of the Contracts Law as focusing on flaws in the will. Based on a description of the oppressed (the first component), it is not at all clear that the will of that party is flawed. Certainly, it is not a case of a flaw in will of an intensity similar to that of other causes of action listed in Chapter 2.

Second, it is not clear what the requirement for oppression is: does it have to do with knowledge of the situation of the oppressed? Is potential knowledge sufficient, as stated in Article 14(a) of the Contracts Law (he should have known), or is it necessary for the other party to be the cause of the situation of the oppressed, as manifested in the causes of action of deception and coercion? Ostensibly, the use of the term "oppression"

Unless an official translation is mentioned, all the translations in this article are the author's.

1. The Hebrew term *oshek* may be translated both as oppressive and exploitative. It is quite clear that in the Bible, the reference is to the broader term, "oppression," which embraces more than mere exploitation (a term that has primarily financial implications). It is also quite clear that the Israeli legislator, in its legal provision, aimed at the broader meaning of oppression. In this article, however, I occasionally use the term "exploitation" when referring to strictly contractual matters or to legal provisions outside of Israel.
2. See Civil Appeal 403/80, *Sassi v. Kikaon*, P.D. 36(a) 762, 766 (Hebrew) (hereinafter, *Sassi*).

implies a unique requirement that reflects a negative moral attitude toward the oppressor.

Furthermore, in contrast to the other causes of action in Chapter 2, which deal only with procedural critique, the oppression provision of the Contracts Law contains also a component of substantive critique of the content of the contract.³

The uniqueness of the oppression cause of action results in ambiguity regarding its conceptual basis, the interpretation of its components, and the relationship between them. Israeli legal literature holds conflicting positions on these matters. Some emphasize the flaw in the will caused by distress, weakness, or lack of experience. Others⁴ believe that the oppression cause of action should focus on the fairness of the contract.⁵ According to an intermediate position, the provision combines the issue of finalizing a serious commitment with the substantive problem. For example, in their book *Contracts*, Daniel Friedmann and Nili Cohen expressed the following position:

The characteristic of the laws at the focus of this chapter is the connection between the idea of the fairness of the contract and the issue of flaws in the will. The unfairness of the contract does not fulfill merely an evidentiary function, but rather constitutes a substantive element of the cause of the cancellation. But it is not alone in this function, otherwise contractual certainty would be undermined too severely. It is joined by a demand for a flaw in the will. But the requirement for a flaw in the will in the oppression and in the unfair influence causes is moderate and much more lenient than that which exists with regard to traditional causes of action (mistake, deception, coercion.) The combination of bad or unfair terms with a flaw in the will, even a moderate one, is what justifies the causes for cancellation.⁶

In the spirit of the intermediary position, case law has also established a pendulum principle, according to which the flaw in the will and the fairness of the contract ought not to be examined in their own right, but rather in combination, so that in the event of a serious problem with the will, it is possible to reduce the threshold of the unfairness of the contract that makes its cancellation possible, and *vice versa*.

B. On the Meaning of Exploitation in the Oppression Provision

We have noted that according to Friedmann and Cohen,

the oppression provision is not based on the behavior of the oppressor, but rather on a combination of the flaw in the parties' will and the unfairness of the contract. The authors were therefore required to explain the role of the exploitation element within the framework of the oppression provision.

The requirement for exploitation by the other party, or by someone on its behalf, reflects the objective test in contract law. In the case of the oppression cause of action, it is sufficient if the other party (or someone on its behalf) knew about the flaw in the party claiming the oppression (knowledge about its distress, lack of experience, etc.), and in view of that made a contract whose terms are unfair. The exploitation is expressed in the fact that the other party knew about the distress and derived a benefit from it (by signing a contract whose terms are greatly advantageous to it).⁷

Thus, Friedmann and Cohen, as well as other scholars, equate the requirement of exploitation with that of knowledge. They argue that the exploitation is not an independent component, but rather a result of knowing about the additional ones.

Case law, as well as some scholars, have noted that exploitation and oppression express immoral behavior,⁸ but ultimately the practical application of the cause of action focused on the questions of the flaw in the drafting of the contract and on objective measures for determining unfairness, with the moral component and the terms

3. For the source of the distinction between substantive and procedural critique, see Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 UNIV. PA. L. REV. 485 (1967).
4. See Sinai Deutsch, *Economic Duress in Contract Law*, 2 Bar-Ilan Law Studies 1, 5-17 (1982) (Hebrew) (hereinafter, Deutsch).
5. See Eyal Zamir, INTERPRETATION AND GAP FILLING IN CONTRACTS 43-45, 99 (1996) (Hebrew).
6. See Daniel Friedmann and Nili Cohen, CONTRACTS, vol. 2, 970-971 (1993) (Hebrew).
7. *Id.*, 983.
8. See, for example, Gabriela Shalev, CONTRACTS LAW 247 (2nd ed., 1995) (Hebrew) (hereinafter, Shalev), which emphasizes the immoral aspect inherent in the oppression provision. According to Shalev, "The terms exploitation and oppression have a negative connotation of immoral or unfair conduct." See also Sassi, *supra* note 2, 769-768: "There is no doubt that the word exploitation implies such knowledge, as it also implies a measure of immorality on its part."

“exploitation” and “oppression” relegated to a declarative status only.⁹

II. INVALIDATING OPPRESSION BY EXPLOITATIVE CONTRACTS IN JEWISH LAW

Similar to Israeli law, Jewish law also addresses the issue of oppressive contracts. In this section I review the main position of Jewish law in this matter.

A. The Fugitive Case and the Jestling Rule in the Babylonian Talmud

The seminal case in the Babylonian Talmud concerning exploitative contracts addresses the contractual relationship between rescuers and fugitives, or the fugitive case. This case appears twice in the same *baraita* cited by the Babylonian Talmud, in the *Bava Kamma* tractate.¹⁰ The first part of the *baraita* states: “If a person running away from prison came to a ferry and said to the boatman, ‘Take a denar [a coin] to ferry me across,’ he would still have to pay him not more than the value of his services.”¹¹

The Talmudic conclusion is that the fugitive’s commitment to pay a denar, which is an excessive fee for this service, is not binding on him. The Talmud calls this law, which exempts the distressed party from honoring his commitment, the “jestling rule.” Following the presentation of the jestling rule, the Talmud contrasts it with the second part of the *baraita*, which seemingly examines the same case, with a different conclusion: “But if he said to him, ‘Take this denar as your fee for ferrying me across,’ he would have to pay him the sum stipulated in full.”¹² That is, in the second case, the contract would be enforced as stated.

To resolve the two parts of the *baraita*, the Talmudic sage Rami bar Hama explains: “[In the second part, the rescuer was] a fisherman catching fish from the sea, in which case he can surely say to him [to the fugitive]: ‘You caused me to lose fish amounting in value to a *zuz*.’”¹³

The Talmud distinguishes between a regular boatman earning his living by providing ferry services, and a fisherman who occasionally earns more, using his time to fish. The latter can justifiably demand a higher than usual fee for providing a ferry service. The Talmudic interpretation of the *baraita* could be described as a rule and an exception: the basic rule cancels a contract in which the distressed person agrees to pay in excess of the regular price. But the exception provides that if the boatman can justify his demand for a higher than usual fee (as could the fisherman, who would have earned more money from fishing during the time that he transported the fugitive), the stipulated price is valid.¹⁴

The jestling rule is applied in an entirely different context in a *suqyah* in the tractate of *Yevamot*¹⁵ about a widow

whose husband died childless (“the *halitzah* discussion”). Jewish law requires either that the deceased husband’s brother (the *yabam*) marry the widow (the act of levirate marriage or *yibum*), or that they perform the *halitzah*, a ceremony that voids the matrimonial bond between the brother-in-law and the widow. After they perform the *halitzah*, the widow is free to marry as she pleases, but without either *yibum* or *halitzah*, she may not remarry.

In this case, the Talmud states that the *yabam* was not a proper match for the widow because of his unsuitability, and could not demand to marry the widow. We may assume that the court would not permit him to do so even if the widow had agreed. In such a case, the only legal option remaining is *halitzah*; but in this case, the brother-in-law refused to perform this ceremony; and he cannot be compelled by law to do so. Following the court’s counsel, the widow promised to give the brother-in-law a certain sum of money for conducting the ceremony, but later she refused to honor her commitment. The court accepted her decision as legally valid, based on the preceding case of the fugitive and the jestling rule.

The Babylonian Talmud contains an additional source (the “medicines” discussion),¹⁶ whose content and linguistic style¹⁷ have led some commentators to connect it to the fugitive case and to the jestling rule. In this discussion, a laborer is hired to bring medicines to a patient. The Talmud rules that the laborer is entitled to full payment, regardless of whether the patient recovered or died. *Tosafot*¹⁸ explain that the agreed payment was

9. See, for example, Sassi, *supra* note 2, *id.* See also Civil Appeal 81/10 *Cohen et co. Contractors v. Geda*, P.D. 37(4) 635, 641; Shalev, *supra* note 8, 247; Deutsch, *supra* note 4, 41.

10. Babylonian Talmud, *Bava Kamma* 116a (the translations of texts from the Babylonian Talmud generally follow the Soncino ed., I. Epstein trans. & ed., 1961). Unless otherwise noted, the references and commentaries to Talmudic tractates relate to the Babylonian Talmud.

11. *Id.*

12. *Id.*

13. *Id.*

14. On the question to what extent the fisherman must base his claim, and the relationship between the loss sustained by the fisherman and the differential between the market to contract price, see *infra* nn. 62-65.

15. *Yevamot* 106a.

16. *Bava Kamma* 116a-b.

17. Like the fugitive case, in this discussion, the Talmud uses the wording “his wages in full.”

18. *Tosafot*, *Bava Kamma* 116b, s.v. “*Lehavi Keruv ve-Durmaskinan la-Holeh*.”

higher than was customary, and therefore the commitment could have been cancelled. The laborer is nevertheless entitled to full payment, despite the oppressive-exploitative agreement, because he would likely have earned more in some other task, and we therefore apply the exception to the rule derived from the fugitive case.

