Crim. A. 112/50

GAD BEN-IZHAK YOSIFOF

v.

THE ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal.
[March 29, 1951]
Before: Smoira P., Silberg J., and Landau J.

Criminal Law - Bigamy committed by Jews contrary to s. 181 *of Criminal Code Ordinance,* 1936 *- Whether section ultra vires on grounds of discrimination - Jewish Law - Freedom of religion and conscience - Prohibition of polygamy not contrary to Jewish Law.*

The appellant, an Israel Jew belonging to the Caucasian community, married in the year 1936. He married a second time in the year 1950 while the first marriage still subsisted. He was convicted of bigamy under s. 181 of the Criminal Code Ordinance, 1936 [1] and sentenced to imprisonment for one year. On appeal it was argued that s. 181 was ultra vires the powers of the High Commissioner by reason of Article 17(1)(a) [2]2) of the Palestine Order in Council 1922 (as amended) in that the section introduced discrimination between the inhabitants of Palestine, namely, between Moslems and Jews, and in that it restricted freedom of conscience and worship.

Held:Dismissing the appeal,

(1) that as the section did not discriminate against men and women of the same community regarded as one unit there was no discrimination within the meaning of Article 17(1)(a) of the Order in Council.

(2) The question of freedom of worship did not arise in this case.

(3) As regards freedom of conscience, religious compulsion can only exist where religion either imposes or forbids the doing of a particular act, and the secular legislature compels a breach of the imposition or prohibition. The Jewish religion does not compel polygamy, and accordingly no ground exists for the suggestion that there was any infringement of the right to freedom of conscience.

1) The text of s. 181 is set out on pp. 176, 177 infra.
2) The relevant part of the text of Article 17(1)(a) is set out on p. 178 infra.

Per Silberg J. Bigamy was never an institution rooted or permanent or favoured in the life of the Jewish people.

Palestine cases referred to :

(1) *Cr. A.* 85/38 - *The Attorney-General v. Ya'acov Ben Yehiel Melnik* (*Kimhi*) : (1939) 6 *P.L.R.* 34.

(2) *C.A.* 119/39 - *Pessia Nuchim Leibovna Shwalboim* v. *Hirsh (Zvi) Shwalboim :* (1940) 7 *P.L.R.* 20.

(3) *M.A.* 18/28 - *The Attorney-General v. Abraham Alt shuler:* (1920-1933) 1 *P.L.R.* 283.

(4) *M.A.* 9/36 - *Sharif Esh-Shanti v. The Attorney-General:* (1937) 1 *S.C.J.* 31.

(5) *H.C.* 109/42 - *Vaad Adat Ashkenazim, Beit Din Hassidim v. District Commissioner, Jerusalem and others :* (1942) 9 *P.L.R.* 715.

Israel cases referred to :

(6) *H.C.* 10/48 - *Zvi Zeev v. Gubernik, the District Commissioner, Urban District of Tel Aviv and others : (1948)* 1 *P.D.* 85.

(7) *C.A.* 376/46 - *Aharon Rosenbaum v. Sheine Miriam Rosenbaum :* (1949) 2 *P.D.* 235.

(8) *H.C.* 8/48 - *Shlomo Gliksberg v. Chief Execution Officer, Tel Aviv and others :* (1949) 2 *P.D.* 168.

American cases referred to:

(9) *Quaker City Cab Co. v. Commonwealth of Pennsylvania :* 48 *S.C.R.* 553.

(10) *Lindsley* v. *National Carbonic Gas Co. :* (1911) 31 *S.C.R.* 338.

Wiener for the petitioner.

E. Shimron, State Attorney and *E. Hadaya,* District Attorney of Jerusalem, for the respondent.

LANDAU J. The appellant, Gad Ben-Izhak Yosifof, was convicted by the District Court of Jerusalem (Halevy P.) of the felony of bigamy, in contravention of section 181 of the Criminal Code Ordinance, 1936, as amended in 1947, and was sentenced to imprisonment for one year. His appeal in directed both against the conviction and the sentence. Upon the suggestion of Dr. Wiener, counsel for the appellant, and with the

consent of the State Attorney, we decided to hear the appeal in two stages - the first stage relating to the conviction, and the second stage (should we reject submission of counsel in regard to the conviction), relating to the sentence.

2. The facts are set out in detail and with great clarity in the judgment of the learned President of the District Court, and since they are almost undisputed, there in no need for me to repeat them at any length. The appellant, an Israel Jew belonging to the Caucasian community, married ~ woman in the year 1936, and she has born him five children. His marriage with her in still subsisting. In the year 1950 the appellant married a second wife by religious rites with the consent of the office of the Rabbinate in Jerusalem. He obtained this consent by a false declaration which was supported by two witnesses, in which he concealed the fact of his existing marriage.

3. Dr. Wiener's submissions in regard to the conviction were directed solely to the legal basis of the judgment of the District Court. Dr. Wiener in fact denies the validity of section 181 of tile Criminal Code Ordinance, as amended. His arguments are these : that in enacting the section referred to the legislature in the days of the Mandate exceeded the powers conferred upon it by Article 17(1)(a) of the Palestine Order in Council, 1922, as amended in 1923, in that :

(a) Section 181 of the Criminal Code Ordinance discriminates between the inhabitants of Palestine;

(b) the section restricts freedom of conscience and worship.

4. In order to understand these submissions it in necessary for me to deal shortly with the history of these sections. Section 181 of the Criminal Code, in its original form, provides :

> "Any person who, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years. Such felony is termed bigamy;"

The section then proceeds to provide for three situations which, if established by the accused, will afford him a good defence. These are:

> "(a) that the former marriage has been declared void by a court of competent jurisdiction or by a competent ecclesiastical authority; or
>
> (b) the continuous absence of the former husband or wife, as the case may be, at the time of the subsequent marriage, for the space of seven years then last passed without knowledge or information that such former husband or wife was alive within that period; or
>
> (c) that the law governing the personal status of the husband both at the date of the first and at the date of the subsequent marriage allowed him to have more than one wife."

Special attention should be directed to the opening words of the section which require as one of the elements of the offence that the new marriage shall be void by reason of its having taken place during the lifetime of the husband or the wife of the previous marriage. This is an exceptional requirement, the basis of which was the desire of the legislature to adapt this provision of the Criminal Law to the conceptions of the Moslem religion which permits more than one wife. The second marriage of a Moslem is not void, and the prohibition imposed by section 181, therefore, does not affect him. It was also the purpose of the third defence mentioned in the section referred to, to protect a person whose personal law permits him to have more than one wife.

5. The Jewish law of marriage, however, was overlooked by the mandatory legislature from the outset, and the language of the section was not made appropriate for the special position created in Jewish law when a man marries two wives. According to that law, as is well-known, the second marriage remains valid throughout, and may be terminated only by divorce. It follows that the language of the section in its original form imposed no obstacle to polygamy among Jews, as appears from the judgment of the Supreme Court in *Attorney-General v. Melnik* (1), in which a Jew was acquitted of the offence of bigamy because of the defective drafting of the law.

