JEWISH LAW
AND CURRENT LEGAL PROBLEMS

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EDITED BY

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The Library of Jewish Law

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Ministry of Justice

The Jewish Legal Heritage Society

Foundation for the Advancement
of Jewish Law

PROCEEDINGS

of the First International Seminar on
The Sources Of Contemporary Law:
The Bible and Talmud and Their Contribution
to Modern Legal Systems

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PREFACE

Throughout the centuries, the Jewish people never abandoned their legal system; and in our time, with their return to their land and the establishment of the State of Israel, the interrelationship between the laws of the State and the sources of Jewish law has reached considerable dimensions.

In 1980, the Knesset enacted the Foundations of Law Act, 1980, which abolished the link of Israeli law with the English legal system, and declared: "If the court in considering a legal question requiring determination, finds no answer to it in any enactment, in decided law or by way of analogy, it shall determine the question in the light of the principles of liberty, justice, equity and peace in the Jewish heritage."

In the wake of this legislation, the Ministry of Justice, under the leadership of the Minister, Mr. Moshe Nissim, established a framework of supportive programs in various fields, such as the preparation of legislative commentaries and fundamental texts, and made provision for consultation in order to further the integration of Jewish law into the Israeli legal system. Similarly, the Ministry has initiated series of lectures, workshops and seminars in Jewish law, held in various locations throughout Israel, in order to strengthen the ties of the Israeli Bench and Bar to the sources and elements of the Jewish legal heritage.

We are also witness to a growing interest in Jewish law in other

countries. Courses in Jewish law have now been established in law faculties and in other departments of universities around the world. This shared interest of the legal community both in and outside Israel in the sources of Jewish law served as the impetus for the International Seminar which took place in Jerusalem in August, 1983, on the topic: "Sources of Contemporary Law: the Bible and Talmud and Their Contribution to Modern Legal Systems."

The seminar was held under the auspices of the Israeli Ministry of Justice and with the sponsorship of the New York County Lawyers' Association and the Israel Bar, in cooperation with Tel-Aviv University.

Participants included approximately 150 judges, lawyers and scholars from various countries. A large group of lawyers arrived from New York, headed by Judge Alfred Kleiman of the New York Supreme Court, who contributed greatly to the success of the conference. The program of the conference appears in the appendix to this volume; all the papers appearing here were delivered at the conference by their authors, with one exception which was presented as a paper.

The organizers of the conference wish to pay tribute to the memory of Dr. Yedidya Cohen, one of the contributors to this volume, who recently passed away: *Yehi Zikhro Baruch.*

We hope that this conference will be but the first of a series of conferences to follow. For the coming year, a conference is being planned on the topic: "Maimonides as Codifier of Jewish Law", in commemoration of the 850th anniversary of Maimonides' birth.

Finally, I wish to express my thanks to all those who assisted in the publication of this volume, and especially to Mr. Peter Elman, who assisted in the preparation of the manuscript, to Prof. Benjamin Greenberger, who provided useful comments and suggestions, to Mr. Ariel Wardi, who contributed to the technical production of the volume, and to Miss Debbie Schick, for her efforts as coordinator of this project.

N.R.

Jeusalem, Israel
5745 – 1984

GREETINGS OF THE MINISTER OF JUSTICE

Moshe Nissim

I am honoured to welcome the participants of the International Seminar on the Sources of Contemporary Law: The Bible and Talmud and their Contribution to Modern Legal Systems.

When we talk of Jewish law, our subject is one of the most ancient of legal systems, with its origins in the Bible. But Jewish law is also very modern in the sense that it has continued throughout the ages to find new responses to new and emerging problems.

And what about the relationship between law in the State of Israel and the sources of Jewish Law? A very significant departure has occurred recently in this respect.

When the State of Israel was founded in 1948, we preserved a provision which the British had enacted in 1922, to the effect that whenever the existing law did not answer or deal with a given legal question the courts were to have recourse to the principles of the Common law and Equity pertaining to England to the extent that the circumstances of the country and its inhabitants permitted.

