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ISRAEL

CRIMINAL AND ETHICAL ASPECTS OF MUNICIPAL RABBIS' LETTER
CONCERNING THE SALE OR RENTAL OF PROPERTY IN ISRAEL TO NON-JEWS

Executive Summary

This report analyzes the criminal and ethical aspects of a letter published by fifty municipal rabbis in Israel alleging that Jewish law prohibits the sale or rental of property in Israel to non-Jews. It suggests that the publication of the letter may have constituted an offense under Israel's penal law and may also subject its signatories to ethical penalties. It further suggests that at least with regard to one of the signatories, an indictment under the Penal Law is highly likely.

I. General Background

On December 7, 2010, Rabbi Shmuel Eliyahu, Chief Rabbi of Tsfat (a city in the Northern District of Israel) and forty-nine other municipal rabbis in Israel issued a letter ruling that Jewish law forbids the sale or rental of property in Israel to non-Jews. The letter was reportedly drafted in support of an effort by the chief rabbi of Tsfat to bar home rental to Arabs in view of the heightened tensions in recent months between ultra-Orthodox and Arab students in that city.¹

Israel's leading Lithuanian Haredi (ultra-Orthodox) leader, Rabbi Yosef Shalom Elyashiv, allegedly refused to sign the letter, as did Rabbi Ovadia Yosef, the spiritual leader of Israel's religious *Shas* party. The letter was condemned by Prime Minister Binyamin Netanyahu.² It has also been reported that Israel's Attorney General has instructed his office to examine whether there are criminal and disciplinary aspects to the rabbis' letter.³

Many in the Jewish communities both in Israel and the United States strongly rejected the letter. Various statements of protest were posted by Israeli citizens and by organizations on the Internet, some arguing that the ban was contrary to Jewish law and that "Jewish law scholars must increase peace in the world and not incite conflict."⁴ A similar message of protest was

¹ Josh Nathan-Kazis, *U.S. Rabbis Offer Rare Rebuke of Israeli Edict*, FORWARD (Dec. 24, 2010), <http://www.forward.com/articles/133983/>.

² *Id.*

³ *AG Instructs Office to Check if Criminal Aspects to Rabbi's Letter*, YNETNEWS.COM (Dec. 9, 2010), <http://www.ynetnews.com/articles/0,7340,L-3996989,00.html>.

⁴ Kobi Nachshoni, *Within Hours: Hundreds Signing Against the Rabbis' Letter*, YNET (Dec. 15, 2010), <http://www.ynet.co.il/articles/0,7340,L-3999560,00.html> (in Hebrew); see also, Kobi Nachshoni, *Rabbi Sherlo: It is*

published in the Israeli Arab press by a group of rabbis, religious officials, and several Jewish organizations, reassuring Arabs that “Judaism loves the human being. Judaism is welcoming. Judaism pursues peace.”⁵

The Israel Democracy Institute similarly condemned the municipal rabbis' ban, stating as follows:

This petition, which reeks of racism and fans the flames of intolerance, has no place in a democratic state. Can we continue to call ourselves a democracy when community rabbis, who are also state employees, openly call for “No entry to Arabs and foreigners”? This petition also has no place in a Jewish state. Is this the same Jewish state that commands us to love the stranger dwelling with us? Of all people, Jews, who were victims of the worst hate crime in history, are obliged to denounce such manifestations of racism.⁶

On December 15, 2010, in a rare, broad-based rabbinic response, American rabbis of various denominations issued a nearly unanimous condemnation of the proposed ban.⁷

This report analyzes the criminal and ethical aspects of publication of the municipal rabbis' letter under Israeli law.

