

Justice or Reconciliation? The Politicisation of the Holocaust in the Kastner Trial

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It was not the trials of Nazi perpetrators such as Adolf Eichmann that first brought the Holocaust to the attention of Israeli courts but rather trials involving their Jewish victims. In the 1950s the Israeli Law of Punishment of the Nazis and their Collaborators led to a number of trials in which judges were obliged to confront the actions of the Jewish leaders and functionaries during the Holocaust.¹ These trials did not receive much public attention and were mainly discussed in the communities of survivors involved in them. One trial, however, stands out as the exception: Criminal case 124/53, The State of Israel against Malchiel Gruenvald, better known as “the Kastner trial” which took place in the district court in Jerusalem during the years 1954–55. This was the first Holocaust trial that succeeded in making itself relevant to the Israeli public at large. How did this change come about? Was there something that distinguished the facts of this case from the many forgotten trials conducted at that time under the Law of Punishment of the Nazis and their Collaborators? No doubt, the Kastner trial differed in important respects from other “Holocaust trials”: not only was it the first (and only) trial that dealt with the actions of a Jewish leader as opposed to those of low-ranking Jewish functionaries (Kapos and policemen), but the central issue it raised—the negotiations conducted between Kastner and Eichmann about the “blood for trucks” bargain—had the power to capture the imagination of ordinary people. Moreover, the fact that this case was brought to court as a criminal libel trial concerning the free speech of an Israeli citizen endowed it with far more immediate interest

¹ Law of Punishment for Nazis and their Collaborators, 5710-5950, 4 L.S.I. 154; H Yablonka, “The Law of Punishment for Nazis and their Collaborators: History, Implementation and Point of View”, (1996) 82 *Kathedra* (Hebrew); T Segev, *The Seventh Million: The Israelis and the Holocaust* (Haim Watzman trans.), New York, Hill and Wang, 1993), pp. 260–2, Y Weitz, “The Law for Punishment of the Nazis and their Collaborators as Image and Reflection of Public Opinion”, (1996) 82 *Kathedra* (Hebrew) 153.

for the Israeli public than the trials judged under the retroactive and extra-territorial Law of Punishment of Nazis and their Collaborators. These differences, I argue, were not sufficient to explain the fierce political debate about Israeli collective identity and memory that the Kastner trial engendered. Rather, it was the brilliant defence lawyer associated with the right-wing Revisionist Party who was largely responsible for its transformation from a trial about past events in a distant land into a full-blown political trial, perceived by the Israeli public to touch upon the most urgent issues of the day. This chapter is devoted to exploring the transformation that took place during the trial and the role of the defence lawyer in effectuating it.

The Kastner trial began as a libel trial against an old Hungarian Jew, Malchiel Gruenvald, who was accused of defaming the Zionist leader of Hungarian Jewry, Rudolph (Israel) Kastner, by alleging that he had collaborated with the Nazis.² Kastner had lived in Budapest during the Second World War and organised, together with other Zionist activists (among them Yoel and Hanzi Brandt), a committee for the rescue of Jewish refugees who were fleeing to Hungary in an attempt to escape the Nazi terror in neighbouring countries. After the 1944 German take-over of Hungary, Kastner had served as chief negotiator with Adolf Eichmann, the top Nazi official responsible for the deportation of Jews to German concentration camps, and with other Nazi officials on behalf of Hungary's Jewish community. The "blood for goods" deal sought by Kastner and seriously considered by the Nazis was intended to save the lives of nearly one million Jews in exchange for ten thousand trucks to be delivered to the German Army. This ambitious goal was not achieved and approximately 400,000 Hungarian Jews were eventually sent to their deaths in Auschwitz. However, Kastner did succeed in saving a group of 1,685 Jews who were shuttled to safety in Switzerland. This transport included a disproportionate number of Kastner's friends and relatives.

After the war, Kastner's involvement in this capacity was questioned; at the 1946 Zionist Congress he was accused by a Hungarian activist of being a cynical opportunist who had selfishly sacrificed Hungarian Jewry in return for his personal safety. Kastner responded with a libel suit against the accuser, submitted to the Congress's Honor Court. He also wrote a long report accounting for all his war-time activities in Hungary. However, the panel decided that it did not have enough evidence to reach a conclusive decision and recommended that the matter be investigated in depth in the future.³ Thereafter, Kastner moved to Israel and became active in the

² For detailed descriptions of the Kastner affair see T Segev, above n.1, pp. 255–320; Y Weitz, *Ha-Ish she-Nirtsah Paamayim (The Man Who Was Murdered Twice)* (Jerusalem, Keter, 1995); Y Bauer, *Jews for Sale? Jewish Negotiations, 1933–1945* (New Haven, Yale University Press, 1994), pp.145–71. For a discussion of the decisions in the trial and appellate courts see Lahav P: *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley, University of California Press, 1997), pp. 123–5, 132–3, 142–4.

³ Weitz, above n. 1, pp. 60–1.

ruling Labor Party, Mapai; by 1952 he served as spokesman for the Ministry of Trade and Industry. Kastner was also on the Mapai candidate list for the first and second Knessets (Israeli Parliament). Though he did not get elected, there was a good chance he would be successful in the third elections to be held in 1955.

It was at this time that Malchiel Gruenvald embarked on a campaign against Kastner. A devoted member of Ha-Mizrahi (the religious wing of the Zionist movement) and a refugee who had lost most of his family in Hungary, Gruenvald had a political as well as a personal agenda. In addition to seeking to expose Kastner's crimes, Gruenvald hoped to denounce Mapai, demand Kastner's removal, and facilitate the appointment of a commission of inquiry to investigate the events that had led to the decimation of Hungary's Jews. The target of his criticism was the negotiations that Kastner had conducted with Adolf Eichmann.⁴ Gruenvald asserted that these negotiations had facilitated the destruction of Hungarian Jewry while benefiting Kastner personally. In a pamphlet he sent to Ha-Mizrahi members in the summer of 1952 Gruenvald phrased his charge that Kastner had collaborated with the Nazis in vivid and offensive terms:

"The smell of a corpse scratches my nostrils! This will be a most excellent funeral! Dr. Rudolf Kastner should be eliminated! For three years I have been awaiting this moment to bring to trial and pour the contempt of the law upon this careerist, who enjoys Hitler's acts of robbery and murder. On the basis of his criminal tricks and because of his collaboration with the Nazis . . . I see him as a vicarious murderer of my dear brothers."⁵

According to Gruenvald's allegations, Kastner had become friendly with the Nazis through their negotiations and as a result had been allowed to save his relatives and a small number of Jewish dignitaries. In return, Kastner had let the Nazis use him by not informing Hungarian Jews of the real destination of the deportation trains. Gruenvald also alleged that Kastner, in collusion with some Nazis, had stolen Jewish money and then helped save the life of Kurt Becher (one of the Nazi officers with whom Kastner negotiated) with favourable testimony at the Nuremberg war crimes trials. Warned by the Attorney General that he either sue Gruenvald for libel or resign from his government post, Kastner sued, and since he was a senior government official he was represented at the trial by the Attorney General, Haim Cohen, himself. In the course of the trial, however, it was Kastner, not Gruenvald, who found himself on the defensive.