In 1980, this provision was replaced by the Knesset in the Foundations of Law Act which instead enacted a provision under the heading of Complementary Legal Sources, in the following unusual terms: "If the court in considering a legal question requiring determination, finds no answer to it in any enactment, in decided law or by way of analogy,

it shall determine the question in the light of the principles of liberty, justice, equity and peace in the Jewish heritage."

This provision opens the door wide to the development and application of the principles of Jewish law in our modern legal system.

Two examples of the influences of Biblical Law may be brought to your attention. First, the Right of Privacy, as to which Biblical Law has indeed already influenced modern law. Protection of privacy in secular law has developed apparently only in the last hundred years. In the United States the first reference to this concept came in an article published in 1890 by Warren and Brandeis in the Harvard Law Review, *in which the opinion that the law should rightly protect a right called the "right to privacy" was expressed. Today this idea has crystallized into a legal right protected by appropriate sanctions.*

Perusal of the Jewish sources, however, indicates that centuries ago the Bible considered privacy an important right. Prov. *11:13 tells us that "He that goeth about as a talebearer revealeth secrets." From this, the rule was derived that to disclose a secret was one of the most serious of transgressions, in the same category as slander.*

In the post-Talmudic period, this principle was extended and applied even to the imposition of sanctions against reading other people's correspondence without permission. Rabbenu Gershom, the Light of the Exile, who lived about 1000 years ago and who is known to us for important legislation regarding family law – the ruling not to divorce a wife against her will and the prohibition of bigamy – prescribed that a person who open's another's letter without permission should be banned and excommunicated from the community. In the Middle Ages such punishment was a most serious matter.

In Israel, the Protection of Privacy Law, 5741–1981, now regulates the subject. The introduction to the bill of the Law draws attention to the fact that in Jewish law privacy merited protection from early times.

Another area of law in which we can see the interesting interaction between ancient Jewish sources and modern legal systems is the law governing the relationship between employer and employee.

It is a fundamental principle in modern labour law that an employee has the right to receive severance pay when dismissed from his work. The Bible, Deut. *15:13–14, states that when a slave has finished the term of his employment he is not to be allowed to leave empty-handed.*

Although the Bible deals with a slave, one of our medieval scholars, Rabbi Aharon Halevy of Barcelona, in the 13th century, extended the idea to the employer/employee relationship.

With the return of our people to Israel in modern times, the practice of severance pay spread, even though there was no law to enforce it. Later when the Israeli courts dealt with the question they ruled that because the practice had become deeply rooted, employers must act accordingly. Nowadays this right is protected in the Severance Pay Law of 1963. When the then Minister of Labour presented the Law to the Knesset he emphasized its ancient source in the Bible and its development as a Jewish custom.

As we may see from these examples, Jewish law deals not only with classical legal topics but also contributes to fields considered modern today. Jewish scholars were concerned in former days with these problems and arrived at significant solutions. A considerable number of these solutions have been adopted by the Knesset and are reflected in the decisions of our Supreme Court.

The old can be combined with the new, and the ancient sources can serve us well in creating a healthy society based on Law and Justice.

It is very rewarding to see today in Jerusalem a gathering of those who have a common interest both in widening their knowledge of the classical Jewish sources and in tying the rich heritage at our disposal even closer to modern legal dilemmas. I wish you all great success in this endeavour.