B. From Cases to Doctrine

All the Talmudic discussions that we examined share several characteristic features:

1. Distress

In each of these cases, one of the parties is in distress. The type of distress that explicitly appears in the Talmudic discussions is personal: a threat to the life of the fugitive, illness in the medicines discussion, and the inability to remarry in the *halitzah* case. Although the fundamental discussions did not directly examine¹⁹ instances of explicit economic distress,²⁰ the context of the discussions indicates that the Talmud did not distinguish between personal and economic distress, which possibly led most commentators to draw an analogy between the cases delineated in the Talmud and instances of economic distress.²¹

2. Semi-monopolistic rescuers

In all the cases discussed in the Talmud, at the moment of the contract, the only reasonable choice available to the distressed party is to enter into a contractual agreement, although the contracting party is demanding a price far higher than market price for the service. The monopolistic nature of the situation is most distinct in the *halitzah* case, where the brother-in-law is the only person, by law, who can enable the widow to remarry. Like the fugitive and medicine cases, at the time the contract is made, the distressed party has no other options. Or, we might say, in light of the pressure exerted on her, the widow is not psychologically free to examine other courses of action.²² Therefore, these discussions involve a distressed party that experiences its situation as requiring an agreement with a truly monopolistic party.

3. Unconventional terms in the contract

Each of the cases describes a transaction in which the consideration is different from what the market price of such a service or transaction would be in the absence of distress.

4. Exploitation

The three conditions we mentioned (a distressed party, a semi-monopolistic supplier, and a price different from the market price) exist in both the standard case of the fugitive ferried by the boatman and in the exceptional case in which the boatman is a fisherman. The Talmud shows that these three conditions do not suffice to create an exploitative contract that can be invalidated: rather,

the Talmud requires a fourth condition: a requirement²³ that the above-market price be the result of exploitation of the second party's distress. If the semi-monopolistic supplier can justify his demand for a higher than normal price, i.e., show that it is not merely the result of his ability to exploit the other party's distress, the contract is valid.

19. But see David Ben Solomon Ibn Abi Zimra, *She'eilot u-Teshuvot Radbaz* vol. 3, 6:2279 (n.p. 1972) (1749), who argues that the discussions in the Talmud also speak of economic distress; the fugitive, for example, had been "imprisoned for a monetary matter."

20. The analogy between life-and-death situations and economic distress can be supported by the Talmudic discussion of the fugitive (*supra* note 10), with its analogy between the case of the fugitive and that of economic distress (honey dripping from jars, below).

21. See Moses ben Maimon (Maimonides) [Maimonides, *Mishneh Torah*, Laws of Robbery and Lost Property 12:6 (H. Klein trans., West Publishing Co. 1954) (1475), who rules: If one travels with a jar of honey and the other with empty bottles, and the jar of honey cracks and the owner of the bottles says to the other, "I will not catch your honey in my bottles unless you give me half of it—or a third of it—or so many denar," and the owner of the honey agrees to this and says, "Very well," the rule is that he is regarded as having spoken in jest and need not give him more than the usual fee, for he has caused the other no loss at all (*infra* the "honey jars" example).

22. The simple understanding of the fugitive case is that this is the only ferry at the river available at the time of his pursuit. In contrast, Rabbi David ben Solomon ibn Abi Zimra, (*supra* note 19) argued that the fugitive is in distress, even if he could avail himself of the services of another ferry, and even if he were "imprisoned for a monetary matter," because he was in a hurry in his distress. According to *Radbaz*, this is not an objectively monopolistic situation, but from the subjective viewpoint of the fugitive, the sense of coercion is similar to that experienced by a party facing a monopoly.

23. In the fugitive case, the offer to pay an excessive price presumably comes from the fugitive, but it appears from the context that this proposal is born out of the refusal to act at the regular price. See, in this spirit, Bezalel ben Abraham Ashkenazi, *Shitah Mekubetzet* (n.p. 1989) (1762), on *Bava Kamma* 116a, which relates regarding the fugitive: "Provided that the boatman refused to ferry him for the regular price, until he agreed to pay a gold *denar*."

The medicine and *halitzah* cases are resolved in the same way.²⁴

Although the Talmud is formulated in a casuistic manner and not as a legal code,²⁵ based on its reasoning, we can properly formulate as legal doctrine the jesting rule, which provides for contracts to be set aside if the following elements are met:

- (a) personal or economic distress;
- (b) semi-monopolistic rescuer;
- (c) above-market price;
- (d) exploitation.

C. The Jestering Rule in the Post-Talmudic Era

Interpreting these Talmudic discussions, post-Talmudic Jewish law applied the jesting rule and its exceptions to a broad range of situations,²⁶ such as rescuers who demanded an exaggerated price for saving property that would be lost if it were not saved immediately;²⁷ physicians who took considerable sums for treating patients;²⁸ a *shofar* blower who feared that the promise of exorbitant payment for his blowing (on the High Holidays) would not be honored;²⁹ matchmakers and mediators who demanded a steep fee from their needy clients;³⁰ a monopolist rabbi who insisted upon an exorbitant payment for writing a bill of divorce;³¹ and husbands who demanded compensation for agreeing to divorce their wives.³² These discussions reveal heated controversies within Jewish law concerning the theoretical basis for invalidation of oppressive-exploitative contracts, as described in the next section. I also describe their practical influence on the regulation by Jewish law of distress exploitation contracts.

III. THE PHILOSOPHY BEHIND THE JEWISH LAW STANCE

A. Background: Flawed Free Will and the Unfairness Argument in Jewish Contract Law

Modern contract law distinguishes between *procedural* arguments, which focus on the free will of the parties, and *substantive* arguments, which are concerned with the fairness of the contractual terms.³³ Although there are other important distinctions between modern American and Jewish contract law, the basis for this modern tension can be found in Jewish contract law. One school of thought maintains that the Jewish law approach to contracts is procedural, and seeks to ensure that the transaction reflects the free will of the parties to undertake such a commitment. These approaches view *gemirat ha-da'at* (the clear expression of one's free and final will) as the key concept of voluntary transactions in Jewish law. Consequently, claims that there are flaws in contract formation are accepted only if it can be proven that the

process of drafting the contract does not reflect the free and final will of the parties.³⁴

In contrast, the principle of *ona'ah* (price fraud), which enables a party to void the transaction if the price of the good or service is more than one-sixth above market price,³⁵ is an outstanding example of a substantive

24. As we saw, *supra* note 15, the Talmudic discussion is limited to an unsuitable brother-in-law. The law dictates that an unsuitable brother-in-law may not perform *yibum* for the widow (i.e., marry her). Therefore, the brother-in-law could not argue that the demand for payment in exchange for *halitzah* results from the need to compensate him for his loss.

25. See Leib Moscovitz, *TALMUDIC REASONING: FROM CASUISTICS TO CONCEPTUALIZATION* (Paul Mohr Verlag 2002).

26. See, e.g., Maimonides, *supra* note 21, Laws of Robbery and Lost Property 12:7, who summarizes the law and the exception as follows: Similarly, if one escaping from prison comes to a ferry and says to the ferryman, "Take me across and I will give you a denar," and he is taken across, the ferryman receives only the usual fee. If, however, there is a fisherman there to whom he says, "Leave your net and take me across," he must give the fisherman whatever he stipulates. The same rule applies in all similar cases.

27. See, e.g., Maimonides, *supra* note 21, who applies the jesting rule in cases of economic distress, as well.

28. See Moses Ben Nahman (Nahmanides), *Hiddushei ha-Ramban* (Novellae on the Talmud) 31 (*Yevamot*: Or-Olam Com. 1962) (1740), on *Yevamot* 106.

29. See the case discussed by Jair Hayyim Bacharach, *She'eilot u-Teshuvot Havvat Yair* vol. 2, 186 (Shimon Kots ed., Eked 1997) (1699).

30. See *infra* notes 40-42.

31. See the case brought by Obadiah Bertinoro, *Perush al ha-Mishnah* (Commentary on the Mishnah) (1548-49), Bekhorot 4:6.

32. See, e.g., the case discussed by Solomon Luria, *She'eilot u-Teshuvot Maharshah* ch. 24-25 (1969) (1599).

33. See *supra* note 3. See also the discussion concerning the oppression provision in Israeli law.

34. Deutch, *supra* note 4.

35. On the *ona'ah* rule, see Joseph Caro, *Shulhan Arukh Hoshen Mishpat* 227 (Tal-Man 1978) (1565). See also in the research literature Aaron Levine, *Onaa and the Operation of the Modern Marketplace*, 14 *JEWISH L. ANNUAL* 225 (1993); Itamar Warhaftig, *Market Value, Prices and Overreaching*, 4 *KETER* 17 (2004) (Hebrew); Binyamin Porat, *Overreaching—Legal and Ethical Principles*, 4 *KETER* 292 (2004) (Hebrew).

doctrine.³⁶ Below I show that many discussions of the jesting rule focused on the procedural-substantive tension or, in Jewish law terms, on the distinction between claims of flawed *gemirat ha-da'at* and the principle of *ona'ah*.

