**Survivor, Legislator, and Jurist: Joseph Lamm’s Legal Legacy in Relation to the Nazis and Nazi Collaborators (Punishment) Law, 1950**

Yehudit Dori Deston and Dan Porat

Introduction

On May 3, 1951, a short item appeared in the newspaper *Haboker* about a highly unusual occurrence: a Member of the Knesset had left the legislature and moved to the Tel Aviv District Court bench. The newly appointed judge, Dr. Joseph Michael Lamm, was honored in a festive ceremony attended by District Court judges, representatives of the Attorney General, jurists, and lawyers, all delivering congratulatory remarks.[[1]](#footnote-1) Although not mentioned in the newspaper item, it would have been more correct to report that Lamm had actually *returned* to his position as judge, having already served as a judge in the Tel Aviv Magistrates Court before becoming a member of Israel’s First Knesset. Lamm’s tenure as an MK, his service as a judge in two different courts, and later as rotating president of the District Court, represented yet more stops along a rich and lengthy career of public and political service that began already in his early adulthood in Vienna. Lamm saw nothing exceptional or problematic about shifting from the courts to parliament and back. With rare candor, he openly suggested that a judge should not be expected to completely abstain from public activity or political involvement. On the contrary, he believed that even when sitting on the bench, judges cannot rid themselves of their social or political views.[[2]](#footnote-2)

To an outside observer, Lamm’s moves between the legislature and the judiciary seem remarkable, possibly even posing challenges to his faithful execution of his judicial duties. Indeed, his extraordinary “crossing of lines” is unique in Israel’s history. One central and potentially serious difficulty involves the separation of powers between the legislature and the judiciary. Specifically, it is the court’s duty to interpret statutes and subject the legislature to judicial review. Lamm himself, interviewed upon his retirement from the bench, admitted that one case he adjudicated taught him “how hard it is to interpret laws that you yourself helped to legislate.”[[3]](#footnote-3) He was referring to the trial of Yehezkel Ingster, a Jewish Kapo who had been convicted of heinous crimes under the Nazis and Nazi Collaborators (Punishment) Law, 1950,[[4]](#footnote-4) and sentenced to death. Less than a year and a half before the trial, Lamm had been among those who had ushered this very bill into law. The debate over the bill in its various incarnations was one of the first contexts in which the question of Jewish collaborators during the Holocaust had come up for public discussion. Inevitably, questions of principle that straddled the line between criminal law and moral judgment arose, and Lamm had taken a very active part in this debate. He had summoned his personal experience as a prisoner at Dachau to validate his positions on issues that arose as the bill was discussed—the uniqueness of the offenses that it specified, the identity of those to be charged under it, and the punishment that should be meted out. Subsequently, Lamm would have to apply the same issues of principle in practice in the courtroom. There, his decisions had to accord with his interpretations of the law in the Ingster verdict and sentencing and in the later exoneration of another defendant, Moshe Puczyc. This article explores the judicial and historical aspects of Lamm’s unique role, as a Holocaust survivor himself, in passing the Nazis and Nazi Collaborators Bill into law. It also reviews his interpretation of the law in the Ingster and Puczyc trials. Lamm’s singular contribution to the history of this law arises from the three “hats” that he wore during this statute’s lifetime: those of a Holocaust survivor, a legislator, and a judge in the most serious trial held under its provisions. A thorough examination of Knesset committee minutes and detailed analysis of his verdicts will show that Lamm’s personal experience as a survivor of Dachau colored his perception of the function of the Nazis and Nazi Collaborators (Punishment) Law and, accordingly, his determination of its content (as a legislator) and its meaning (as a judge).

The article joins a number of important studies conducted in recent years on the enactment of the Law and the trials held under its provisions in Israeli courts of law, in which Jews—Holocaust survivors themselves—who had been Kapos or members of the Jewish police—were brought to justice.[[5]](#footnote-5) These studies examined the fledgling state’s legal attempts to address the phenomenon of Jewish collaboration in the Holocaust. In many senses, this research brings back to life a fascinating historical episode. It is only recently that this subject has received the attention it warrants in the historiography of Israel’s judicial approach to the Holocaust and, more broadly, in the assessment of how Israeli society coped with the Holocaust in the country’s first decade. However, in contrast to the foci of these studies—defendants who had been brought to trial and the judicial system that heard their cases—this article centers on the role of one person in the affair and his definitive contribution to shaping and implementing the law, from a number of positions: survivor, legislator, and judge. In this way, the article makes a unique and important contribution to historical and judicial research on the law and the Kapo trials in Israel.

The article has four sections. Section 1 presents Lamm’s biography, and Section 2 focuses on Lamm’s role in passing the Nazis and Nazi Collaborators (Punishment) Lawin 1949–1950. Section 3 discusses Lamm’s interpretation of the Law as manifested in the trials of two Jews accused under the Law of having collaborated with the Nazis—Ingster and Puczyc. After these three parts of the puzzle have been portrayed, the broad tableau is drawn in the Conclusion, showing that Lamm’s personal experience in each level of the Law influenced his actions in regard to the Law in the level above it.

Survivor and immigrant

Joseph Michael Lamm was born in 1899 in Wigdorovska, Galicia (then in Austria), to a well-off Zionist family. In his teen years, he moved with his family to Vienna, where he finished secondary studies at a gymnasium and advanced to the High School of International Trade and doctoral studies in law at the University of Vienna (1924). After seven years as a law intern, he was admitted to the bar and opened his own practice. As a student, he began his public activity in the Tzeire Tsiyyon movement. Subsequently, his colleague would remark about this period of Lamm’s life: “I don’t know whether he spent more time studying law or in the Zionist Movement, but when he graduated he had both legs planted in both fields.”[[6]](#footnote-6)

