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*The Association wishes to record its special gratitude to
THE RICH FOUNDATION (SWITZERLAND)
for its contribution to The Remember Warsaw Conference*

Remember Warsaw

***Remember Warsaw* is the third 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 Warsaw International Conference was held on May 9-13, 2001, by the IAJLJ, under the auspices of the Secretary General of the Council of Europe. Co-Sponsors were The Polish National Council of Legal Advisors; The Polish National Bar Association; The Polish Judges Association; and European Judges and Prosecutors for Democracy and Freedom. Following are presentations from the Conference. More will appear in the next issue of *JUSTICE*.**

PRESIDENT'S MESSAGE

W

e are gathered here today to remember our colleagues, from the bar, from the bench and from academia; the Jewish lawyers, judges, law professors and legislators, who lived and practiced here, who studied and taught in Polish universities, who wrote law books and created precedents. They were members of proud Jewish communities, but they were also an integral part of the Polish legal community, of its history and its culture.

Members of the International Association of Jewish Lawyers and Jurists have come from around the world to mark their lost colleagues' contribution to the legal system of this country and to salute their memory. We note with satisfaction that Polish lawyers and judges are with us, co-sponsoring this gathering.

Your presence is a statement, a recognition of the fact that our colleagues were also your colleagues.

The decision to hold this conference in Warsaw was not an easy one. A number of our members criticized it, and others are not attending because they will not set foot in a country where their families perished without a trace. We understand their decision and respect it.

But we who are here, feel that it is not enough to talk of our colleagues from afar, to distance ourselves emotionally, to speak of faceless numbers, as we did when we first learned of the full scope of the Holocaust. We were so shocked by the sheer numbers, that we only spoke of the mass, of the six million human beings, of the one and a half million children who were exterminated like vermin. When we mentioned Poland, we spoke of a mass of almost three and a half million Jews.

In the beginning it was only families, like mine, who singled out the relatives lost as separate human beings, father, mother, sons, daughters, brothers, sisters, aunts, uncles and cousins. We mourned them in private. Then the stories of individuals began to appear in the media, in literature, on stage and on screen. We realized that we had not really grasped the enormity of the human tragedy until we saw the face of a single human being who was there, the eyes of one child.



Alas, we cannot look in the eyes of our perished colleagues for we cannot give them faces. We could not even find relatives to talk about them in our session on personal recollections, because whole families were wiped out, without a trace. We decided that at least they should not remain nameless. So we tried to give them names.

We have listed as many names as we could find of Jewish lawyers who had lived and worked in Poland before the German invasion, marking the cities where they lived and worked.

Looking at the lists of nearly 2,000 names displayed in the conference, we feel that we have engaged in a small act of remembrance.

Remembrance has always been a central aspect of Jewish life. Jews have been victimized for many years and in many countries throughout our history. They were persecuted, discriminated against, vilified and brutalized wherever they lived. We knew ghettos, *numerus clausus*, an inquisition and bloody pogroms. Jews were butchered, burnt at the stake, tortured, expelled from their homes, robbed of their possessions.

As a people without a country of our own, we never had the means to protect ourselves or the weapons to fight back. The only thing left to us was remembrance. “Don’t forget, tell your children and your children’s children”, has become a national motto, our only way of dealing with discrimination, with persecution, with pogroms. We have a long memory. Every year we sit down to a *seder* on Passover and tell our children what the Egyptians did to us thousands of years ago. Jews boycotted Spain for 500 years, in response to the Inquisition. We live now in a global village and boycott has ceased to be an option. Instead we go from one country to another in Europe, and we are here today to say that we shall never forget and that we shall never tire of reminding the world, even though the world would like to forget.

We remember the perpetrators and we remember the collaborators. We also remember all those who knew and kept quiet. But, we also remember those who risked their lives and the lives of their families, many of whom paid the ultimate price, to save Jews. We are here to remember and also to honour them. But first and foremost we remember the victims, our brothers and sisters, who were first robbed of their human image, humiliated, dehumanized, brutally tortured and then exterminated, their burial place unmarked.

In time we realized that the six million Jews did not only perish in the physical sense. With them perished a tremendous intellectual and spiritual potential that can never be regained. A whole culture was wiped out. The loss is not only ours, as Jews, for no country, no city, no community, which lost victims in the Holocaust, will ever be the same. This is also true of this country, Poland, which had the largest Jewish community in Europe; this city, Warsaw, in which every third person was Jewish. Therefore, we need to remember and to remind the world of their legacy, for indeed they left an enormous legacy that has enriched the world.

In every country where they lived, Jewish philosophers, psychologists, authors, poets, scientists and artists left their mark. They wrote constitutions and legal precedents, they composed music and invented new cures, they painted masterpieces and enriched science. If one walks through Europe today, if one opens one’s eyes and ears, one encounters everywhere the enormous legacy left behind by those who were robbed not only of their lives but of their dignity and their humanity.

It is up to us to preserve their legacy.

We, as an Association, propose to add one more aspect to the fabric of remembrance. We need to remember that the contribution to society of our brothers and sisters in law lives on. In the framework of this project we go from country to country in Europe, where our colleagues lived and worked. We walk in their footsteps, visit places where they lived, where they worked, where they taught, but we do not remember them silently, we talk about them in public, reminding those who need reminding who our colleagues were, their legacy, and what was done to them. We remind those who presently live in the homes of our lost colleagues, who work in their former chambers, who replaced them at the law faculties, who quote from their writings and read the books they had written, we remind all those that the Jews were here and that their legacy lives on. This is how we propose to remember them and to commemorate them.

We are often told that the world is tired of the Holocaust, that it is time to turn a new page; but in fact the world cannot wipe this horror from its memory, the world does remember, and not only through museums and monuments. Not only in Germany, but throughout Europe, the Holocaust is constantly on the agenda, often the subject of dramatic controversy and heated arguments. Even the existence of the Holocaust denial movement, with its mass of literature, its sick messages and its false allegations, is part of the public discourse.

Until we travel through Europe, we often do not realize how prominent the Holocaust is on the national agenda. Part of the public debate, it is not always positive or easy on our ears, sometimes painful, often distorted, it is there and will not go away.

As facts slowly emerge, even countries which were hitherto considered untarnished by collaboration, find dark patches in their history. Truth cannot be hidden forever. Truth will out, as Poland has so dramatically and tragically witnessed in the story of Jedwabne. Incredibly, facts which were buried for almost 60 years have emerged and compelled a whole nation to face its past. And this is as it should be, because one cannot honestly face the present or the future, without facing the past. Stories also keep cropping up in other countries. We learned only recently, with the opening of the KGB archives, of the collaboration of Russian citizens in exterminating Jews in many Russian cities. All over Europe, the Holocaust is “unfinished business” in more ways than can be described.

The question remains: how does a nation confront its past? Is it sufficient to tell the story, to confirm the facts and to ask for forgiveness? Indeed, it is a big step in the right direction, but is it enough? Can one really expect forgiveness? Or is it a symbolic act, which, to have meaning, must be accompanied and followed by deeds which prove a real commitment, a down payment of a debt which can never be paid in full.

I am often asked, especially by young people, why their generation should feel responsible for what happened before they were born. “Why should we carry a burden of guilt?” They ask, “why should we bear the consequences of something which we have not done?” Of course, they carry no responsibility on the individual level. But is there a collective guilt?

Indeed, we are born as individuals, free to choose between good and evil, and we have the right to be judged as such individuals. But we are not born in a vacuum. We are identified at birth with our family, with a particular community, an ethnic group, a nation, a

religion, a political entity, by a language, a culture. Actually, from birth, we have very little choice in creating our personal identity. Even if we choose to separate ourselves from some of these identifying factors, they can return in various forms, for example, a grandchild who suddenly has the urge to look for his roots, or a Hitler who ignores our choices and reminds us who we are.

Being part of a group has its benefits, but it also carries with it implied responsibility. We all carry with us our collective past, we can try to direct our present and our future, but as a people we can never disassociate ourselves from our history.

So, as much as one has a right to be proud of one's country, of its history, its culture and its heritage, one must also share the responsibility for its misdeeds in the past. One must recognize that like any national asset, a national debt is also carried over from one generation to another, it cannot be wiped out.

We recognize that the Polish people have also been victims of the Germans. Poland was not only occupied, it was devastated by the German occupiers. The capital demolished, millions of citizens murdered. Poles are rightly proud of their heroes who fought the Germans and wrote a magnificent chapter in the history of their country.

We appreciate the fact that the Polish people and their leaders are at present in the process of facing and recognizing some painful facts from the past. As part of this process we are able to speak frankly at this conference of the fate of Jewish lawyers in Poland not only during the Nazi occupation, but also in periods that preceded and followed it. It is indeed a time for frank talk, and we are pleased that by co-sponsoring this conference you are participating in the frank discourse which is part of our program. Therefore, we ask you, as members of the legal community, to fully participate in the process of righting a historical wrong.

European Jews left behind them not only a cultural heritage. Throughout Europe they left a staggering quantity of assets, which represented years of hard work and savings for future generations. It took 50 years for Europe to recognize the need to legally compensate the rightful heirs of the individual victim, and of the vanished communities. It took all these years for Europe to admit that it had not only witnessed the murder of its Jews but also looted their assets. We expect all people of goodwill to help in settling this debt in an honorable, just and equitable manner.

Sadly, Jews who ask for what is theirs, are cynically accused of extortion. We are even threatened that this legitimate claim will only increase anti-Semitism. This is a painful reminder that the world has not learned its lesson. Looking back on the last century, one of the bloodiest in human history, that has witnessed the worst unparalleled event that can only be characterized as the ultimate evil, we realize that since then an alarming tide of brutality has continued to rise in the world. Worse, we are becoming conditioned to it. We see it on the screens in our living rooms, we watch massacres, executions, torture, heaps of mutilated bodies, slaughtered children, mass graves, we hear of "ethnic cleansing" and brutal rape, and we walk by shrugging our shoulders and shaking our heads, asking "what else is new?" The worst part is that our children are becoming conditioned to this as well. How can we educate the young generation when we see such atrocities and do not act. What is the use of preaching moral values to them, when the world that looks out at them from the television screen belies all those values. How do we expect them to believe us!

Yadava

Ben -

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Europe and Poland Greet the Remember Warsaw Conference

Walter Schwimmer, Secretary General of the European Council:



This meeting organized by the International Association of Jewish Lawyers and Jurists in Warsaw has a symbolic value in the crossroads of so much suffering endured by the Jewish people.

The European Council has had the privilege in the past of welcoming the IAJLJ to the headquarters

of the European Council in Strasbourg in order to show the support of our Organization for the defence and promotion of human rights in Europe and throughout the world.

The Warsaw meeting will make it possible to recall the scope of the contribution made by Polish Jews to the development of the Polish heritage of which it is an integral part and which radiates far beyond the borders of Poland and our continent.

This conference goes far beyond the duty of memory. It fulfils the need for continuous vigilance because the fight against anti-Semitism in Poland and elsewhere is never ending. It is a sacred cause for all Europeans who respect human rights and the imperative of pluralist democracy as well being a credibility factor for the States themselves.

The presence among you of the highest authorities in the world of law, especially Polish and Israeli, is itself a symbol of reconciliation and hope, a commitment as well, that very specifically fulfils the past goals and present missions of the European Council.

These are the principal reasons why the Secretary General of the European Council is wholly committed to this meeting which we hope will finally mark the start of a new era for all. ■

President Aleksander Kwasniewski, President of Poland:

Minister Jolanty Szymanek

delivered the following statement on behalf of the President of Poland: We are here today to honour people who have lived in Poland for centuries, contributing to the development of our country. People whose lives have left a significant legacy for future generations; who have worked for the independence and prosperity of their country - Poland.



Hundreds of years ago, Jews found hospitality in Polish lands. They settled and the Jewish communities developed freely for centuries. The Jews were able to live according to their laws, religion and culture. We worked and even fought for our independence - together. This peaceful coexistence lasted until the twentieth century, when terrible ideologies started to affect Polish-Jewish relations. Nevertheless, until World War Two, Poland was a multiethnic State where Poles and Jews, Ukrainians, Germans, Lithuanians and other nationalities coexisted alongside each other.

But war came in September 1939, and Poland became the first victim of the Nazi empire. It destroyed this multiethnic structure and the Holocaust deprived Poland of the presence of the Jews. About 3 million Jews and 3 million Poles were killed during this darkest hour of Europe's history. Moreover, millions of Poles were displaced from their homes in the former Eastern parts of Poland and moved to the West, taking the place of hundreds of thousands of Germans, who by the decision of the four powers from Potsdam were resettled in Germany.

Poland's multi-ethnicity has never recovered from this terrible blow.

A new beginning was only possible after 1989. Before this historic date, Communism successfully stifled any discussion on Polish-Jewish relations. Only the post Cold War era could reopen doors to unresolved and taboo issues. I shall refer to two of these issues:

The first was the crime which took place in Jedwabne - because the public debate on this subject in Poland opened another chapter in the Polish-Jewish dialogue, and in the perception of anti-Semitism. This fact cannot be described in other words than a moral breakthrough.

Jedwabne - a town where in July 1941 about 1,600 Jews were killed at the hands of Poles. Jedwabne - for ordinary people an unbelievable crime, arousing feelings of guilt and shame. Jews who had been living in peace with us for centuries, killed by their neighbours. During his visit to Israel, my great compatriot, Pope John Paul II said that "there are no words strong enough to lament the terrible tragedy of the *Shoah*...". Those words of the Pope reflect the state of mind of many Poles with regard to the Jedwabne crime. It is also a certain catharsis for Polish society. Although it activates anti-Semitism, it is an opportunity for deep meditation on Polish attitudes towards the Jews. The social taboo concerning Polish participation in the murders of Jews has been broken. Suddenly, Polish newspapers have the courage to write brutal truths about our historic crimes, about pogroms, about people demanding ransom in exchange for not turning Jews over to Nazis, about general indifference to the Jewish tragedy, about the huge deficit of compassion. Moreover, more and more people understand that it is unacceptable to balance the bad deeds with the good ones, crimes with nobleness and courage. Polish trees in *Yad Vashem* are not a measurable antonym of what happened in Jedwabne.

We want to use the public debate about the genesis of the Jedwabne crime to fill in the blank spots which were formed in the Polish consciousness as a result of the half-century of silence and the politicization of anti-Semitism. That is why President Aleksander Kwasniewski decided there was a need to commemorate the victims of Jedwabne and express an apology on behalf of the Polish State in that symbolic place - an apology for the Polish indifference and crimes against our Jewish compatriots.

We are returning to normal relations. The Jewish community is rebuilding its identity and importance. Today we feel that Poles and Jews have the best opportunity in many years to repair relations and to look forward to the future. While it is not possible to compare the scale of Jewish life in Poland today with

what it used to be in the past, Poland's Jewish community is growing and is increasingly active. This is reflected in the Jewish culture, which is experiencing a real renaissance in Poland.

There are several framework solutions vitalizing Jewish life in Poland. Among these the Act of February, 1997, on the relationship between the State and the Jewish religious communities, is of fundamental importance. This Act is the first of such importance in hundreds of years, that comprehensively regulates the existence of the Jewish faith. It also contains a chapter on real estate matters. Under the terms of this Act, real estate of the communities is being returned to its previous owners - synagogues, community seats, cemeteries should reinstate the religious, educational and charitable activities.

But the most serious expectations concerned the return of private property. This is the second unresolved war-time issue I would like to mention.

Restitution legislation has been discussed in Poland for several years. We should remember that in the Polish context this is an unusually complex task. Poland was moved geographically from the East to the West, and this was accompanied by a vast movement of people. Poland is a country where an absence of archives is the rule and where objects have changed hands many times after the War. Thousands of Poles have experienced the misfortune of loss of property and the hope for reprivatization - regardless of origin, religious belief and other features.

Unfortunately, until now we have not been able to solve the question of property restitution. The Restitution Bill passed by the Polish Parliament on March 7, 2001 was rejected by President Aleksander Kwasniewski. Among other issues the President rejected the proposal to narrow the eligibility of restitution to people with Polish citizenship on 31 December, 1999. That proposal inspired numerous reservations on the part of Polish communities living abroad, as well as on the part of Polish citizens of Jewish origin. The President believed that the introduction of such a condition would violate the fundamental norms of a democratic state under which the right of ownership should be restored to all those who lost it, regardless of any additional conditions.

Reprivatization should be a democratic process in the sense that it should involve all interested parties to an equal degree and on equal principles. But irrespective of future solutions, everyone who believes that his rights were infringed after the War is fully entitled to seek the return of property in the courts.

Many towns including Warsaw and Lodz, have witnessed this process.

Everyone who visits our country recognizes that Poland is undergoing fundamental and historic changes. We are a member of NATO, and on the road to becoming a new member of the European Union. But looking towards the future, we shall never forget the past and millions of Jews, who lived with us for centuries, will never be treated only in historical terms. Their spirit is still vibrant, their achievements still present.

