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Temple Mount Faithful – General, Inspector-General of the Police, Mayor of Jerusalem, Minister of Education and Culture, Director of the Antiquities Division, Muslim WAQF - In the Supreme Court Sitting as the High Court of Justice [September 23, 1993]

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**TEMPLE MOUNT FAITHFUL—AMUTAH ET AL.
v. ATTORNEY-GENERAL
INSPECTOR-GENERAL OF THE POLICE
MAYOR OF JERUSALEM
MINISTER OF EDUCATION AND CULTURE
DIRECTOR OF THE ANTIQUITIES DIVISION
MUSLIM WAQF**

**In the Supreme Court Sitting as the
High Court of Justice
[September 23, 1993]**

M. Elon D.P., A. Barak J., and G. Bach J.

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I. FOREWORD

*Kitty O. Cohen**

The Israeli Supreme Court, sitting as the High Court of Justice, is the highest instance which individuals and groups of citizens may petition to challenge an action or inaction by any government or other public authority in the country. With the court rests judicial review and the power to overrule government decisions. In the absence of a constitution and a full bill of rights (Basic Laws now partly fulfill that role) the High Court of Justice is well known as an incorruptible and impartial arbiter between the Israeli government and its citizens and between the Israeli authorities and the residents of the West Bank.

The contribution of the Supreme Court to the application of Jewish law to major challenges confronting the State of Israel is of considerable importance.¹ While Israel's judges often refer to Jewish law sources, they also know Jewish law cannot always be applied to the complex social, religious, and political reality in Israel. They therefore have recourse not only to the texts of Jewish law, but to its spirit, depth, wisdom, and justice.

We are pleased to publish the translation of the 1993 judgment of the High Court of Justice on a petition regarding the religious and legal status of the Temple Mount (H.C. 4185/90). This publication of the Catholic University Law Review, in conjunction with the Israel Colloquium is part of the Colloquium's ongoing effort to inform the public on sensitive, in this case emotionally charged, complex issues related to Israel.

II. A NOTE ON THE TRANSLATION

Translations of Jewish primary and secondary sources differ; they often use different phrases for the same topic or expression. Edward Levin²

* Dr. Kitty O. Cohen is founder and board member of the Israel Colloquium. She is a graduate of the Hebrew University of Jerusalem and was awarded a Ph.D. degree at Yale University. Dr. Cohen is the author of *THE THRONE AND THE CHARIOT*, and a number of articles. She has lectured extensively in Israel, Europe, and the United States. Dr. Cohen also has published the results of two surveys of black-Jewish relations in the United States and is co-editor of *PERSPECTIVES ON ISRAELI PLURALISM*.

For information on the programs and publications of the Israeli Colloquium, please write to: The Israel Colloquium, P.O. Box 1874, Ramat HaSharon 47100, Israel. E-mail: msroz@pluto.mscc.huji.ac.il. In the United States write to: P.O. Box 516, Tenafly, NJ 07670.

1. See 4 MENACHEM ELON, *JEWISH LAW, HISTORY, SOURCES, PRINCIPLES 1575-1946* (The Jewish Publication Society, Philadelphia, Jerusalem 1994).

2. Translator and editor of *JUDAICA AND ARCHAEOLOGY*. His major translations include the *EVERYMAN'S MISHNAH SERIES* by Pinhas Kehati (senior translator 1987—), the

translated the decision. We are particularly grateful also to Melvin J. Sykes³ for reviewing the different translations, evening them out, and thus rendering them accessible to non-Hebrew-reading jurists and lay readers.

Archaeological terminology relating to places on the Temple Mount presented an additional difficulty: apparently no established terminology (in Hebrew, Arabic, or any other language) exists. The translator, therefore, relied on his good judgment and the recommendations of archaeologists in Jerusalem.

All Bible translations are from the new Jewish Publication Society *Tanakh*.

III. MENACHEM ELON: A BIOGRAPHICAL SKETCH

Menachem Elon is Deputy President (Retired) of the Supreme Court of Israel. He currently serves as Professor of Law at The Hebrew University of Jerusalem and at New York University. Menachem Elon was born in Duesseldorf, Germany in 1923, and emigrated to Palestine in 1935. He received his rabbinic ordination after eight years of study at "Yeshivat Hebron" in Jerusalem. In 1948, he received his diploma from the Tel Aviv School of Law and Economics, and was released from army service in 1949. In 1954, he received a Master's Degree in Humanities, with honors, and in 1962, a Doctor of Laws Degree *cum laude* from the Hebrew University of Jerusalem.

From 1950 to 1951, he served as secretary to the Knesset's Finance Committee. For several years, he was a military prosecutor and President of a military court. From 1954 to 1962, he served as Deputy Attorney General of the State of Israel. From 1959 to 1966, he was Advisor on Jewish Law to the Ministry of Justice. He also has served on government committees involved in the preparation of various bills for the Israeli Civil Law Codification. In 1985, he was a candidate for President of the State of Israel.

