

The Jewish history of the Supreme Court

Address to JNet: The Jewish Civil Servants' Network¹

Lord Neuberger, President of the Supreme Court

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1. I have been asked to talk to you about the Jewish history of the Supreme Court. I am not quite sure what that is meant to cover, but it is always good to have a vague title as it enables the speaker to have a fair degree of latitude.
2. For an institution born in only 2009 the Court has only a short history, not even having reached its barmitzva. However, the Supreme Court was not created *ex nihilo*. It took the baton from its predecessor as the highest court in the land: the Appellate Committee of the House of Lords; or, as we were commonly known, the Law Lords. Between our two institutions our history is somewhat deeper, and provides richer territory for cases and appeals that touch on areas of Jewish interest.² Our cases are about applying law to facts, and just as the law evolves over time, so too do those facts and human stories. Looking back on the last century of Jewish-related cases in the House of Lords and Supreme Court casts as much light on social history of Britain and its attitudes to minority groups as it does on legal principles.
3. The Jewish input into the rule of law has been almost as disproportionately large as the Jewish input into science and music. I think that this is for two main reasons. First, the Jewish religion is very much directed to complying with rules and interpreting rules. Our fundamental text is the Torah, not for nothing known as the Law of Moses, with its ten commandments (twice) and 613 mitzvot. The Midrash and Talmud are full of interpretation and do's and don't's. Judaism requires very little of its adherents in terms of belief, but a great deal in terms of what they can and can't do. The rabbis and gaonim were judges and arbitrators as much as religious leaders. And so for more than two millennia the Jews lived and breathed learning, analysis and law.

¹ I am very grateful to Daniel Isenberg who is responsible for the bulk of this talk

² See D Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (2011)

4. The Jews are also naturally interested in the rule of law because of two millennia of persecution. In bad times, of which there were many, the Jews were victims of expulsions, massacres, pogroms and genocide, and even in good times they were frequently dependent on the whim and indulgence of kings and tyrants driven by self-interest. It is scarcely surprising that these many years of persecution, fear of the mob and of the arbitrary exercise of power has inculcated a passionate interest in, and strong support for, the rule of law, with its civilising consequences.

5. Of course the two drivers, a legal frame of mind and experience of persecution, were closely interrelated. Persecution drove the Jews to protect themselves materially and intellectually, living on their wits, and that required study and learning. As the recently retired and distinguished Appeal Court Judge, Sir Bernard Rix said in a lecture to the Three Faiths Forum in 2007, “From the time of their exile in Babylon ... the Jews turned inwards to their law ... to scholarship, to analysis, to interpretation, and to education.” And, because Jews were well-educated, they were successful, and this helped generate persecution.

6. So, after two millennia of learning and persecution, along comes the age of enlightenment, and the liberalising constitutions of the seventeenth and eighteenth centuries, with their emphasis on the rule of law and emancipation of the Jews. Sadly, the rule of law and emancipation were far from heralding the end of persecution, but it is unsurprising that they should result in the Jews, with their tradition, finding such a prominent position in the legal world – whether as judges, lawyers or academics. I remember my first visit to a Chancery court; it was to sit in on a case involving the meaning of a will. The arguments in court were very similar to the sort of points made in the admittedly few shiurim which I attended after my bar mitzvah. Mr Justice Walton’s analysis of the testator’s intentions as stated in his will was like a bad-tempered Rashi’s interpretation of God’s will as stated in the Torah.

7. This country has seen many successful Jewish judges, barristers and solicitors, and there still are. And, not least due to the mass exodus of Jewish jurists from Germany in the 1930s, the legal academic world in this country has benefitted enormously from Jewish

contributions, as is demonstrated in Jack Beatson and Reinhard Zimmermann's remarkable compilation, *Jurists Uprooted*³.