Poland will never forget its citizens of Jewish origin, whose attainments are an undeniable part of Poland and Europe's heritage. ■

Janusz Niedziela, Minister of State, Ministry of Justice

The International Conference to Commemorate Jewish Lawyers and Jurists in Poland and Mark their Contribution to the Polish Legal System is a perfect occasion to recall the past, as Poland and its capital city, Warsaw, were a good example of a multicultural and multinational community. They were a unique example of perfect cooperation between people of different nationalities and different religions to build a common fatherland in Poland.

Unfortunately, the Second World War destroyed many century old buildings. Poland of many nations does not exist anymore not only because of the change of borders but also because of the Nazi plan to exterminate the Jewish nation.

The best part of the Polish multinational community died in concentration camps as well as during the fighting. Polish Jews also died in other places such as in Katyn (the young lawyer **Nikodem Feinberg**; Warsaw advocate **Leon Kryzwicki**, **Efraim vel Fiszal Babad** from Przemysl; **Leon Frenkel**, an advocate from Stryj and others).

The pre-War Jewish community was part of the Polish elite as well as part of the lawyers' elite. There were many famous legislators, theorists and practicing lawyers of Jewish origin, for example, **Aleksander Kraushar**, a great advocate living in the 19th century, who also dealt with literature and history; **Prof. Maurycy Allerhand**, a member of the Codification Commission and co-author of the Trade Law Code, died in a camp near Lwów; **Stanislaw Posner**, a famous civil lawyer, historian and sociologist; **Prof. Szymon Rundstein**, one of the greatest European lawyers, negotiator of international treaties, legislator

in the League of Nations, Judge of the Permanent Arbitrage Tribunal in the Hague; **Emil Rappaport**, advocate, Judge of the Highest Court, codifier, poet; **Prof. Rafal Taubenschlag**, famous papirologist and historian of law, humanist; **Prof. Ernest Till**, advocate, procedurelist, codificator and writer and many many others.

The goals of the IAJLJ: international cooperation based upon the rule of law, prevention of war crimes, punishment of war criminals, combating racism, xenophobia and anti-Semitism, are parallel to the goals of the Polish government.

For the past several years of democratic changes in our country, according to international standards, Poland has systematically built a system of human rights protection. The Polish Constitution guarantees equality under the law, the prohibition of discrimination and equal treatment of every citizen by the State authorities (Art. 32).

The Constitution states that ratified international treaties are a direct source of law, thus, the Convention Combating All Forms of Racial Discrimination may be applied directly, and in the event of any legislative conflict with the internal law, such a treaty will have priority.

The process of ratification of the International Criminal Court Treaty is already very much advanced in the Parliament. The ICC will sentence people who have committed war crimes, crimes against humanity and genocide.

The Republic of Poland guarantees every citizen - no matter of what nationality, race or religion - equal rights and treatment, helping to strengthen justice and order.

Since Poland rejoined the community of democratic countries, we have taken every occasion to recall Polish history, so that future generations will not lose their national conscience and heritage. Polish tradition and present efforts would not be the same if the Jews were not a part of it. This interesting conference will surely give us many more examples of how important Jewish lawyers were in developing our judicial system in the past and will persuade us that a multinational country creates a stronger democracy. ■

Mr. Andrej Kalwas, President of the Polish National Council of Legal Advisors; **Mr. Czeslaw Jaworski**, President of the Polish National Bar Association and **Justice Teresa Romer**, Supreme Court of Poland, President of *JUSTITIA*, The Polish Judges Association, also warmly welcomed the participants to the Conference. ■

The Warsaw Ghetto Uprising: Why So Late?

Marian Turski

Why was the uprising so late? Almost the entire nation had perished. The death sentence had been passed on the Jews. The decision upon the final solution had been taken. We only know this in hindsight, but let us look at this process with the eyes of those who lived in those days. How could they evaluate the situation? How could they imagine the future. Can we imagine their emotions, sentiments, their way of thinking? In the first years of Nazi occupation - we understood that the death sentence had been passed, but we considered it a delayed verdict, a postponed death. Starvation, hard labour, perhaps some other diseases would strike, but nobody could imagine the contents of the Final Solution - the *Endlösung*.

According to some textbooks, the decision on the Final Solution, the *Endlösung*, was taken at the Wannsee Conference in January 1942. This is not true. The Wannsee Conference was a meeting to work out the logistic of the *Endlösung* - the scale and the timetable of the chase, wherefrom, who would be first, *etc.* There is a difference of opinion among historians, but I would say that the decision was probably taken between March/April and July 1941. The invasion of the Soviet Union with the *Einsatzgruppen*, was no doubt part of the implementation of the *Endlösung*. After uncovering various documents, we know of a famous order from Goering to Heydrich in July 1941. We can guess that Himmler mentioned in his talk to Hess, who was commander of Auschwitz, in March/April 1941, the eventual role of the planned Auschwitz II (Birkenau) in the implementation of the Final Solution. We even know that they stopped at the road connecting Auschwitz and Birkenau, where Himmler demonstrated ideas of what and how to build.

Marian Turski is a leading journalist and commentator in Poland, Chairman of the Association Jewish Historical Institute.

Certainly, the implementation of the *Endlösung* was carried out stage by stage. For example, the armband with the Jewish *Magen David*, was introduced at different times, in different countries. Thus, if we presume that the decision upon the Final Solution was taken in 1941, we must ask - when did the news about the Final Solution reach the Warsaw Ghetto? How did the first news come and how was it distributed, when there was no television, no press, no mass media? How did it reach the people in the streets?

One of the most important items of Jewish heritage is the Ringelblum Archives, which houses in the Jewish Historical Institute in Warsaw, documents gathered in the Warsaw Ghetto, orders, instructions, official reports clandestine memoirs, testimonies and even novels. This clandestine archive was called *Oneg Shabbat*. Only one third of the archive was lost during the uprising and its aftermath when all the housing was blown up by the Germans. From this archive we know when the news about the Final Solution reached the ghetto.

The first news came to Warsaw in October 1941, news from Ponar near Wilno - made possible by the contacts between *Hashomer Hatzair* and Polish scouts, with a particular contribution being made by one of the leaders of the Polish scouts, Alexander Kaminski. The second important part of the news came with the escape of Szlamek, also named Greyanowski. Szlamek was a young Jew who was employed in Chelmno, the first annihilation camp to start operating in Poland. He escaped *via* small ghettos and finally came to Warsaw with information about the camp. He reached the Warsaw Ghetto in February 1942 and his report was published in the clandestine press of the ghetto. In March 1942, news arrived about the evacuation of the ghetto in Lublin. The elite formed the idea that the German policy *vis-à-vis* the Jews was changing. The first to realize this was Abba Kovner in Wilno. The second stage of the German policy toward the Jews was sudden annihilation.

The news had come to Warsaw, but who knew it? The elite? Only a small minority read the clandestine press. Only the elite would share that news. Almost half a million people lived in Warsaw. It was unconceivable for those people, for us, to comprehend that such a large population could be exterminated. Even when the news reached people, it was very hard to believe. Between the knowledge and understanding that 'it might happen to me,' there was a large gap. People fed themselves with illusions. Those who were in Poland might remember that there was a very popular song, encouraging people to believe that it was only a short time before the English, the Americans and the French would come and the Allies would win.

Following are two examples of the way news of what was happening in the Warsaw Ghetto was received in the free world. One of the leaders of the Polish Socialist Party, Adam Prager, who was also in the government in exile, wrote in his memoirs that when news about the destruction of Polish Jewry came to London from the Warsaw Ghetto, through an emissary of the clandestine Polish organization *Armia Krajowa*, he made the following comment to another socialist leader Adam Ciolkosz:

"I told Ciolkosz, that propaganda, in order to be effective, must have at least some relation to reality, or at least be probable. How can you believe in the killing of 700,000 people? The Bund should have written that 7,000 people were murdered. In that case, we could have passed that information to the English with some chances that they would believe it."

There was also the case of Jan Karski, the heroic and dedicated emissary, who visited the Warsaw Ghetto and delivered messages from the leaders of the Jewish parties in the Warsaw Ghetto to Western leaders. He was received by President Roosevelt and also Supreme Court Justice Frankfurter. He reported what he had seen in the Warsaw Ghetto, but his listener could not believe it. When Ambassador Ciechanowski asked, "can't you trust a Polish officer?" The answer was: "I trust him, but I can't believe it."

Sometimes one can read in textbooks the sentence: "If the Jews in the ghetto had stood up to the Germans, their fate would probably have been the same. So, why didn't they do it?" Yes, they would have been killed because this was their fate, their destiny. But at least a few Germans would also have been killed. So, why did they meekly go to be slaughtered? Why? Because of the terror imposed by the Germans. This very basic question was asked in a film shown 20 or 25 years ago in Warsaw. In Poland the film was called *Metro*, the original title in English was *Incident*. The story tells of carnage in the subway in New York. Sixty passengers are terrorized by two bandits with knives, who demand money. Among the sixty, there are young and strong people, yet no one tries to disable the bandits, each one is afraid for his own life. That is the psychology of terror.

Sometimes one can read in textbooks the sentence: "If the Jews in the ghetto had stood up to the Germans, their fate would probably have been the same. So, why didn't they do it?" Yes, they would have been killed because this was their fate, their destiny. But at least a few Germans would also have been killed. So, why did they meekly go to be slaughtered?"

It is estimated that 5%, even 7%, of those who were in the camps survived. Everybody had to make a decision on his own, with his own body, with his own life, with his own death. Our friend, an inmate of Birkenau, Halina Birnbaum, titled her memoirs, *The Hope Dies Last*. This was true for everybody. The secret of terror is fear and intimidation. When it was decided to establish the ghetto in Lodz, German soldiers speeded things up by entering 10 or 12 apartments in the main street named Piotrkowska and killing people and forcing them to move into the ghetto. This is the secret of terror. Terror paralyzes action. Terror makes people incapable of action. It

immobilizes people, makes them helpless and powerless.

This is perhaps one of the first conclusions which may be reached when one thinks of those days. One must understand that terror totally paralyzes people. In the Warsaw Ghetto there was once an accidental shooting between Jewish fighters and German factory guards. Two Germans were killed. The following day, the Germans took revenge. They murdered 170 randomly chosen Jews.

Hence, what was the thinking of the leaders of the ghetto? We have some minutes from a conference that was convened after the start of the Great Deportation from the ghetto of Warsaw in

July 1942. The participants were all leaders of Warsaw Jewish political parties. Most, including the highly respected Schiper, a well-known Jewish historian, suggested opposing the young leaders who wanted to act. "Please don't precipitate the annihilation of the Jews". I quote Zisha Fridman, the great religious leader:

"I believe in God. I believe that a miracle will occur. God will not let the Jewish nation be destroyed. The struggle against the Germans makes no sense. In a matter of days, the Germans can wipe us out all together. If we do not fight, the ghetto will survive longer and then a miracle will happen."

The thinking was that if they behaved quietly, perhaps some of the Jews could survive. This was true to some extent. As one can see, the dilemmas were not just virtual. They were real dilemmas.

I would like to quote Itzhak Schiper from the same meeting:

"Self-defense means a destruction of the ghetto. I believe that it is possible to save the core of its inhabitants. A war is on and every nation has to make sacrifices. So, we have to make a sacrifice too, in order to save the core of our nation. Were I convinced that it is impossible to save the core of the nation, my conclusion would have been different."

This was also the way of thinking of Haim Rumkowski, the Chairman of the Jewish Council of the Lodz Ghetto. When the great deportation started in Lodz on September 5, 1942, he gathered his people and said:

"In my old age, I must stretch out my hands and beg: Brothers and sisters! Hand them over to me! Fathers and Mothers: Give me your children!... There are in the ghetto many patients who can expect to live only a few days more, maybe a few weeks. I don't know if the idea is diabolical or not, but I must say it. 'Give me the sick. In their place, we can save the healthy.'... A broken Jew stands before you. Do not envy me. This is the most difficult of all the orders I've ever had to carry out at any time. I reach out to you with my broken, trembling hands and beg. Give into my hands the victims. So that we can avoid having further victims, and a population of 100,000 Jews can be preserved!... What do you want, that 80,000- 90,000 Jews remain, or God forbid, that the whole population be annihilated?"

Anthropologists, psychologists, sociologists sometimes ask whether our nation typically behaves according to the known stereotype. In a way the answer is yes, because a nation has patterns of life, patterns of heroism - for example, at the time of

the Warsaw uprising, there were 500 fighters of the Jewish fighters organization (ZOB), plus 250 from the revisionist fighters organization (ZWZ), with only a handful trained, *vis-à-vis* 2,170 trained soldiers and officers. It is true then that at extreme times, the attitude of a community, of a society, of a nation, changes. Before the War there was a saying, quoted in Julian Tuwim's *We Polish Jews*: "The Jew going to the war, what can he do. He's a coward." These are not permanent features of a nation, but nevertheless there is a kind of burden - a burden of a heritage.

A second obstacle is connected with psychology, with sociology. There were many Jews who were Orthodox, and they understood that here was *kiddush ha'shem* - sanctification of the Name of God, a sacrifice, similar to the sacrifice of Abraham with Isaac. This was also part of this population's way of thinking. Additionally, tricks were played by the Germans. For a long time many people believed that they would be transferred to labor camps, perhaps in the East. We know that in the first days of the "Great Deportation", the *Grossaktion*, in Warsaw in July 1942, there were many volunteers. Who volunteered? Those who wanted a loaf of bread and a kilo of marmalade, because they were hungry. They believed that the Germans wouldn't waste good bread...

Now, I would like to expose one of the main issues that - I would say - answers the question: "why so late?" In the ghetto, a team of doctors, headed by Dr. Milejkowski, understood that they were coping with an exceptional opportunity to contribute something to medical knowledge. All diseases can be examined in a lab with a microscope - all diseases but one. The starvation disease. This is a disease which today can only be examined in places like Nigeria or Uganda. But in the Warsaw Ghetto, there was an opportunity to do so. For half a year, this team of doctors tried to examine starving people. A detailed report was prepared. It was handed over to the clandestine movement outside the ghetto for safekeeping. Only Dr. Emil Apfelbaum-Kowalski survived out of the twenty doctors. Soon after the war, in 1946, the report - *The Starvation Disease* - was published with pictures of the diseased people and analyses. Following is part of the conclusion:

"An organism dying from prolonged wasting hunger becomes like a candle being extinguished: life withers away gradually without being visible to the naked eye tremor. A starving person slackens his awareness, which stubbornly guards the remnants of his possession, that is, his reserve of energy. His movements are

sparse as if calculated. The slowness or even immobility lasting sometimes all day, inclination towards the lying position, drowsiness, sleepiness, silent restrained reflexes, dormancy of cycle - this is a common picture of a decrepitude which has been marked by hunger."

Hunger causes you to deteriorate. It absolutely deprives you of energy. It does not permit you to be active, to make decisions. We who were in Auschwitz or in some other camps, hated most the Germans, but we also hated those people from *Kanada* and from the "Sonder commando" To explain - because they were those who had everything. They were also cruel. They were aggressive. But on the other hand, if there were those who could afford to mutiny, it was the people from the "Sonder commando" who did not care, because they were strong. They were not starving, so they could make decisions. I could not. This is very important. The starvation disease is perhaps the main answer to the question: why the majority could not even think about revolting.

In the ghetto of Lodz I had a classmate, a very intelligent boy - Dawid Sierakowiak. He wrote a diary, day after day, until his death in 1943 from starvation and tuberculosis. Some of his notes were preserved. He told a story about his family. In September 1942, his mother was caught by the Jewish police to be deported as Rumkowski demanded. Dawid Sierakowiak wrote in his diary: "what did my father do? He did not run to look for help, to look for some people who could release my dear mother. He went to the kitchen to consume her food." This is very tragic. But this is a proof of what hunger does; how it hurts people.

Before I conclude, I would like to make two more points. First, in order to prepare our self-defense - we called it an insurrection, an uprising, but it was forced, desperate self-defense, not a matter of choice - weapons had to be obtained. And here is the great chapter of Jewish relations with the outside world and with the outside clandestine movement. I would like to share with you some of the thoughts of the Polish leadership. I was privileged to be granted the friendship of Jan Karski who told me that the Jews had asked him to demand weapons for the ghetto. The Polish Army refused saying they were short of arms. There wasn't enough even for the Polish army, and if the arms would be shared with the Jews, they would be wasted because the Jew could not cope with the Germans for longer than two or three days. The Jews were an untrained minority, and therefore the request would not be granted, unless different orders came from

London. Then something very important happened - the great effort and success of the Jewish fighting organization - ZOB - in January 1943. In the so-called "January Uprising" the first Germans were killed, and the Jews showed that they knew how to fight an overwhelming dominating enemy. After this, the delivery of weapons was much greater.

Something else also happened in January 1943 - the fall of Stalingrad and people suddenly understood that the Germans could be hurt, that the Germans could be defeated. This was the first urban uprising in Europe. There was no example to follow, no prototype. This must be understood when we try to answer the question: why so late?