ENCYCLOPEDIA OF ARCHAEOLOGICAL EXCAVATIONS IN THE HOLY LAND (staff translator, 1993), MAGIC, MYSTICISM, AND HASIDISM by Gedalyah Nigal (1994), and THE SAYINGS OF MENAHEM MENDEL OF KOTSK by Simcha Raz (1995). Mr. Levin is currently preparing a collection of essays on Jewish religious responses to the Holocaust.

3. A.B., Johns Hopkins University; LL.B., Harvard University. Diplomate, Baltimore Hebrew College. Adjunct Faculty Member: University of Maryland School of Law. Fellow: American College of Trial Lawyers, American College of Trust and Estate Counsel, American Bar Foundation, Maryland Bar Foundation (former President). Member: American Law Institute, Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, American and Maryland State Bar Associations, Bar Associations of Baltimore City. Sole Practitioner, Baltimore, Maryland: General Practice, trial and appellate litigation, probate and trusts.

In 1977, he was appointed to the Supreme Court of Israel and in 1988, he was appointed Deputy President of the Supreme Court. In 1984, he was appointed the first Caroline and Joseph S. Gruss Professor of Talmudic Civil Law at New York University School of Law, where he serves as Director of the Jewish Law Program, and in 1990, he was appointed the first Caroline and Joseph S. Gruss Professor of Talmudic Legal Studies at Harvard Law School. He established and then directed the Institute for Research in Jewish Law at the Hebrew University until 1977. He has been a guest lecturer on the faculty of Oxford University and University College, London.

In 1986, he received an honorary doctorate from Yeshiva University in New York. For the twenty-fifth anniversary of the reunification of Jerusalem, *Yom Yerushalayim* (Jerusalem Day) in 1992, he composed the *Covenant of Jerusalem* which was signed by leaders of the State of Israel, the Israel Defense Forces, and world Jewry.

On Israeli Independence Day in 1979, Justice Elon received Israel's highest civilian award, the Israel Prize, for his three-volume work on Jewish Law and for his outstanding contributions to the field. In 1993, Justice Elon was elected President of the World Union of Jewish Studies.

Justice Elon has published many works on the history and nature of Jewish law and the relation between Jewish law and the State of Israel, including *THE FREEDOM OF THE PERSON AND OF THE DEBTOR IN JEWISH LAW* (1964), *RELIGIOUS LEGISLATION IN THE LAWS OF THE STATE OF ISRAEL AND WITHIN THE JURISDICTION OF THE CIVIL AND RABBINICAL COURTS* (1968), and *JEWISH LAW, HISTORY, SOURCES, PRINCIPLES* (*Mishpat Ivri*, 1973). The latter is a three-volume work now in its third Hebrew edition (1988). A four-volume English translation of this book was published by the Jewish Publication Society in 1994, and in 1989, the first seven chapters of *JEWISH LAW* appeared in the Russian language. From 1968 to 1971, Justice Elon edited the Jewish law section of the *ENCYCLOPEDIA JUDAICA*, which subsequently appeared in his book, *PRINCIPLES OF JEWISH LAW* (1975). By 1984 he had edited ten volumes of *THE ANNUAL OF THE INSTITUTE FOR RESEARCH IN JEWISH LAW OF THE HEBREW UNIVERSITY OF JERUSALEM*.

IV. INTRODUCTION

Menachem Elon

The following ruling of the High Court of Justice of the State of Israel is one of the most important decisions in which I was privileged to partici-

pate. I wrote the Court's ruling, with Aharon Barak (current President of the Supreme Court) and Gavriel Bach concurring. In addition to the specific laws applying to the case, the ruling drew upon historical research as well as the necessary legal basis for the conclusions we drew.

The decision also constituted an exciting personal experience for me and my colleagues. The Supreme Court does not, as a general rule, hear testimony and clarify facts, which is the task of the lower courts. This time, however, due to the legal and historical importance of the case before the court, and in order to verify the facts disputed by the parties, we decided to conduct a tour of the Temple Mount, which is described in detail in the ruling. The intensity of this experience stems from the unique nature of the Mount. For Jews living in Israel as well as for those in the Diaspora, the Temple Mount has been their holiest place for *circa* 4,000 years; for Muslims, it has been their third holiest place, after Mecca and Medina, for *circa* 1,300 years; and Christians also attribute sanctity to the Mount.

The decision is one of the most detailed judgments delivered by the Israeli Supreme Court sitting as the High Court of Justice, and it appears here in its entirety, with the exception of one purely legalistic section (*see infra* section 44) which is not of relevance to the basic issues discussed in the ruling.