6. Some years passed until the publication in 1947 of the amended section 181, which was drafted with the intention of bringing the provisions of the criminal law in regard to bigamy into conformity with Jewish law. And this is the solution which the legislature found to this problem:

(1) The requirement at the beginning of the section that the new marriage should be void was deleted, and it was provided as to the future that the offence is committed whether the subsequent marriage is valid, or void or voidable. In this way the section was also made applicable to the second marriage of a Jew which is not void. It would appear that as far as Moslems are concerned, it was decided by the legislature that the original language employed at the beginning of the section was not necessary to exclude them from its operation, since they are in any case excluded by "the third defence" provided in the law governing personal status which permits polygamy.

(2) The second and third defences provided for in the original section were restricted. Cases in which the law as to marriage applicable to the wife or husband at the date of the subsequent marriage was Jewish law, were excluded from the second defence, and cases in which the law as to marriage applicable to the husband both at the date of the former marriage and at the date of the subsequent marriage was Jewish law, were excluded from the third defence.

In place of these defences which were excluded a new fourth defence was laid down for Jews, namely, the case in which "the law as to marriage applicable to the husband both at the date of the former marriage and at the date of the subsequent marriage, was Jewish law and that a final decree of a rabbinical court of the Jewish community ratified by the two Chief Rabbis for Palestine and giving permission for the subsequent marriage, had been obtained prior to the subsequent marriage. "

7. Dr. Wiener's whole argument, as 1 have said, was directed to the point that section 181 is inconsistent with Article 17(1)(a) of the Palestine Order in Council. The provisions of that Article, in so far as they affect the problem before us, are as follows *:* -

> "The High Commissioner shall have full power and authority..... to promulgate such Ordinances as may be necessary for the peace, order, and good government of Palestine, provided that no Ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship, save in so far as is required for the maintenance of public order and morals; or which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion, or language."

Article 83 of the Order in Council again emphasises that "All persons in Palestine shall enjoy full liberty of worship subject only to the maintenance of public order and morals..." This section is in the general chapter of the Order in Council, and it adds nothing to the provisions of the amended Article 17(1) (a) which deals particularly with matters of legislation. The source of Article 17(1)(a) is Article 15 of the Mandate for Palestine from which it has been copied almost word for word. These conceptions, which were embodied in Article 15 of the Mandate, were not new, but had already found their place in the world of political thought in the French Declaration of the Rights of Man and the Citizen, of the year 1789, and in the days of the first ten amendments of the American Bill of Rights of the year 1791. The principle of non-discrimination reflects the aspiration of the equality of all citizens before the law. Freedom of conscience and worship is one of the liberties of the subject which is guaranteed to him under every enlightened democratic regime. In the declaration of the establishment of the State of Israel it is said:

> "The State of Israel... will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex. It will guarantee freedom of religion, conscience, language, education, and culture..."

Dr. Wiener mentioned these words in His argument, but he drew no legal conclusions from them. In this he was correct, for the court has already held in *Zeev v. Gubernik (6)*, that that declaration "contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal". Dr. Wiener agreed, therefore, that if the Knesset of the State of Israel were to enact a section such as section 181, he would not have been able to challenge its validity. His submission, therefore, is limited in scope and touches only upon the situation which existed during the time of the Mandate. I am in agreement with him and with the learned President of the District Court that if it should indeed emerge that there existed an inconsistency between section 181 of the Criminal Code Ordinance and Article 17(1)(a) of the Order in Council and that section 181 was void ab initio, then it was not a part of "the existing law" in accordance with section 11 of the Law and Administration Ordinance, 1948, and would therefore be invalid in the State of Israel as well.

8. The learned President of the District Court in his judgment rejected the general submission of Dr. Wiener both in regard to discrimination and also in regard to freedom of conscience and worship. He summarised his opinion in paragraphs 21-28 of his judgment, which read as follows :-

> "21. The institution of monogamous marriage is regarded among all peoples, in all faiths and in all communities in which it exists as one of the most valuable conceptions of human culture. The establishment of the family and the peace of the community depend upon it. The institution of monogamous marriage deserves and requires the protection of the criminal law in all countries where it exists. In Palestine, where it exists in proximity to the institution of polygamous marriage, it requires stringent protection."
>
> "22. It cannot be conceived for one moment that the Palestine Order in Council wished to prevent the Mandatory legislature from affording monogamous marriage in Palestine effective protection by means of the criminal law. All that was demanded by the Order in Council in this

connection was that the law of bigamy should not prejudice that section of the population whose law of personal status recognised polygamy."

"23. Section 181 was designed to protect the institution of monogamous marriage which existed in a certain section of the population of the country and in no sense prejudices the institution of polygamous marriage which exists among another section of the community. In other words, the object of section 181 is to protect those men and women (and their children) whose marriages, in accordance with their law of personal status, are monogamous marriages. Section 181 takes care not to prejudice the law of personal status (religious or national) of any inhabitant. It does not prejudice liberty of religion (which is included in the guarantee "of freedom of conscience and worship") but, on the contrary, it respects that liberty in all its provisions. Were it necessary for me to base my judgment upon this ground, I also would not hesitate to decide that the criminal law defending monogamous marriage is required "for the preservation of public order and morals". As far as discrimination in favour of the Moslems is concerned, it is not section 181 which created the distinction between the law of monogamous and polygamous marriage in Palestine; this distinction exists and is rooted in fact and confirmed by the Order in Council upon which counsel for the accused relies. It is for these reasons that I decide to reject the general submissions of counsel for the accused to the extent that they do not touch upon the special provisions of section 181 in regard to Jews."

In so far as the special provisions of section 181 relating to Jews are concerned, it was held by the President - after a comprehensive survey of the development of Jewish law in this field - that "Jewish law does not permit a person to take a second wife in Palestine, unless he first obtains permission so to do according to law". In support of this opinion the President cited in his judgment a number of authorities on Jewish law which he culled from Rabbinical literary sources. He therefore rejected the idea that there exist in Palestine Jews of the Eastern communities who are permitted by Jewish law to take more than one

wife without special permission so to do, and held that section 181 is in full conformity with Jewish law.

9. Dr. Wiener strongly attacked the general theories of the learned President. In his opinion there is no room for these propositions in the judgment of a judge whose duty it is to interpret the law and not express opinions on social problems such as the preference of monogamy over polygamy.

I see no substance in these criticisms of Dr. Wiener. The learned President did not just express opinions. He refrained, for example, from expressing generally any preference for the system of monogamy over that of polygamy, but particularised and said (in paragraph 21 of his judgment) that "the institution of monogamous marriage deserves and requires the protection of the criminal law in all countries where it exists." We find nothing wrong in this expression of opinion. It is not the function of a judge simply to interpret the law mechanically. A judge is sometimes required to interpret abstract conceptions such as, in the case before us, "discrimination" and "freedom of conscience". It is of no avail in such circumstances to attempt to confine oneself within the four corners of legal theory. The judge must make a thorough investigation, must weigh the benefit of the community and that of the individual, the degree of justice and equity, and other considerations such as these in order to reach a correct assessment of the intention of the legislature.

