**“An Israeli court is the most natural and appropriate forum for conducting trials of crimes against the Jewish people”**

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The two-year anniversary of the passing of Israeli Supreme Court Justice Gabriel Bach (13 March 1927 – 18 February 2022), which falls close to International Holocaust Remembrance Day, provides an important and timely opportunity to reflect on his views regarding Israel’s commitment to prosecuting Nazi criminals.

Having enjoyed a long, rich legal career, Bach—a German-born Israeli jurist who served on Israel’s Supreme Court—is best known for his role as deputy prosecutor in the Jerusalem trial of the high-ranking SS officer Adolf Eichmann. More than three decades later, when the trial of Nazi camp guard John Demjanjuk was held in Israel, Bach specifically asked *not* to be included among the panel of justices, because he feared that the public might believe that “whoever had sought the death penalty for Eichmann ought not to be a judge in the trial of Demjanjuk.”

However, Justice Bach did indeed preside over two important “ancillary proceedings” related to the Demjanjuk trial, which involved criminal and administrative matters.

And while these two proceedings addressed very similar legal issues—the question of whether judicial interference in the discretion of the Attorney General in matters relating to Nazi criminal cases was warranted or justified—Bach would make two ostensibly opposing rulings.

The first of the two proceedings centered on a petition filed by Demjanjuk’s defense counsel to the Israeli High Court of Justice in April 1988—right before the Jerusalem District Court convicted Demjanjuk of being the infamous “Ivan the Terrible” from the Treblinka extermination camp, where he had been noted for his particular cruelty in operating the gas chamber. The petition opposed the Attorney General’s decision not to open a police investigation against Noah Klieger, a Holocaust survivor and journalist for the Israeli newspaper *Yedioth Aharonoth*, and against his editor. Klieger had published a series of pieces describing and analyzing the Demjanjuk trial, in which he had expressed a clear position regarding what he believed the desired outcome should be. The petitioner, Demjanjuk’s defense attorney Yoram Sheftel, argued that Klieger’s articles violated *sub judice* rules, under which media outlets are prohibited from expressing an opinion or reporting on pending legal proceedings (Article 71(a) to the Israeli Courts Law, 1984). In his response to the petition, the Attorney General acknowledged that while Klieger’s statements did allegedly violate *sub judice*, in this case, there was no danger that the integrity of the judicial process would be affected. Moreover, he added that, in the given circumstances, freedom of speech deferred to in view of the “great emotional charge involved in trials relating to Nazi crimes.”

Bach rejected the Attorney General’s arguments outright, stressing that the opposite was in fact the case. In his view, it was crucial that the rules of *sub judice* would be rigorously applied during trials of intense public interest, strong feelings would naturally be formed either in favor or against the defendant. This was doubly true, Bach argued, in trials concerning Nazi crimes—and was even essential for preserving international recognition of Israel’s authority to conduct such trials in the first place:

It is implied by the decision [of the Attorney General] that with regard to a trial brought in Israel against a defendant accused of Nazi crimes, there is no public interest in maintaining the same rules that have been established by the legislature to preserve the integrity of the judicial process. This is a conclusion that may, in fact, be interpreted as indirect support for the views of those who deny Israel’s right to try Nazi criminals. For myself, there is no doubt in my heart that the Israeli judicial system is indeed capable of holding a fair trial for such a defendant. Moreover, I am convinced that a court in Israel is the most natural and appropriate forum for trials concerning crimes against the Jewish people. Precisely for this reason, my opinion is that there is no reasonable reason to not apply, in practice, the provisions of the law that protect the rights of the parties in a trial from external influences, including “trial by media” (High Court Case 223/88 **Sheftel v. Attorney General** PD 43(4) 356, 366 (1989)).

Bach therefore made an unusual decision within administrative law, and ordered the Attorney General to open a police investigation against Klieger and his editor. The investigation led to the prosecution and conviction of both journalists, who were given suspended prison terms.

Almost four years later, after Demjanjuk’s acquittal by the Supreme Court, several petitions were filed against the Attorney General’s decision not to open new proceedings against the former Nazi camp guard, this time for his alleged crimes in Sobibor. On this occasion, Bach ruled that the Attorney General’s decision was reasonable, and there was no justification for the Supreme Court to intervene. Bach opened his ruling by declaring that he “well understood the spirit and feelings of the petitioners,” some of whom were Holocaust survivors. He stressed that the crimes of the Nazis and their collaborators were “grave and abominable” and that, in general, public interest supported their investigation. However, Bach found that the Attorney General’s reasoning in the Demjanjuk case could not be dismissed, particularly when it came to potential claims of “double jeopardy,” a legal situation in which an accused person is prosecuted twice for the same or similar charges after an acquittal or dismissal, thereby violating his or her right to a fair trial. Bach stressed that:

Some of the petitioners have made the argument before us that all considerations of justice, fairness towards the defendant, and the proper procedure that the Court practices in criminal trials, are dwarfed by the need to bring Nazis to justice and exact revenge on them, and therefore there is no place in this case to respect the aforementioned rules. I cannot accept this position. [...] It is precisely because I am confident that an Israeli court is the most appropriate forum for bringing Nazi criminals to justice, in every aspect, that I am convinced we have an obligation to ensure that all of the defendant’s rights, as guaranteed by our laws and the rulings of our Courts, are upheld even in relation to the individual accused of these horrific crimes (High C. Case 4162/93 **Federman v. Attorney General** PD 47(5) 309, 329 (1993)).

Bach thus agreed with the position of the other justices and rejected the petitions. The Attorney General’s decision remained unchanged, and Demjanjuk was deported from Israel as a free man.

Although the two proceedings discussed above ended in opposing legal rulings by Bach—in the first case, intervening in the Attorney General’s decision and in the second case, refusing to intervene—to a large extent, they express the same, clear judicial principle: justice must not only be done—it must also be *seen to be done*. This perception strongly embodied Bach’s philosophy regarding the matter of prosecuting Nazi criminals in Israel, precisely because of his firm conviction that Israel was the “most appropriate forum” for conducting such trials. Therefore, for him, Israel had a duty not only to follow the law, but to show that it was doing so. In light of the legal struggle for which Israel is currently preparing, this basic insight bears repeating once again.