Legal Theory

THE LESSON OF JEWISH LAW FOR LEGAL CHANGE*

*Haim H. Cohn***

In his Introduction to his classic *De Iure Belli et Pacis* we find Hugo Grotius explaining to his readers why it was that he so extensively quoted from, and relied upon, the Old Testament and the Hebrew scribes. It goes without saying, according to him, that the laws of God cannot but be an ideal model for the laws of man; indeed, why should God have bothered to make laws, were it not for the purpose to teach man how to legislate. Any possible notion that God's laws may still be binding on man is, of course, easily refuted by the superseding teachings of the New Testament – but still there are some eternal, immutable laws which, though restated and promulgated also in the revealed divine law, in reality constitute natural law, that is, law too self-evident to need explicit legislation. If, then, the purpose of the divine lawgiver could not have been to apprise us of natural law which every rational being is anyway aware of, nor to legistate positive law to any people except only the children of Israel until the advent of Christianity – the real and lasting divine purpose must have been to provide mankind with a first but definitive and enduring lesson in lawmaking.

* Much of the material here presented is reproduced from the author's "Legal Change in Unchangeable Law: The Talmudical Pattern", in *Legal Change, Essays in Honour of Julius Stone*, (Sydney, 1983).

** Deputy President Emeritus, Supreme Court of Israel.

This aspect of the contribution which divine law has made to the evolution of human law has, Grotius notwithstanding, been sadly neglected. Elaborating a little further on the Grotian proposition, the point is that human lawmakers should take their lead from the divine lawgiver both as to purposes and as to the limitations of legislation. As far as purposes are concerned, Written and Oral Law both abound, of course, with statements describing objects and reasons of particular legislative norms, which may well serve even present-day needs; but I shall not at present go into these. I am concerned with the limitations of legislation, or, to be more exact, with one most fundamental limitation, namely, that all legislation must be subject to changes, and that law and immutability are mutually exclusive terms.

How can you learn changeability from divine law which, by its very nature, must be immutable? In the case of the Torah, its unchangeability is not just implied by its divinity: it is elevated to the rank of an explicit and binding norm. The Bible contains a good many exhortations to the effect that the Law is being given for evermore and shall be binding on all generations to come; and such statements are reiterated in abundance also in apocryphal literature (for instance, *Jub.* 33:16: "everlasting laws for everlasting generations").

Philo Judaeus commented adversely on the laws of other peoples, which had to be changed and amended time and again, and praised the Mosaic Law as the only one which had proved durable and had needed no change since the day it was first given, "as if impressed with the seal of nature"; it will continue in unabated force "for all times to come and remain immortal, so to speak, so long as sun and moon and heavens and the universe subsist".[1] Very similar sentiments were expressed about the same time by Flavius Josephus: "Other nations consider it an advantage not to stay on with old traditions, and whoever aspires to the farthest-reaching progress is considered the wisest ot men. But we hold those to be prudent and virtuous who stick both in deeds and in thoughts to the ancient laws – and surely there can be no better proof of the excellence of our laws than the lack of need to amend them. Being convinced that the laws a priori express God's will, it would

[1] *Vita Mosis* II 14–15.

indeed be ungodly ever to deviate from them. Who would dare to change them? Who could ever devise any law more just and perfect?"[2]

And Jesus is reported to have preached: "Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled": *Matt.* 5:18; "And it is easier for heaven and earth to pass, than one tittle of the law to fail": *Luke* 16:17.

The *Halakhah* was finally settled in the Maimonidean Code as follows:

> It is explicitly and clearly laid down in the Torah that its laws stand for ever and evermore: the Torah suffers no change, no diminution and no addition; for it is written, 'Ye shall not add unto the word which I command you, neither shall ye diminish aught from it' (*Deut.* 4:2, 13:1); and it is written, 'Those things which are revealed belong unto us and our children for ever, that we may do all the words of this law' (*ibid.* 29:28); hence you learn that all the words of the Torah are binding on us in eternity.[3]

And it is one of the Maimonidean Articles of Faith that the Torah now in our hands was given to Moses and will never be replaced, nor will there ever be any other Torah from God.