When Wehrmacht forces marched into Vienna and Nazi Germany annexed Austria in 1938, Lamm was placed on the Nazis’ blacklist due to his public activity. Shortly after Kristallnacht, on November 16, 1938, he was arrested and sent to the Dachau concentration camp, where he languished until December 22, 1938.[[7]](#footnote-7) His stay in Dachau remains murky. He never elaborated about it and the camp documents merely reported his personal particulars, including his date and place of birth and his Jewish nationality. It is hard to know exactly how his internment there affected him, but it undoubtedly left its impressions. Immediately after his release, Lamm acted to obtain a “certificate” (Mandate Palestine immigration visa) and reached Palestine as an immigrant in September 1939.[[8]](#footnote-8)

On September 1, 1948, Lamm was named magistrate judge in Tel Aviv. On February 14, 1949, after less than five months on the bench, he took off his robe and was elected to the First Knesset on the Mapai list. In the parliament, he served as a member of the Constitution, Law, and Justice Committee and the Public Services Committee. He did not, however, find political life attractive, describing it as “organizationally and conceptually suffocating.” The need to toe the party line on each and every vote was to his disliking.[[9]](#footnote-9) Therefore, after two years in the house, Lamm resigned his seat and in early May 1951, at the aforementioned festive ceremony in his honor, returned to the judgeship, this time in Tel Aviv District Court.[[10]](#footnote-10) Subsequently (in August 1965), he was appointed rotating president of the court. Lamm found his métier in court, in contrast to the legislature, because as a judge he could “express his personality [and] his social outlooks, irrespective of whether they clashed with convention, the establishment, and even the opinions of judges in higher instances.”[[11]](#footnote-11)

Even while serving as a judge, Lamm continued to delve into weighty public issues and went so far as to express political views and criticize governmental and other public policies.[[12]](#footnote-12) True to his view that “A judge need not be cut off from the people; on the contrary, he should be involved with the people and aware of what’s happening among them,” Lamm continued to dabble in public activity even while serving as a judge.[[13]](#footnote-13) As an avowed soccer fan,[[14]](#footnote-14) he headed the Israel Football Association (1955–1959). He was also World President of B’nai B’rith, from which post he acted on behalf of Soviet Jewry. Concurrent with his judicial position, Lamm kept up his public activity for immigrants from Central Europe, held the presidency of the Central European landsmanshaft in Israel, and engaged in welfare activity for these immigrants. He was also active in the Greater Israel movement and took part in imitating the reinterment of Vladimir (Zeʼev) Jabotinsky’s remains in Israel “as a way of reaching out to the various camps in the country.”[[15]](#footnote-15) In addition, he lectured at the School of Law and Economics in Tel Aviv, where he taught a course in constitutional law, and at Tel Aviv University, where he gave a course on the history of the idea of statehood.[[16]](#footnote-16)

Lamm retired on June 1, 1969, after eighteen years as a District Court judge and about a year before reaching the statutory retirement age for judges (70), believing that he should vacate his post in favor of “talented young people who’ve been waiting for it.”[[17]](#footnote-17) Even after his retirement, Lamm continued to serve on various committees and arbitration teams; he also chaired the Israel Consumer Council, remained active on the executive committee of the Central European landsmanshaft, and chaired the Israel-Austria Association. Joseph Lamm died on May 25, 1976, at the age of seventy six. He and his wife, Emma, left no children behind.

Joseph Lamm the legislator

“There’s a difference between ‘collaborator’ and ‘collaborator’”

Lamm was an active participant in deliberations of the Knesset Constitution, Law, and Justice Committee and the subcommittee in their dealings with the theoretical and practical aspects of the Nazis and Nazi Collaborators (Punishment) Law. It was even he who presented the committee’s stance to the Knesset plenum when the bill was put to a vote. Lamm’s legal education and knowledge of international law made a major contribution to the committee’s discussions, in which he expressed his views on the minutiae of the various sections of the bill. More than this, however, Lamm’s personal experience as a concentration-camp prisoner—albeit for a short time—seemed to influence his views on the issues of principle that underlay the bill. This living experience gave his remarks during the committee’s discussions the unique complexion of a person who is indeed entitled to “judge his fellow.”

The idea of enacting a law that would allow Nazi criminals and collaborators to be prosecuted was first mentioned in the Knesset in August 1949, when the Constitution, Law, and Justice Committee took up for discussion “the problem of Jews suspected of collaborating with the Nazis in the camps.” Within this ambit, the possibility was raised, theoretically at that point, of “passing a law for punishing criminals in the camps.” The committee members discussed the declarative and theoretical aspects of such a statute, on the one hand, and the procedural difficulties that would surround its passage, on the other. In the course of the debate, Lamm advised his colleagues about the practical aspects of such a law. To his way of thinking, even if bringing Nazi collaborators to trial was morally justified, ultimately the law would really target Jews who had held relatively minor posts:

From the practical side of things, the great criminals won’t be there. Perhaps some little Kapo in a concentration camp came to Israel, and a Kapo is the most hated one of all. Anyone who was in a concentration camp knows the situation of the little Kapo. It’s easy to say that obeying an order doesn’t absolve a person of responsibility, but I saw people of very high moral stature, communists and socialists, whom no one could suspect of being predatory beasts from the human standpoint. I saw them as room superintendents, as Kapos, and how they turned into beasts within a day or two. I don’t know if this matter can be determined so easily. On the other hand, I know the displeasure of immigrants who had been in a camp when they discover someone who had been a Kapo and bring him to trial, and he goes free because there’s no way to do anything against him.[[18]](#footnote-18)

At the end of the committee’s deliberations, the Minister of Justice, Pinchas Rosenblüth, announced that his ministry would draft a bill on the matter and present it to the committee. Indeed, in late January 1950, the Ministry of Justice handed the Government Secretariat a draft bill titled “The Punishment of War Criminals Bill (1950).”[[19]](#footnote-19) It was referred directly to the Ministerial Committee on Legislative Affairs for debate and, on March 27, 1950, it was presented to the Knesset plenum for first reading. After it passed on first reading, it was sent on to a subcommittee of the Constitution, Law, and Justice Committee. After the subcommittee approved its wording, the discussion reverted to the committee plenum. In the course of several sessions, the committee members debated various objections to the sections of the bill.