8. The earliest impact of the Jews on English law dates back to the 13th century when the use of Jewish credit agreements founded on Talmudic law was the basis for English liens on property, which has been traced as a source of the modern mortgage.⁴ However, it was not until significantly later that Jews sat on the bench. Sir George Jessel was the first senior Jewish judge in England; he had been Gladstone's solicitor-general and sat in the Court of Appeal from 1881. He became Master of the Rolls, perhaps the most famous until Lord Denning. Interestingly, part of the job of Master of the Rolls since at least 1377 had been a responsibility for converted Jews, and in that year he was given a piece of property on the east side of Chancery Lane which included the *Domus Conversorum* which housed converted Jews. Jessel made sure that any reference to this role in the MR's official long title was removed. Sir George Jessel, was one of the most formidable judges ever to sit on an English bench – he reserved judgment only twice, and that was only because his colleagues asked him to do so. One of his colleagues once asked him whether he had actually said “I may be wrong but I am never uncertain”. Sir George's reply was “that is partly true: I said that I was never uncertain”.

9. Another larger than life judicial figure was to bestride the judicial stage, and also the political stage, in the next generation. Rufus Isaacs, Marquess of Reading, had a remarkable career, ending as Foreign Secretary, having been previously Viceroy of India. Before that, he was Lord Chief Justice (and, remarkably, for a couple of years during World War I while LCJ, he was also Ambassador to Washington). Earlier, he had been Solicitor General and Attorney General – and before that, many thought that he was very lucky not to have gone to prison for his dishonesty in Marconi affair.

10. To turn to rather less colourful characters, the first Jewish Law Lord was Lionel Cohen, appointed in 1951, and he was followed by Cyril Salmon in 1972. Thereafter, probably as a result of social changes, a greater number of Jews were appointed to the bench, and subsequently to senior judicial roles. Since then the highest court has seen the likes of Lord

³ Ed J Beatson and R Zimmerman, *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain: German-Speaking Emigre Lawyers in Twentieth Century Britain* (2004)

⁴ See Judith A. Shapiro, ‘The Shetar's Effect on English Law – A Law of the Jews Becomes the Law of the Land’ (*Georgetown Law Journal*, Vol 71, 1983), 1179-1200.

Woolf, Lord Hoffmann, Lord Millett, Lord Brown, Lord Collins, Lord Phillips, and, indeed, myself.

11. Jewish women also have a proud place in strides to further gender equality across the legal profession: in 1922 Sara Moshkowitz was one of the first few women to be called to the Bar; and Rose Heilbron was one of the first two women in England both to be appointed King's Counsel as well as to the High Court bench. And of course Dame Rosalyn Higgins deserves mention as the first woman judge to be appointed to the International Court of Justice in the Hague, and its former President.

12. I now turn to cases that have come – as they continue to come – before the highest court in the land: the Supreme Court now, the House of Lords as it used to be, as well as the Privy Council – the panel of judges, identical in personnel to the Supreme Court, that advises Her Majesty on appeals from British overseas territories and particular Commonwealth nations.

13. In fact, one of the earliest cases of Jewish interest in the 20th Century was an appeal to the Privy Council from Egypt, then under British control. In the 1924 *Sasson* case⁵ the Privy Council held that a Jewish divorce by the Grand Rabbinate of Alexandria on grounds which would not have supported a decree for divorce in English law, was to be recognised by the English court. Interestingly the Privy Council compared the case to recognition of Islamic 'talaq' divorces which were recognised by British courts in colonial India. Their Lordships spoke of the "*divorce good according to the religious law of the non-Christian subject*".

14. Prevailing attitudes to Jews in particular were manifest in a House of Lords judgment in the 1926 *Glicksman* case⁶, an insurance case in which the underwriters refused to meet the claim of a tailor due to failure to disclose a material fact – namely that another company had rejected the claimant's application for insurance. Viscount Dunedin describes the meeting between the insurance seller and tailor in these terms:

"On the one hand Mr. Cohen, agent for the insurance company, keen, as he was quite entitled and bound to be, to get business for the insurance company, and, on the other hand, this wretched little ladies' tailor of

⁵ *Sasson v Sasson* [1924] AC 1007

⁶ *Glicksman (Pauper) v Lancashire and General Assurance Company, Limited* [1927] AC 139

whom the arbitrator tells us that he could neither read nor write and could only sign his name, and whose natural and best language was Yiddish and not English - surely an impar congressus.”

Mr Glicksman, the tailor, lost his appeal, but not without Viscount Dunedin passing comment on the insurance company in the following way:

“I am left with this impression, that those - shall I call them attractive? - qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew.”