But God revealed Himself not only directly, as on Mount Sinai: various other modes of revelation are described in Scripture, more particularly that which comes through the mouths of God's prophets. It was God's own promise that He would raise up prophets in Israel and put His words in their mouths (*Deut.* 18:15) – if only because the people had asked to be excused from ever having to confront a direct divine revelation again and God had deigned to grant them this request (*ibid.* 18:16–17). Now the promise to raise prophets and divinely inspire them is followed by the command: 'Unto him (the prophet) ye shall hearken' (*ibid.* 18:15) – which was interpreted as vesting legislative authority in God's prophets and commanding obedience to whatever they may ordain, even in contradiction to the Torah – so long as they would not command to practice idolatry, since by thus commanding they would have conclusively disqualified themselves as God's

[2] *Contra Apionem* II 20–21.
[3] *Hilkhot Yesode HaTorah* IX 1.

prophets (*ibid.* 13:2–4). The competence of the prophets to enact legislation contrary to any law of the Torah was later confined to suspensory or temporary measures only,[4] presumably in order to keep the Torah intact. The restriction to temporary measures is based on the precedent of the prophet Elijah who only once allowed himself, in what he regarded as an emergency, to violate divine law by sacrificing outside the Temple (1 *Kings* 18). Professor Bernard Jackson, in an unpublished paper, surmises that this restriction may have been prompted by the desire to disavow the law reforms attributed to Jesus whose authority as prophetic lawmaker was based on his qualification as miracle-worker (*Deut.* 13:2).

The test of the temporariness of prophetic law appears to lie in the language used by the prophet. If he purports totally to abolish or obliterate any one of the laws of the Torah, then he ought not to be obeyed; but if he commands anything to be done or omitted contrary to those laws without explicitly abrogating them, then he must be obeyed[5] – even though the continuation in force of the divine law would then become purely academic.

It seems a great pity that the forty-eight prophets and seven prophetesses[6] who were reported to have possessed all the necessary qualifications, abstained from exercising their wide legislative powers: presumably they did so for the simple reason that they were not at all aware of the competencies retrospectively, as it were, to be conferred upon them by the talmudical interpretators of Scripture. The only pieces of prophetic legislation preserved to us are laws setting out the powers and privileges of kings (1 *Sam.* 8:11–17, 10:25), statements containing some rudimentals of the law of contracts and conveyances (*Jer.* 32:44), reiterations of the Deuteronomian law (*Deut.* 24:16) against vicarious criminal responsibility (*Ezek.* 18, and 2 *Kings* 14:6), and some amplifications of sabbatical law (*Is.* 58:13, *Jer.* 17:21–22).

Perhaps it was the very scarcity of prophetic legislation that rendered the retrospective widening of their legislative competency innocuous: at any rate, good care was taken by the sages to ensure that in

4 *Yev.* 90b *et al.*

5 *Sanh.* 90a, *Hor.* 4b.

6 *Meg.* 14a; according to Nahmanides *ad Deut.* 18:19, there were 180 prophets; according to *Seder Olam Rabba* 21, there were even many more.

future no pretender to prophetic competency could ever again exercise any legislative power. The words concluding *Leviticus*, "These are the commandments which the Lord commanded Moses for the children of Israel on Mount Sinai", were taken as the authority for the talmudical rule that "no prophet is any longer allowed to (or, in another version, will any more) innovate any new law".[7] Maimonides based the same rule on the verse, the Torah "is not in heaven" (*Deut.* 30:12).[8] There is a talmudical tradition to the effect that later prophets like Haggai, Zechariah and Malachi, rather than innovate new laws of their own, in fact only restated ancient rules or customs which had fallen into oblivion;[9] but even that prophetic craft appears to have ceased. It was Ezra the Scribe who, reading "in the book in the law of God distinctly... gave the sense and caused them to understand the reading" (*Neh.* 8:8) – meaning, according to talmudic interpretation, that he reinstated all the rules of law that had meanwhile been forgotten.[10] Where rules may have fallen into oblivion, it would indeed stand to reason that, short of direct divine revelation, their resurrection may require prophetic gifts. And when it was found that the authoritative translators of the Bible into Aramaic, Onkelos and Jonathan ben Uziel (and more particularly the latter), had added in their translations matters of interpretation and amplification not vouched for in the Biblical text, they were held to have been prophetically inspired or instructed.[11]

