

# Ukrainian News

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## A VIEW FROM THE COMPOUND

By

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To say that Jerusalem is only ostensibly a city of peace is as hackneyed as it gets. But clichéd observations become clichéd observations for a reason — they tell the truth. This explains why after spending more than a year as a law clerk at the Supreme Court of Israel in Jerusalem, I instinctively tensed for the first few weeks after my return to New York whenever I heard the sound of helicopters passing overhead. In Jerusalem, helicopter overflights at any frequency greater than sporadic indicate another violent clash between Moslem and Jew, or, if you will, between Arab and Israeli. This usually means that blood has been spilt and that more bloodletting is imminent. For an Israeli, the sonic booms of jets barely interrupt quotidian mental routines. In a small country that is always at war or at war readiness supersonic military planes have no choice but to fly over urban areas. The beat of helicopter rotors, however, spells trouble.

One place in Jerusalem well-placed for observing helicopter flybys is the Israeli Supreme Court. The Supreme Court of Israel is situated in a picturesque area of Jerusalem known as the Russian Compound, also home to a dramatic onion-domed Russian Orthodox church. The Court's three-story building, as the rest of the compound, was built in the nineteenth century by the Russian government to house Russian pilgrims — hence the name of the area — and to this day, chiseled in the stone above the courthouse's main entrance, is a Cyrillic inscription. The Russian Compound is, to use a loaded term, strategically located: it sits on a hill, overlooking the ridge that demarcates

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East (Arab) from West (Jewish) Jerusalem. The old city with its Christian, Arab, Jewish, and Armenian quarters, its countless holy sights, and its ever-present political tension is, figuratively speaking, only a stone's throw away.

I came to think of my office, on the top floor of the Court's building, as a still camera that offered snapshots of Jerusalem's passions and currents. Aside from the Russian church and the courthouse, the Russian Compound also contains Jerusalem's police headquarters and main lockup. The window at my desk faced the church and those police buildings and usually within a day of most *intifadah* "incidents" I could see the fruits of police and army labors. A long line of Arab prisoners, linked to each other by plastic handcuffs, would be brought from the police station, past the church, and into the courthouse – the building that is home to Israel's highest court also houses Jerusalem's lowest courts, the magistrate courts, where many *intifadah*-related arraignments are processed.

From my perch I had a clear view of the plaza that lay between the row of lockup cells and the church. That open ground frequently hosted groups of Arab villagers, mostly women, that would gather around the jails waiting to talk to or catch a glimpse of some prisoner. My window also allowed the occasional scene of a police sapper detonating a suspicious object, and from my office, as from any room in the courthouse, the many popping sounds of gunfire from the old city were clearly heard the day that seventeen Arabs were killed on the Temple Mount.

The interior of the courthouse offered up no less telling vignettes. Israel's most infamous murderers, terrorists, and spies frequently entered the courtrooms of the Supreme Court for the oral arguments of their appeals. However, it was not the oral arguments of notorious cases, but those of constitutional cases, that provided the clearest window through which to look into the heart of Israeli society.

A unique aspect of Israel's "constitutional" system – the country has no formal constitution – is a type of law suit known as the Bagatz. Bagatz is the acronym for *Beit Din Gavoha LeTzedek*, or High Court of Justice. A Bagatz action allows one to sue directly in the Supreme Court any government or even quasi-public body for arbitrary or unreasonable activity, and standing in these cases is very liberally construed. In Bagatz cases, the Court sits in its capacity as the High Court of Justice and issues injunctions in justifying circumstances. From a Bagatz decision there is no appeal – to whom would you appeal decisions of the highest court? Thus, aside from serving in the traditional Supreme Court role of final court of appeal, the Israeli Supreme Court frequently acts as a court of first and last instance.

What can be at issue in a Bagatz ranges from the trivial – is an agency's denial to grant a kiosk license capricious – to the fundamental – are the government's political coalition agreements legal. Israelis proudly, and justifiably, point to the Bagatz institution as a real opportunity for the little man to battle and defeat the grinding establishment. While perhaps it would be romantic to imagine the Bagatz' roots as some-

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how snaking into an ancient past in which kings and chieftains granted audiences to complainants big or small – indeed, such procedures still exist in some parts of the Middle East – the truth is that it was the British, governors of Palestine from 1917 to 1948 under a League of Nations Mandate, who created the High Court of Justice.