⁴ For a detailed examination of the negotiations see Y Bauer, above n.2, pp. 145–71.

⁵ Translated by P Lahav, above n. 2, p. 123. The Hebrew quotation in S Rosenfeld, *Tik Pili 124: Mishpat Gruenvald-Kastner (Criminal Trial 124—The Gruenvald-Kastner Trial)* (Tel Aviv, Karni, 1955), pp. 16–17. The full version is quoted and translated into English by Segev, above n. 1, pp. 257–8.

Shmuel Tamir, the defence attorney, answered the accusation against his client with the response: “He spoke the truth”. Tamir did not deny that Gruenvald had written the offending pamphlet. Quite the contrary—he set out to prove that everything in it was true. Tamir claimed that had the Jews been informed of the Nazi extermination plan, many of them could perhaps have escaped to Romania, revolted against the Germans, or sent calls for help to the outside world, all of which could have significantly slowed down the Nazi killing process.

Tamir’s main aim was to turn the trial into a political trial, a means for delegitimizing the ruling Mapai party. But here he confronted formidable obstacles. In the 1950s the Israeli public regarded the Holocaust as belonging to “another planet”, and saw the Holocaust survivors who had immigrated to Israel as “Others” to the Israeli collective. This attitude was supported by the prevailing Zionist ideology known as “the Negation of the Diaspora”, according to which the state of Israel epitomised a rupture with the two thousands years of Jewish life in the Diaspora. It envisioned a “New Jew” who would develop in the land of Israel with characteristics diametrically opposed to those of the Diaspora Jew. The New Jew was to be connected to the land, leading a productive life and relying on self-help in economic and security matters, as symbolised by the figures of the *halutz* (the pioneer farmer and builder) and the *shomer* (defender and warrior). This ideological background can explain why the Holocaust trials of the 1950s had until then been perceived by the Israeli public as internal matters involving the communities of survivors alone. Thus, Tamir had to find a way to make a trial that dealt with events that had occurred in that “other planet” of occupied Europe relevant to the political controversies of the day.

The Kastner affair could have signalled a first questioning of the Zionist ideology that opposed the proud “New Jew” of the land of Israel to the submissive Jews of the Diaspora. After all, Kastner was a *Zionist* leader who had chosen negotiations and co-operation with the Nazis rather than military resistance. This moment of recognition, when the simplified stereotype of myth confronted the complexities of concrete historical realities, had an explosive potential. It could have led to a searching critique of this aspect of Zionist ideology, and in particular, of its disparaging treatment of Holocaust survivors who had not belonged to the resistance. Tamir, however, who had no intention of undermining an ideology he himself upheld, was quick to notice the political potential of the Kastner trial and chose to take it in another direction that could be used to sully the Zionist credentials of his political opponents. Thus, instead of examining Zionist ideology in light of the historical reality of occupied Europe, he chose to distort that reality to make it fit the ideological dictum, thus strengthening the blindness that this ideology produced. In other words, Tamir sought to show that it was not the ideology that was at

fault but the leaders (Kastner and, by association, Mapai) who had failed to live up to it. In order to sustain this argument Tamir skillfully exploited the legal process, building his case on three central strategies which involved (a) adapting historical reality to the binary structure of Zionist ideology; (b) re-enacting past trauma in the courtroom; and (c) manipulating the legal discourse of “truth”.

A SOCIO-LEGAL BINARY STRUCTURE

The legal process of Israeli law is adversarial. The struggle between the two sides—the prosecution and the defence—generates a drama, which is intensified in criminal proceedings that continue from day to day and take place within a relatively short period of time. The binary structure of the trial, which creates the impression that there are only two possibilities—acquittal or conviction—was perfectly suited to the story Tamir wished to promote, according to which people were faced with two mutually exclusive choices—heroic resistance as opposed to collaboration and treason. The formal positions of prosecution and defence in a criminal trial thus came to symbolise two ideological positions: co-operation and defiance. Kastner’s actions were associated with the cowardly path of collaboration while Tamir’s political stance was associated with the heroic path of resistance. The entire intermediate range of actions between these two poles, such as the different ways in which the underground movement co-operated with the official *Judenrat*, was disregarded. The binary framework thus excluded serious consideration of the issues actually faced by Kastner and other Jewish leaders who had to take decisions on the basis of weighing probabilities without the benefit of hindsight, the immense difficulties of saving the victims, the impending end of the war as a factor that was considered in the negotiations, etc. Moreover, this binary structure (both ideological and legal) that was imposed on the facts obscured the tragic nature of the decisions taken by people who were forced to make the cruel choice of sacrificing the few in the hope of saving the many.

Tamir presented his arguments within the framework of the Zionist narrative that exalted the New Jew as the opposite of everything represented by the Jew in the Diaspora. According to Tamir, Kastner’s compliance with the authorities was typical Diaspora behaviour, which had led to full collaboration with the Nazis and to the annihilation of the Jewish people of Hungary. The Zionist alternative to “Kastnerism”, however, could not come from Tamir’s client, Malchiel Gruenvald, himself a typical Diaspora Jew who was ultimately a marginal character in the legal drama.⁶ Rather, it was Defence Attorney Tamir himself who was offered as a model

⁶ Judge Halevi even had difficulties remembering Gruenvald’s name. See Segev, above n. 1, p. 255.

of the proud *Sabra* (native-born Israeli Jew). The contrast between the “new” and “old” Jew was especially evident in the cross-examination of Kastner. Tamir’s eloquent rhetoric and perfect fluency in Hebrew were in stark contrast to the broken Hebrew of Kastner’s testimony, which was filled with “foreign” expressions.⁷ Moreover, by managing to transform his position in the trial from that of a formal defence lawyer into that of a *de facto* prosecutor, Tamir re-enacted the national myth of heroism—the weak and few overcoming the strong and many by turning a defence into a victorious offensive.

The Zionist narrative, which Tamir so skillfully put to his use in the trial, was well known to the Israeli audience and made it receptive to his critique. Although Tamir’s criticism failed to reveal the sordid secrets and sensational facts that he promised, he succeeded in transforming his defence of Gruenvald into a political attack by extending the patterns of behaviour he had identified in Nazi-occupied Hungary to the situation in pre-state Palestine, implying that the leadership of the Yishuv (the Jewish population in Mandatory Palestine) during the war had played the role not of the “heroic Zionist” but, like Kastner, of collaborators with the foreign ruler.

