

Law in Times of Crisis

Festschrift for Yoram Danziger

Edited by
Eric Hilgendorf



Duncker & Humblot · Berlin

ERIC HILGENDORF (Ed.)

Law in Times of Crisis

Schriften zum Strafrechtsvergleich

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יורם דנציגר

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Message from the Dean

As Dean of the Faculty of Law, University of Würzburg, I very much welcome the initiative to publish a Festschrift for former Israeli Supreme Court Justice Yoram Danziger, who is now a professor at the renowned Tel Aviv University. In these difficult times, when the Israeli constitutional system is under more pressure than ever before, it is extremely important to send a signal of solidarity to our Israeli colleagues. Our faculty's collaboration with Yoram Danziger dates back many years. Danziger has participated several times in international summer schools at our faculty and has given widely acclaimed lectures. His son organized a highly appreciated exhibition of his paintings in the faculty's Max Stern Cellar, dedicated to the memory of Max Stern, a Jewish wine merchant who emigrated to the United States in 1938. Time and again, colleagues from our faculty have visited Israel. I am especially grateful to Yoram Danziger for receiving and generously hosting alumni of our faculty at the Israeli Supreme Court. May this commemorative publication illustrate our gratitude and support to the honored jubilarian in difficult times!

Ad multos annos!

Würzburg, May 2023

Christof Kerwer

Foreword

On November 26, 2023, Yoram Danziger, professor at Tel Aviv University and former judge of the Supreme Court of Israel, celebrated his 70th birthday. Colleagues, students, friends and companions of Justice Danziger have taken this as an opportunity to compile a volume that is intended both to relate to various issues concerning the Israeli legal system and to reflect the broad spectrum of Danziger's thought and work.

Yoram Danziger was born in Tel Aviv in 1953. He graduated from the Herzliya Hebrew Gymnasium in 1971. From 1972 to 1975 he served in the Israeli army. In 1980 he graduated with a law degree (LL.B.) from Tel Aviv University. The same university also awarded him the Master of Laws (LL.M.) the following year. In 1983 he was awarded a doctorate in law. His thesis was entitled "The Duties of Directors of Target Companies in Takeover Bids". Danziger wrote it at the London School of Economics under the supervision of Professor Lord Wedderburn, the former Dean of the faculty.

After his return, Danziger founded the law firm "Danziger, Klagsbald & Co." in Tel Aviv (Ramat Gan) in 1984, in which he served as managing partner and head of the corporate department of the firm until 2007. Danziger's main area of work was commercial law. Moreover, he was an active member (as well as a board member for a few years) of the Israeli Association of Civil Rights and the founder of the Tel Aviv branch (back in 1980). In 2000 he published a book entitled "The Right to Information about the Company". Danziger's other publications are also mainly related to business and corporate law.

In 2007, Danziger was appointed as a justice on the Israeli Supreme Court. The appointment of a lawyer practicing in the private sector was then, and still is, very unusual. Many of his decisions were marked by their clear orientation toward secular liberalism and human rights, including freedom of expression.

In 2018, Danziger resigned from his judgeship almost six years before his official retirement, with private but probably also political reasons playing a role. At the time, the liberal newspaper *Haaretz* ran the headline "Israeli Supreme Court Loses Most Liberal Justice."

After his retirement, Danziger was appointed as chairman of the Public Committee for the Prevention and Correction of Wrongful Convictions. He also serves as a member and a board member of the Council of the Israeli Science Foundation. In 2022 he was appointed by the President of Israel, Mr. Isaac Herzog, as chairman

of the Advisory Committee to the President for the awarding of the President's medal of honor.

In addition to his highly successful legal and judicial activities, Danziger became active in academics at an early stage. In 1983 he became a lecturer on the law faculty at the Tel Aviv University, specializing in corporate law. From 1984 to 1988, he also taught at the School of Management of the same university. In addition, Danziger served as an adjunct lecturer at the College of Management (Rishon LeZion) from 2011 to 2018.