10. Dr. Wiener argued his submissions in regard to the merits of the case under two headings - the one dealing with discrimination, and the other with freedom of religion and worship. I shall deal with the submissions in that order. Dr. Wiener confined his argument with regard to discrimination to the following points:

> (a) The idea that there exists a distinction in principle between monogamy and polygamy has no basis in the law of Palestine. According to the intention of the legislator who drafted the Order in Council marriage is an institution common to all communities, and the Mandatory legislature could not therefore lay down in subsequent legislation on marriage different principles for different communities. The criminal law relating to bigamy falls within this rule.

(b) An argument that the legislature adjusted the section in question to the religious needs of the different communities cannot be justified, since section 181 is not so drafted, and in any event there was no necessity for a High Commissioner to set himself up as a "policeman" for the religious communities.

(c) The test of discrimination is an objective test and we must not, therefore, enquire into the intentions of the legislator. The prohibition against discriminatory laws is absolute without its being reserved to matters of the maintenance of public order and morals, for these are only mentioned in connection with freedom of conscience and worship.

11. Mr. Shimron, the State Attorney, argued against this submission upon the question of discrimination. In his submission the prohibition against discrimination does not mean that the legislature must introduce a mathematical equality between all citizens. Discrimination must not be confused with distinction. The prohibition extends only to discrimination to the disadvantage of a particular group of people. The Palestine legislature, however, did not discriminate in favour of one community or against another community. It found itself faced with a varied social and legal state of affairs in the different communities, with each community having its own way of life. It therefore tried to find a legislative solution which would be in conformity - as far as possible - with this existing situation. The solution which it found is a reasonable and not a capricious one. Mr. Shimron, in his submissions, relied upon judgments of the Supreme Court of the United States which, in interpreting the Fourteenth Amendment of the Constitution of the United States in connection with the equal protection of the laws, decided that this amendment does not prevent classification of different groups within the community by the legislature.

12. It must be pointed out at the outset that Article 17(1)(a) of the Order in Council does not provide in general terms that all discrimination is forbidden. The article lays down, however, in a consolidated form, three aspects according to which discrimination between inhabitants of the country is forbidden, and these are on the grounds of race, religion, and language. Does section 181 mention religion as a reason for differentiating between the

communities? Counsel for the parties did not deal specifically with this question. It seems to me that the matter is open to doubt. In the time of the Mandate the court recognised Jewish law as "the national law" of the Jews of Palestine (see *Shwalboim v. Shwalboim* (2)). I do not think that, in speaking in section 181 of the person whose law relating to marriage is Jewish law, the mandatory legislature intended to restrict this conception to Jews who were members of the Jewish community as a religious community. It designedly created a special class of people who are distinguished by their law of personal status. This has little effect, however, as far as Article 17(1)(a) of the Order in Council is concerned, for if the dividing line under section 181 is not religion we shall be compelled against our will to reach the conclusion that the differentiation is based on race, or on a conception of religion and race combined.

13. It seems to me that the articles of the Order in Council itself destroy the contentions of Dr. Wiener that marriage under the Mandatory law was considered the same institution for all the communities. The legislature allocated jurisdiction in matters of marriage between the different religious communities, and in so doing it was undoubtedly aware of the wide distinction between the various laws of marriage of the main communities in the country. See in this regard the judgment of this court in *Rosenbaum v. Rosenbaum* (7). It was only in 1989 that the first step was taken to introduce a unified law of marriage for persons who were not members of the recognised religious communities (see Article 65A of the Order in Council). This provision, however, merely provided the additional legislative framework, but this frame was never filled with content. It is clear to me that the law of marriage which existed in the time of the Mandate and which exists in this country today is not a single one, but is varied according to the different systems of personal law.

14. What is the correct meaning of the expression "discrimination", which appears in Article 17(1)(a)? It is true that according to its etymological source this English word means no more than "distinction" and not necessarily a distinction for good or bad. In the social sciences, however, the word has acquired a more restricted connotation.

I quote from the Encyclopaedia of the Social Sciences, New York, 1948, vol. 14 at p. 131 where it is said: -

> "The term social discrimination may be tentatively defined as unequal treatment of equals, either by the bestowal of favors or the imposition of burdens."

and further on the same page :-

> "Discrimination should not be identified or confused with differentiation or distinction."

and on page 182 :-

> "Discrimination carries with it the idea of unfairness."

I have already explained that the expressions which I am considering here are not merely legal terms. They are the common heritage of people with a democratic tradition and we do not hesitate therefore to seek assistance from American non-legal sources. The distinguishing feature implicit in the expression "discrimination" is an attitude which is unequal and unfair - for different classes of people. This is also the opinion of the English judges in the time of the Mandate. In the well-known case of *Attorney-General v. Altshuler* (3), for example, the court asked in its judgment at p. 286 :

> "Can it be said because the bye-law in question makes a distinction in favour of the minority ...that there is, therefore, not a discrimination against the majority."

and it replies :

> ".. .it is just as much discrimination when the majority suffers as it is when a minority is discriminated against."

I quote these passages only for the sake of the linguistic interest which they possess, without expressing any opinion as to the correctness of the view of the majority of the

judges on the merits. The same expression, as used in the book of Exodus, (8, 18; 11, 7) [1] is used to connote a distinction for good or for evil.

15. I have considered the American judgments cited to me by Mr. Shimron, and particularly the judgment of Mr. Justice Brandeis in *Quaker City Cab Co. v. Pennsylvania* (9), which interprets the "Equal Defence Clause" in the American Constitution (the Fourteenth Amendment). However I cannot derive any assistance from this judgment for the problem before us, for the amendment referred to does not mention the expression "discrimination" and the American court, in interpreting the amendment, proceeded on the assumption that discrimination (that is to say, actual discrimination either in favour or against a particular class of persons) is permitted subject to the condition that it expresses itself in the form of classification on a reasonable basis (ibid., p. 556), while in our case discrimination is forbidden in all circumstances and is not limited by considerations of public order, and other considerations of a like nature.

