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PRESIDENT'S MESSAGE



I

n this issue *JUSTICE* is offering the hospitality of its columns to Mary Robinson, the UN High Commissioner for Human Rights, and former President of Ireland.

Ever since our Association was granted consultative status by the United Nations, in 1995, we have been involved, through our representative, in the work of the various UN bodies concerned with the promotion and the protection of human rights, and we have therefore followed closely the functioning of the office of the High Commissioner for Human Rights.

From time to time we found it necessary to express to the High Commissioner our concern at the discriminatory treatment meted out to Israel at the United Nations, notably the General Assembly and the Commission on Human Rights. Reference was also made to certain incidents involving the Office of the High Commissioner. One such incident referred to the statement of UNHCHR's representative at a meeting of experts concerning the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Fortunately, examination of this issue has been discontinued in accordance with a subsequent decision of the States Parties to the Geneva Convention, arrived at last August.

A further issue which we raised referred to the circumstances in which the High Commissioner agreed to the holding of a Seminar on Islamic Perspectives on the Universal Declaration of Human Rights, in the context of the celebration of the 50th anniversary of the Declaration's adoption. The International Association of Jewish Lawyers and Jurists felt that this was a valid subject of undoubted interest but expressed concern at the conditions in which the Seminar would be conducted, limiting discussion and intervention to the invited Islamic experts.

Yet another issue which arose subsequently was the High Commissioner acceding to a request made in April 1999 by the "Special Committee to Investigate the Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories" (created by General Assembly Resolution 2243 (XXIII) of December 1968, composed of the representatives of Malaysia, Senegal and Sri Lanka), with a view to seeking Israel's cooperation with that body. Both the substance and the timing of requests for Israel's collaboration in this regard gave rise to concern on the part of our Association, arising from the highly controversial mandate given to this body by an essentially political resolution, devoid of any features of a recognized UN human rights mechanism.

From time to time we expressed our concerns through our representative in Geneva, and in letters to the High Commissioner. In our Spring issue No. 20 of *JUSTICE* we published a statement adopted at our 11th International Congress in Jerusalem (*Ibid* pp. 23-24).

In my meeting with the High Commissioner, together with the IAJLJ's Geneva representative, Daniel Lack, which took place at the office of the High Commissioner at the Palais Wilson in Geneva, on 27 July last, all these and other related issues were discussed in depth in a cordial atmosphere. We hope that this meeting will serve as the basis of a dialogue to be pursued with a greater sense of awareness of the positions of both sides.

During our discussion the High Commissioner offered to state her position on this and other issues in an article to be published in *JUSTICE*, in the context of her forthcoming visit to the Middle East early in 2000. We hope that we shall be able to take up the threads of this dialogue in subsequent constructive exchanges both within and outside our columns.

We trust that the High Commissioner's forthcoming visit to the region, including Israel, will enable her to become more familiar with Israel's democratic and legal institutions and its capacity to make a greater contribution to meeting legitimate international concerns at the deteriorating human rights climate in many regions. We share her view that Israel's full cooperation in this endeavour will be greatly enhanced by ending its continued arbitrary exclusion from the regional grouping of UN Member States, which bars it from membership of the Security Council, the Commission on Human Rights and other important UN bodies.

In this context we express our hope that the new millennium will introduce an era of true enjoyment of human rights in a climate of peace and justice for all.

Hadassa Ben-Zur

Remember Berlin

Remember Berlin is the second of a series of conferences commemorating Jewish lawyers and jurists who perished in the Holocaust and their contribution to the law in their respective countries. The Berlin Conference was held on June 3-8, 1999, jointly by the IAJLJ, the Berlin Bar Association and the German-Israeli Jurists Association, on the occasion of the publication of “*Anwalt Ohne Recht*” [Lawyers without Rights], under the auspices of the Secretary General of the Council of Europe, Mr. Daniel Tarschys. Highlights from the Conference appeared in the last issue of *JUSTICE*. We continue with more highlights.

Holocaust Denial: Will it Cast a Shadow on Holocaust Memory in the New Millennium?

Deborah E. Lipstadt

In addressing the topic of Holocaust denial it is crucial to begin with an assessment of the degree to which deniers have succeeded in spreading their beliefs. What is the current situation? Is it *sha'at dahak*, a crucial moment, or are we overreacting to a perceived, but not necessarily real, threat? There exists little evidence that the deniers have made significant progress. Surveys taken in both Europe and in North America have consistently shown that deniers have convinced only an infinitesimally small number of people to believe that the Holocaust is a hoax.

Despite the fact that the various surveys which have been conducted over recent years show exceptionally small numbers of people subscribing to the pseudo-theories propagated by Holocaust deniers, Jews are often skeptical of these results. In fact, Jews are often skeptical of results of surveys which demonstrate that there has been a general diminution of anti-Semitism, as has been the case in the United States. They argue that those who are interviewed in these surveys know that it is “politically incorrect” to express anti-Semitic views or to deny the Holocaust.

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Whereas it once was acceptable to express an open hostility to Jews, in the post-Holocaust world those sentiments are less acceptable.

Respondents will, therefore, camouflage their true feelings. As a result, many Jews contend that the

results of these surveys do not correspond to reality, *i.e.* the true extent of anti-Semitism is far higher than the surveys demonstrate. Even if we allow that this may be an accurate assessment and that there is more anti-Semitism and Holocaust denial extant than the most sophisticated survey demonstrates, there still seems to be a tremendous gap between Jews' perception of the extent of anti-Semitism and the reality of it. So too it is with



Holocaust denial. When I assure audiences that Holocaust denial is not an existing threat, my assurances are treated by the audience with great skepticism despite the fact that there is no evidence that deniers have achieved significant inroads among the general populace. In fact, the opposite seems to be the case.

The construction of memorials and museums, the proliferation of courses and the appearance of ever increasing numbers of books on the topic all confirm that the Holocaust, and not the denial thereof, has increasingly become a topic of interest for portions for the general population. [It has become so, at the very least, for that portion of the population which reads books and attends museums. While not the majority, that portion of the population includes the intellectual and the decision making elite.] From the Mall in Washington, D.C., which is but a mile from the White House, to what has quickly become known as the Liebeskind Museum in Berlin, the Holocaust has found and, more importantly, has been given, a prominent place in the “popular” culture of North America and much of the European continent. For example, the United States Holocaust Memorial Museum has in its six years of existence consistently welcomed two million visitors a year, eighty percent of whom are not Jewish. Were there extensive doubt about the existence of the Holocaust this would not be the case. One may not always agree with the manner in which the Holocaust is presented in these varied venues, e.g. as one of a long string of genocides. There is, however, no debate about whether it happened or not. The primary locale for such debates is on the deniers’ websites and on the pages of their journals. Another equally discredited source of Holocaust denial are the far-right extremists who have adopted and disseminate these pseudo-arguments.

One need not look only at museums and books for evidence of the place the Holocaust holds in the popular imagination. In recent years both governmental leaders and the media have frequently chosen the example of the Holocaust in order to contextualize their arguments. During the recent military campaign in Kosovo political leaders and journalists repeatedly drew analogies to the Holocaust. They compared what was being done to the Kosovars with what was done during the Holocaust. Some journalists called on political leaders to be sure that this time the world would not sit “idly by” as it had in the 1930s and 1940s. Political leaders and journalists would not have used these analogies, however correct or incorrect they may have been (and many, it should be noted, were gross exaggerations) had they thought that they would not resonate with the general

populace or at the least, an important segment thereof. They certainly would not have relied on comparisons to the Holocaust as a means of bolstering their current cause if they believed significant numbers of people doubted the truth of the Holocaust.

Let me digress for but a moment. It is important to stress that I refer to outright denial and not to those attempts by some German historians and politicians to relativize the Holocaust. These historians and politicians have argued, as part of what became known in the 1980s as the historians’ struggle, that not only was there nothing unique about the Holocaust but that the third Reich was “only” emulating Stalin’s treatment of the peasants and others when it persecuted and annihilated the Jews. Some among them, e.g. Ernst Nolte, even attributed Hitler’s anti-Jewish policies and statements in 1939 to provocative remarks by foreign Jews. However much one might disagree with their historical analysis, their views do not fall within the confines of Holocaust denial. Yet even as we note that the relativizers are not deniers, they do, it should also be acknowledged, make life more comfortable for deniers. Deniers use portions of the relativizers’ arguments for their own purposes and hide behind the relativizers’ respectable credentials.

If it is indeed the case that when we speak of denial we are talking of a phenomenon that has little impact, why then should we be concerned about Holocaust denial and the deniers? Would it not be wiser to simply dismiss them as irrelevant? Why should we worry about a group which disseminates a pseudo-historical theory which contravenes all manner of evidence and scores of witnesses? Might it not be strategically wiser and certainly more efficient to just ignore them and the false theories they propagate? Deniers can be described as the historical equivalent of flat earth theorists. As such, why should they be worthy of our time or our concerns? Astronomers and earth scientists do not expend time and energy contending with people who believe the sun revolves around the earth. Similarly, biologists do not write books dedicated to refuting “creationists,” *i.e.* those who argue that the world was created as it is explicitly described in the book of Genesis. Should we not emulate the stance of these scientists who dismiss as irrelevant the flat earthers, the creationists, and others who propose equally crazy pseudo-theories which are suspended in air and contravene all evidence? NASA, the American governmental agency in charge of space exploration, does not expend efforts refuting those who charge that the various moon landings actually took place on a stage set in

Nevada. They do not consider them worthy of their time or their energies.

There is also a strategic argument to be made for ignoring deniers. When we confront them there is always the danger that in some measure we are inadvertently granting them the publicity they so crave. By overreacting to the threat posed by Holocaust deniers we grant them the credibility that they have not yet been able to achieve on their own. It would be tragic if those of us who are interested in both exploring and preserving the history of the Holocaust would be inadvertently responsible for helping deniers achieve something that they have never been able to accomplish through their own efforts: attaining the status of a significant contemporary danger. To act as if Holocaust denial is currently a major threat to truth and memory is to accord the deniers more credit than they deserve and, in a manner of speaking, is to assist them in their quest to spread their pseudo-history. Nonetheless, despite the fact that their theories are no more plausible than those proposed by the flat earthers, I believe it an error to ignore them.

If deniers have achieved so little, why then do I believe it would be a mistake to ignore them? The reason we must not ignore them has less to do with the situation today and far more to do with the future. It is my conviction that deniers do not represent, to borrow a phrase from American legal parlance, a clear and present danger. The threat they pose is not one whose results will be evident in the not so distant future. Their impact will be limited as long as there are those alive who can say, "This is my story. This is what happened to me." Deniers find survivors an impediment because they can speak in the first person singular. My concerns are focused on a time, one which, we must sadly admit, is not in the far off distant future. When first hand witnesses are no longer alive, deniers will find it much easier to ply their wares.

But that fight must take very specific forms and be directed at a specific audience. Its objective must not be to try to change the mind of those who propagate Holocaust denial. I do not believe that we should invest time in either debating deniers or convincing them that they are wrong. Deniers are, as is evident to anyone who has examined any of their publications or websites, anti-Semites. Anti-Semitism is a form of prejudice. Prejudice means that a person has made up their mind prior to hearing the facts [pre-judge]. They do not wish to be "confused with the facts." One cannot argue in a rational fashion with a prejudiced person. In fact, to use rational arguments in order to

convince a prejudiced person that their view is wrong is to suggest that their beliefs have a rational basis. Moreover, to enter a debate with them is to elevate them to an "other side." Denial is not an iconoclastic view of history. It is complete and total fiction, fiction created with a diabolical objective. Moreover, deniers falsify, fabricate and manipulate data at will. Anything which contradicts their preconceived notions they ignore. Debating someone who adopts such tactics is an impossibility.

Who then should the audience be? Not the deniers themselves but the many people who, having little if any knowledge of the Holocaust, might be inclined to fall prey to their views. For example, a person who might, after exploring their website, emerge asking: "How do we know there really were gas chambers? How do we know the *Diary of Anne Frank* is not a hoax? How do we reach the figure six million?" Confused after having read all sorts of fraudulent information disseminated by deniers, they must be given the facts. In other words, when fighting the deniers our audience should not be the deniers themselves but should be their potential audience. The best way of accomplishing this goal, of course, is to educate people about the facts of the event and not to have to wait to undo the damage wrought by their encounter with deniers. Historians must ensure that people are aware of this phenomenon so that upon encountering it they understand its roots, *modus operandi*, and ultimate objective. That objective is not simply "looney" history. Holocaust deniers have, by and large, a distinct political agenda. They attempt in a variety of ways to "resurrect" the reputation and possibly the political future of National Socialism. The only way of so doing is to strip it of the worst blot on its record, the Holocaust.

And how should this fight be waged? Not by "proving" that the Holocaust happened. We should fight Holocaust denial by exposing the absurdity of the deniers' charges. The best vehicle to be used in doing so is not, in fact, the testimony of survivors but the documents left to us by the perpetrators. Those documents can be used to corroborate personal testimony. The personal word of the survivor has an emotional impact that cannot be matched. The voice of the witness is emotionally powerful and can convey the horror of the event in a way that nothing else can. Yet, because deniers make all sorts of pseudo-scientific and pseudo-historical claims, the most efficacious way to demolish those claims is with the words and the documents of the perpetrators themselves. Survivors' testimony can then serve

to buttress the conclusions we reach from the documents. This process of relying on different types and sources of proof, often called triangulation, is the most substantial manner of demolishing the deniers arguments.

Finally, we must recognize that there is no need to answer every one of their charges. If that were our strategy there would be, to quote Ecclesiastes, “no end to the matter.” But some of the primary charges made by the deniers can be easily answered. For example, deniers stress their claim that there were no gas chambers. Not only can proof of their existence be provided but the specious and untenable nature of the deniers’ claims can also be overwhelmingly demonstrated. Destroying that claim obviates the necessity to answer many of the other claims made by deniers.

In waging this fight we must ultimately recognize two things: there is something unbelievable about the Holocaust and, so too, there is something quite appealing about denial. Even when all aspects of the Holocaust are explicitly documented and understood there still remains, even for the most experienced scholar, something about it that beggars the imagination. Even with all the research that has been done about the Holocaust there is something about it which remains “beyond belief.” Consequently, there are people who might more easily fall prey to the deniers’ claims. That may be why some scholars who have written about this event have used the *via negativa* to try to explain to their readers how the Holocaust could have happened. In other words, rather than try to “explain” what made the Holocaust possible — a task they still find impossible — they identify those elements without which it would have been impossible, e.g. centuries of Christian anti-Semitism, a world wide depression, a sentiment in Germany that the country had been “stabbed in the back” at the end of World War I, a Versailles treaty which left the democratic Weimar government financially and politically burdened, Hitler and a German populace willing to accept National Socialist ideology in its entirety.

There is also something appealing

about Holocaust denial even to “good” people who are not attracted to conspiratorial and anti-Semitic theories. I know of no one who would not prefer to live in a world where a Holocaust would be an impossibility. So too, I know of no one who would not prefer to live in a world where all sorts of destructive acts — from sexual abuse of children to genocide — never happened. The problem, of course, is that we do not live in such a world. Deniers seduce well intentioned but ill informed and unsuspecting individuals by offering them the opportunity to live in a “repaired” world. Deniers seek to convince these individuals that the Holocaust is a myth. Deniers take advantage of the unprecedented horror of the event and the fact that it is, in some measure, “beyond belief” to achieve their goals.

In sum then, we must fight denial but not fight with the deniers. We must recognize that they are a danger, but a limited danger. Even as we explore and expose this phenomenon we must not elevate it in importance. And we must engage in this effort with the facts. The facts of this event constitute the still small voice which will do the most to protect truth and memory from the assault being waged against it.



Participants at the Remember Berlin Conference, held in the Federal Administrative Court in Berlin

The Ousting of Jewish Lawyers from the German Nazi State

Wolfgang Benz

Attempt at Displacement by Illegal Measures: Boycott and “Suspension”

The National-Socialist seizure of power on 30th January 1933 was followed by anti-Semitic excesses, which, as a rule, were disapproved of by the public, but were not taken very seriously since they were regarded as exuberance connected with ‘national elation’. Among the objects of the excesses were Jewish jurists. The fact that the uncouth activities of NSDAP* - activists and SA** - marked the beginning of the complete dismantling of government based on the rule of law only dawned upon their contemporaries in the course of time. However, those that would deplore this later on, were of course in the minority.¹

In the middle of March 1933, a meeting was convoked by the “League of National-Socialist German Jurists”, with reference to the program of the NSDAP, according to which public offices were to be held by German citizens only: “A citizen can only be one who is a member of the German race. A person can only be a member of the German race who is of German blood, regardless of what he professes. Therefore, no Jew can be a member of the German race”. The speaker, a lawyer, demanded that no Jew should be allowed to practice in the Third Reich as a judge, notary or attorney. The speaker’s comments gave rise to stormy applause and were funneled into a catalogue of demands raised by the National-Socialist League of Jurists.²

First, all German courts, up to the level of the Supreme Court of the German Reich, were to be cleansed forthwith of judges and officials belonging to a ‘foreign race’. Second, licensing of lawyers of ‘foreign race’ to appear before German courts was immediately to be blocked. Third, already existing licensing of ‘members of a foreign race belonging to the female sex’ was to

be canceled immediately. Fourth, only members of the German race could be ‘German notaries’, with preference to be given to war veterans. Fifth, within four years all Jews had to withdraw from the legal profession, each year one



fourth of the lawyers. Sixth, all ‘lawyers of foreign race’, who had been members of Marxist parties (*i.e.* the KPD*** or

1. This text is based on my contribution “From Deprivation of Rights to Persecution and Extermination. Jewish Jurists under the National-Socialist Regime”, in: *German Jurists of Jewish Extraction*, published by H. Heinrichs, H. Franzki, K. Schmalz, M. Stolleis, Munich 1993, p. 813-852; compare Lothar Gruchman, *Justice in the Third Reich 1933-1940. Adaptation and Subjugation during the Görtner Era*, 1988; Hermann Weinkauff, *German Justice and National-Socialism. A Review*, 1968; Horst Göppinger, *Jurists of Jewish Descent in the “Third Reich”*, 2nd edition, 1990.

* NSDAP - *Nationalsozialistische Deutsche Arbeiter-Partei* - National Socialist German Workers Party.

** SA - *Sturmabteilungen* - Storm Troops.

2. *Leipziger Tageszeitung*, 16th March 1933 (Our Jurists Demand). The “League of National-Socialist German Jurists” named itself, starting 1936, NS-League of Protectors of the Law”. Compare this to Michael Sunnus, *The NS-League of Protectors of the Law*, 1990.

*** KPD - *Kommunistische Partei Deutschlands* - German Communist Party.

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SPD****) had to be deprived of their license. The same was to apply to judges. Seventh, the National-Socialist jurists demanded immediate dissolution of the Bar Associations, as well as new elections, according to the criterion of their being 'clear of Jews and Marxists'. Exceptions could, at most, apply to front-line combatants during the First World War and lawyers, who had lost their sons at the front-line.

This program by the National-Socialist League of Jurists was propagated all over the German Reich, starting March 14, 1933. Even more than the violent infringements directed at Jewish jurists - which, with some mental effort, may have been considered as excess transgressions by some individual fanatics - this propaganda threw light upon developments yet to come. Immediately afterwards the National-Socialist demands began to be translated into action.