I have tried to explain how important the issue of starvation was. Now, I must add another, very tragic fact. The uprising would not have been possible if not for the Great Deportation and death of the 270,000 people who were sent to Treblinka. So long as people were with their families, they had to take care of them - fathers, mothers, grandfathers, grandmothers, children. I will quote one of the most impressive, interesting and shocking memoirs written. It was published in Poland in 1992-3, and also published in Hebrew. The Polish title was - *Days as Long as Centuries*. The author is Marian Belland:

"Well, this (the uprising) is good for young people, ready for everything anytime. People who have nothing to lose anymore, but for us our whole life is our family, and our only consolation is in being together. None of us has even thought yet, even for a while, about breaking away and looking for a way to save ourselves. With just our bare hands, with elderly people and the weak women, can we dare to take such a desperate step? We shall die right at the beginning. For us, there is only one possibility left: to wait, and wait, and wait. The solution has to come by itself."

So, this was the tragic paradox - only after the fathers, the mothers, the grandfathers, the grandmothers and the children perished, could those who were left make the decision to fight. This, briefly, is the answer to the question - why did the Warsaw Ghetto uprising occur so late?

Jews as the Citizens of the Polish Republic: Some Legal Aspects

Jerzy Tomaszewski

The emergence of new States in Central and Eastern Europe after the First World War raised an important question: who had the right to be a citizen of these States? This question was answered in principle in relevant clauses of the peace treaties and either in special treaties concerning the rights of minorities signed by the big powers with the new States or in their declarations. The internal laws of individual States had to comply with these stipulations and it was an important task of the Polish legislators to prepare adequate legal solutions.



leader of the National Democratic Party and President of KNP) to the United States and his meetings with the Jewish leaders aroused their fear that the future Polish State would follow Romania's example. This fear was aggravated by the fact that in May 1918, the KNP declined to issue identity cards to Jews born and living on Polish lands. The identity cards, with the agreement of the French authorities, identified the bearers as having the right to Polish citizenship.

The Polish Republic, however, was affected by the revolutionary atmosphere which developed in the years 1917-1919

A unanimously accepted declaration of the Polish National Committee (KNP) in Paris, a provisional Polish representation, stated in August 1918:

"No privileged classes should exist in new Poland: Polish citizens without distinction as to origin, race or creed must all stand equal before the law."¹

The experience of Romania after the Berlin Treaty of 1878 (which contained a similar provision) showed, however, that the term "citizen" was relatively vague and created doubt as to who was a citizen. A similar declaration, in spite of its apparent democratic character, was not therefore able to safeguard the rights of national minorities. The visit by Roman Dmowski (the

in Eastern and East-Central Europe, including Russia and the Balkans, and the National Democrats had limited influence on events in the country. At that time, no moderate politician in Poland tried to promote plans discriminating against national minorities. Perhaps there were people who nurtured such ideas, nevertheless they had no opportunity to implement them. The dominant trend in government could be seen in a circular issued by the Minister of Internal Affairs Stanislaw Wojciechowski at the beginning of February 1919, *i.e.*, before the peace treaties were signed:

"I feel compelled to remind [everyone] that the Jewish population enjoys Polish civil rights just like the ethnic Polish

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1. Lerski, George J.: *Dmowski, Paderewski and American Jews (A Documentary Compilation)*, "Polin" Vol. 2 (1987), pp. 97-8.

population and it [the Jewish population] must not be subject to violence or abuse of law. In independent Poland, citizens shall not be divided into categories.”²

The Polish Law on Citizenship enacted on 20 January 1920, incorporated the provisions of the peace treaties and of the Treaty concerning National Minorities. The law strictly defined who ought to be considered a citizen of the Polish State. The law also gave all ethnic Poles, wherever they had hitherto been living, the right to acquire Polish citizenship and this encouraged political emigrants to return home. The Israeli Law of Return contains a similar provision. It appeared, however, that the implementation of these principles was not as simple as was expected. Most difficult was the situation in the provinces, which, before 1914, had belonged to the Russian Empire. The eastern provinces, in particular, were heavily affected during the war years 1915-1920. Many people lost all their documents and numerous local administration offices were destroyed, their records lost, making it an impossibility to prove beyond doubt the right to Polish citizenship.

It was relatively easy for an ethnic Pole (particularly a Roman Catholic) to be acknowledged as a Polish citizen. Any other person had to have documents required by the law, in the absence of which his legal status was unclear. This affected members of all the national minorities, not only Jews. Generally, the lack of confirmed citizenship did not influence everyday life. Most peasants in remote villages or the artisans and shopkeepers of the *shtetlech* were unaffected. The local administrations were glad that the “aliens” did not vote (having no Polish citizenship) but had to pay taxes. The “aliens” were even called to military service in spite of their unclear status. Further difficulties were faced by people (mainly Jews) who lived in territories incorporated into Poland, but who had neglected in the past to settle formalities. These people were still recorded in registers in areas which after 1921 belonged to the USSR. The number of people with undefined citizenship was significant and probably reached about 600,000 Jews.

The issue of people with undefined citizenship could not be neglected. It had to be solved and became a topic of a legal dispute which engaged the Jewish deputies in the Sejm.³ The first person to take action was probably the Minister of the Interior Zygmunt Hübner who on 26 June 1924 issued a circular on the matter. His successor (Cyril Ratajski) continued the task. The local administrations were instructed to introduce a simpli-

fied procedure for the rural population, *i.e.* primarily for Beloruses, Lithuanians, Poles and Ukrainians and only for a relatively small number of Jews. A circular of 13 January 1926 (issued by Minister Władysław Raczkiewicz) referred to the inhabitants of towns, where most Jews were resident. We can assume that the repeated instructions were put into effect very slowly and the local authorities hindered their implementation. Even as late as May 1926, when Józef Piłsudski performed his *coup d'état*, the whole question had not yet been resolved. The new Minister of the Interior Kazimierz Młodzianowski continued the same policy, sending successive circulars and demanded progress. On 28 August 1926, he wrote:

“The registration has not started everywhere; it is delayed, and the local authorities are making difficulties.”

The vast majority of cases were probably settled before 1928. Although the Jewish deputies continued to raise this question in Parliament, the remaining number of persons of undefined citizenship was probably not great.

No less difficult a question was connected to formally ensuring equal rights for all Polish citizens, irrespective of religion or nationality. Declarations on this issue had been made by Polish politicians since November 1918, and the 1921 constitution guaranteeing equal rights, stated:

“Every citizen shall have the right to maintain his national convictions and to cultivate his language and his ethnic habits.” “No citizen may be restricted in the rights granted to all other citizens because of his faith or religious views.” “No bill can contradict the present constitution, nor violate its provisions.”

These provisions remained unchanged when a new constitution was adopted in 1935. The final article of the 1921 constitution stated however:

“All the existing regulations and legal institutions inconsistent with the provisions of the present constitution shall be submitted to the legislative body, within a year at the latest, so as to bring

2. *Archiwum Akt Nowych w Warszawie (AAN), Komitet Narodowy Polski w Paryżu*, vol. 2066, p. 119. Quoted in: Tomaszewski, Jerzy: *The Civil Rights of Jews in Poland 1918-1939*, “Polin” Vol. 8 (1994), p. 115.
3. The relevant documents are in Central Zionist Archives in Jerusalem, files of Icchak Grunbaum (A127 vol. 95).

them into conformity with the constitution by means of appropriate legislation."⁴

The last provision was probably not intended to preserve earlier anti-democratic laws. Rather, it was an expression of overoptimistic expectations on the part of the deputies who were sure that it was possible to change laws in a short time. The dangers connected with the Polish-Soviet war and other difficult political and economic questions appeared however much more urgent than completing the fundamental constitutional principles of the Republic.

The existing discriminatory laws remained valid until the necessary changes could be made to the old legislation. There were of course significant exceptions. The German and Austrian authorities in time of war and occupation, later the Polish Parliament, introduced new laws in certain areas (e.g. concerning local self-government) and in this new legislation the old discriminatory provisions were no longer present. However, several other discriminatory regulations remained valid, e.g. special, more severe punishments for the Jews stipulated in the Russian Penal Code; privileges for the Orthodox church at the expense of other religions, and the specific discrimination against Judaism. Austrian law discriminated against Jewish languages which were not permitted in public life (e.g. it was illegal to speak Yiddish at a political convention as a delegated policeman had to understand the speeches and dissolve the meeting if somebody offended the emperor). The government tried to solve these complex issues at least in part, and on 23 March 1921, published an explanatory note in the official gazette, *Monitor Polski*, indicating which discriminatory regulations were abolished by the laws enacted after 1918. Nonetheless, the announcement was not precise, and, more importantly, had no legal significance. The General Prosecutor's office confirmed several weeks later that the Austrian rules concerning the use of Jewish languages were in force, although meetings and lectures organized by citizens and their associations in private, were not subject to this law.⁵

The government and the Jewish deputies, often in co-operation with Socialists and deputies of other national minorities, tried several times during Parliamentary debates to introduce a draft bill invalidating certain discriminatory laws, but in vain. Failure was due to unfortunate coincidences, political crises, changes of cabinets or political strategy and tactics of successive ministers. A significant argument against the im-

mediate annulment of the laws discriminating against the Jews was that in a Catholic country it would be impossible to invalidate such laws prior to invalidating similar laws discriminating against the Catholic Church - a goal being pursued by Polish diplomats negotiating a concordat with the Vatican.

The validity of old discriminatory laws was of interest to both Polish supreme judicial institutions: the Supreme Court of Justice and the Supreme Tribunal of Administrative Law. The former stated in a case decided on 16 February 1924, that the constitution had automatically abolished the discriminatory regulations, the abolition of which did not require the establishment of new laws. The latter, however, ruled that these discriminatory regulations were valid until the Parliament voted new laws.⁶ In practice, one result was that more severe punishments applicable to Jews under the penal code lost their validity, although several other regulations of an administrative character remained valid. The issue was finally resolved by a law voted upon in the Autumn of 1930 and enacted in Spring 1931.⁷ The law abolished all restrictions on the civil rights of, or special privileges given to, Polish citizens due to their origin, race or religion, which had been enacted before Poland regained its statehood. The wording of this law was significant as it precluded any actions being brought before the Supreme Court of Justice challenging the constitutional validity of any law enacted after 11 November 1918. An example of one such law was the law introducing Sunday as the obligatory day of rest, voted for despite the protests of the Jewish deputies, and supported by the Socialist deputies as an essential step towards securing the right of workers to a weekly day of rest against the possible ill will of capitalists.

The law abrogating old discriminatory provisions was of only symbolic value as at that time probably only insignificant remnants of these provisions remained. Before 1931 steady but slow progress occurred in the unification of the Polish legal system and in the elimination of former discriminatory laws. Though of interest, scarcity of information regarding the im-

4. *Dziennik Ustaw Rzeczypospolitej Polskiej* (DzURP) 1921 No 44 item 267; DzURP 1935 No 30 item 227.

5. AAN, *Prezydium Rady Ministrów* vol. Rkt 64/4, pp. 48-9.

6. According to the question presented in the Parliament by Maksymilian Hartglas and his colleagues on 30 November 1928. AAN, *Ministerstwo Wyznan Religijnych i Oświecenia Publicznego* vol. 390, pp. 180-1.

7. DzURP 1931 No 31 item 214.

mentation of the discriminatory provisions would suggest a relatively low number of cases where the discriminatory laws were applied. Application was possible when the Court of Justice or the administration had some freedom of interpretation of the legal provisions. In other cases, for example, when the Russian law did not allow a Jew to buy mining rights, the interested Jewish businessman could enter into a partnership with a Christian. In the last resort, particularly in the former Russian provinces, bribes would be given to the appropriate person.

Far more dangerous were the efforts of the Polish nationalist politicians, particularly National Democrats, to influence political and administrative life. One tragic, but politically unsuccessful, attempt on a high level, was the campaign against president-elect Gabriel Narutowicz, who was nicknamed the "Jewish elect", because the deputies who voted for him represented left and centrist Polish parties and national minorities, including Jews. Narutowicz was murdered by a nationalist ideologue (who, after his trial and execution, was venerated by radical nationalists as a "martyr of the national Polish cause"). The nationalists demanded that the deputies representing national minorities should refrain from voting on issues such as the election of the president, as they believed that this should be the exclusive right of "ethnic Polish" deputies.

A possibility of such a development arose in 1935 when the new constitution introduced a vague formula:

"The rights of a citizen to influence public affairs shall be measured according to his effort and contribution to the common cause. These rights cannot be curtailed because of origin, religion, sex, or nationality."

This provision was a remnant of the dream held by Walery Slawek, a personal friend of Pilsudski, whose thoughts were preoccupied with the idea of a state governed by the most meritorious citizens. It is true that Slawek did not think about any discrimination against national minorities, however, his ideas could be interpreted in a discriminatory sense.

On the local level, in the towns of the central, southern and eastern provinces, it was impossible to eliminate the influence of Jewish voters on the municipal authorities. The Jews participated in the town councils and, in several cases, particularly in small towns, were granted posts of deputy mayors or, infrequently, mayors. Even in the city of Lwow the deputy mayor was, as of 1930, a known Jewish politician Wiktor Chajes (who was, however, a follower of the assimilationist movement). Such an

arrangement could often be agreed between the National Democrats and conservative Jewish members of the town council. Sometimes moderate Zionists entered a similar coalition. An interesting electoral alliance was achieved in 1928 in Przemysl, comprising moderate Jewish, Ukrainian and Polish parties against a coalition of National Democrats and *Agudas Isroel*. There, Jews received the post of deputy mayor and significant practical profits for the whole community.⁸ Rarely, Polish and Jewish Socialists could achieve a similar strong position and dominate the town hall. There is still insufficient data about the situation in the municipal authorities in the whole of Poland. However, partial studies indicate that local Jewish politicians often accepted that the Polish members of the town council would retain dominant positions and did not try to play a role commensurate with their number among the voters. To some extent this was due to the lack of Jews experienced in public activity in small towns. Another important factor was the traditionally inferior social status of Jews compared to the status of Christians, something that was not easy to overcome among the conservative local population.

The first half of the 1930s was marked, however, not only by the abrogation of the old discriminatory laws, but by the great crisis and beginning of a political offensive by National Democrats against the government, in which anti-Jewish arguments were used more and more often. The nationalists accused the ruling camp of allegiance to the Jews and initiated riots at universities and in certain small towns. The peak of this activity occurred in about 1935, which was coincidental with the death of Pilsudski in May that year. The loss of the charismatic leader left the ruling politicians in a difficult situation as they had no clear program or other person of sufficient authority to replace the "Commander". Endeavors to find support among the democratic parties or individual politicians were in vain. They demanded the return to democratic processes and this could not be fulfilled by the ruling group. Some of the latter politicians were sincerely convinced that in the Europe of those days only a country with an authoritative system of power could survive and that the Jews were dangerous because of their strivings for democracy. Interestingly, this was the reason why several politicians from Pilsudski's camp began to sympathize with

8. Wierzbieniec, Waclaw: *Spolecznosc zydowska Przemysla w latach 1918-1939*, Rzeszów: Wydawnictwo Wyższej Szkoły Pedagogicznej 1996, pp. 166-7.

nationalism, albeit not with the more radical right-wing National Democrats.

This was probably also the reason why a group of deputies prepared a draft bill banning *shechita*. Formally, the ban did not discriminate against any group of citizens as it did not refer to Jews or Moslems but addressed all citizens interested in the slaughter of cattle. It did, however, affect the followers of these two religions and the Deputy Minister of Religious Denominations and Education (Rev. Bronislaw Zongollowicz) protested. The ban also affected the producers of meat (*i.e.* peasants), and the combined forces of Rev. Zongollowicz and representatives of the Ministry of Agriculture helped to moderate the law. *Shechita* in 1936 was not banned but limited to the estimated needs of the Jewish population.⁹ Another similar law, formally applying to all citizens but in fact mainly affecting Jews trading in devotional goods, restricted this activity to people of the given religion. The last of these laws was enacted at the end of March 1938 and made it possible to deprive Polish citizens of citizenship in a simplified way if they had lived abroad longer than five years. Formally, the law concerned all citizens, however, secret instructions issued to the Polish consuls demanded that it be used against national minorities (mainly Jews) and Communists.

The three laws mentioned above did not discriminate formally against any category of Polish citizens. It is not insignificant that until the end of the Second Polish Republic there were no laws openly discriminating against any national minority including Jews, whereas in certain other European countries the policy of Third Reich found imitators. The nationalist policy, discriminating against the national minorities, was not an open, legally based enterprise in Poland. International opinion had some influence on this attitude and the general international condemnation (at least in words) of the Third Reich was convincing. Further, although public opinion in Poland was often ill-disposed towards minorities and particularly Jews, it was by no means ready to accept a policy of open discrimination.

It is true that there were projects and even efforts to introduce draft bills in Parliament modeled on the infamous Nürnberg laws. The authors of these projects could not, however, gather a sufficient number of signatures of other deputies as required by the internal regulations of the Polish Parliament, and the drafts remained on paper only.