B. The Procedural Perspective:

Distress Exploitation and the Demand to Finalize a Serious Commitment (*gemirat hada'at*)

According to Sinai Deutch, the jesting rule in Jewish law is based on a flaw in finalization of the distressed party's intent.³⁷ According to this approach, which parallels the modern procedural unconscionability argument, a commitment for excessive consideration made in a state of distress cannot function as the party's final intent,³⁸ and therefore is not binding. Working within this approach, post-Talmudic legal decisors (*poskim*), like Rabbi Joseph Caro, held that the jesting rule may be overcome by an action that proves that the distressed party's will is indeed final despite the distress, such as the implementation of a commitment,³⁹ an oath, or a handshake.⁴⁰

Another procedural approach of Jewish law, suggested by Rabbi Yom Tov ben Abraham Ishbili (*Ritba*), brings the invalidation of oppressive-exploitative contracts closer to a classic duress argument.⁴¹ According to this approach, the problem with a commitment made in a state of distress is not the party's lack of decisive intent in the obligation it undertook. To the contrary, distressed people seriously intend to honor their undertaking in order to extricate themselves from their distressed state. But because the commitment was made under duress,⁴² the law does not recognize it as a free-will commitment. Furthermore, as long as the commitment was made under duress, a vow, handshake, or any other means that proves decisive intent, but not free will, cannot validate the contract.⁴³

C. The Substantive Approach:

Exploitation and the Review of Contract Fairness

In the post-Talmudic period, the jesting rule has been applied by decisors to additional cases where there is a disparity between the proper fee and the stipulated fees for intermediaries,⁴⁴ guarantors,⁴⁵ exorcists, and matchmakers.⁴⁶ This expansion is surprising, because it is not at all clear that the parties in these cases suffer from any tangible distress, and certainly not distress serious enough to impair their free will. Nor is it clear that these cases are indeed monopolistic or semi-monopolistic.⁴⁷ If the jesting rule focuses on the impaired will of the distressed party, a distinction should have been drawn between these cases and Talmudic discussions in which one could argue that the distressed party's will is impaired.⁴⁸ Instead, these cases focus on substantive

36. On this interpretation of *ona'ah* and the rejection of an alternative interpretation that perceives this law as an example of the contract doctrine of mistake, see Levine, *supra* note 35. Similarly, the law of Rabbi Huna, holding that a sale under duress might be valid if the usual price for such a transaction was paid ("if they [threaten to] hang him and he sells, the sale is valid"—*Bava Kamma* 62a; *Bava Batra* 47b; 48a, b) may be understood as reflecting the superiority of the substantive approach to the procedural one. See the extensive discussion in Benny Porat, *Coercion and the Principle of Contractual Justice: Jurisprudential Observation of "Talyuhu ve-Zabin,"* 22 DINE ISRAEL 49 (2003) (Hebrew).

37. See Deutch, *supra* note 4. He uses the Hebrew term *gemirat ha-da'at*.

38. Deutch, *supra* note 4, finds support for this view in the wording of the above Talmudic passages, which explains the ability of the exploited party to claim: "I was merely jesting with you." According to Deutch, this attests to the non-serious nature of the commitment made by the distressed person.

39. For this reason, Deutch supports his view with the position of Rabbi Joseph Caro, in Caro, *supra* note 35, *Hoshen Mishpat* 264:8, which limits the invalidation of oppressive-exploitative contracts to the instance in which the distressed person's commitment has not been executed.

40. On this legal conclusion, see Aryeh Leib Heller, *KETZOT HA-HOSHEN* vol. 3, 264:4 (1982) (1788-96).

41. This seems to be the explanation by Yom Tov Ben Abraham Ishbili, *HIDDUSHEI HA-RITBA* vol. 1 (Novellae on the Talmud) (*Yevamot*: Mossad Harav Kook 1992) (1787), on *Yevamot* 106a:

This case is different, for he agreed because of the compulsion. How so? In the case of the unworthy brother-in-law, she was [under duress, for fear of] being chained to him [i.e., being unable to remarry]. And similarly, in the case of the ferry, this was a case of duress, which led him to agree; and a stipulation under duress is counted as nothing, and only his [regular] wages are coming to him.

42. *Ones* in Hebrew.

43. See Ishbili, *supra* note 41 (*Kiddushin*: Mossad Harav Kook 1985) (1553), on *Kiddushin* 8a. See also Ashkenazi, *supra* note 23, on *Bava Kamma* 116a, who states, in the name of Rabbi Menahem Meiri, that the jesting rule applies also in finalized transactions.

44. On the fee of intermediaries, see, e.g., Isaac Adarbi, *She'eilot u-Teshuvot Divrei Rivot* 396 (n.p. 1989) (1582); Joseph Lev, *She'eilot u-Teshuvot Mahari Ibn Lev* 1:100 (photo. repr. 1960) (1587), who discuss the fee of intermediaries through the lens of the jesting rule. The discussion focuses on the gap

contract fairness,⁴⁹ and the party's distress and its influence on the finality of its intent plays a secondary role, if any.⁵⁰ The transition from procedurally flawed free will arguments to fairness review is clearly reflected in the attitudes of commentators who explicitly identify⁵¹ the Talmudic jesting rule with the principle of price fraud (*ona'ah*),⁵² which invalidates a transaction when an excessive price is charged.⁵³

D. Changing the Focus to the Moral Duties of the Exploiter

1. Exploitation Contracts and the Moral Duty to Aid a Distressed Person

Several commentators⁵⁴ have characterized the Talmudic discussions accepting the jesting rule as cases in which the non-distressed party is committed to aid the distressed person even without an agreement.⁵⁵ This analysis opens the way for a fresh understanding of the jesting rule and for the regulation of oppressive-exploitative contracts in general. Unlike the procedural approach, with its focus on the free and final will of the distressed party, and the substantive approach, which is concerned with the terms of the contract, this approach focuses on the non-distressed party (the "exploiter") and his obligation to the distressed party. The argument against the exploiter is that, because the aid to the distressed party is a routine act that he is commanded to perform, he should not demand excessive payment for his actions. This criticism of the exploiter's behavior enables us to accept the distressed party's claim for contract annulment.

Basing the jesting rule on the duty to aid a distressed person presumably limits⁵⁶ this rule to instances of a clearly enforceable legal duty or, at least, to a clear religious commandment to aid the distressed person.⁵⁷

Close inspection of the post-Talmudic discussion reveals, however, that this approach was applied even where it would have been more suitable to classify the duty to aid a distressed person as a moral duty,⁵⁸ rather than an enforceable legal duty⁵⁹ or a religious commandment⁶⁰ (in the narrow Jewish law sense of the term). This enables us to view the regulation of oppressive-exploitative contracts in Jewish law as an indirect means of legally enforcing moral obligations, even those that could not be directly imposed. This new understanding enables us to comprehend the seemingly puzzling fact that in certain cases (such as that of *halitzah*), the court was engaged in creating an agreement that it would later invalidate on the grounds of "jesting."⁶¹ According to our interpretation, the court thus circuitously enforced the moral obligation that could not be directly imposed at the outset.

2. Moral Exemptions to the Jestng Rule

The moralistic approach of the jesting rule is clearly

between the contractual price and what the judge assesses as just compensation for the intermediary's efforts. Cf. Jacob of Lissa, *Netivot Ha-Mishpat, Novellae*, 264:19 (1980) (1809), who focuses on the disparity between the contractual fee and the customary price.

45. See Asher Ben Jehiel, *She'eilot u-Teshuvot Ha-Rosh* 64:3 (photo repr. 1954 of 1885 ed.) (1517), who applies the jesting rule to the fee of guarantors.
46. For a discussion of the fees of matchmakers and exorcists in the context of the jesting rule, see R. Moses Isserles's commentary on Caro, Shulhan Arukh, *Hoshen Mishpat* 264. Isserles distinguishes between consent to the matchmaker's fee, which has no legal standing unless it corresponds to the proper price, and consent to the exorcist's fee, which is valid in any event. See also Mordecai Ben Hillel, *Mordekhai* (1509) on *Bava Kamma*, 10:172; Elijah Ben Hayyim, *Teshuvot Ha-Ranah* 3.
47. To reconcile the approach that bases the jesting rule in Jewish law on a flawed will with the post-Talmudic cases discussed in this part, some recent commentators explain that these cases reflect flawed *gemirat ha-da'at* as well. For possible support of this view, see Ephraim Navon, Mananeh Efraim, *Laws of Hiring* 15, p. 67-68 (Moshe Eizenbach Publisher), who maintains that elements of distress and even duress exist, at least in the instances of the matchmaker and the exorcist. As I noted, neither the cases nor rabbinical discussions of them focused on this aspect, although they may contain a certain element of lack of choice, which joins together with the central issue of contract unfairness.
48. Some of those who based the jesting rule on the flawed will of the exploited party emphasized the difference between cases that involve distress and those in which there is a gap between the contractual price and the market/fair price. See Solomon Cohen, *She'eilot u-Teshuvot Maharshakh* 2:80 (n.p. 1990) (1586). Cohen discusses the case of a community that hired a rabbi at a high wage and wished to cancel the contract with him; see also *id.* at 1:79, the case of an intermediary. In both cases, Cohen emphasizes that those who base the jesting rule on duress would fully validate agreements with no element of coercion. Cohen, however, also mentions opposing views, which focus on the contractual terms and therefore apply this doctrine in instances in which the party's will is not flawed, but the fee is nevertheless not fair.
49. On the claim that the jesting rule is part of the general rule of fairness of contract, see Warhaftig, *supra* note 35. Warhaftig suggested different ways of testing contract fairness, such as: (a) a wage that seems proper to the judge, (b) the objective customary wage, and (c) the customary wage, with the judge also taking into account the subjective conditions of the case.

superior to both the procedural and substantive approaches in explaining the exceptions to the rule in the Talmud and in the post-Talmudic literature. The procedural and substantive approaches have difficulty explaining the Talmudic distinction between the regular boatman and the fisherman. Each case involves a distressed person. Consequently, how is the other party's economic opportunity relevant according to the procedural perspective, which focuses on a distressed person's difficulty in expressing his free and final will regarding the transaction?

In principle, one could envision an expansive substantive approach that reviews contract fairness not only by comparing the contractual price with the market price, but also by taking into account the specific circumstances of the parties (such as the loss of alternative profits). Such an approach could explain the distinction between the cases of the fisherman and the regular boatman, because the fisherman will lose potential profit unless the deviation from the market price corresponds to the fisherman's hypothetical losses.⁶² The fisherman, however, is not required to objectively prove the claim that he suffered a loss.⁶³

Furthermore, some decisors have ruled that even without a tangible correlation between the loss of alternative profits and the contractual price, the existence of such a loss,⁶⁴ or even the fisherman's authentic feeling of lost opportunity, is sufficient to validate the contract.⁶⁵ If the correlation between the loss of alternative profits and the contract price is irrelevant, and the decision is to rely on the fisherman's subjective feeling instead of objective data, it is difficult to harmonize these cases with substantive approaches that focus on contract fairness.⁶⁶

By contrast, our new moral understanding of the Jewish law explains the Talmudic distinction between the regular boatman and the fisherman, showing why that party's profession is clearly relevant. The boatman who usually ferries passengers at the regular price should view the fugitive's request to be ferried at the market price as a costless request. Consequently, the demand for an above-market price reflects his exploitation of the fugitive's distress. In the case of the fisherman, however, the contract is enforceable because the steeper fee compensates for the loss of alternative income of the fisherman, and reflects a legitimate desire to avoid loss.