During the years of the Holocaust, one of the central divisions among the different Jewish political groups in Palestine had involved the relationship with the British authorities. Mapai, the leading party, had chosen co-operation with the British in their war efforts against the Nazis, while the Revisionists had believed that the military struggle for liberation from the British in Palestine should continue. At first glance, the Kastner trial seemed irrelevant to this controversy since it dealt with the actions of Jewish leaders in Nazi-occupied Hungary. However, in his effort to discredit the Mapai party, Tamir used Kastner’s political affiliation with Mapai leaders to imply an underlying resemblance in their political approach. Both, he argued, had preferred negotiations and co-operation to military resistance. In Europe this choice had proved to be catastrophic since it had facilitated the Nazi annihilation of European Jewry. The trial, in Tamir’s vision, should serve to demonstrate this “lesson” to the Israeli public, a warning against the pragmatic path of negotiations. This, he argued, was the essential meaning of the Zionist message of the “negation of the Diaspora”, since Jews in the Diaspora throughout the ages had relied on compliance and co-operation with the authorities for their survival. The Israelis, as the New Jews, should abandon this path and criticise the Mapai leadership for demonstrating a “Diaspora mentality”. In short, the trial should serve to legitimate the Revisionist approach as the only “authentic” Zionism capable of guarding against the recurrence of similar catastrophes to the Jewish people in the future. It was here for the first time that the political path of “negotiations” acquired the defeatist

⁷ Weitz, above n. 2, p. 126.

connotation that was to be evoked in future political debates concerning the legitimacy of the negotiations of Israeli leaders with Arab and Palestinian leaders.

By removing the Mapai leaders from the category of “heroic Zionists” Tamir rendered this slot vacant. In Tamir’s version, the right-wing underground movements (to which Tamir himself had belonged) which had urged that all contacts with the British cease, were the only ones fit to bear that title. He completed his subversive narrative by representing the Jewish population in occupied Europe not as passive victims but as heroes ready for battle who had been misled by incompetent leaders and had therefore gone “like lambs to the slaughter”. Tamir’s revisionist history met little resistance, since the Israeli public did not have to make a major conceptual change, as would be required by a truly critical approach to the prevailing ideology, but merely had to switch the positions of the participants in a narrative with clearly defined roles. Moreover, it helped ordinary people deal with their own guilt feelings for not having done enough during the war to save their Jewish brethren, since the failure could now be attributed to an incompetent and deceitful leadership.

Tamir’s portrayal of the events was deliberately non-linear and non-chronological. Instead he opted for analogical story-telling, jumping constantly in space (Israel/Hungary) and in time (war-time/trial time) in order to make comparisons between Kastner’s leadership in Hungary and Mapai’s leadership in Palestine.⁸ This analogical story-telling helped create a drama in black and white, since historical time with its elements of contingency, uncertainty and ambiguity was expelled from the courtroom. Moreover, this method transformed the audience into capable participants in the legal drama, because each one was invited to fill in the gaps in the story of Kastner by making analogies to what had happened in Mandatory Palestine and on the basis of his or her knowledge about the present. Since the actions of the leaders on both sides were depicted as determined by internal tendencies (“Diaspora mentality”) rather than external exigencies, knowledge of historical details was not required. Gone also were the important differences between the situations in Hungary and in Palestine during the war, and the actions of leaders under colonial rule and in a sovereign state. In this narrative there was no longer a difference between

⁸ Among the analogies, the analogy between Kastner’s cover-up of the “Auschwitz secret” and the fact that the news about the Holocaust were kept quiet in Israel; between Kastner’s collaboration with the Nazi’s and the Mapai party leadership’s collaboration with the British; between Kastner’s responsibility for the failure of the paratroopers’ operation in Hungary and Mapai’s role in the failure of Yoel Brand’s mission. A closer look at these analogies, however, demonstrate their implausibility. Tamir was making a contradictory argument: on the one hand, he condemned Kastner for collaboration saying that this road was futile from its inception, on the other hand, he blamed the leaders of Mapai for not co-operating with Kastner (by failing to attend to his messenger Yoel Brand) and attributed the responsibility for the failure of the negotiations with the Nazis onto them.

the past and the present. Unlike ordinary trials that are directed to determine the truth about past events, the Kastner trial was future-oriented, intended to encourage the public to draw lessons from the affair in order to choose between different courses of action in the future.

THE RE-ENACTMENT OF A PAST TRAUMA IN THE COURTROOM

“The prominent” versus “the masses”

Tamir’s narrative offered an alternative framework in which to judge the actions of the Yishuv’s leadership during the war. The trial thus went beyond a representation of past events to create connections and symbols that did not inhere in the events themselves but were the product of an analogical story-telling in the courtroom. However, in order to render historical events part of a living collective memory, it was not sufficient merely to switch the roles of the participants in the Zionist narrative. It was essential to revive the past and recreate the trauma in the courtroom. For this purpose Tamir relied on testimonial witnessing. Tamir’s early recognition of the value of survivors’ testimonies as a privileged site for memory preceded the proliferation of current studies on the issue of history and memory. Indeed, testimony has recently become a prevalent and important genre of non-fiction, and witnessing—typically, witnessing based on memory—has emerged as a widely used mode of access to the past and its traumatic occurrences. Recent studies reveal that testimonial witnessing transforms the audience itself into a secondary witness, but that its reception depends on the extent to which the audience is capable of real empathic listening.⁹ However, as we shall see, Tamir was interested in reviving the trauma through the testimonies of eye-witnesses not in order to deepen historical understanding of the full complexity of the events but in order to reinforce his own political message, and he did not therefore bother to create the proper framework for real listening.¹⁰

⁹ D LaCapra, *History and Memory after Auschwitz* (Ithaca and London, Cornell University Press, 1998).

¹⁰ Psychoanalyst Dori Laub explains that “bearing witness to a trauma is, in fact, a process that includes the listener”. See S Felman and D Laub, *Testimony—Crises of Witnesses in Literature, Psychoanalysis and History* (New York and London, 1992), p. 70. Therefore, to recover from a trauma it is not enough to tell the story. One’s story has to be received by an empathic audience. However, people are often reluctant to listen to stories of traumatic experiences because the story “forces us to acknowledge that we [the listeners] are not in control of our own”. See S J Brison, “Outliving Oneself: Trauma, Memory, and Personal Identity”, in D Tietjens Meyers (ed), *Feminists Rethink the Self* (Westview Press, 1997), p. 26. On a societal level, Israeli society found it difficult to face a collective experience of such helplessness and horror and preferred to hear about the heroic moments of the ghetto fighters and Jewish partisans. In order to overcome the societal pressures on the survivors not to tell their stories, more than individual occasions of listening were needed.