Essentially, the Bagatz phenomenon funnels nearly all of Israel's constitutional and administrative law cases into one court. Thus, from a social and political perspective, a Supreme Court courtroom is the place to be if one wants to understand the contemporary pushes and pulls on the country. I spent endless hours listening to arguments that Jews for Jesus should not be recognized as Jews under Israel's Law of Return (which guarantees every Jew instant citizenship), the government was illegally comprised because of an unlawful coalition agreement, the rabbinate had no right to deny certain restaurants that are kosher its certification simply because those restaurants host belly-dancing, environmental concerns should bar the erection of a Voice of America broadcast transmitter in the Negev desert, and the like.

Murmuring by pundits that the Court was becoming too involved in resolutions of purely political disputes was probably inevitable, but particularly loud, this past year. To trace this alleged politicization of the Court to its source, an understanding of the current inability of the major political parties to inspire even an iota of electoral confidence is necessary.

Since its establishment in 1948, Israel has not experienced a majority government. After each election the two large parties, the rightist Likud and the leftist Labor, vie with each other for leadership of a working coalition by promising political concessions to small, often extreme, parties. Forming a minority government is only half the battle; maintaining it is the other half, as shifting coalitions are a fact of life in the Knesset, Israel's parliament.

It is the small, religious parties who most often control enough Knesset seats to guarantee for themselves a swing vote role, and so they are the frequent beneficiaries of those political concessions. In exchange for promises to join with one of the two large, secular parties – Likud is usually the successful suitor – the religious parties regularly demand, and receive, legislation that mandates certain conformities to *Halakha*, or Jewish religious law. An example of the consequences of this type of legislation is that El Al, Israel's national airline, has for years not been able to fly on Friday night or Saturday, the Jewish Sabbath. More late-breaking illustrations of these concessions are two recently enacted laws, one prohibiting the sale of pork in the country and the other curtailing sexually suggestive advertising. This last law is called *Hok Ha'To-evah*, or the Abomination Law, which a friend writes me is precisely the name for it.

Obviously, legislative concessions to religious parties peeve to supersensitive ends the largely secular Israeli population, which generally suspects a nascent theocracy. Seeing the concessions as nothing more than political cynicism and cowardice, the electorate vilifies both Likud and Labor. Voters, however, are reluctant to hinge their votes on religious issues; not only do issues of defense dominate elections, but few feel that any one party is more principled than the other. Thus, most Israelis feel themselves ensnared by a process of "Khomeinism" and victimized by a government inexorably motivated by self-interest.

The Court became involved in the machinations of government and politics because of two of the Court's attributes: one, its Olympian competency, and two, the Bagatz. Almost anybody in Israel feels that the Supreme Court is the only government institution that functions professionally and without partisan motivation. The immense respect accorded the Court in Israeli legal and non-legal circles, and the concurrent nadir of public confidence in the

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Knesset's ability to act forcefully and for the benefit of the people, as opposed to the parties of relatively small constituencies, only made it inevitable that nearly every controversial government action would be objected to in a Bagatz suit.

This past year the Court saw many Bagatz cases that essentially challenged the government's ability to act for the commonweal, more, in fact, than what was customary. Lack of confidence in the government is fathoms deep in Israel today and the Bagatz petitioners simply were seeking a second opinion. If the Supreme Court would consider political decisions as matters susceptible to judicial oversight then all would abide by the Court's stamp of approval or disapproval of those government decisions. As illustration, an initial government policy not to distribute gas masks to the populace after Iraq invaded Kuwait and threatened Israel with scorching destruction, was challenged in a Bagatz suit as being unreasonable and incompetent. The petitioners sought a mandatory injunction to force distribution of gas masks. They did not succeed. Of course, events on the ground quickly erased any difference of opinion on the matter, and soon after winning the Bagatz, the government reversed itself.

The obvious question of the justiciability of these types of matters is being worked out in the cases presently under the Court's consideration, with precedent available for denying the existence of a political question doctrine, a favorite tool of the U.S. Supreme Court for avoiding thorny political issues. The resolution of this matter may well determine who indeed runs the country. Two of Israel's major newspapers already have depicted Justice Aharon Barak, perhaps the Court's most liberal judge, as running the government from the Russian Compound.

The main international attention-grabber on the Court's docket this past year, however, was the appeal of John Demjanjuk, or as the

prosecution had established at trial, Ivan the Terrible. Ivan the Terrible was a particularly brutal and murderous guard of a Nazi extermination camp at Treblinka, Poland during World War II. For being said monster, Demjanjuk, who had been extradited to Israel from Cleveland, Ohio, was convicted and sentenced to death. Conviction under Israel's Nazi war crimes law mandates an appeal to the Supreme Court, and so, for a solid six weeks last spring, a five Justice panel – the Court usually sits in bancs of three; only in important cases will it convene a panel of five – patiently listened to and reviewed every iota of evidence that had been presented at trial. Notably, permission was granted to introduce at the appeal evidence newly discovered as a result of the now relatively open societies of Eastern Europe, muddying a bit the traditional appellate separation between issues of law and issues of fact.