In 2018, after retiring from the bench, Danziger was appointed professor at Tel Aviv University. Since then, he has headed the LL.M. program of the Faculty of Law. In 2021 he was awarded the Order of Merit of the Federal Republic of Germany.

In the dispute over the curtailment of the powers of the Israeli Supreme Court in favor of the government, which has been going on since 2022, Danziger has been actively engaged as a defender of the separation of powers and the rule of law. In May 2023, he spoke at one of the "Saturday demonstrations" in Tel Aviv in front of more than 200,000 people.

Danziger's family has German roots, which may be one of the reasons why Yoram Danziger has traveled to Germany a number of times. A special connection exists to the old town of Würzburg, where Danziger has lectured several times at the Julius-Maximilians-University and participated in conferences and workshops.

Yoram Danziger has been married to Mrs. Ronit Danziger since 1977. The couple has three children (Yonathan, Daniela and Yoav) and three grandchildren (Cyan, Noga and Maya).

It is not easy to characterize in just a few words a person as multifaceted and active in many areas as Yoram Danziger. Four qualities that characterize Danziger are vigor, acumen, practical understanding, and optimism – all of which make the most appropriate combination for a lawyer and judge. Danziger belongs to Israel's most respected and important jurists. This Festschrift is acclaimed at making his work and thought even better known beyond the borders of Israel. *Ad multos annos!*

*

I would like to thank Mrs. Sina Tenbrock-Ingenhorst, Mr. Roger Fabry, Mrs. Leonora Qerimi and Mrs. Amelie Pauly very much for their help in editing the texts. In addition, I would like to thank Mrs. Larissa Szews from Duncker & Humblot for her excellent work. I would also like to express my sincere thanks to the Schulze-Fielitz-Stiftung Berlin for a generous printing grant.

Veitshöchheim, July 2023

Eric Hilgendorf

Jewish Lawyers in Germany – an Asset for the Liberal Constitutional State

*By Brigitte Zypries**

On 21st February 2021, President Frank-Walter Steinmeier opened the year of celebration “1700 years of Jewish life in Germany” at a ceremony in Cologne, Germany’s oldest Jewish community. In 2021, Jews had been living on the territory of present-day Germany for 1700 years. The year of celebration was the occasion for an enormous number of events in all disciplines throughout Germany. Germany reaffirmed: in literature, philosophy, painting or music, in science, medicine, in business – Jews have helped write and shape our history, Jewish people have made a decisive contribution to Germany’s awakening to modernity.

For some years now, Germany’s lawyers have been increasingly concerned with the question of the extent to which the National Socialist past of judges at the highest federal courts had an impact on the jurisprudence of those courts after 1945. Of the highest federal courts, the Federal Supreme Court, the Federal Labour Court and the Federal Social Court have issued orders to research the National Socialist past of their judges. The Supreme Federal Finance Court provides information about its history on its website without such a reference, and the Federal Administrative Court, together with the University of Leipzig, launched a project some time ago with the task of coming to terms with the past of its first generations of judges.

The 26th Annual Conference of the German-Israeli (DIJV) and the Israeli-German (IDJV) Lawyers’ Associations in May 2022 in Bonn, at which Professor Danziger thankfully provided important ideas for the whole conference in his keynote speech, also dealt with the topic. Dr Rainer Schlegel, the President of the Federal Social Court, and Dr Peter Frank, the Federal Public Prosecutor at the Federal Supreme Court, spoke about projects to come to terms with the history of their institutions and sparked a lively discussion among the participants.

For years, the DIJV has been calling for lawyers of the post-war period to come to terms with the National Socialist past. We demand and support academic reappraisal by the highest federal courts and have also been involved in the campaign: “Rename Palandt”.

This commitment is based on the realisation that only those who have come to terms with their past and learned lessons from it can shape the future.