15. That descriptive characterisation was, however, anomalous, and two years later the Privy Council decided the Canadian *Hirsch* case⁷ in a more detached manner, focusing on the narrower legal issue of statutory construction. The case questioned the validity of a Quebec statute that provided that Jews should, for school purposes, be treated as Protestants and have the same rights and privileges (including the right to education). The Board – as the Judicial Committee of the Privy Council is often known – found the Québécois legislation valid, except insofar as it enabled Jews to be appointed to the Protestant Board of School Commissioners or conferred on them the right of attendance at rural dissentient schools.

16. I mentioned earlier that not only does the law evolve and develop, but so too do the factual contexts to which it is to be applied. That is not always the case. The 1932 *Keren Kayemeth* case⁸ required the House of Lords to decide whether the organisation (presumably the forerunner of the present KKL-Jewish National Fund) was exempt from income tax, it being “*established for charitable purposes only*”. The main object of the institution, by its memorandum of association, was to acquire land in Palestine and other parts of the Middle East “*for the purpose of settling Jews on such lands*”. Its argument before their Lordships was that living in Palestine is an essential part of the Jewish religion, and the law of Judaism cannot be adequately carried out except in Palestine. As such, the settlement of Jews in Palestine may therefore rightly be called a purpose for the advancement of religion.

17. The purported charity failed, however. In part their Lordships looked not to Jewish theology, but instead to the language employed in the memorandum of association, which

⁷ *Hirsch v Montreal Protestant Board of School Commissioners* [1928] AC 200

⁸ *Keren Kayemeth le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650

was not of a religious character. Although the minds of those persons involved in the association may have been motivated by religious devotion, the object of the association was not to do something which is in itself religious. Of some interest, though, is the concurring speech of Lord Thankerton, who responded to the argument that the association was a trust for purposes beneficial to the community – that it had been established for the benefit of Jews all over the world. His Lordship did not think that Jews could be “*described as a community in the sense in which that word is used in this connection*”, which “*predicates the existence of some political or economic body settled in a particular territorial area*”.

18. Lord Thankerton did not consider Jews to be a “*community*” for relevant purposes in the *KKL* case, and in a case decided in 1942 their Lordships had some uncertainty about the meaning of ‘Jewish’. *Clayton v Ramsden*⁹ was a case about the validity of a clause in a will that ceased any benefits to any of the testator’s daughters who, after his death, married a person “*not of Jewish parentage and of the Jewish faith*”. One of his daughters subsequently married Harold Clayton, who fell into the specified category, and the validity of the clause was challenged. The first question for their Lordships was the meaning of the phrase “*Jewish parentage*” – was this an issue of religion (as held by the Court below) or of race? The House of Lords interpreted the clause in the latter manner, and the moment in history is once again key to the judicial perspectives. This was 1942, a time in which we are fully aware of how Europe could think about racial biology, especially seeking to quantify or apply the language of science to the Jewish race. Lord Wright’s speech sums up not only their Lordships’ conclusions, but also their attitude to race at the time:

“...It is a different problem to determine what is the degree of racial purity in fact required by the condition. In that respect the clause falls short of clearness and distinctness. On reading it, the court or other party interested is left in complete doubt what degree of racial purity will satisfy the condition. Is it to be 100 per cent., or will 75 per cent. or 50 per cent. be sufficient? The words of the clause do not enable any definite answer to be given.”

Both elements of the clause – relating to Jewish parentage and being of the Jewish faith – failed on grounds of uncertainty.

⁹ *Clayton v Ramsden* [1943] AC 320

19. The Court is conscious of its constitutional role and has always been sensitive to issues of possible political controversy. In 1962 the House of Lords decided the appeal in the 1965 *Schtraks* case¹⁰. The appellant was wanted in Israel for offences in connection with a grandfather's refusal to return his grandson (the appellant's nephew) to his parents because of his fear that the child would not receive an Orthodox Jewish education. The Israeli government sought Mr Schtraks' extradition from the UK, and he was apprehended and detained awaiting extradition. Mr Schtraks brought habeas corpus proceedings. He argued in part that since the UK did not recognise the Israeli government as having *de jure* sovereignty in Jerusalem, but only *de facto* authority, Jerusalem was not "territory" of Israel within the meaning of the agreement between the UK and Israel. As such, his argument ran, he could not be lawfully extradited. Mr Schtraks did not, however, succeed. Their Lordships considered that "territory" in the context of the extradition agreement included any area over which a contracting party exercised effective jurisdiction. Accordingly, since the Israeli government exercised jurisdiction over Jerusalem, and no other State was recognised as having *de jure* sovereignty, Jerusalem was within the "territory" of Israel within the meaning of the agreement.