II. Prior Indictment Against Rabbi Shmuel Eliyahu

The Tsfat rabbi, Shmuel Eliyahu, was previously indicted in 2005 for publication of incitement to racism under the Penal Law as the result of statements he had made in media interviews. During the trial the prosecution agreed to drop the charge under the condition that he would publish a statement nullifying his prior statements and explain that he did not intend to offend the Arab population as a whole, but only referred to a minority that supported terrorism. The court closed the case after the rabbi had complied and upon the prosecution's statement that “similar expressions in the future will form a sufficient ground for a renewal of proceedings in this case.”⁸

After the case was closed, the Center of Jewish Pluralism of the Movement for Advanced Judaism in Israel petitioned the Supreme Court to order the Attorney General (AG) to reverse or renew the indictment against the rabbi. The petition was rejected. The Court held that ordinarily it does not intervene in the AG's decisions on whether or not to indict, but would only intervene in those rare cases where the AG's decision reflected a substantial lack of reason. In the opinion

Allowed to Rent Apartments to Arabs, YNET (Dec. 15, 2010), <http://www.ynet.co.il/articles/0,7340,L-3989403,00.html> (in Hebrew).

⁵ *Within Hours*, *supra* note 4.

⁶ *IDI Denounces Rabbis' Petition Against Rental to Arabs*, THE ISRAEL DEMOCRACY INSTITUTE, <http://www.idi.org.il/sites/english/OpEds/Pages/IDIDenouncesRabbisPetition.aspx> (last updated Dec. 15, 2010).

⁷ Josh Nathan-Kazis, *supra* note 1.

⁸ HC 6702/05 Center of Jewish Pluralism—the Movement for Advanced Judaism in Israel v. the Attorney General, *available at* the Nevo Legal Database, <http://www.nevo.co.il> (in Hebrew; by subscription).

of the Court, the prosecution's condition that the rabbi publish a clarification and apology, while retaining the right to reopen the criminal case if he repeated his prohibited statements, reflected a reasonable balance given the circumstances of the case.⁹

III. Issues Presented

- A. Is differential treatment in housing based on religion, nationality, or ethnicity allowed under Israeli law?
- B. Are there any restrictions on speech that might extend to the statements by the rabbis?
 - Was the publication intended to incite racism?
 - Does religious speech receive greater protection than speech generally, or is the religious nature of the speech in question immaterial?
 - Are there additional restrictions that might apply to the statements of these rabbis in the event that they are employed as rabbis by civil authorities?
- C. How should this apply, or how has it been applied, to incitement by Israeli Arabs?
- D. Is the law different on either side of the Green Line, either as to Israelis or to non-Israelis?

IV. Statement of Law

The following laws are relevant to evaluation of the legality of the rabbis' letter:

- Basic Law: Human Dignity and Liberty, as amended¹⁰

§ 1. Basic principles

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

...

§ 8. Violation of rights

⁹ *Id.*

¹⁰ Basic Law: Human Dignity and Liberty, SEFER HA-CHUKKIM [Book of Laws, Official Gazette] No. 1391, (5752-1992), *as amended*, English translation available at the Knesset website, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.¹¹

- Penal Law (Amendment No. 20), 5746-1986,¹² which added the following language:

Article A1: Incitement to Racism

§ 144a. Definitions:

“Racism”—persecution, humiliation, denigration, expression of hatred, threats or violence, or promoting feelings of ill will and resentment towards a community or sections of the population, solely due to color or belonging to a particular race or national-ethnic origin;

“published”—as defined in section 2, including in radio or television broadcasts;

§ 144b. Prohibition of publication of incitement to racism

- (a) A person who published material with the intent to incite to racism is liable to imprisonment for five years.
- (b) For the purpose of this section, it is immaterial whether the publication led to racism or not, or whether it contained truth or not.

§ 144c. Permitted publication

- (a) The publication of a correct record of an act described in section 144b shall not be deemed as an offence under that section, provided that it was not done with the intent to incite to racism.
- (b) The publication of a quote from religious writings or prayer books, or the observance of a religious rite, shall not be deemed an offence under section 144b, provided that it was not done with the intent to incite to racism.

A summary of additional pertinent legal provisions relating to the ethical requirements of rabbis sitting as judges of rabbinical courts (*dayanim*) are included in the analysis below.

V. Analysis

A. Is differential treatment in housing based on religion, nationality, or ethnicity allowed under Israeli law?

Differential treatment in housing is generally prohibited under Israeli law.¹³ A leading Supreme Court decision on this issue is *Kadaan v. Israel Land Administration*,¹⁴ rendered by

¹¹ *Id.*

¹² Penal Law (Amendment No. 20), 5746-1986, 40 LAWS OF THE STATE OF ISRAEL [LSI] 230 (5746-1985/86) (authorized translation from the Hebrew by the Ministry of Justice).