The earliest start was in Bavaria. Advocate Dr. Hans Frank officiated there as provisional Minister of Justice. As a member of the SA who participated in Hitler's putsch in 1923, as head of the legal department of the NSDAP, and as founder of the National-Socialist League of Jurists, he was a protagonist of the 'National-Socialist revolution'. Justice Minister Frank explained to the Presidents of the Supreme Courts of the various States and to the Attorneys General, that the 'popular opinion which found its expression in the political new order demanded 'that judges of Jewish extraction must no longer meddle in criminal justice and in disciplinary law, and that State Attorneys and public prosecutors of Jewish extraction must no longer appear in court sessions as representatives of the prosecution'.

The NSDAP assigned the date of April 1, 1933 as a day of boycott of 'Jewish shops, Jewish merchandise, Jewish physicians and Jewish lawyers'. This was the first public action demonstrating the anti-Semitism to be practiced in Germany from then on, an action which was given considerable attention by the international press. The worried comments in foreign newspapers during the days preceding the action were apostrophized as 'Jewish atrocity propaganda' and were utilized in order to stimulate anti-Semitic strongman acts.⁴ In order to stage the production of April 1, 1933, mass rallies were held, focusing on the curtailment of Jews in certain professions in accordance with their proportion in the population, and all this in addition to SA-guards posted in front of Jewish shops, lawyers' offices etc. In order to 'increase the impetus of the action' the action-committees (which were managed by the anti-Semite Julius Streicher) concentrated on the medical and legal professions and

on the demand of curtailment of licenses at schools and universities.⁵

Hans Kerrl, who had been Reich-Commissioner for the Prussian administration of justice and since April Prussian Minister of Justice, dispatched on the evening of March 31 - by teletype and over the police radio network - a directive to the Presidents of the Supreme Courts of the various province-states, to the Attorneys General and to the Presidents of Penal Execution Offices, which was considered the 'first pernicious blow against Jewry in the judicature'. Kerrl's radio message said:

"The rage of the people concerning the overbearing behaviour of officiating Jewish lawyers and judges has assumed dimensions which force us to take into consideration the possibility that the people will act in self-defense, particularly at a time of the justified campaign of resistance of the German people against the all-Jewish atrocity propaganda. This would constitute a danger for the maintenance of the administration of justice. It will therefore be the duty of all relevant authorities to see to it that the underlying cause of such actions of self-defense will be obliterated at the latest upon the start of the defensive boycott led by the NSDAP. I therefore request to urge all officiating Jewish judges to submit their application for retirement immediately, and to grant these applications immediately. I request to suspend Jewish prosecutors and Jewish officials in the penal administration forthwith. Particular rage was caused by the arrogant behaviour of Jewish lawyers; therefore I request to arrange with the Bar Associations or the local lawyers' associations as early as today, that starting tomorrow morning at 10 a.m., only certain Jewish lawyers may appear, and this in a proportion which roughly represents the proportion of the Jewish population to the general population.

**** SPD - *Sozialdemokratische Partei Deutschlands* - German Social-Democratic Party.

3. Gruchmann, p. 128 f.; Göppinger, p. 57. In Württemberg, Baden and Hessen similar urgings were published. In Hamburg, the Senator for Justice Dr. Rothenberger forced Jewish judges to resign, pointing to preventive measures.
4. Wolfgang Benz (Publisher), *The Jews in Germany 1933-1945. Life under National-Socialist rule*, Munich 1988, p. 272 f.
5. Gruchmann, *Judicature in the Third Reich*, p. 221 f.
6. Citation after Sievert Lorenzen, *The Jews and the Judicature*, Hamburg 1942, p. 172 f.
7. *Ibidem*, p.175.

I request to cause the collective resignation of the Board of the Bar Associations by suitable negotiations. If the Board or members of the Board refuse to resign, I ask to be informed soonest. After the complete execution of the above mentioned measures, orderly and dignified administration of justice must be effected, under appreciative cooperation with the population and application of all suitable measures. If the district or regional leadership of the NSDAP wish to supervise the safety and order within the court house, then this wish is to be granted in order to safeguard the urgently required authority of the judicial organs”.

From the legal aspect, the directives of Kerrl were as baseless as the very similar simultaneous decrees by his Bavarian colleague Hans Frank. If a later semi-official representation of the Ministry of Justice of the Reich alleged that “in the morning of 1st April 1933, with one blow, the German judiciary was almost devoid of Jews”,⁷ then this was no less demagogic than the reasons which were given by Kerrl and Frank for their decrees (namely, that the authority of the administration of justice had to be protected), not to mention the allegedly increasing rage against the Jews. Just as the pogrom atmosphere had been created from above, so the aim of the ‘suspension’ of the judges was to enforce legal pretexts, by which the anti-Semitic intentions of the regime could be translated into reality.

Of course, the psychological effect achieved was in inverse proportion to the legal content of the measures. Siegfried Neumann, lawyer and notary at Küstrin, who was also well-known as democrat, pacifist and active member of the Jewish community, described in his memoirs the effect of the decree by the Prussian Ministry of Justice dated 1st April 1933, according to which all Jewish notaries were to abstain from conducting any official business, until the final regulation of the circumstances. “And now of all times it occurred to the Minister of Justice to spread through official channels entirely common letters of extortion, since the exclusion of Jewish notaries cannot yet be achieved by law”.

The day of the 1st of April 1933 carried with it the shameful foreboding of events yet to come, even though despite the SA-guards in front of Jewish shops, offices and practices there occurred occasionally manifestations of solidarity and sympathy by courageous citizens. In the lawyers’ chambers of the courts the National-Socialists triumphed. Signs in front of law offices were smeared with the legend “Jew”, at the Munich Justice building an announcement was posted to the effect that: “in order to maintain quiet and order in the conduct of legal matters and in order to safeguard the prestige of the administration of justice, the Justice building is ‘off limits’ until further notice to Jewish lawyers, starting 1st of April”.

Not only was this a black day because of the officially directed demonstration of contempt for norms of the rule of law, but it also served as curtain-raiser and trailblazer for the following statutory regulations:

Exclusion by Legislative Acts: The Professional Officials Law and the Lawyers Law

The first legislative measures, by which the German Jews were robbed of the achievements of emancipation, bear the date of 7th April 1933. The designation of the first law was pretty cynical: “Law for the Restoration of the Professional Officialdom”, since after all, the contrary applied, namely, the expulsion of unwanted civil servants from their profession.

On the one hand, the law was directed against political adversaries of the National-Socialist regime, and was aimed primarily against Social-Democrats and known adherents of the parliamentary-democratic Weimar constitution, but, on the other hand, the law established in Section 3: “Officials who are of non-Aryan extraction, are to be pensioned off”. Honorary officials were dismissed from their offices. The regulations of execution ensured that Jewish trainees at the courts, judges and notaries would suffer the same fate: The ‘Aryan paragraph’ also applied to employees and workers in the public service.¹⁰

According to an estimate by the ‘Central Office for Jewish Economic Assistance’ from the year 1933 approximately 2000 Jewish academically schooled officials lost their profession and their employment, not including approximately 700 university teachers of Jewish faith.¹¹ By 30th April 1934, 574 Jewish judges and prosecutors departed from the service. The fact that

8. Siegfried Neumann, *From “Ave Caesar” (Kaiserhoch) to Expulsion*, 1978, p. 87.

9. Göppinger, *Jurists of Jewish Extraction*, p. 60.

10. RGBI (Official Gazette) 1933 I p. 175 f.; Joseph Walk, (Publisher), *The Separate Law for Jews in the National-Socialist State. A Collection of legal Measures and Directives - their Contents and Significance*, Heidelberg 1981.

11. A clue to the number of Jewish judges and prosecutors including veterans of W.W.I is given in the detail to be found in Lorenzen, to the effect that altogether 643 Jews belonging to the higher Prussian judicial service were suspended on 1st April, 1933. Lorenzen, *The Jews and the Judicature*, p. 176. The proportion of Jews in the Prussian Judicature was decisively higher than that in the other province-states.

12. Gruchmann, *Judicature in the Third Reich*, p. 134; Göppinger, *Jurists of Jewish Extraction*, p. 69.

this group of persons was not larger at that time is to be attributed to the exemption provisions, which were included in the Professional Officials Law upon express wishes of the President of the Reich, Hindenburg. The hoary head of state, who was anything but of prodigious democratic ideology, still was, as commander-in-chief during World War I, permeated by a concept generally termed 'soldier's honour', and he was petitioned during the first months of Hitler's regime again and again precisely by veterans from Jewish circles who hoped to be supported by him in respect of their threatened legal positions. And so Hindenburg indeed intervened at the beginning of April 1933 with the Chancellor of the Reich, Hitler. According to Hindenburg's perception, officials, judges, teachers and lawyers who had been disabled by war or had been front-line soldiers or were sons of battle casualties or had lost their sons in battle, should be left in the country's service: "If they were good enough to fight for Germany and shed their blood for it, they also should be considered good enough to continue serving the Fatherland in their profession".¹²

Hitler could not - temporarily! - refuse the urgings of Hindenburg; he replied to the President of the Reich that the draft law already included a suitable provision. And the exemption provision of Section 3.2 of the Professional Officials Law expanded the circle even more; the 'Aryan paragraph' did not apply to 'officials who had already been officials since 1st August 1914 or who had fought during World War I for the German Reich or its allies or whose fathers or sons were killed in World War I'.¹³

The execution of the Professional Officials Law, as far as the judicial sphere was concerned, was the responsibility of the province-states, until the judicial administrations of the province-states were dissolved on 30th January 1934. Prussia and Bavaria particularly busied themselves immediately with rigorous regulations for its execution. In Prussia, the proof of having fought at the front-line or, respectively, of being entitled to suitable privileges, had to be submitted, together with documentary evidence, within three days. Also, in cases of doubt, the proof of 'Aryan descent' had to be furnished within only three days. A 'non-Aryan' was a person who was descended 'from non-Aryan, particularly Jewish, parents or grandparents'.¹⁴ And it sufficed, if one parent or grandparent was 'non-Aryan'. The latter attribute was assumed to exist, if one parent or grandparent was Jewish. According to the regulations of law in the Reich, officials who were not already officials on the 1st August 1914, had to prove their 'Aryan descent'. In cases of doubt profes-

sional opinions were to be procured from the expert for racial research at the Interior Ministry of the Reich.

The privilege pertaining to having been a front-line combatant or, respectively, the exemption provision for those already having been licensed on 1st August 1914, also applied to the 'Law concerning Licensing of Lawyers' dated 7th April 1933 which was passed as the second of the anti-Jewish cleansing laws. As emerges from Hitler's reply dated 5th April 1933 to Hindenburg's intervention, it had been intended, from the beginning, to include Jewish lawyers in the discrimination planned against officials and judges: 'The defense of the German people against the flooding of certain professions by Jewry' is necessary - thus Hitler wrote to Hindenburg - since there was a whole series of intellectual professions in which, in certain cities of the Reich and, among others, in Berlin, 'Jewry occupies up to 80%, and sometimes even more, of all of the positions'.¹⁵ Hitler explicitly mentioned lawyers and physicians.

In order to determine the actual dimension of the proportion of Jews, it suffices to look at the statistics. According to official data, on 7th April 1933 out of a total of 11,814 licensed lawyers in Prussia, 3,370 were Jews. This corresponds to a proportion of 28.6%. In Berlin the percentage was higher, but on no account, did it reach 'more than 80%'. In the Court of Appeals of the Berlin district the proportion of Jews totaled 48.3%.¹⁶ Outside Prussia the proportion of Jewish lawyers and notaries was considerably smaller.

The Lawyers Law dated 7th April 1933 was formulated less rigorously than the Officials Law, to which it explicitly referred in the definition of the circle of persons to be excluded (those of 'non-Aryan descent').

According to the law's determining passages licensing could be canceled or, respectively, refused, until 30th September 1933, in the latter case 'even if the reasons therefor as provided in the lawyers' regulations do not exist'. 'Persons who have been active in the direction of Communism were to be excluded from being licensed. In case of doubt, therefore, even the privilege

13. Hans Mommsen, *Officialdom in the Third Reich*, Stuttgart 1966, p. 159 f.
14. According to Regulation for the Execution of the Law dated 11th April 1933, Official Gazette, 1933 I p. 195; Göppinger, *Jurists of Jewish Extraction*, p. 73 Cited after Krach, *Jewish Lawyers*, p. 205.
16. Data according to Lorenzen, *The Jews and the Judicature*, p. 166, and Krach, *Jewish Lawyers*, p. 416, 419.
17. Law concerning the Licensing to the Legal Profession dated 7th April 1933, Official Gazette, 1933 I p. 188.

provisions in favour of old-time lawyers and war veterans could be circumvented.¹⁷ Even though the discretionary provisions were dealt with rigorously to the detriment of the Jewish lawyers concerned - if according to the letter of the law there existed such a possibility, they were deprived of their license - the number of those lawyers who were able to lay claim to the exemption provisions was considerable. Out of 3,370 Jewish lawyers in Prussia 2,158 kept their license; after re-examination of several disputable cases their number even increased again in the summer of 1933 (to 2,609). But from then on, of course, their number dwindled steadily, since some lawyers resigned on their own initiative, looked for ways to emigrate, or retired.

According to the statistics, the results of the Lawyers Law remained limited - much to the chagrin of the National-Socialists - who obviously did not take into account that there was such a high proportion of long-time lawyers and front-line combatants. In addition, the consequences of the legal measures of April 1933 lagged far behind the announcements and illegal manoeuvres of the Commissioners of Justice in Prussia and Bavaria, who, in the course of the boycott of 1st April 1933 intended, in one single blow to make the legal profession 'free of Jews'.

The catastrophe, both from the psychological point of view and from that of being able to earn a livelihood, which still closed in upon a considerable number of jurists, was beyond any global description. The situation can be elucidated by describing the destiny of a single person. Hermann Lehmann, who lost his lawyer's license in 1933/34 after having practiced law for five years at Bremen, describes a particularly painful detail of the loss of his livelihood, such as many Jews - and not only jurists - underwent. What was at issue was the behaviour of the President of the Regional Court of Bremen, for whom Lehmann had worked as a trainee: "As a lawyer, I had several times pleaded before his court, and we knew each other well. I met him in the morning in the market place in the vicinity of the Roland statue and greeted him respectfully, he being the senior. He recognized me immediately, looked through me as if I was air, and did not return my greeting. It painfully dawned on me how deeply I must already have sunk in the appreciation of my fellow beings".¹⁸

Discrimination by Rescission of Emancipation: The Nuremberg Laws 1935

At the 'Party Rally of Freedom' on 15th September 1935 the 'Nuremberger Laws' were promulgated, and celebrated in

contemporary legal literature as 'basic laws of the state' (*Koellreutter*), as the realization of programmatic demands (Frick) and as milestones, enabling 'the Reich to deliver the second annihilating blow against the Jews in the legal profession'.¹⁹

The "Reich Citizen Law" and the 'Law for the Protection of German Blood and German Honour (Blood Protection Law)' constituted from that point on the basis of the racial policy of the National-Socialist regime leading to the final solution of genocide at Auschwitz, Treblinka, Sobobor, Belcec, Chelmno and other locations at which the annihilation of millions of human lives was carried out.

The 'Reich Citizen Law' was a stringing together of phrases, on the one hand, but also a significant symbol, on the other hand, and it constituted the framework in which the step from the discrimination of Jews to the deprivation of their rights was executed. The law established the difference between 'Members of the State' and 'Citizens of the Reich'. The crucial sentence reads: 'Citizen of the Reich' can only be the member of the state of German or related blood, who by his behaviour proves that he is willing and suited to faithfully serve the German people and the Reich'.²⁰ By means of this formulation it was possible to exclude Jews and other unwanted persons from the community of fully entitled citizens, and the circle of the persons concerned could be defined at will, according to 'racial' or ideological aspects: In addition to Sinti and Roma, 'enemies of the people' could also be affected. However, most of all it was the German Jews who were excluded, as an entire group, and they were transformed into second class subjects, since only 'Citizens of the Reich' were from that point on 'the sole owners of full political rights under the terms of the laws'.²¹

The Reich Citizen Law, decreed on 14th November 1935,

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18. Hermann Lehmann, "A Wanderer in three Continents", in: *Publications of the Hanseatic Bar Association Bremen*, Bremen 1990, p. 19 f.
 19. Otto Koellreutter, *Basic Questions of the Shaping of our People and State*, 1936, p. 10; Reichs-Minister Dr. Frick, the Reich Citizenship Law and the Law for the Protection of German Blood and German Honour, dated 15th September 1935, in *Deutsche Juristen-Zeitung* (German Jurists Periodical) 1935, p. 1390 f.; Lorenzen, *The Jews and the Judicature*, p. 183.
 20. Reich Citizen Law dated 15th September 1935, Official Gazette, 1935 I p. 1146.
 21. *Ibidem*, S. 2 (3).

attempted to define the circle of persons discriminated against by the law. As far as the authorities of the National-Socialist State were concerned, from that point on, the problem was to what extent Jewish ‘half-breeds’ were to be treated as Jews or as ‘Aryans’. The efforts at definition, in relation to which the well-known commentary by Stuckart/Globke helped intensify the zeal of the legislator,²² and exposed the problems of the National-Socialist racial science, since in order to determine the half-breed attribute the religious affiliation also had to be called-in: “A Jewish half-breed is a person descending from one or two grandparent-individuals who were fully Jewish by race.... As being fully Jewish by race is a grandparent who belonged to the Jewish religious community”.²³ More important than the extension of the circle of those concerned - in respect of the determination who was ‘fully Jewish’ or was ‘considered Jewish’ - was the provision according to which Jewish officials, without exception, now had to resign from their office. Reich Interior Minister Frick added, paraphrasing the regulation to the Reich Citizen Law: “It follows from the fact that a Jew cannot be a citizen of the Reich, that he is excluded in every respect from participation in public matters. The officiating Jewish officials have therefore to remove themselves; after 31 December 1935 they are being retired”.²⁴

Immediately after the Nuremberg Party Rally, Gürtner, the Reich Minister of Justice, asked to be informed how many Jewish judges and prosecutors were still active in the legal service. By telegrams dated 30 September 1935 they were retired, effective immediately. Their number still amounted to 232 - many of those that had still been tolerated because of their front-line privilege having resigned and left government service of their own initiative after 1933. By the middle of October 1936, 205 Jewish judges and prosecutors were dismissed. The dismissal of the remaining 27 ensued, for special reasons, slightly later.²⁵

Beyond the circle of individuals defined by the ‘Reich Citizen Law’, officials ‘related to Jews’ were retired. The pretext for this measure was the prohibition applying to Jews, against hoisting the flag of the Reich at their apartment. Because of the many occasions on which the flag had to be hoisted by order, there often occurred in ‘mixed marriages’ a conflict between duty and prohibition, and therefore ‘Jew-related officials were, as a rule, retired similarly to Jewish officials’. The German Officials Act dated 26th January 1937 afforded the pretext for the removal of ‘Jewish half-breeds’ from government service. The new regu-

lation pertaining to officials extended - with its ‘Aryan paragraphs’ - far beyond the Officials Law of 1933, and took into account the Nuremberg Racial Laws to an excessive degree. According to the Officials Law also the spouses of the civil servants had to be ‘of German or related blood’. Exceptional permits for spouses could be given, at most, for ‘half-breeds of the second degree’.²⁶

The second of the Nuremberg Racial Laws of 1935 had fewer repercussions on the status of jurists than the Reich Citizen Law, but it meddled in the private sphere of many Jews, to a degree which threatened their livelihood. The law prohibited marriage between Jews and non-Jews, as well as extra-marital intercourse between Jews and ‘Aryans’. This latter provision opened a wide door for denunciations and, together with the draconian persecution and penal practice of the National-Socialist judiciary, destroyed the life of many individuals.²⁷

The destruction of a Jewish jurist pursuant to the ‘Blood Protection Law’ is documented in proceedings at the Hamburg District Court. The case may serve as an example and it proves how the National-Socialist judicature served as instrument of political and racial persecution. A respected lawyer, born in 1886, practicing successfully at Hamburg since 1912, was arrested in August 1938, on suspicion of having had a relationship with a non-Jewish woman. The denunciation, which was expanded by further accusations (smuggling of foreign currency and sodomy) resulted from a dispute about rent. This was a case of revenge. The witness for the prosecution was subjected to considerable pressure by the investigating authorities; despite the more than dubious evidence of the witness - the accused lawyer (as a veteran of World War I he was not affected by the Lawyers Law of 1933 and was able to practice his profes-

22. Stuckart/Globke, *Commentary to the German Racial Legislation*, vol. 1, 1936; compare Martin Hirsch, Diemut Majer, Jürgen Meinck, *Justice, Administration and Judicature under National-Socialism. Selected Writings, Laws and Judicial Decisions from 1933 to 1945*, 1984, p. 340.
23. 1. Regulation to Reich Citizen Law, 14. November 1935, S. 2(2), Official Gazette, 1935 I p. 1333 f.
24. Frick, Reich Citizen Law, in: *German Jurists' Periodical* 1935, p. 1390 f.
25. Lorenzen, *The Jews and the Judicature*, p. 185.
26. German Officials Law dated 26 January 1937, particularly S. 25, 59, 72, Official Gazette 1937 I, p. 141.
27. Law for the Protection of German Blood and German Honour, dated 15th September 1935, Official Gazette 1935 I, p. 1334 f.

sion until he was arrested) was sentenced on 1st December 1938 to six years imprisonment. The reasoning of the judge read:

“At the determination of the penalty special weight was given to the fact that the accused, as a lawyer and fully trained jurist, who because of his profession most certainly realized the significance and implications of the Nuremberg Laws, violated the Blood Protection Law. It certainly takes a considerable criminal intent, if a Jew in the position of the accused who several times has appeared as a defense attorney in cases dealing with racial desecration, disregards the Nuremberg Laws as late as 1937 and 1938 in such a manner”.