20. I suppose it could be said that *Schtraks* foreshadows the much more recent *Richardson* case heard by the Supreme Court in 2014¹¹. The appellants were convicted of aggravated trespass in circumstances where, in the course of a political protest, they had refused to leave a London shop which was run by the subsidiary of an Israeli company operating out of the West Bank. The offence requires the trespasser to intend to disrupt "any lawful activity" being carried out on the premises. The appellants' argument was that the shop-owner was not engaging in "lawful activity" because it was involved in a number of criminal offences, including aiding and abetting war crimes, money laundering and cheating HMRC. The Supreme Court did not need to make a substantive finding on the allegations made against the Israeli state. Rather, it was sufficient to dismiss the appellants' appeal for the Court to hold that a collateral criminal offence would only affect the lawfulness of the activity when it was integral to the core activity carried on at the premises. In any event, in respect of the allegations of war crimes, they could not be made out on the facts: at most a *separate* corporate entity had employed Israeli settlers at a West Bank factory. The Court commented

¹⁰ *Schtraks v Government of Israel and others* [1964] AC 556

¹¹ *Richardson v DPP* [2014] AC 635

that it is highly doubtful that mere employment could amount to procuring or aiding a state in the unlawful transfer of population.

21. One of the high points of 20th century jurisprudence in this jurisdiction was the 1975 case *Oppenheimer v Cattermole*¹². The taxman was pursuing two Jewish refugees from Germany – both now naturalised British citizens – for tax owed on reparations-related pension payments from their country of birth. Mr Oppenheimer and Miss Nothman argued that they had never lost their German citizenship and, as such, were owed relief under double taxation arrangements between the UK and Germany. The Court of Appeal had found for the government on the basis that once the war was over German law should be recognised: the decree which had stripped the litigants of their German citizenship in 1941 might have been morally wrong, although legally valid.

22. The House of Lords (although ultimately finding for the government based on a post-war German statute) did not mince its words regarding the proper approach to be taken by English courts to laws such as those in force during Nazi rule over Germany. Lord Cross opined that a law which deprives individuals of their citizenship and property based purely on “*racial grounds...constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all*”. The decision in *Oppenheimer* is of considerable significance in international law and it featured significantly in the reasoning of the Supreme Court in two decisions earlier this year relating to the principles of crown act of state and foreign act of state - *Belhaj v Straw*¹³ and *Rahmatullah v Ministry of Defence*¹⁴.

23. One should not forget that courts in the UK are experienced and adept at applying the law to a wide array of factual circumstances. Aspects of Jewish faith, law or culture can sometimes provide the context for those general principles to be applied or questioned. In *Re: H (Minors)*¹⁵, decided in 1998, the father of three young children appealed to the House of Lords against a decision below that he had acquiesced in their removal to England by their mother. The case provided their Lordships with the opportunity to provide guidance to the courts below on the meaning of ‘acquiescence’ under Article 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction 1980. Both parents were Orthodox

¹² *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249

¹³ [2017] 2 WLR 456

¹⁴ *Rahmatullah v Ministry of Defence (No 2)* [2017] 2 WLR 287

¹⁵ *Re: H (Minors) (Abduction: Acquiescence)* [1998] AC 72

Jews and the father had not taken part in legal proceedings in England because of the requirements of his faith not to participate in secular court proceedings without the authorisation of a Beth Din, the rabbinical court. His actions – including his recourse to the Israel Beth Din – were not clearly and unequivocally inconsistent with his pursuit of his summary remedy under the Hague Convention, and their Lordships therefore ordered the summary return of the children to Israel.