Or it has been said that with the destruction of the Temple prophecy was taken away from the prophets and bestowed upon the scholars[12] – a dictum dating from the third century, manifestly extolling the manifold innovations and reforms which the Sages had already introduced into the law. Not only did the Sages claim for themselves and their immediate predecessors some quasi-prophetic status, but they adduced scriptural authority for the proposition that the words of Sages are weightier than the words of prophets: a prophet must first qualify himself by giving "a sign or a wonder" (*Deut.* 13:1), whereas Sages are to

7 *Tem.* 16a, *Shab.* 104a, *Yoma* 80a.
8 *Op. cit.* IX, 1.
9 *Suk.* 44a.
10 *Meg.* 3a.
11 *ibid.*
12 *B. B.* 12a.

be obeyed solely "according to the law which they teach you" (*ibid.* 17:11).[13] Small wonder that when the Sages had taken over, nobody ever again claimed the gift or competence of divine prophecy. There are legendary traditions that the prophet Elijah will one day return to earth and make important legislative pronouncements, especially with a view to clarifying existing obscurities;[14] but it was laid down beforehand that his *novellae* would be binding only if consistent with such customs as may meanwhile have taken root.[15]

Notwithstanding the purported devolution on them of such quasi-prophetic status, the Sages never pretended to exercise any of the powers conferred upon prophets by their own feat of biblical hermeneutics. It was axiomatic for them that, whatever competencies they might arrogate to themselves, they would and could not change divine law: any such change might be fatal to its sacrosanctity and amount to flagrant disproof of its perfection and timelessness. The Sages decided to look to the unchangeable law itself for the necessary authority to amplify or modify it – and if the letter of the law should prove too inflexible to be moulded to their purpose, they would resort to its spirit, which was surely dynamic and alive.

Fortunately enough for the evolution and development of the law, they found in the Torah dicta enough which could be – and duly were – interpreted as opening the door to further legislation. In the context of the rules for adjudication in cases of controversy, it is laid down that "thou shalt come unto the priests, the levites and unto the judge that shall be in those days and inquire: and they shall show thee the sentence of judgment (*devar hamishpat*, lit.: the matter of the law, i.e. what the law is). And thou shalt do according to the sentence... which they shall show thee, and thou shalt observe to do according to all that they inform thee... thou shalt not decline from the sentence which they shall show thee, to the right hand, nor to the left" (*Deut.* 17:8–11). In the Sages' interpretation of the Biblical text, the concluding words – neither "to the right hand nor to the left" – were regarded as emphasising that priests and judges must be obeyed even if the law they teach

[13] *Y. Ber.* 1:4, *Y. Av. Zar.* 2:8.
[14] *Shab.* 108a *et mult. al.*
[15] *Yev.* 102b, *Av. Zar.* 36a.

you is that right is left and left is right.[16] Presumably because of the fact that obedience to judgments rendered in particular cases is already explicitly covered in this and the preceding verse, the commandment of obedience to the law to be taught by priest and judges "that shall be in those days" was held to apply to, and to have been originally and divinely intended for, future pronouncements of a legislative nature.[17]

Much stress was laid on the self-evident fact that future judges and legislators had to be men of "those days", i.e. of their own times: if one had to wait for other legislators like Moses or the prophets, no authorization to legislate would ever be of any avail. It was the legislator who would be available in "those days", whatever his merits or qualifications, who would be clothed with legislative authority meeting Mosaic or prophetic standards.[18] Any inquiry into causes and effects of the deterioration of times appears to be irrelevant to the duty of obedience to whatever laws are the product of one's own times (cf. *Eccl.*7:10: "Say not thou, What is the cause that the former days were better than these? for thou doest not enquire wisely concerning this").