An especially trenchant argument took place among the committee members as to Section 10(a), “Absolution of Criminal Liability,” which established absolution for a defendant “if he acted by commission or omission in order to spare himself from the threat of immediate mortal danger and [if] the court is convinced that he did his best to prevent the outcomes of said act of commission or omission.” This section reflected the legislator’s awareness of the special circumstances of Jews who would be prosecuted under the law even though they themselves had been oppressed; this provision was necessary because the general protections available to a criminal defendant would not be in effect.[[20]](#footnote-20) This defense was not included in the original bill; the Ministry of Justice added it after the first meeting of the Constitution, Law, and Justice Committee, where Member of Knesset Zerach Warhaftig proposed that a distinction be made between an “oppressing” person and an “oppressed” one in terms of the degree of punishment given for the same offense. Warhaftig’s motion was rejected but the distinction between the two found expression in the section that allowed absolution from criminal liability—which, according to the bill, would apply only when the perpetrator him/herself had been an “oppressed person.”[[21]](#footnote-21)

The possibility of absolution from criminal liability touched off an acrid polemic that seemed to revolve more around moral and value worldviews than around purely juridical disagreements. MKs Israel Bar-Yehuda and Hanan Ruppin (Mapam) were the main champions of the anti-absolution stance. There is no reason, they argued, to grant “total forgiveness” to criminals; the circumstances of offenders’ own mortal peril were relevant only to mitigate sentence and not to dismiss criminal liability. The potential defendants whom Bar-Yehuda and Ruppin had in mind were Judenräte, in clear distinction from members of the resistance movements, who alone, in the two MKs’ opinion, could be cleansed of criminal liability.[[22]](#footnote-22) The majority opinion, however, favored leaving the absolution clause intact. Lamm himself, among the most conspicuous representatives of this stance, noted that a person convicted of an offense under the provisions of the bill would carry an onerous stigma. Such a conviction, he continued, should be no less valorated than the judicial importance of the conviction per se. Accordingly, he stressed his objection to focusing on the crime itself and sought to punish perpetrators for considerations of deterrence only. In his opinion, the legislator should have the perpetrator in mind and, for this reason, leave an escape hatch that would absolve him or her of criminal liability under appropriate circumstances. Thus, Lamm expressed his awareness of the complexity of a person who commits criminal oppression while themselves being oppressed: “I think we mustn’t categorize people as criminal when any decent person knows that they would have done the same thing under the same circumstances.”[[23]](#footnote-23) It was his searing experience as a camp prisoner, which exposed him against his will to a grim if not impossible reality of life, that allowed Lamm to perceive matters with more complexity than would some committee members who thought it justified to prosecute former police and Kapos in ghettos and camps. Countering them, Lamm reasoned:

We need to distinguish between “collaborator” and “collaborator.” There’s a simple “collaborator” who committed no crime but rather helped to assure order in the area for which he was responsible under Nazi rule. A “Kapo” in a camp who helped to maintain order, even if he had to use his disciplinary authority, isn’t a “collaborator” in his own mind. For me, such a person starts to be a “collaborator” the moment his work leaves his jurisdiction and he hands people over to the Nazi authority.[[24]](#footnote-24)

Lamm elaborated on this stance when the bill was submitted for its second and third readings in August 1950. At this occasion, presenting the Knesset plenum with the committee’s majority opinion, he again invoked his personal experience as evidence of the difficulty that arises in holding any official to quasi-automatic moral judgment without assessing the nature of the official’s specific actions[[25]](#footnote-25):

I myself was imprisoned in a camp and I know how many crimes were committed by the camp officials, not only Nazis but also aides who themselves were prisoners in the camps. But I also know of many cases in which such people, although themselves oppressed, did everything to prevent the crimes from occurring. There were various cases where a “Kapo” had to do something that, in our opinion, helped the Nazis, in order to spare his subordinates from grave injuries that might prove fatal. For example, if two people in a room that held a hundred people failed to maintain order—and this happened in many cases—the Nazi overseer, seeing that this or that prisoner’s closet was not kept in order, might lead out all hundred and make them stand barefoot for hours outside in the winter cold, below seventeen or eighteen degrees, or he would punish the block in other severe ways, all because two prisoners had committed a breach of order. And even if all the other prisoners tried to maintain order, it wouldn’t help them in such a case because the violator knew how to breach order without others discovering it ahead of time. In such a case, the only option was to impose a disciplinary punishment on the violator in order to spare the whole group from mortal danger. This is only one example among many. [...] Now they ask: Who forced a person to be a “Kapo?” I tell you that there were people who accepted the job because the prisoners asked them to. [...] I know of prisoners who did holy work as “Kapos” or block overseers.[[26]](#footnote-26)

Thus, for Lamm, each case had to be tested in accordance with its circumstances and, in most instances, the mere fact that a person had been a Kapo did not attest to moral dereliction. From this point of departure, Lamm believed it important to leave room for acquittal. In this context, he concluded his remarks at the meeting as follows:

Members of the Knesset, do not forget that this whole section [of the bill] speaks about someone who’s being oppressed, and we mustn’t insist that an oppressed person should behave in a way other than the way all of us would behave, just to prove to Jewish history that he’s clean and fit. If I’m fighting for the rights of this oppressed person, I must have all of us in mind: how we might behave under the same circumstances. I dismiss the possibility that you and I, too, would behave differently than would many oppressed people whom, if Member of Knesset Bar-Yehuda’s objection is accepted, would be held criminally liable even though they are innocent of crime.[[27]](#footnote-27)

Remarks from the heart are taken to heart. A majority of Members of the Knesset accepted Lamm’s stance and the absolution section was inserted into the Nazis and Nazi Collaborators Punishment Bill as ultimately passed into law.