9. See Rudnicki, Szymon: *Ritual Slaughter as a Political Issue*, "Polin" vol. 7 (1992).



Participants of the Remember Warsaw International Conference paid a visit to the Treblinka death camp site and attended a memorial service. (Photo courtesy of Dan Pattir)

Poland as the Core of the Jewish Diaspora: Jews and the March 1921 Polish Constitution

Shlomo Netzer



My subject is the early phase of Polish Jewish relations in the second Polish Republic, established in 1918, expressed by the story of Jicchak Grinbaum and Maksymilian Hartglas, who were leaders of the Jewish representation in the Polish Sejm, during the debates concerning the March Constitution, 1921.

In the beginning of the twentieth century, the two met as young students at the Faculty of Law, Warsaw University. They continued their common political activities, cooperating during the coming 50 years. Their primary activities were as elected and reelected members of the Polish Sejm, outspoken leaders of Polish Jewry and active members of the Zionist organization. In 1948 with the establishment of the State of Israel, Grinbaum was nominated Minister of the Interior and Hartglas - Director General of the Ministry.

As experienced parliamentarians, they contributed to the formulation of the procedures of the first Israeli Parliament, the *Knesset* (then called the "Constituent Assembly"). Today, streets are named after them.

Who were these two men and how were they brought up? Jicchak Grinbaum was born in Warsaw in 1879 and Maksymilian (in Hebrew: Meir) Hartglas was born in 1883 in Biala Podlaska. Their fathers maintained some mode of Jewish

life, taking part in Jewish community activities, attending prayers in the synagogue at Sabbaths and holidays.

Maksymilian Hartglas' father, Kalman, spoke Yiddish and Polish. He organized Polish language courses for Jewish youngsters and was a member of the committee for the establishment of the Jewish hospital in Biala Podlaska. Jicchak Grinbaum's father, Jehoshua, was a scholar (a *misnaged*), involved in Jewish community life in Plonsk, the town to which his family moved, during Jicchak's early childhood. In Plonsk, together with Avigdor Grin, David Ben-Gurion's father, he established a modernized Jewish school (*heder metukan*) named "Wisdom and Sagacity" (*hochma v'tushija*), in which secular and religious education were united, based on the three R's: reading, writing and arithmetic.

Nevertheless, the education of the children at home was handed over to their mothers.

Maksymilian Hartglas' mother, Dwora Alexandra *née* Rozenwajg, was very eager to imitate the Polish way of life, and inclined to assimilation. Her young son, educated in his early childhood by his mother, was alien to Jewishness. On the other hand, his surroundings in Biala Podlaska, a town in which 50% of the inhabitants were Jews who were involved and active in the life of their community, influenced him. In the secondary school the young boy met Jewish pupils, among them Litwaks (Jewish pupils who came to the school because of the *numerus clausus* in Russian schools) obtaining primary knowledge, about the Zionist movement.

Jicchak Grinbaum's mother, Lea *née* Kerer, was first married

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to an antiquary in Warsaw. The antiquarian booksellers sold antique and out of print books, collected by Jewish peddlers all over the country. They had little shops, mainly on Swietokrzyska Street in Warsaw. Polish intellectuals came to their shops looking mostly for rare Polish books (*biale kruki* - white ravens). The shopkeepers in their Jewish dress with side-curls and beards offered them at bargain prices.

The young Jicchak Grinbaum spoke Polish as his mother tongue. He was deeply impressed listening to the evening readings of Polish literature which took place at his mother's home. The young boy listened attentively to readings of the famous literary works of Adam Mickiewicz, Juliusz Slowacki and others. He was fascinated, as well, by the Bible stories he read in Hebrew. Studying Jewish history, he closely examined the endurance of the Jewish people during the long years of the Diaspora, admiring their yearning for redemption, and their will to return to Zion.

Both Grinbaum and Hartglas grew up in Jewish houses, far removed from the assimilation which Polish Jews abhorred, and the boundaries of which only a few, mostly among the Jewish plutocracy, trespassed. During their studies in secondary schools Grinbaum and Hartglas took part in discussions overflowing with social and national pathos. In the meantime, Zionism and the Zionist World Congresses impressed them. They read the booklet *Der Judenstaat (The Jewish State)*, written by T. Herzl, the founder of the Zionist organization, paying attention to its subtitle: "*Versuch einen modernen Losung der Judenfrage*" ("An attempt to find a modern solution for the Jewish problem"). Finally they became faithful supporters of the Zionist ideas, accepting them with their youthful excitement.

At the beginning of the 20th century they began their studies at Warsaw University. Jewish Warsaw at that time was the biggest Jewish center in the Jewish Diaspora. In 1901 there were 257,000 Jews in Warsaw, *i.e.*, 35.7% of its total population, living mainly in the center of the city.

The two young students of law belonged to the Zionist academic corporation *Kadimah*, discussing, elucidating and clarifying national problems. Indeed, they adopted concepts from the Polish political vocabulary, especially the term *OJCZYŻNA* that means fatherland and homeland. Their political experience was cultivated in the "Monday meetings", that took place in the parlor of Nahum Sokolow, editor of the Hebrew weekly *Hacfirah*, founded by Chaim Zelig Slonimski, the grandfather of

the famous Polish writer Antoni Slonimski. On Sabbath afternoons, they met at the receptions of the Jewish writer J.L.Perec.

In 1905 Grinbaum and Hartglas were elected delegates to the seventh Zionist Congress in Basel. They were deeply impressed by the Jewish parliament "of the future Jewish State". Coming back to Warsaw, they set in motion the new established autonomous Zionist bureau in Poland, in accordance with the decision of the Basel Congress. The bureau was active during the elections to the Dumas, publishing a Jewish political manifesto and urging ideas of Jewish self-determination, as well as fostering awareness of Jewish civic and national rights.

After the 1905 revolution, disappointed by their lack of success and threatened by the reactionary steps of the Russian authorities, Zionist activities in Russia came to a standstill. The young Zionists found their organization ineffective, immersed in routine, and unable to face the new situation. As a result, they concluded that the Zionist organization could not disregard the problems of the Diaspora, focusing only on the "one way idea" of building the Jewish national home in Palestine, as it was formulated by the older generation of Zionists.

Grinbaum and Hartglas, editors of the Warsaw Zionist weekly *Zycie Zydowskie*, together with other young Zionist newspaper editors, suggested a "harmonic approach" to Zionism, combining activity aimed at building a national home in Palestine with the struggle for Jewish rights in the Diaspora. They coined this *Landespolitik* or *Gegenwartsarbeit*, *i.e.*, "present work" in the Diaspora parallel to "future work" for Eretz Israel.

At the third Russian Zionist Conference, convened by the young Zionist leaders in 1906 at Helsingfors, Grinbaum put this "double program" to a motion that was accepted by a great majority. The severe situation which followed the suppression of the 1905 revolt led to the Helsingfors program being postponed immediately, nonetheless, the program paved the way for the future Jewish parliamentary policy which was implemented during the two decades of the Second Polish Republic, established after the First World War. Its adversaries, the "one way" Zionists in Poland, criticized this program of *Polityka krajowa* and ironically nicknamed it "Sejm Zionism".

In the meantime the Polish Zionists organized themselves for the period which would follow the world war. Grinbaum described the national feeling among Polish Jewry in a topographical depiction of a modern Jew in Poland:

"A Jewish intelligent person, speaking Polish, attached to its

culture, self-conscious, straightening his back, resisting assimilation, demanding the right of the Jewish people for freedom and national perfection.”

At the third Zionist conference, convened 1917 in Warsaw, on the eve of the resurrection of Poland, Hartglas suggested the principles of the Jewish political program in Poland (published in Polish: *Zasady naszego programu politycznego w Polsce*).

In short:

The Polish reborn State will be a multiethnic political unit, and the Jews will be Polish citizens of Jewish nationality - *natione Polonus-gente Judaeus*.

As an ex-territorial minority, their national autonomy will be recognized by the State, with the *Kehilla* (Jewish community) as its basic unit.

On his return to Warsaw in August 1918, Grinbaum, together with other members of Jewish parties, energetically began to organize a Jewish National Council, that would represent Polish Jewry and face the newly created political situation. In fact, he only succeeded in forming a Temporary Jewish National Council (*Tymczasowa Żydowska Rada Narodowa*), elected in a pre-conference of Polish Zionists and their adherents convened in December 1918 in Warsaw.

In the Autumn of 1918 the new Polish State was founded among military and diplomatic struggles over the final demarcation of its boundaries. For the next two decades, Poland faced a multitude of economic, social and demographic problems. In the newly established independent State, Poles comprised 60% of the population, another 30% were national minorities, concentrated mostly in the border areas, adjacent to their mother countries. The Jews who accounted for 9-10% of the population were a unique and mostly urban minority dispersed throughout the country with an economic structure that differed from that of the Gentile society.

The problems of the new State were the background for the molding of Polish Jewish relations. The Poles' attitude to the character of the new established State was expressed in the affirmation that identification between statehood (*panstwowosc*) and nationality (*narodowosc*) was to be absolute, inseparable and irreversible. The inescapable conclusion was that the minorities living in the country had to subordinate their national aspirations to the one-nation state (*panstwo narodowe*). However, this attitude was in blatant opposition to the ethnic demographics in East Central Europe, especially in Poland.

Polish Jews demanded a distinction between statehood and nationality in line with the character of the multiethnic population in Poland that was a multinational state (*panstwo narodowosciowe*). Their principal demand was that the Jews be recognized as a national minority, entitled to be an autonomous unit.

This demand, which varied according to who put it forth, was totally rejected by the Polish majority. The Poles imposed the stamp of Polish nationality on the State and coerced the minorities into accepting the exclusivity of Polish interests. In other words, they preferred the national interest, dismissing particular Jewish demands.

The “Election Law” in respect of the Constituent Sejm, due to be elected in January 1919, seemed, at first sight, to be democratic. But immediately it became clear that the “geometric engineered law” gave preference to Polish populated districts over those populated mostly by minorities. The Jews, being dispersed over the whole country, found themselves, as a result of that law, deprived of the right to elect representatives, proportional to their number among the total population. But all the efforts by the Jewish Sejm members to amend the Election Law in Parliament failed.

The 11 Jewish members of the Sejm elected in 1919, formed a “Free Association of Sejm Members of Jewish Nationality”; among them were Grinbaum and Hartglas.

With the opening of the Sejm, the Election Law aim of minimizing the number of Jewish Sejm members was followed by restriction of their activities at the plenary sessions of the Sejm. Afterwards, membership in standing committees of the Sejm was confined to factions of up to 12 members (the Jewish Sejm association counted less than 12 members). These restrictions had the potential to drive the Jewish representation out of the Parliamentary agenda and out of Parliamentary activity, which mainly took place behind the curtains in the Sejm committees.

The Jewish representation and Grinbaum and Hartglas in particular, understood the importance of participation in the proceedings of the Sejm constitutional committee, destined to prepare the Constitution of the new State. Therefore, notwithstanding their former decision to support the democratically minded left parties, they preferred to elect the right-wing candidate as Sejm speaker (Wojciech Trapczynski). In payment, Grinbaum was elected to be a member of the constitutional committee. The proceedings concerning the future Constitution began in the spring of 1919, concurrently with the Paris Peace Conference, convened in the same time.

The Committee of Jewish Delegations established in March at the Paris Peace Conference, headed by prominent Jewish American leaders, invoked the principle of self-determination, formulated by US President Woodrow Wilson, to further national aspirations and demanded recognition of the civil and national rights of the various minorities. They also made great efforts to achieve national autonomy for Polish Jews.

The Committee proposed an international convention to guarantee the rights of national minorities in the newly established countries in East Central Europe. The convention that was to be signed by the Polish representatives was intended to be the basis for guaranteeing Jews' rights in the yet-unwritten Constitution. But the Jews' aspiration to be seen as a distinct group (*ius differendi* - the right to be different) conflicted sharply with the Polish desire for a homogenous state. The Poles argued against the proposed international guarantees, which, they said, insulted their pride as a sovereign state. They stressed the traditional Polish tolerance of Jews in the past as a sufficient guarantee, while ignoring the then ongoing violence, pogroms and oppression.

Finally, the Poles signed the Treaty of Minorities in June 1919. However, they severely criticized the 12 articles of the Treaty providing for the rights of minorities. They accused the Jews of disloyalty in seeking support through "painful and humiliating" international guarantees, which would be imposed (*narzucony*) upon Poland. The right-wing accused the Jews of organizing an international plot in which "the anonymous power" aimed to establish a Judaeo-Polonia, a "state within a state".

The delegates of Polish Jewry in Paris saw in the Minorities Treaty an important achievement, stressing the fact that an international body had acknowledged the problem of the Jews as a minority. They believed that it would be followed by the ratification of the treaty by the Sejm, and the inclusion of the relevant articles in the Constitution.

During the debates on the Constitution in the Sejm and the constitutional committee, agreement was reached as to the basic principals of the fundamental laws. Some of the Jewish amendments were aimed at ensuring the democratic character of the State, in its broadest sense. As citizens of the State, they looked to it to guarantee and ensure their rights as a minority. Their main amendments were aimed at implementing their national tenets in the Constitution, to be approved by the Sejm. But they did not act solely for Jewish rights. They were concerned about

safeguarding the State's democratic character for the benefit of all its citizens, and contributing to legislation regarding the domestic economy, trade development, taxation, internal and external affairs. Some of their proposals seconded the motions of the left democratic Polish parties.

Needless to say, almost all the Jewish amendments, published in the official protocol of the constitutional commission submitted to the Sejm, were rejected.

Almost all the Polish factions were united in their longing to form a national State, and explicitly objected to recognizing its multinational character. The time was not ripe for a pluralistic approach to Polish statehood. The Poles, like other newly established States in East Central Europe, stood for a dogmatic conception of nationalism, negating all other elements. It was aggravated by instigation against the Jews, fostered by the right-wing parties, based on a latent animosity that arose anew at the end of the 19th century.

In contrast, Jewish loyalty to the State had already been expressed during the first Sejm debate on the "Jewish question".

Grinbaum educated in a Polish gymnasium declared, in Latin: *Civis Polonus sum et nihil Poloniae a me alienum puto* (I am a Polish citizen and all that concerns the Polish State is of interest to me).

Factually, the Jews proved this on various occasions, as they stood unanimously behind the government and took an active part during the 1920 Polish Bolshevik war.

Indeed, Jewish loyalty to the country in which they lived, had its origin in ancient times. The prophet Jeremiah wrote to the Jewish exiles in Babylon after the destruction of the First Temple (in the sixth century B.C.): *Dirshu Shlom Ha'ir*: "And seek the peace of the city whither I have caused you to be carried away captives, and pray unto the Lord for it; for in the peace thereof shall ye have peace." (*Jeremiah 29,7*).

Polish Jewry followed this path; for example, the Rabbi of Sosnowiec, J. Englard, encouraged the Jewish inhabitants of his town to subscribe to the Polish national loan in 1933, reminding them about Jeremiah's letter and emphasizing the mutual interest in the security of the Polish State.

But the dialectic tension of Polish Jewry continued in the years to come. On one hand, they wanted to be equal citizens of the State. On the other hand, they wanted to preserve and develop their national uniqueness while continuing their unequivocal support for Polish sovereignty. The Jewish representation published brochures in Yiddish and Polish, reporting

about the Constitution debate in the Sejm. The Jewish press went into details informing its readers and molding Jewish public opinion. As a result, Polish Jews gradually became “*homi politici*” - political minded and aware of their rights.

The Jews accepted the ratification of the Constitution by the Sejm with mixed feelings.

In the solemn moment of the ratification of the first Constitution in the newborn State, they shared the excitement of all Sejm members. Some expressed the hope that they would be respected Polish citizens, participating in festivity and sorrow. They tried to believe that the various articles of the Constitution would be implemented in good faith, ensuring the equal rights of Jews as citizens and respecting their national demands. But there were also doubts. The moderate Jewish Sejm member from Krakow, Dr. Joshua Thon, emphasized the vague formulation of some articles in the Constitution which left room for arbitrary acts. He added that it looked like a frame without a picture, which had yet to be painted in the future. He expressed his fear that it would remain a piece of paper.

The ensuing events refuted the hopes of the optimists, disappointing them, and soon a political struggle began for full citizenship, for the redress of grievances and against discrimination, which lasted for the two decades of the Second Polish Republic.

Thus, a discrepancy between the two nations in finding an acceptable solution to the Jewish problem *de jure*, shaped a dissonant situation, harmful to the establishment of balanced Polish-Jewish co-existence in Poland.

But *de facto*, the Jews were able to develop a unique, *sui generis*, cultural, social and political autonomy in Poland, which the famous Jewish writer, Nobel Prize winner, Shmuel Joseph Agnon would describe as *Nusach Polin* - a version of Polish autonomy.

Thus, we find a multiplicity of Jewish political parties, economic organizations, social associations, educational networks and various cultural activities in the Second Republic of Poland, and indeed, Poland became the core of the Jewish Diaspora during the interbellum.



Plenary session at the Remember Warsaw International Conference

Restitution of Jewish Assets in Poland - Legal Aspects

Monika Krawczyk

The issue of Jewish property has always been sensitive because of the dramatic circumstances accompanying its history.