Tamir used the structure of the testimonies in the trial in order to recreate the painful moment of “selection” between “the prominent Jews” who were rescued and the “Jewish masses” who were sent to their deaths. This tactic was made possible as the result of an unwise decision by the prosecution to call Kastner as its first witness in order to allow him to present his version of the events. Kastner’s tendency to exaggerate, to be somewhat vague and to sometimes take more credit than he deserved may have worked to his advantage in his negotiations with the Nazis when he had had nothing substantial to offer, but was exploited by Tamir to Kastner’s detriment in the trial.¹¹ Through his aggressive cross-examination of Kastner, Tamir exposed many weak points in his testimony. The prosecution, therefore, had to call a large number of “political” witnesses who had worked with Kastner to substantiate and complete his testimony. The witnesses for the prosecution included people like Menachem Bader, Ehud Avriel, Yoel Palgi and others who were prominent political figures and who had played key roles in rescue operations in Europe.¹² Some, like David Berman, had been *Judenrat* members and some held public positions in the young state of Israel.¹³ By extending the scope of the trial and causing it to become more political, Tamir set a trap for the prosecution. Instead of countering the prosecution’s well-known political witnesses with other well-known political figures—a move that in any case was not possible for Tamir because of his marginal position in Israeli politics—he decided to call a number of mostly unknown Holocaust survivors whose voices had not yet been heard by the Israeli public.¹⁴ These people, from various walks of life and affiliated with a broad range of political parties, formed a vivid contrast with the witnesses for the prosecution, most of whom belonged to the Israeli socio-economic elite and were affiliated with Mapai. Tamir emphasised the fact that his witnesses

The solution of using the trial as a controlled environment in which survivors’ testimony could gain such empathic listening was not attempted in the Kastner trial but had to wait for the Eichmann trial of the 1960s.

¹¹ Weitz, above n. 2, p. 353.

¹² Menachem Bader was a member of the left-wing Mapai party and a member of Knesset; Ehud Avriel was the Israeli delegate in Budapest and the director of the Prime Minister’s office and the Finance Ministry.

¹³ Witnesses like Prof. Benjamin Aktzin, dean of the law school at the Hebrew University, and Shmuel Benzur from the Foreign Ministry, were not connected directly to the affair and were summoned by the prosecution as part of its policy to call important people who would make a better impression on the court because of their public credentials. Weitz, above n. 2, p. 132.

¹⁴ Among the survivors were Irena Hirsch, Yosef Kats, David Rozner, Paul Gross, Friedrich Mund, Eliezer Rozental. Weitz notes that the idea of bringing these witnesses, all survivors from Kastner’s home town Kluz, all simple, hard-working people who had lost many of their relatives in the Holocaust, was a wise decision. “Their words sounded reliable and authentic, and the story they told was engaging” *ibid.*, p. 195. The contrast was also between the “simple people” and the “political elite”.

were not affiliated with any particular political party, arguing that it proved that “the spontaneous truth” was on his side. Their true testimonies were being repressed by the authorities who had initiated the libel trial in order to keep them from the public gaze. Thus, the contrast between the prosecution’s list of prominent political figures and the unknown witnesses of Tamir had the powerful effect of recreating the traumatic moment of “selection” within the courtroom. The result was a complex tale of a dual act of selection—the original selection of the few privileged Jews who had boarded Kastner’s train, re-enacted by this second selection of “privileged witnesses” by the prosecution who had been summoned to defend Kastner.¹⁵

In order better to understand Tamir’s procedural tactic we should consider the legal method of proving the truth through first-hand testimony and direct observation.¹⁶ The law privileges the human voice as the basis for proving the truth. For this reason establishing the trustworthiness of the witness becomes an issue of critical importance in the trial. As Lawrence Douglas observes, “in this jurisprudential model, the witness identifies himself to the court before he tells the court what he has seen. His identity, once defined and secured, is considered anterior to, and enabling of, the act of bearing responsible witness”.¹⁷ Tamir was doubly burdened in this respect. The prevalent Zionist ideology of the day rendered the “ghetto fighters” and “resistance members” as the only trustworthy witnesses of the period.¹⁸ Ordinary survivors, on the other hand, were deemed suspect. Their very survival was taken by Israelis to be a sign of their moral failure, an attitude that has been succinctly captured by Primo Levi: “the worst survived, that is the fittest: the best of all died”.¹⁹ These survivors were transformed into “victims” in the extreme sense of the word described by Lyotard, indicating those who cannot even express their victimisation because their words are considered unreliable.²⁰ The

¹⁵ For a discussion of a similar educational technique of creating double-layered experience of the past as a device of memory in museum tours see T Katriel, “Remaking Place: Cultural Production in an Israeli Pioneer Museum”, (1993) 5:2 *History and Memory*, 104–35.

¹⁶ Strong (ed.), *McCormick on Evidence* (The West Group, 1992), pp. 37–40.

¹⁷ L Douglas, “Wartime Lies: Securing the Holocaust in Law and Literature”, in 7 *Yale Journal of Law and Humanities* 367–95, at 389.

¹⁸ Throughout the 1950s the only historical accounts of the Holocaust in Israel were written by people associated with the Jewish resistance.

¹⁹ P Levi, *The Drowned and the Saved* (W.Weaver trans.) (New York, Vintage Books, 1982), p. 9.

²⁰ “This is what a wrong would be: a damage accompanied by the loss of the means to prove the damage. This is the case if the victim is deprived of life, or of all her liberties, or of the freedom to make his or her ideas or opinions public, or simply of the right to testify to the damage, or even more simply if the testifying phrase itself is deprived of authority. In all these cases, to the privation constituted by the damage there is the added impossibility of bringing it to the knowledge of others, and in particular the knowledge of a tribunal”: see

prosecution used this “economy” of uneven credibility and packed its list of witnesses with “heroes” and “political leaders”. Tamir, because of his marginal political position, was left to rely on the testimonies of those considered to be the least reliable in the young Israeli society—the Auschwitz survivors. However, by using the symbolic structure of witnesses in the trial as a re-enactment of the past trauma of selection, Tamir was able to turn a disadvantage into an advantage. In his defence the very “respectability” of the prosecution’s witnesses was presented as a sign of their unreliability, since they were the ones deemed most interested in “covering-up” the selection of themselves and their friends to be rescued by Kastner’s train. In other words, the same logic that undermined the reliability of Holocaust survivors (the mere fact of their survival) was now used to discredit a specific group of survivors—the leaders—simply by virtue of their having belonged to the *Judenrat* or their present affiliation with the Mapai establishment. With this performative hyperbole Tamir transformed the “ordinary survivors” into reliable witnesses who were perceived by the public as doubly wronged, once by their Nazi persecutor, and again by the Israeli prosecution.