Crime against the Jewish people

Another trigger of controversy among members of the committee was the identity of the victims of the crimes: Should this population include only Jews, or should the law also allow perpetrators of crimes against other peoples to be prosecuted? In the early going, when the key section of the bill included only the offenses of “crimes against humanity” and “war crimes,” Lamm believed that the law should be reserved for crimes against *Jewish victims only,* leaving the treatment of malfeasance against other peoples to other countries’ judicial disposition. In Lamm’s opinion, the material difficulties caused by retroactive incidence of the law to crimes committed outside Israel’s borders justified empowering the state to punish the criminals only when the victim belonged to the Jewish people. Lamm stressed in particular that the law should not be used to prosecute an oppressed Jew who, to save himself, had collaborated with the Nazis *against members of other peoples.* In this context, too, Lamm summoned his personal experience in Dachau in support of his position:

I can envision a case where a Jew collaborated with the Nazis against Poles in a concentration camp that he shared with other peoples. I was in a camp together with Czechs, and I know the Czechs treated me rather well. But I was also with oppressed Germans in the camp and I was willing to kill German prisoners in the Dachau camp. Should I have been prosecuted? Therefore, I propose that the crime of genocide be excluded from the law and that only crimes against the Jewish people be left in.[[28]](#footnote-28)

In several debates surrounding this question, the committee members agreed with Lamm’s position of principle and affirmed that the law should make special reference to crimes committed against the Jewish people. They reasoned, however, that the incidence of the statute should not be limited to anti-Jewish crimes only; instead, such crimes should be set on the same plane as crimes against humanity and war crimes, which are acknowledged in international law. Member of Knesset Zerach Warhaftig, for example, argued, “If we omit crimes against humanity, it will seem as though we’re looking out for ourselves only. [...] It’s impossible to discriminate like that.”[[29]](#footnote-29) The chair of the committee, Nahum Nir-Rafalkes, agreed: “We have to start with the Jews; but I’m not just Jewish, I’m also human.”[[30]](#footnote-30) Thus, Lamm’s view was rejected; the new offense of “crimes against the Jewish people” was added to the bill in Section 1(a)(1), its content identical to the crime of genocide set forth in the Genocide Convention, with one crucial difference: its victims are Jews.[[31]](#footnote-31)

In response to this legislative demarche, Lamm stood his ground even more tenaciously. As he saw it, once the special offense of crimes against the Jewish people is written into the law, there is no choice but to limit its incidence to crimes against the Jewish people and not against other peoples. Nir-Rafalkes vehemently opposed Lamm’s motion to this effect, stressing, “If the committee clarifies the matter in the way Lamm proposes, we will have to prepare the whole bill all over.”[[32]](#footnote-32) Indeed, the committee rejected Lamm’ position, such that the bill in its final wording applied not only to crimes against Jews even though the special and new category of “crimes against the Jewish people” appears in its preamble.[[33]](#footnote-33) In practice, however, no person other than Adolf Eichmann has been tried in Israel under this law on the charge of having committed a crime against members of nations other than the Jewish people.

On August 1, 1950, after a debate in the Knesset plenum, the Nazis and Nazi Collaborators (Punishment) Law was adopted on second and third reading.[[34]](#footnote-34) It was invoked almost at once, with Moshe Puczyc and Yehezkel Ingster among the first defendants. On the judge’s bench in Tel Aviv District Court, where Puczyc’s and Ingster’s trials took place, was none other than Joseph Lamm, alongside judges Pinhas Avisar and Israel Levine. Together they took up the question of the defendants’ criminal liability, as will be discussed in Section 3 of this article.

Mitigating the punishment: “There was no such person in the Gestapo”

One cannot conclude the discussion of Lamm’s contribution to the legislation on genocide crimes without dealing with his stance on the proper severity of punishment. For this purpose, we broaden the perspective from the Nazis and Nazi Collaborators (Punishment) Law to the passage of the Prevention and Punishment of the Crime of Genocide Law, 1950. This statute was enacted in tandem with the Nazis and Nazi Collaborators (Punishment) Law and is considered its twin in terms of the offenses that it addresses. However, while the Prevention law is forward-looking, designed to deter potential miscreants, the other is retrospective and has a quintessentially retributive purpose at its base.[[35]](#footnote-35) The two bills were debated concurrently in both the Knesset plenum and the Constitution, Law, and Justice Committee, and they were passed into law half a year apart. For this reason, it is of interest to examine the stance of Joseph Lamm—an active participant in the debates in both forums—on the issues of relevance to both bills. Indeed, our discussion of Lamm’s worldview as a legislator would not be complete without an inquiry into his position on the anti-genocide bill.

The most interesting issue in this context pertains, as stated, to Lamm’s stance on the punishment that those convicted of genocide crimes deserve. In the Nazis and Nazi Collaborators Punishment bill, it was proposed that those convicted of either offense—a crime against humanity or a war crime—should be punished “as would those convicted of murder, or more leniently.”[[36]](#footnote-36) As we recall, the Nazis and Nazi Collaborators bill left out the offense of “crime against the Jewish people” at first; it was added only later. At the time the bill was placed on the Knesset table, the penalty for murder was death, meaning that those guilty of one or both grave offenses under the Nazis and Nazi Collaborators law should be put to death or punished in more leniently. By then, however, the Knesset was debating the repeal of capital punishment in Israel.[[37]](#footnote-37) This seems to explain why the final version of the bill explicitly prescribes capital punishment for perpetrators of the relevant offenses.[[38]](#footnote-38) No substantive explanation for the change in wording between the bill and the law has been found—either in the explanatory notes to the law, or in *Divre ha-Knesset*, or even in the subcommittee’s deliberations. However, a comparison of the legislative proceedings for the anti-genocide bill and, particularly, Lamm’s stance on the question of the severity of punishment yields especially interesting findings that may shed light on the issue.

Like the Nazis and Nazi Collaborators bill, the statute relating to genocide provides that one convicted of this crime should face a penalty equivalent to that for murder or something more lenient.[[39]](#footnote-39) In the debates over the genocide bill, both in the Knesset plenum and in the subcommittee, however, the legislators believed the death penalty should be retained in this law even if it would be repealed for murder.[[40]](#footnote-40) Lamm himself insisted that this should be done clearly and explicitly, leaving no loophole for judicial interpretation. “If I were a judge,” he stressed, “I would say: Wherever it’s written that the punishment shall be like that for murder, the decision obtained for that punishment should apply in this case, too.”[[41]](#footnote-41) By saying this, he would prove prophetic, although he did not know it then.