Israel's Supreme Court in March 2000. In a 4-1 decision the Court held that the Israel Lands Administration was not legally allowed to allocate state lands to the Jewish Agency for the purpose of setting up the town of Katzir¹⁵ on the basis of discrimination between Jews and Arabs.

According to Court President Aharon Barak the State was not authorized to adopt a policy for the allocation of land use exclusively for Jews. Such a policy, he held, would violate the principle of equality, which is a basic value of the Israeli legal system and derives from the Jewish and democratic character of the state. A discriminatory policy, according to Barak, would further contradict the guarantee of Israel's Proclamation of Independence that the State would protect equality among its citizens without discrimination on the basis of religion or nationality.¹⁶ It would similarly violate various international conventions that recognize the right to equality, he said.¹⁷

The complexity of the Kadaan case, however, stemmed from the unique role of the Jewish Agency in utilizing funds raised in the Diaspora to enhance the development of Israel and the settlement of Jewish immigrants in it. In doing so, the Jewish Agency is acting based on legal authority provided to it under the Status of the World Zionist Organization–Jewish Agency (Status) Law, 5713-1952.¹⁸

According to Barak, the State's obligation to allocate land equally, irrespective of religious or national origin, also extends to land that it transfers to a third party, namely, the Jewish Agency. The Jewish Agency's historic role in developing the country and fulfilling the objective of building a Jewish national home in Israel, as recognized in legislation and special agreements with the State, does not provide any authorization to the State to discriminate among its citizens. Barak therefore concluded that cooperation between the State and the Jewish agency must be carried out in accordance with the laws of the State and cannot be based on unlawful discrimination.¹⁹

B. Are there any restrictions on speech that might extend to the statements by the rabbis?

¹³ Exceptions may be authorized, such as for advancing a policy of settling Bedouins (nomads in the South of Israel) in permanent housing. *See* HC 528/88 Avitan v. Israel Land Administration, PISKE DIN [PD] 43(4) 297 (1989).

¹⁴ HC 6698/95 Kadaan v. Israel Land Administration, 54(1) PD 258 (5760/61-2000).

¹⁵ Katzir is a bedroom community abutting the densely populated Arab area in the Lower Galilee known as the "Little Triangle."

¹⁶ Proclamation of Independence, 5708-1948, 1 LSI 3 (5708-1948), English translation available at the Knesset website, http://www.knesset.gov.il/docs/eng/megilat_eng.htm.

¹⁷ HC 6698/95 Kadaan v. Israel Land Administration, 54(1) PD 258, paras. 21 & 24.

¹⁸ Status of the World Zionist Organization–Jewish Agency (Status) Law, 5713-1952, 7 LSI 3 (5713-1952/53).

¹⁹ HC 6698/95 Kadaan v. Israel Land Administration, 54(1) PD 258, paras. 34-38.

- *Was the publication intended to incite racism?*

The Penal Law prohibits the publication of racist expressions. The law defines “racism” as the humiliation, denigration, and promotion of “feelings of ill will and resentment towards a community or sections of the population, solely due to color or belonging to a particular race or national-ethnic origin.”²⁰ One might argue that the publication of the letter in this case was intended to incite racism as is reflected in the controversy that erupted following the letter’s release and the feelings of ill will, resentment, and humiliation of Arab Israelis it has created.

The issue of intent is further discussed below in connection with religious speech.

- *Does religious speech receive greater protection than speech generally, or is the religious nature of the speech in question immaterial?*

Considering the apparent racist nature of the letter, it is necessary to determine whether its publication constituted “a quote from religious writings or prayer books” that qualifies as an exception to the prohibition on publication of incitement to racism in accordance with section 144c(b) of the Penal Law. According to this provision, “a quote from religious writings or prayer books” does not constitute an offense if “it was not done with the intent to incite to racism.”²¹