Bail, revision and resumption of proceedings or pardon were steadily refused by all relevant authorities. Neither was the detention pending trial taken into consideration. On 10th December 1942, he was deported from the Hamburg-Fuhlsbüttel penitentiary to Auschwitz, and there he was murdered in the beginning of January 1943. In August 1946, after proceedings were resumed, a verdict of ‘not guilty’ was pronounced by the 2nd division for criminal matters of the Hamburg District Court.²⁸

Extermination

After having been dislodged from court chambers and lawyers’ offices, from faculties of law and from public service, the fate of jurists of Jewish extraction was hardly different from that of other professional groups of German Jews. There were of course some nuances: The legal education and the legal practice proved to be rather an impediment as far as emigration was concerned, and lawyers who were deprived of their livelihood were less prone to be met by gestures of solidarity or sympathy than physicians. If here and there medical practitioners met with remnants of loyalty and gratitude on the part of their non-Jewish patients, a fact which eased their livelihood or temporarily mitigated the situation - judges and lawyers could expect to become victims of acts of revenge. There exist many examples of such acts. The most prominent, though not necessarily the most well-known case is that of Advocate Hans Litten.

Hans Achim Litten, born in Halle in 1903, was a scion of a bourgeois-conservative family. His father, Fritz Julius Litten, taught Roman and civil law as full professor at Königsberg University, bore the title of privy councilor for legal matters, was of German-national ideology, opposed the republic and was adviser to the Prussian government. His Jewish descent appeared

to no longer have played a part. True, the career of the father would not have been possible without his having undergone baptism, but for the son the occupation with Jewish tradition and Jewish mysticism probably was of importance primarily in order to draw a demarcation line between the son and his father. Hans Litten studied law and in 1928 settled as lawyer together with a slightly older colleague at Berlin.

Without becoming a member of any party, Litten committed himself to the workers’ movement and busied himself as an attorney within the framework of the ‘Red Aid’, that same organization which, with the intellectual support of Albert Einstein, Käthe Kollwitz, Thomas and Heinrich Mann, Kurt Tucholsky and Arnold Zweig, aided working class people who were cited before the courts for political reasons.

The young lawyer Litten became known when he filed a complaint against the Social-Democratic Berlin Chief of Police Zörgiebel, because of instigation to commit murder. During the prohibited Mayday demonstration of 1929 the police fired recklessly into the crowd, after the workers disregarded the prohibition to demonstrate. There were 33 casualties. Litten’s complaint led to a commission of inquiry and to protest demonstrations.

The mandates which the lawyer accepted against National-Socialists were of grave consequence. In November 1930, the ill-famed Berlin SA-platoon 33 raided a workers’ pub, the ‘Eden Palace’, and seriously injured four men. Litten represented them as accessory prosecutor, and caused Adolf Hitler to be summoned to the witness stand as responsible chief of the NSDAP; there he succeeded in driving him into a corner. Litten intended to prove that the acts of violence by the SA were not only approved by the party leadership, but actually planned by it, and he forced Hitler to distance himself publicly from his Berlin party chief Goebbels. This was the most spectacular, but not the only case of its kind, handled by Litten. The National-Socialists swore revenge.

Contrary to his friends’ advice Litten did not flee abroad, when Hitler became Chancellor of the Reich. In the night of 28 February 1933, when the *Reichstag*^{****} was burning, Litten was

28. Hans Robinsohn, *Judiciary as Political Persecution. Administration of Justice in “Cases of Racial Desecration” at the Hamburg District Court 1936-1943*, 1977, p. 94 ff.

**** The German Parliament.

arrested and was taken to the Spandau penitentiary. Later stations of his thorny road were the concentration camp Sonnenburg, and then Spandau again. At the end of October 1933 he was transferred to the Brandenburg penitentiary. Maltreatments, investigations under torture, a failed attempt at suicide after an extorted and then retracted incrimination against Communist workers whom he had represented against the SA - these were stations prior to being committed to the concentration camp Esterwegen in Emsland in February 1934. Three years and two months followed in the concentration camp Lichtenburg. Then Litten, suffering from serious cardiac disease, having had to perform hard physical labour and lacking medical care, was incarcerated for three months at Buchenwald, and finally, from October 1937, at Dachau. In the beginning of February 1938 his mother was informed that he had put an end to his life by hanging. It was impossible to examine the circumstances of his death.

Hans Litten's mother, who during her quarterly visits experienced the physical decline of her son, did everything in her power during all of this time to help her son. Petitions dispatched to the Reich Minister von Blomberg, to Hindenburg, and to the Reich Minister of Justice were as much in vain as interventions with notables of the National-Socialist State, to whom Mrs. Litten had - or sought - business ties. Appeals from abroad were also unsuccessful, since Litten was an object of Hitler's personal thirst for revenge. This was learned - at the latest - by his mother on the occasion of a visit to Roland Freisler, who had at his disposal the files of the case. Freisler rather ungraciously snubbed the petitioner and declared that under no circumstances would he do anything in Litten's favour. However, he was said to have talked with Hitler after all, and to have reported to his friends about the outcome: "Nobody will ever achieve anything for Litten. Hitler's face turned bluish red when he heard the name."²⁹ At her last visit to the Dachau concentration camp in the fall of 1937, in addition to the insignia of the political prisoners, Hans Litten also wore on his prisoner's garb the Yellow Star, the brand-mark introduced in concentration camps long before it was introduced in everyday life outside the confines of concentration camps. The Yellow Star called for particularly cruel treatment and extreme arbitrariness against its Jewish bearers.

The phase of discrimination and exclusion of Jews which, as a matter of National-Socialist policy, had begun with the excesses of the spring of 1933 and had been formally codified by the

Nuremberg Laws of the fall of 1935, culminated in the year 1938. A flood of provisions, decrees and regulations regimented and tormented the everyday routine of Jews in Germany.³⁰ The fact that in dealing with the judicial authorities Jews were prohibited from using the 'German salute', starting November 1937, probably did not particularly bother many of them. The fact that according to a decree by the Interior Ministry, dated 16 November 1937, passports for traveling abroad were to be issued only in exceptional cases, was of graver importance. At the end of March 1938, Jewish communities were deprived of their status of public corporations. At the end of April 1938 all Jews were forced to declare their property (in excess of 5000 Reichsmark). In the course of the 'June-action' all previously convicted Jews (including those convicted for trifling matters were arrested) and committed to concentration camps. These acts served to intimidate, and were supposed to increase the pressure to emigrate.

The introduction published on 23 July 1938 of a special identity card for Jews (starting 1st January 1939) and the obligation decreed on 17th August to assume an additional compulsory Jewish first name of Sara, or respectively, Israel not only indicated a future tougher course, but these measures also had practical significance for the preparation of the planned looting and persecution of a minority deprived of its rights. In the middle of October 1938, the passports of Jews were seized, and on the newly issued ones - which were no longer issued readily - a "J" was stamped, upon the suggestion of Switzerland. But these were by far not all the measures, and to them were added the regulations which people thought up on the local and regional level, such as the signs at the entrance to townships to the effect that Jews were not welcome, benches in the parks with the inscription 'For Aryans only', and the prohibitions against visiting municipal baths, parks, and certain city quarters.

By the fall of 1938, after five and a half years of National-Socialist rule, the conditions of German Jews had drastically

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29. Irmgard Litten, *A Mother fights Hitler*, 1984, p. 64 f.; The book appeared first in English (*A Mother fights Hitler*), 1940 in London, and then, *inter alia*, in Paris, in order to draw the attention of world opinion to the Litten case.
30. Joseph Walk (Publisher), *Separate Body of Laws for Jews in the National-Socialist State. A Collection of legal Measures and Directives - their Contents and Significance*, Heidelberg 1981.

deteriorated, because of politically planned and formally 'legalized' discriminations. Many could still not believe that after the forfeiture of professional livelihood already suffered by a considerable number of jurists, after the loss of social status, civic reputation and civil rights, matters could get still worse. Others, however, were convinced that the threat of 'solution of the Jewish question' which was announced with increasing frequency, would be turned into reality, by evacuation or expulsion of Jews from Germany or by similar measures. However, nobody believed, after all that had already happened, in the allegedly spontaneous popular rage that 'erupted' on 9th November 1938.

The pogrom of November 1938³¹ was staged by governmental authorities and on the highest level. Neither the assassin Grünspan in Paris, nor his victim, the embassy secretary vom Rath were of decisive importance in respect of the events, but what was important were the possibilities which offered themselves to the National-Socialists, such as was the case with the burning of the *Reichstag*.

Among the purposes that the NS-regime wanted to achieve by the pogrom and by what followed, was the dislodging of Jews from the German economy, *i.e.* the 'Aryanization' of all businesses and enterprises, from the smallest corner shop up to the department store and the factory, and the forced emigration of Jews from Germany. Indeed, after the horror of the pogrom, German Jews attempted with all of their strength and with increasing desperation to emigrate. But they only encountered mounting obstructions. If during the first years of National-Socialist rule many Jews balked at the idea of leaving their German fatherland, it then became increasingly more difficult to take assets abroad with them, to attain immigration visas and to finance their departure. The global economic crisis had not yet been overcome, and hardly any country was interested in the immigration of people without means. The professional structure of German Jews presented an additional impediment, since most immigration countries were interested in qualifications differing from those which the German Jews had to offer. For jurists it was even more difficult than for others, since they had hardly any chance of gaining a foothold in the profession they had studied. The Anglo-Saxon legal system required that German Jurists study anew, which caused the desired target of immigration, the United States, to lose much of its attraction. In Palestine, laws deriving from the Ottoman empire still applied, and in addition the restrictions imposed by the British mandatory

power vehemently obstructed until 1948 the immigration of Jews. Therefore, apart from psychological barriers, it is no surprise that Jewish jurists, like most of the other representatives of the German academically educated bourgeoisie, decided on immigration only unwillingly and with difficulty.

Upon Jewish papers and organizations being banned after the pogrom of November, the public life of the Jews perished. Robbed and reduced to paupery, there remained only their private eking out of a livelihood under increasingly wretched circumstances. On April 30, the 'Law of Rental Relations with Jews' was promulgated which prepared the concentration of Jewish families in 'Jew-houses'. The intention was - and it was rapidly realized - to concentrate Jews in apartments which would facilitate their being supervised (and later, their being deported). It could not be expected of 'Aryans' - so it was argued - to live together with Jews in one and the same house. The beginning of the war on 1st September 1939 carried with it a restriction on leaving one's home: Jews were not permitted to leave their quarters after 9 p.m. in the summer and after 8 p.m. in the winter. Starting 20th September they were no longer permitted to keep radios; all this was declared as essential for the war, the same as the prohibition to own telephone connections (19th July 1940), since Jews were considered as 'enemies of the Reich'. From the beginning of December 1938 they were no longer permitted to drive or to own cars, from September 1939 they were assigned to special groceries, in the beginning of 1940 Jews in Berlin were permitted to buy foodstuffs only between 4 p.m. and 5 p.m. (and in addition the rations apportioned to them were considerably smaller than those apportioned to 'Aryans'). The bureaucrats invented ever new degradations, such as the prohibition against keeping pets or visiting lending libraries.

Beginning 1st September 1941, a police regulation was published concerning the labeling of Jews: From 15th September every Jew from the sixth year on had to wear a Yellow Star on his clothing. From this point on the public humiliation and branding was complete, the supervision of the persecuted minority was perfect. From 1 July 1943 Jews in Germany were

31. Herman Graml, *Reichskristallnacht (Reich Crystal Night). Anti-Semitism and Persecution of Jews in the Third Reich*, Munich 1988; compare Wolfgang Benz, *Education to Inhumanity . The 9th November 1938*, in Johannes Willms (Publisher), *The 9th November. Five Essays concerning German History*, Munich 1994, p. 49-65.

subject to police law (the 13th regulation to the Reich Citizen Law), *i.e.* they no longer had recourse to legal instances. But by that point of time few Jews still lived in Germany. Officially, the German Reich was 'free of Jews'. Some individuals went underground, others lived under the dubious protection afforded by 'mixed marriages' with non-Jewish spouses, and these had to expect at any time that they would have to share the fate of the majority of German Jews.

Among the deportees murdered in the Ghettos and death camps in Polish and Soviet territory, were also those former lawyers and judges, administration jurists and professors of legal faculties, who were chased out of their offices between 1933 and 1938, and whose professional livelihood was annihilated by the laws and regulations of the National-Socialist State.

The following fates, picked out of many thousands, symbolize the end of the road for the majority of German Jewish jurists.³² The lawyer Siegfried Gumbel of Heilbronn, who had been President of the Supreme Jewish Council at Württemberg since 1936, was committed to Dachau concentration camp in November 1941, where he was murdered on 27th January 1942. The respected lawyer and notary Ludwig Hess of Stuttgart, after having suffered the loss of his profession and his apartment, was deported in August 1942 to Theresienstadt, where he perished in September. From Stuttgart also came Robert Bloch, who had been dismissed without pension from the Württemberg judicial service in August 1933. In July 1942 he was deported to Auschwitz, and murdered there. Georg Aronsohn, who came from Bromberg, and who was a lawyer, respectively a 'consultant', at Berlin from 1920 to 1938, was deported to Theresienstadt, where he died in January 1943. Siegfried Bodenheimer, head of the District Court at Mannheim until 1st October 1935, immigrated some time later to the Netherlands, but fell into the hands of the Gestapo after the occupation of that country by the German army. In 1942 he was deported, together with his wife, to the Westerbork concentration camp and from there to Theresienstadt, where he died of exhaustion and hunger.

Concerning Elisabeth Kohn of Munich, it is known only that together with her mother and sister she was deported on 20 November 1941, and she was probably murdered soon after at Riga. Georg Brodnitz, extraordinary professor of political science at Halle and until 1933 publisher of the *Journal of General Political Science*, lost his life in December 1941 in Ghetto Lodz. The life of Johannes Austerlitz, who once at Essen was councilor at the District Court, was deported to Izbica (22 April 1942) and died at an unknown date at the Minsk concentra-

tion camp. Kurt Levy, until 1933 lawyer at the Court of Appeals at Berlin, was active in the Central Association of German Citizens of the Jewish Faith, after having been forbidden to practice his profession. After the pogrom of November 1938 he was taken into custody at Sachsenhausen concentration camp, and after his release he was head of a department at the Association of Jews in Germany, and later its last chairman, until he was deported on 17 June 1943. Theresienstadt signified for him, as for so many others, only a station on the road, since in the fall of 1944 he was deported from there to Auschwitz, where he was murdered on 30th October, immediately after his arrival.

German Jewish jurists were once respected people, successful as lawyers and notaries, esteemed as judges, renowned as university teachers, of irreproachable efficiency as administrative officials. National-Socialist racial dementia excluded them, chased them out of their law offices and court chambers, banished them from their professorships, and finally also exterminated their physical existence.

Even more terrifying than the laws, decrees, measures, boycott acts, and acts of violence which sealed the fate of German Jewish jurists, was the willing acceptance of this policy by their colleagues. The 'exclusion' of the Jews from the German legal world occurred, after all, in bright daylight, and the National-Socialist regime attained the approval of the profiteers, opportunists and taciturn ones. Such was the case at a conference dedicated to the 'Jewry in the Legal Science' held at the beginning of October 1936 in Berlin, where, with the participation of many prominent German jurists, the assembled scientists vied with one another in anti-Semitic utterances. Carl Schmitt summed up at the congress the 'Relation of Jews to the German Intellectual Assets' as being 'parasitic, tactical and commercialized' and in a decision the participants swore to do all in their power in order to comply with the demand of the Reich legal leader Hans Frank: "May this conference signify the complete expiration of Jewry in the German legal science".³³ The 'Aryan' German jurists did all in their power to comply. If, despite all this, a number of Jewish German jurists survived the National-Socialist dementia, either by emigration, by going underground, by being protected by 'mixed marriages' or even in concentration camps, then the last thing they are indebted to is the solidarity of their colleagues.

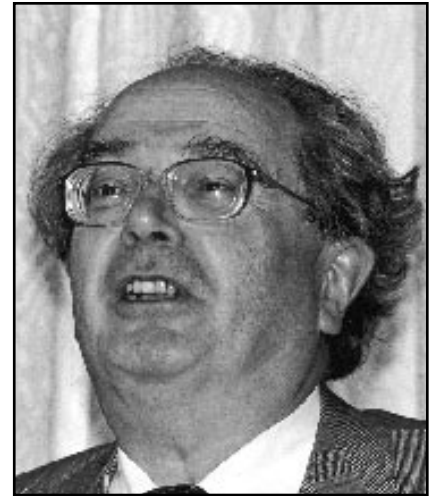
32. Documents at Göppinger, *Jurists of Jewish Extraction*, and Krach, *Jewish Lawyers*.

33. Göppinger, *Jurists of Jewish Extraction*, p. 153 f.

The concluding session of the Berlin Conference hosted a series of personal presentations under the title: *Personal Memories of the Second Generation*. Some of these testimonies appeared in the last issue of *JUSTICE*. Here are more.

Ludwig Chodziesner, Berlin Attorney

Michael Benjamin



When I met Ludwig Chodziesner in 1940, he was eighty years old, and I - eight. Onkel Ludwig appeared to my boyish perception as a real “*Opa*”, in the books in which I could bury myself as much as I liked. That was not always so.¹

The cigar-manufacturer Georg Schoenflies from Landsberg an der Warthe (Gorzów)² had four daughters. The eldest, Pauline, married my grandfather Emil Benjamin (among his children was also my uncle Walter Benjamin); the second, Elise, married Ludwig Chodziesner. The town of Chodziez, from which the family name comes, is situated between Poznan and Pila (former Schneidemühl) in the part of Poland that was annexed by Prussia in 1793; not far - coincidence or not? - from the home town of Max Wronker, Ludwig Chodziesner’s future partner, and from the estates of the counts Kwilecki and von der Schulenburg, his future clients.