* *Brigitte Zypries* was German Federal Minister of Justice and is the President of the Israeli-German and German-Israeli Lawyers Association.

An honest look at the 1700 years of Jewish life in Germany was the goal of the Year of Celebration. For “only in this way can we draw lessons for the present and for the future. That is and remains our responsibility!” (Federal President Frank-Walter Steinmeier in his opening speech).

As part of the Year of Celebration, the Ministry of Justice and Equality of Saxony-Anhalt organised an exciting event on 1st September 2021 entitled “Jewish jurists on the territory of present-day Saxony-Anhalt: shapers of international history and German legal culture”. For example, Arthur Ruppin, a founder of Tel Aviv, was a legal trainee at the Magdeburg Regional Court.

I took part in that conference. While preparing the welcoming address, I noticed that the German-Israeli and the Israeli-German Lawyers’ Associations, of which I am president, had not yet dealt with the importance and the necessity of a culture of remembrance of the Jewish heritage and Jewish faith with regard to the interpretation of law for us lawyers working today.

We were and are primarily interested in a judiciary, a public prosecutor’s office and a legal profession that braves neo-Nazi hostility and is determined to stand up against the right.

The question of whether religion influences the interpretation of law by lawyers of the past or present has not yet been the subject of a conference.

But, could that be a theme? Would that be important in Germany today? Regardless of whether lawyers work as lawyers, judges, public prosecutors, administrative or association lawyers or whatever – all of them, regardless of whether they are Christians, Muslims, Jews or atheists – all lawyers must apply the law that is applicable in Germany and Europe.

During the 19th century, the modern state consistently asserted its exclusive claim to lawmaking and thus increasingly withdrew the right of religious communities to legislate. That applied to Jewish law just as much as it did to the Canon Law of the Catholic Church.

In Germany, this was most evident in respect of family law issues. For example, on 1st January 1876, civil marriage was introduced in the German Reich and exclusively church-based marriage was abolished.

The fact is that the Catholic Church to this day does not consider a state marriage to be a valid marriage – it lacks an essential element: the administration of the sacrament of marriage – but that does not affect the validity of state marriage.

The state makes the law and the religious faith of those applying the law should not matter in a democratic constitutional state. Faith is a private matter. But we all know that the interpretation of legal texts depends decisively on the prior understanding of the users.

This pre-conception is essentially shaped by upbringing – in the parental home, in kindergarten, at school, in dealings with the peer group.

And of course religious upbringing also shapes a person. Depending on which doctrines or basic attitudes the religion advocates, the people – and thus also legal practitioners – will be shaped by it.

Thus also those who apply the law – the judges – will be more lenient and understanding or harsh and implacable. Regardless of whether it is a matter of dealing with oneself or others or of interpreting the applicable law.

Jewish law has some special features. It is not the law of a state, but of a people: the people of Israel.

In its more than 3,000-year history, the people of Israel have lived predominantly under foreign rule and, most importantly, in the Diaspora: Jews have lived and continue to live in many different countries and cultures, under very different systems of rule and law. Although these systems have always had an influence on the development of Jewish law, Jewish law has nevertheless been able to retain its independence over the centuries. The fact that Jewish communities often enjoyed – to varying degrees – autonomy in legal matters contributed significantly to that.

For religious Jews, however, the real reason that Jewish law has retained its independence and distinctiveness to this day is the fact that it is not based on the authority of an elected legislature, but is founded on the covenant of the people of Israel with God. Its original source and its very core is therefore divine revelation as expressed in the Torah and the other books of the Hebrew Bible.

Jewish law is linked back to God – with the substantive consequence of a harmonious combination of severity and leniency. Jewish law seeks to find the middle way between strict demands and benevolent indulgence – a middle way that the more formal, so to speak ethically distant secular state law is not necessarily able to find in the same way.