Indeed, when the anti-genocide bill was presented to the plenum for second and third reading, Lamm expressed himself clearly: “I object to prescribing the death penalty for general criminal offenses. But this objection, which I have maintained for decades, cannot dissuade me from seeking capital punishment for crimes that transcend all the crimes mentioned in the general criminal code.”[[42]](#footnote-42) Interestingly, Lamm adhered to this approach consistently then and for many years after. While serving as a Member of Knesset, he took the initiative of signing many fellow parliamentarians to a petition to the President of the State seeking clemency or mitigation of sentence for persons who had been sentenced to death before the State of Israel had been established. The President, Chaim Weizmann, assented to the initiative due to his opposition on principle to capital punishment and commuted death penalties to life imprisonment.[[43]](#footnote-43) However, while Lamm was among the opponents of capital punishment for murder, he exceptioned persons whom he deemed guilty of crimes against humanity, including Nazis and their accomplices as well as terror activists. In regard to the last-mentioned, Lamm based his stance on considerations of deterrence.[[44]](#footnote-44) One doubts that he considered such considerations relevant in regard to Nazi criminals; his attitude toward them was driven largely by considerations of retribution. For this reason, Lamm opposed the provision of the bill that allowed a penalty more lenient than death. Two decades after his activity on the committee, he described his stance in a newspaper interview:

I opposed this motion both in principle and in practice. I believed that if a capital penalty is established, the authority to deviate from it should not be given. [...] What is more, we claim that the Germans are lenient in their trials of Nazis.[[45]](#footnote-45)

Indeed, at the very beginning of the legislative process, Lamm insisted that the death penalty should not be set as a maximum sentence in a way that would give the court discretion about whether to impose it. “There’s no judge anywhere who would sentence someone to death on his own counsel if he can impose a lighter penalty,” he reasoned.[[46]](#footnote-46) Still, Lamm believed that the court should be given a narrow and strictly demarcated path of discretion to reduce an offender’s sentence—but only in clear-cut cases to be established in the law, in which the court would have to apply leniency. Even then, Lamm stressed, a significant penalty comprising at least ten years in prison should be prescribed because “the court should not be given the option of imposing symbolic penalties on genocidaires.” Therefore, Lamm insisted on setting not only an upper bound, the death penalty, but also a lower bound: a minimum punishment that would thwart “[the] a possibility of sentencing any genocidal criminal to a symbolic minimum penalty of one day or even a fine of one [Israel] pound.”[[47]](#footnote-47) What were those circumstances that, where present, would prompt the court to impose a lighter sentence? Lamm, mounting the Knesset rostrum, proposed a wording very similar to that ultimately incorporated into the law:

A person found guilty of genocide should be sentenced to death; however, if he committed the act that constitutes the offense while complying with a law or an order of an authority that must be obeyed by law and did his best to attenuate, as far as possible, the severity of the outcomes of the offense—then the court should impose, in lieu of the death penalty, a term of imprisonment that should not fall short of ten years.[[48]](#footnote-48)

Most members of the subcommittee and especially the chair, Nir-Rafalkes, opposed Lamm’s position on the grounds that it would tie the courts’ hands if at some future time they would hear cases that would justify a lesser penalty. Nir-Rafalkes presented the theoretical example of a “good man” in the Gestapo who felt sorry for Jewish children and therefore moved them to a place where he knew they would not be put to death. In response, Lamm, with the authority of someone in the know, cried, “There was no such person in the Gestapo.”[[49]](#footnote-49)

Lamm’s position was ultimately accepted. In the Prevention and Punishment of the Crime of Genocide Law, it is stated that, as a rule, the perpetrator of the crime of genocide shall face capital punishment except in unusual cases where two cumulative conditions are met: first, the defendant is absolved of criminal liability (even though the law makes no provision for this) or “grounds for forgiveness of the offense” are present; and second, the defendant “did his best to attenuate the severity of the outcomes of the offense.”[[50]](#footnote-50) This wording rather closely resembles that of Section 11 of the Nazis and Nazi Collaborators (Punishment) Law, which provides the option of not applying the death penalty if “extenuating circumstances” are present:

In determining the punishment of a person lawfully found guilty of an offense under this Law, the Court may take into account, as a factor mitigating the severity of the punishment, the following circumstances:

1. the person committed the offense under circumstances that, were it not for Section 8, would have absolved him of criminal liability or would have served as grounds for forgiveness of the offense, and did his best to attenuate the severity of the outcomes of the offense;
2. the offense was committed with the intent to prevent, and may have prevented, outcomes more severe than those caused by the offense;

However, if the offense at hand was committed under Section 1, the Court shall not impose on the offender a punishment more lenient than a ten-year term of imprisonment.

Subsequently, Lamm described the death penalty that was eventually written into the Nazis and Nazi Collaborators (Punishment) Law as mandatory (“absolute capital punishment,” he said) but as leaving the judge a “loophole” in interpreting the law so as not to impose this punishment where unsuitable. This interpretation, Lamm reasoned, lay at the core of the judge’s job and distinguished the judge’s craft from that of the legislator:

Matters of law lend themselves to interpretations and the legislator can never know in advance what circumstances will be present when the Court will have to make its ruling. [...] Modern legislation is framework legislation that allows judges the possibility of interpreting matters in accordance with their worldview. [...] Our era is so dynamic that the legislator cannot foresee developments. Therefore, it is the duty of the judge’s craft to fill the gap.[[51]](#footnote-51)

Such an opportunity to interpret the law came Lamm’s way when he sat in judgment shortly after the law went into effect. As described in the next part of this article, the Section 11 quoted above, and the more lenient sentencing that it allows, would undergird Lamm’s ruling in the case of a defendant convicted of offenses under this law shortly after Lamm doffed his legislator’s hat and donned the judge’s robe.