Prof. Dr. Michael Benjamin, Berlin, is a member of the Association.

The family tradition reports about a miracle-rabbi, and about the fruit of an “indiscretion” with a Polish noble among the ancestors of Ludwig Chodziesner. Frequently also people were surprised by Ludwig Chodziesner’s astonishing resemblance to Kaiser Wilhelm II. Be that as it may, Ludwig Chodziesner’s parents came from a humble background and lived in very modest circumstances. Nevertheless, his family was the only one in the little town Woldenberg (now Dobięgniew), which - at the price of great sacrifices - produced university graduates. Ludwig Chodziesner as well as two of his three brothers became lawyers.

When Ludwig Chodziesner married Elise Schoenflies he was 32 years old, was an assessor (had passed the second juridical State examination) and was a partner of Dr. Max Wronker, one of the best known lawyers in Berlin - his family too is found in the book “*Anwalt ohne Recht*”. The office was situated in the then Kaiser-Wilhelm-Straße 49 (now Liebknechtstraße), very near to the house Burgstraße 28, where many years later

the *Gestapoleitstelle* (city control centre) Berlin, was situated. It was not far also from the *Sammellager* (transit camp) for Jews related by marriage to “Aryans”. Many of them were saved from deportation after the “factory action” taken in February 1943, the courageous public demonstrations of their “Aryan” wives and husbands.

Ludwig Chodziesner was successful. His homes testify to that: From the

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1. M. Benjamin expressed his great debt of gratitude for the kind support of Frau Johanna Woltmann-Zeitler (Munich), the biographer of Ludwig Chodziesner’s daughter Gertrud Kolmar, and to his granddaughter Sabina Wenzel (Paraty [Brazil]), the “*Bienchen*” of his letters.
 2. Names of Polish towns are quoted in the form official at that time, as also used by Ludwig Chodziesner himself. The Polish names valid now, are given in brackets.

Poststrasse near the office the family moved to more fashionable Tiergarten, and in 1899 they bought a mansion in the Berlin West End. There, the four children - Gertrud, the eldest, Margot, Georg and Hilde grew up.

In 1903, Ludwig Chodziesner stepped into the limelight for the first time. On 17 January 1897, countess Isabella Kwilecka from the high Polish nobility became the mother of a boy - the future heir of the estates belonging to this branch of the Kwilecki family; and the brother of the count lost his right of inheritance. At that time the countess was 51 years old - a fact which led not only to rumours but also to private investigations by this brother. In the end, the countess, her maid and the midwife were arrested and charged with foisting a child (*Kindesunterschabung*). The details of this case - worthy of the pen of Hedwig Courths-Mahler (or Rosamunde Pilcher) - can still be found today in any collection of famous court cases.³ It should be remembered that at that time there was no exact knowledge about blood groups never mind genetic analysis. Ludwig Chodziesner solved the task brilliantly and defended the countess successfully.

Ludwig Chodziesner later described the enthusiastic reception of the acquittal of the countess in his social surroundings:

“Pinnacle of his (father’s Julius Chodziesner) life, the only case when he was drunk, drunk on exhilaration, were those weeks of November 1903, when everybody was talking about ...his eldest son. When all newspapers mentioned and acclaimed him as the successful defender of countess Kwilecka. When in the small synagogue in the Schulstrasse in Charlottenburg people crowded around

him, congratulated him and shook his hands - that was when he felt: It was not in vain that I lived, worked and suffered great want”.⁴

Contributing still more, probably, to Ludwig Chodziesner’s popularity was his participation as defending counsel in the case of Prince Philipp zu Eulenburg, an intimate friend of Kaiser Wilhelm II. The origin of this politically highly explosive and probably most sensational case of that time was the accusation against the prince that he was a homosexual. True or not, this accusation could mean social death. The real reason was intrigues and power struggle at the imperial court. For the first time in Germany the press - in the person of the brilliant but vacillating journalist Maximilian Harden - played a decisive role. This case, too, one can find in every “*Pitaval*”.⁵

In 1910, Ludwig Chodziesner was counsel of count Friedrich-Werner von der Schulenburg, later German ambassador in Moscow, in his divorce suit. Ludwig Chodziesner was no longer alive, however, when Schulenburg took part in the conspiracy of 20 July 1944 and was executed by the Nazis.

Ludwig Chodziesner had become a “star lawyer”. His political convictions, like those of many Jews of his social origin, were liberal. Decidedly, he defended the independence and impartiality of justice.

“The truth”, he said in his final speech in the Kwilecki case, “is an aloof beauty, which will not unveil her face to those who mean to get hold of her following prejudices enclosed in files. In the name of an alleged truth Luther was persecuted and Hus was burnt and this Moloch worship claims its victims up to the present days”.⁶

Ludwig Chodziesner defended trial by jury, which aroused some people’s suspicion, as he said “by the bare fact that it dates from 1848”.⁷

At the same time, Ludwig Chodziesner was loyal to the German Empire and to the emperor. With them he connected equality before the law and social advancement. One was integrated in the German society as far as that was possible for a Jew. On questions of religion Ludwig Chodziesner (as well as many of his Protestant colleagues) was not too eager. In 1939 he wrote to his daughter: “Friday evening after about 60 years I was for the first time again at the synagogue”.⁸ He kept, however, his religion. He saw himself as a “German citizen of Jewish religion”. That anti-Semitism was tolerated, and the “old” religion was transformed into racial anti-Semitism, that the social contradictions became more and more aggravated - all

3. Cf. e.g. Friedrich Karl Kaul: *Von der Stadtvogtei bis Moabit. Ein Berliner Pitaval*. Verlag Das neue Berlin. Berlin 1965, S. 277ff.
4. Letter to Hilde Wenzel, 10 December 1939. Quoted in: Johanna Woltmann: *Gertrud Kolmar. Leben und Werk*. Wallstein Verlag Göttingen [1995], p. 27.
5. Both cases, for example, in: Friedrich Karl Kaul: *Von der Stadtvogtei bis Moabit. Ein Berliner Pitaval*. Verlag Das neue Berlin. Berlin 1965, pp. 155ff, 277ff.
6. “*Berliner Tageblatt*”, 25 November 1903, p. 4.
7. i.e. the defeated democratic revolution. - “*Berliner Tageblatt*”, 25 November 1903, p. 3.
8. Letter to Hilde Wenzel, 26. March, 1939. Quoted in: Johanna Woltmann: *Gertrud Kolmar. Leben und Werk*. Wallstein Verlag Göttingen O. J. [1995], S. 254.

this Ludwig Chodziesner like many other German Jews did not take seriously.

Consequently, during World War I Ludwig Chodziesner was patriotically-minded. The defeat of Germany hurt him deeply and not only morally; the lost war and inflation also caused serious financial losses. Nevertheless, the Chodziesner family remained prosperous. They had to sell the West End mansion; but soon they found a favourable alternative. Ludwig Chodziesner bought a house in the developing suburb Finkenkrug, where the family lived for the next 19 years.

When Ludwig Chodziesner's wife Elise became seriously ill, the eldest daughter Gertrud kept the family's house. At the same time Gertrud's outstanding poetic talent became more and more apparent. Gertrud Kolmar (that was her pseudonym after the German name of Chodzie, the town of the family's origin) became one of the most important modern poets of the German language.

At this time my mother came in touch with the Chodziesners. She was a school-friend of Gertrud Chodziesner's cousin Dora Benjamin and met Gertrud, and possibly Ludwig Chodziesner too, in 1921. It was he, who, after Hilde Benjamin set up her lawyer's practice, "sent me my first client", as she wrote later.

The other children found their way as well. The daughter Margot obtained a zoologist's doctorate; later she became a poultry-breeder. The son Georg married the lawyer Dorothea Galliner, continuing thus the tradition of the family. Hilde became a book-seller and was married in 1930 to Peter Wenzel, a colleague. Grandchildren announced themselves.

Everything indicated a quiet evening of Ludwig Chodziesner's life.

The Nazi dictatorship knocked sideways all these lives. The books of Walter Benjamin, Ludwig Chodziesner's nephew, were burnt; he himself was forced to emigrate. Georg Benjamin, Walter's brother and Hilde Benjamin's husband, was arrested in 1933 for the first time. Gertrud Kolmar, whose poems to that date had been devoted with great sensibility and power of language to the worlds of Man and Woman, to Humanity and Nature, wrote within two months, breathlessly and as if hunted, a cycle of more than 20 poems "*Das Wort der Stummen*" ("The word of the silent people"). The titles speak for themselves: "In the Camp"; "The Prisoners"; "The Tortured"; and "We Jews", which begins:

The night alone can hear. I love you, I love you, oh my people, In my embrace I want to hold you warm and close just as a wife would hold her husband on the scaffold steps. Or like a mother who cannot allow her son to die alone.⁹

Ludwig Chodziesner was hit by the deprivation of Jewish officials, lawyers, physicians. On 13 July 1936, his name was "removed" from the lawyers' register after 45 years' activity. During the pogrom of November 1938 he was arrested for four days. He was forced to sell the house in Finkenkrug at a ridiculous price. They found a flat in Berlin, Speyerer Strasse 10. It would become their last domicile.

The Chodziesner family dispersed all over the world - from Brazil to Australia, from Switzerland to Uruguay. Only Gertrud, the eldest, remained with the

father until to the end. We know that Ludwig Chodziesner too discussed emigration, but we do not know exactly the reasons for his final decision to remain. Maybe, he was in a similar mood to the German Jewish scholar and writer Victor Klemperer, who noted down in his diary after the November pogrom: "Constantly the question worries us: To go or to remain? To go too early, to remain too long? To go into nothingness, to remain for undoing?"¹⁰

From 1940/41 the house on Speyerer Strasse 10 became a "*Judenhaus*". The flat was assigned to a growing number of subtenants. From March 1942 Ludwig and Gertrud Chodziesner had to live together in one room. Gertrud had to do forced labour up to 14 hours a day (if one includes 4 hours' walk to work). One feels admiration for an old man of eighty years who in such situation wrote long letters to his relatives, made autobiographical notes, looked for new acquaintances and communication.

"Uncle Ludwig" wrote my mother, "was no more the autocrat as I remembered him, he was an old, but unbroken man."

Fighting their own fears and the Nazi policy of isolation, the persecuted frequently moved closer together. My

9. *Dark Soliloquy. The Selected Poems of Gertrud Kolmar.* Translated and with an Introduction by Henry A. Smith. The Seabury Press. New York 1975, S. 113.

10. Victor Klemperer: *Ich will Zeugnis ablegen bis zum letzten. Tagebücher 1933-1941.* Herausgegeben von Walter Nowojski unter Mitarbeit von Hadwig Klemperer. Aufbau-Verlag Berlin 1995, p. 436.

continued on p. 28

Memories of Eduard Meyerstein

David Arad

Eduard Meyerstein was born on March 26 1871, in Berlin and grew up in Berlin-Tiergarten (Zoo). His mother Henriette was a Gebert by birth, called by the pet name "Jettchen". She served the writer Georg Hermann as an example for the character in his novel "Jettchen Gebert", a work, which today still enjoys great popularity and which because of an exhibition "The Children of Jettchen Gebert", dedicated to her, became of fresh current interest.

On December 5 1908, the Chamber of Commerce of Berlin appointed the 37-year-old attorney and later notary Eduard Meyerstein to be its legal advisor. He received a provisional salary of 9000 Reichsmark and therefore was a sort of "State employee". There still exists a reference to the agreement of April 12 1916, which granted him a rent subsidy allowance of 1800 Reichsmark, which would have to be "taken into account in



full with the salary when calculating the pension, respectively the widow's and orphan's benefits". The business of lawyer Meyerstein was so successful, that on the occasion of his 60 birthday hardly any paper was published, which did not bring him into prominence. That this was not limited to Berlin, may be proven by an article of praise in the *Wiener Handelsblatt* of May 29, 1931, which stated among other things:

"Heads of the German economy - Eduard Meyerstein, legal advisor of the Chamber of Industry and Commerce of Berlin for his 60 birthday.

Attorney and notary EDUARD MEYERSTEIN in Berlin, who recently had his 60th birthday, belongs through his almost thirty years of activity as

legal advisor of the Chamber of Industry and Commerce in Berlin to those leaders of the German economy, whose life's work for the development of the legal foundations for trade and commerce is of invaluable importance - even though for the masses their names disappear behind their important works."

The article of praise ends with the words:

"that his work as a legal advisor became a decisive factor for the development of the Central-European economy".

How did the Chamber of Industry and Commerce in Berlin thank him for his work?

In 1933 Eduard Meyerstein, like most of his Jewish professional colleagues, received a message "asking" him, "in order to avoid the people's wrath being released, to give up the rights of license as a notary."

In October 1934, the Chamber of Industry and Commerce in Berlin pensioned him off provisionally. He did not receive a pension or allowance. In 1938, Eduard Meyerstein succeeded in emigrating to Palestine, to which his wife and children had already escaped.

One might assume, that after 1945 this disgraceful behaviour would be regretted and changed. Not so! One can only be amazed at the motivation with which Eduard Meyerstein was denied any pension claims: The Chamber of Industry and Commerce (IHK) Berlin turned down allowance claims of former employees, and of course also that of the former legal advisor Eduard Meyerstein, and pointed out that the IHK was a new foundation, and that it was by no means a

Adv. David Arad, attorney and notary from Jerusalem, has for many years been a member of the DIJV (German-Israeli Lawyers Association). David Arad reported on the congress "Attorney without Law" not about his own fate as a Holocaust victim (among other camps also Auschwitz), but about the family history of the Berlin lawyer Eduard Meyerstein, to whose granddaughter he is married.

legal successor of the former Chamber of Industry and Commerce in Berlin. Therefore, just as the Federal Republic of Germany was not a legal successor of the German Empire, the mere identity of names was not sufficient to validate claims against the new institution.

Amazingly, it was only in 1990, when claims of old “organizations of the empire” sprang up again in the area of the former GDR and East Berlin, that different reasoning applied. Of course, the majority of associations and organizations claimed back “their” old pieces of land, which are very lucrative today - and in fact regained them. As far as I know, the IHK until today has not given up its legal position of that time. The legal claims of the former legal advisor Eduard Meyerstein have gone under once and for all.

And now about Eduard Meyerstein the Jewish lawyer:

I return to Georg Hermann’s novel “*Jettchen Gebert*”. Today her story is history, taken up by institutions such as the Leo Baeck Institute and remains preserved. In the preface to the exhibition “*Jettchen Gebert and her Children*” it says:

“Georg Hermann (Borchardt), who was murdered as a seventy-year old in Auschwitz, delighted the German reading public with the delicately drawn history of the charming, but yet so unhappy young Berlin woman and her middle-class Jewish family, which surrounds her and cares for her. Maybe Hermann, without being aware of it, has portended the destiny of German Jewry in *Jettchen Gebert’s* fate”.

Both from Georg Hermann’s work and from Dr. Simone Ladwig-Winters’ book “*Anwalt Ohne Recht*” one might obtain the impression that Eduard Meyerstein,

who continued to work in Berlin until 1938, possessed an anti-Jewish and anti-Zionist attitude. But the outward appearance, even though it gives rise to well-liked anecdotes to this day, deceives. One tells about Eduard Meyerstein that he, on the occasion of a gathering of the SA in the year 1937, when asked for a donation, answered that he could not donate anything “since I am a Jew”. To which the angry SA-man replied: “Everyone can say that”.

Early on, Eduard Meyerstein was aware that the future of his children could only be in Palestine of those days. They had already left Germany in the year 1932. What became of his children?

In 1927 his only daughter Ursel married the young active Zionist and attorney Dr. Rudolf Liebstadter from Nurnberg. Emigrating with the two of them, was another Zionist leader, Dr. Meinhold Nussbaum. He was for many years an associate of Dr. Liebstadter and after 1945 was active as a legal advisor at the *Wiedergutmachung* (compensation) negotiations. It was a painful loss for us, when Dr. Nussbaum fell victim to a tragic traffic accident in Cologne.

In 1932 Eduard Meyerstein’s only son also emigrated to Palestine. With an eye to his future in Palestine he had already had himself trained as a farmer and studied agricultural economy in Germany. As a typical “*Jecke*” he took his assignment so seriously, that with his emigration he even took live cattle, namely, 12 cows, with him aboard the ship.

I do not want to leave unmentioned the fact that Eduard Meyerstein was married with someone who was born Josefy. Of all places grandmother Josefy lived in the house at Kurfurstendamm, which today accommodates the chancellery of the

President of the Constitutional Court of Berlin, Professor Finkelburg. Also related was the Benjamin family, from which came the famous writer and philosopher Walter Benjamin, who at the last moment on his flight fell victim to the persecution of the Nazis. I do not want to report today about that branch of the family, since a direct descendant of the Benjamin family is present and will lecture about his family’s history.

Raised as a religious Jew, I possess and proudly use the prayer book, a *Siddur*, which I took over from my father-in-law Dr. Liebstadter, and which lists the family tree since 1797. As I have already said, Dr. Liebstadter was also a lawyer, as are my children Tamar and Ehud, who carry on the legacy of being attorneys into the next generation. Over the decades, to the amazement of Ursel Liebstadter, the daughter of Eduard Meyerstein, everything in this family has taken a favourable turn. In remembrance of her beloved father, the unforgotten Eduard Meyerstein, she wrote to her grandson Ehud the following poem in German:

I am the fourth in the generation
And I open up my office with a
celebration.
My great grandfather was well known
in the chamber of trade
And my grandfather also has made
His living as a lawyer in Nuernberg
well known
Not only with “Grundherr (N) but also
with “Cohn”
Proudly I bear both of their names
1. Hanging on the wall in nice black
frames
2. Hoping that everything thus remains
Wise advice always gave me my father
So that is why I would see myself as
rather
The fourth one in my generation
And probably my son Alon will be the
fifth continuation.

It is Important for All of Us Never to Forget

Peter Galliner

It was an ominous decision. All the years they had tried to help others leave Nazi Germany in time, and were also always hoping that they could do the same. My father had been very active, both in his profession as a lawyer and also amongst the members of the Jewish Reform Community, to support as many people as possible.

It is quite unbelievable that only now have I received a last letter from my father, written from the hospital where they had been taken a day before they died. Despite my attempts after the War, particularly in the first post-War years, but also in the 1960s, to get hold of any documents and letters, I was unsuccessful. I approached the *Rechtsanwaltskammer*, the local police, and the law courts. I made many personal visits without avail. It was only when Dr. Ladwig-Winters started on her research on the fate of the Jewish lawyers in Berlin that by chance, she came across this letter and some other documents, all carefully filed away in the courts. I am more than grateful to her.

Sixty years have gone by since I was fortunate to leave Berlin in the first days



of 1939, alas, without my parents. Despite my efforts in London, I failed to get permission for them to follow me. I had just come out of school and it was very difficult to make the right connections. It was only in 1941 that my parents were able to get a visa to Cuba, but by then it was too late to leave. It also turned out at the time that many of these visas to Cuba were forged and, as we know, some of the boats never reached their destination.

The deportation order for my father and my mother came a few months later. Like many others, they decided to take their own lives as they were convinced that deportation would lead to certain death.