A leading 1996 decision dealt with a similar case involving the distribution of an article titled “Investigation of Jewish Rulings on the Killing of Gentiles (non-Jews)” by Rabbi Alba, who taught *Halacha* (Jewish law) in a religious school (*kollel*) near *Me’ arat HaMachpela*, the cave of the Patriarchs, in Hebron, Judea (the West Bank).²² In a 5-2 majority decision the Supreme Court rejected Rabbi Alba’s appeal over his conviction for the publication of an incitement to racism after distributing the inflammatory article to his students. In his defense, Rabbi Alba claimed that the article emphasized that it was not intended to provide any ruling based on Jewish law, but rather to raise issues for study by the rabbinic students.²³

According to Justice Mazza the question before the Court was not whether the appellant’s article correctly described the approach of *Halacha* (Jewish law), but rather whether the evidence proved that the appellant, under disguise of an article having a *Halachic* title, published it with the intention of inciting racism. Such intention, according to Justice Mazza, could be inferred from the circumstances of the publication’s timing and location.²⁴

Concurring with Justice Mazza in rejecting the appeal, Court President Barak differed on the method of inferring incitement to racism. According to Barak, incitement to racism must be

²⁰ Penal Law (Amendment No. 20), 5746-1986, inserting § 144a, 40 LSI 230 (5746-1985/86).

²¹ *Id.*

²² This is the second holiest site for Jews (after the Temple Mount in Jerusalem) and is also venerated by Christians and Muslims.

²³ CrimA 2831/95 Rabbi Ido Alba v. State of Israel, 50(5) PD 221(1996).

²⁴ *Id.*

expressed in the text of the publication itself and cannot be implied by circumstances surrounding the publication.²⁵

Barak recognized that subjecting incitement to racism to criminal liability harmed the principle of freedom of expression. Such harm could, however, be justified in accordance with section 8 of Basic Law: Human Dignity and Liberty if it was designed for a proper purpose.²⁶ The purpose of limiting racist incitement expressions, according to Barak, was to prevent harm to human dignity and foster equality among people. The harm to freedom of expression that was caused by prohibiting incitement to racism, he concluded, must not exceed the extent required for the purpose of preventing incitement to racism. Such excess can be found when the publication is completely innocent and the incitement is merely in the mind of the publisher. This was clearly not the case with regard to Rabbi Alba's publication, which both Justice Mazza and President Barak found to have included a racist message that was clearly intended to incite.²⁷

- *Are there additional restrictions that might apply to the statements of these rabbis in the event that they are employed as rabbis by civil authorities?*

Municipal rabbis are appointed by the State in accordance with the Dayanim Law, No. 20 of 5715-1955, and are civil servants.²⁸ Based on Israel's administrative law, officers of the state are bound by the same requirements that apply to the State when they carry out official duties. Such requirements include the duty to respect human dignity and refrain from discriminating against persons based on religion, or nationality.²⁹

The rabbis' letter does not seem to have been related to the execution of any of their official duties of adjudication. Even outside the performance of official duties, however, as *Dayanim*, the municipal rabbis are subject to the *Ethics Rules for Dayanim* that were issued on April 13, 2008, by the President of the High Rabbinical Court, Rabbi Shlomo Moshe Amar.³⁰

The rules prohibit *Dayanim* from engaging in any political or party activities and from expressing their views on issues that are essentially non-legal or controversial.³¹ *Dayanim* are also prohibited from appearing in public media, including the press, radio, television, and the Internet, in the absence of advance authorization by the President of the High Rabbinical

²⁵ *Id.*

²⁶ Basic Law: Human Dignity and Liberty § 8, SEFER HA-CHUKKIM (Book of Laws, Official Gazette) No. 1391, (5752 - 1992), *as amended*, English translation available at the Knesset Website, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm & text provided on page 4 of this report.

²⁷ CrimA 2831/95 Rabbi Ido Alba v. State of Israel, 50(5) PD 221 (5756/57-1996).

²⁸ Dayanim Law, No. 20 of 5715-1955, 9 LSI 74 (5715-1954/55). *Dayanim* are rabbis who serve on rabbinical courts for the adjudication of matters of marriage and divorce of Jewish residents and citizens of Israel. *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, No. 64 of 5713-1953, 7 LSI 139 (5713-1952/53). They may be authorized to arbitrate based on the Arbitration Law 5728-1968, 22 LSI 210 (5728-1967/68).