The decisors' refusal to demand a correlation between the loss of alternative profits and the contract price, and their willingness to rely on the fisherman's subjective feeling instead of objective data, are consistent with a focus on the exploiting party and its moral obligations. If there is a difference between the market price and the fisherman's loss of alternative profits, or if the fisherman

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50. According to at least some commentators, the possibility of voiding service transactions because of their unfairness was limited to certain transactions in which no concrete acquisition act (which according to Jewish law symbolizes the finalization of the transaction) is implemented. *See, e.g.,* Asher Ben Jehiel, *supra* note 45, at 46:3.
 51. *See, e.g.,* the opinion of Jonathan Ben David of Lunel, *Novellae on the Talmud (Bava Kamma: S. Friedman ed., 1969)* on *Bava Kamma* 116a (this view is cited also in Ashkenazi, *supra* note 23, on *Bava Kamma* 116a, s.v. "Mi," in the name of Rabbi Jonathan).
 52. *See supra* note 35.
 53. Similarly to some modern approaches that combine procedural and substantive arguments, Jewish law also developed an approach stating that only the combination of one party's distress and an asymmetry between the contractual price and the market price can lead to the voiding of the contract. Such an intermediate approach is taken by Jacob of Lissa, *supra* note 44, 264:19, who connects the jesting rule with the general *ona'ah* rule, but with the former reflecting the interaction between the terms of the contract and the situation of distress.
 54. *See, e.g.,* Mordecai Ben Hillel, *supra* note 46, on *Bava Kamma* ¶ 174: "The reason is that he [the other party] is in danger and he must rescue him, and take his wages; here, too, one is commanded to bring medicine to the patient." *See also* Moses Ben Nahman, *supra* note 28, on *Yevamot* 106a, s.v. "U-de-Amrinan." "According to one explanation, the reason for the teaching of the *baraita* is that he must rescue him, on account of [the obligation of] returning a lost article; and for this reason, he is entitled only to the customary price." *See also* Menahem Meiri, *Beit Ha-Behirah* (Makhon ha-Talmud ha-Yisraeli ha-Shalem 1962) (1794), on *Yevamot* 106a.
 55. In the case of the jars of honey (*see supra* note 20), the owner of the jars is commanded to offer assistance by force of the well-known Jewish law of "returning a lost article." *See* Exod 23:4; and in the Talmud: *Bava Metziah* 32. *See also* Anne C. Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives*, 10 J.L. & RELIGION 197-206 (1993). In the fugitive and medicines cases (*see supra* notes 10 & 21), the boatman and the laborer, respectively, are duty bound to rescue. According to these commentators, this duty expands the original law of the return of lost property to include human life. In the *halitzah* case, the brother-in-law is not worthy to be married to the widow, and he therefore is required to perform *halitzah* and not *yibum*.
 56. At the same time, these views may allow for the termination of a contract in additional cases in which a person undertakes to do his religious duty, even in the absence

believes this to be so, his refusal to extend aid at the regular price cannot be morally censured. In the absence of such moral censure, the contract cannot be voided.

Focusing on the moral assessment of the exploiter's behavior and his duty to the distressed person can explain two additional exceptions to the jesting rule that developed in the post-Talmudic literature. First, the jesting rule is not applicable when service is provided in circumstances that increase the cost of the service to the boatman, or if he faces some dangers beyond the usual risk when the situation of distress is absent.⁶⁷ When the distress of the other party changes the nature of the required service, refusal to provide the service at the market price can no longer be condemned. Without moral censure of the service provider, one cannot speak of exploitation and oppression.

Second, the jesting rule does not apply when the supplier has previously invested in skills such as medical studies, which enable him to aid a distressed person better than an average person would be able to. In such cases, the contract price reflects a legitimate demand for compensation for the considerable time needed to acquire special medical knowledge.⁶⁸ Consequently, the contract is valid.

E. Conclusion

I have shown how the procedural approach focuses on the exploited party, and on how its distress limits its ability to exercise free will (according to Ritba),⁶⁹ or to finalize a serious commitment (*gemirat da'at*) (according to Rabbi Joseph Caro, as understood by Deutsch).⁷⁰ I have also shown that the substantive approach focuses on contract content, which it seeks to evaluate by the objective criterion of contract fairness. I argued that Jewish law offers an additional, unique view, which bases the invalidation of oppressive-exploitative contracts on a moral examination of the exploiter's behavior. The exploiter is morally obligated to aid the distressed, and morally prohibited from gaining from that distress. Demanding above-market terms from a distressed person violates the moral prohibition, and is legally significant: it enables the distressed party to annul its contractual commitment. According to this view, invalidation of the contract is a means to compel the oppressor-exploiter to fulfill his moral duty to the oppressed-exploited. But at times there is no strong *ex ante* moral duty to aid the distressed person at the regular price, and therefore no moral justification for invalidating the contract. These are cases in which (a) alternative profits may be lost, or the serving party believes that there will be such a loss; (b) the distress changes the type of service or the risk that the service entails; and (c) a prior investment exists in the required skills or the availability of the service provider.

of distress. See Mordecai Ben Hillel, *supra* note 46, on *Sanhedrin*, ¶ 704, who connects the law of the exploiter with the case of a grandfather (*infra* the grandfather) who told his son-in-law to study with the latter's son (i.e., the grandfather's grandson), and promised him payment for the teaching. Despite his commitment, the grandfather is exempt from payment. Most of the commentators, however, do not accept this elaboration and think that even if there is a religious duty to perform the commandment for free, this obligation in itself does not suffice for the legal invalidation of the commitment. See, e.g., David Ben Samuel, *Turei Zahav, Yoreh Deah* 336:3, who emphasizes that despite the religious prohibition, the commitment may not be canceled once it has been given.

57. See Bertinoro, *supra* note 31, on *Bekhorot* 4:6: "I saw a scandal on this matter among the rabbis of Ashkenaz [the Franco-German Jewish center]: the ordained rabbi, the head of the academy, was not ashamed to take ten *zehuvin* [a large sum of money] for the half an hour of the writing and giving of a single bill of divorce, and two *zehuvin*, or at the least, one *zehuvin*, payable to each of the witnesses who signed the bill. As far as I am concerned, he is not a rabbi, but a thief and coercer, because he knows that bills of divorce may be given in his city only with his permission, and the one who must give a bill of divorce is forced to give him all he possesses."

Note the difference between Bertinoro's condemnation of the rabbi's actions and the procedural approaches that focus on the coercion, and the substantive ones that are concerned with the contract terms.

58. Although the fugitive case can be based on a commandment in the narrow sense, many authorities had difficulty in locating a parallel commandment in the case of the recalcitrant brother-in-law. In this spirit, see Moses Ben Nahman, *supra* note 28, on *Yevamot* 106a: "For, at any rate, there is no tangible obligation for him to perform *halitzah*."
59. See Luria, *supra* note 32, at ¶ 25: "This issue of *halitzah* speaks of those who cannot be compelled to perform [*halitzah*], for in cases where compulsion is possible, deception is unnecessary."
60. See Simeon Ben Zemah Duran, *She'eilot u-Teshuvot Ha-Tashbez* 4:3:20 (1891): "And in both instances, he is not obligated to act for free, for as regards every commandment that is imposed on the entire world, he need not perform it for free. If, however, one asks for more than what is proper for [performing this act], this is an improper request, since, in the final analysis, this is his duty."
61. See Solomon Ben Abraham Adret, *She'eilot U-Teshuvot Ha-Rashba* 1240, who maintains that, *ex ante*, we may counsel the exploited party to adopt the tactic of "jesting."

IV. POSSIBLE INFLUENCE OF JEWISH LAW ON ISRAELI LAW IN THE MATTER OF OPPRESSION

I believe that the moral approach of Jewish law to the subject can enrich the existing interpretation of the oppression provision in Israeli law by injecting real content in the expression of exploitation and in the moral significance of the cause of action.⁷¹ First, similarly to Jewish law, in my opinion, the courts should examine not only the terms of the contract and the flaw in the parties' will, but also the question of whether there was a moral obligation in the specific case to make a contract, based on customary terms, with someone in distress. Second, from the moral point of view, an objective examination of the price should not suffice to justify the behavior of the oppressor who demanded a wage beyond what is customary, but rather, it should be examined whether it was justified under the given circumstances. Third, the moral point of view makes relevant the questions concerning the intent of the oppressor, his original responsibility for creating the state of distress, and whether he acted in good faith. Finally, contrary to the customary situation, a distinction must be made between types of exploitation. The case of the party who chose not to see the distress of the oppressed is not the same as that of the party that is responsible for the distress in one way or another. The distinction between the types is manifested in the principle of the pendulum: the more exploitative one party is, the smaller the degree of distress and the gap between customary and present terms that are required to enable the cancellation of the contract.