It is unbelievable that no official

attempt had been made to contact me or others in a similar situation. There was no excuse for this, particularly in view of the fact that between 1961 and 1964 I was in Berlin in a very prominent position as Chairman of the largest well-known publishing house, the Ullstein concern. The late Axel Springer, who had bought the *Ullstein Verlag* after the War, had asked me to come to Berlin. It was quite a tough decision for me, but at the same time it was a rare occurrence that somebody with my German-Jewish background, well-established in London in a senior position at the *Financial Times*, would come to Berlin after the Wall had gone up. It would have been easy for someone from the Lawyers Association here or the local courts to get in touch with me. Even when I went to these various offices myself, I got no help or information concerning my parents.

To go back to 1938, my father, like most other Jewish lawyers, was still able to do some legal work, even after the “*Kristallnacht*” pogroms in 1938, but that too had to come to an end. We were fortunate at the time to leave our Berlin flat by the back door just when the State Attorney came to arrest us. My father had been warned by one of his colleagues that they were on their way. We stayed with the widow of a close friend, who was not Jewish. I never went back to our home before I left for London. My parents returned there some months later, when they had to give it up. In the subsequent years they were forced to move from one address to another. They were also forced to work at the main Siemens factories in Berlin, engaged in menial work, until the bitter end. Their life during those years had become exceedingly difficult - only

Dr. Peter Galliner, London, Director Emeritus of the International Press Institute, speaks about his parents.

thanks to one or two non-Jewish friends who secretly brought them some food, were they able to survive. One other friend, a banker, who had his own small private bank, supported them with some money. He indeed was a righteous person and a hero in many ways.

He had quite a number of Jewish clients and spared no efforts to help where he could. He went frequently to the Gestapo trying to get people out of jail or concentration camps. Sometimes he succeeded. After the War, he started again in a small way. He was invited by some of his former clients in Israel to meet them and was shown much appreciation for what he had done. I met him on my first visit to Germany after the War. He lived in a small room in Hamburg. Even so, he declined to accept even small presents because he felt that there were many who were far worse off than himself. Ultimately he moved back to Berlin and started his bank again, building it up quite successfully. Many of us are most grateful to him. Some of those who are here today will find that their parents knew him too. His name was Otto Scheurmann.

As long as I was in Berlin, I was able to go to school, finishing up ultimately in a private Jewish school, the Goldschmidt School, which had the great advantage that pupils were being prepared to sit for the Cambridge School Certificate, which proved very helpful.

My father had been a lawyer and public notary in Berlin for more than 25 years. He had a good practice in many ways. Later on he became involved in human rights cases, where people had been persecuted for their political views, mainly Social Democrats, as he had been quite active in the Party as well, and, of

course, many members of the Jewish Community were among his clients. He always felt that as long as he could help other people, he would not want to leave. He was only keen that my elder sister and myself would get out of the country in time.

Less and less of his non-Jewish clients would continue coming to him, and after 1938, hardly anyone kept in touch. As for the non-Jewish lawyers, I can remember only one or two of them who came to see my father from time to time. They lacked the courage. In the end there were only one or two of his Jewish colleagues who kept up a close relationship. One of them was the late Dr. Coper who ultimately took over my father's affairs. He was quite a fabulous man. He had been physically handicapped, as he had lost the use of one of his legs during World War One. Even so, he had to go through the concentration camps and in the end was rescued. I saw him on one of my first visits to Berlin and he was like a father to me. I met his son at a recent gathering here in Berlin when Dr. Ladwig-Winter's book on the fate of the Jewish lawyers of Berlin was presented.

In London, I was fortunate that some distant relatives took me into their factory and I was trained to become a furskin dyer. It was not a very pleasant time. Of course, all my thoughts had been with my parents. All my efforts to bring them out had failed. I still find it hard to accept this. I think it was in 1941 or 1942 that most Jewish refugees from Germany in Great Britain were interned, first in some temporary camps under canvas outside London and later on on the Isle of Man. For me it was a blessing in disguise. As it happened, I was

together with some very well-known academics from Oxford and Cambridge Universities, and they in turn started university courses in the camp. I got to know people who ultimately made their careers in universities, but also some who returned to Germany and became prominent politicians.

Strangely, it was a fascinating time for me, and I had no material worries. All our worry was to get released as soon as possible. It is true to say that we were all behind barbed wire, but we were given enough food and did not have to worry about any money. However, the whole question of internment of Jewish refugees became an important issue in the House of Commons, when it was realized that they had put the arrested refugees together with German prisoners-of-war and Nazi sympathisers. Ultimately it was all sorted out and we were released after one year.

I returned first of all to the furskin dyeing factory but later on, I became a fully fledged librarian and after a year or so, I was asked to join one of the best-known papers in Britain, the *Financial Times*, and was in charge of their Library and Information Department. This was really the beginning of my career. I was later appointed as Foreign Manager, and built up a network of foreign correspondents, started a syndication service, and also looked after foreign circulation, foreign advertising and all the foreign interests of the paper.

After the War, I tried to establish contacts with a number of my father's former colleagues and went to Germany for the first time, officially as correspondent for the *FT* in Berlin. I met one or two of the Jewish lawyers such as Dr. Coper who had survived the Holocaust.

As far as the non-Jewish lawyers are concerned whom I approached, there is only one who had answered.

He worked for my father as a young assistant for many years, but then left Berlin to go to West Germany. However, his letter was full of sympathy and understanding. What I did find in Berlin in the early post-War years was that some of my father's non-Jewish clients had suffered politically, also worked with some resistance groups, but had survived the War years. It did show me that not all Germans had supported the regime and quite a few helped others who were harassed and persecuted. This gave me hope.

After the War I could establish closer relations with diverse German political personalities such as Adenauer, Erhard, Willy Brandt, Ollenhauer, Genscher, and many others. When the *Deutsch-Englische Gessellschaft* was set up in Dusseldorf to further better understanding, I was one of the founders and got many of my British friends to join. In the course of time, it became very well-known and influential by its name as the Konigswinter Conference, with its annual meetings.

It was quite a challenge for me to be transplanted into Germany during 1961 to 1964, and to find myself as the boss of more than 3,000 people at the Ullstein concern. I saw that as a chance to see how the new German democracy would work.

I left after three years as I could no longer agree to the politics which were expressed in the Springer papers. It was quite an experience.

I had taken up my friendship with my old friend, Willy Brandt, who had become the Mayor, whom I greatly

respected and whom I had already got to know in London. And for whatever reasons, the papers, directed from the Hamburg Headquarters of the concern, became very critical of his politics. I did not feel that I would want to carry on under the circumstances and returned to London.

During that time, both at Ullstein and elsewhere, I never saw any signs of hostility and anti-Semitism, but of course this was a time when such feelings would not be shown. It is different nowadays when people speak up. Of course I am greatly concerned at the outbreaks of anti-foreign feelings, the attacks on the Turkish and other minorities, and also the frequent anti-Semitic incidents. I think these are exceptions and that only a limited number of individuals are responsible - but I think it has become even more urgent now to take an active part against these outbursts of intolerance and hate.

I know that my parents would have been happy to see that after the terrible atrocities, Jewish life in Berlin has once

again been restored to some extent. They would also have been delighted, as I am, that their granddaughter, my daughter, born and educated in London, has established herself in Berlin and is the head of the *Judische Volkshochschule* which has become an important cultural center. They would have been even more delighted with their great-grandson who started his education in the Jewish School in Berlin and had his *Barmitzvah* here nearly two years ago. So life goes on.

But it is important for all of us never to forget what has happened. We owe this to all those who are no longer with us. When you look at Berlin today, you can hardly imagine what the city looked like after the War. Most of the synagogues have gone, but the cemetery in Weissensee is still there and very well-restored. Walking along those rows of tombstones is a profound experience as the stones speak about former Jewish life in this city. It is an experience one can never forget.



Audience listening to proceedings at the Remember Berlin Conference

The Lindenstrauss Family

Alisa Rosen-Lindenstrauss

This is the story of the lucky ones.

My grandfather Jacob Lindenstrauss, a Berlin businessman in the field of advertising products raised six sons and one daughter. His fourth son, Herbert died at the age of 16 during World War One, his 3 older sons Leo (my father), Erwin and Erich served in the German army. My father was even decorated for his service on the French Front. Four of the brothers: Leo, Erich, Walter and Bruno, studied law as did their sister's husband Werner Fraustaedter, and Ilse Stammreich, later Bruno's wife. Erwin Lindenstrauss was the only son who chose a different career.

Their loyal military service was indeed the reason why Leo and Erich were allowed to keep their legal practices after 1933. Less lucky was my uncle Walter who was too young to serve in the War. My uncle Bruno and aunt Ilse were at the time still legal trainees. However, even veteran lawyers were not able to practice by 1936, as described in "*Anwalt ohne Recht*", since they were forbidden to appear in Court early in 1935. This brought about the mass emigration of Jewish lawyers from Germany.

One by one the family members emigrated to Palestine, leaving behind

their worldly goods, going to the unknown in the desert - as they imagined it (where the piano would be too heavy for the camel to carry!). They were Zionists. My father was proud to have been born in 1897 - at the time of the first Jewish Congress in Basel. Being Zionists they did not consider going elsewhere, although had their lives not been threatened they would not have left Germany.

In January 1936, my father Dr. Leo Lindenstrauss, my mother Toni *nee* Jacobi, my 8 year old sister Ruth, my 7 year old brother Herbert and my grandmother Martha Jacobi, landed at Jaffa harbour. It is told in the family that my mother, getting off the ship, looked around and said "*Leo, Alibaba und die 40 Reuber!*" (Leo, Alibaba and the 40 thieves!).

Their flight from Germany took a while. My brother, a mentally retarded child, had been educated in a special boarding school, owned by two fine ladies of the aristocracy, that was due to be closed down. It became known only later that both the children and their teachers were murdered by the Nazis.

On his arrival in Tel Aviv, my father found his brother Bruno who had come there in 1934, after finishing his legal training, as well as Bruno's wife Ilse, who had just finished her Ph.D. thesis on the Beer Breweries Law. He also found there his sister Hertha Fraustaedter and family, who had immigrated in 1933



after fleeing earlier from Germany to Brussels, Belgium. My uncle Werner Fraustaedter, a man with Leftist convictions and an expert on citizenship laws, had, prior to Hitler's nomination as Chancellor, demanded the latter's deportation from Germany on the grounds that he was not a German citizen. For this the Nazis later searched for him. My uncle Erich had also arrived in Palestine in 1933, settling at first in Haifa. Erwin arrived in Palestine with his wife and daughter only after *Kristallnacht*. The last to arrive in Palestine was my uncle Walter, who could no longer practice law after 1933. He worked for the Palestine Bureau in Berlin on behalf of the Jewish Agency. One of his jobs was to escort Jewish children sailing from Germany to Trieste. With the increased danger posed by staying in Berlin he asked the Jewish Agency to enable him to go with his

Mrs. Alisa Rosen-Lindenstrauss, Jerusalem, speaks about her father, Adv. Leo Lindenstrauss, and family.

family to Palestine, but still needed there he was forced to flee on what was almost the last train when World War Two broke out.

Facing the difficulties of immigrants, both financially and socially, especially in having to master a totally foreign language, the family faced years of hardship, working in whatever jobs were possible at the time, in an undeveloped country. There was no choice of course: my mother would say "*Mann muss die Feiertage feiern wie sie fallen*" (one has to celebrate the holidays as they fall). My grandmother couldn't stand it, she committed suicide within the first year in Palestine.

My father started out by managing the stand of the Tzel-Korati Building Co. at the Orient Fair in Tel Aviv, and later on, after being unemployed for a time, he became Director of the Petach Tikvah Branch of Peltours Travel Agency and Insurance Co. which at the time dealt mainly with the shipping to Europe of gift crates of oranges. By the time the War broke out in 1939, nobody needed travel agencies or orange shipping any more. His office was closed down and again he became unemployed, still having to provide for his family and soon expected baby - myself.

Erich worked at the Haavara office in Haifa which was busy saving Jewish property left in Germany, by trading for German goods needed in Palestine. The office was later moved to Cairo, Egypt, from where Erich returned to Palestine in 1939, to settle in Jerusalem. Erwin, the family salesman, earned his living selling office equipment, and Walter started out as an accountant.

Uncle Werner continued writing professional articles in German on social

laws as well as books on various legal issues. However, as living expenses increased and he was joined by grandfather Fraustaedter, who also fled from Germany at the last minute before the War, my aunt Hertha was forced to contribute to the family's income, which she did by becoming a well-known girls dressmaker.

Over the course of time the Lindenstrauss brothers each managed to find his place in the local community, however, none of them except aunt Ilse returned to the legal profession. Even so, Dr. Fraustaedter who was known for his brilliant legal mind was later requested to be one of the four jurists to each write a draft of the Constitution for the young State of Israel. Although none was adopted, he received the Rupin Prize for his work.

My father had neither the money nor the time to start studying a completely different legal system, switching from continental law to English common law. Moreover, having specialized in German family law, he had no affinity to the Jewish law in that field practiced in Palestine. He was busy earning his family's living, with a special worry over a handicapped boy, mentioned above, and no special facilities at the time to provide the child with special training. My father and his brother Erich, as well as Werner Fraustaedter eventually joined the Civil Service, and went on working for the Israeli Government once the State of Israel was established. My uncle Bruno was appointed General Staff Director of the Anglo-Palestine Bank, later Bank Leumi Le Israel, and my uncle Walter became General Director of the Industry Bank in Haifa, as well as polit-

ically active as a Liberal member of the Municipal Council in Haifa.

Sadly, neither my father nor his brothers lived to reach the age of 70, which makes one think how different things might have been had history made a detour around the years 1933-1945. Yet one must be thankful not to have suffered the real horrors of those years.

When I first came to my father to ask for his permission to study law, he was strongly opposed to it. The lesson he had learned from his own history was that one should study a profession one can practice everywhere. He would therefore have preferred me to be a trained nurse rather than a lawyer, but since by that time my cousin Micha Lindenstrauss, son of Walter, was already a law student, he gave in. Actually he was very proud the day I was awarded my university degree, but unfortunately he died 3 days later (of a fifth stroke) and did not live to see me admitted to the Bar.

For a time it seemed that what started out to be a Lawyers Dynasty, to the joy of my grandfather, came to a stop, yet although the Lindenstrausses have today a greater variation of occupations, 9 of us are still in the legal profession: I and my husband, our 3 children, our son-in-law, my cousin Micha Lindenstrauss, President of the Haifa District Court, one of his daughters and her husband.

The only living member of the immigrant generation of our family is my aunt Ilse, who is 96 years old, and who practiced law until almost 10 years ago. In earlier years she also had a legal column in the *Ha'aretz* newspaper.

You can therefore see for yourselves that the Lindenstrausses are still in business!

The Grünbaum Family

Ilana Soreq

My grandfather, Counsellor of Justice (*Justizrat*) **Simon Grünbaum**, was born in 1864 at Riesenburg as one of four sons. He regarded himself totally as a German of Jewish faith. During the First World War he served as an officer of the Mounted Artillery and was even awarded the Iron Cross.

I do not know what my grandfather, who, as a lawyer, represented major companies, contributed to German law. What I do know is that he was a man of high moral principles who adhered to values which, today, seem to be regarded as valueless.

His personal Jewish tragedy began with the emigration of his two sons from Germany to what was then Palestine. He himself travelled to Palestine twice: in 1936 and in 1939. He returned to Germany because he could not imagine that even older Jews would not be allowed to live out the rest of their lives in peace.

On September 8, 1942, already an old man he was deported to Theresienstadt, where he died after two days.

We would like to express our deep gratitude to the late Mrs. Liselotte Zwik of Berlin, who was my grandparents' housekeeper. She looked after them until

their deportation, and under grave personal danger, procured food for them until the last minute.

My grandfather's sons, the brothers Grünbaum, never forgot this and they paid Mrs. Zwik a lifelong pension.

My father, **Dr. Hans Grünbaum**, was born in 1903 in Berlin as the elder of two brothers. At the age of 31, already a practicing lawyer, he emigrated from Germany to what was then Palestine. In 1933, immediately after the new discriminatory laws entered into force, the Jewish lawyers were the first of all professions to be abused; they were simply barred from practicing law. Despite his young age, my father was already admitted to appear before the Supreme Court of Justice (*Kammergericht*) of Berlin and stood at the start of a promising career.

Having been a Zionist since his *Barmitzvah*, his way out of Germany led him directly to Palestine. He was well aware of the fact that, at the time, it was agriculture that was needed there, rather than the practice of law. Accordingly, he settled in the old Moshava Gedera, where he bought a piece of land near Moshav Bitzaron, then one of the southernmost Jewish villages in the country.

Together with his wife, Gertrud-Dobbi, and his brother Ernst, he set up an even smaller hamlet, called Tiferet Israel, a farm comprising various agricultural branches: citrus groves, fruit orchards, vegetable gardens, chicken breeding and



goat raising. This small farm was surrounded by a number of Arab groups, so that the three *Yekke* (a nickname for German Jews in Palestine) families there were a tiny minority in the neighbourhood. The Grünbaum brothers had to stand guard at night in order to prevent recurrent Arab attacks and looting. With great effort and tenacity, they managed to overcome all difficulties, including the readjustment to a completely new way of life and the hard climatic conditions (from Berlin directly to the desert!).

In 1954 he went back to Germany to work as a lawyer at the United Restitution Organization in Munich, where he stayed for 15 years. In 1970 he returned to Israel to become URO's Director in Tel-Aviv.

He died in 1992 at the age of 89. Almost to the last day he worked at URO and was a member of a team of jurists

Mrs. Ilana Soreq, Haifa, speaks about members of her Grünbaum family.

who worked out propositions for restitution to Jews originating from the territory of the previous GDR after the German unification.

My father's brother, **Dr. Ernst Grünbaum**, was born in 1907 in Berlin. He too took up the career of a lawyer, before his emigration to Palestine he worked as an articulated clerk with a view to becoming a judge. Arriving in Palestine, he first thought of continuing the career of a jurist and, consequently, he did his articles in Jerusalem at the law office of Dr. Moses, who, later, became

the Comptroller General of the State of Israel.

Apparently my father needed his brother both for moral support and for help on the farm; Ernst therefore joined my father in farming.

When the Second World War broke out he joined the British army.

After the War's end he studied book-keeping and later worked for the Ministry of Finance. In 1948 he got married and settled down in Tivon near Haifa. Beside his professional work, he started painting, and later, purely for the

sake of his artistic work, he moved from Tivon to the Arab quarter of the town of Acre. The family lived there amidst the Arab inhabitants, maintaining excellent relations with their neighbours. Ernst even took private lessons in Arabic. The Arab neighbours loved the Grünbaums and helped them whenever needed.

After 7 years of artistic work in Acre, the family returned to Tivon.

During his last years Ernst became an excellent painter, whose works have been exhibited in numerous art shows in Israel and Germany. He died in 1987. ■

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father - a Jew and a Communist - would not leave. From 1940/41 my mother regularly took me with her on weekend-visits to the Chodziesners in the flat with so many books, that became narrower and narrower.

It is well known that from April 1942 the Star of David was to be put up also at the doors of the flats. For a time it was removed repeatedly. That was a well-meant demonstration, but caused trouble and danger for the inhabitants.

We felt that Ludwig Chodziesner had finished with his life. In his will in July 1942 he appointed as heir his daughter Gertrud and after her Hilde Benjamin

In the beginning of September his hour came. Ludwig Chodziesner received the order of deportation. On 7 September, he signed the notorious 16 page financial declaration. My mother and Peter Wenzel, his son-in-law helped to pack his luggage. On 13 February 1943, he died in Theresienstadt.

His daughter Gertrud, whose deportation was delayed for the time being because of labour "essential to the war

effort", probably only survived her father by a number of days. With the "factory action" she was arrested and deported to Auschwitz on 2 March 1943, from where she did not return.