Before the war, Poland was home to about 3.5 million Jews. They constituted 7-10% of the population. Jews generally inhabited towns and cities and about 30% of Warsaw's population was Jewish. In some *shtetels* Jews comprised 80% of the populace.

From the above brief introduction one may draw conclusions as to the economic status of the Polish Jews. Even if only 10% of the Jewish population were property owners, it means that at least 300,000 properties were owned by the Jews. This is only real estate; one must also add precious articles, bank accounts, insurance policies and other benefits.

Restitution of Communal Properties

In the mid 1990s, the Polish Parliament enacted legislation regulating the status of various religions in Poland. The Law on the Relationship between the [Polish] State and Jewish Communities in the Republic of Poland was adopted on 20 February 1997, and came into force on 9 May, 1997 (the "Law").¹

Article 30 *ff.* provides for the procedure on the regulation of the status of real properties (formerly owned by Jewish communities) in order to return them to today's local Jewish communities. The applications for regulation may be filed either by specific communities or by the Union of Jewish Communities, which may conduct relevant regulatory proceedings either independently, or in co-operation with a special-purpose-foundation which it may establish along with other

organisations representing Polish Jewry, including the World Jewish Restitution Organization (mentioned by name).²

For historical-geographic reasons, regulation is different in relation to properties located

(i) in the areas included before the Second World War (as of 1 September 1939) in the territory of Poland, and (ii) in the former German territories incorporated in Poland in 1945, on the basis of the Jalta Treaty. Consequently, there is no regulation relevant to communal Jewish properties located on the Vilna - Lvov belt, as those territories became part of the former Soviet Republics of Lithuania, Bielarus and Ukraine³ - over which Poland lost its sovereignty.

Jewish cemeteries, synagogues, community headquarters and "buildings serving religious, educational and social-aid purposes"⁴ may be claimed under the first category (properties located within the borders of Poland in 1939).



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1. Law Journal No. 41 Item 251 (as amended).
2. Art. 5 and 22.
3. There are however some regulations concerning private property left behind.
4. Properties such as: schools, hospitals and orphanages.

The second category was narrowed and includes cemeteries, synagogues and headquarters of the pre-war communities which are also official seats of today's communities, if the applicant intends to reinstate their religious, educational or social-aid function.

The regulatory procedure is initiated by the submission of an application which must include evidence (*i.e.* documents) proving the title of a pre-war Jewish community (or other "religious legal persons"⁵) to the claimed property. This is not an easy task considering the devastation of archival documents during the war.

The detailed regulatory procedure was described in the Ordinance of the Minister of the Interior on 10 October 1997⁶ which came into force 6 days later. Within the period between issuing the Law and the Ordinance, few applications were submitted because, until the Ordinance was issued, there were no guidelines for proper filing. This seemingly irrelevant issue is significant, because the time limit for submitting applications expires 5 years after the Law comes into force. This problem is essential for the whole restitution process as, so far,⁷ only 650 applications have been submitted, which, according to some estimates, amounts to only 10% of possible claims. However, more realistic data shows that at maximum, an additional 2000 applications could be submitted. This slow filing is due to the onerous process of researching archives and a scarcity of qualified staff.

If an application is successful, regulation may consist of the return of title to the applicant, the assignment of replacement property, or monetary compensation (in that order). The reason for employing various solutions is that the regulation may not infringe rights acquired by third persons. So far, about 120 properties have been returned to the Jewish communities, most being the original properties used by the pre-war communities. Unfortunately, most of the properties are in very bad structural condition requiring immediate repairs.

The regulatory proceedings are held by a Commission consisting of an equal number of members representing the State Treasury and Union of Jewish Communities ("the Commission"). The decisions of the Commission are final (may not be appealed) and are the basis for the registration of title in the Land and Mortgage Registers. The Land and Mortgage Registers are maintained by District Courts and title entries are subject to the courts' control. So far the Commission is not aware of courts undermining the Commission's decisions. In the event that the Commission is not able to reach a decision, the

case may be referred to the common court. So far there has only been one such case.

A serious problem exists with regard to the restitution of cemeteries. According to Jewish law, a cemetery (as *beit olam*) may not be interfered with in any way and the peace of the bones may not be disturbed. Jewish cemeteries were devastated first by the Nazis and then by the locals. Many cemeteries were simply designated for other purposes (parks, roads, even buildings). After half a century of such enormous neglect full restitution of such properties is not possible. On the other hand, close co-operation with rabbinical authorities is required in order to secure the sanctity of the cemeteries.

Restitution of Private Properties

A. Reprivatisation Law

First, the Reprivatisation Law which was discussed in Parliament for the past 3 years, was vetoed by the President. The draft was submitted by the Government and contemplated full compensation to the expropriated former owners (or their successors) who were Polish citizens on the date of eviction.⁸ The draft passed by Parliament in February 2001, provided for only partial (50%) compensation and only to former owners (with a limited circle of heirs) who were citizens of Poland on 31 December 1999. This provision was criticised as non-constitutional.⁹

The presidential veto removed any chance of swift compensation for those evicted or regulation of ownership issues in Poland. In justification for the veto, it was stated that Poland could not afford to start restitution with claims reaching about 70 billion USD.¹⁰ It was stated that litigation in the common courts

5. The statutory term "religious legal persons" was not defined in the legislation and created interpretation problems in the practice of the Regulatory Commission. The possible definitions could range from a statement that any Jewish organisation was of a religious character to the claim that the phrase "Jewish" was solely a national matter and had nothing to do with religion.

6. MP No.77 Item 730.

7. As of 7 May 2001.

8. "Komunikat Ministerstwa Skarbu Państwa", *Rzeczpospolita*, 8 December 1998, p. 18.

9. P. Winczorek "Reprywatyzacja i konstytucja", *Rzeczpospolita*, 16 January 2001, p. C3.

10. M. Wielgo "Proszę do sądu", *Gazeta Wyborcza*, 23 March 2001, p. 24.

would therefore be most appropriate. Within those 3 years public opinion also withdrew support for reprivatisation.

In the absence of the Reprivatisation Law regulating the scope of remedies available to former property owners, the status of many properties remains unclear, and accordingly, investments involving real estate may be affected.

B. Litigation in the Common Courts - General Rules

Since most former owners lost title pursuant to nationalization laws, administrative procedures must first be exhausted before applying to the common courts.

Actio in rem

A court action by a former owner seeking restitution, may, in principle be based on Article 222, Section 1 of the Civil Code:

“An owner may demand from a person who factually has control of a thing to release that thing to him, unless that person has a right (remedy) effective with respect to the owner, to control the thing.”

According to Article 223 of the Civil Code, the statute of limitation does not apply in respect of the above claim if the claim concerns real estate. The statute of limitation in respect of movables is 10 years. This claim may be pursued as long as the claimant remains the owner. Loss of title results in the expiry of the claim.¹¹ Titles to real estate are recorded in Land and Mortgage Registers. There is a legal presumption that the right disclosed in the relevant Land and Mortgage Register expresses the actual legal status.¹² The matter of title evidencing will be further explored below.

Polish civil law, however, recognizes the institution of usucaption, which allows the possessor of real estate who is not an owner, to acquire title, if such person possesses the real estate uninterrupted for 20 years in good faith, or 30 years where good faith may not be attributed to the possessor. The acquisition of title takes place by operation of law and is not dependent on a court decision.¹³ However, the Supreme Court has ruled that the State Treasury cannot credit the period during which it holds possession toward the period required for usucaption, if it is determined that the possession was acquired pursuant to a decision which was later declared null and void. This decision has many opponents among scholars.¹⁴

Further, in most cases, expropriation took place on the basis of various nationalisation laws, among which there are about 20 laws concerning real estate alone.

The above indicates that most former owners have lost their legal title, and the only way to regain it, is to pursue the invalidation of individual administrative decisions, issued on the basis of the nationalisation laws.

Actio ex obligationem

As a starting point in this connection, it is useful to quote Art. 77 of the Constitution¹⁵ which states that:

- “1. Any person has a right of compensation for the damage done to him by unlawful acts of public authority.
2. Acts of law may not deny access to the courts to anyone seeking a remedy for the infringement of his freedoms or rights.”

This provision is both a guideline and the “final judgement” because individuals are entitled to file a constitutional claim in the event of infringement of their constitutional rights by a public authority.¹⁶

Compensation claims for unlawful acts resulting in expropriation may only be pursued when the administrative body authorised to review individual claims officially declares that there was a breach of the law. The possibility of filing compensation claims in the common court is very limited, because the properties were nationalised pursuant to laws issued legally, albeit unjustly.

The Polish legal system has not adopted the principle that the State (acting in the dominium sphere) is responsible for damage done to individual as if it was a private person. Accordingly, individual administrative decisions are not reviewed by the common courts. In Poland there is a separation between the administrative and civil law. Therefore, the common courts are bound by an administrative decision as long as it is valid. In restitution cases, an individual administrative decision directed at specific owners should first be invalidated pursuant to Art.

11. E. Skowronska “*Kodeks Cywilny - Komentarz*”, C.H. Beck, Vol. I, p. 399.

12. Article 3 of the Land and Mortgage Registers Law of 6 July 1982 (Law Journal No. 19, Item 147, as amended).

13. E. Skowronska “*Kodeks Cywilny - Komentarz*”, C.H. Beck, Vol. I, p. 335-338.

14. *Ibid.*

15. Journal of Laws of 1997, No. 78, Item 483.

16. Art. 79 of the Constitution, *ibid.* fn. 13.

156 of the Administrative Procedure Code¹⁷ and thus be eliminated from the legal system. One of the valid grounds for such an application is the claim that an expropriation decision was issued without valid legal basis (the statute of limitation does not apply to this claim). Only if that charge is upheld will the administrative authorities issue a new decision declaring the expropriation/nationalisation decision invalid, thereby enabling the former owner to take steps for *restitutio in integrum*. If such a decision cannot be issued due to “irreversible legal effects”¹⁸ the former owner may claim monetary compensation from the administrative body which issued the decision which was determined to be invalid. If the claimant is not satisfied with the compensation, the matter may be submitted to the common court. Where it is not possible to invalidate a decision, the administrative body will declare that a defective decision was issued but that it cannot be eliminated from the legal system. Such a declaration also allows a claimant to demand compensation.¹⁹

The restitution process, as described above, is usually very complex and time consuming (each administrative decision may be appealed and/or submitted to judicial review), because it involves legal actions at the junction of administrative and civil law.

C. Examples of Nationalisation Laws

As mentioned above, there were many laws which had the effect of expropriation. Every reprivatization process, if started today, would involve administrative proceedings for the invalidation of the decisions issued on the basis of those laws.

“Post-German and deserted properties”

Most former owners lost their properties by reason of the Post-German and Deserted Properties Decree.²⁰ Under this Decree any property (movable and immovable) which was not recovered by the original owners as of 1 September 1939, within 10 years (5 years in case of movables) of the year 1945, passed to the State. This law is no longer in force, but the State may still gain title to the properties by virtue of its provisions. It was confirmed by a Supreme Court ruling in 1987.²¹ So-called “post-German & Gdansk (Danzig) properties” - located in the territories of the Third Reich and Frei Stadt Danzig incorporated in Poland, were nationalized automatically as of 19 April 1946, except for property belonging to persons of Polish nationality, or “other nationality persecuted by the Germans”.²²

“Warsaw Properties Decree”

The Decree on Ownership and Use of the Land in the City of Warsaw of 1945,²³ which is still in force, regulates the status of ownership in the City of Warsaw (within the 1945 borders) separately from the rest of the country, in order to facilitate fast reconstruction of the capital. The Municipality of Warsaw obtained ownership of the land as of 21 November 1945, but the Decree enabled pre-war owners to apply for title to buildings and the establishment of long-term (99 years) *in rem* rights to use the land, called “perpetual usufruct”. Applications were favoured, if use of the land was reconcilable with the local zoning plans. After an initial period of fairly smooth processing, the authorities started (for political reasons) to reject all applications. This led to a situation where hundreds of applications were not decided, or were rejected unlawfully. Since the law is still in force, those owners who submitted their applications in a timely manner in the past, may still re-apply for a right to perpetual usufruct, following the invalidation of the earlier unfavourable decisions.

D. Proving Title

Former owners, or their successors (*i.e.* heirs²⁴) must docu-

17. Journal of Laws of 1980, No. 9, Item 26.

18. Current law regulations protect an entity that acquired its title to property in good faith and was entered in the Land and Mortgage Register. Therefore in many cases the return of original property may not be possible due to the rights acquired in good faith by third parties. In certain cases it is possible to proceed further and (relying on the decision confirming that the expropriation was unlawful) submit a claim to the common court for dissolution of the agreements transferring title. This is not the typical situation but applies mostly to state-owned entities who acquired *ex lege* perpetual useful title (being a long term right to use the property, creating an interest in the land). In that case, the consequence is uncertainty as to the validity of the existing owner title, which was entered in the Land and Mortgage Register. This is quite a paradoxical situation, and therefore it is recommended detailed due diligence is carried out on property in any transaction involving the transfer of title.

19. Art. 158 Section 2, *ibid.* fn 15.

20. Journal of Law of 1946, No. 13, Item 87, as amended.

21. Resolution of Supreme Court of 25.02.1987, III CZP 2/87, OSNC 1988/4/46.

22. Art. 2.1, *ibid.* fn 19.

23. Journal of Laws No. 50, Item 297.

24. Although reprivatization claims are of a monetary character (*i.e.* are transferable in principle), transfer of such a right to a third party is questionable.

ment their claims if they wish to initiate reprivatisation procedures. If a Land and Mortgage Register was maintained in respect of a particular property, the title of the original owner will be entered therein, and it is possible to receive an appropriate certificate. Old Land and Mortgage Registers created before the war have been replaced by a new land registration system, however the former registers may still be traced.

The problem is that many such title registers vanished during or after the war. If a Land and Mortgage Register is not available, a claimant must seek other documentation which may have been preserved in the State Archives. Since the filing system is complicated, the assistance of qualified researcher is necessary.

As a heritage of the 125 year division of Poland between Germany, Austria and Russia, three different systems of Land and Mortgage Registers were maintained before the war. It is interesting, that for some obscure reasons, a significant number of Land and Mortgage Registers from Galicia (which was under Austrian rule) were not replaced after the war by the new KW system, and were actually continued. To gain title to property it was sufficient to submit a certificate of inheritance to the relevant Land and Mortgage Register tribunal.

Certificates of inheritance are of a crucial significance here, because without them no valid claims may be made. According to the Polish Civil Procedure Code²⁵ if the real estate of the deceased is located in Poland, only a Polish court has jurisdiction to declare the rights of inheritance in that respect.²⁶ An incidental procedure which may be necessary to start at this point is to obtain a statement of death, if the death certificate of the original owner is missing.

Summary

The issue of the restitution of Jewish properties is very complex. The matter is subject to administrative and civil law and raises questions in the context of international public and private law. Additionally, it is highly political and sensitive. It should also be noted that the lack of general solutions (like the Reprivatisation Law) and the complicated factual status of the properties require each case to be individually analysed in detail.

25. Law Journal of 1964, No. 43, Item 296, Art. 1108 and 1102, Section 1.

26. T. Erecinski, J. Ciszewski "Miedzynarodowe postepowanie cywilne", PWN Warszawa 2000, p. 148-150.



Top: Memorial service at Auschwitz Death Camp: two survivors Adv. David Arad and Mrs. Malka Grossman laying a wreath. Bottom: A map of the remaining Jewish Quarter at Crakow (Photo courtesy of Dan Pattir).



Qualifications, Not Connections, Nor Protection

Aviad Hacoen

The *Torah* devotes a significant amount of space to the appointment of those who were to work on the *Mishkan* (Tabernacle). After two complete *parshiot*, *Terumah* and *Tetzaveh*, in which the *Torah* describes, in painstaking detail, the contents of the *Mishkan* and the priestly garments (over 200 verses!), the *Torah* then turns to the appointment of the designers and artisans:

“And the Lord spoke to Moshe, saying, See, I have called by name Bezalel the son of Uri, the son of Hur, of the tribe of Yehuda: and I have filled him with the spirit of God, in wisdom, and in understanding, and in knowledge, and in all manner of workmanship, to contrive works of art, to work in gold, and in silver, and in brass, and in cutting of stones, to set them, and in carving of timber, to work in all manner of workmanship. And I, behold, I have given with him Aholiav, the son of Ahisamakh, of the tribe of Dan: and in the hearts of all that are wise I have put wisdom, that they may



make all that I have commanded thee... according to all that I have commanded thee shall they do. (*Ex. 31, 1-11*).

Not only that, but a few chapters later (*Ex. 35, 30-35*) the *Torah* again describes the appointment of those working on the *Mishkan*. Why the detail? The commentators struggled with these issues. From them they derived a number of key elements in regard to the appointment of public servants and community leaders to fill various positions: What are the necessary qualifications? Does family relationship or other interest serve to disqualify the candidate? What is the appropriate method for making the appointment - should it be by “public tender”¹ or by some more direct means?