16. Nevertheless, I am of the opinion that in substance Mr. Shimron's submission is correct. I have said that discrimination means a distinction for good or for bad. Article 17(1)(a) does not forbid a different legislative arrangement in respect of different classes of persons, provided that the arrangement involves no discrimination for good or bad. For example, the Language of Courts Rules provide in rule 4 that every summons, every official copy of a judgment and every official document shall be issued in the language of the person to whom it is addressed. This provision involved a distinction between different classes of people by reason of language. Would it ever occur to us to say that this is discrimination because from an objective point of view one law has not been laid down for all? On the contrary, it would appear that here we have a desire to confer equal status upon all the official languages. And so it is in the case of marriage. The Mandatory legislator decided that the time had come to prohibit bigamy by a prohibition in the Criminal Code. Two roads were open to it. It could have imposed a general prohibition upon the members of all communities or find a compromise between the desire to prohibit bigamy, and the social realities of the country. Dr. Wiener admits that a general prohibition would not have been beyond the competence of the Mandatory legislator, but he denies its power to lay down different laws for different communities. I cannot accept this opinion. A legislature

1) "That you may know that God has drawn a distinction between Egypt and Israel."

does not operate in a vacuum, but is faced with an actually existing social state of affairs with its various manifestations, and must formulate legal forms to meet that situation, and also direct its development in the future. As far as the institution of marriage is concerned, the legislator found himself confronted, as raw material, with a reality consisting of varied outlooks which were fundamentally different. It found that the population of the country was not homogeneous, but that it consisted of different peoples and communities, each with its own laws and customs. Can we say that the Mandatory legislature committed a breach of the principle of non-discrimination because it did not impose its will on the existing situation but to some extent yielded to reality? There is an even more important factor. I am not dealing here only with a difference between actually existing situations, but a difference which was already established in the written law which applied before the Mandatory legislator began to act. Legislatory recognition of the differences between the outlooks of the peoples and communities in the country was already introduced into the Order in Council itself, which did not introduce one law for all people in the country but in matters of personal status handed over such matters - at least in part " to the jurisdiction of the courts of the communities. The draftsman of the Order in Council also added little that was new, and only recognized a legal situation which already existed previously in the time of the Turks. The Mandatory legislature, therefore, was consistent, and in drafting section 181 not in a single form but in a varied form, continued to build upon legal foundations which had already been laid down for some time.

Counsel for the appellant is correct, however, in submitting that in the ultimate result the test must remain objective. It is possible that the intention of the legislature was desirable, but that it failed in its efforts, and that its solution in fact prejudices a particular class of persons, and discriminates against them in favour of others. We are not, therefore, relieved from the task of examining the details of the legislative arrangement which was made in the matter before us. I shall not be influenced by the dotting of i's and the crossing of t's, and should it appear that in essentials no discrimination has been introduced by the legislature, the court will ratify its actions and not invalidate them.

17. The object of respecting the provisions of the law of personal status of each person in Palestine is abundantly clear from section 181. We know from the explanatory notes to the proposed amendment that it was drafted after consultation with the Chief Rabbinate and

was intended to satisfy its requirements. Rabbi Ya'acov Baruch, the Principal Secretary of the Office of the Rabbinate in Jerusalem, who gave evidence in this case, also confirmed that the Chief Rabbinate had approved this amendment (see also the article of P. Dikstein, "Ha-Praklit" January, 1946, p. 18). There is therefore no doubt as to the good intentions of the legislature towards the Jews. From an objective point of view as well, however, although there is here a difference in the legislative arrangement, there is no discrimination against anyone. Wherein lies the discrimination upon grounds of race or religion in handing the final decision in regard to permission to marry more than one wife - and thereby the exclusion of a person from the general provisions of section 181 - to the competent Rabbis of the Jewish community? I shall deal later with the question to what extent the contents of this section are consistent which Jewish law and I shall assume for the moment that there is no absolute consistency between them - but that does not mean that the provisions of the section are ultra vires, for in my opinion the legislature was entitled to introduce an innovation in the secular law (and a prohibition of bigamy is a matter belonging to the secular law) by transferring an additional duty to the religious courts of the Jewish community whose power to issue binding decisions is itself derived from the secular law. In so doing the Mandatory legislature did not constitute itself as a "policeman" in matters of religion. It remained within the ambit of its powers, and merely used the existing machinery of the religious courts in order to achieve its purpose after giving full consideration to the feelings of the Jewish community.

18. And that is not all. Without expressing an opinion as to the social and moral values of monogamy and polygamy it may in any event be laid down with certainty that that outlook which sees an advantage in a number of wives is basically a "masculine" outlook, for a prohibition against a number of wives restricts, as it were, the liberty of the male. The prohibition of bigamy, however, has the important social purpose of protecting the first wife. To release the man from the prohibition against bigamy contained in the criminal law would be to lower the status of the wife. It is for us to decide whether there exists here discrimination against the members of a particular race or religion, and we may not take a one-sided view of the problem. We must ask ourselves whether the men and women of the same community regarded as one unit are discriminated against. The answer to this question cannot be otherwise than in the negative.

19. For these reasons I reject these submissions of Dr. Wiener, and in my view section 181 of the Criminal Code Ordinance, 1936, is not repugnant to the provision against discrimination in Article 17(1)(a) of the Order in Council.

20. I shall now pass to consider the second submission relating to freedom of conscience and worship. In my opinion the question of freedom of worship does not arise here at all. The intention of the legislature was directed to forms of worship among the different religions - in regard to matters between man and his God, and not in regard to matters between man and man.

I shall therefore confine the enquiry to freedom of conscience. This is an ethical conception dealing with knowledge of good and evil. A man may derive his opinions on good and evil from a source which is not religious. A religious man, however, is guided in matters of conscience by the commandments of his religion, and we therefore accept the assumption that the complete application of the principle of freedom of conscience also demands freedom of religion.

Dr. Wiener's main submission was that the Mandatory legislature, in laying down rules relating to marriage, trespassed upon the area of religion since, according to the Order in Council. marriage is a religious institution. Freedom of conscience means freedom to live according to the dictates of religion. Jewish law permits polygamy at least among those communities which have not accepted the Ban of Rabbenu Gershom.[1)] In certain cases polygamy is even almost a religious duty. The test is objective, and it makes no difference if the appellant belongs to one of those communities. And if section 181 is repugnant to the religious customs of any community, then it must be invalidated completely. The section is prejudicial in particular to those Jews who are not members of the Jewish community, for it compels them to approach the courts and the Chief Rabbis whose authority they do not recognise - in order to secure permission to marry. In explaining these submissions, Dr. Wiener readily conceded, as I have said, that had the legislature introduced the prohibition on bigamy generally by imposing a criminal

1) Whose Ban on those who took more than one wife was restricted for centuries to European and American Jews.

prohibition, it would not thereby have exceeded its powers, for a prohibition such as this would evidence a desire to regulate the question of bigamy purely from the secular angle.

Mr. Shimron's submission on this aspect of the matter was as follows. The question of marriage is secular and not religious, and legislation regulating this matter has no effect upon religious sentiment. Freedom of conscience and freedom of action are not the same thing, for freedom of conscience is confined to the realm of thought alone. Mr. Shimron supported the conclusions of the learned President in the court below that there is no inconsistency between section 181 and Jewish law, and submitted that the fact that a minority do not recognise the rabbinical courts can have no decisive effect on the matter.

2l. I do not think that freedom of conscience is limited to freedom of thought alone. A man who enjoys freedom of conscience must not be deprived of the right to obey the dictates of his conscience by action. The proviso to Article 17(1)(a) in regard to public order and morals is sufficient to prevent harmful acts which some may seek to justify on the ground of freedom of conscience. Even *Esh-Shanti v. Attorney-General* (4), upon which Mr. Shimron relied, does not go so far as to hold that freedom of conscience is limited to matters in the realm of thought alone.