24. The *Helow* case¹⁶ in 2007 involved an allegation of alleged judicial bias. The appellant was a Palestinian refugee, who had been critical of the Israeli government regarding the attack on the Sabra/Shatila refugee camp in Lebanon in 1982. Her application for asylum in the UK was refused, as was her application to the Immigration Appeal Tribunal for leave to appeal. She subsequently presented a petition for statutory review to the Court of Session in Scotland, which was dismissed by the Lord Ordinary, Lady Cosgrove. The appellant argued that the Lord Ordinary's decision ought to be set aside because of her membership of the International Association of Jewish Lawyers and Jurists, whose magazine had carried a number of extremely pro-Israeli articles. Her case was that a fair-minded and informed observer would have concluded that there was a real possibility that the Lord Ordinary was biased by reason of her membership. Their Lordships, however, disagreed. Membership of an organisation did not necessarily connote approval of all material that it published, especially where the stated aims and objectives of the organisation were unobjectionable. Here, the fair-minded and informed observer would not have concluded that there was a real possibility of bias; they would assume a judge could discount material she had read and reach an impartial decision according to the law.

25. The final case on our whistle-stop tour is arguably the most important, and the most high-profile. It is the Jewish Free School case decided in 2009¹⁷. The case was the first to be adjudicated by the Supreme Court on its establishment in 2009 and its importance was recognised by the assignment of 9 judges to hear it. Nine judge panels rarely occur more than twice in any year, and only one case, the *Miller* (Brexit) case, has been heard by a 11 judge panel. In *JFS* a man claimed discrimination against the Jewish Free School on behalf of his son and ex-wife, who was a convert to Judaism. The school's policy relied on the authority of the Office of the Chief Rabbi to determine who was Jewish for the purposes its

¹⁶ *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416

¹⁷ *R (E) v Governing Body of JFS and another* [2010] 2 AC 728

admission policy. The Chief Rabbi determines Jewish status by matrilineal descent or by conversion through the orthodox Jewish denomination. In this case, the prospective pupil's mother had undergone a non-orthodox conversion and so was not deemed *halachically* Jewish according to the Office of the Chief Rabbi and, therefore, to the school.

26. On whether the school had engaged in direct discrimination the Justices were split 5:4 in favour of the pupil. The majority reasoned that the matrilineal test was a race-based test (as well as a religious one) because of its focus on descent. A larger majority of 7 took the view that if the policy was not *directly* discriminatory then it was *indirectly* so. It put persons of the same ethnic origin as the claimant's son at a particular disadvantage compared to other persons. Although the policy pursued a legitimate aim of providing an Orthodox Jewish education to those recognised as such, it could not be justified as proportionate as the school had not considered its impact on pupils such as the claimant's son.

27. In *JFS* the Court, as in *Miller*, undertook its traditional role, one which is straightforward to describe, but often complex to carry out: it applied the statutes of Parliament and the principles of the common law. In *Miller* that was the European Communities Act 1972 and in *JFS* that was the Race Relations Act 1976. The Court did not ask itself 'who is a Jew according to English law?'. Instead, it asked whether a school's admissions policy complied with a piece of primary legislation. In many ways, the Supreme Court and House of Lords have always eschewed more sensitive questions of identity: in *JFS* the focus, quite rightly, was on the demands of the statute; and in *Clayton v Ramsden* their Lordships specifically found the notion of "*Jewish parentage*" one too uncertain and vague for judicial determination. Ironically, had the father in *Clayton* used language akin to *JFS*' admissions policy, the clause in his will may have survived judicial scrutiny.

28. The Jewish tradition places much emphasis on law, justice and judging. In the desert Moses takes his father-in-law Jethro's advice in delegating judicial authority; and the Noachide Laws to all of humanity include the obligation to establish courts and a legal system. Indeed, the Talmud in Tractate Shabbat (10a) states that every judge who judges a true judgment, even for a single hour, it is as though he had become a partner in the creation of the world. Our ambitions on Parliament Square may not be so lofty, but just as the rabbinic tradition of "*not in heaven*" places much emphasis on the role of man in the development of Jewish law, so too we take seriously our role in the evolution of the common

law. We find ourselves versed in a tradition, interpreting the words of judicial rather than rabbinic sages. Jews are often portrayed – and as frequently perceive themselves – as a wandering people; but through the rule of law we, and all other groups who have been marginalised or persecuted, can try to find, and hope to find, safety, security and a place to call home.

David Neuberger

London, 17 May 2017