

## Correspondence

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### War and Remembrance

TO THE EDITORS:

I was pleased to see your journal dedicate so much space to our recent book, *The War for Palestine* (AZURE 13, Summer 2002), and honored that the book should be reviewed by so distinguished a scholar as Yehoshua Porath.

Alas, I fear Professor Porath read a different agenda into the book than was intended by the editors and contributors. We were encouraged by the critical vein of new history produced by certain Israeli scholars, based on Israeli archival materials, which promotes an agenda for a critical new history of the Arab side of the story of 1948. Rather than trying to debunk myths in the Zionist historiography, most of the contributors set their sights on the myths of Arab historiography. While three of the contributions might rightly be seen as part of the Israeli "new history," five of the essays treat Arab nations exclusively: The Palestinians, Egyptians, Iraqis, Jordanians, and Syrians. A full reading of the book would conclude it to be more critical of the Arabs than the Israelis.

Similarly, Porath seems to have misunderstood what we meant when

we speculated that the critical revision of a nation's history might be a "victor's privilege." This does not mean, as Porath claims, that the victor has "the luxury of dominating the historical discourse with its version of events." Rather, this means that the victor is sufficiently legitimate before its citizens and secure in its political institutions as to allow scholars the freedom to write critically about their nation's past. It seemed to us that the "new history" in Israel was a sign of the strength of the Israeli state, and the absence of such freedoms in the Arab world a sign of the insecurity of Arab states.

In hindsight, it seems we overestimated the freedoms Israeli historians would enjoy in writing critical history. Rather than becoming the new orthodoxy, as we had assumed, the new history and academic freedom generally have proved more fragile in Israel than our characterization of the "victor's privilege" suggested. The retraction of school textbooks which Porath mentioned in his review, the disgraceful Teddy Katz affair at Haifa University, and the efforts of new historian Ilan Pappé's colleagues at Haifa University to subject him to a kangaroo court suggest a degree of intolerance none of us would have

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expected from Israeli academia. In this, the parallels we drew between the distortions in Arab and Israeli historiography of 1948 regrettably still stand.

Eugene L. Rogan  
Oxford

### **Assimilation's Retreat**

TO THE EDITORS:

For those of us who have long labored in the fields of both Israel activism and Orthodox community-building in America, Stuart Schnee's letter (*AZURE* 13, Summer 2002) misses the point.

It is true that large segments of American Jewry, both Orthodox and less observant, have lost much of their idealism. But this is true of Jews everywhere, including in Israel. If Orthodox American Jews want kosher Oreos and kosher Disney World, too many Israelis, including those wearing yarmulkes, are flocking to trance dances and casinos.

Instead of seeing diaspora existence as inherently pointless, a better issue to raise would be: What are American Orthodox Jews doing to advance our ideals in the public arena? Or, in military terms, while Israeli Jews defend the front lines of our national existence, what are American Jews

doing in the similarly crucial task of defending the rear?

The answer is disappointing, even when the correct question is framed. While Orthodox Jews do continue to visit and study in Israel in disproportionately large numbers, the public advocacy for Israel from the main American Orthodox organizations—the Orthodox Union, Young Israel, and Agudath Israel—is shamefully weak. None of the major Orthodox groups have taken strong public stands on behalf of Jewish rights in Judea, Samaria, and Gaza. None took leading roles in opposition to the folly called Oslo. None of them have seriously addressed the dangerous situation for Jews on American college campuses.

Even more disappointing, none of them seem to have been able to capitalize on the nomination of Joseph Lieberman for vice president in the 2000 presidential campaign, a watershed which might have opened floodgates for a young generation of Orthodox activists to enter the public arena here. Our Jewish day schools, thank God, are bursting at the seams, but very few of our best and brightest are being groomed for Jewish activism.

So Schnee is correct that even mundane life in Israel is far preferable to the mindless pursuit of kosher creature comforts in America.

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But he misses the point that a generation of articulate and committed Orthodox activists would do Israel, and America, a world of good.