22. I reject the remaining arguments of Dr. Wiener in regard to freedom of conscience. I think that Dr. Wiener destroyed his own argument by conceding that there may also be a secular approach to the subject of marriage. If, in principle, the secular law relating to marriage may be imposed upon all the inhabitants of the country, why should legislation which seeks to respect the demands of various religions, according to the grasp of the secular authorities after they have consulted the Jewish religious authorities before enacting the law, be forbidden? This is not trespassing upon the field of religion. On the contrary, as T have said, there was a clear desire to follow the golden mean between the religious sphere - as defined by the religious institutions themselves - and the secular sphere.

23. I would add here that it is by no means clear that according to Jewish law, the law of marriage belongs to the field of religion It is true that the Order in Council speaks of religious courts, and the draftsman undoubtedly assumed as a matter which was self-

evident that religious courts deal with matters before them in accordance with laws of a religious character. But the draftsman had no power to change the essential nature of Jewish law. It is true that that law is based entirely upon a religious foundation since its source is the Law of Moses. There is, for example, no essential distinction between the law of persons and the law of property from the point of view that one is religious and the other secular, for they are all bound up together in one legal system. It would not be right, therefore, to attribute an essentially religious character just to the law of persons, thus distinguishing it from other branches of Jewish law. In other words, from the point of view of Jewish law (and it is with this law that we are dealing at present and not with the point of view of the secular legislature which drafted the Order in Council), the Law of Moses regulates all branches of civil and criminal law, and there is no difference between the intervention of the secular legislature in the field of the law of persons and its intervention in any other field of the law as a whole. No one will contend, for example, that in laying down the secular law of property the legislature was guilty of trespassing upon the field of religion, and the same applies to the intervention of the legislature in the law of marriage.

24. This is not all. Religious compulsion can only exist where religion either imposes or forbids the doing of a particular act, and the secular legislature compels a breach of the imposition or prohibition. There can be no question of such compulsion in regard to acts which religion merely permits, without any absolute imposition or prohibition. Dr. Wiener must show, therefore, that there exists an inconsistency between an order of the secular legislature and some absolute directive in Jewish law which compelled polygamy. Dr. Wiener did point, indeed, to a number of instances in which such an inconsistency, as it were, would exist were polygamy obligatory under Jewish law. The President of the District Court, however, has shown convincingly that the legislative regulation of marriage introduced by section 181 is in complete accord with the principles of Jewish law as they have developed throughout the ages, and that custom in Palestine, binding all the communities, generally forbids polygamy. A man is not permitted - and certainly is not obliged - to marry more than one wife, on the strength of his own decision alone. He is required for this purpose to procure a special permit which will only be issued on certain conditions now laid down, inter alia, in the Rules of Procedure of the Chief Rabbinate of Palestine of the year 1943. This ground in itself is sufficient to answer any argument about

the infringement on the freedom of religion, though this does not diminish the force of the other considerations which we have already mentioned to contradict this argument.

25. In conclusion, the submission relating to that minority which did not recognise the Jewish community also cannot stand the test of analysis. Knesset Yisrael was regarded by the Mandatory authorities as the organisation of the Jewish community, and all efforts to secure legal recognition for other bodies failed (see for example the case of *Vaad Adat Ashkenazitm v. District Commissioner* (5)). The Mandatory legislature was consistent, therefore, in leaving the final decision relating to the issue of a permit in the hands of the Chief Rabbis of Knesset Israel. I have already rejected the submission relating to an infringement of liberty of conscience in its material aspect. Can the undisputed fact that it is necessary to approach the religious courts of Knesset Israel and the Chief Rabbis in order to secure the necessary permit be regarded as infringing freedom of religion? This contention cannot be accepted any more than the argument of a person that he cannot recognise the authority of the courts of the State at all because of considerations of conscience. The provision relating to freedom of conscience is subject to the condition relating to the maintenance of public order which demands of every citizen that he accept the authority of the courts established by law. A Jew was not obliged to be a member of Knesset Israel, but it cannot be deduced from this that the legislature was unable to confer jurisdiction upon the courts of the Rabbinate over persons who were not members of Knesset Yisrael. Section 181(d) of the Criminal Code Ordinance, 1936, indicates the existence of such a jurisdiction, for this section gives official recognition to a permit of the rabbinical courts in respect of any person whose personal law is Jewish law, that is to say, also in respect of Palestinian Jews who are not members of Knesset Yisrael. It is difficult to see how the legislature could have provided otherwise since the recognition of the State was accorded only to these courts as the religious courts of the Jewish community.

26. For the reasons stated above I am of the opinion that the appeal against the conviction should be dismissed.

SILBERG. J. I am also of the opinion that the appeal should be dismissed.

2. In the submission of counsel for the appellant, section 181 of the Criminal Code Ordinance is invalid for two reasons :

(a) It restricts freedom of conscience.
(b) It discriminates between one person and another on grounds of religion.

The remaining arguments and contentions of counsel for the appellant are merely branches of his two main submissions as set forth below.

3. As far as counsel's first submission is concerned, I should say at once that I entirely disagree with the opinion of the State Attorney that the guarantee of freedom of conscience extends only to the protection of freedom of thought. Thoughts are not punishable nor are they subject to other sanctions, and there is therefore no need to protect them. It follows that the freedom of conscience which enjoys the protection of the legislature must necessarily include a man's acts and deeds, the fruit of the exercise of his conscience, provided always that they do not exceed the bolunds of his purely personal affairs. When they do exceed these limits, they again become subject, like all other activity - to the surveillance of the law.

4. The question, therefore, is whether section 181 really restricts a person's freedom of conscience. I could, in fact, limit the question and define it in this way: whether the section referred to restricts the individual freedom of conscience of the appellant in this case, in the particular circumstances of this case. I do not wish, however, to divide the problem in this way, since I have in the result reached a negative conclusion in regard to this question even in its full connotation.

5. How is there likely to be a restriction on freedom of conscience in the circumstances of the present case?

There is no doubt that freedom of conscience also includes freedom of religion. In order to show, however, that some prohibitory provision of the law restricts freedom of religion, it is not sufficient to establish that religion does not forbid the act in question. It is necessary to go further and prove that the doing of that act is demanded by religion - that

religion commands and obliges the performance of that act. Not everything that is permitted by religion need necessarily be permitted by law. These two areas, therefore, are not identical. The one deals with matters between man and God, and matters between man and man, while the other also deals with matters between man and the State.