The tragedy was followed by the farce: the confiscation of Ludwig Chodziesner's wealth. Whoever becomes acquainted with the files of the *Oberfinanzdirektion Berlin*, with the ant-like officials' work, bureaucratic eagerness and juridical perfectionism - orders, notifications, delivery forms, land register entering - by which Ludwig Chodziesner was robbed as well as tens of thousands other Jews - whoever sees that feels wrath and shame as a German, a lawyer and as human being.

Ludwig Chodziesner's life is exemplary for a generation of German Jews. Each of you will draw his own conclusions on it. Let me finish by quoting Heinrich Heine:

"The present day is a result of the past day. We have to explore what the former wanted, to understand what the latter wants." ■

In Memoriam: Dr. Paul Feher

The Association mourns the death of Dr. Paul Feher, member of the Board of the French Section and advocate of the Court of Appeal in France.

Dr. Feher and his wife established the Feher Foundation which contributed greatly to worthy causes in Israel in many fields.



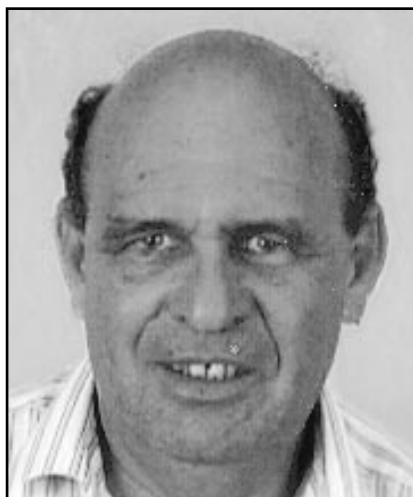
Adv. Dr. Ernst Seligsohn

Arnan Gabrieli

I have kept asking myself during the last few days, what Dr. Ernst Seligsohn would have said about this conference? What would his attitude towards it have been? I know that his attitude towards Germany was ambivalent. On one hand he was born here in Germany, his parents were born here. His mother tongue was German. His roots were in German culture. He studied in German universities. He was conversant with German literature, art, *etc.* On the other hand there was no forgiveness for what was done to him, to his family, and to everything he was brought up to believe in by the Nazi dictatorship. The country they considered to be their fatherland treated them as it did...

As I said Ernst Seligsohn was born here in Berlin. His father Dr. Martin Seligsohn was a lawyer in this city, in partnership with his brother, Dr. Arnold Seligsohn. They specialized in the area of law which is today known by the name "intellectual property law" - patents, trademarks, copyright, *etc.* Their office was located in Berlin Grunewald. Arnold wrote a textbook on German patent law and also lectured on this subject in the law faculty of the University. The younger generation of the Seligsohns joined the firm - Julius,

Adv. Arnan Gabrieli, Tel-Aviv, speaks about his partner, Adv. Ernst Seligsohn.



Arnold's son, and Ernst, Martin's son. They were both Doctors of Law and entered the firm to practice intellectual property law like their fathers.

Ernst married Lily Katz, who came from an important Jewish family in Cassel. They built their home in Berlin and already had two little children when the Nazis came to power on January 30, 1933.

When the Jewish lawyers were disbarred in April 1933, Ernst did not even consider the possibility - if there was any - of applying for permission to continue practicing. Instead the firm considered moving to Prague in Czechoslovakia, where they had quite a number of important clients. Ernst Seligsohn went to Prague to examine the possibilities and returned to Berlin with a negative recommendation. He and his father then decided to move to Palestine.

In August 1933, Ernst and Lily came to visit Palestine. They had some friends in Tel Aviv and Gedera, people who had gone to Germany to study in the 1920s and whom they had met in the University. In January 1934, Ernst, Lily and their children, together with Martin, his wife and their other two sons and daughter, as well as Lily's parents from Cassel, came to Palestine and settled in Rupin Street in Tel Aviv.

It is impossible to describe the tremendous difficulties of moving from one of the most developed countries in Europe such as Germany to an Asian, underdeveloped country such as Palestine in the 1930s. To this we should add the problems of the language and the climate. Lawyers had, apart from these problems, also the problem of learning a completely different legal system. The Palestinian legal system of the 1930s was especially complicated, since it had an Ottoman basis, with the principles of English common law and doctrines of English equity. The British Government of Palestine did not help Jewish immigrants in their efforts to become Palestinian lawyers. And this was an understatement. Not all Jewish lawyers who were expelled from Germany and came to Palestine succeeded in becoming lawyers in Palestine. Ernst Seligsohn was one of the lucky people who did. Others had to convert to other trades and professions. He opened his practice in Tel Aviv in 1940 and tried to specialize in intellectual property law. The country was too small and underdeveloped and he had to maintain a general practice in order to earn his living. Only in the late 1960s did it become possible to keep a practice

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In Memory of Dr. Alfred Prager

Brigitte Ringer Nenner



Dr. Prager made a career in New York, where among his other functions, he was the Chairman of the AUFBAU, the German Jewish newspaper in the United States.

Mrs. Brigitte Ringer Nenner commemorated him not by describing his life and achievements but rather by speaking about the Nazi persecution and the Holocaust in memory of those who perished, as he would have done had he lived. She expressed herself in her language of poetry and read several poems out of many written by her on Nazi persecution, Holocaust and survivors. How it began and how it ended.

Kristallnacht or Tale of a Witness

I am a witness,
For I have seen
I am a witness
Who lived in Berlin.

I saw those streets
Covered with glass
I saw the Brown Shirts
Having "*viel Spasse*".

I saw Jewish men
Dragged out of bed.
Fifty years later
I cannot forget.

Brigitte Ringer Nenner, a Holocaust survivor herself, commemorated her uncle Dr. Alfred Prager, a young prominent lawyer who left Berlin in 1934 for the United States after Jewish lawyers were excluded from the Courts.

I saw those Jews
Hung by the neck
Heard singing and shouting
"*Juda verreck*".

I saw the Temple
In flames, burning high.
I was a child
and asked myself "why".

I saw the crowds
Watching the show.
I did not hear anyone
Saying: "No".

9th November 1988

What is in a name...?

They call us "survivors"
As we are on earth

They call us "survivors"
For all it is worth

Who can survive
A corpses life...?!

23 December 1998

"Surviving"

As we are growing older
The pain seems to get worse
Memories of the *Shoah*
Are like a silent curse

At times when we were younger
Somehow life has gone on
With ailments and with sorrow
We, now, are left alone.

Nobody will ever understand
No surgeon has learned such wounds to mend
No matter how many pictures are seen
Nobody in future can know what has been.

June 1998

Memorial Levetzow Street - Berlin

Where our Temple still should be
A cattle car instead we see
And next to it a wall in black
Naming those who don't come back.
Names - names - names...
Their pain forever hidden

FOR JEWS DYING WAS NOT FORBIDDEN!
Translated from German by the author
June 1992

Amsterdam 1943

The 20th of June, who could ever forget?
They came very soon and took me from bed.
I did not know how to get dressed.
With one in my room, who enjoyed the arrest.
Another took parents and brother out
Speakers were hungry for Jews very loud
They brought us to a football place
Where yellow stars filled all the space
In burning sun we stood one day
At night they were leading the cattle away,
Hungry and thirsty and trembling of fear...
The cattle cars told us the slaughter was near

This happened to me in my Twentieth Year.

20 June 1998

Human Rights are Based on Mutual Understanding and Respect

Mary Robinson

At the end of February 1998 I went to Tehran to open a workshop on human rights for the Asia-Pacific Region. I noted that the region encompassed a swathe of the planet from Cyprus to Samoa and that it would indeed be a challenge to find much common ground given the diversity of cultures, faiths, systems of governments, ideologies and history represented amongst the delegations.

At the back of my mind was an apprehension that the meeting could become a forum for making arguments about adjusting human rights values to take into account specific cultures and beliefs, thus rejecting the universality of human rights. I was relieved that in his opening speech, the Foreign Minister of Iran, Mohammed Kharazzi, reaffirmed the universality of human rights. He set the tone and his delegation played a crucial role in bringing the meeting to a series of constructive conclusions leading to the adoption of a framework for technical co-operation in human rights. This helped my Office increase its activities in areas such as human rights education, technical cooperation and developing independent national human rights institutions.

While in Tehran I took the opportunity to meet with government officials and raise a number of serious issues regarding the human rights situation in Iran. Our discussions included concern about the widening gulf between the Islamic world and the west. I was told that there were vested interests on both sides working to keep Islam and the west apart and a fear of a "clash of civilizations" scenario developing. We agreed that all should work, in their own ways, against such an outcome.

A few weeks later Minister Kharazzi was the first speaker at the annual meeting of the Commission on Human Rights and invited me to organize a dialogue on Islam and human rights. I welcomed the invitation but then listened carefully as a number of my advisers warned of the risks in exploring some of the most sensitive fault lines in international affairs. I spent a few months consulting widely including with respected leaders such as the late King of Morocco

and benefited from the counsel of those supportive of such an initiative and those urging great caution.

In the end there seemed only one course to follow - a course based on my conviction that advancing human rights would always depend on a willingness to

listen and to respect diverse points of view. It was in this spirit that I worked during the summer and autumn of 1998 with the Organization of the Islamic Conference to organize a two-day seminar we titled "Enriching the Universality of Human Rights, Islamic Perspectives on the Universal Declaration of Human Rights". We invited twenty-three experts on Islamic law and human rights, three of whom were women. The main themes were: Islam and the principle of non-discrimination; civil and political rights; and economic, social and cultural rights. To preserve the basic scholarly objectives, only the experts participated but they spoke in front of an audience of government representatives, NGOs, the media and people drawn to Geneva for such a rare event.

It was an enriching experience. I learned of the fundamental principles of Islam relating to the dignity of the human person, to the search for justice and the protection of the weak, solidarity, and respect for other cultures and beliefs. In all these discussions, no one expressed doubts about the Universal Declaration of Human Rights nor denied the legitimacy or universality of human rights standards and their relevance to promoting and protecting human rights at the national level.



Mrs. Mary Robinson, former President of the Republic of Ireland, is currently the High Commissioner for Human Rights of the U.N.

This experience will be in my mind early next year when I visit Yemen, Jordan, Lebanon, Israel and the Occupied Territories in my first visit to the Middle East. I will carry with me the lessons from this seminar: that even though our customs, beliefs and traditions may be different, we can all unite in our commitment to realizing human rights. I hope to have further meetings with scholars of different faiths to continue the dialogue which can be beneficial to all of us.

In my first press conference after becoming High Commissioner I was questioned on issues relating to the State of Israel and the ongoing tensions in the Middle East. I had no answers then but acknowledged that that I would have to become involved in the human rights dimensions of the Middle East issue and noted that my Office maintained a presence in Gaza.

My own experience in Ireland and as President of Ireland taught me that hatred only begets terrorism which only begets more hatred in a never-ending cycle of horror. It taught me that it took much more courage to work for peace than to march to war. Like most of the world I rejoiced in 1994 when Prime Minister Yitzhak Rabin called for the "peace of the brave" and took the hand of Yassir Arafat.

In Israel next year I hope to meet Prime Minister Ehud Barak and learn first hand of his courageous efforts to re-invigorate the process to secure the "peace of the brave". Similarly, I will meet the Palestinian National Authority President Yassir Arafat and discuss his work in the same cause.

The United Nations history in the Middle East has been long and honourable. Countries as diverse as Ireland and Fiji continue to contribute blue helmets in the cause of peace.

I am aware of the concerns regarding the United Nations in the

State of Israel and amongst its supporters worldwide. It is self-evidently wrong that Israel is denied a place in the system of regional groups. I look forward to swift resolution of that issue and to Israel being elected to serve on bodies such as the Commission on Human Rights and on the Security Council which have pronounced themselves on issues relating to Israel and the Occupied Territories.

However, the resolutions of the Security Council, of the Commission and of the General Assembly cannot be brushed aside and least of all by myself. As High Commissioner for Human Rights, I am obliged to pursue the implementation of the norms contained in international conventions on human rights and humanitarian law. This was the context of remarks made on my behalf to a closed meeting last year of the High Contracting Parties of the Fourth Geneva Conventions, the body of international humanitarian law dealing with the particular conditions in occupied territories. It is unfortunate that those remarks, made in the spirit of strict objectivity and good conscience which guide all my interventions, have aroused such controversy.

We all recognize that issues relating to Israel have a rare ability to polarize and divide. This is never my intention but the reality must not inhibit my responsibility to speak out on important human rights issues. When I visit Israel and its neighbours in a few months time, I will speak frankly to the leaders I meet, to citizens groups and publicly. Whatever the past, my message is directed to the future and remains essentially the same: that human rights are of central importance for every society; that human rights are based on mutual understanding and respect and that human rights must underpin any search for peace.

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specializing in intellectual property law only.

Ernst Seligsohn was one of the very first lawyers in Palestine who dealt with intellectual property causes. He contributed a lot to the development of this area of the law in Palestine and especially in Israel. First, as a lawyer, he was a party to almost all of the intellectual property trials which took place in Israel during the first decades of Israel's statehood and was involved in most of the important

Supreme Court precedents in the field of copyright law, patent law, trademark law, *etc.* Secondly, as a teacher, he lectured on this subject in the Law Faculty of the Hebrew University of Jerusalem, the first law faculty to be established in Israel. All the lawyers of my generation were his students. Thirdly, as a legislator, he was a member of the ministerial committees which prepared the Israeli Patent Law and the new Copyright Bill. Finally, as an author, he wrote the first textbook in Hebrew on trademark law.

Apart from being a lawyer, Ernst

Seligsohn, was a Renaissance man, well versed in European literature, music and the arts, a man whose intellectual interests were very wide and diversified.

In the final analysis I believe he would have been pleased to know that a special conference was convened here in Berlin for the purpose of remembering the Jewish lawyers of this city and commemorating their contribution to German law.

People of the State of New York v. Museum of Modern Art

Special Report

In August 1999, the American Section of our Association filed an *amicus curiae* brief in the New York Court of Appeals supporting the New York District Attorney's investigation into allegations that two paintings on loan to the Museum of Modern Art (MOMA) were actually stolen from Austrian Jews by Nazi agents or collaborators. The two paintings by the expressionist Egon Schiele, *Portrait of Wally* and *Dead City III*, were loaned to the Museum by the state-funded Leopold Foundation of Vienna, Austria, which came into possession of the paintings after the War. Prior to Germany's annexation of Austria, *Dead City III* was owned by Fritz Grunbaum who died in Dachau. *Portrait of Wally* was allegedly stolen from Lea Jaray Bondi's apartment shortly before she fled Austria in 1938.

The American Section brief focuses on the public policy arguments raised by MOMA to the effect that the benefit of art enrichment, through loaned foreign art, outweighs New York's public interests in equal handed law enforcement, and thus justifies immunizing loaned foreign art works, as an entire class of stolen property, and therefore the entire class of criminal actors trafficking in stolen foreign art works, from equal application of the District Attorney's prosecutorial powers and the investigative procedures of the Grand Jury.

The American Section justifies its intervention by noting that New York is a population center for a large and vital Jewish community, including one of the largest populations of Holocaust survivors and their heirs. Approximately 100,000 Holocaust survivors are still living in the United States in addition to the 360,000 survivors in Israel. The brief notes that the wholesale theft of art from Jewish art owners by the Nazis (and even earlier by their Austrian collaborators) was part of a planned total obliteration of Jews and of Jewish culture from Europe. One of Hitler's goals was the establishment of a monumental art museum in Linz, Austria. By 1944, the Nazis had amassed more than 8,000 items for the Linz museum alone; this Austrian collection was in addition to the huge numbers of art works seized by the Nazis for other destinations. These criminal acts were the predicates for specific indictments against Nazi officials during the Nuremberg War Claims Tribunal.

The American Section brief argues that within the historical and legal context of recent intensified documentation of Nazi-seizures of Jewish cultural property, all cultural institutions and particularly art museums, have a significant moral and public educational duty to discharge. They have a duty to exercise a very high degree of due diligence regarding provenance and authenticity of art works to be loaned or purchased, to prevent museum participation in improper possession and traffic in Nazi-looted art. No art museum should knowingly serve as a "fence" or a "dupe" for criminal interests. The brief points out that this moral imperative was expressed in a U.S. Department of State and U.S. Holocaust Museum Conference held in Washington in November 1998. The meeting attended by representatives of 44 nations focused on Nazi-looted art and recommended the adoption of mandatory museum guidelines. In June 1998, the American Art Museum Directors (AAMD) formed a "Task Force on Spoliation of Art During the Nazi/World War Interrogatories Era (1933-1945)". The AAMD adopted its own non-mandatory guidelines, to which MOMA and other New York Art Museums were signatories, directing the art community to be particularly vigilant with respect to the legitimate provenance of works of art borrowed, displayed or permanently acquired.

The brief argues that the effort by MOMA to obtain untoward judicial expansion of Section 12.03 of the Arts and Cultural Affairs Law, to newly create absolute immunity from criminal process for foreign art works in New York, represents a revisionist approach to the provenance issues implicit in recent disclosures of the scope of Holocaust era art thefts. Public policy, however, requires emphasis to be placed upon documenting the legality and legitimacy of Nazi-era art by museums and in properly researching acquisition of all displayed works of art. The interests of justice to Holocaust survivors, to the Jewish community and to genuine art enthusiasts, as a whole, plus the intense moral resonance of these matters are weighty considerations for the NY art museums and certainly for the courts. The brief notes that these are far weightier questions than the mere administrative convenience of museum staff and cost-containment questions in the organization of omnibus exhibits.

Defending Justice and Memory

Philippe A. Grumbach

It should be recalled that Art. 261 *bis* PC prohibiting racial discrimination, was adopted by the Swiss Parliament on 18 June 1993 and ratified by popular vote on 25 September 1994, following a referendum initiated by the extreme right-wing parties. This provision entered into effect on 1 January 1999. This popular legislative process is probably a unique phenomenon in the whole of Europe.

Art. 261 *bis* PC in particular has as its purpose to respond in terms of Swiss law to the requirements of the UN International Convention of 1965 on the Elimination of All Forms of Racial Discrimination, following its ratification by Switzerland. However, Section 4 of Art. 261 *bis* PC goes beyond what the UN Convention requires in combating “negationist” and “rejectionist” theories known in German as *Auschwitzlüge* (“Auschwitz lies”). The lawmaker clearly expressed his intent to punish those who falsify this chapter of history.

The Legal Issue

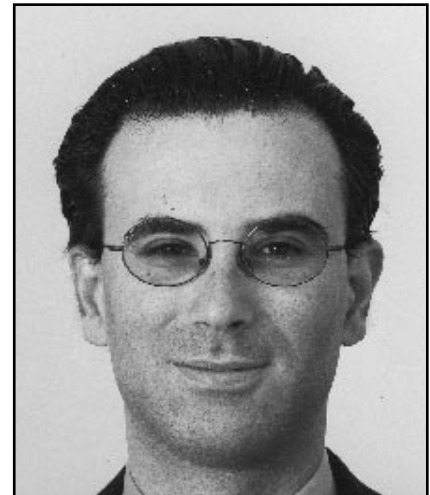
On 10 August 1999, the Supreme Court of Switzerland (Tribunal Federal) delivered an important if paradoxical decision on the subject of combating those who disseminate “negationist” views of the Holocaust.

The legal question that had to be decided was whether a bookseller who actively disseminated Roger Garaudy’s notorious work “*Founding Myths of Israeli Policy*” (*Les mythes fondateurs de la politique israélienne*) should be found guilty of propagating racial discrimination as defined in Art. 261 *bis*, section 4 of the Swiss Penal Code.