According to Rabbi Professor Walter Homolka, the most important consequence of the combination of religion, ethics and law that is typical of Judaism is an ever vigilant sense of social justice.

This influence of ethical considerations on Jewish law is also reflected in the view that one should not insist on claims based on a strict interpretation of the Torah, but should rather exercise leniency and restraint.

With such a general understanding, Jewish legal practitioners may come to different conclusions when interpreting, for example, the German Civil Code (BGB), in contractual matters than someone who grew up in a strict Protestant or Catholic family.

It is therefore not surprising that lawyers of the Jewish faith were among the liberals during the German Empire and the Weimar years.

As liberal legal policymakers, they made fundamental contributions to the unification of the German legal systems in the empire. In 1873, for example, the national liberal lawyer Eduard Lasker, together with Johannes von Miquel, succeeded in hav-

ing the Reich Constitution amended and the Reich given legislative responsibility for all civil law. In doing so, they created the preconditions for the drafting of the Civil Code, in the development of which, in turn, the Jewish jurist Prof. Levin Goldschmidt played a decisive role.

There were several Jewish ministers and secretaries of state in the Weimar Republic. For example, the secretary of state in the Reich Office of the Interior, Hugo Preuß, who was in charge of the first draft of the Weimar Reich Constitution, or the long-serving secretary of state for justice, Curt Joel, who was certainly the most politically influential lawyer of Jewish origin in the Weimar Republic.

The professional importance of lawyers in the Empire and the Weimar Republic lay – in addition to political and legislative activity – in the founding of institutes, scientific journals and as editors and authors of seminal publications.

One example is the internationally renowned Professor Ernst Rabel, who founded the Kaiser Wilhelm Institute for Foreign and International Private Law in 1926, the second oldest of today's Max Planck Institutes for Law. In 1927 he founded the celebrated *Zeitschrift für ausländisches und internationales Privatrecht*.

Many Jewish lawyers were involved as publishers and editors of legal journals. The *Deutsche Juristen-Zeitung* (German Lawyers' Newspaper) was published from 1896 by the Jewish publisher Otto Liebmann, who was known above all for supplementing the major academic commentaries with short commentaries more suitable for practical use.

Liebmann's most important short commentary was on the BGB, written by three lawyers, two of whom were Jewish. From 1939 they were replaced by the *Palandt*. Otto Palandt was president of the National Socialist Reich Examination Office – he consistently ignored his predecessor. Only last year, Beck Verlag – which had bought the publishing house from Liebmann in December 1933 – announced that the *Palandt* commentary would be renamed – it is now called *Grüneberg*, after the judge at the Federal Supreme Court Christian Grüneberg. The initiative “#Palandt umbenennen”, founded in 2016, was successful!

Have you noticed that so far you have only read the names of men? That is of course because in the German Empire women were denied access to the administration of justice (i. e. the professions of judge, lawyer, public prosecutor, administrative lawyer). It was not until the Weimar Republic that women were admitted to the state law examinations.

As one of the first women in Germany, the Jewish Marie Munk was admitted to the bar in 1924, and in 1930 she had the title of *Landgerichtsrätin* (district court councillor). Today, Marie Munk is considered one of the most important marriage and family law experts of the Weimar period. In addition to her proposals on the law of children born outside of wedlock, divorce law and marriage law, together with Margarete Berent, she drew up proposals for reforming the law on matrimonial property, which much later formed the basis for the introduction of the community of ac-

crued gains. Marie Munk was dismissed from the judiciary in 1933 and emigrated to the USA.

Jewish lawyers have thus had a considerable influence on the legal development of today's Germany. It would be interesting to see what the situation is like for lawyers of the Jewish faith working in Germany today. Is there a significant group that is involved in legal policy? Do they themselves have the impression that their upbringing in the Jewish faith influences their application of the law?

The DIJV and the IDJV will not run out of topics and we look forward to many more events with our honoured jubilarian.