**Benjamin Korn**

Elkins Park, Pennsylvania

## The Supreme Court

TO THE EDITORS:

Evelyn Gordon's "Center Court" (AZURE 13, Summer 2002) draws on the writings of Ruth Gavison in order to critique the Israel Supreme Court as having undermined the rule of law. The rule of law, she writes, means that government agencies operate according to the dictates of the law rather than competing with them; when they do not, it is individuals in power, rather than principles of law, which carry the day. Gordon argues that the Supreme Court has undermined the rule of law by ruling in areas inappropriate for judicial involvement, and by undertaking a "constitutional revolution" that is neither supported nor reflected by the parliament, with the result that "instead of strengthening the rule of law in Israel, the Supreme Court has replaced it with the rule of man." This activism, Gordon writes, undermines public faith in the legal system, politicizes the judiciary, and even works

against democratic ideals, according to which law is supposed to derive its authority from the will of the people rather than from one group of elites or another.

In my opinion, a useful comparison can be made between the approach of the Supreme Court and that of traditional Jewish law. While there may be some superficial similarities between the activist policy of the Supreme Court and certain halachic principles, in fact there is an enormous difference between the role of the Israeli judge and that of the *dayan*, or rabbinical judge. This difference raises serious questions about the wisdom of the Supreme Court's approach.

At first glance, the Talmud seems to grant the halachic judge a wide degree of discretion to deviate from the written law. One famous example is the words of R. Eliezer ben Yaakov in the tractate Sanhedrin: "I have heard that a rabbinical court can propose punishments that are not according to the Tora..." A more concrete example appears in the tractate Yevamot, where the court knowingly deviates from the written law in order to punish "Pishon the camel-driver," whose wife wanted to leave him because he had been mistreating her. In this case, the rabbinic judges justified their ruling as necessary to serve the cause of justice: "Pishon the camel-driver behaves in a rough

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manner, so he was given rough justice.”

However, this “activism” of the halachic court is different from that of the Israel Supreme Court in two important ways.

First, the discretion granted judges by Jewish law is limited and specific. The halacha is set out in highly detailed language: “All of the measures established by the rabbis are precise: A person is allowed to immerse himself in a ritual bath with a volume of forty *seahs*, but if there is one drop short of forty *seahs*, he may not do so.” This level of detail sets natural limits on the discretion that can be exercised by the *dayan* and offers clear direction in applying it. By contrast, Israeli legislation often invites wide interpretation because of its ambiguous wording, which allows, and may even require, the courts to replace their own opinions for those of the legislature. So, for example, while the halacha sets out precise punishments for different crimes, Israel’s legislature merely sets out maximum and minimum penalties, which demand significant discretion in their application.

Second, Jewish law insists that the rabbinic judge be above all morally virtuous, that he set a moral example for society. In the Bible, it was Jethro who spelled out the qualities required of Israel’s judges: “Able men, who

fear God, men of truth, hating unjust gain.” (Exodus 17:23) These moral qualities help ensure the purity of the judge’s intentions when ruling. By contrast, the main prerequisites for an Israeli judge are knowledge of the law and a judicial temperament—requirements which lack any moral significance, and therefore do not protect against the abuse of judicial authority.

In my view, it is these differences that provide a safe moral framework within halacha for the exercise of discretion on the part of rabbinical judges. The absence of these safeguards in Israel’s legislation and its courts should make us more wary of the potential dangers of judicial activism in Israel.

**Benny Porat**  
Jerusalem

## **The Longing for Zion**

TO THE EDITORS:

I find the article by Arie Morgenstern (“Dispersion and the Longing for Zion, 1240-1840,” *Azure* 12, Winter 2002) to be of great importance during these days, where even among Zionists there is a weakening of the notion that there is justification for a Jewish national state in Israel.

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It is so obvious to all of us that there were immigrations to Israel for spiritual and other reasons since time immemorial. However, it is important to write about it and make sure that we are not painted as modern-day colonialists with no attachment to this land. I absolutely loved the article, as it reinforces my love for those pioneers over the centuries, those who braved the trials and tribulations of the various *aliyot*, and makes me proud to be part of that chain. Thank you for raising my morale.

**Jonathan Davis**  
Kochav Yair

## **A Constitution for Israel**

TO THE EDITORS:

In "A Constitutional Convention for Israel: Lessons from the American Experiment" (AZURE 12, Winter 2002), Ruth Gavison presents an outstanding exposition of the lessons from the American Constitutional Convention of 1787 that can be applied to the Israeli situation. While I concur with almost all she writes, I disagree with the two operative functions that she prescribes for the Knesset in an Israeli constitutional process. My skepticism of the Knesset's ability to rise to the occasion—indeed, the Knesset's very

performance has been one of the prime motivators of the renewed call for a constitution—plus other factors lead me to conclude that its role in the process must be minimal.