Should acceptance by the community be a condition of the appointment? These questions also permeate contemporary legal discussions of this issue,² and have a prominent place in the legislation and legal rulings in the State of Israel.³ In this overview, we will look at some of the principles that relate to this issue in Jewish law, and examine how these have been applied in the legal system of “a Jewish and democratic State”.

Rashi, the great Biblical commentator

1. Compare this with the method of appointment of judges: “Our Sages said: The High Court would send out throughout the Land of Israel to examine [potential candidates]. Anyone found to be wise, God-fearing, humble, sane, learned, and acceptable to others - he would be made a judge in his own town, and from there he may be promoted to the Court at the entrance to the Temple Mount, from their to the Court at the entrance to the Temple Court, and from their to the High Court” (*Maimonides, Laws of the Sanhedrin 2, 8*).
2. See, for example: Y. Zamir, “Political Appointments”, *Mishpatim* 20, 19; Y. Zamir, “Political Appointments under Judicial Review”, *Mishpatim* 21, 145; D. Dari, *Political Appointments in Israel* (Tel Aviv, 1993).
3. See, for example: State Service (Appointments) Law, 5719-1959; Chapter 3 of the Government Corporations Law, 5735-1975.

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(France, 11th century), deals with the identity of these senior appointees, Aholiav and Bezalel. Apparently, what bothered *Rashi* was this: Why did the *Torah* go to the trouble of noting Bezalel's lineage, mentioning not only his father's name, as is common in the Bible, but also that of his grandfather: "Bezalel the son of Uri, the son of Hur"? In answer, *Rashi* explains that this "Hur" was none other than the son of Miriam, Moshe's sister;⁴ in other words: a relative of Moshe. This teaches us that those involved in making public appointments ought to work towards "appropriate disclosure" of the facts, identifying any family relationship between the one making the appointment and the one being appointed, to avoid a possible conflict of interests and to ensure complete transparency of the process of appointment.⁵

In contracts with the well-regarded lineage of Bezalel, his associate in the work - Aholiav the son of Ahisamakh - came from an "anonymous" family, not from the elite. Here, too, the Sages, and *Rashi* following them, saw an important lesson:

"And Aholiav - from the tribe of Dan, the least of the tribes, descended from the maidservants. And God compared him to Bezalel in the work on the Mishkan, [Bezalel] who was from the greatest of the tribes [=Yehuda], thus fulfilling the verse 'nor regards the rich more than the poor'. (*Job* 34, 19)"⁶

This principle of equal opportunity - "nor regards the rich more than the poor" - is fundamental to public law: It is qualifications - not connections - that should determine the fitness of a person for a position, without regard to his family

background, social standing or economic status.⁷

Even the necessary qualifications need to be relevant to the task: wisdom, understanding, "knowledge in all manner of workmanship", "to contrive works of art", "to work in gold, and in silver, and in brass" (*Ex.* 31, 3-6). It is not enough to have theoreticians or dreamers - what is required is people with proven experience in work; it is not enough to have artisans and technicians - what is needed is an artist who can "contrive works of art", using the creative powers within himself to breathe into these lumps of gold and silver that "extra soul" which is essential for God's Dwelling-Place. More than that: human relations skills and the ability to work as part of a team are also necessary characteristics: "Then Bezalel and Aholiav, and every wise-hearted man... And all the wise men, that carried out all the work of the sanctuary, came every man from his work which they did" (*Ex.* 36, 1-4).

The writer of *Sefer Hahinukh* (Spain, late 13th century) stressed the importance of the appointee being able to work with others involved in the task:

"So let everyone wise of heart learn a lesson not to ever appoint two men in any matter whatever who are far apart in their nature and different in their conduct, such as a righteous person and a wicked one, or a despicable person and a distinguished one. For if the *Torah* minded about the pain that animals have through this,⁸ which are not possessed of intelligence, then all the more so with people, who have an intelligent, reasoning spirit [by which] to know their Maker." (Commandment 540).

The Supreme Court also took note of

this point, when it disqualified a person for a public position on the grounds that he was "a fractious and quarrelsome person".⁹

By Authority of the Community

The appointment of Bezalel and Aholiav established, as a fundamental rule in Jewish law, that it is insufficient for the candidate to qualified to carry out the requirements of the position. Rather, it is appropriate that the appointment be accepted "on the authority of the community". This would ensure the community's reliance on the authority and its actions. And this is how the Sages put it:

Rabbi Yitzhak said: One does not appoint a leader over the community unless one consults the community, for it is stated: "See, God has proclaimed by name, Bezalel."

The Holy One, Blessed is He, said to Moses: "Moses, do you consider Bezalel worthy of this undertaking?"

4. *Rashi* on *Ex.* 35,30.
5. This, in fact, is the practice.
6. *Rashi* on *Ex.* 35:34.
7. Compare this with the general ruling established in Israeli law in regard to all workers: "An employer may not discriminate between his workers or between applicants for employment on the grounds of... age, religion, nationality, country of origin, opinions or political party affiliation."
8. The reference is to the prohibition of using two different animals together for work (*Deut.* 22, 10), which is the topic on which the author is writing here.
9. See: H.C. 258/64: *Moshe Zilonius aka Moshe Ya'ari v. Minister of Religious Affairs*, 19(1) P.D. 517.

[Moses] said to [God], "Master of the Universe, if he is worthy before You, then he is certainly worthy before me!"

[God] said to [Moses], "Nevertheless, go and ask them [the people of Israel]." [Moses] went and asked them, "Do you consider Bezalel worthy?" They said to him, "If he is worthy before the Holy One, Blessed is He, and before you, then he is certainly worthy before us!" (*Berachot*, 55a).

In other words, it is only when the community has approved the appointment, and the appointee has been found worthy in the community's eyes, that the appointment takes effect. An amazing testimony to the application of this law in practice comes to us from two sources, one from the *Ashkenazic* world and the other from *Sephardic* world. The first comes from a *responsum* of Rabbi Moshe Sofer - the *Hatam Sofer* - the leader of Orthodox Jewry in Hungary in the late 18th and early 19th centuries. The *Hatam Sofer* was asked to deal with the fitness of a certain rabbi to serve in that capacity, after his appointment was forced on the community against their will, through the coercive power of the local authorities:

Your expressions of friendship and kindness have reached me, accompanied by your question asking for guidance as to the way in which [you] should go¹⁰ in regard to a certain rabbi who has lorded it over you¹¹ without asking for or obtaining the consent of the majority of the community, solely on the basis of a command from the high over the high.¹² [This rabbi] has gone and taken the position of Rabbi by force, without your consent. You have asked me¹³ what is the law of our Holy *Torah* regarding this man, whether one is obliged or permitted to show him the respect due to him as

Rabbi, and whether he acted properly or not.

Response: This rabbi, even if he is a scholar, has acted improperly by being appointed to this high position through main force; indeed, where is his wisdom in the *Talmud*? Did not our Sages state in *Berachot* (55a) "Rabbi Yitzhak said: One does not appoint a leader over the community unless one consults the community, for it is stated: 'See, God has proclaimed by name, Bezalel the son of Uri, the son of Hur, of the tribe of Yehuda; and I have filled him with the spirit of God, in wisdom, and in understanding, and in knowledge'. The Holy One, Blessed is He, said to Moses: 'Moses, do you consider Bezalel worthy of this undertaking?' [Moses] said to [God], 'Master of the Universe, if he is worthy before You, then he is certainly worthy before me!' [God] said to [Moses], 'Nevertheless, go and ask the people of Israel: Do you consider Bezalel worthy? etc.'"

And now, let us consider: If in regard to Bezalel, who was filled with wisdom and understanding and knowledge, the Holy One commanded the Israelites through his faithful messenger, Moses our Teacher, and did not impose his appointment on them without asking them and obtaining their consent, how can a person be appointed to any position without asking for the consent and acceptance of the majority of the community.

Although initially one ought not make such a coercive appointment, the *Hatam Sofer* ponders whether the rabbi should not be disqualified *post facto*, in spite of the flaw in the appointment:

Nevertheless, although a person should not be appointed without the agreement of the community, if however the king or a minister appoints him - his decision is law, since we accept as law the principle that "the law of the land is law".

However, the judge should inform the authorities who appointed him that he does not wish to take up the appointment, since the community does not approve. If the authorities force him to take up the position, then "the law of the land is law". However, if he does not inform the authorities in the way that I have described, and especially if he has made representations to the authorities [=to obtain this position] - then he is an unfit person and it is proper to inform the authorities that this judge has acted improperly, and that he ought not hold a position of authority over the Jews and not set foot into our palaces [*i.e.*, communities]. Thank God, most of the rulers of our lands are merciful, and have pity on the Jews, desiring the furtherance of religion and not its destruction. Therefore, when the authorities are so informed, they will surely take heed and remove the forceful hand from the Jewish communities.

The second testimony to the application of the law was discovered only recently, with the publication of the community ledger of the Jewish community of Tunis, and it is dated about 170 years ago:

10. Based on the expression in *Exodus* (18, 6): "And you shall inform them of the way in which they shall go and the deed that they shall do."
11. An expression borrowed from the claims of Datan and Abiram, Korah's associates in the rebellion against Moses.
12. Based on the expression in *Ecclesiastes* (5, 7): "For there is high one who watches over him that is high; and there are yet higher ones over them."
13. See: *Isaiah* 45, 11.

The case is that the learned and righteous Rabbi David Bunan,¹⁴ may God protect and preserve him, was appointed by a number of individuals from the Holy Community of the Portuguese, to serve as a judge in the said community. When he was appointed, other individuals challenged the said appointment. And, after the said Sage held the position for a number of weeks, when he saw the confusion within the community that resulted from the fact that he was appointed without the agreement of the community, he removed himself from serving as judge.

Now we the undersigned hereby give notice that henceforth no rabbi may be appointed as judge of the community, neither the said rabbi to continue as judge, nor any other rabbi, unless it is with the authority of the whole community, from young to old. And even if one individual prevents the appointment of the judge whom it is desired to appoint - the rest of the community, who wish to make the appointment, can only do so with the agreement of that individual who prevented the appointment. And if some individuals disobey [this ruling] and appoint [someone] as judge without the authority of the whole congregation, then that appointment is null and void, and has not value whatsoever. In witness whereof we have signed our names on the 13th day of the month of Kislev 5593 a.m. (5.12.1832) and so it is established.¹⁵

Appointment of Relatives

There is a popular saying that goes, "Where there are connections, you don't need *protekcija*." Since time immemorial, all sorts of "relatives" and "associates" have tried to get themselves appointed to public office, not on the basis of their qualifications, but largely (or even solely) on the basis of their connections with those making the appointment. In

Jewish law this issue developed in an interesting way. On the one hand, since the established approach in public administration is based, to a large extent, on regal principles, the rule was established that public office could be passed down, from father to son, as an "inheritance". This law derives from the rules apply to the king, and was extended to all positions of "authority". On the other hand, as time went on the application of this "privilege" was reduced to a minimum. Now, where the son wishes to be appointed in his father's place, he must meet all the substantive criteria required for the position. This is how the *Rambam* expresses it (*Laws of Kings* 1, 7):

As soon as he is anointed, he acquires the office for himself and his children forever. The right thereto is transmitted as a legacy, as it is said to the end that he may prolong his days in his kingdom, he and his children, in the midst of Israel...

But not only the office of king but every position or appointive office held by the father descends to his son and son's son in perpetuity...

However, the *Rambam* immediately limits this principle:

... provided that the son is entitled to fill the vacancy by reason of wisdom and piety. If he is qualified to take his father's place by reason of piety, but is not his father's equal in wisdom, he is appointed and given additional instruction.

But if he is wanting in piety, he is not appointed to any office, be his knowledge ever so great...

Over the centuries, a broad body of literature has developed around this topic of the inheritance of appointed office, as the Sages sought to find a balance

between the demands of custom and tradition, and the desire to appoint the most appropriate people to office and retain public trust in the actions of public authorities.

Your Deeds Will Draw You Near, and Your Deeds Will Remove You Far

A reflection of an alternative approach found in Jewish legal sources is expressed beautifully in the story of the death of Rabbi Akabya ben Mehalalel, one of the great sages of the *Mishnah*:

At the hour of his death ... He [=his son] said to him: Father, commend me to your friends! [*i.e.*, request of your colleagues that they appoint me to some position].

He said to him: I will not commend. He said to him: Did you then find a fault in me? He said to him: No, your deeds will draw you near and your deeds will remove you far.¹⁶

An echo of the Sages' negative attitude to nepotism - the improper preferment of relatives - can be found in a number of

14. Rabbi David Bunan - Tunisian Jewish scholar of the 19th century. Co-authored the *responsa* "Dey Hashev". Colleague of Rabbi Yehuda Halve, the Rabbinic judge of Gibraltar. Died in 1855.

15. Y. Avraham, *Pinkas Hakehilah Hayehudit beTunis* (The Ledger of the Jewish Community in Tunis), (Lod, 1997), Section 42, p. 115.

16. *Mishnah Eduyot* 5, 6-7. This tractate of the *Mishnah* differs in style and sequence from the rest of the *Mishnah*. It does not deal with a single area of law. Instead it contains statements relating to many different laws, the common factor being the fact that a single Sage stated them or testified to them.

sources.¹⁷ The following is one that makes the point particularly sharply:

Woe is me because of the House of Boethus;¹⁸ woe is me because of their staves! [with which they beat the people]; woe is me because of the House of Hanin, woe is me because of their whisperings [=their secret conclaves to devise oppressive measures]; woe is me because of the House of Kathros, woe is me because of their pens! [=with which they wrote their evil decrees]; woe is me because of the House of Ishmael the son of Phabi, woe is me because of their fists! [=their violence]. For they are High Priests, and their sons are [Temple] treasurers, and their sons-in-law are trustees and their servants beat the people with staves.¹⁹

Potential conflict of interests in the appointment of people who are first-degree relatives is reflected in a law found in the Jerusalem *Talmud* (*Peah* 8, 7 [21a]):

“Two brothers should not be appointed as community leaders. Rabbi Yosi appointed one of two brothers [to a particular position, but did not appoint his brother to another position]. He then went up to the Academy and stated before them: I did not find any fault in the brother, but one should not appoint two brothers as community leaders.”

Many sources in Jewish law bitterly decry appointments that are the result of extraneous considerations. Characteristic of this is the sarcastic statement of Rabbi Yaakov Hagiz (Jerusalem, 17th century) in regard to appointments gained through payment of money:

“A dinar takes in, a dinar rakes in, a dinar permits, a dinar forbids, a dinar

appoints a fool over the masses” (*Leket hakemah*, Laws of Regulations).

Appointments and Appointive Bodies in Israeli Law

Israeli law devotes a good deal of attention to the issue of public appointments. As a result of regular changes in government, the many appointments as directors of government corporations and other administrative bodies, the courts have frequently been asked to rule on the appropriateness of the appointments and the fitness of the appointees for the various positions. The fundamental principle in such a case was formulated by Justice Elon in the *Dekel* case:

A public authority which appoints a person to serve in the public service, does so as a trustee for the public, and it is a general principle that this trust needs to be exercised fairly and honestly, without any extraneous considerations, and for the benefit of the community, from whose prerogative and one whose behalf the authority to make appointments has been given to the appointing body.²⁰

And thus:

The political appointment is a breach of trust against the community by the executive authority as a public authority. It may impair the trust of the public in the Public Service. It impairs the principle of equality. It impairs the professional standards of public servants who are not required to demonstrate, in the framework of a tender, that they are the most suitable for the position. It may bring about a situation in which connections take precedence over qualifications, and politics, in the narrow meaning of the term, becomes a central factor in the appointment... It may lead to the destructions of public ethics... Through

all of these the political appointment undermines the fundamental principles of our legal system, our concept of the nature of the public service, and the social contract that is the basis of our existence as a decent society.²¹

In conclusion: we have looked at some of the ways Jewish law looks at the area of appointment to public office, yet there is a great deal more in the sources - and these are open to all those who care to be involved in making (or reviewing) public appointments.

17. This quasi-historical description is based on a situation in which family connections took on a central role. Regarding this phenomenon in the Second Temple period, see: G. Alon, “The Sons of the Sages”, *Researches in Jewish History*, Part 2 (Tel Aviv, 1958), 58-73.
18. The House of Boethus, the Boethusians: one of the sects in the Second Temple period, related to the Sadducees. The Boethusians rejected a number of principles of Jewish belief: Reward and Punishment, the Resurrection of the Dead, and others.
19. Babylonian Talmud, *Pesachim* 57a. In this context, compare: Section 33 of the State Service Law (Appointments), 5719-1959.
20. M. Elon, H.C. 4566/90, *Dekel v. Minister of Finance*, 45(1) P.D. 33.
21. H.C. 154/98 *New General Workers Federation et al. v. State of Israel*, Takdin-Elyon. See also: H.C. 932/99 *The Movement for Quality Government v. Chairman of the Commission to Examine Appointments in the Public Service*, Takdin-Elyon; H.C. 6777/98 *Shraga Rosenberg v. The Commission to Examine Appointments*, Takdin-Elyon.