Another verse which was adduced as authority to lay down later law was this: "Ask thy father, and he will show thee; thy elders, and they will tell thee" (*Deut.* 32:7). This verse was chosen by Maimonides as the true source of later legislative authority,[19] though in talmudical sources it figured only as an alternative source.[20] It was said that in the future, "Israel will see and hear from the mouths of the elders as if from the mouth of Holiness".[21] As legislators, the elders had a distinctive advantage over priests, levites and judges, if only because the term could more easily be interpreted as comprising the leaders of the community: the term "elder" was anyway used as synonym for the man who had acquired wisdom.[22] There are some laws expressly designated as commands of the elders.[23]

[16] *Sifre Deut.* 154.
[17] *Midrash Tanna'im* (ed. Hoffman) 103, *Pesikta Rabbati* 3, *Midrash Tanhuma Nasso* 29.
[18] *R. H.* 25a–b.
[19] *Sefer HaMitzvot* A 1.
[20] *Shab.* 21b.
[21] *Sifre Deut.* 310.
[22] *Kid.* 32b.
[23] *Mitzvat Zekenim*: *Suk.* 46a.

Another opening for future legislation was found by some in the report that "statutes and ordinances" were given while in the desert (*Ex.* 15:25), quite apart from the Law revealed to them; and the same expression is thereafter applied to laws enacted by later legislators (*Jos.* 24:25, *Ezra* 7:10) – a clear indication of the legitimacy and validity of humanly enacted as distinguished from divinely revealed law. The "statutes and ordinances" given before the revelation of God's Law were, according to talmudical legend, the *ius gentium* – the Seven Noahide Commandments which are regarded as binding not only upon the people of Israel but upon all mankind.[24] A later commentator regarded these "statutes and ordinances" as the customary laws of civilized behaviour between man and man, which need no divine revelation.[25] There appears, however, to be some difference of opinion as to whether the Noahide laws were not of divine origin: while in talmudic sources it is stressed that they are binding upon mankind because all nations have accepted and customarily observe them,[26] Maimonides postulates their acceptance and observance by the Gentiles by way of conscious and voluntary submission to divinely revealed law.[27] But whether the Noahide laws are properly classified as divine or as customary, the "statutes and ordinances" of human provenance serve the purpose at hand in any event.

Yet a further authorization of future legislative activity has been deduced from the divine assurance that the Torah "is not in heaven, that thou shouldest say, who shall go up for us to heaven, and bring it unto us, that we may hear it, and do it" (*Deut.* 30:12) – which, on the face of it, is but a divine assurance of the immediately operative effect of Written Law, without any expletory or regulatory addenda being required. But the assurance that the Torah "is not in heaven" was interpreted to mean that it is *no longer* in heaven: it is now for humans on earth and no more for God in heaven to legislate. No regard should any longer be paid to such divine or quasi-divine expressions of approval or

[24] Namely, the prohibitions of idolatry, blasphemy, homicide, robbery, incest, and consumption of living animals; and the prescription to administer justice: *Sanh.* 56b.

[25] Nahmanides *ad Ex.* 15:25.

[26] *B. K.* 38a, *Hul.* 92a–b.

[27] *Hilkhot Melakhim* VIII, 11.

disapproval as "heavenly voices" (*Bat Kol*) or other miracular interventions which purport or are intended to set at nought such human legal principles as the majority rule.[28] By another interpretation, the divine assurance that the Torah is not in heaven nor beyond the seas (*ibid.* 30:13) was reversed into its opposite: if indeed, it was said, the Torah is so "very nigh unto thee" (*ibid.*), then naturally you would not have either to ascend to heaven or to go beyond the seas to look for it, but would have to search for it only in your own immediate sphere.[29] As the Torah is not in heaven, it is not the province of stargazers who look to heaven for the law, and as it is not beyond the seas, it is not for scatterbrains diffusing all over the seas, but the challenge to earthbound pragmatists.[30]