If Israeli law were to adopt the approach suggested in this article, it would have a significant implication for painful cases of *get* blackmail. I mentioned above the case in which the Talmud refused to enforce the commitment of a woman who agreed to pay her brother-in-law to perform *halitza*, in accordance with the doctrine requiring nullification of contracts that are a product of distress exploitation. Similarly to the case of the dishonest *halitza* agreement, there are many husbands in Israel who abandon their homes but refuse to divorce their wives. As a result, there are documented cases of extortive agreements, in which the woman waives her property rights to receive a *get*. Unfortunately for these women, neither civil nor rabbinical courts apply the doctrine of distress exploitation in these cases, and validate agreements in which cruel husbands take advantage of their wives' distress and exploit them. At least in a portion of these rulings, the courts adopt the commercial-contractual rhetoric, and do not sufficiently apply moral censure to the exploitative behavior of *get* refusal.⁷²

It may be that this position, adopted by the courts, is

62. According to certain interpretations of *ona'ah*, this law may also be influenced by the seller's special expenses, which led him to sell above the market price. See Levine, *supra* note 35, at 248.
63. The Talmud formulates the fisherman's claim subjectively: he could have said to him, "you caused me to lose... a zuz."
64. For the validation of the contract, even if asymmetry exists between the profit that is denied the fisherman and the contractual price, see Heller, *supra* note 40, at 264:2: "But the statements by *Rosh* [Rabbeinu Asher ben Jehiel] and *Ma'adanei Melekh* explain in that case that, even if this entails a slight loss, he must be given all that was agreed."
65. See Jacob of Lissa, *supra* note 44, at 264:17: "Whatever he stipulated, even if it appears that he does not profit so greatly; since he could possibly catch in his net the amount of fish equivalent [in value] to the stipulated amount, he [the second party] must pay him the full [stipulated sum]."
66. Note that, similarly to the conclusion drawn from the substantive approaches, Rabbi Moses Isserles permits the fisherman to receive only what he actually lost; if the contractual price is higher than the sum of the proven loss, he is not entitled to the former. See Ashkenazi, *supra* note 23, at 116a: "*Rema* [Rabbi Moses Isserles], of blessed memory, interpreted this in detail, and this is his wording: ...When he suffers a loss, he is not allowed to take more than what he actually lost."
67. See Bacharach, *supra* note 29, at 186, who considers the shofar blower who was promised a large sum of money for the danger entailed in traveling. Bacharach explains that the dangers of traveling justify a higher than customary fee, and therefore the jesting rule is not applicable.
68. See Moses Ben Nahman, *supra* note 28, on *Yevamot* 106a, who distinguishes between the act of charging an exorbitant price for medicines, which contains all the elements of exploitation and consequent invalidation of the commitment, and the case of a physician who demands a high fee, which is morally justified. In Nahmanides's words "But a physician is entitled to his full fee, because his wisdom was sold to him, and it is worth much money." See also Caro, *supra* note 35, *Yoreh De'ah* 336:3; but see David Ben Solomon, *Ibn Abi Zimra*, *supra* note 19, at 3:556, who maintains that if he is the only physician there, even according to Nahmanides, we may invalidate this excessive fee.
69. See *supra* note 41.
70. See *supra* note 4.
71. For the argument about the possible influence of Jewish law on the unconscionability provision in American law, see Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 NORTH CAROLINA L. REV. 315, 346-361 (2008).

a result of the fear that nullifying such agreements would eliminate the option of *get*-refused women to obtain a divorce by paying off the recalcitrant husband. According to this approach, as long as religious divorce law does not allow unilateral divorce, the option of purchasing the *get* in return for an exploitative agreement is the lesser of two evils.

A deeper analysis, however, leads to the opposite conclusion: in many cases, the reason behind the refusal to divorce is the potential for blackmail. The knowledge that an oppressive agreement will not be validated would not cause recalcitrant husbands to continue in their refusal. On the contrary, it would nullify the financial incentive in their refusal, as recalcitrant husbands would know that even if they reached an exploitative agreement, it would not be enforced.

At a mock trial held at the Faculty of Law of Bar-Ilan University, a panel of judges headed by Supreme Court Justice Neal Hendel, ruled that under certain circumstances, in which the divorce agreement clearly exploits one spouse, the existing law must be reconsidered and such divorce agreements annulled.

In light of the above, I am hopeful that in the spirit of Jewish law, the judicial courts in Israel will change their policies and enable the annulment of divorce agreements not only in staged trials, but in trials that have a substantial outcome in the real world as well.

V. CONCLUSION: JEWISH LAW AS AN INSPIRATION FOR MODERN LAW

Addressing the Jewish law regulation of oppressive-exploitative contracts, I have reviewed the cases discussed in the Talmud and in the post-Talmudic literature, and have formulated a legal doctrine that invalidates oppressive-exploitative contracts. I analyzed the philosophy at the basis of this doctrine. The first two approaches, which are concerned with the flawed will of the contractual party and contract unfairness, parallel the procedural and substantive approaches in modern contract law. The third approach, which is unique to Jewish

law, makes a connection between the *ex ante* moral duty to rescue and *ex post* contract invalidation.

At a deeper level, the article has modeled a cultural encounter between the regulation of oppressive-exploitative agreements in Jewish law and the legal and economic approaches at the basis of modern contract law. This encounter illustrates the benefits that are likely to emerge from comparative work, both for the study of Jewish law and for the researchers and shapers of modern law. On one hand, the analogy with modern conceptions helped uncover a unique approach of Jewish law that has not been considered before; on the other, despite its seeming contradiction with modern economic values and logic, Jewish law, upon deeper inspection, was shown to balance between individual rights, solidarity with the other, and sensitivity to long-range this-worldly consequences. The desire to incorporate individualism, moral solidarity, and utilitarian considerations characterizes new developments in contemporary legal thought. In this sense, the Jewish law doctrine governing oppressive-exploitative contracts may serve as an important and intriguing source of inspiration for modern lawmakers. Finally, the article makes a unique contribution to the current interpretation of the oppression cause of action in Israeli law, especially of the possibility of fighting injustice in divorce settlements, which leads to exploitative agreements. ■

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*An earlier version of the analysis was published in *Oppressive Contracts: A Jewish Law Perspective*, 23 *Journal of Law and Religion* 425 (2008)*

72. See, for example, Civil Appeal 5490/92, *Pegas v. Pegas*, Takdin 94(4) 516, and my critique of the ruling in Shahar Lifshitz, "The regulation of the marital contract in Israeli law: Initial roadmap," *Kiryat Hamishpat* 4 271, 298 (2004) (Hebrew).

International Legal Forum

Seminar in Israel, March 4-9, 2017

Reviewed by Ronit Gidron-Zemach

The Association, in collaboration with Project Interchange (the educational institute of the American Jewish Committee) brought to Israel in March 2017, a delegation of twelve senior jurists from various European countries, including Germany, Albania, Lithuania, Italy, Latvia, Greece and Poland.

This initiative is the result of the seminar held by the IAJLJ in Austria in November 2015 under the auspices of the Austrian Ministry of Justice. At that seminar, discussions were held with local official representatives from the Ministry of Justice and the Ministry of Interior. One of our goals was to present the need to re-embrace the working definition of antisemitism, and to classify antisemitic hate crimes, and address this phenomenon accordingly. The seminar also included a historical introduction, and an overview of the rise of antisemitic incidents in Austria and the lack of proper enforcement and punishment. Given the success of the seminar, it was decided to follow up on this project with an educational legal seminar in Israel for European high-profile prosecutors and judges. As a professional Jewish association, we saw great importance in bringing leading jurists to Israel, since there is nothing like "feeling the ground" and seeing things from a local perspective, and not as they are presented in the media.

For months, the Association invested great efforts in assembling the list of participants; it was necessary to identify them and examine their ongoing work. This was a difficult task in itself since people with high profiles such as theirs often have "less presence" online. We therefore contacted members of the IAJLJ abroad and other colleagues in order to learn about every potential candidate.

At the same time, the Association, in collaboration with the AJC in Israel, designed an academic program that would be consistent with our goal: teaching the history of the Jewish people, antisemitism, the Israeli legal system and more.

The jurists visited Israel for five full days, and the program included a meeting with Dan Meridor, a tour of the Knesset and a meeting with MK Begin and MK German, a visit to the Supreme Court and a meeting with Justice Neal Hendel, a visit to Ramallah and a meeting

with the Palestinian Deputy Minister of Justice, meetings with representatives of the Ministry of Foreign Affairs in Jerusalem, a lecture at the Ministry of the Diaspora, a meeting with a Kadi, a tour of the southern settlements around the Gaza Strip, including presentations from a retired IDF colonel and one of the members of our Board of Governors, Adv. David Benjamin. Together, they provided a military and a legal perspective of the Israeli-Palestinian conflict. The delegates had an emotional meeting with a Holocaust survivor, toured Yad Vashem and heard Prof. Yehuda Bauer. A reception with other IAJLJ members and representatives from other law firms was held at the Herzog, Fox & Neeman Law Firm in Tel Aviv, including a presentation. In between, there were also tours of the Western Wall Tunnel and an urban trip in Tel Aviv.

Rabbi Andrew Baker (of the AJC) and I accompanied the delegation during its entire stay.

The visit was extremely successful. The jurists were exposed to a new reality; they learned about the history of the Jewish people and the Israeli-Palestinian conflict, they held in-depth dialogues with the people they met and they expressed interest in all the legal and historical aspects to which they were exposed.

Throughout the experience, the members of the delegation were able to forge personal connections with each other, as well as with me. One of the sentences I still recall, after I made my speech before the delegates at the reception, in which I shared with them my personal story and the reasons why I work for the IAJLJ and the rationale that motivates me, is that *"it was a memorable week and that Israel gained a new friend."* To me, this is the core of the vision we had and what we sought to achieve. If we led foreign non-Jewish leading jurists to become friends of Israel, then we accomplished our purpose. ■

Ronit Gidron-Zemach is CEO of the International Association of Jewish Lawyers and Jurists.

“Antisemitism and Hate Crime in the Digital Age” Conference in Vienna

Reviewed by Julia Andras

The International Association of Jewish Lawyers and Jurists (IAJLJ) and Lansky, Ganzger & Partner Rechtsanwälte (LGP) organized the opening event of the Viennese Dialogue for the Protection of the Rule of Law at the Österreichische Kontrollbank (OeKB) on June 20, 2017.

The Viennese Dialogue “Countering Antisemitism and Hate Crime in the Digital Age” followed up the conference organized by the IAJLJ and Tel Aviv University, supported by the Austrian Ministries of Internal Affairs and of Justice, in 2015. It has become a forum for the exchange of suitable instruments to combat antisemitism and hate crime. The aim of the event was to expand on the thought process which had successfully been initiated in 2015. About 70 guests had accepted the invitation for the dialogue, among them Austrian State Secretary Muna Duzdar and representatives of the Austrian Ministries of Interior and of Justice.