Of the myriad issues raised on appeal, many of which were reiterations of matters raised at trial, perhaps the most nettlesome was the contention by the defense that all the proceedings were founded on a tragic case of mistaken identity, that Demjanjuk had been extradited and sentenced to death for the crimes of another man. Demjanjuk, a Ukrainian who had been named Ivan and had emigrated to the United States soon after World War II, freely admitted to having served as a Nazi collaborator and having worked in some of the death camps. But he was not, he claimed, the infamous Ivan the Terrible. He had never been assigned to Treblinka, he said. At worst, he insisted, he was Ivan the Less Terrible. Nonetheless, at trial the court found the evidence that the right man was tried and convicted "overwhelming."

There were confusing hypotheses presented by the defense, the most complicated being its Theory of the Three Ivans, in which John Demjanjuk was said to have borne a remarkable resemblance to and have been confused with two other Ivans, one of whom was Ivan the Terrible. The prosecution too had some diffi-

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culties; it claimed that a German identity card of one Ivan Demjanjuk, issued in the large German army base of Trevniki, with a picture said to be of the defendant and identified by witnesses as that of Ivan the Terrible, proved that the defendant and Ivan the Terrible were one and the same. But the State relied on the confusion of war to explain why the card did not list Treblinka, the acknowledged camp in which Ivan the Terrible had committed his atrocities, as one of the cardholder's work assignments.

The defense said that it could better explain why the card did not list Treblinka. It claimed that the Trevniki document was a KGB forgery. The card was said to be part of a Soviet frame-up of Demjanjuk, which, the defense asserted, was consistent with KGB retaliation against traitors, or more precisely, Ukrainians who collaborated with the Germans, and also served Soviet desires to foster enmity between its Ukrainian and Jewish communities. The prosecution countered with forensic evidence to show that such a forgery had not occurred and that the document was unquestionably reliable.

From an intellectual perspective, the case was as chock-full of interesting legal, factual and historical issues as it was encumbered by review of minute detail. Of one thing, however, there is no doubt: the trial and appeal have earned prominence in Israeli judicial history, partly because of their historical importance, partly because of their length—indeed, Demjanjuk was brought to Israel over five years ago—and partly because of issues rarely or never before dealt with by Israeli law. The outcome of the appeal is now pending.

While many wrenching scenes are regularly played out in or near the courthouse, the often harsh sights and sounds are tempered by an integral, most noticeable feature of the Court—its members. The Court Justices are a group of twelve professionals inspiringly motivated by an obvious dedication to their country and quite lacking in the hubris that can infect men of such

achievement. In Israel, judges of all levels are selected by a committee of nine that includes the Chief Justice—who is chief of the Court by virtue of seniority only, two fellow Justices, the Minister of Justice and representatives of the government, the parliament and the Israel Bar Committee. Obviously, with such a spectrum of selectors, appointees are rarely, if ever, appointed for political reasons. Indeed, not only is the competence and expertise of the Court hardly ever questioned, its political leanings are only rarely examined by critics; political affiliation is considered only a minor Court characteristic.

The Justices interact between each other with a genuine comradery. For example, the Justice for whom I clerked, Menachem Elon, an ordained Rabbi as well as a Doctor and Professor of Jewish Law, teaches a weekly Talmud class to a number of fellow Justices. Nor is this warmth for internal consumption only. The Justices are well-known for their thoughtfulness for the citizen in his battles against an often Kafkaesque bureaucracy.

A hearing I witnessed on my first day at work illustrates well the humaneness that marks the Supreme Court. Justice Elon was presiding over a panel that had engineered a compromise in a financial squabble which had rent apart a family. To cement the compromise and hoping to pacify the feuding siblings, Elon instructed the father, a traditional Jew who had emigrated to Israel from Yemen, to build a *sukkha*, the temporary booth in which Jews sit during the *Sukkoth* festival, which then was impending. Elon told him to bring together the whole family for a meal in the *sukkha*. The old man, obviously touched and perhaps a little taken aback by such a personal approach to his case, happily agreed to do so. Elon then offered to attend the meal himself, if the old man would care to invite him.

Perhaps part of the reason for the relaxed and thoroughly pleasant atmosphere at the Court is the general informality of Israeli society and

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the socialist, classless roots of the State. Perhaps it is just a happy collection of wonderful judges. Whatever the reasons, the Justices are considered by nearly all Court watchers to be unique, humane individuals, without peer. And if my personal experience may attest, deservedly so.