A similar exgetic fate befell the explicit biblical prohibition, "Ye shall not add unto the word which I command you, neither shall ye diminish aught from it" (*Deut.* 4:2). The same prohibition is reiterated a second time: "What thing soever I command you, observe to do it: Thou shalt not add thereto nor diminish from it" (*ibid.* 13:1). On the face of it, this is a clear interdiction of legislating either for the amplification of the Written Law or for any detraction from it; and so it was seen by Maimonides, as a matter which "is clear and explicit in the Torah".[31] But Maimonides then had to find some explanation and justification for the Oral Law which constituted a vast body of additions to the Written Law, manifestly contrary to the divine interdiction. Elsewhere he gives that explanation in the following terms: "As the court (of Sages) has power to prohibit a thing which is permitted, and such prohibition will then stand for generations; and as they have power to permit temporarily what is prohibited by the Torah; what is it then that the Torah interdicted, ye shall not add to it, neither shall ye diminish aught from it? It means that nothing may be added to, and nothing detracted from, the Torah for eternity, as if it were Torah itself".[32] At yet another place he enlarges on the subject: "All these Sages were the giants of their times... and all of them were hearkened

[28] *B. M.* 59b.
[29] *Er.* 55a.
[30] *Ibid.*
[31] *Hilkhot Yesode haTorah* IX, 1.
[32] *Hilkhot Mamrim* II, 9.

to by thousands and myriads.... In each generation they made rules to erect fences around the torah... and laid down customs and regulations which were observed and diffused in their times, and wonderful laws which they had themselves deduced from Scripture according to traditional canons of interpretation.... So long as they added commandments by way of regulation [*Takkanah*] or instruction [*Hora'ah*] or prohibition [*Gezerah*], they did not make 'additions' [within the meaning of the divine interdiction], for they did not say that it was God who made these commandments".[33] In other words: if the Sages prohibited what is permitted in the Torah, or permitted what is there prohibited, without purporting thereby to add to or detract from the substance of the Torah – as for instance, for the express or implied purpose of erecting a fence around the Torah, or with the reservation of temporariness – they acted within their competence and were not violating the divine interdiction.

Maimonides' glossator, Rabbi Abraham ben David, forcefully dissented: 'Nothing which they prescribed and prohibited for hedging and preserving the Torah could ever amount to a violation of the interdiction not to add or detract, even though they may have prescribed it for eternity or enacted it as if it were a part of the Torah itself".[34] This blunt approach seems much to be preferred to a solution which might eventually turn on the particular language used or on an often undeterminable legislative intent – even though the legislative intent might perhaps be presumed to conform to Written Law and not to run counter to its interdictions.

It is, however, highly significant that the talmudists themselves – those great and active adders to and detractors from the Written Law – appear to have interpreted the interdiction of additions and detractions as applying to individuals only, as distinguished from any legislative authorities (whoever they might be from time to time). The *actus reus* contemplated by the divine interdiction lay, on this view, in independent action by an individual: adding, for instance, another day or hour of rest to the prescribed days or hours, or detracting from those prescribed; or repeating the performance of a command which the Torah

[33] Introductions to *Mishneh Torah* and to the *Mishnah* Commentary.
[34] Ravad ad *Hilkhot Mamrim* II 9.

prescribed to be performed but once; or otherwise venturing ameliorations, embellishments or curtailments as individual initiatives for individual use.[35] This rather restrictive interpretation of the interdiction left the door wide open for legislative additions and detractions.

Much later, an attempt was made to reconcile this interpretation with that of Maimonides by applying the one to the first and the other to the second of the relevant biblical verses: the first (*Deut.* 4:2) was said to apply to legislation in general, and to address itself to legislative authority, whereas the second (*ibid.* 13:1) was said to address itself to individuals only.[36] But this rather academic, if ingenious, solution was very much in the nature of an afterthought. The talmudists themselves clearly did not regard the divine interdiction of additions and detractions as an obstacle to their legislative activity, having relegated the interdiction to the precincts of individual conduct.