In making these observations we need scarcely consider the validity in Palestine of the Ban of Rabbenu Gershom, and whether a Sephardi or Caucasian Jew here in Israel is permitted by law to marry more than one wife. Even if we assume - and I do not imagine that that is so - that the Ban of Rabbenu Gershom has no application to a Jew who comes here from tile regions of the Caucasus, the constitutional validity of section 151 will remain completely unaffected. It is not necessary, therefore, for me to enter into an examination of the interesting theoretical problems in which counsel for the appellant involved himself, namely, whether the Ban of Rabbenu Gershom (or its voluntary continuation after the year 5000 A.M.), is to be determined by the place in which a person is situated - in accordance with the opinion of some commentators - and whether it applies, therefore, to all the inhabitants of that place - even to new immigrants from countries in which the Ban is not acted upon, or whether it is only a personal obligation - in accordance with the opinion of other commentators - and has no application to a person who comes to a place where the Ban is accepted from a place where it is not accepted. (See Shulhan Aruh - Even Ha-ezer - I,9, and commentators ad loci Knesset Hagedola - Even Ha-ezer, Annotations Bet-Yosef, 1,22 (in the name of Rabbi Itzhak Hen); compare, however, Responsa of Nissim, 48; Kol Eliyahu, 2, Responsa on Even Ha-ezer, 12, and Knesset Hagedola, 20, q.v.)

6. The correct definition of the question, therefore, to put it shortly and yet accurately, is as follows : whether a man from Israel is obliged, by law, to take more than one wife or not. Counsel for the appellant advanced a novel submission in regard to this question, namely, that since the commandment to be fruitful and multiply is the first commandment in the Bible - first in order and in importance - any provision in the law which restricts the number of wives a man may marry is likely to lead to that commandment's being disobeyed. In support of his argument, counsel relied upon "She-elat Ya'avetz" of Rabbenu Ya'acov Gershom as being calculated to prevent a man fulfilling the commandment to be fruitful and multiply, and as preventing the increase of the seed of Israel. It is possible to

go further in the spirit of counsel's submission, and to argue that the prohibition against bigamy is also likely to prevent the fulfilment of the commandment requiring a man to marry the childless wife of his deceased brother - in so far as that commandment is still observed in this country. I mean to refer to those Eastern communities who follow the opinion of Rabbi Izhak Alfasi and Maimonides that it preferable for a man to marry his deceased brother's widow than to give her her release, as is done by the Ashkenazi community in accordance with the opinion of Rabbi Moshe Isserlis. (See the dispute between Abba Shaul and the Rabbis, Yevamoth, 39b; Bechoroth, 13a; Rabbi Itzhak Alfasi, Yevamoth, Chapter "Ha-Holets" (Chapter 4); Maimonides "Yibum Vehalitsa" - 1,2; Annotations Rabbi Moshe Iserlis, Shulhan Aruh, even Ha-ezer - 165,1). I refer to those who are of the opinion that the commandment referred to should be observed even by those who are already married (Pit'hei-Tshuva, Shulhan Aruh - even Ha-ezer, 165, subs. (c), which is opposed to the responsum of Rabbi Itzhak Bar-Sheshet, Title 302 quoted in Bet Yosef and in the interpretation Even Ha-ezer at the beginning of chapter 165).

This submission, however, has no substance whatsoever. Without entering into the question of the meaning of Article 17 of the Order in Council - whether it prohibits legislation which is intended from the outset to prejudice the dictates of religion, or whether it also invalidates any law which is likely, in particular circumstances, to prevent the observance of one of the religious duties - without embarking at all upon an investigation of this problem, there is a very simple answer to the submission of counsel for the appellant in this case. That answer is that this section 181 has already concerned itself from the outset with preventing any possible conflict between the law and religion, and has provided a special method for the resolution of any conflict between them. I refer to the "permission" set out in subsection (d) of the section. It is provided in that sub-section that a person who has more than one wife will be free from guilt ("it is a good defence to a charge under this section") if he proves that the law as to his marriage (both his first and subsequent marriage) is Jewish law, and that "a final decree of o rabbinical court of the Jewish community, ratified by the two Chief Rabbis for Palestine, and giving permission for the subsequent marriage, had been obtained prior to the subsequent marriage". And since the rabbinical court and also the two Chief Rabbis will certainly, no less than any other person, give proper consideration to the observance of religious duties and, if it appears to them correct to do so both from the legal point of view and the facts of

the case, will grant the permission requested, there is a sufficient guarantee of "freedom of religion". Where have we grounds for complaint against the Palestine legislature? Was the Mandatory legislature obliged to constitute itself the guardian of matters of religion, and to impose or permit the fulfilment of a commandment which even the religious court is not prepared to permit? I would be very surprised indeed if that were so!

7. But counsel for the appellant continued to urge that it was just this very subsection - subsection (d) of section 181 - which constitutes a serious inroad into the freedom of conscience and religion. He submitted that the jurisdiction of both "the rabbinical court of the Jewish community" (which is the court of "Knesset Yisrael"), and that of the two Chief Rabbis, extends to members of "Knesset Yisrael" alone[1] (see *Gliksberg v. Chief Execution Officer* (8), and judgments there cited), and a man who is not a member of Knesset Yisrael can derive no benefit from a "permission to marry" given by a court such as this. It follows that a man who is about to take a second wife will be compelled, against his will, to join the Knesset Yisrael in order to secure the legal validity of the permission referred to. Can there be any greater religious compulsion than this?

There are two replies to this submission which, in my opinion, is without substance.

(a) First, I have grave doubts whether the jurisdiction of the rabbinical court is limited here too, in regard to the defence provided for in section 181(d),to members of Knesset Yisrael only. Without expressing any final opinion I am inclined to think - as was said by the learned President of the District Court in paragraph 48 of his judgment - that by virtue of the provisions of rule 6(1) of the Jewish Community Rules, [2]read together with the provisions of Article 9(2) of the Palestine Order

1) To understand this argument it must be remembered that in the days of the Mandate there were non-conformist Jews who were outside the official Jewish community and who refused to recognise the courts or its rabbis.

2) Palestine (Amendment) Order in Council, 1939, art. 9(2):

Provisions regarding religious communities

9. (1) .....

(2) For the removal of doubts it is hereby declared that, notwithstanding anything contained in the Principal Order, or any amendment thereof or any rule of law to the contrary, the Change of Religious Community Ordinance, and the Religious Communities (Organisation) Ordinance and the Rules made under the last-mentioned Ordinance, were lawfully enacted

in Council (Amendment), 1939,[3] section 181 confers a special jurisdiction upon the court of Knesset Yisrael and upon the Chief Rabbis to grant permission to marry also to a person who is not a member of Knesset Yisrael ;

b) Secondly, even if we assume that this is not so, and that a man who is very anxious to marry a second wife is compelled, whether he likes it or not, to become a member of Knesset Yisrael - is this something so very shocking? Is this to be treated as "interference with the freedom of religion"? Is the religion of a member of Knesset Yisrael any different from the religion of a person who is not a member of the Knesset ? Religious "compulsion" such as this means nothing, and it is difficult to submit with any seriousness that the whole legal force of section 181 is to be destroyed because of this feature.