Joseph Lamm the judge

“Courts of law are not historians”[[52]](#footnote-52)

As best as is known, Lamm presided over two trials that book place in Tel Aviv District Court in which the defendants were Jewish Kapos: that of Moshe Puczyc, deputy commander of the Jewish police in the Ostrowiec ghetto and camp, and that of Yehezkel Ingster, Kapo at the Gräditz and Faulbruck camps in 1943–1944. Ingster, born in Będzin in 1911, was indicted for actions he had committed as “\_\_\_” ["קולונן שיבר], akin to a “Chief Kapo,” in the aforementioned labor camps in 1943–1944. In the indictment, presented to Tel Aviv District Court in September 1951, Ingster was charged with five offenses under the Nazis and Nazi Collaborators (Punishment) Law, including war crime and crime against humanity. The punishment set forth in the law for both is death, as will be recalled, and this fact hovered like a heavy cloud over the courtroom throughout the proceedings. According to the indictment, Ingster had treated prisoners with extreme cruelty. He strode about in the camps clutching a rubber-sheathed baton with metal studs, with which, as well as with his hands and feet, he assaulted anyone who crossed his path. Among other cruelties, Ingster beat prisoners as the morning wake-up call was sounded, as the prisoners marched to the morning roll call, as they rushed in fright down a narrow staircase to the roll-call grounds, during the roll call, as they worked, and in the evening, as they returned from work starving and broken from their grueling labor and queued for their paltry and unsatisfactory soup rations. In addition, Ingster, also according to the indictment, was one of several Kapos whose task it was to punish prisoners by lashing them, which he did with much gusto.

The Ingster trial: the verdict

In its verdict, handed down on January 4, 1952, the District Court convicted Ingster of some of the violent offenses listed in the indictment and acquitted him of others, including the commission of a war crime. On the charge of a crime against humanity, the views were divided: Judges Avisar and Levine favored conviction; Lamm acquittal. The actions of which the defendant was found guilty, the majority reasoned, added up to a crime against humanity because they satisfied two cumulative conditions. First, the acts at issue were “grave in nature and able to embitter a person’s life, humiliate him, [and] cause him serious bodily or mental anguish,” and second, they had been perpetrated against civilians on a large and systematic scale, “in a manner that the human conscience and emotion find outrageous.” Applying this standard to the defendant’s conduct, the majority believed that these two conditions had been met:

We are convinced that beatings cruelly delivered with a rubber baton to the hands and feet irrespective of where they land, even if there were some grounds for this but especially in the absence of any grounds whatsoever, and all the more when the victims are frail, helpless, and despairing, where [the beatings] are administered morning and night against multiple prisoners, are inhuman acts.[...] It should be added here that, in our opinion, even a person who himself is oppressed and interned in the same camp as are his victims is legally capable of committing a crime against humanity by perpetrating the inhuman acts that we described above against his fellow prisoners. Unlike a war criminal, the perpetrator of a crime against humanity need not be a person who identifies with the oppressive regime and its malicious intent.[[53]](#footnote-53)

Lamm, expressing the contrasting minority view, argued that the gravity and extent of the actions are not the only litmus tests to be applied in defining an act as a crime against humanity. To convict a person of this offense, he maintained, the *intent to annihilate* all or most of the population against which the act was directed must also be demonstrated; in the defendant’s case, this meant the intent to annihilate Polish Jewry. Therefore, Lamm concluded, Ingster should be acquitted of this offense despite his brutal and cruel comportment, it not having been proved that he had intended to annihilate even one prisoner in the camp. In this context, Lamm drew a clear distinction between the doings of the Nazis and their accomplices, which were geared to the extermination of the Jewish people, and those of the defendant, who was “only an instrument in the Nazis’ hands” and “remained their aide only.” As such, “the defendant facilitated the attainment of the Nazis’ goal of exterminating the Jewish people—a ghastly role, but his intentions and those of the Nazis were intrinsically different.”[[54]](#footnote-54)

Lamm also mentioned the Biblical affair of the Jewish police who had been appointed to supervise the Jews who performed grueling labor in Egypt. These police had pitied their conationals and were punished by their Egyptian overseers on this account, thus meriting inclusion in the Sanhedrin.[[55]](#footnote-55) Lamm then concluded succinctly, without elaborating: “And there were Kapos in our own times who were fit for the Sanhedrin and did not fear their Hitlerist overseers and did not oppress the prisoners.”[[56]](#footnote-56) Here Lamm referred back to the testimony of the main defense witness, who himself had held a post similar to the defendant’s in the two camps and, in contrast to the defendant, “carried out his difficult duties without beating [prisoners] and without stirring their hatred.”[[57]](#footnote-57) Although it was not written into the verdict, the possibility that Lamm’s personal experience in Dachau steered him to this conclusion cannot be dismissed. Unlike the Jewish police who supervised their brethren in Egypt, the defendant, Lamm noted at the end of the verdict, “did not follow our forebears’ path. He treated prisoners cruelly and inhumanely. However, be his intention what it may, even the worst, this, notwithstanding everything, does not make him one of Hitler’s taskmasters insofar as his actions did not reveal an intent to annihilate us like [Hitler].”[[58]](#footnote-58)

According to this interpretation, the actions of Jewish collaborators may transgress the other sections of the law but would never add up to the grievous offenses listed in Section 1 of the law—crime against the Jewish people, crime against humanity, and war crime. Thus, Lamm proposed an additional scale of reference for the offenses specified in the Nazis and Nazi Collaborators (Punishment) Law, transcending the familiar and self-evident test of the severity of the acts. The test for this scale is intent: the three crimes listed under Section 1 of the law require a special and especially grave intent to exterminate the civilian population against which the offenses were committed. For the other offenses, only an “ordinary” psychological foundation in accordance with the requirements of effective criminal law is needed.