Not just its public appeal, but much of the Court's power, rests on its nearly spotless reputation and proven wisdom. This is helpful to the Court because its punch does not pack the same constitutional wallop as that of the American Court. It has no official power to pass on the legitimacy of primary legislation – where there is no constitution there can be no constitutional review. Israel is thus what is called a democracy of legislative supremacy. This means that when the Knesset, Israel's parliament, legislates, the resulting law is the last word. The Court has no formal yardstick against which to measure the validity of the law and whenever the Knesset is distressed over a decision of the Court it can simply pass a law that effectively reverses the Court. This situation is considered by some in Israel, including at least one member of the Supreme Court, to be appropriate since the Court Justices are not elected and only those that are chosen by the people ought ultimately to decide how the State should function. A further consequence of not having a constitution is that the courts cannot easily access broad constitutional principles in areas of law in which only sparse legislation has been passed.

But judges being what they are, the Court is hardly powerless. Of course, all regulations and secondary legislation are measured for validity against the primary legislation that spawned them. More remarkably, where the Knesset has not legislated specifically, the Court has found it possible to weigh certain types of activities against such ambiguous standards as basic principles of democracy or maxims of enlightened humanity. In fact, the suggestion that a court operating without the net of a constitution is the more powerful for it because it need not pin its motivating principles to a specific text, would

not be misplaced.

The Court has been aided in its search for guiding principles by a 1980 law entitled the Foundations of Law Act, which allows the Court, in cases of lacunae in the law, to resort to the "principles of freedom, justice, equity, and peace of the Jewish heritage." Just what is that Jewish heritage, has become, not surprisingly, the focus of a raging intellectual debate on the Court, with the two polar perspectives being represented by Justice Elon and Justice Barak, who otherwise are on the friendliest of terms.

Elon, on the one hand, contends that this heritage is none other than *Mishpat Ivri*, or the traditional Jewish civil law, religious in source, that governed the commercial, communal and even criminal affairs of the post-exilic Jewish communities in Israel and in the diaspora for nearly two thousand years. Barak, on the other hand, has a much wider perspective of this Jewish tradition, in which he includes all the great moral, philosophical and legal thinkers of Jewish history, even those from without the traditional, religious world. The works of Spinoza, a brilliant, but generally considered sacrilegious, medieval Jewish scholar, might serve as an example of where these two Justices would disagree on precedential validity.

But Bagatzes, Justices and esoteric jurisprudence are only part of the Court's soul. No fair account of the Supreme Court could ignore the city in which the Court is located. It is doubtful that the Court's wisdom and fairness could soothe so many of Israel's intense conflicts if the Court were not clothed in the cultural and spiritual power of Jerusalem, a city of massive symbolic meaning to all Israelis. Sitting on a hill in the heart of Jerusalem imbues the Court with an importance and influence it could have nowhere else. Jerusalem is unique in many ways, perhaps the most obvious being its renowned handsomeness. The city is, taking into account here the inadequacy of language, impossibly beautiful. Architecturally, it is a

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hodgepodge of various styles, which can only be expected from a city that is now planning its trimillennial anniversary and has seen more nationalities in its administrators, pilgrims, warriors, settlers and planners than some cities have residents. But today, Jerusalem, made up of both the old city and the new city, is tactilely and visually unified. Under a 1917 British law, all buildings erected in Jerusalem must be faced in locally quarried stone. Jerusalem stone cuts from the ground soft and white and then hardens by drying. It weathers gray, pink, and even orange. Buildings that today go up in new Jewish and Arab neighborhoods are relatively unimaginative architecturally – blocks on stilts seem to be the prevailing model – but they are saved from the fate of blandness by the mesmerizing stones of their facades. Even the most modern-styled building looks as if it could be placed alongside Jaffa Gate, one of the more popular entrances into the old city, with easy architectural harmony.

To adequately sing Jerusalem's praises is to compete with ancient kings and prophets. I simply can say that I never tired of my walks in Jerusalem. My route home from work would carry me down the rise of the Russian Compound, across downtown, through the graceful neighborhood of Rechavia and along a ridge overlooking the olive-tree laden Valley of the Cross. Another walking route in Jerusalem can grace one with breathtaking views of the Dead Sea, the lowest point on earth, and its surrounding desert. A view of the old city walls is another possibility, as are countless other famous vistas.