Giving Voice

The defence repeatedly declared its intention to allow the survivors, who had never before been given the chance to tell their stories in public, to report “the whole truth”. However, a scrutiny of the actual testimonies reveals a different view of what went on in the trial. Legal rules of procedure limit the testimonies of witnesses in court, mainly by subjecting them to the form of questions and answers that are controlled by the attorneys. Tamir’s questions did not allow for hesitation or confusion in his witnesses’ testimonies. Their words were meant to be heard only insofar as they supported the Zionist “lesson” in favour of military resistance advanced by Tamir. Consequently, the question repeatedly presented by Tamir to the survivors was “What would you have done if you had known about the secret of Auschwitz?” The answer was inevitably that they would not have boarded the trains. Tamir’s question took advantage of the understandable anger felt by the passengers of the death transports who had not been fortunate enough to be rescued by Kastner’s train. His questions were aimed to elicit a simple answer, an answer that would place all the blame squarely on the leaders who had known about the atrocities but had not warned their communities about them. Any other answers, which suggested that the leaders’ decision to co-operate with the Nazi authorities had been complex, influenced by the Nazis’ own deceptions and by extremely uncertain circumstances, were presented by Tamir as efforts to

J-F Lyotard, *The Differend* G Van dAbbeele (trans), (Minneapolis, University of Minnesota Press, 1988), p. 5.

conceal the truth. He ignored the crucial issue of whether “knowing” about Auschwitz at that time could have been the same as comprehending its meaning. Thus, Tamir created the impression of breaking the silence about the Holocaust without actually giving the public a chance to listen to the accounts of Holocaust survivors in all their complexity and ambiguity.

The difficulty of listening to testimonies of Holocaust survivors within an ideological framework and within the constraints of legal questioning is particularly evident in Tamir’s cross-examination of Hillel Danzig. Danzig had been affiliated with the Jewish Council in Kastner’s home town, Kluz. Notwithstanding Danzig’s efforts to explain the difficulty of judging past events in today’s courtroom, his words were dismissed as perjurious and unreliable:

“Question: . . . If you had known that the train was going to Auschwitz, how would you have acted in relation to your family and yourself?

Answer: I don’t know...I can think about it today and give you an answer, but it has nothing to do with the situation then, with what I would have done under those circumstances.

Question: Why doesn’t it have anything to do with it?

Answer: Because we are sitting here today in completely different circumstances. What one asks and answers here in the state of Israel, after ten years, is not at all related to the situation then.

Question: Can you remember the situation then?

Answer: I remember. But I can’t tell you what I would have done given the way things are now. Since all the Jews boarded those trains, I guess that my family and I would probably have gotten on the train too, if there were no other possibility”.²¹

In his study of the testimonies of Holocaust survivors, Lawrence Langer discovered a split between past and present experiences, which prevented the survivors from presenting a coherent chronological account.²² The rules pertaining to legal evidence are based on the assumption that there is chronological continuity between the past and the present, and any discrepancy is interpreted as a sign of lying or evading the truth. The law is accustomed to dealing with a witness who either does or does not remember, but lacks tools that are sensitive enough to deal with a witness who remembers all too well but is incapable of reproducing the past in the present. Thus, in Kastner’s trial, the silencing of the survivors took on a new dimension—even when they came to testify in public, their testimonies were not really heard.

²¹ Recited in the court’s decision, C.C. 124/53 Attorney General vs. Greunvald P.M. 44 at pp. 85–8.

²² L. Langer, *Holocaust Testimonies: the Ruins of Memory* (New Haven and London, 1991).

Several years later, in the Eichmann trial, the Attorney General Gideon Hausner faced a similar problem. In order to facilitate meaningful listening to survivors' testimonies he decided to relax some of the rules of procedure, in particular, the format of questions and answers.²³ Each personal narrative found its place in Hausner's comprehensive narrative about the history of Nazism that portrayed the different stages of the destruction chronologically and geographically, addressing the fate of Jews in the different European centres.²⁴ In Eichmann's trial, the geo-historical narrative of the Holocaust was thus built upon a long procession of over ninety survivors' testimonies whose stories were heard as personal and representative at the same time. Indeed, Hannah Arendt who came to report the trial described these testimonies as resembling a "town meeting" more than legal proceedings.²⁵ Arendt, however, failed to notice the barriers of silence that had to be overcome to facilitate the telling of a traumatic experience. Hausner tried to do this by providing a new framework for listening to the survivors. Arendt also criticised the prosecution's decision in Eichmann's trial for its failure to meet the basic legal requirement of concentrating its case upon the actions of the perpetrator and not upon the suffering of the victims-witnesses.²⁶ But this narrow legalistic view fails to address the problem of bearing witness to a traumatic event, and using the courtroom as means of overcoming silence.²⁷

Hausner's procedural decisions in Eichmann's trial may have been influenced by the earlier Kastner trial in which the traumatic moment was re-enacted without resolution. Tamir's unwillingness to create an adequate

²³ For this purpose he relied on the permission given in art. 15 of the Law for Punishment of Nazis and their Collaborators (1953) under which Eichmann was tried, which stipulates that the court "may deviate from the rules of evidence" provided it "places on record the reasons which prompted" such deviations.

²⁴ For elaboration of the need to create such a framework for listening in overcoming a traumatic experience see Brison, above n. 10, pp. 12–39.

²⁵ H Arendt, *Eichmann in Jerusalem* (Harmondsworth, Penguin Books, 1963, reprint 1994).

²⁶ *Ibid.*, p. 5.

²⁷ I do not mean to conflate the therapeutic and juridical settings of testimony. For obvious reasons juridical testimony cannot replace therapy. However, when the barriers of silence are not only individual but also collective, trials can have a therapeutic function by reconciling the personal traumatic story with the larger framework of collective memory. In such instances the ordinary direction of telling from the private to the public sphere is reversed. (For a sociological account of the movement of stories from the private to the public see, W Felstiner, R Abel and A Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming", in (1980) 15 *Law and Society Review*, 631–87. This function of a trial as a facilitator of testimony can be seen in the Eichmann trial and also in the Truth and Reconciliation Commission in South Africa. For the Eichmann trial and psychotherapy see Judith Stern "The Eichmann Trial and its Influence on Psychiatry and Psychology" (2000) 1(2) *Theoretical Inquiries in Law* 393–428 for testimonies of survivors in South Africa see M Minow, *Between Vengeance and Forgiveness* (Boston, Beacon Press, 1998), pp. 61–74.

framework for listening to the survivors reduced their testimonies to a pathological repetition of the original trauma. The survivors were deprived of a sense of control and empowerment in relating their story, especially as they were brought in as defence witnesses and expected to limit their narrative to pointing an accusatory finger at Kastner. In the Eichmann trial, by contrast, survivors were brought in as witnesses for the prosecution, a structural change that allowed them to direct their accusations where they really belonged—at the Nazi perpetrators.²⁸ With no legal resolution to the painful past (the acquittal of Gruenvald was not accompanied by the conviction of Kastner), the emotions aroused by the Kastner trial exploded in the murder of Kastner—the first political assassination to occur in the state of Israel.