8. Before leaving this subject I wish to touch shortly upon another point which also provides a simple and complete solution, in quite another way, to the problem of the freedom of conscience and religion. It is well known that Article 17 of the Order in Council lays down one proviso in respect of the prohibition on the restriction of freedom of conscience, and that is in so far as is required "for the maintenance of public order and morals" (do not read: "and morals" but "or morals"). Dr. Wiener, for his part, has introduced a proviso to the proviso and contends that the word "public" in this context means the whole public and not only a part of the public. I do not know from where this doctrine is derived, nor whether there was any place for it in the conditions of life which prevailed in Mandatory Palestine. It seems to me that in a heterogeneous society, with its many variations and different cultural groups, we can very well imagine that a particular law was necessary for "the maintenance of order" in only one of the different sectors of the population of the country. It can hardly be imagined that the position was otherwise. And

3) Jewish communities Rules, rule 6(1):

Judicial powers of Rabbinical Offices.

6. (l) Each Rabbinical Office shall sit as a Rabbinical of Court of first instance in such places as may be prescribed by the Rabbinical Council and shall exercise the jurisdiction conferred upon the courts of the Jewish Community in Palestine by any Order in Council or Ordinance or other legislation of the Government of Palestine and shall have exclusive authority to register dedications of property for charitable purposes made by members of the Community according to Jewish law.

the word "order" does not mean only the prevention of disorder. It includes also the maintenance and regulation of particular forms of living and cultural values in which that particular section of the community is interested, and which it holds dear. And if this is so, the amendment to section 181 - which was introduced under pressure from the Jewish community as a whole - is absolutely valid and completely unexceptionable even if the fullest effect be given to the proviso in Article 17.

It would in fact have been possible to solve the whole problem by the process of reasoning set forth above alone. Since in my opinion, however, there was no restriction whatsoever on the freedom of conscience and religion in the circumstances of this case I found it necessary in the preceding portions of my judgment to deal with other aspects of the problem.

9. 1 pass now to the second and more serious submission of counsel for the appellant, namely, that of discrimination. This is an argument of substance which demands careful consideration. The conception discussed in the preceding paragraph can in any event have no place in regard to this portion of the enquiry, for the provisions of Article 17 prohibit discrimination in all circumstances - even if it be necessary for the maintenance of public order, since the proviso has been omitted from the concluding portion of the Article.

Article 17, as enacted in Article 3 of the Palestine (Amendment) Order in Council, 1923, provides as follows :

> ".....no Ordinance shall be promulgated.....which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language."

It is Dr. Wiener's submission, stated shortly, that since, in terms of the real and practical application of section 181, bigamy - that is to say, having more than one wife - is permitted for Moslems, but is forbidden to Jews and Christians, the law discriminates between one man and another on grounds of religion.

For the sake of accuracy it must be added that Dr. Wiener does not complain - nor can he complain - that bigamy is permitted for Moslems, and that, as it were, there is discrimination in their favour. It was not this legislative act which permitted them to indulge in bigamy, for they were permitted to take more than one wife before this Act was promulgated. His main argument is that section 181 prohibits bigamy for Jews to a greater extent than for members of any other community, for, differing in this respect from other communities, they are forbidden to contract bigamous marriages even where their religious law permits them to do so (see the language of subsection (c)). It follows that the law has discriminated here, and has discriminated against the members of the Jewish community.

10. It is still not clear whether counsel for the appellant complains of discrimination on the grounds of race or on the grounds of religion. It would appear, however, that Dr. Wiener complains of religious discrimination, for he has emphasised before us again and again that section 181 makes the discrimination dependent upon the nature of the law which applies to the marriage of the offender; whether that law is Jewish law, or "some law which is not Jewish law".

11. It seems to me that it is just there - in those words and in that definition - that the weakness in counsel's argument appears. The language of the section is as follows : -

> ". . . . . provided that it is a good defence to a charge under this section to prove : -
> .....
>
> (c) that the law as to marriage applicable to the husband both at the date of the former marriage and at the date of the subsequent marriage was a law other than Jewish law and allowed him to have more than one wife, or
>
> (d) that the law as to marriage applicable to the husband both at the date of the former marriage and at the date of the subsequent marriage was Jewish law and that a final decree of a rabbinical court of the Jewish community, ratified by the two Chief Rabbis for Palestine and giving

permission for the subsequent marriage, had been obtained prior to the subsequent marriage."

This language leads to two conclusions:

(a) That section 181 makes the conviction and sentence dependent - not on the racial or religious affiliation of the wrongdoer, but upon a third test which is different from both of these, namely, what is the law which is applicable to the marriage of the offender;

(b) that the whole difference between the two classes of cases expresses itself, as a matter of fact, in one point alone, and that is that while it is sufficient for a man whose law is not Jewish law to prove, even at the trial itself, that his personal law - that is to say, that law applicable to his marriage - permits him to marry more than one wife, a man who is subject to Jewish law is obliged to prove that before his second marriage was celebrated he had produced a certain certificate laying down that he was permitted, individually, to marry a second wife. In other words, in regard to a man such as this - who falls into the second class - a criminal court will not be satisfied with the evidence of an expert with an abstract legal opinion, but will demand the production of an actual personal certificate issued to him, before he is married to the second wife.

12. As I have already indicated, the submission of discrimination as advanced by counsel for the appellant is completely destroyed by these considerations. In order to explain the principle we must deal shortly with the question of the special legal situation of "matters of personal status" and the place which they occupy within the framework of the general civil law of the State.

13. As everyone knows, the Palestine legislature divested itself of the power to lay down its own new principles in matters of personal status, and for reasons which are understandable and well-known it generally transferred the regulation of such matters -

both from the point of view of procedure and from the point of view of substantive law, to the different religious codes of the various communities. Matters affecting the marriage and divorce of a Palestine citizen, who is a member of one of the recognised communities, are dealt with, even in the civil courts (when the question, for example, arises before them incidentally) in accordance with the religious law of the community in question. That also applies in regard to the duty of maintenance by a Palestinian husband in a claim brought against him in a civil court, and also to other similar types of claim.

The matters which I have so far mentioned are simple, plain and well-known, and there is no reason to discuss them at any length. There arises, however, an interesting question which is not so simple, and that is the explanation of the rule which I have stated. Did the Palestine legislature, from the legislative point of view, leave a vacuum, and in respect of these matters employ foreign legal norms which have no place in its own system of law? Or did the Palestine legislature take over these legal norms, and make them an integral part of its own general system of civil law? This question is not, as we shall see, a merely theoretical one.

14. Even if there could have been some hesitation on this question up to the year 1945, the problem was completely settled with the promulgation of the Interpretation Ordinance 1945, and the matter is no longer open to any doubt. Section 2 of that Ordinance provides distinctly that the expression "law" also includes "the religious law (both in writing and verbal). . . . . which is in force, or which will be in force in future in Palestine." These words are crystal clear, and any interpretation of them would he superfluous. The legislature has in this section expressed its opinion in unmistakable language that the religious law, to the extent that it is in force in Palestine, itself constitutes an integral part of the law of the State. That is to say, that if a district court deals, for example, with the obligation of a Jewish husband who is a citizen of Palestine to pay maintenance, and it applies - as it is obliged to do - Jewish law, that part of Jewish law which deals with the question is regarded as if it had been enacted as one of the laws of the State. This, moreover, is the only reasonable and the only possible approach to the matter. Religious law is not "a foreign branch" which is grafted onto the trunk of the tree from without, but, to the extent that it was recognised, is itself inextricably interwoven with the boughs of the tree and forms a portion of its boughs and its branches.