It is easy to get carried away with Jerusalem's many hills and valleys, its dramatic views of the Judean desert, its seemingly pure sunlight, its wonderful building blocks and its unique atmosphere. The seductive appeal of Jerusalem knows few parallels. But a city that so beguiles can obscure from the casual spectator deep-rooted problems. Jerusalem is a city that seethes with political and religious strife and I

expect that a visitor from Belfast would feel rather cozy with the place. It is, after all, a city that only recently was at least as thoroughly divided as Berlin had been. Between 1948 and the Six Day War in 1967, Jerusalem had not only stone walls partitioning it into Jordanian and Israeli sovereign areas, but Jordanian snipers regularly ensuring that the wall was but a comparatively minor obstacle. Today, a number of apartments and offices in downtown Jerusalem still have bullet holes in their steel shutters and stone facades, reminding their tenants of trying days not too long ago. Finding a Jerusalemite who can vividly recall the joyful bulldozing of the wall and the capture of the old city in 1967 is hardly a difficult task.

But today, ironically, Jerusalem is nearly as divided as it was before its unification in 1967. Arabs and Jews for the most part lead distinctly separate lives, each group fearful of the other. There are separate shopping and entertainment areas, separate bus routes and companies, separate school systems and schedules, separate power grids and so on. What the two communities seem to share most is the utopian vision of a strifeless Jerusalem. A lot of versions of this vision, however, imagine one community there without the other – a Moslem *Al-Quds* or a Jewish *Yerushalayim*.

Sadly, today there is no escaping the noise and violence. Time was when a Jew could stay on his side of the Green Line, as the former border separating West from East Jerusalem is called, and an Arab on his and there would be no need for either to experience the friction for which the city is now noted, a sad commentary in its own right. However, even that touch of segregated tranquility is no longer possible; staying home does not insulate anybody anymore. Today Jews are fatally attacked with butcher knives and Arabs set upon by reacting lynch mobs in the once quieter West Jerusalem. Israeli cars are torched in West Jerusalem and stoned in East Jerusalem. Jewish worshippers at

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the Western Wall and Muslim worshippers at the mosques on the Temple Mount are attacked and some are killed.

Each of these types of incidents, which serves as a virtual beacon for the helicopters, is never isolated; it touches off tensions that ripple throughout the neighborhoods of the city, be they Arab or Israeli. Thus, recently, when the bodies of two obviously murdered Jewish boys of high school age were discovered in a valley near an Arab village on the outskirts of Jerusalem, the city was gripped by chaotic riots for three days.

Of course, Jerusalem's contemporary tragedies and *de facto* partition are but an extension of past brutalities and conquests. It is said that Jerusalem has been conquered at least fifty times. Whatever the number, rivers of blood have coursed through its streets since just about the time of the city's establishment by King David. Arthur Koestler was right on when he wrote that Jerusalem was home to "more holy murder, rape and plunder than any other place on earth." He attributed Jerusalem's unholy mess to the "poison" of religion.

Poison or antidote, religion is definitely the beat to which the city marches. Be it Muslim bowing, Jew swaying, or Christian kneeling, religion governs the movements of Jerusalem. Frequently, the muezzin's call to worship, the murmur of Jewish prayer and the melody of Christian chants coincide, and that, that point where three of man's most evolved belief systems intersect, is Jerusalem's mesmerizing still-point. That is its magic and that is its danger. The point of intersection of such great passions creates unpredictable cooperations and unimaginable frustrations.

The more radical of Jerusalem's religious practitioners, of which there are no short supply, are not content with private ministrations to their faiths. Through money, demonstrations, influence, media manipulation and sometimes violence, they can display great commitment to

shaping and forming Jerusalem along the lines of a particular vision. Generally, cooler heads lead the city and represent its inhabitants, but there is no denying the influence of the extremist, religious constituencies. It is as if, observes Amos Elon (no relation to Justice Elon), a well-known Israeli author and journalist, thousands of quivering arms were straining to pull Heavenly Jerusalem downward to sit upon Earthly Jerusalem. The result is predictably conflicting: the serenity and beauty of the ideal, the noise and violence of the real.

But it would be wrong to conclude on a grim note. Despite any tragic minuses, it is Jerusalem's pluses, which are countless, that have the last word. Indeed, the city never fails to draw from the mouths of residents, tourists and dignitaries words of praise and awe. Jerusalem is a special place, noticeably unto its own. Its mood rarely coincides with the mood in the rest of Israel, which is better represented by the frantic, nightlife-obsessed city of Tel-Aviv. Israelis regularly concede that people from Jerusalem are gentler and more polite than those from the rest of the country, something impossible to comprehend if you have ever fought the Jerusalem central bus station crowds on a Friday afternoon. It has a hypnotic atmosphere that can make you feel at once your insignificance and your importance. It can send you soaring with rhapsodic delight and plummeting with searing disappointment, like the object of an archetypical obsession. It is a city like no other.