²⁹ *See, e.g.*, Kadaan v. Israel Land Administration, *supra* note 14.

³⁰ Ethics Rules for Dayanim, 5768-2008, Kovetz Hatakanot (Subsidiary Regulations) No. 6698, p. 1164.

³¹ *Id.* § 17.

Court.³² Such authorization is also required for statements made in the publications of academic organizations, the Bar Association, or Jewish ultra-Orthodox institutions of learning.³³

No evidence of such authorization for publication of the letter has been disclosed. In addition to criminal charges, the publication could therefore subject its authors and signatories to a review by the ethical committee headed by a *Dayan* of the High Rabbinical Court for this purpose.

C. How should this apply, or how has it been applied, to incitement by Israeli Arabs?

The Penal Law does not distinguish between Jews and Arabs, and the offense of publishing material with the intent to incite to racism applies to all offenders irrespective of their religion, or national origin.

A search for Israeli court decisions in which Israeli Arabs were convicted or even indicted for publication of an incitement to racism has not identified any cases. All cases where the accused was indicted and convicted seem to have involved Israeli Jews. The only reference to the penal offense of incitement to racism, and specifically to its definition of racism by Israeli Arabs, appears in connection with petitions to disqualify candidates' lists based on section 7A(a)(1) of the Basic Law: The Knesset, which prohibits the participation of a candidates' list if "its objects or actions, expressly or by implication, include . . . (3) incitement to racism."³⁴

Interestingly, the attempt to disqualify two Arab Knesset Members from running for the Knesset based on section 7A(a)(1) failed, whereas the disqualification of a Jewish candidate associated with the Kahana's outlawed *Kach* movement succeeded.³⁵

D. Is the law different on either side of the Green Line, either as to Israelis or to non-Israelis?

Israeli law applies to Israelis and non-Israelis living in Israeli settlements in the West Bank.³⁶ Palestinians living in areas controlled by the Palestinian Authority (PA) in the West Bank are bound by PA law. Israeli military orders, where applicable, are not relevant to this discussion, as they are based on Israel's belligerent occupation and not on Israeli domestic law.

³² *Id.* § 39(c).

³³ *Id.* § 39(d).

³⁴ Basic Law: The Knesset (Amendment No. 9), Sefer Ha-Hukim No. 1155 (5745-1985), p. 196, English translation is available AT the Knesset website, http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm.

³⁵ See Election Appeal 11280/02 Central Election Committee for the 16 Knesset v. Knesset Member Ahmed Tibi, 57(4) PD 1 (5763/64-2003), available at the Takdin Legal Database, <http://www.takdin.co.il/search/#3> (in Hebrew).

³⁶ See, e.g., CrimA 2831/95 Rabbi Ido Alba v. State of Israel, 50(5) PD 221 (1996).

VI. Conclusion

The December 2010 publication of a letter proclaiming that Jewish law forbids the sale or rental of property in Israel to non-Jews appears to qualify as a publication of material with the intent to incite to racism, which is prohibited by Israel's Penal Law.

According to the Penal Law the publication of a quote from religious writings or prayer books does not constitute an offense if it was not done with the intent to incite to racism. Although the letter allegedly quotes Jewish writings, its objective is to convey a message that will apply to future real estate transactions among Jews and Arabs in the State of Israel. The letter, therefore, does not merely cite protected speech, but appears to contain a racist message that is prohibited under Israeli law.

Considering Tsfat Rabbi Shmuel Eliyahu's previous 2005 case involving an indictment for publishing earlier statements against Arabs and the prosecution's warning that it would reopen the criminal case if he repeated his prohibited statements, it is highly likely that Israel's AG office will find proper grounds for his indictment in publishing the latest letter.

In addition to having violated the Penal Law, the signatories may also be subjected to an ethical inquiry by the ethical committee headed by a *Dayan* of the High Rabbinical Court. Publication of the letter appears to be outside of the official duties of municipal rabbis. Therefore, one may argue that it was not a violation of their duties as officials of the state. However, their actions appear to violate the ethics rules that apply to them, which prohibit engaging in political activities and expressing views on issues that are essentially non-legal or controversial.

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