The Rights of Non-Jewish Foreign Spouses under the Law of Return and the Nationality Law

H CJ 3648/97 and 27 other petitions
Israel Stamka and others v. Minister of the Interior, Director of Visas in the Ministry of the Interior and the Director of the Population Registry
Before Justices Mishael Cheshin, Dalia Dorner and Dorit Beinish
Judgment delivered on 4.5.99

Precis

This unanimous judgment delivered by Justice Cheshin concerned the legal status of 31 couples who had engaged in inter-faith marriages. The scenario discussed was that of a Jewish citizen of Israel, male or female, who married abroad - either in person or through a proxy marriage (known as a "Paraguay marriage") - a person who was neither Jewish nor a citizen of Israel. In passing, Justice Cheshin noted that the legal position would be the same if the spouse who was an Israeli citizen were a non-Jew, except in respect to the position under the Law of Return.

The Judgment

The Issues

Justice Cheshin pointed out that four questions arose:

1. Whether the non-Jewish foreign spouse was entitled to the rights conferred by the Law of Return - 1950 and the Nationality Law - 1952 upon Jews immigrating to Israel, including Israeli citizenship.
2. Was the Ministry of the Interior's policy of requiring the foreign spouse to leave the country until the Ministry had conducted an investigation as to the genuineness of the marriage, justified.
3. On the assumption that the answer to the first question was in the negative, what was the status of a foreign spouse under the Nationality Law - 1952.
4. Was the Ministry of the Interior justified in refusing to register the foreign spouse in the Population Registry.

The Right of the Foreign Spouse to Return

Justice Cheshin described a "Paraguay marriage" in which each of the parties appointed a legal attorney located in Paraguay to conduct the proxy wedding ceremony in the absence of the couple. For many years, the Israeli Ministry of the Interior had interpreted the Law of Return so that the foreign spouse of the Jewish citizen became entitled upon marriage to the status of a Jew for the purposes of the Law of Return, and

consequently to the status of an immigrant (*oleh*) by virtue of his status as a Jew. In 1995, the Ministry began interpreting the Law differently. Under the new interpretation, the foreign spouse fell outside the ambit of the Law of Return and accordingly also outside the ambit of the Nationality Law.

The Petitioners contended that after so many years the Ministry of the Interior was estopped from undermining the Law by reinterpreting it. This contention raised a difficult question of interpretation, namely, whether, when considering a statute brought before the Court for interpretation and for a determination as to the scope of its application, the Court was entitled to take into account the manner in which an administrative authority had customarily interpreted that statute, on occasion over a lengthy period of time.

Justice Cheshin swiftly dismissed the contention of estoppel, noting that an administrative authority which had interpreted its powers in a certain way, even over a long period of time, and thereafter had concluded that it had erred in that interpretation, was not only entitled to reverse the erroneous course of conduct but was obliged to do so. Acts and decisions taking place in the past, on the basis of the erroneous interpretation, would possibly remain unaffected by the

new interpretation in view of the fact that it would be unjust to deprive individuals of rights and interests acquired under that original interpretation.

The question of the weight that the Court would accord to the past practice of the administrative authority was different to the question of estoppel. Such a question would only arise in unusual cases where the statute was ambiguous. Justice Cheshin noted that Justice Aharon Barak had expressed his views regarding possible interpretations in these situations in his work *Interpretation in Law* (Nevo, 1994, Vol. 2). In Justice Cheshin's own view, however, the weight to be given to the interpretation employed in the past by the authority was both as light and as heavy as a feather. The Court could not disregard the psychological influence attached to the competent authority's interpretation that had been applied before the question was raised before the Court and which had taken root over many years. Nonetheless, the interpretation *per se* had to be accorded minor weight.

Justice Cheshin commenced his analysis by pointing out that the competence to interpret a law lay with the Court. This competence, with its concomitant responsibility, ensued from the principle of the separation of powers. From the moment the legislature enacted a law, the power to interpret it lay exclusively with the Court (Cr. L/App 1127/93 *State of Israel v. Yossi Klein* 48(3) P.D. 485). This principle also applied in relation to the interpretation of secondary legislation and normative administrative acts. Thus, where a Minister had established criteria for supporting public institutions, it was for the High Court to construe these criteria, once they had been published and until

they were rescinded or were modified, and not the Minister who had established them (H.C. 5290/97 *Ezra and others v. Minister for Religious Affairs and others* (not yet published)). The Court was the "expert" in relation to the interpretation of laws and it could not delegate its responsibility or depend on others for that purpose. Thus, for example, it was not possible to accept the argument that the Labor Tribunal's expertise in labor law was an obstacle to the intervention of the High Court in its decisions (H.C. 1520/91 *Vilensky v. National Labor Tribunal* 46(5) P.D. 502).

Nonetheless, where the subject-matter of the law was professional or technical, the practice of a competent authority - an authority having professional and technical know-how or one which was assisted by such know-how - was entitled to be accorded weight when the Court sought to interpret the law. The position was different where the legislature intended to establish norms of behaviour for the public or for individuals. The exclusive "expert" in relation to normative matters was the Court. Indeed, the higher one climbed the normative pyramid, the greater the responsibility of the Court in interpreting the law and the smaller the weight to be attached to the interpretation given by the competent authority.

In the case at hand, the Court was dealing with the interpretation of a provision of the Law of Return, a question relating to the scope of application of one of the fundamental laws of the State. Not only was no "expertise" needed to interpret it, but bearing in mind the exalted place of this law on the normative ladder in the State, there could be no doubt that the authority's interpretation of the law -

even if applied over many years - carried no weight whatsoever. Moreover, of course, the authority had reversed its policy and was now advocating an interpretation of the law that seemed more appropriate to the Court. Justice Cheshin concluded this point by stating that the Court's interpretation could not be retroactive and thereby infringe rights vested under the old interpretation of the law, but would only apply to matters which might arise in the future.

The Right of a Non-Jewish Spouse to Return

Justice Cheshin described the right to return under the Law of Return and the statutory qualifications to that right. He noted the 1970 amendment to Sections 4A and 4B that provided as follows:

Section 4A

- (a) The rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law - 1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.
- (b) It shall be immaterial whether or not a Jew by virtue of whom a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel.
- (c) The restrictions and conditions prescribed in respect of a Jew or an *oleh* by or under this Law or by the enactments referred to in subsection (a) shall also apply to a person who claims a right under subsection (a).

Section 4B

For the purposes of this Law, "Jew" means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.

In addition Section 2(a) of the Nationality Law stated:

Every *oleh* under the Law of Return - 1950, shall be an Israeli citizen by virtue of return.

Section 4A was intended to extend the application of the Law of Return to persons other than Jews, who were family members of a Jewish person entitled to immigrate. This was the basis of the Petitioners' argument, namely, that as a Jew was entitled to immigrate, his spouse was entitled to the same right and consequently to obtain Israeli nationality. Moreover, as the Law did not differentiate between Jews who had not yet immigrated and were not citizens and Israeli Jews, no differentiation should be made with regard to their non-Jewish spouses. Further, it was immaterial whether the marriage to the non-Jewish spouse took place before or after the Jew immigrated (if it took place before - there was, of course, no doubt that the non-Jewish spouse was entitled to immigrate). According to the Petitioners this conclusion was strengthened by Section 4 of the Law which made the position of a Jew who immigrated after the Law of Return equal to that of a Jew who was born in Israel or who had immigrated before the Law of Return.

The Respondents rejected this argument on the basis that a "spouse" under Section 4A of the Law of Return and the consequent right to nationality only

referred to a person who married a Jew prior to that Jew becoming a citizen of Israel. It did not refer to one who married a Jew who was already a citizen of the State.

Considering this question, Justice Cheshin first examined the language of Section 4A of the Law of Return. He held that, *prima facie*, the "static" wording of the Section supported the argument of the Petitioners. However, a "dynamic" construction required that Section 4A be read in the context of the whole Law of Return, and Section 1 of the Law referred to the rights of Jews (and their spouses) upon immigration. Justice Cheshin preferred the latter construction rather than one that saw Section 4A in isolation.

Proceeding to examine the history of the Law of Return, Justice Cheshin explained that it was one of the justifications for the existence of a Jewish State - namely, it expressed the inherent and almost absolute right of every Jew to return and settle in Israel (subject to the very limited exceptions set out in Section 2(b)). Deriving from this right was the immediate and unquestionable right of the Jew to become a citizen of the State and to enjoy the material benefits granted by the State to an *oleh* - but not to a person entering the State with any other status.

Sections 4A and 4B were enacted in 1970 in consequence of the decision in HC 58/68 *Shalit v. Minister of the Interior*, 23(2) P.D. 477, where the Supreme Court allowed children of a mixed marriage, to be registered as "Jews" in the Population Registry even though they were not Jewish according to the *Halacha*. Section 4B rectified the situation by stating who was a Jew for

the purposes of the Law of Return, while Section 4A gave rights to family members of a Jew. The subsections were intended to be complementary, on one hand preserving Jewish national unity according to tradition, while on the other hand expanding the right of return to family members with the intention of preserving family unity where one of the family members was a Jew. Mixed marriages were widely practised abroad and it was feared that negating the rights of a non-Jewish family member would impede the return of Jews to Israel. Thus, Section 4A was specifically addressed to inter-faith marriages, with the intention of encouraging Jews to immigrate. This policy was strengthened by Section 4a(b) of the Law that made it immaterial whether the Jew, by virtue of whom the family member had the right to immigrate, was alive or dead, or, had or had not immigrated. The family member's rights were independent.

Returning to the issue of the non-Jewish spouse of a Jewish **citizen** of the State, Justice Cheshin noted that a synoptic examination led to the conclusion that it was not embraced by Section 4A. The primary purpose of the Law of Return was not served (*i.e.* the return of Jews to their Biblical homeland) nor its ancillary purpose (*i.e.* to encourage Jews to immigrate and prevent their families from being divided). Once a Jew was a citizen of the State, either by virtue of being born there or by virtue of the Law of Return, his right of return was extinguished, and marrying a non-Jew could not vest that spouse with rights based on the extinguished right.

Moreover, if that right were to be recognized it would lead to serious and unjustified discrimination against non-Jewish citizens of the State who might

also wish to marry non-Jews in Israel and thereby entitle them to become citizens by virtue of the Law of Return.

The Petitioners also relied on Section 4 of the Law to the effect that all citizens of the State were in the nature of “new immigrants”. Justice Cheshin rejected this argument, holding that Section 4 intended to place all Jews in the same position. The section regarded all Jews as having realized their historic and inherent right to return to Israel; however, having realized that right, these Jews were placed in the same position as all other citizens of the State, and did not possess any additional rights.

Justice Cheshin concluded that the right of return was vested only in family members of Jews prior to their immigration to Israel.

Policy Towards a Foreign Spouse Wishing to Settle in Israel and Obtain Israeli Nationality

Justice Cheshin considered the policy of the Ministry of the Interior in situations where an Israeli citizen - Jewish or non Jewish - married abroad a person who was neither Jewish nor an Israeli citizen, but who wished to settle in Israel and obtain Israeli citizenship. The Ministry’s policy depended on whether, at the time of the marriage, the “foreign” spouse was legally or illegally present in Israel.

Initially, the Ministry followed a policy whereby the illegally resident foreign spouse had to pay a fine and was then given a work and residence permit while his application and the genuineness of his marriage was considered. In 1996 a new policy was initiated whereby the

foreign spouse was required to leave the country while the Ministry considered his application and status. This policy acknowledged that a marriage ceremony had taken place but focused on the legality of the residence of the foreign spouse at the time of the marriage.

Justice Cheshin considered but rejected the argument that the Minister of the Interior did not have the right to deport a non-Jewish foreign spouse who had married an Israeli citizen. The argument was that such a person had the right to be naturalized (under Section 5 of the Nationality Law) making him ‘almost a citizen’ and taking him out of the purview of Section 13 of the Entry into Israel Law - 1952, which provided for the deportation of illegal aliens. Justice Cheshin noted that the Entry into Israel Law did not recognize the status of ‘almost a citizen’, and the Minister of the Interior retained his discretion to decide whether or not to accept an application for naturalization by the foreign spouse, albeit on easier conditions. The foreign spouse did not acquire a right to be naturalized under the Nationality Law, merely by virtue of marrying an Israeli citizen. The High Court of Justice had not yet considered the Ministry of the Interior’s policy described above.

Justice Cheshin accepted the Petitioner’s contention that this policy and the exceptions thereto had not been publicized sufficiently, as required by proper administrative procedure, and therefore potential deportees could not know their rights or obtain adequate legal advice. Justice Cheshin held that this state of affairs was not only unsatisfactory but also bordered on illegality. While the Ministry’s deportation policy did not require to be published as second

dary legislation, it comprised internal guidelines which might impair an individual’s rights, and therefore its implementation was contingent upon due publication. The fact that the objection to the non-publication of the policy was made by an illegal alien was not relevant as due publication was a matter of the rule of law and a requirement established by case law.

Justice Cheshin noted that one of the Respondent’s arguments was that they were not deporting the foreign spouse but requiring him to leave while his application to settle and be naturalized was considered on the merits. Justice Cheshin rejected this contention, holding that it was not the manner in which the foreign spouse was required to leave (*i.e.* by a deportation order or a request to leave) which was relevant and the subject of the present Court hearing but whether the Ministry was competent to require the foreign spouse to go.

The Status of Foreigners in Israel and Competence to Deport Them

Justice Cheshin stated that an Israeli national had the right to stay in Israel as long as he desired, and the State had no right to deport him. A non-Israeli citizen or a person who was not an *oleh*, on the other hand, was in Israel by virtue of an entry visa given to him under the Entry into Israel Law - 1952. Being in Israel otherwise than by virtue of a valid visa or permit was a criminal offence and the Minister of the Interior had power to deport him. Such a deportation order did not have to be reasoned. The case law showed that the Minister’s right to deport a foreigner was very broad, although still subject to judicial review by the High

Court of Justice. In practice, the Minister always gave reasons for a deportation order.

Deportation Policy

The premise was that where an Israeli citizen married a non-Jewish foreigner legally present in the country, the Ministry of the Interior did not intervene in the right of that foreigner to continue residing in Israel. Where that foreigner wished to obtain Israeli nationality the Ministry implemented a specific policy for that purpose. Where, however, the foreigner was not legally resident in the country, and following his marriage, wished to obtain nationality - the spouse was asked to leave the country, while the genuineness of the marriage was investigated.

This policy had followed a surge in fictitious marriages among the foreign community in the country. Israel had become a magnet for foreigners seeking to live and work there, many of whom stayed without a legal permit. Many had also engaged in fictitious marriages in order to obtain a status recognized by the Ministry of the Interior and prevent deportation. The number of these marriages had increased as the Ministry of the Interior responded by hardening its enforcement policy. Other fictitious marriages were conducted for financial reward or by reason of other mutual interests such as money on one hand and a release from the army on the other. The Ministry of the Interior had decided to wage war against these marriages, and the path chosen was to require the foreign spouse to leave the country while the genuineness of the marriage was examined. The Ministry claimed that the harm to the individual in such cases was minor compared to the benefit obtained

by uncovering and reducing the number of fictitious marriages. Additionally, a number of exceptions were made to the Ministry's policy on humanitarian grounds, although these exceptions had apparently not been made public.

Justice Cheshin clarified that this policy had been adopted notwithstanding the certificate of marriage and notwithstanding the absence of any factual basis for assuming the marriage to be fictitious. The individual cases were not examined and no hearing was conducted by the Ministry prior to the spouse being requested to leave. The Petitioners contended and Justice Cheshin accepted that this policy was not grounded on statistical data regarding these marriages. In the absence of such data, the question arose whether the policy was justified. Justice Cheshin stated that it was the duty of an authority which made a decision infringing individual rights to collect the relevant data, analyse them, weigh them and consider the significance of the proposed decision and its possible consequences, and only then take action. In acting as they had, the Respondents had breached this rule of administrative procedure. Additionally, this policy not only harmed the interests of the foreign spouse, it also harmed the interests of the Israeli spouse and he surely had a right to be heard before such harm took place.

Reasonableness and Proportionality

The Petitioners further argued that the policy of the Ministry of the Interior was neither reasonable nor proportionate. Justice Cheshin described the test of proportionality and the disputes surrounding it, but noted that the test of proportionality would be enforced in a

manner commensurate with the gravity of the harm to a right or the importance of the right harmed.

In this case, the premise was that to battle against fictitious marriages was a proper goal, and to uproot this phenomenon was a proper intention. All agreed that the intentions of the Ministry of the Interior accorded with the values of the State of Israel and were intended for a proper purpose. The question was whether the means adopted by the authority - *i.e.* the requirement that the foreign spouse leave the country until the genuineness of the marriage was examined - was a means "which did not exceed what was necessary".

In the Court's opinion, the means adopted by the Ministry of the Interior were not proportionate to the objective - which was proper in itself - which the Ministry intended to achieve. Their force was much greater than needed in order to achieve the purpose; and in terms of damage-benefit, the damage outweighed the benefit.