The bookseller pleaded that he was innocent of the charge, basing himself on Art. 27 of the Penal Code which provides for special treatment in terms of penal liability for members of the Press corps. In other words, the bookseller argued, only the author of the book that was published should be held criminally liable, to the exclusion of all other parties involved in the chain of distribution of the book.

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In the present case, the Swiss Supreme Court held that to admit the applicability of Art. 27 of the Penal Code to this situation would defeat the purposes sought to be achieved by the lawmaker in Art. 261 *bis* PC section 4. In fact, several passages of Garaudy’s book directly or indirectly deny or grossly minimize the significance of the genocide of the Jews by the Nazis.



Significance of the Swiss Supreme Court Decision

This decision of the Swiss Supreme Court will set an important precedent, since learned publicists were previously divided in their opinion on this issue.

It will be recalled that the Supreme Court sent the case back for decision to the Supreme Court of Appeal of the Canton of Vaud directing that the bookseller be found guilty of racial discrimination.

However, this decision should be considered as a disappointment since the Supreme Court held the view that the three Associations who were associated with the Appeal, namely the *Ligue internationale contre le racisme et l'antisemitisme* (“International League against Racism and anti-Semitism”) the *Federation Suisse des Communautés Israelites* (“Federation of Swiss Jewish Communities”), the *Association des Fils et Filles des Déportés Juifs de France* (“Association of Sons and Daughters of Jewish Deportees of France”), were not endowed

Association Demands Release of Iranian Jews

The following is the text of a press release issued by the Association on October 31, 1999 in relation to the 13 Iranian Jews arrested by the Iranian authorities on charges of spying for Israel and the United States:

“The International Association of Jewish Lawyers and Jurists, acting through international bodies, has asked the Iranian authorities to release the 13 Jews under arrest in Iran.

If these persons are indeed put on trial, the IAJLJ demands that it be allowed to send an independent observer to the proceedings, so as to ascertain that the accused are given a fair trial as has been guaranteed by the Iranian authorities.

In order to ensure that the observer also be seen to be independent, the IAJLJ approached Mr. Georges Flecheux, a well-known French jurist who in the past held the office of President of the Bar of Paris and is currently the President of the Institute of Human Rights of the Paris Bar.

Mr. Flecheux agreed to represent the IAJLJ as an observer in the trial and stated that he was ready to go to Iran upon short notice of the commencement of proceedings.

We have been informed that our message has been delivered to the Iranian authorities, but we have not yet received a response. Accordingly, we have decided to make it public, through the French Section of the Association, during the visit of the President of Iran in Paris”.

with legal capacity to file an appeal to the Supreme Court. This decision was reached on the grounds that these Associations did not suffer loss or damage as provided for in the Swiss Federal Code of Criminal Procedure (Art. 270, Section 1, CCP). Under Swiss law, a person is considered to have suffered loss or damage, if he suffers such loss or damage directly as a result of the act complained of. Exceptionally, however, only professional and economic associations are entitled to appeal to the Supreme Court together with consumers organizations for protection against unfair competition.

These kinds of rules, however, cannot be found when it comes to the treatment of racial discrimination. The position adopted by the Supreme Court is to be deplored, since it represents a narrow view of suffering loss or damage in this particular context, which excludes the consideration of any moral component. Ten or fifteen years from now, the last direct survivors of the *Shoah* will have disappeared. This means that henceforth only the initiative of judicial officials can be relied on to file proceedings against “rejectionists” and those who deny the Shoah, unless the law is changed.

Thus, a political campaign will have to be initiated for the right to be given to Associations of the kind described, to act at all appropriate levels in defending the interests of victims of racism and anti-Semitism, as well as in preserving their memory, given the fact that the victims themselves will no longer be able to defend themselves.

An Unintended Paradox

The decision of the Supreme Court of 10 August 1999 has thus unwittingly given rise to a striking paradox. On the one hand, it is extremely forward looking in its exposure of Holocaust deniers and negationists but on the other, it has brought about a situation in which only a few years hence there will no longer be anyone left alive to ensure that those who deny or negate this historical truth will not go unchallenged, unless the Associations which sought to perform this important function are in fact empowered to act. It would not be fitting for such a role to be left to prosecutors to assume. Clearly associations representing the victims can alone be relied on to ensure that this historic task is not neglected by future generations.

Ethics in the Public Service

Aviad Hacoen

The rule-kingdom of public law in Jewish law - constitutional law and public administrative law - ranges over continents and seas, crosses cities and communities, and carries with it rich lore hundreds of years old. Prior to treading the paths of this kingdom, community leaders and stern-faced governors pass who desire to impose their authority on the public; magnates and noblemen who wish to control the public coffers entrusted to them, with a strong hand and an outstretched arm; powerful men who take the law into their own hands, seeking to unlawfully negate decisions which have been reached; and at their side the humble of the land acting as the trustees of the public, whose houses are empty and all that is owned by them - belonging to the public; leaders and *dayanim*, teachers and writers, treasurers and tax collectors who distance themselves from anything which has the “taint of bribery”, and who refrain from any act which might give rise to a suspicion of calumny.

Already in earlier ages, wise men sought to establish rules and restrictions, which would create a code of proper conduct for the servants of the public and would ensure integrity in the public service. The learned men of Jewish law applied to public servants - both those elected and those working in the public service - various rules of ethics, which required them to exercise greater care in respect of their conduct, at a stricter level than that required of a man acting within the sphere of private law.

The basis for making public servants subject to special rules of conduct is the fact that they are deemed to be “trustees”, whose status and power are sustained by the public and who are given authority and power in order to serve that public truly and faithfully.

In order that he may fulfill his functions faithfully, the public servant must devote the majority of his time to his public work.

This principle finds expression in Jewish law from the state-

ment concerning Moses in the *Torah*: “And Moses went down from the Mount unto the people” *Exodus, 19:14*, which teaches that Moses would not have turned to his business and would not have gone down to his house except “from the Mount” , “unto the people” (*Mechilta de-Rabbi Ishmael, Parashat Iтро*).



This obligation has been made so strict that even when the public servant is not in direct contact with those requiring his services, it is proper “for his heart and mind to be on them” (*Rabbi Menachem Hameiri, Provence, 14th Century*).

In order to prevent a situation where there is a conflict of interest between the duty to faithfully fulfill his functions and his private interests, the public servant is on occasion prohibited from engaging in any other business, and a duty is imposed on him to safeguard his health and ensure that he rests properly during the night, in order that he may properly perform his job during the day (*Sefer Mordechai to Tractate Baba Matzia, Rabbi Mordechai Ben Rabbi Hillel of the Ashkenazi sages, 13th Century*).

The public servant must exercise particular care not to exploit his office so as to make the public fear him and not to use his high position in order to obtain benefits. As is well known, the grave normative prohibition against accepting bribes - “do not accept bribes because the bribes will blind commissioners and will distort the words of the righteous” was originally directed towards *dayanim* sitting in judgment.

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Like many other rules of public law, the prohibition on bribery was expanded and imposed also on persons working in the public service. Moreover, additional ethical obligations were imposed on them which were designed to prevent the exploitation of their power - even if that exploitation did not actually amount to bribery - in order to receive personal benefits.

Thus, the sages interpreted (*Yalkut Shimoni, Judges, 247, 71*) the prayer of Samsom: "Remember me, I pray thee, and strengthen me, I pray thee, only this once" (*Judges, 16:28*), "I remember twenty-two years in which I judged Israel, and did not tell one of them to pass me a rod from place to place".

Out of a desire to preserve and nurture the public's respect for the public authority, the public official is commanded to exert particular care also in his contacts with people and in his private life.

The *Halacha* which was originally stated in respect of the *Torah* scholar - "In the same way as a wise man is known for his wisdom and knowledge and is distinguished by these from the rest of the people, so too he must be known for his acts, in his food and his drink... and all these acts shall be pleasant and very proper" (*Rambam, Mishne Torah, Halachot De'ot, 5, 1*) - was also applied to public servants. Thus, for example, a person who was appointed a "leader of the community" was prohibited from performing disreputable tasks which were not part of his work, in public, so that he would not be held in contempt by the public and thus cause the authority which he represented to be held in disrepute in the eyes of the public (*Talmud Babli, Kidushim, 70, 71; Rambam, Mishne Torah, Halachot Sanhedrin, 25, 4*).

An interesting rule in this connection was promulgated in the Berlin community, according to which the leaders of the community were required to attend the meetings of the community committees, dressed in a "mantle" *i.e.* a top garment, and the reason - "so that there would be cast over him dread of the public and the fear of God" (Records of the Berlin community, page 29, N. Rackover, *The Rule of Law in Israel*, page 87). A person infringing this rule was subject to a fine.

Public trust in the public authority is essential to its functioning, respect for it and respect for its decisions.

This principle is well rooted in the soil of Jewish law from ancient times. One of the main principles of the rules concerning public servants in Jewish law relies on *Mishnat Avot* "And all who deal with the public shall deal with them for the sake of God". These words were interpreted by Rabbi Ya'akov Ben Zvi Emdin (of the German sages of the 18th Century) as the imposi-

tion of a special duty on public servants to refrain from exploiting their office to become rich, even if done lawfully and legally, in order to prevent vilification.

A reflection of the tension involved in this issue, which also prevails today, is found in the *Midrash* on the verse (*Exodus 33:8*), "And it came to pass, when Moses went out unto the tabernacle, that all the people rose up, and stood every man at his tent door, and looked after Moses, until he was gone into the tabernacle."

The sages considered the interpretation of this "looking", and stated (*Tanhuma Yashan, Pekudi, 4*): "And they looked after Moses" - and what would they have said?... In condemnation they would have said, see a neck, see legs, eats from the Jews and drinks from the Jews, and everything he has is from the Jews. And his friend replies: A person who controlled the work of the tabernacle, you do not ask that he be rich! And because Moses heard this, he said to them: I vow, when the tabernacle is finished, I will make an account with you, as it is said (*Exodus, 38:21*) "This is the sum of the tabernacle".

Accordingly, a public servant who deals in financial matters is commanded to provide accounts of his activities even in respect of those cases where this is not required as a matter of law. The sages learned from the rule in the *Torah* (*Numbers, 32:22*), "and [you] shall be guiltless before the Lord, and before Israel" that the public servant must make every effort in order to "perform his duty towards the people" - to appear to be trustworthy and honest in the eyes of the public, not less than in his efforts to be "guiltless" towards God. This principle relies on the statement of the prophets - "The Lord God of gods, he knoweth, and Israel he shall know", (*Joshua, 22:22*), and as is written: "So shalt thou find favour and good understanding in the sight of God and man" (*Proverbs, 3, 4*).

This obligation "to perform one's duty towards the people" has numerous repercussions for the care which must be taken in dealing with the public's money. I shall refer to only a few of them. The *Mishnah* in *Tractate Shekalim* (3,2) deals with the duty of a person who comes into contact with public moneys to refrain from any act which might give rise to suspicion that he dealt dishonestly with that money. Accordingly, he is prohibited from engaging in the management of public moneys when he is dressed in clothes having pockets or long sleeves, in which money can be hidden "in case he become rich and it will be said 'from the moneys of the office (the public funds in the Temple) he became rich'".

In addition, since as a matter of law no doubt may be cast upon the honesty and trustworthiness of people who have been conferred with the task of being responsible for the public coffers (by virtue of “the assumption of qualification and innocence” applicable in Jewish law as in other contemporary legal systems), they have been made subject to the obligation to present the public with a report of all their activities (*Tor, Yoreh De’ah, Section 257, Beit Yosef, Shulchan Aruch and Rama, Ibid*”).

This obligation, to “appease the people”, led to the establishment of an additional principle which requires public persons engaged in collecting moneys for the public coffers to do so in the presence of at least two other people, and to distribute them in the presence of at least three other people (*Rambam, Halachot Matanot Ani’im, 9,5*).

An additional interesting example concerning the duty to prevent villification on the part of the public in respect of the activities of the public servant is found in one of the community ordinances promulgated in Mantua in Italy, in 1538. This provision stated that it was the duty of a person applying to work in the public service to pass through “a cooling off” period between his work in the private sector and his work, in the same field, in the public sector, in order to prevent slander to the effect that he is exploiting his connections in the private sector to advance his interests in the public sector and *vice versa*.

As part of the application of proper ethical norms in the public service, Jewish law scholars also struggled on occasion against the “political” appointment of inappropriate persons to the public service. Even though according to the Jewish tradition it is possible to find roots for the permission - and perhaps even the duty - to prefer the appointment of people to public offices by reason of their family connections (such as the crown which passes by “inheritance” from father to son) the sages qualified the rule in later generations and held that every appointment must be examined, first and foremost, on the basis of the qualifications of the candidate and not on the basis of his connections.

A reflection of the reservations felt about the phenomenon of nepotism - preference for family members - for public offices, is found in the Babylonian Talmud (*Psachim, 57, p.1*) “Alas, for the house of Ishmael ben Fiabi, who are high priests, and whose sons are treasurers, and whose sons-in-law are administrators, and their servants strike the people with sticks”. This principle was even applied as a guideline for the High Court of Justice in

the State of Israel, when it came to decide the question of the qualification of a person having a political identity to occupy a particular public office (H.C.J. 4566/90 *Dekel v. Minister of Finance*, 45(1) P.D. 33).

The duty to refrain from a conflict of interests in the fulfillment of the public function led to the prohibition on the appointment of family members to act in the same functions (*Jerusalem Talmud, Pe’ah, Section 8, Rule 7*).

A comparison of the status of public servants to dayanim sitting in the courts led to a duty also being imposed on them to preserve the confidentiality of information reaching them within the framework of their functions, as well as a prohibition on “leaking” that information. Rabbi Eliahu Ibn Haim (Turkey, 16th Century) even prohibited persons from sitting on the community committees if they were found to have “leaked” information which reached them within the framework of their jobs (*Responsa, Rabbi Eliahu Ibn Haim, Chapter 111*).

In conclusion, Jewish law regards the public servant as a “trustee” of the public, who, in all his activities, must act for the benefit of the public, and must exercise particular care in his acts, so as to do what is right and good not only “in the eyes of God” but also “in the eyes of man”.

Mark Your Calendar Now

Toronto International Conference of The International Association of Jewish Lawyers and Jurists

Sheraton Centre Hotel, Toronto, Canada

August 13-16, 2000

To be followed by Post-Conference tours.

Full programme to be published in the next issue of *JUSTICE*.

For further information please contact the IAJLJ office:

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From the Association

U.K. Section Holds Annual Dinner at Mansion House

The U.K. Section of the Association held its annual dinner this year at a most prestigious venue - the beautiful and historic Mansion House which is the official residence of the Lord Mayor of the City of London - by kind permission of the Jewish Lord Mayor - Lord Levine of Parkesdown. Lord Levine was welcomed by Lord Woolf, the Master of the Rolls. The Guest of Honour was Lord Mackay of Clashfern, the former Lord Chancellor, who described how he and his wife had drawn "great strength from the Jewish scriptures". He applauded the devotion of the Jewish people to the law and the legal profession, and praised the work of the Association. Lord Mackay was thanked by Judge Myrella Cohen, Chairman of the U.K. Section, and she presented both Lord Levine and Lord Mackay with the "History of the Jewish People." The function was attended by Judge Hadassa Ben-Itto, representatives of many other Sections and judges, barristers, solicitors, jurists and their guests from the U.K.



**Back L to R: Sheriff and Sheriff's Lady, Judge Cohen, Judge Ben-Itto, Lord Mackay, Lady Mackay, Colonel Cohen, Mrs. Myan, Judge Myan, Recorder of London, Sheriff's Lady and Sheriff.
Front L to R: The Lady Mayoress, the Lord Mayor, Lord Woolf, Lady Woolf.**



L to R: Ilan Steinberg (WJRO), Neal M. Sher, Amb. Stuart E. Eizenstat

Secretary Eizenstat, WJRO Receive Pursuit of Justice Honour

The American Section bestowed its 1999 Pursuit of Justice Award to Ambassador Stuart E. Eizenstat, Deputy Secretary of the Treasury, and the World Jewish Restitution Organization. The award ceremony took place at the Hart Senate Office Building on Capitol Hill.

Neal M. Sher, President of the American Section of the Association, recommended Secretary Eizenstat and the WJRO for their vital work on

Holocaust restitution. Eizenstat, an Undersecretary of State until his recent confirmation as Deputy Secretary of the Treasury, has steered the U.S. effort in restitution matters since 1995. Sher credited Secretary Eizenstat for galvanizing U.S. restitution policy.

According to Secretary Eizenstat, the Holocaust and looted assets could have been consigned to the dry pages of history, yet they are now front page news. Secretary Eizenstat termed it a "noble effort to right the wrongs of the worst and most ghastly events of this century before going on to the next." The work is producing results.

Secretary Eizenstat concluded by remarking that if we can absorb all of the Holocaust's lessons as we go into the 21st century, then that will be the greatest tribute to the memory of the victims.

Prof. Cotler Elected to Canadian Parliament

The Association congratulates its Special Counsel, Prof. Irwin Cotler, upon his election to the Canadian Parliament.

Editor's note: Correct photograph of Dr. Yvonne Arndt, which should have appeared in our Special Issue: Remember Berlin, Autumn 1999, p. 55. JUSTICE apologizes for the error.



Interrogations under the Spotlight of Human Rights Legislation

H.C. 5100/94; 4054/95; 6536/95; 5188/96; 7563/97; 7628/97; 1043/99

Public Committee Against Torture in Israel *et al v. The State of Israel et al.*

Before: President A. Barak; Deputy President S. Levin; Justices T. Or; E. Matza; M. Cheshin; Y. Kedmi; I. Zamir; T. Strasberg-Cohen and D. Dorner

Judgment delivered 6 September 1999

Precis

The General Security Service (“GSS”) investigates individuals suspected of committing crimes against Israel’s security. The Supreme Court considered whether the GSS is authorized to conduct these interrogations and whether it may do so on the basis of ministerial directives regulating interrogation methods which authorize investigators to apply physical means against suspects and whether the legal defence of “necessity” could be used to sanction these interrogation practices.

The Court unanimously concluded that according to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and authorize the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual GSS investigator does not possess the authority to employ physical means which infringe upon a suspect’s liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.

An investigator who insists on employing these methods, or does so routinely, is exceeding his authority. His potential criminal liability shall be examined in the context of the “necessity” defence. Just as the existence of the “necessity” defence does not bestow authority, so too the lack of authority does not negate the applicability of the necessity defence nor that of other defences. The Attorney General may instruct himself regarding the circumstances in which investigators shall not stand trial, if they claim to have acted from a feeling of “necessity”.

The Court pointed out that a legal statutory provision is necessary for the purpose of authorizing the government to instruct in the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary “law of investigation”.

Consequently, the Court decided that the *order nisi* be made absolute

Judgment

President A. Barak:

Background

1. The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding. Terrorist organizations have established as their goal Israel’s annihilation. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy (For an in depth description of this phenomenon see the *Report of the Commission of Inquiry Regarding the GSS’ Interrogation Practices with Respect to Hostile Terrorist Activities* headed by (ret.) Justice M. Landau, 1987 - hereinafter, “Commission of Inquiry Report”) published in the Landau Book 269, 276 (Volume 1 , 1995).

The facts presented before this Court reveal that one hundred and twenty one people died in terrorist attacks between 1.1.96 and 14.5.98. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel’s cities. Many attacks... were prevented by measures taken by the authorities responsible for fighting these hostile terrorist activities on a daily basis. The main body responsible for fighting terrorism is the GSS.

In order to fulfill this function, the GSS also investigates those suspected of hostile terrorist activities. The purpose of these interrogations is, *inter alia*, to gather information regarding terrorists and their organizing methods for the purpose of thwarting and preventing them from carrying out these terrorist attacks. In the context of these interrogations, GSS investigators also use physical means. The legality of these practices is being examined before this Court in these Applications.