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I. Constitutional Law and Legal Theory

Reparations for Holocaust Survivors – Searching for Justice in Israel and Germany

By *Daphne Barak-Erez**

I. Introduction

Should the law recognize the right to sue monetary reparations for wrongs that, in many ways, cannot be corrected? This is one of the perennial questions of law. Queries regarding how to correct injustice and whether such reparations should be deemed possible are not new, and were addressed as early as the final chapters of the Book of Job.¹ After Job suffered the loss of his family, and his fortune, the biblical narrator tells us that God blessed him with great fortunes and a new family. This is a challenging and question-begging ending, much like the Book of Job in its entirety. Is it at all possible to correct an injustice as great as the one suffered by Job? Is it possible to correct such a wrong? In many ways, this is a recurring dilemma in tort law. In some contexts this dilemma is, however, intensified. A major example of this dilemma is the law applicable to the reparations given to Holocaust survivors for their unparalleled loss, which in fact can never be fully corrected.

This article seeks to analyze the reparations awarded to Holocaust survivors as a distinct case-study both in corrective justice, as well as in transitional justice. It does so by examining the legal dilemma through the lenses of the complex relationship between the newly established State of Israel, founded shortly the Holocaust, and the Federal Republic of Germany, established around the same time, which represented a “New Germany”. It also does so by telling a story of comparative law, taking into consideration the influence that German law had on Israeli law in this area, as well the limitations entangled with such an influence.

* Prof. Dr. *Daphne Barak-Erez* is a Justice at the Supreme Court of Israel. The article is dedicated with friendship and admiration to my friend Prof. Yoram Danziger, whose family emigrated from Germany to then Palestine before World War II, and devoted a chapter of his fruitful career to building the bridge between the State of Israel and Modern Germany. An earlier version of this study was published in Hebrew – *Barak-Erez*, in: Levin/Rubinstein/Stauber (eds.), *Memory and Justice – Israel’s Supreme Court Judges Write about the Holocaust*.

¹ *Barak-Erez*, in: Levin/Rubinstein/Stauber (eds.), *Memory and Justice – Israel’s Supreme Court Judges Write about the Holocaust*, pp. 269–288.

More specifically, the article focuses on the regulation of the reparations awarded to Holocaust survivors by Israeli law, and in that context addresses the role played by the Israeli courts in legal proceedings initiated by individuals who claimed that they should be recognized as Holocaust survivors and receive reparations accordingly. While doing so, the Israeli courts had to both uncover the history which served as the background for the litigation and pursue just decisions.² Their efforts reveal and exemplify the shortcomings of law in confronting personal and national tragedies, as well as expose its significant contributions in this area.

Following this introduction, the article opens by outlining the history of the so-called Reparations Agreement (known also as the Luxembourg Agreement)³ of 1952, between the State of Israel and the Claims Conference on the one side, representing the Jewish people, and the Federal Republic of Germany, on the other. The article then illustrates the various oppositions to this agreement and the arguments that were made to confront them. Later on, the article clarifies the scope of the Israeli legislation regarding this matter, which in fact adopted the rules of entitlement set by German legislation for paying individuals who brought forth their claims within Germany. Accordingly, the Israeli law was lacking in how it reflected the full history of the Holocaust. In addition, the article describes later developments in the international arena, which broadened, at least partially, the scope of the reparations awarded to Holocaust survivors, as well as to other victims of Nazi Germany. The article then highlights the complex social challenges posed by the reality of the reparations paid to Holocaust survivors, including their contribution to socio-economic disparities in Israel, and the results of their incomplete coverage (leading to some Holocaust survivors living in poverty to this day, and enabling only limited application to Middle Eastern Jewish communities). The article then concludes by focusing on current issues faced by the Israeli courts, which have to decide on legal actions brought forth by Holocaust survivors, in circumstances in which these actions are not only aimed at obtaining monetary reparations, but rather also at securing recognition and acknowledgement.⁴

² For the narration of history by courts, see also Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, *Canadian Journal of Law and Society* 16 (2001), pp. 93–112; Barak-Erez, *The Law of Historical Films: In the Aftermath of Jenin*, *Southern California Interdisciplinary Law Journal* 16 (2007), pp. 495–522; Barak-Erez, *History and Memory in Constitutional Adjudication*, *Federal Law Review* 45 (2017), pp. 1–16.