The Petitioners had not proved that the policy, which had been operated for a number of years, was effective in reducing the numbers of fictitious marriages, while the parties to the marriage would certainly be harmed if they were forced to separate for a period of months. Moreover, the Ministry had not proved the number of fictitious marriages and their ratio among marriages between Israeli citizens and foreign non-Jews, and accordingly it was questionable whether one could find a rational connection between the means and the objective.

Justice Cheshin also believed that it was more difficult to prove the genuineness of the marriage where one or

both of the parties were abroad compared to the situation where both were in Israel, and one could test, for example, whether they maintained a common household over a period of time. Justice Cheshin thought that the slackness shown by the Ministry in its supervision was one of the main reasons for the change in policy, and the new policy was merely an easy way for the Ministry to avoid its supervisory duties.

Justice Cheshin held that the Ministry's policy also failed to meet the second test of proportionality. This test asked whether the harm to the individual exceeded what was necessary, *i.e.*, whether the harm was outside the "scope of proportionality" - which was determined by taking into account the substance of the right or interest being harmed and degree of importance attributed to them.

Upon being forced to leave the country the parties encountered huge difficulties, including economic difficulties of leaving and being forced to live abroad, as well as employment and health problems. The Respondents had not properly weighed the right of the individual to marriage and the grave harm to family life consequent upon their policy. An individual had a fundamental right to marry and establish a family. This right was recognized by international treaties, for example, Article 16(1) of the Universal Declaration of Human Rights, 1948; Article 12 of the European Convention on Human Rights; and Article 2.23 of the International Convention on Civil and Political Rights, 1966.

Justice Cheshin held that it would have been proper for the Respondents to have chosen other means to achieve their

objectives, which would cause less harm to the individual. Such means included greater supervision over illegal residence in Israel, and more thorough investigations of the genuineness of marriages. Such means would probably entail greater costs, but this fact on its own did not justify the serious action that the Ministry was taking against the individual.

Further, there was no correlation between the benefit achieved by the policy and the harm to the individual. The benefit was merely speculative and it would only be chance that would decide whether the policy would uncover a real or a fictitious marriage. The damage, on the other hand, to an authentic marriage, was real and proven. In the absence of statistics, it was hard to ignore the real possibility that the many - those who had engaged in genuine marriages - would be suffering for the few - those who had engaged in fictitious marriages.

In view of all this, Justice Cheshin could only conclude that the Ministry of the Interior's policy in respect of foreign spouses illegally present in Israel was not proportional, and therefore was null and void. The policy of requiring these spouses to leave the country for a period of months until the genuineness of their marriage was examined, was a policy that was incompatible with the axioms of a democratic regime anxious to safeguard human rights. There were cases in which the Ministry could ask a foreign spouse to leave, for example, where the marriage or certificate of marriage was fictitious on its face. In all cases the parties had to be given an opportunity to be heard. If, following the investigation, the Ministry was persuaded that the marriage was fictitious it could deport

the foreign spouse, subject to his right of appeal to the Court.

However, in view of the premise that the foreign spouse was illegally present in the country, and that a phenomenon of fictitious marriages prevailed, a heavier than usual burden of proof would be imposed on the parties to prove the genuineness of the marriage, particularly in cases where the marriage took place after deportation proceedings had already been commenced against the foreign spouse.

A similar provision existed in U.S. law, which required the foreigner seeking not to be deported to prove:

"[B]y clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given..." (8 U.S.C. Section 1255(e)(3)).

Granting the Right of Permanent Residence - Process

Justice Cheshin next considered the situation where the foreign spouse, who was legally resident in Israel at the time of the marriage, or the foreign spouse who was illegally resident but who had engaged in a genuine marriage, applied for permanent residence in Israel and thereafter to be naturalized. Processing this application could take up to six years. First the Ministry of the Interior examined the genuineness of the marriage and whether there was a security or criminal obstacle to granting the application. This investigation took

place while the parties remained in Israel. If the Ministry was satisfied that the marriage was genuine, the parties had to undergo a 'graduated test' of over five years duration. During the first stage of this test the foreign spouse received a three months visitors permit which could be extended. 27 months later the spouse entered the second phase of the test. If the marriage had continued and in the absence of a criminal or security obstacle, the foreign spouse obtained the right to a temporary permit. The foreign spouse held this status for a period of 3 years, until the conclusion of the cumulative period of 5 years and 3 months. At that point the Ministry examined whether the marriage remained in effect, and if so the foreign spouse was granted the status of permanent resident.

Only upon conclusion of this process was the foreign spouse entitled to commence naturalization proceedings.

Justice Cheshin reiterated that Israel was committed to protection of the family unit by virtue of international conventions and also recognized the need to provide such protection through family reunification. The Petitioners' contentions in this case revolved around the length of time taken by the "graduated test" and the severity of its standards.

Justice Cheshin decided to leave open the reasonableness and proportionality of the Ministry's policy in relation to the length of time needed for permanent residence to be granted and preferred to consider the issue of the reasonableness of the actual application for nationality. Here the position was different because it was based on a law and not upon policy and guidelines. Justice Cheshin noted that nationality could be obtained in

seven ways under Section 1 of the Nationality Law, one of which was naturalization. The spouse of an Israeli national could be naturalized on easier conditions by virtue of Section 7 of the Nationality Law. Whether or not the easier conditions were allowed was subject to the broad discretion of the Minister of the Interior. The discretion was derived, *inter alia*, from the nature of the right to nationality. The right to nationality was a basic right and had the power to give rise to other rights and duties. Moreover, it was not limited to the borders of the State but had effect abroad. All this gave rise to a very broad discretion. Nonetheless, the Minister of the Interior could not ignore the fact that the legislature had contemplated making it easier for the foreign spouses of Israeli nationals to obtain Israeli nationality. Consequently, the burden was on him to show why he did not discharge the foreign spouse from these conditions, in whole or in part.

Section 7 expressed Israel's international commitment to ease the naturalization process of a married woman as reflected in Article 3 of the Convention Regarding the Nationality of a Married Woman, and in view of the principles of equality applied in Israel, Section 7 applied equally to men. Section 7 was intended to protect the rights of the couple and the Minister had to take this purpose into account when determining the policy for implementing Section 7.

In relation to the issues at hand, it was clear that the Minister of the Interior would not consider naturalization until the end of the test period regarding permanent residence. Justice Cheshin held that in this the Minister was over reaching in the exercise of his broad

discretion. This was particularly true as the Court had not been informed of any exceptions to this policy. A period of six years prior to considering the application for naturalization was too strict. Reference here was to a right not only of the foreign spouse but also of the Israeli citizen who wished his partner to be at his side, together with their children, all possessing equal rights.

Accordingly, Justice Cheshin held:

- A. The right of return vested in the family members of Jews **prior** to the latter immigrating to Israel.
- B. 1. The policy of the Ministry of the Interior in relation to foreigners marrying Israelis while the foreigners were in Israel without a permit, was a policy that was not proportional and was null and void. The demand that the foreign spouse leave the country for a number of months until the genuineness of his marriage was examined, was a policy which was incompatible with the axioms of a democratic regime interested in human rights.
2. At the same time, where the foreign spouse was illegally present in Israel, the Ministry of the Interior was entitled to demand a higher than usual standard of proof of the genuineness of the marriage.
3. In those cases where the marriage was clearly fictitious on its face, the Ministry of the Interior was entitled to require the foreign spouse to leave the country prior to a thorough investigation being made of the genuineness of the marriage.
4. In any event there was a duty on the State to hear the parties and

enable them to persuade the authority of the genuineness of the marriage.

5. The Court was only considering the issue of the genuineness of the marriage. Naturally, the Minister of the Interior could also weigh other matters, such as a criminal record and possible dangers to the public.
 6. If, after a thorough investigation, the Ministry reached the conclusion that the marriage was fictitious, it was possible to deport the foreigner subject to his right to a hearing before the Court.
 7. It would be proper for the Ministry to put in writing and publish its internal guidelines.
- C. It would be proper to regulate the presence of a foreign spouse in secondary legislation, in the absence of which the Ministry of the Interior had to put in writing and publish its internal guidelines.
- D. 1. With regard to the naturalization of a foreign spouse - the Minister of the Interior was entitled to establish policy - which had to be published - under which the foreign spouse would be naturalized following a reasonable period of time and after preconditions had been met. Each application for naturalization had to be considered on the merits. In the absence of special reasons, the Minister should not make the examination of the application for naturalization subject to the lapse of the time needed to obtain the status of permanent resident.
2. Within the framework of the

general policy, the Minister of the Interior was entitled to set a minimum period for granting the application of a foreign spouse for naturalization. This minimum period had to meet the test of proportionality.

- E. The Court would not consider the period of time needed to obtain the status of permanent resident or the issue of the registration of the marriage.

In view of all the above, the Petitioners' cases would be returned to the competent authorities for reconsideration.

Justices Dorner and Beinisch concurred.

Below:
Opening session of the Remember Warsaw Conference (L-R): Janusz Niedziela, Minister of State, Ministry of Justice; Minister Jolanty Szymanek; Mr. Czesław Jaworski, President of the Polish National Bar Association; Justice Teresa Romer of the Supreme Court of Poland; Mr. Andrej Kalwas, President of the Polish National Council of Legal Advisors; Judge Hadassa Ben-Itto, President of the IAJLJ; Professor Shewach Weiss, Israel's Ambassador to Poland; Adv. Michael Traison of the international law firm Miller, Canfield, Paddock & Stone.



From the Association

Dr. Meir Rosenne Honoured by France



The Association is pleased to announce that Dr. Meir Rosenne, member of the Presidency, and former Ambassador of Israel to the U.S. and France, was promoted to the rank of Commander in the prestigious Légion d'Honneur of France, by decree of the President of France of May 15, 2000.

IN MEMORIAM

Abraham Lincoln Marovitz

Haim H. Cohn

Five years ago we published a congratulatory message to Judge Abraham Lincoln Marovitz on the occasion of his 90th birthday (*JUSTICE* No. 7 p.24). Now the news has reached us that on March 17, 2001, he died from kidney failure in his home at Chicago, Illinois. The Association has lost one of the last of its founding members, and a lifelong active supporter. The legal profession has lost one of the most humane and liberal judges ever. And Jewry has lost a proud and upright son and a faithful Zionist.

His parents immigrated from Lithuania and settled in Chicago when Abe - as family and friends called him - was five years old. They were strictly orthodox and very poor and humble people who wanted their two sons to grow up as pious and law-abiding Jews, better educated than they were. But they could not afford college education for them; so Abe had, from the age of 16, to earn his own livelihood. He was fortunate in finding work as an office boy in a large law firm - where, soon enough, one of the partners detected in him some legal talent and decided to pay for his tuition at the Kent College of Law in down town Chicago. He graduated in 1925, two years before he would be eligible for admission to the Bar.

Judge Haim H. Cohn is a former Justice of the Supreme Court of Israel.

Before describing his chequered career, let me return to his parents - if only because he invested them with some kind of virtual presence throughout his long life. He spoke of his mother as if she was still at his side, guiding and protecting him. Only out of piety for his parents he kept a kosher household, while outside his home indulging in all forbidden culinary delectations. Out of piety for them he generously supported *yeshivot* and charitable institutions of the *Old Yishuv* in the Holy Land. And solely out of piety for them he did not marry his lifelong faithful and beloved companion who was a gentile (and whom he would not ask to convert to Judaism for the purpose only of marrying him). A free-thinking agnostic, he was truly devoted to Jewish values and traditions, not because he believed in their innate superiority, but because he thought that he owed his *Judischkeit* to his revered parents. It was touching to observe such manifestations of filial piety by such an emancipated and enlightened man of the world.

He served as an assistant State Attorney until 1933, when he took up private practice. He must have earned a good reputation, because five years later he ran for election to the Senate of the State of Illinois and won. He became a close friend of his fellow Senator Richard Daley who was in later years to become Mayor of Chicago. After the



United States had entered the war against Germany and Japan, he volunteered for the Marine Corps. He reached the rank of Sergeant-Major and used to show his guests the insignia which he had kept of his echelon, with manifest pride. He was wounded in active service in the South Pacific, but would not accept the Purple Heart offered to him, because other servicemen of his company had been wounded much more severely, and no such medal had been offered to them.

In 1950 he decided to run for election to the Judiciary. Whether he had had enough of private practice, or whether anyway he had contemplated a judicial career - at any rate he took his stride unto the Bench with great verve and high aspirations. His success as a trial judge is evidenced by his promotion in 1958 to Chief Judge of the Criminal Court. In

1963, he was appointed to the federal Bench by President John F. Kennedy; and while he retired in 1975, he retained senior status, and in his capacity as Senior Judge continued to hear cases allotted to him until 1990 when he was 85.

His chambers in the US Court Building in Chicago had to be seen to be believed. Next to his elegant library-study there was an elongated rectangular room, ostensibly intended for large meetings, with a heavy oak table in the middle, and the opposite walls covered with pictures, shelves and ledges such as museums use for their exhibits. And a veritable mini-museum it was: the left wall (when coming in from the hallway) was dedicated to Abraham Lincoln, and the right wall to Moses the Lawgiver. There was no portrait or sculpture ever made of Moses or of Lincoln which was not represented there by some replication or other - but, almost needless to say, there were also a few rare originals. It has been said of his collection that it constituted a shrine to his presidential namesake - and so did it constitute a shrine also to the man who embodied Jewish law and Jewish religion. While portraits and sculptures of Lincoln were all more or less true to life, those of Moses, of course, were all pure imagination: he loved to indulge in speculations about the real likeness of Moses, and had his predilections for this or the other artist who supposedly came nearest to his image.

It was, of course, no mere coincidence that Lincoln and Moses were thus joined together. That his parents had named him - surely as a token of their newly won American patriotism - after the great American president, was for him a clear

case of *noblesse oblige*; and that their most ardent aspiration for him had been that he should be a good Jew, was for him reason enough to perpetually symbolize his Jewishness by honoring our great Teacher and Lawgiver. But when asked about his reason for joining them in this way, he would prefer to go, so to speak, into the merits: Moses redeemed his people from Egyptian slavery and led them into liberty, "out of darkness into great light" - and Lincoln abolished the abomination of slavery and made all Americans free and equal. It was this concern with the fate of the underprivileged, the unequal, that caught up with his imagination. Throughout his long career, he strove for the betterment of living conditions of the poor; he would go out of his way, even beyond the letter of the law, to remedy unfair and immoral deprivations and discriminations; and his particular preoccupation was with adolescents of ethnic minorities, of whatever colour or faith, to enable them to become assets to society instead of liabilities.

He counted himself among the fortunate who made his way out of the ghettos of poverty and privation into the glamorous world of enlightenment and comfort - and he became a veritable master of the art of living. Chicago was (and is) full of his friends and admirers: there was no good restaurant, no fashionable shop, no institute of learning, no Jewish club or charity, where he would not be greeted with manifest joy and affection. To move around town as his guest was like accompanying royalty (or some popular hero of sports or pop music). He was the most gracious and generous host - and he gave you the feeling that you were doing him a big

favor by letting him host you. And he had an inimitable way of introducing visiting judges whom he invited to sit with him on the Bench, to the lawyers in the courtroom.

The great popularity which he enjoyed is testified to by the proclamation by Mayor Daley of April 15 as Judge Abraham Lincoln Marovitz Day. Several court and university buildings in Chicago bear his name. But the many honours conferred on him could do nothing to change his innate modesty or his - rather uncommon - consciousness of his own shortcomings. He used to say that nothing he had accomplished was of his own doing: it was the guidance and affection of his parents, his teachers, and his many friends and colleagues that paved the way for him.

He lived a full and rich life - may he now rest in peace.

From the Association

Cape Town's New Chapter

The Association is pleased to announce the establishment of a new chapter in Cape Town. The Chapter was launched in April 2001 with an Inaugural Dinner and a Colloquium on *Racism and the Limits of Free Speech*. Judge Ben-Itto, President of the Association, who was present in Cape Town for the launching, gave the main address at the *Yom Hashoah* gathering, attended by 1,500 members of the Jewish Community as well as by non-Jewish religious and civic dignitaries.

Please Mark Your Calendar

The 12th International Congress of Jewish Lawyers and Jurists will be held in Jerusalem and Eilat

December 23-27, 2001

on

“Standing by Israel in Time of Emergency”

Sunday, December 23 Opening in Jerusalem

Monday, December 24 Departure to Eilat - day at leisure

Tuesday, December 25 *and*

Wednesday, December 26: Two full days of deliberations. (8 sessions)

Evening: Gala Dinner

Thursday, December 27: Morning Session: General Meeting and Closing Session

Afternoon: Return home *or*

Optional **week-end in Eilat**: Thursday, December 27-Sunday, December 30, 2001.

Topics of sessions on Tuesday and Wednesday:

Setting the Record Straight: The Present Crisis and International Public Opinion

Confrontation with Non-State Belligerents

State Supported Terrorism

Islamic Fundamentalism: A Global Threat

Holy Places in the Holy Land

Coping with Human Rights Issues in a Fighting Zone

Anti-Israeli Bias in U.N. Bodies

High Tech Lawyering

Further information and detailed programme including registration fees and hotel accommodation will follow soon.

Please complete the enclosed intention form to enable us to send you details as early as possible.

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