Warning Words in the Run-up to Al-Quds Day

“Hatred in words quickly turns to hatred in deeds. The internet has become a catalyst for hate speech. This is why we have to set a culture of togetherness against the culture of hatred,” said state secretary Muna Duzdar in her welcoming words. With her initiative against hate on the internet, she advocates for the education of so-called “digital ambassadors” to strengthen “digital moral courage” and would like to establish a central reporting point against hate on the internet. She would like to take a pioneering role in the EU. Michael Schwanda, Head of Sektion III, Austrian Federal Ministry of Justice (who attended the conference on behalf of the Minister of Justice, Wolfgang Brandstetter), presented the training program “Justice and History” for candidate judges. The compulsory curriculum provides for courses in the area of “knowledge about the NS era,” visiting memorials, in-depth symposia about contemporary history and discussions with contemporary witnesses. Peter Gridling, Director of the Federal Office for the Protection of the Constitution and Counter Terrorism (BVT), Austrian Ministry of Interior, presented statistics in the report on protection of the constitution, according to which the number of extremist actions has been continuously on

the rise for years. “The flow of refugees has unsettled a lot of people in Austria, the number of xenophobic offences has tripled.” In view of this development, Gridling was less confident than the State Secretary and demanded that politics should strongly advocate for prevention and raising awareness within the civil population.

Offenders are Often Not Aware of the Implications of Their Crimes on the Internet

According to the host, Gerald Ganzger, who as a lawyer is regularly involved in proceedings regarding antisemitism and hate crime, the prevention of antisemitism and hate crime called for general as well as specific deterrence. Offenders must be deterred from future criminal acts, hate crime on the internet must be outlawed beyond mere criminal prosecution. “Hate crimes on the internet are no mere trivial offences. This message must be communicated to society via the media.”

Combat Zone Internet and Appeal for Paradigm Shift in Europe

“Due to the progressive development of digitalization, a new scene for antisemitism and hate crime has been set” is the central finding of the President of the Jewish Community (IKG), Oskar Deutsch. The latest events in the academic sector (antisemitic chat-groups by students) had shown: “Antisemitism is neither tied to a specific age-group nor to a social class. Therefore, the key to breaking the respective stereotypes lies in working with young people. Digital media play an important role here. We ought to be ready to enter into a dialogue with our fellow human beings, but we should also be consequent in case of offences” said Oskar Deutsch at the Viennese Dialogue for the Protection of the Rule of Law. Ariel Muzicant, honorary president of the Austrian Jewish Community (IKG) and vice-president of the European-Jewish Congress (EJC), urged politicians to show more courage. “You cannot convince people with philanthropic initiatives. We have to pull out all the stops in order to preserve and protect European values. This requires a paradigm shift, because there can be no space for extremism in Europe.”

Doron Rabinovici: One Cannot Forgive the Jew for What Has Been Done to Him

Secondary antisemitism, i.e. the denial of crimes, reversal of the roles of victims and perpetrators – the term “new antisemitism” refers to consistencies and discontinuities at the same time. Author Doron Rabinovici:

the judicial system provides the framework to advance substantive clarification according to certain rules in each individual case. (...) The civic public is noticeably being replaced by socially separated forums. The media of editorial responsibility are under general suspicion. No common visions, but particular conspiracy theories are becoming the common denominator. It is the social digital private companies that set their own rules, while being mainly subject to the logic of profit. Digital communication is particularistic, and at the same time it is globally linked. It is not secure knowledge but the sensational confirmation of personal prejudices that is virally distributed. Therefore, this is about the defense of democratic institutions and a pluralistic society. The judicial system is needed as a place of regulated negotiations. As a place of republican democratic authority. Perhaps the mere defense of minimum standards of civilization is no longer enough. We have to regain the territory of the public sphere, otherwise we will be overrun by the advance of authoritarian populists.

Understanding the Mechanisms of Online Communication

The finding of journalist Ingrid Brodnig: “anonymity and invisibility make Facebook the new gateway for antisemitism.” This social media expert has analyzed the communication behavior of several (relevant) Facebook groups on the occasion of the conference and, using the terminology of the American psychologist John Suler, speaks of “online disinhibition.” “You do not have to look the victim in the eye and communication can take place non-simultaneously.” The alarming numbers presented by Yogev Karasenty, Director of the Forum against Antisemitism at the Israeli Ministry of Diaspora Affairs, caused a stir among the audience: on average, a hate posting on the web currently reaches approximately 3,000 people via “likes” and retweets, which indicates a tremendous multiplier effect. A qualitative glance at the

postings in the German-speaking world showed that these postings were often written in poor linguistic quality. “Facebook, Twitter and Co. claim to have adopted the condemnation of hate speech as their company policy. However, this is not reflected in their behavior regarding the deletions of postings,” the expert of the Ministry of Diaspora Affairs criticizes. As a strategy, Yogev Karasenty suggested global regulation (“geo blocking policy”) and corresponding wording in the laws on the national level. IT companies should also be held accountable more than is now the case. In this context, Irit Kohn, IAJLJ President, pointed out the Israeli expertise regarding the combating of antisemitism and hate crimes on the internet. “In Israel, there is intensive research on antisemitism and hate crimes on the internet, this experience is virtually predestined for a transfer of knowledge. This is why we try to invite delegations to Israel. IAJLJ considers itself, in particular regarding the issue of antisemitism and hate crime, as an intermediary in the service of humanity and the rapprochement of cultures.”

Enforcing One’s Rights as a Victim

Julia Andras and Kevin Barrett, both legal experts at the law firm Lansky, Ganzger & Partner, specialize in hate crime on the internet, and locate immense adjustment requirements regarding the rights of victims. The legislator may have reacted to the current developments, e.g. that relevant suspect notifications have doubled within only three years, and has established a publicity threshold of 30 persons. Still, the victims of hate crimes often lack the possibility to fight these crimes effectively. For example, the Jewish Community is not treated as a party in current proceedings regarding hate crimes on the internet. Lawyer Julia Andras sketched the current problems lawyers must face when combating hate crimes. The Public Prosecutor’s Office in Vienna (*Staatsanwaltschaft Wien*) would often decide not to pursue actions that were unambiguously criminal offenses and to stop the proceedings, with the argument that “the perpetrator could not be found.” “Photos and videos of Nazi salutes are recorded at FPÖ election rallies and then published. However, due to not being admissible as a party, one has no influence on the further proceedings,” the lawyer complained about the status quo. Contrary to what is the case in criminal proceedings, victims can assert their own rights very quickly in civil proceedings and “turn off” hate postings, the media lawyer Gerald Ganzger added. “This is enforced by a coercive penalty, which can amount to up to EUR 100,000 per day. This is a hard blow even for large companies. Of course, the right to free speech must be protected when fighting hate speech. Therefore, the two basic rights must be weighed carefully in each individual case,” says Gerald Ganzger.

High-Profile Contributors to the Opening Event

Contributors to the conference “Antisemitism and Hate Crime in the Digital Age” at the Österreichische Kontrollbank were: Mag. Muna **Duzdar**, State Secretary for Diversity, Public Service and Digitalization, Mag. Michael **Schwanda**, Head of Sektion III, Ministry of Justice; Mag. Peter **Gridling**, director of the Director Federal Office for the Protection of the Constitution and Counter Terrorism (BVT), Ministry of Interior; Dr. Gerald **Ganzger**, lawyer and Managing Partner LANSKY, GANZGER + partner; Dr. Ariel **Muzicant**, Honorary President of the Jewish Community of Vienna (IKG), Vice President of the European Jewish Congress (EJC); Oskar **Deutsch**, President of the Jewish Community of Vienna (IKG); Irit **Kohn**, lawyer and President of the International Association of Jewish Lawyers and Jurists (IAJLJ); Ronit **Gidron-Zemach**, lawyer and CEO of the International Association of Jewish Lawyers and Jurists (IAJLJ); Dr. Doron **Rabinovici**, author and historian; Mag. (FH) Ingrid **Brodnig**, journalist and author of “Hass im Netz” (“Hatred on the Web”); Mag. Kevin **Barrett**, associate at LANSKY, GANZGER + partner; Dr. Julia **Andras**, lawyer and Head of the Jewish Desk at LANSKY, GANZGER + partner; Yogev **Karasenty**, Director of the Forum against Antisemitism at the Israeli Ministry of Diaspora Affairs. ■

About Lansky, Ganzger + partner

With approximately 140 employees at five locations in Vienna, Bratislava, Belgrade, Baku and Astana, Lansky, Ganzger + partner (LGP) ranks among the largest law firms in Austria. Since the 1970s, members of the law firm have been involved in the integrative cooperation of members of different ethnic and social groups. The founders of the firm, Gabriel Lansky and Gerald Ganzger, have represented persons under the threat of persecution in exactly the same way as renowned clients from the political and economic spheres for more than three decades. Numerous successful proceedings before the EGMR complete this profile. Gabriel Lansky has been an active member of Amnesty International since 1973.

Julia Andras, Attorney-at-law, heads the litigation practice at the international (Vienna-based) law firm LANSKY, GANZGER + partner. She has been with LGP since the early 2000s, including two years in Tel Aviv when she headed the Israeli branch of the Austrian Israeli Chamber of Commerce (AICC). Back in Vienna, she continued to work as a litigation lawyer in the fields of damages, labor law, general civil law, estate and inheritance law and infrastructure law. Dr. Andras stayed with the Chamber of Commerce as the current General Secretary and she heads the Israeli and the Hungarian departments of the firm. She has been a member of the International Association of Jewish Lawyers and Jurists (IAJLJ) since 2006.



BOOK REVIEWS

The Life, Times and Work of Jokūbas Robinzonas-Jacob Robinson

Edited by Eglė Bendikaitė and Dirk Roland Haupt

Academia Verlag, Sankt Augustin (2015) 269 pp.