³ It is worthwhile to note that the term “Luxemburg Agreement” carries with it a more neutral meaning. The Hebrew term “*shilumim*” is interesting in the sense that it expresses both a meaning of “payment” and a meaning of correction and retribution. The German term, “*Wiedergutmachungsabkommen*”, also does not seem to be neutral, in the sense that it refers to the correction of a wrong.

⁴ For the meaning of recognition of this nature, see Taylor, in: Gutmann (ed.), *Multiculturalism Examining the politics of recognition*, pp. 25–73; Dixon, in: De Vos/Kendall/Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, pp. 326–351.

1. The Reparations Agreement and Israeli Legislation

The story of the legal regulation of reparations awarded to Holocaust survivors started as early as Israel's formative years. In a nutshell, its portrayal should open by describing the negotiations between the Israeli government, led by Prime Minister David Ben-Gurion and the Minister of Foreign Affairs Moshe Sharet, and the Government of West Germany, led by the Federal Chancellor Konrad Adenauer, who also served as Foreign Minister at the time.⁵

Those negotiations were conducted with the intention of signing a comprehensive agreement that would supposedly promote reconciliation between the two nations. The agreement was designed to include reparations,⁶ both to the State of Israel and to the individual survivors who lived within its borders.⁷

The agreement that was eventually signed was comprised of two “layers” which were designed to complement one another. The State of Israel was awarded a large sum of money for the purpose of supporting its initial development and constructing infrastructure. An inseparable part of that was the understanding that Holocaust survivors who immigrated to Israel before the agreement was finalized would not be entitled to any additional reparations from Germany. The rationale behind this limitation was that the support given to the State of Israel would, in and of itself, secure and ensure aid and monetary support for those individual survivors residing within its borders. Meaning in fact, that Israel conceded, on behalf of its citizens at the time, their individual rights to sue for reparations in Germany, an act that was not applicable to individuals who would immigrate to the country after the conclusion of the agreement. At the same time, Germany (at the time, West Germany) took it upon itself to guarantee the individual entitlement of (other) survivors to sue for reparations. Thus, the agreement resulted in a distinction between “old” immigrants,

⁵ In fact, the source of the idea of a collective demand for receiving reparations from Germany can be traced back to the internal deliberations within the Zionist organizations back in the 1940s, before the end of World War II, in the context of meetings dedicated to the organization of mass immigration to the land of Israel. See *HaCohen*, *The One Million Plan: David Ben-Gurion's Plan for Mass Immigration in the Years 1942–1945*, pp. 180–204 (Hebrew).

⁶ For more background on the early negotiations regarding this matter, see *Diner*, in: Engelhardt/Zepp (eds.), *Sprache, Erkenntnis und Bedeutung – Deutsch in der jüdischen Wissenskultur*, pp. 280, 281.

⁷ It has been pointed out that the Reparations Agreement signed between Israel and Germany is unique in its kind – giving remedy by a state that was not in existence when the wrongs were committed, to a new state that was not in existence at the time as well. See *Rosenne*, *The Perplexities of Modern International Law*, p. 435 (Hebrew). The negotiations also involved the Claims Conference, an American Jewish organization bringing together several Jewish bodies active in the area of reparations, restitution and assistance to holocaust survivors. See *Sagi*, *German Reparations: A History of the Negotiations* (Dafna Alon trans.); *Blumenthal*, *Right to Reparations: The Claims Conference and Holocaust Survivors, 1951–1964*.