What civilian population is it that a person accused of a crime against humanity must seek to annihilate? True to the stance that he expressed in the debates of the Knesset Constitution, Law, and Justice Committee, Joseph Lamm the judge interpreted the law in a manner that related it solely to offenses against the Jewish people:

Admittedly, [the Nazis and Nazi Collaborators Punishment] bill as submitted by the Government of Israel to the First Knesset did not mention the Jewish people explicitly, even though [this people] was the principal victim of the Nazis’ cruelest crimes, which were unequalled even in the Jewish people’s lengthy history. Only the legislator, on its own counsel, decided to establish crimes against the Jewish people as a special crime, additional to other crimes specified in the bill. It is undisputed that the sponsors of the bill intended, foremost, to punish those who committed crimes against Jews specifically. For this reason, instead of settling for generalities, the legislator determined that offenses committed against the Jewish people during the era of Nazi rule [should be considered] a specific offense.[[59]](#footnote-59)

Following this interpretive assumption that the sole intention of the law is to punish perpetrators of crimes against the Jewish people and none other, Lamm concluded that Jews cannot be convicted of crimes against the Jewish people and crimes against humanity under this statute because this statute is geared to members of their people. However, while he wrote this conclusion explicitly in regard to crimes against the Jewish people (it being noted that even the prosecution had not placed Jews on trial for these offenses), he merely alludes to it in regard to crimes against humanity. The allusion was well understood. After Ingster’s trial, no more Jews were brought to justice on the grounds of crimes against humanity.[[60]](#footnote-60)

The Ingster affair was one of the first in which Jews were prosecuted for collaborating with the Nazis and the very first in which the court was asked to rule on the underlying psychology of the offense of crimes against humanity in the Nazis and Nazi Collaborators (Punishment) Law. For this purpose, Lamm had to interpret the law in comparison of its wording both with the bill and with the offense of genocide as defined in the Prevention and Punishment of the Crime of Genocide Law. Lamm also related at length to comparative law, including Article 10 of the Nuremberg Charter (the Charter of the International Military Tribunal) and the Genocide Convention. In his analysis of the provisions of the law, Lamm was well aware of the difficulty that exists when a judge needs to interpret a law that he had helped to draft. Thus he wrote:

Clearly I must be very cautious in my efforts to interpret the paragraph that defines the essence of a crime against humanity because I personally took part, in my capacity as a member of the First Knesset, in drawing up the law that would be enshrined, and I have no doubt whatsoever that Lord Halsbury’s opinion makes much sense: the person responsible for formulating a law is the least suited to interpreting it because he may mingle his own intention with the purpose of the language that he used when he worded [it]. [...] When I interpret the meaning of a crime against humanity, I will try to distract myself from every intention I had as the law was being legislated and to bear in mind only the written letter in its own language, as though I will be seeing it for the first time when the trial at hand is presented to us.[[61]](#footnote-61)

Did Lamm really behave this way? As we have seen, his verdict does more than allude to the views that he had expressed several years earlier as a legislator, in the deliberations of the Constitution, Law, and Justice Committee. Overall, however, it seems that the interpretation Lamm gave in his verdict is broader than that adduced from the legislative history of the Nazis and Nazi Collaborators (Punishment) Law. Thus, in his ruling in the Ingster case he expressed his belief that “the judge, by interpreting the law, actually makes law because he can introduce in his interpretations an intent that the legislator had never thought of.”[[62]](#footnote-62)

Subsequently, Lamm explained in a newspaper interview, he had felt while hearing the Ingster case

that as [the law] was being legislated I had not borne in mind that, in fact, a crime against the Jewish people should have the special intent of harming Jews *qua* Jews. One should not say about a Jew who had held a position in the concentration camps that he had done it in order to hurt Jews *qua* Jews. Rather, he had done it with the feeling that thus he was helping himself. As long as there is no proof that he had caused people’s death, his cruelty should not be seen as having such an intention.[[63]](#footnote-63)

The Ingster trial: the sentence

An additional and even more important and principled controversy surfaced between Lamm and his partners on the bench, Avisar and Levine, concerning Ingster’s sentence. According to the majority view, once a defendant is convicted of a crime against humanity, “the law leaves us no choice but to sentence [him] to death.”[[64]](#footnote-64) Had the court been given discretion in sentencing, Avisar and Levine explained, the defendant should have received a ten-year prison term for his crime against humanity along with additional terms for assault and battery, to be served concurrently. Furthermore, there was reason to bear the defendant’s personal circumstances in mind—he was ill with a malignant disease that had led to the amputation of one leg and paralysis of the other—and to mitigate the punishment considerably. The judges explained that the legislator should have left the court empowered to hand down a lighter sentence than death, for two reasons:

(a) It is quite clear that a criminal who himself is a Nazi or who identified with the barbaric regime of the vile Nazis is not the same as a criminal such as this defendant, who himself was oppressed and lived under inhuman conditions as did his victims. (b) Not all criminal acts against humanity are similar in their severity and cruelty....[[65]](#footnote-65)

Lamm, in his minority opinion, also noted the starting assumption that the death penalty is mandatory and leaves the court no discretion in sentencing, as was his view when the law was enacted. In this case, however, the exception in Section 11(b) of the Nazis and Nazi Collaborators (Punishment) Law applied: the court is allowed to reduce sentence to a prison term no shorter than ten years in a case where the defendant intended, in his actions, to prevent outcomes even graver than those occasioned by the offense. Lamm noted that this had not been proven in the trial. (The defense focused on denying that the defendant had committed the crime at all.) However, true to his method in rulings—to help defendants exercise their right to a defense in full[[66]](#footnote-66)—and given that the defendant had been convicted of a series of actions that added up to a crime against humanity but had committed no single act grievous enough to warrant this definition on its own, Lamm was convinced that “many of the defendant’s actions that only collectively constitute a ‘crime against humanity’ were indeed carried out with the intention of preventing graver outcomes and indeed prevented them.”[[67]](#footnote-67) Under these circumstances, Lamm found that Ingster should be sentenced to only ten years in prison on account of all counts on which he had been convicted.