THE MANIPULATION OF THE LEGAL DISCOURSE OF “TRUTH”

Cross-examining national myths

Two testimonies were particularly important in rendering Tamir a social iconoclast who shattered national myths. One of the main heroic myths in Israeli memory of the Second World War was that of young Israeli paratroopers, who were sent by the British to war-torn Europe on a mission of espionage, and who also undertook to help the Jews organise resistance to the Nazi occupiers.²⁹ Tamir challenged the accuracy of this myth in the trial, but without undermining the basic Zionist narrative. He did not try to challenge the standard of heroism against which the actions of *Judenrat* members were judged. Nor was he willing to discuss the limitations of heroism as a rescue device by showing how the paratroopers' actions had proved futile in the reality of the Holocaust since they had become a burden on the local Jewish leaders and endangered their rescue attempts. Instead, Tamir sought to discredit one of those paratroopers, Yoel Palgi, who was a witness for the prosecution, and through him the Mapai party with which he was affiliated.

National myths, woven on the basis of actual events but replete with historical inaccuracies, are not likely to withstand cross-examination in court. Yoel Palgi, the only paratrooper who had survived that mission and

²⁸ For further discussion of the novelty in Hausner's approach to testimonial witnessing see L. Bilsky, "The Competition of Storytellers in Eichmann's Trial" in Steven Aschheim (ed.), *Arendt in Jerusalem* (University of California Press, forthcoming).

²⁹ Three of the paratroopers were directed to Hungary. Senesh Palgi and Goldstein intended to arrive in Hungary before the Nazi invasion in order to organise rescue and were given Kastner's address as their connection person. However, they were late, Senesh was caught crossing the border while Palgi and Goldstein's arrival was known to the Nazis who threatened to cancel the rescue train if they were not handed over. After discussing the matter with Kastner and his partners, Palgi and Goldstein gave themselves up to the Nazi authorities.

managed to return, was known for his autobiographical book *And Behold a Great Wind Came*, which described the mission and its failure but glorified the courage of the Israeli paratroopers, particularly that of Hanna Senesh who was executed by the Hungarians.³⁰ Tamir cross-examined Palgi on his book, aiming to re-tell it as a story about Kastner's treason and Palgi's cover-up. For this purpose he wanted to establish that Kastner was told by Palgi about the military espionage mission of the paratroopers, that Kastner delivered one of the paratroopers, Peretz Goldstein, to the Nazi authorities, and that Palgi deliberately concealed these facts in his book. This line of inquiry can be seen in Palgi's cross-examination:

Tamir: . . . I tell you that you did not disclose your military mission to Kastner.

Palgi: If you say so, you are lying.

Tamir: But on page 116 to your book you write: 'to sum up, for the moment we should not disclose our military mission'.

Palgi: The book lies intentionally about this point . . . *I wrote a novel and not a history book*, there are two points in the book that I intentionally blurred and changed.

Judge Halevi: Why did you find it necessary to change the truth about Kastner and the transmitter?

Palgi: Maybe it is a bad habit of a liar—when he does not want to tell the truth he exaggerates. I did not know what would be the implications of my writings. There were numerous trials in Europe against people who delivered Allied soldiers and were later executed. Dr. Kastner, technically, delivered Goldstein to the enemy. This is why I did not write the true version about the arrest of Goldstein. Not only in order to save Goldstein, if he remained alive, but also to protect Kastner and the whole affair. And as to the transmitter, I added that Kastner did not know about it as an emotional reaction to the lie. I wanted to emphasize that Kasnter had nothing to do with it".³¹

Tamir restricted his criticism of the paratroopers' affair to question Palgi's willingness to co-operate with Kastner and to hand himself in to the Nazis. Tamir refrained from investigating whether the heroism of the paratroopers could realistically offer an alternative to Kastner's rescue efforts, and was unwilling to admit the possible "price" of such heroism, the undermining of the rescue attempts of Kastner's committee. Instead, he exploited the structure of the criminal process to offer a simple solution to the discrepancy between the myth of heroism as related in the book and the reality of collaboration with the Nazis. Tamir presented Kastner as an all-knowing figure whose actions had sabotaged the paratroopers' mission from the very beginning. This dichotomous view of heroism and treason was strengthened with the testimony of Katherine Senesh, Hanna Senesh's

³⁰ Y Palgi, *And Behold, a Great Wind Came* (Tel Aviv, 1946, reprint 1977) (Hebrew).

³¹ Rosenfeld, above n.5, pp. 130–1 (emphasis added L.B.).

mother, who was brought in as a witness for the defence. Senesh presented a pure version of heroism, in the eyes of a mother who had unsuccessfully tried to meet Kastner in order to deliver a package to her imprisoned daughter. Since the dead cannot be called to testify and there is no need to fear their response, Tamir could strip Palgi of his heroic aura and reconstruct the myth of heroism around Hanna Senesh, “the paratrooper who did not return”. Interestingly, in this trial, the reconstructed myth of heroism revolved around two women, Katherine Senesh, the mother, a symbol of sacrifice, and Hanna Senesh, the daughter, an Israeli Jeanne d’Arc.³² Again, the binary ideological framework was supported by a re-enactment in the courtroom of the tragic conflict of Senesh (the mother) versus Kastner, heroism versus treason.

The defence: “I told the truth”

It is ironic that the first political trial in Israel concerning events during the Holocaust took place in the framework of a libel trial, the very framework that became typical for what came to be known as “Holocaust denial trials” in the 1980s and 1990s.³³ The prosecution in such cases has to prove that the denials of the Holocaust are “false” and the courts often find themselves functioning as tribunals burdened with determining the truth of the Holocaust according to legal conventions of proof and evidence. In the Kastner trial, however, this structure was reversed since it was the attorney for the defence, and not the prosecution, who claimed that the state authorities were involved in an attempt to silence the truth about the Holocaust. Tamir drew an analogy between Kastner’s alleged efforts in Budapest to conceal the truth about the destination of the trains to Auschwitz and what he saw as the concealment of the information about the Holocaust by the Mapai leadership in Palestine. Tamir thus presented the trial against Gruenvald as an attempt to censor the truth about the Jewish leadership’s part in the failure to stop the catastrophe.