Reviewed by Robbie Sabel

This compilation of ten essays reminiscing on the life of the international lawyer Jacob Robinson evokes the atmosphere of a lost cosmopolitan Jewish world. It is the world of Chaim Weizmann, Hersch Lauterpacht and Nahum Goldman. A European world of the 'Thirties, 'Forties and early 'Fifties of the Twentieth century. This was a period when Jewish humanistic intellectuals were in the forefront of the quest for universal human rights, coupled with fervent Zionism. These multilingual Jewish Europeans - Robinson himself, according to this book, was fluent in Yiddish, Hebrew, Russian, English, French, German, Lithuanian and Spanish "and had a working knowledge of Danish and Hungarian"- were at home in both the intellectual salons of Vienna and in the *shtetl*s of Eastern European Jewish communities.

When I was first posted to the Israel delegation to the UN, I was briefed in Jerusalem by Shabtai Rosenne, who told me that the most useful briefing I would receive would be from the then-retired, Jacob Robinson in New York. Frankly I knew little of the man and, in those pre-Google days, had to go to a library and look up his entry in a Jewish encyclopedia. I subsequently visited him in his elegant somber Riverside Drive apartment. The apartment could have been in pre-war Europe: heavy drapes over the windows, massive stuffed furniture and an enormous library on polished wood book shelves that covered all the walls. I remember receiving a succinct if slightly cynical survey of the workings of the UN. One piece of practical advice from him that I recall was to always get friendly with the UN personnel of the Secretariat and language services. They produce the documents and "documents are the lifeblood of UN work."

Jacob Robinson commenced his long public service career as director of the Hebrew gymnasium in Verbalis Lithuania but, after being admitted to the local bar, he soon entered politics, becoming a member of the Lithuanian Parliament and chairman of the Jewish faction and leader of the minorities bloc in Parliament. This

association with the rights of minorities was to be an integral part of his public life for the next 50 years. Although as Phillip Graf writes "from an activist for collective minority rights he later advocated human rights" (p. 194).

In 1931, Robinson was appointed Legal Advisor to the Lithuanian Foreign Ministry in which post he represented Lithuania in some landmark cases at the International Court at The Hague including the well-known Interpretation of the Statute of the Memel Territory case. In 1940, he escaped to the U.S. and, like other Jewish refugee lawyers, became involved in issues of human rights.

Haupt writes that "to hold those who were responsible for the Holocaust accountable in terms of criminal law was a centerpiece in the strategic thinking of Jacob Robinson" (p. 130). Robinson served as a consultant for Jewish affairs to the U.S. prosecutor at the Nuremberg trials. Shabtai Rosenne, in his essay in the book, credits Robinson for persuading the US prosecutor "of the appropriateness of the new concept of 'crimes against humanity' as the rubric for the indictment of Nazi excesses against Jews" (p. 75). Nevertheless, at the trial, crimes against humanity were only considered to be those crimes committed "in connection with war crimes or crimes against the peace" (p. 105), thus excluding crimes against the Jews committed before the outbreak of the War. Robinson summarized his experience by pointing out that at the Nuremberg trials "The Holocaust was never highlighted as a distinct crime" (p. 99). An interesting note is that Robinson wanted to call Chaim Weizmann as a witness "to the total picture of the Holocaust," but the British opposed the idea, "fearing that the testimony would fuel support for the Jewish case in Palestine" (p. 93).

In 1947, Robinson was appointed legal advisor to the Jewish Agency delegation to the UN and later as Counselor to the Permanent Israel delegation to the UN. Robinson

played a major role in the Israel delegation to the Reparations agreement with Germany and later served as a consultant to Gideon Hausner and Gabriel Bach, the prosecutors at the Eichmann trial in Jerusalem. Hausner wrote that it was Robinson's blueprint that was "the central pillar" of the international law arguments in the case (p. 81). As is well known to lawyers, it was the Israeli Court decision in this case that set the international law precedent establishing universal jurisdiction for crimes against humanity.

When the Molotov-Ribbentrop Pact was signed in 1939, an arbitration commission was established by the Pact to settle outstanding disputes. Daniel A. Greenberg in his essay relates that Robinson "told me with some amusement how Molotov had nominated him to be one of the members of that commission, a nomination that of course was vetoed by the Nazi regime because he was a Jew" (p. 216).

Robinson was rightly considered at the time as one of the leading world experts on the United Nations, and he was a fervent believer in advancing its principles. This didn't prevent him from taking a sober view of reality,

and in his 1958 seminal lecture published by the prestigious Hague Academy he wrote that "neither in letter, nor in spirit, nor in substance is the United Nations what it was supposed to become" (p. 161). Robinson was a keen observer of the international scene and his comment on Russia, years before *Perestroika*, was prescient. "Russia and the Soviet Empire will never last. It is beset by enormous centrifugal forces that are constantly working to tear it apart" (p. 213).

Perhaps because my grandparents were *Litvaks*, I particularly enjoyed reading Shabtai Rosenne's assessment of Robinson: He "displayed all the characteristics popularly associated with the intellectual leaders of Lithuanian Jewry — the qualities of accuracy, of rational analysis, of absence of public show of emotions, of coolness in adverse circumstances and of satisfaction at success" (p. 83). ■

Robbie Sabel is a professor of international law at the Hebrew University Jerusalem, a former Legal Advisor to the Israel Ministry of Foreign Affairs and a member of the Advisory Board of Justice.

*Sovereignty in the Age of Global Terrorism:
The Role of International Organizations*

by *Miriam Feinberg*

Brill Nijhoff (2016), 206 pp.

Reviewed by Rachel Frid de Vries

In this book, the author, Dr. Miriam Feinberg, addresses some of the legal and practical challenges in finding solutions to contemporary variegated patterns of global terrorism and its impact on sovereignty. The enterprise is complicated by the absence of an agreed international definition of “terrorism” and the tendency among some theorists to downgrade the concept of “sovereignty.”

Terrorism threatens the core attribute and obligation of the sovereign state: to protect its citizens from violence. The attacks on the Twin Towers on September 11, 2001 drove home the lesson that national legislation and adjudication are inadequate at protecting the populace from major terrorist acts. Henceforth, international and regional organizations would be fundamental actors in the battle against terrorism alongside states.

Thereby, Feinberg notes, a certain tension has inevitably been introduced. On one hand, states have to compromise their sovereignty by participating in international counterterrorist forums that aim to provide greater protection to the citizens of the states. On the other hand, states strive to retain their primary responsibility for national security.

Within the state, the need to engage in counterterrorism has spawned inter-branch conflict. While traditionally the executive dominated in matters bearing on national security, after the Twin Towers attack, the judiciary has become increasingly involved in shaping the contours of state responses to terrorism. Among other things, as Feinberg observes, we have been witnessing an exacerbation of the conflict between the state’s need to furnish increasing security to its citizens and the countervailing desire to protect human rights and concomitant procedural safeguards.

Putting aside the question of defining “terrorism,” the author examines the nature of the counterterrorism measures taken since September 11, 2001 and offers an assessment of how states and international organizations interacted in this sphere of activity over the past decade and a half.

The book is divided into three parts. Part 1 focuses on the global level – i.e., on the impact of the September 11,

2001 attacks on the role of the UN Security Council in counterterrorism. Although the term “terrorism” was not originally included in the Security Council’s powers under the UN Charter, the Security Council’s pronouncements on this issue were gradually subsumed under their role to maintain “international peace and security.” Overall, the Security Council has been content to relegate to the states the tasks of defining the term “terrorism” for themselves and of instituting the requisite measures for combating it (so long as steps taken by states remain within the parameters set forth in Security Council resolution 1373). The book examines the impact of the Security Council’s approach on the sovereignty of the UN Member States and concludes that it is somewhat limited by the leeway that the Security Council still leaves to states.

In Part 2 of the book, the author turns her attention to the actions of four regional organizations, and especially the European Union (EU), because of its highly developed structure of governance and strong legal regime that facilitates implementation of the relevant counterterrorism measures. The other regional organizations analyzed are the Organization of American States (OAS), the Council of Europe, and the African Union (AU). These organizations reflect a geographical and structural diversity and were selected by Feinberg for their action against terrorism. For each organization, the book studies the influence of September 11, 2001 on its power and the type of counterterrorism regime it has developed as a result.

The proliferation of organizations acting to combat terrorism inevitably arouses concerns regarding the potential for clashes among the various legal regimes. This topic is explored in Part 3 of the book.

Here the focus is primarily on the terrorism sanctions regime forged at the UN level and later implemented by the EU and its member states.

Additionally, the author discusses the manner in which human rights and the rule of law have become integral parts of increasing case law on sanctions against terrorists. Through the conduit of courts, she notes, a balance has

been sought between the ever-increasing strong executive role in national security issues and the challenge of ensuring maximal protection of human rights even in this context. EU courts' case law features prominently in this endeavor, but it also arouses concern that the EU courts' judgments might lead to a fragmentation of the international counterterrorism regime.

Regarding the role of courts, the author concludes on the basis of her research, regional organizations that include a court have had a more significant impact on the measures adopted both by States and international organizations. This is because they have provided an alternative discourse to the executive-focused one. This role has become fundamental, especially given the targeting of individuals, rather than States, by the sanctions regimes.

As for the impact on sovereignty, this book aims to examine whether the internationalization of counterterrorism measures through the transfer of competences to international and regional organizations, and the implementation (or absence) of these measures, has had an impact on the sovereignty of states. The author concludes that the impact is limited by the nature of the organs adopting the measures and/or by the fact that many international instruments are widely adopted, yet

poorly implemented, as they require that states adopt domestic measures that can vary widely from the original intent.

Feinberg concludes that the absence of a truly international court to deal with terrorism, the lack of an international definition of terrorism, and the existence of so many varied, and sometimes conflicting, counterterrorist regimes – all lead to legal uncertainty. But far from weakening state sovereignty, international organizations, according to Feinberg, have contributed to the strengthening of the security agenda of states.

Feinberg does not disentangle the web of legal complexities thrown up by the multilayered battle against the scourge of international terrorism, nor could she be expected to do so. But scholars, policy makers and interested lay readers will learn much from her coherent presentation of the manner in which states and international organizations have interacted to maximize their joint and separate efforts to combat global terrorism during the critical years examined in this book. ■

Dr. Rachel Frid de Vries lectures on EU Law, Private International Law and Arbitration Law at Carmel Academic Center in Haifa, Israel. She was formerly Deputy to the Vice Attorney General (International Law) at the Israel Ministry of Justice.