Specifically:

1. The Knesset should not alter the proposal created by a constitutional committee or convention. In 54 years, the Knesset has not fulfilled its mandate to create a constitution; why should it now have the opportunity to meddle with the product of an arduous process that will represent, at long last, the consensual agreement that we have all been longing for? Second, it was the Knesset that designed and enacted—and subsequently repealed—Israel's ill-conceived version of direct elections for the prime minister. How can that same body be entrusted yet again with the design of governmental mechanisms? Third, a draft constitution will most likely prescribe changes to legislative powers, possibly by providing greater checks and balances or by restricting legislators' immunity. How can the Knesset—an interested party—be empowered to tamper with the delineation of its own authorities or of its relationships with other branches of government? Fourth, the knowledge that the Knesset is at liberty to change the product may well deter committee members from agreeing to

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painful compromises out of fear that their concessions will be undercut by the Knesset, and that they will subsequently be perceived as unprincipled, or worse, fools. Finally, believing that the Knesset would become involved later in any case, the committee might well opt to avoid addressing certain controversial issues altogether, preferring to push them off onto the Knesset and thus defeat the very purpose of the committee.

Rather, the role of the Knesset should simply be to vote “yes” or “no” on whether it believes that the convention’s product is worthy of being sent to the people for their consideration. A simple majority is all that should be needed from the Knesset, as public ratification is what will give authority to the constitution. In addition, a new constitution may very well call for a different legislative structure, in which case even a special majority of the current Knesset would not be a legally meaningful act.

The American experience suggests a number of additional reasons that the Knesset should not touch the product of a committee or convention. The Continental Congress at first considered making changes in the Constitutional Convention’s document. However, at the urging of James Madison and others, it thought the better of doing so for four key

reasons, as Madison recounted in a letter to George Washington (September 30, 1787):

The right of Congress [to make amendments] was not denied, but the inexpediency of exerting it was urged on the following grounds: (i) That every circumstance indicated that the introduction of Congress as a party to the reform was intended by the states merely as a matter of form and respect; (ii) that it was evident from the contradictory objections which had been expressed by the different members who had animadverted on the plan that a discussion of its merits would consume much time, without producing agreement even among its adversaries; (iii) that it was clearly the intention of the states that the plan to be proposed should be the act of the Convention with the assent of Congress, which could not be the case if alterations were made, the Convention being no longer in existence to adopt them; (iv) that as the act of the Convention, when altered, would instantly become the mere act of Congress....

Applied to the situation in Israel, these reasons might be restated thus:

(i) Any role the Knesset might play in a constitutional reform process would really be out of formal respect, but it is not where real reform is intended to emanate from; (ii) Knesset deliberations would likely take a lot of time and, in the end, not produce a better result; (iii) if the country has

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specifically convened a constitutional committee, then that is the body out of which the final proposal should come; (iv) Knesset involvement would simply detract from the importance of the occasion.

2. Members of the constitutional committee should not be appointed by the Knesset. Knesset appointment does not guarantee that the members represent the public's will, either in fact or in the eyes of the public. It also does not ensure that the ablest and most respected members of Israeli society are assigned to this most momentous and historic task.

Rather, members should be elected in a special election, which itself would add drama to and focus on the proceedings. Every party in the Knesset would offer a slate of its best and brightest thinkers and doers. (No traditional campaigning, though; the candidates' names and bios should speak for themselves.) To ensure that the commission is not simply a subset of the Knesset, at most only every third name on a party's list should be permitted to be a sitting member of Knesset. Then, the citizenry will elect, say, thirty national representatives based on proportional representation,

with no entry threshold. This approach would foster full representation by capable people.

The interests of local government also need to have a voice at the table to weigh in on local or regional interests. Thus, local representatives too should be chosen, preferably in the special election.

Such a special election would have the added benefit of bestowing enhanced legitimacy on the delegates and the committee, imparting additional *gravitas* to the entire process, and enhancing the sense of participation in the process and ownership of the results on the part of the citizenry.

The Knesset's statutory responsibility for producing a constitution for Israel would be fulfilled responsibly and best simply by enacting legislation that calls for the special election, by charging the delegates with their mission, by providing adequate resources for them to do their job well, and then by deciding whether the results warrant consideration by the citizens.

**David Raab**  
Ra'anana

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