³² The newspapers called Katherine Sensesh “a Hebrew mother” (erasing her “Diaspora” origins). By contrasting Kastner to Senesh, Tamir succeeded in creating an implied gender opposition between “the heart” (Senesh) and “the brain” (Kastner).

³³ See for example the trial of Ernst Zundel, a German-born Canadian citizen who had arranged for the publication of *Did Six Million Really Die?* a pamphlet that alleged that the Holocaust was a Zionist hoax (*Regina v. Zundel*, 58 O.R. (2d) 129). Many of the court documents associated with the suit are reproduced in B Kulaszka (ed.), *Did Six Million Really Die? Report of the Evidence in the Canadian “False News” Trial of Ernst Zundel—1988* (Toronto, 1992). For legal articles on the topic of “Holocaust Denial Trials” see Douglas, above n. 17; E Stein, “History against Speech: The New German Law Against ‘Auschwitz’ and Other Lies”, in (1986) 85 *Michigan Law Review* 277–324. For historical assessments of the phenomenon of Holocaust denial see, P Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust* (foreword and translation by Jeffrey Mehlman) (New York, Columbia University Press, 1992) and G Seidel G, *The Holocaust Denial: Antisemitism, Racism and the New Right* (Leeds, Beyond the Pale Collective, 1986).

The law usually tries to make a clear distinction between historical truth and legal truth, leaving the former to historians. Tamir could, of course, have based his defence on a lack of intention (*mens rea*) on the part of Gruenvald who had written the pamphlet allegedly slandering Kastner. Although it could have helped his client, this option would not have given Tamir the chance to present the “truth” as being on his side and to use it as a political leverage. By adopting the “I told the truth” line of defence, Tamir forced the court to employ legal means to clarify complex and difficult historical issues. Tamir promised to present “the naked truth” in the trial. However, the truth in a trial is always the result of complex procedural rules, which involve additional considerations such as the finality of the legal proceedings, due process, predictability, etc. In addition, Tamir exploited the procedural advantage afforded him as the attorney for the defence to make serious charges against Kastner and the Zionist leadership but supported his version without fully substantiating it (for example, the defence was exempt from proving its version beyond reasonable doubt, and did not have to present its charges at the beginning of the trial in order to allow for appropriate preparation of the prosecution). In contrast, because his official status in the trial was that of a witness for the prosecution, Kastner, who was the *de facto* defendant, did not enjoy any of the procedural rights and protections that the adversarial system grants criminal defendants. Although these procedural rules shaped the “truth” that was presented at the trial and tilted it in favour of Tamir’s version, they were not apparent to the public which was only concerned with the question of which version would receive the court’s stamp of approval. Thus, the public was all too responsive to the “verdict” that acquitted Tamir’s client (and thereby condemned Kastner) without realising the circumscribed character of the narrative frame of the trial. The complex reality in which Kastner had acted was neatly trimmed to serve the purposes of a mythical story of heroism, appropriated by one side of the Israeli political spectrum.

Conspiracy theory

The only persons who could present a whole story without interruptions and outside the constraints of the question-answer framework were the attorneys in their closing arguments, and the judge in his decision. In its closing arguments, the prosecution attempted to limit the wide range of facts presented in the trial in order to re-focus attention on Gruenvald’s actions. Accordingly, it presented a legal analysis of the various sections of the law of libel. By contrast, the defence chose to concentrate on the factual aspects of the trial in order to re-assemble them into a coherent story. In opting for suspenseful narrative rather than dry law, Tamir managed to capture the public’s imagination. Tamir’s narrative left nothing to chance and all the elements in the narrative were linked together in

order to posit a conspiracy theory according to which the leadership in Budapest had allegedly worked together with Yishuv leaders in Palestine in order to mislead the masses. Tamir's version was consistent with popular conceptions of crime as represented in literature—every single fact in the story serves to move the story forward. However, as noted by Alan Dershowitz, a law professor and well-known American criminal lawyer, real life is not a dramatic narrative and is full of irrelevant details and coincidences. In real life, a person who coughs a little in the evening isn't necessarily about to die, and a gun revealed in Act I does not necessarily go off in Act III.³⁴

The plausibility of the conspiracy story was enhanced by the structure of a criminal trial that focuses the charges against a specific individual. Although the charges were *de jure* against Gruenvald, Tamir succeeded in turning Kastner into the *de facto* defendant. The individualistic nature of a criminal trial allowed Attorney Tamir to disregard the broader background of the Holocaust, which could have served to situate Kastner's actions in their appropriate historical context, and to present the public with a simplified version of the grave ethical dilemmas posed by the Nazi regime. Tamir re-directed the blame onto the victims' leader by accusing Kastner of having conspired with the Nazi leaders to save his relatives and thus having facilitated the destruction of the Jews of Hungary.³⁵ Since the charge was against one particular person, the Israeli public at large was absolved from the need for self-examination, and since the trial channelled all the blame onto Kastner (and the Mapai leadership) it offered an easy solution to the mounting feelings of guilt of the Israeli public for not having done enough to rescue Jews during the Holocaust—convict Kastner and thus avoid confronting the past. And as the formal charges were against Gruenvald, his acquittal by the judge was read as if it were a conviction against Kastner, thus serving as the justificatory basis for his subsequent assassination. Instead of facilitating a critical public debate, the trial cut short such a debate before it had even begun. It provided a simple answer to the troublesome question “Like lambs to the slaughter?”—an answer repeated by witness after witness like a Greek chorus: “because our leaders betrayed us!”

³⁴ A Dershowitz, “Life Is Not a Dramatic Narrative”, in P Brooks and P Gewirtz (eds), *Law's Stories* (New Haven and London, Yale University Press, 1996), pp. 99–105.

³⁵ The Israeli journalist Alex Barzel criticised this move at the time of the trial: “this was a typical Jewish response of self-hate. The direction of the blame for the Holocaust to the near and most venerable—the other Jew”. Cited in Weitz, above n. 2, p. 265.