15. Let us return to our problem, and examine the influence of this approach on the question before us. The effect is patent and clear : the basic idea which lies at the foundation of section 181 - at the foundation of all the provisions of that section - is to prevent an intrinsic and unreasonable conflict between different portions of the law of the State. For since, in the field of the civil law, there is no single arrangement common to all of the laws of marriage and divorce for all the inhabitants of the country, each community having its own laws, and ifs own forms, so it would be inappropriate to lay down one equal law for all sections of the inhabitants in the field of criminal law. It would be insufferable if there were a contradiction between the civil "permission" to commit bigamy, and the criminal prohibition of bigamy, and if these two conceptions did not coincide. The legislature therefore laid down as a general rule that if the civil law - that is to say, the "religious law" in accordance with which civil questions relating to the marriage of the offender are to be determined - permit him to marry more than one wife, it - the legislature - does not wish to prohibit him from so doing from the point of view of the criminal law. Here, however, the legislature was confronted with a difficulty in respect of members of the Jewish community, or to use the language of the legislature, persons the law of marriage applicable to whom was Jewish law. The difficulty was that Jewish religious law in fact recognises the validity of bigamous marriages - that is to say, having more than one wife - but it does not "permit" such marriages in a general and absolutely unrestricted form. On the contrary its general attitude to them is negative, and it only permits them subject to many reservations and conditions. Hence the legislature found itself confronted with a very complicated situation - a situation complicated from the legal point of view. It could not understand the situation in question nor did it believe that it could itself solve the problem. Who would investigate and who would decide if the particular person who married more than one wife was in fact permitted by Jewish law to marry a second wife? Could such an important and complicated question be decided on the basis of experts who would be heard by the court after the event? What, therefore, did the legislature do? It established special machinery, namely, the rabbinical courts of the Jewish community, together with the two Chief Rabbis of Palestine, and it transferred to them - and to them alone - the power of deciding the question whether a second marriage on the part of the husband could be permitted - resulting naturally in his exemption from punishment - or not.

In short, the legislature did not act here with discrimination and did not discriminate in any way on the basis of religion or race. Also in regard to Jews, the legislator did not depart from the basic principle that no distinction should be introduced between the civil and criminal aspects of bigamy, but it refrained from deciding itself upon the civil aspects of the matter - being mindful of its failure in 1988 - and it transferred the matter to more competent hands, namely, to the religious courts and the Chief Rabbis, who were to decide the matter before the commission of the act. This is not a case, therefore, of racial or religious discrimination, or of discrimination at all. It is a necessary consequence of the legal differences between those portions of the law by which the legislature regulated matters of personal status of the citizen. In the field of the civil law of personal status, however, the legislature was compelled to lay down different legal norms for each community by means of the religious laws. No one has ever questioned the correctness of this course. All that the legislature proceeded to do, in the field of criminal law, was to draw the practical and logical conclusions from this distinction in the civil law.

16. And now one word on tile question so ably dealt with by the State Attorney relying on judgments given by the American courts, and in particular on the theory expressed in one case, *Lindsley v. National Carbonic Gas Co.* (10), by Mr. Justice Deventer of the United States Supreme Court. Not all discrimination is discrimination in the full sense, for in some cases it is nothing more than drawing a distinction. Drawing a distinction in which way? - when there exists a real difference between the two persons between whom discrimination is alleged on any reasonable basis, and the discrimination is not capricious (see p. 340, column g, ibid.). The conception lying behind the prohibition against discrimination is that a man shall not be prejudiced only because of his belonging to a particular race or religion, and there is no discrimination when it is not only on the basis of race or religion that the distinction exists, and where there is no prejudice. The discrimination in section 181 is only in the nature of a distinction. A Jew is not punished for polygamy because he is a Jew; but he is restrained by the threat of punishment from taking more than one wife seeing that the society to which he belongs - the Jewish community - has itself laid down that taking more than one wife is inconsistent with its moral and cultural conceptions - that it can no longer permit that practice. It therefore requested the legislature to prohibit the taking of more than one wife in its own interest, and the legislature acceded to this request. What we

have here, therefore, is not a discrimination which is prohibited, but a distinction which is permitted, in no way offending the provisions of Article 17. This conception is in fact similar to that expressed above in paragraphs 14 and 15, expressing indeed two sides of the same coin.

17. In conclusion I wish to point out that ~ unreservedly associate myself with the conclusions of the learned President of the District Court in regard to the validity of the Ban of Rabbenu Gershom and the extent of its application in this country. It is a widely-accepted principle that that Ban - or the custom which has remained after the year 5000 A.M. (see Responsa of Hatam Sefer - Even Ha-ezer - s. (d)) - is valid in Israel, and binds everyone who enters this country. The authorities for this proposition were cited fully in the judgment of the learned President. I only wish to add that already in tile period of the Amoraim - some 700 years and more before the Ban of Rabbenu Gershom - there expressed itself - here and there - an inclination against polygamy, from the spiritual point of view. If the Amora Rabbi Ami, who lived in the 4th Century, said, "that I say : everyone who marries a second wife shall divorce his first wife (if she so desires) and pay her the sum of her ketuba" (Yebamot, 65a). Pay particular attention to tile strong introduction "that I say !" - this shows there were even in that far off time, people who were in favour of this idea. And even Raba, who differed from the opinion of Rabbi Ami in connection with this principle, said "A man may marry more than one wife if he is able to support them", also expressed his opinion indirectly elsewhere, and took it for granted that it is in no sense a natural thing that a man should marry more than one wife, and that it is necessary - at least from the moral point of view - to procure the consent of the first wife to such an act (see the reply of Raba to Abayeh - Kiddushin - 7a : "So he said to her at the time of the marriage - that if I wish to marry another woman, I shall do so"). Any one who knows how to read between the lines will find many such expressions of opinion widely spread throughout our ancient literature, but this is not the place to dwell upon this subject at any length.

In short, bigamy was never an institution which was rooted, or permanent or favoured, in the life of the Jewish people. It was merely 'tolerated', if one may use this expression - and what was laid down by Rabbenu Gershom, the Light of the Exile, at the beginning of

the 11th Century, was no more than to put the final touches upon a gradual and deep development throughout the generations.

It is my opinion, therefore, that the appeal should be dismissed, and the conviction confirmed.

SMOIRA J. I have read the judgments of my colleagues Silberg J., and Landau J., and I have nothing to add. They have both reached the conclusion that the appeal should be dismissed, *and I* am in agreement with their opinion.

We therefore dismiss the appeal against the conviction.

After hearing counsel for the appellant, the appellant himself, and the District Attorney, we find no ground for imposing a lighter penalty. We also dismiss the appeal against the sentence. We confirm the judgment and sentence of the district court .

The appellant will be imprisoned for a period of one year from today.

Appeal dismissed.

Judgment given on March 29, 1951.