The European Convention on Human Rights (ECHR) – A Guide Including a Comparison with Israeli Law

by Chava Shachor-Landau

Bursi – Publisher of Law Books (2015), 278 pp. (Hebrew)

Reviewed by Nellie Munin

This book draws an interesting and unique comparison between human rights norms enshrined in the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR) in Strasbourg, and the norms of the same rights in Israeli law, as interpreted by the Israel Supreme Court, acting also in its capacity as the High Court of Justice.

The main purpose of the book was to demystify the mechanism of the protection of human rights in Europe and to familiarize Israeli academics, judges and lawyers with the European Model. The general practice in Israel is to follow American precedent and there is a tendency to overlook European law. The European Convention was drafted in 1950 in response to the Holocaust and the atrocities of the Second World War, and was inspired by the Universal Declaration of Human Rights in 1948, to restore human rights to humanity.

Professor Landau's Guide is intended to be simple and accessible. Although Israel is not officially a party to the ECHR, every Israeli has access to the European Court of Human Rights, like all 820 million citizens of Europe, and all human beings should know their rights.

First Part – Introduction

Chapter 1 covers the history of ECHR, its territorial scope, and the legal hierarchy of its provisions. Discussing the relationship between the right to remedies by national courts and by the ECtHR, the book emphasizes the fact that individuals can approach the ECtHR for a remedy against their own state. An individual having *locus standi* before a supra-national tribunal was a revolutionary achievement under international law.

Chapter 2 describes the organs and the mechanism of enforcement with a view of their historical development. It notes the ECHR's clear preference of a friendly settlement at all stages of a case and specifies the terms of admissibility before the ECtHR.

Chapter 3 explains the three major pillars of

interpretation guiding the ECtHR judgments: namely, the margin of appreciation left to the states where there is no general consensus in Europe on the issue, and the principles of subsidiarity and proportionality.

Second Part – Rights and Freedoms

This part is the core of the book, introducing the bill of rights and freedoms enshrined by the ECHR. Each chapter is devoted to one right, as interpreted by ECtHR case law. Each chapter then compares the ECtHR approach with the Israeli approach regarding the same right or freedom. Published for the first time in Hebrew, this comprehensive comparison of the two legal approaches can serve as a guide and a source of inspiration for further development of Israeli case law on human rights issues, as well as an important research instrument.

This part covers a broad landscape of civil and political rights and freedoms globally: the right to life (chapter 4, art. 2 ECHR), the prohibition of torture (chapter 5, art. 3 ECHR), the prohibition of slavery and servitude (chapter 6, art. 4 ECHR), the right to liberty and security (chapter 7, art. 5 ECHR), the right to a fair trial (chapter 8, art. 6 ECHR), the prohibition of retroactive penal legislation (chapter 9, art. 7 ECHR), the right to respect private and family life, home and correspondence (chapter 10, art. 8 ECHR), the right to marry and to found a family (chapter 11, art. 12 ECHR), the right to freedom of thought, conscience and religion (chapter 12, art. 9 ECHR), freedom of expression (chapter 13, art. 10 ECHR), freedom of peaceful assembly and freedom of association (chapter 14, art. 11 ECHR), the right to property (chapter 15, art. 1, Protocol 1 ECHR), the right to education (chapter 16, art. 2, Protocol 1 ECHR), the right to free elections (chapter 17, art. 3, Protocol 1 ECHR), and the general non-discrimination provision (chapter 18, Protocol 12 ECHR).

With regard to the *right to life*, the death penalty was abolished in Europe in 1983 (by Protocol 6, ECHR). The death penalty was also abolished in Israel, with the

exception of crimes of genocide. Different approaches between ECtHR and the Israeli courts exist, with regard to euthanasia and the right to life of embryos.

Absolute interdiction of *torture* is upheld both in Europe and in Israel even in emergency cases, where the lives of others are at stake.

The prohibition of *slavery and servitude* has become relevant in the 21st century and both the ECtHR and Israeli courts have faced new cases that dealt with modern slavery and human trafficking.

The right of liberty and security of a person requires a balance with other public interests. This balance seems to be treated differently by the ECHR than by Israeli courts. The latter rely on the Basic Law: Human Dignity and Liberty. The book concludes this comparison by saying that the enforcement of this provision in Europe has yet a long way to go.

Two basic norms of criminal justice: *the right to a fair trial and the prohibition of retroactive penal legislation* are treated similarly by the ECHR and by Israeli Law. Following World War Two, both systems apply the same exception to this rule with regard to Nazi criminals and their collaborators.

The right to *respect for individuals' private and family life, home and correspondence* involves *inter alia* legal questions regarding the right to parenthood, children's rights, immigrants' rights, homosexuality, prisoners' rights, and the environment. The book notes a more liberal approach by the Israeli Courts, compared to ECtHR, with regard to IVF in cases where one party withholds consent.

With regard to the consideration of the best interests of the child, the European Court had to justify the stay of an Israeli child in Switzerland on grounds of his best interest not to be returned to his father in Israel.

The right to marry and to found a family raises legal questions regarding the rights of same-sex partners to marry. This right was denied by the Strasbourg Court for lack of a general European consensus on the issue.

The book examines attempts by ECHR and the Israeli Courts to balance the *right to freedom of thought, conscience and religion* with other rights. Comparing ECtHR judgments dealing with Christian and with Jewish religious issues, it raises a question whether the ECtHR showed more sensitivity in the former than in the latter cases (referring to *Cha'are Shalom Ve Tsedek v. France*).

The chapter on *freedom of expression* is the longest chapter in the book mainly due to recent developments. The question of the absolute or limited nature of the right is still unresolved. The attitude of the ECHR is to limit the right to freedom of expression. European case law is clear that the denial of the Holocaust is not protected by freedom of expression (*Garaudy v. France*) and the denial of the

Holocaust is distinguished from the denial of the Armenian genocide (*Perincek v. Switzerland*). The historic debate over the Armenian massacres is not over yet and denying their character as genocide is not prompted by hate or justification of the atrocities, as it is in the case of the Holocaust.

Hate speech and racism is also not protected by freedom of expression or freedom of assembly (*Vona v. Hungary*). Racist parades against Gypsies and Jews in Hungary were considered a violation of a higher right prevailing over the right to freedom of expression.

The right to property is dealt with briefly and shows similarities between Europe and Israel.

The right to education is vigorously upheld both by the ECtHR and by the Israeli Courts. Both respect the values of parents in the spirit of ECHR's Protocol. The Israeli law also relies on the Convention on the Rights of the Child, 1989, ratified by Israel in 1991. The author recommends updating the old European provision and to recognize that not only the parents have certain rights but that children should be made the subjects of the right to education.

In the ECHR, *the right for free elections* expresses a commitment taken by the member states rather than as a right of individuals. While the ECtHR's case law interpreting this provision deals with the rights of prisoners and bankrupt individuals to vote, Israeli cases deal with the legitimacy of political lists of candidates to be elected as Knesset delegates.

Lastly, the book briefly mentions the general *non-discrimination* provision included in the ECHR's Protocol 12, in force since 2005 and ratified so far by 20 of 47 member states.

Third Part – Conclusion

The third and last part of the book reiterates the importance of the ECtHR as an accessible forum for individuals, offering effective enforcement against their national state. It highlights its accessibility to petitioners from non-ECHR countries and emphasizes the dynamic and evolving interpretation of the Court in the changing spirit of the times. The use of the Convention as a source of values and inspiration to Israeli courts is made easily accessible. The Convention has proved to be a living instrument in spite of its age, progressing with the times as a result of the jurisprudence of the Court.

As a lawyer and a professor of public international law, I believe that this unique book in Hebrew fills a gap in the study and promotion of human rights. This book already made its first contribution to the Israeli jurisprudence in the case of *Julani v. the State of Israel* (CA 6237/12, 6.9.2016, paras. 34-35) where the Israeli Supreme

Court referred to this book's comparative study on the definition of slavery by the ECtHR convicting, for the first time in Israel, the Julani couple for holding a Philippine woman who worked in their household in Jerusalem in conditions of slavery. The ECHR and its rich case law may serve as a source of inspiration for judges, lawyers and scholars, especially equipped with the comparative input and the systematic, comprehensive analysis thereof. The book may also raise awareness

among Israelis as to their potential right of access to the ECtHR in case of a violation of their rights by any of the 47 European states that are bound by the Convention. ■

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PAUL OGDEN – IN MEMORIAM

This year, the IAJLJ lost a dear friend who contributed his valuable time and passion to the Association – Paul Ogden z"l.

Paul was an advisor and friend from the very first moment. He improved my English and explained why one must write in a certain way or another. He worked with me, and together we built the previous IAJLJ website – he proofread, gave advice on web design and its contents, and much more. We worked together when he was the language editor of JUSTICE (then I learned a great deal from him on editing, pagination, and the appearance of the publication). Together we wrote the first IAJLJ newsletter about five years ago, and thereafter, so much more. Paul cared about the IAJLJ and its activities, and therefore it was important for him to participate in various conferences and events of the organization over the years.

Beyond the professional aspect, we shared mutual fondness for animals, for good coffee, and cherished discussions on the future of the State of Israel and its status in the international arena.

The notice of his death was unexpected, and left us in deep grief. We did not have a chance to tell him all that he meant to this organization before he parted.

I take this opportunity to say goodbye to a man who first and foremost was a good person of values, a friend and colleague, and I am grateful for his constructive and genuine friendship.

Irit Kohn, President of the IAJLJ, joins in expressing the Association's sincere appreciation of his great contribution over the years and sorrow at his loss.

May his memory be blessed.

Ronit Gidron-Zemach

May 2017



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
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צדק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** *šdq* (= reliability, virtue), **ARABIC:** *šadaqa* (= he spoke the truth), **ETHIOPIC:** *šadaqa* (= he was just, righteous)] Derivatives: צדקה **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** צדקתה (= justice). **PALMYRENE** צדקתה (= it is right). צדק 1. just, righteous. 2. pious.

After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

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