CONCLUSION: BETWEEN MEMORY AND HISTORY

Alain Finkelkraut opens his reflective book on the Klaus Barbie trial with an observation about the way in which a criminal trial can transform history into a living reality:

“We were able to see an already historical past transmuted into a judiciary present. For two months at the Palais de Justice in Lyon, within the framework of a criminal debate, protagonists from an era believed bygone reclaimed their story from the historians. By focusing our attention on the sentence and no longer simply on knowledge or on commemoration, this judiciary ceremony filled in the abyss that had separated us from the era of Barbie and his victims. The very fact that we waited along with them for the verdict made us their contemporaries. What had happened more than forty years ago was receiving today, before our eyes, its epilogue”.³⁶

These observations apply with similar force to the Kastner trial. Moreover, it seems that Barbie’s defence lawyer Jacques Verges employed many of the disruptive techniques that were used by Shmuel Tamir in order to prevent the state authorities from using a criminal trial to dictate the script of collective memory. Notwithstanding the difference in the context of the two trials, both defence lawyers chose to undermine the official story of “heroism” by exposing the scale and scope of the phenomenon of collaboration that it covers up. Thus, in both trials “heroism” and “collaboration” were presented as two mutually exclusive courses of action between which the judges (and the public at large) had to choose. In both, past and present were conflated in the interest of an ideological re-telling of history.

However, there is an important difference between the Barbie and Kastner trials. Barbie’s trial took place forty years after the event and hence the lawyers were faced with the formidable task of unfreezing history and turning it into a living memory. In Kastner’s trial, Tamir had to deal with the opposite problem since it took place only ten years after the end of the war when survivors were still struggling with their personal losses and traumas, and when the Israeli public at large had yet to process the collective trauma of losing a third of the Jewish people. The historical perspective that is gained from the passage of time and historical research was still lacking. The narrators of history at this time were “story-tellers” in the traditional sense of relating their personal experiences as underground fighters and Jewish partisans. This was a history told exclusively by representatives of what was then considered the “heroic” side of the Holocaust, and their stories deflected attention from the much wider phenomenon of mass victimisation. Their stories were seen as supplying the moral standard against which to judge the Jewish leaders’ co-operation

³⁶ A Finkelkraut, *Remembering in Vain* (R Lapidus (trans.), introduction by AY Kaplan New York, Columbia University Press, 1992), p. 2.

with the Nazis. These stories were also used to consolidate the collective identity of Israelis as the New Jews in the tradition of the heroic and fearless underground fighters of the Warsaw and Vilna ghettos.

Within this ideological framework Tamir sought to exploit the forum of a criminal trial to direct political criticism against the ruling party, Mapai. Delegitimation of Mapai required telling the story of the collaboration of *Judenrat* members and drawing an analogy between their collaboration and Mapai's actions in Palestine. As we have seen, Kastner provided Tamir with the perfect opportunity to redirect the criticism of the behaviour of the mass of Jews during the Holocaust to the political leadership of Israel since Kastner, the Jewish leader who had allegedly betrayed his community to the Nazis, was also the spokesman for the Ministry of Trade and a Mapai candidate for the Knesset. But Tamir needed to sustain the Zionist myth of heroism in order to legitimise his own political stance, which glorified military resistance and opposed negotiations with the enemy, in the past the Nazis or the British, in the present the Arabs. Moreover, in order to gain popularity with the Israeli public at large, Tamir had to offer a resolution to the painful reality exposed during the trial of the Jewish mass victimisation and their leaders' collaboration.

In light of this tension in Tamir's political stance, the law can be seen as a forum that enables the political lawyer to present his criticism as exhaustive (telling the story that was not told, giving voice to the victims, cross-examining myth, establishing the truth) while at the same time reinforcing the frameworks of collective myths. Thus, instead of being used as an opportunity truly to question the rescue possibilities that military heroism offered under Nazi rule, and comparing it to the co-operation options, the trial provides the political lawyer with a scapegoat. Kastner, the *de facto* defendant, was demonised as an "Other" to the Israeli collective (of New Jews) and his party Mapai as the one that had betrayed the people and the authentic Zionist path. The binary framework of a criminal trial enabled Tamir to offer an easy solution to the moral dilemma—all that was needed was to convict Kastner and to replace the ruling party in the coming elections. The short-term consequences of this criticism are well known in Israel: Tamir won his case in the district court (a decision that was later reversed by the Supreme Court), Kastner was assassinated by people affiliated with the radical right, Mapai, though not defeated, lost a substantial portion of its votes in the elections. However, the long-term consequences of the Kastner trial have rarely been explored. I had already suggested that the traumatic re-enactment of the past in the Kastner trial can explain many of the legal strategies adopted by Attorney General Gideon Hausner in the Eichmann trial, such as the focus of the trial on victims' testimonies, the relaxation of the rules of evidence, and, most importantly, the deliberate attempt to exclude the Kastner affair and the story of the *Judenrat* from the Eichmann trial.

Hannah Arendt, who came to report the Eichmann trial for the *New Yorker* and who knew very little about the Kastner affair, could only discern the pathological symptoms without understanding their roots. She was quick to condemn and harsh in her criticism of Hausner. In a reflective essay written several years after the controversy that her book *Eichmann in Jerusalem* ignited, Arendt returned to the silencing of the Kastner and *Judenrat* affairs that she had detected in the Eichmann trial and explained the danger she attributed to their suppression:

“The facts I have in mind are publicly known, and yet the same public that knows them can successfully, and often spontaneously, taboo their public discussion and treat them as though they were what they are not—namely, secrets. That their assertion then should prove as dangerous as, for instance, preaching atheism or some other heresy proved in former times seems a curious phenomenon . . . Since such factual truths concern issues of immediate political relevance, there is more at stake here than the perhaps inevitable tension between two ways of life within the framework of a common and commonly recognized reality. *What is at stake here is this common and factual reality itself, and this is indeed a political problem of the first order*”.³⁷

In Arendt's view the public reaction to the Kastner affair, the refusal to confront the painful issues it had raised and their treatment as taboo, as was manifested in the trial of Eichmann, was dangerous to a democratic regime. This constituted more than a “free speech” problem of suppressing one side of the debate. What was at stake was the narrowing of the very framework of reality that could become the subject of public debate and contestation. Unlike opinions, Arendt contended, “facts” of this kind are the most fragile and therefore most in need of our protection since they depend on collective recognition and exist only to the extent that they are spoken about in public.³⁸ Of course, once admitted, a whole range of interpretations is possible, a process that cannot even begin when a subject is treated as taboo. It may be an irony of history that Tamir, a lawyer who took upon himself to defend freedom of speech against its suppression by the mechanism of criminal law, ended up producing a collective memory (or rather collective amnesia) whose threat to the possibility of free speech discussions in Israel was much more fundamental and long-standing. The traumatic experience of the trial and its aftermath strengthened a tendency in Israeli society to see criticism as unavoidably leading to political violence and, therefore, to prefer the silencing of painful issues to their serious discussion. In this way, the Kastner trial postponed the frank and free discussion of a traumatic past for many decades, it perpetuated myths and closed an entire chapter of history to serious deliberation.

³⁷ H. Arendt, “Truth and Politics”, in *Between Past and Future* (Harmondsworth, Penguin Books, 1968), pp. 236–7 (emphasis added).

³⁸ *Ibid.*, p. 238.