Although Lamm adhered to his minority opinion against the formalistic majority, the three judges unanimously urged the President of the State “to take the circumstances noted above into account and to mitigate the defendant’s punishment as [you] see fit.”[[68]](#footnote-68) Ingster appealed to the Supreme Court and his appeal was heard by the President of the Court, Moshe Smoira, and Justices Yitzhak Olshan and Shneor Zalman Cheshin on April 7, 1952. In its ruling, handed down without explanation at the end of the discussion, the court accepted the appeal, vacated Ingster’s conviction for crimes against humanity, and repealed his death sentence. His convictions on the other counts were allowed to stand, and on their account he was sentenced to four prison terms of various lengths not exceeding two years, to be served concurrently.[[69]](#footnote-69) As best is known, the rationale behind the ruling was never offered. Two months later, Ingster received clemency and was released from prison by order of the Minister of Police in view of his state of health.[[70]](#footnote-70) He died at home several days later.[[71]](#footnote-71)

Lamm found the testimonies at the Ingster trial difficult to hear; they may even have dredged up harsh memories. The looming outcome of the trial, too, as he described it two decades later, left him sleepless (“For nights I could not close an eye,” he said.) Ultimately, the trial was a landmark in Lamm’s judicial career. If he had believed until then that “law is made by the judge, not by the legislator,” in the sense that judges are entitled to interpret the law as they wish, this case demonstrated the difficulty that arises when legislator and judge are one. Indeed, “Since that trial, I have concluded that one should not be both a judge and a legislator,” he admitted.[[72]](#footnote-72) Relating to the Ingster trial affair almost two decades after its occurrence, Lamm drew an explicit line between the question of intent in committing the act and the severity of punishment the perpetrator should face. “The death penalty,” he said, “should be given to a person who intended to harm a Jew *qua* Jew, whereas all [this defendant] wanted was to make his life more comfortable.”[[73]](#footnote-73)

The Puczyc Trial

District Court’s majority ruling to sentence the defendant to death was an exceptional step. In fact, it was the second and last time in Israel’s history that this penalty was imposed on a Jewish defendant[[74]](#footnote-74); afterwards, capital punishment was invoked only in the trial of the Nazi Adolf Eichmann. This ruling is also especially interesting in view of another verdict handed down by the same panel of judges only about two months later in the case of Moshe Puczyc, who had been placed on trial for war crimes, crimes against humanity, and additional offenses under the Nazis and Nazi Collaborators (Punishment) Law. The misdeeds were attributed to him during his service as deputy commander of the Jewish police in the Ostrowiec ghetto and, afterwards, as commander of the Jewish police in the Ostrowiec camp, the labor camp that the Nazis had established after they had liquidated the ghetto.[[75]](#footnote-75)

In a rare step, the judges dismissed all charges after hearing some of the evidence, finding the testimonies of the twenty-seven prosecution witnesses unreliable if not false and preferring Puczyc’s own account. The fifty-two page ruling, delivered by Judge Avisar with the consent of judges Levine and Lamm (exceptionally lengthy by the standards of rulings at the time) included copious historical background information about the establishment and operation of the ghetto and the camp, as well as the biography of Puczyc himself: born in Warsaw in 1910, a public functionary and Zionist activist who had been active before, during, and after the war in various public capacities and had also held a government post after he had immigrated to Israel in late 1948. In the verdict, one gets a complex picture of the grim reality of life in the ghetto and the camp. The judges plainly gave the defendant much leeway in view of the inhuman circumstances of this life and the things did under them. In the ruling, it was stated unequivocally that the defendant, who sometimes had beaten Jewish prisoners in the camp who were under his authority, should not be seen as having committed a crime against humanity. Therefore, in this case, in contrast to the Ingster trial, the judge saw no need to seek the extenuating circumstances set forth in Section 10 of the Nazis and Nazi Collaborators (Punishment) Law. In this context, the court noted in its ruling that

We believe that the defendant did use his hands [slapped and punched—Y.D. and D.P.] in various cases, but there was not even one case that could be termed an inhuman act in the sense of the Law. [...] The most exalted point beyond all doubt, in our opinion, is that the defendant dealt with the public’s needs both before and after the war and when he was given the wretched task of being one of those most responsible for order and discipline in ghetto and camp life. He carried out this task by displaying a public approach to the matter and the awareness that he was acting for the public welfare. It is clear to us that he played a major part in concern for improving living conditions in the ghetto and the camp, sparing people from transports and even from death, and sheltering and protecting those who escaped.[[76]](#footnote-76)

Concluding the ruling, the court went to the trouble of explaining why the witnesses had perjured themselves against the defendant: “The defendant appears to have overstated what he had done to eradicate scourges in public life.” This caused widespread anger because some witnesses were embittered after having lost dear ones and believed the defendant had had a hand in it. After all, “His dynamic character and his education made him the most conspicuous member of the leadership in the ghetto and the camp.” Furthermore, some witnesses had had it in for him due to “trivial injuries” that he had caused them.[[77]](#footnote-77) The court’s impression here is totally different from its impression of Ingster, in whose case the judges rejected the defense’s allegation of a conspiracy by the witnesses and found that they had been objective and accurate in their account of the defendant’s persona and conduct.[[78]](#footnote-78)

In fact, while the Puczyc verdict was undergirded by the court’s view of the defendant as a loyal public servant who had acted for the public welfare, thus justifying his personal choices,[[79]](#footnote-79) the Ingster ruling rested on a diametrically opposite picture of the defendant as a vile and merciless sort who had accepted a position of power for personal gain and not due to duress. It is not out of the question that the general impression of judges Avisar and Levine of the defendant’s character and the factors that motivated him to act as he did contributed the opposite outcomes that they had reached in each of the affairs. As for Judge Lamm, in contrast, his hybrid outlook on the extent of freedom of choice of defendants who themselves were prisoners was already evident in his ruling in the Ingster case, which nevertheless did not belittle the gravity of Ingster’s acts. This, it seems, is one of many manifestations of Lamm’s judicial temperament, which a colleague of his described in a eulogy: “One of Lamm’s amazing traits was his way of forming an opinion on the basis of direct personal experience.”[[80]](#footnote-80)

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