[President Barak next described the nature of the Applications, the histories of the respective Applicants, and the various alleged methods of interrogation].

Applicants’ Arguments

14. In principle, all the Applications raise two essential arguments:

First, that the GSS is never authorized to conduct interrogations. **Second**, that the physical means employed by GSS investigators not only infringe upon the human dignity of the suspect undergoing interrogation, but in fact constitute criminal offences. These methods, argue the Applicants, are in violation international law as they constitute “torture,” which is expressly prohibited under international law. Further, the “necessity” defence which, according to the State, is available to the investigators, is not relevant to the circumstances in question. In any event, the doctrine of “necessity” at most constitutes an exceptional *post factum* defence, exclusively confined to criminal proceedings against investigators. It cannot provide GSS investigators with the preemptory authorization to conduct interrogations *ab initio*. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the legislature pertaining to the use of such methods and conforming to the requirements of Basic Law: Human Dignity and Liberty.

We asked the Applicants’ attorneys whether the “ticking time bomb” rationale was not sufficiently persuasive to justify the use of physical means, for instance, when a bomb is known to have been placed in a public area and will undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once. This question elicited a variety of responses... There are those convinced that physical means are not to be used under any circumstances; ... others argue that even if it is perhaps acceptable to employ physical means in most exceptional “ticking time bomb” circumstances, these methods are in practice used even in absence of the “ticking time bomb” conditions. The very fact that, in most cases, the use of such means is illegal provides sufficient justification for banning their use altogether... All the Applicants highlight the distinction between the ability to potentially escape criminal liability *post factum* and the granting of permission to use physical means for interrogation purposes *ab initio*.

The State’s Arguments

15. The position of the State is as follows: The GSS investigators are duly authorized to interrogate those suspected of committing crimes against Israel’s security. This authority emanates from the government’s general and residual (prerogative) powers (Section 40 of Basic Law: the Government). The authority to investigate is equally bestowed upon every individual investigator by virtue of Section 2(1) of the Criminal Procedure (Testimony) Law and the relevant ancillary powers. With respect to the physical means employed by the GSS, it is submitted that these methods cannot be qualified as “torture,” “cruel and inhuman treatment” or “degrading treatment,” that are strictly prohibited under international law. The practices of the GSS do not cause pain and suffering, according to the State’s position.

Moreover, the State argues that these means are equally legal under Israel’s domestic law. This is due to the “necessity” defence outlined in Section 34(11) of the Penal Law (1977). Hence, in the specific cases having the relevant conditions inherent to the “necessity” defence, GSS investigators are entitled to use “moderate physical pressure” as a last resort in order to prevent real injury to human life and well being. Resorting to such means is legal, and does not constitute a criminal

offence... As per the State’s submission, there is no reason for prohibiting a particular act, in specific circumstances, *ab initio* if it does not constitute a crime. This is particularly true with respect to the GSS investigators who are responsible for the protection of lives and public safety. In support of their position, the State notes that the use of physical means by GSS investigators is most unusual and is only employed as a last resort in very extreme cases. Moreover, even in these rare cases, the application of such methods is subject to the strictest of scrutiny and supervision, as per the conditions and restrictions set forth in the Commission of Inquiry’s Report.

The Commission of Inquiry’s Report

16. The GSS’ authority to employ particular interrogation methods, and the relevant law respecting these matters were examined by the Commission of Inquiry ... Following prolonged deliberation, the Commission concluded that the GSS is authorized to investigate those suspected of hostile terrorist acts, even in absence of express statutory regulation of its activities... The Commission concluded that in cases where the saving of human lives necessarily requires obtaining certain information, the investigator is entitled to apply both psychological pressure and “a moderate degree of physical pressure”. An investigator who, in the face of such danger, applies that specific degree of physical pressure, which does not constitute abuse or torture of the suspect, but is instead proportional to the danger to human life, can avail himself of the “necessity” defence, in the face of potential criminal liability. The Commission was convinced that its conclusions to this effect were not in conflict with international law, but instead reflect an approach consistent with both the rule of law and the need to effectively safeguard the security of Israel and its citizens.

The Commission’s recommendations were duly approved by the government.

The Authority to Interrogate

18. The term “interrogation” takes on various meanings in different contexts. For the purposes of the Applications before the Court at present, we refer to the asking of questions which seek to elicit a truthful answer... An interrogation inevitably infringes upon the suspect’s freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect’s dignity and his individual privacy. In a State adhering to the rule of law, interrogations are therefore not permitted in the absence of clear statutory authorization, be it through primary legislation or secondary legislation, the latter being explicitly rooted in the former. This essential principle is expressed by the legislature in the Criminal Procedure (Powers of Enforcement - Detention) Law - 1996 which states as follows:

“Detentions and arrests shall be conducted only by law or by virtue of express statutory authorization for this purpose” (Section 1(a)).

Hence, the statute and regulations must adhere to the requirements of Basic Law: Human Dignity and Liberty (see Section 8). The same

principle applies to interrogations. Thus, an administrative body, seeking to interrogate an individual... must point to the explicit statutory provision which legally empowers it. This is required by the rule of law (both formally and substantively). Moreover, this is required by the principle of administrative legality. "If an authority (government body) cannot point to a statute from which it derives its authority to engage in certain acts, that act is *ultra vires* and illegal." (See I. Zamir, *Administrative Authority* (1996) at 50; See also B. Bracha, *Administrative Law* (Vol. 1, 1987) at 25).

19. Does a statute, authorizing GSS investigators to carry out interrogations exist? A specific instruction, dealing with GSS agents, in their investigating capacity was not found. "The Service's status, its function and powers are not in fact outlined in any statute addressing this matter" (Commission of Inquiry's Report, *supra*). This having been said, the GSS constitutes an integral part of the executive branch. The fact that the GSS forms part of the executive branch is not in itself sufficient to invest it with the authority to interrogate. It is true that the government does possess residual or prerogative powers, defined as follows:

"The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority." (Section 40, Basic Law: The Government).

However, we are not to conclude from this provision the authority to investigate, for our purposes. As mentioned, the power to investigate infringes on a person's individual liberty. The government's residual (prerogative) powers authorize it to act whenever there is an "administrative vacuum" (See H.C. 2918/93 *The City of Kiryat Gatt v. The State of Israel and others*, 37 (5) P.D. 832 at 843).

A so called "administrative vacuum" of this nature does not appear in the case at bar, as the relevant field is entirely occupied by the principle of individual freedom. Infringing upon this liberty therefore requires specific directives (*per* President Shamgar in H.C. 5128/94 *Federman v. The Minister of Police*, 48(5) P.D. 647 at 652.).

20. While it is true that various interrogation directives, some with ministerial approval, followed the Commission of Inquiry's Report, these do not satisfy the requirement that the authority flow directly from statute or from explicit statutory authorization. The directives set out following the Inquiry Commission's Report merely constitute internal regulations.

From where then, do the GSS investigators derive their interrogation powers? The answer is found in Section 2(1) of the Criminal Procedure [Testimony] Law which provides (in its 1944 version, as amended):

"A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold inquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence..."

It is by virtue of the above provision that the Minister of Justice particularly authorized the GSS investigators to conduct interrogations regarding the commission of hostile terrorist activities... It appears to us - and we have heard no arguments to the contrary- that the question of the GSS' authority to conduct interrogations can thus be resolved. By virtue of this authorization, GSS investigators are tantamount to police officers in the eyes of the law. If this solution is appropriate, is there no place for regulating the GSS investigators' powers by statute?

[President Barak continued to discuss the means employed for interrogation purposes; the scope of the GSS powers and whether they encompassed the use of physical means in the course of the interrogation as well as whether the "law of interrogation" sanctions the use of physical means, such as those used in GSS interrogations].

22. An interrogation, by its very nature, places the suspect in a difficult position. "The criminal's interrogation," wrote Justice Vitkon over twenty years ago, "is not a negotiation process between two open and fair vendors, conducting their business on the basis of maximum mutual trust" (Cr. A 216/74 *Cohen v. The State of Israel* 29(1) P.D. 340 at 352). An interrogation is a "competition of minds", in which the investigator attempts to penetrate the suspect's thoughts and elicit from him the information the investigator seeks to obtain...

Indeed, the authority to conduct interrogations, like any administrative power, is designed for a specific purpose, which constitutes its foundation, and must be in conformity with the basic principles of the [democratic] regime. In crystallizing the interrogation rules, two values or interests clash. On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated. This having been said, these interests and values are not absolute. A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth. "The interrogation practices of the police in a given regime," noted Justice Landau, "are indicative of a regime's very character" (Cr. A. 264/65 *Artzi v. The Government's Legal Advisor*, 20(1) P.D. 225 at 232). At times, the price of truth is so high that a democratic society is not prepared to pay it (See Barak, *On Law, Judging and Truth*, 27 *Mishpatim* (1997) 11 at 13). To the same extent however, a democratic society, desirous of liberty seeks to fight crime and to that end is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary.

Our concern, therefore, lies in the clash of values and the balancing of conflicting values. The balancing process results in the rules for a 'reasonable interrogation' (See Bein, *The Police Investigation- Is There Room for Codification of the 'Laws of the Hunt'*, 12 *Iyunei Mishpat* (1987) 129). These rules are based, on the one hand, on preserving the "human image" of the suspect (See Cr. A. 115/82 *Mouadi v. The State of Israel* 35 (1) P.D. 197 at 222-4) and on preserving the "purity of arms" used during the interrogation (Cr. A. 183/78, *supra, ibid.*). On the other hand, these rules take into consideration the need to fight the phenomenon of criminality in an effective manner generally, and

terrorist attacks specifically. These rules reflect “a degree of reasonableness, straight thinking (right mindedness) and fairness”.

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of “brutal or inhuman means” in the course of an investigation (F.H. 3081/91 *Kozli v. The State of Israel*, 35(4) P.D. 441 at 446). Human dignity also includes the dignity of the suspect being interrogated... This conclusion is in perfect accord with (various) international law treaties - to which Israel is a signatory - which prohibit the use of torture, “cruel, inhuman treatment” and “degrading treatment”... These prohibitions are “absolute”. There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable. **Second**, a reasonable investigation is likely to cause discomfort. Indeed, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various machinations and specific sophisticated activities which serve investigators today. In the end, the legality of an investigation is deduced from the propriety of its purpose and from its methods...

From the General to the Particular

[Justice Barak entered into a detailed analysis of each interrogation method, the harm it caused the suspect, the extent of its violation of his dignity and the extent to which it exceeded what is necessary and whether it formed part of the general power to conduct a fair and effective interrogation. Justice Barak concluded that the power to interrogate given to the GSS investigator by law is the same interrogation powers the law bestows upon the ordinary police investigator, and that the restrictions applicable to the police investigations are equally applicable to GSS investigations. No statutory instructions endow a GSS investigator with special interrogating powers that are either different or more serious than those given the police investigator.]

Physical Means and the “Necessity” Defence

33. We have arrived at the conclusion that the GSS personnel who have received permission to conduct interrogations (as per the Criminal Procedure [Testimony] Law) are authorized to do so. This authority - like that of the police investigator - does not include most of the physical means of interrogation which are the subject of the Applications before us. Can the authority to employ these interrogation methods be anchored in a legal source beyond the authority to conduct an interrogation? An authorization of this nature can, in the State’s opinion, be obtained in specific cases by virtue of the criminal law defence of “necessity”, prescribed in the Penal Law, Section 34 (1):

“A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from

substantial danger of serious harm, imminent from the particular state of things, at the requisite timing, and absent alternative means for avoiding the harm.”

34. We are prepared to assume that- although this matter is open to debate - (See e.g. A. Dershowitz, Is it Necessary to Apply ‘Physical Pressure’ to Terrorists- And to Lie About It?, 1989, 23 *Israel L. Rev.* 193) - the “necessity” defence is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature. Likewise, we are prepared to accept - although this matter is equally contentious- (See M. Kremnitzer, The Landau Commission Report- Was the Security Service Subordinated to the Law or the Law to the Needs of the Security Service?, [1989] 23 *Israel L. Rev.* 216, 244-247) - that the “necessity” exception is likely to arise in instances of “ticking time bombs”, and that the immediate need refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion’s occurrence...

35. Indeed, we are prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the “necessity” defence, if criminally indicted. This however, is not the issue before this Court. We are not dealing with the potential criminal liability of a GSS investigator who employed physical interrogation methods in circumstances of “necessity.” Nor are we addressing the issue of admissibility or probative value of evidence obtained as a result of a GSS investigator’s application of physical means against a suspect. The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of “necessity”. Moreover, we are asking whether the “necessity” defence constitutes a basis for the GSS investigator’s authority to investigate, in the performance of his duty...

36. In the Court’s opinion, a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the “necessity” defence. ... This defence deals with deciding those cases involving an individual reacting to a given set of facts. It is an *ad hoc* endeavour, in reaction to an event. It is the result of an improvisation given the unpredictable character of the events.. Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power. The administrative power is based on establishing general, forward looking criteria, as noted by Professor Enker.

“Necessity is an after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values...The defence of necessity does not define a code of primary normative behaviour. Necessity is certainly not a

basis for establishing a broad detailed code of behaviour such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like (Enker, "The Use of Physical Force in Interrogations and the Necessity Defense," in *Israel and International Human Rights Law: The Issue of Torture* 61,62 (1995)).

Moreover, the "necessity" defence has the effect of allowing one who acts under the circumstances of "necessity" to escape criminal liability. The "necessity" defence does not possess any additional normative value... The very fact that a particular act does not constitute a criminal act (due to the "necessity" defence) does not in itself authorize the administration to carry out this deed, and in doing so infringe upon human rights. The rule of law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect. The lifting of criminal responsibility does not imply authorization to infringe upon a human right...

37. If the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. The release would flow not from the "necessity" defence but from the "justification" defence which states:

"A person shall not bear criminal liability for an act committed in one of the following cases:

(1) He was obliged or authorized by law to commit it." (Section 34(13) of the Penal Law)

The defence to criminal liability by virtue of the "justification" is rooted in an area outside of the criminal law. This "external" law serves as a defence to criminal liability. This defence does not rest upon the "necessity", which is "internal" to the Penal Law itself...

A Final Word

39. This decision opens with a description of the difficult reality in which Israel finds itself security wise. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, thereby requiring the authorization to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the

ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty "befitting the values of the State of Israel," is enacted for a proper purpose, and to an extent no greater than is required. (Section 8 of the Basic Law: Human Dignity and Liberty).

Consequently, it is decided that the *order nisi* be made absolute, as we declare that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the "necessity" defence, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the "necessity" defence be available to GSS investigators, be within the discretion of the Attorney General, if he decides to prosecute, or if criminal charges are brought against them, as per the Court's discretion.

Deputy President S. Levin, and Justices Or, Matza, Cheshin, Zamir, Strasberg-Cohen and Dorner agreed.

Justice Kedmi:

Justice Kedmi agreed but added that it was difficult for him to accept a state of affairs where due to the absence of explicit legislation, the State would be helpless, legally, in those rare emergencies defined as "ticking time bombs" and that the State would not be authorized to order the use of exceptional interrogation methods in those circumstances. As far as he was concerned, such an authority exists in those circumstances, deriving from the basic obligation of being a State to defend its existence, its well-being, and to safeguard the lives of its citizens. In those circumstances, the State - as well as its agents - would have the natural right of "self-defence", in the larger meaning of the term.

In order to prevent a situation where the "time bomb" was ticking and nothing could be done, he therefore suggested that the judgment be suspended for a period of one year, during which the GSS could employ exceptional interrogative methods in those rare cases of "ticking time bombs", on the condition that explicit authorization be given by the Attorney General. In this period the *Knesset* would have the opportunity to consider the issue and the GSS time to adapt itself.

*Extracts taken from official translation of the Ministry of Justice.
Abstract prepared by Dr. Rahel Rimon, Adv.*

The Council of Europe Welcomes The International Association of Jewish Lawyers and Jurists Strasbourg, France, January 20-23, 2000

Programme

Thursday, January 20, 2000

Arrival and registration at the Holiday Inn Hotel
Free Evening

Friday, January 21, 2000

09:00-10:00 Welcome reception at the Council of Europe:
Mr. **Walter Schwimmer**, Secretary General of the Council of Europe
Mr. **Hans Christian Kruger**, Deputy Secretary General of the Council of Europe
Judge **Hadassa Ben-Itto**, President, I.A.J.L.J.
Mr. **Joseph Roubache**, President of the European Council of the I.A.J.L.J.
Keynote Address: **From One Council of Europe to Another - Traversing a European Orbit**
Mr. **Francis Rosenstiel**, Director of Research, Planning and Publishing of the Council of Europe

10:00-10:30 Coffee Break

10:30-12:30 Session at the Council of Europe
From Xenophobia to Anti-Semitism and Vice Versa: A Calamity in Europe... and Elsewhere?

Chairperson and Moderator:

Mr. **Daniel Lack**, Advocate, permanent representative of the I.A.J.L.J. to the U.N. in Geneva

Speakers:

Mrs. **Isil Gachet**, Head of the Secretariat of ECRI
Professor **Joseph Voyame**, First Deputy President of ECRI (European Commission Against Racism and Intolerance)

Professor **Andras Kovacs**, Central European University in Budapest, Hungary

Mr. **Jean Kahn**, President of the European Monitoring Center against Xenophobia and Racism

Conclusion:

Mr. **Alexandre Adler**, France, journalist, historian

13:00-14:15 Light lunch at the European Court of Human Rights

14:30- 16:00 Session at the European Court of Human Rights

Chairperson and Moderator:

Judge **Myrella Cohen**, President of the U.K. Section of the I.A.J.L.J.

The European Court of Human Rights:

A Permanent Institution in the Service of the European Citizen

Judge **Jean-Paul Costa**, Judge at the European Court of Human Rights

The International Criminal Tribunal:

Toward an International Legal Order

Mr. **Jean-Baptiste Avel**, Deputy Director of European and International Affairs, Ministry of Justice, France

Balancing Security and Human Rights:

The Israeli Experience

Mr. **Dan Meridor**, Chairman of the Committee for Foreign Affairs and Defense of the Knesset (Israeli Parliament) and former Minister of Justice and Minister of Finance of Israel

Conclusion:

Mr. **Bernard Cahen**, former President of the "Union Internationale des Avocats", President of "Rassemblement des Avocats Juifs de France"

19:30 Shabat Dinner with the Jewish Community of Strasbourg

Saturday, January 22, 2000

17:30 Business Meeting of the European Council of the I.A.J.L.J.

20:00 **Gala Dinner**

Under the auspices of the I.A.J.L.J. with the participation of the Weizmann-Europe Institute of Science

Presiding:

Judge **Hadassa Ben-Itto**, President of the IAJLJ

Guests of Honour:

Mr. **Walter Schwimmer**, Secretary General of the Council of Europe

Mr. **Hans Christian Kruger**, Deputy Secretary General of the Council of Europe

Hosts:

Mr. **Joseph Roubache**, President of the European Council of the I.A.J.L.J.

Mr. **Robert Parienti**, Director of the European Committee of the Weizmann Institute of Science

I.A.J.L.J. honours and pays tribute to:

Mr. **Jean Kahn**, President of the European Monitoring Center against Xenophobia and Racism in Vienna

Justice **Pierre Drai**, former Premier President de la Cour de Cassation, France, Honorary President of the French Section of the IAJLJ

Sunday, January 23, 2000

Excursion to Strasbourg and environment: "Jewish Presence in Alsace"; Visit the Jewish Museum of Bouxwiller; Visit and lunch at Obernai; Visit Colmar (if time permits).