Yet another fortification of their legislative authority was found by the talmudists in the Psalmist's "It is time to act for God: they have broken your law" (*Ps.* 119:126). This verse lends itself to at least two interpretations: it may mean, on the one hand, that it is time to act for God because His laws have been broken; or it may mean, on the other hand, that God's law is or may be broken when it is time to act for God.[37] The construction adopted for our purposes was that divine law may be deviated from whenever that may be necessary to meet an emergency,[38] "the time to act for God" being interpreted as a situation which required legislative intervention to avert any danger to public or religious order.[39] The concept of an emergency situation was eventually so diluted as to leave it practically to the discretion of the authority concerned to determine the circumstances in which any such deviatory legislative action would be required or justified. The saying, "it is better for the Torah (or, according to another version, for one letter of the Torah) to be uprooted than for the Torah to be forgotten in Israel", which was given as a reason for allowing deviatory legislation when it

[35] *R. H.* 28b, *Er.* 96a, *Suk.* 48a, *Zev.* 80–81, *Men.* 40b.
[36] Gaon Elijah of Vilna in *Aderet Eliahu ad Deut.* 4:2.
[37] *Ber.* 63a.
[38] *M. Ber.* 9:5, but cf. *Y. Ber.* 9:7.
[39] Rashi *ad Sot.* 69a and *ad Git.* 60a: "whenever the time comes to enact some law for the sake of heaven, the Torah may for this purpose be deviated from".

was time to act for God,[40] was in another context expanded to read: "it is better for one letter of the Torah to be uprooted than for the Holy Name to be desecrated", or, according to another version, "better uproot one letter of the Torah, if you can thereby sanctify the Holy Name".[41] A desecration of the Holy Name might be caused even where "passers-by would say, what kind of people are these, pretending to be sons of kings and behaving like that"; or "where the nations would say, this is not a people worthy to associate with".[42] Even the danger of this kind of mere public-relations mishap was enough to invoke the authority of the Psalmist for legislating in addition to or in detraction of the Written Law, in such ways as the circumstances of the particular situation might require. Incidentally, this verse in the Psalms appears to be the earliest – and the only scriptural – source of authority to enact emergency legislation modifying or suspending the general law; and, like its modern counterparts, it tended already in antiquity to be interpreted much too widely.

Or, the weighty precedent of Moses having broken and smashed the tablets of stone upon which God Himself had engraved His law, out of sheer fury at the sinfulness of the people (*Ex.* 32:19; *Deut.* 9:17), was taken as an indication that sometimes you have to abolish and smash or quash the law first, before replacing it by better law.[43] When God ordered Moses to hew new tablets, on which He would engrave the law again, He referred to the old ones reminding him that "thou brakest them" (*Ex.* 34:1) – a quite unnecessary reminder, which was taken to convey express divine approval of Moses' having smashed them even though they had contained the divine law.[44] The words of the Preacher, there is "a time to cast away stones, and a time to gather stones together" (*Eccl.* 3:5), were said to find verification in the smashing of the stones of the law, prior to the gathering of new stones for better laws.[45] While there were surely no revolutionary ideas in the minds of the talmudists, they did not shrink from calling in aid God's

[40] *Tem.* 14b and Rashi *ad loc.*
[41] *Yev.* 79a.
[42] *Ibid.* and Rashi *ad loc.*
[43] *Men.* 99b: at times abolition of the Torah may amount to its foundation.
[44] *Shab.* 87a, *Yev.* 62a, *B B.* 14b.
[45] *Deut. R.* 3,13.

approval of the smashing of the tablets of law in order to imply divine acquiescence in their own deviatory legislative ventures.

Indeed, divine approval was a necessary ingredient in the validity and acceptability of all legal innovations. As "heavenly voices" and other like divine manifestations could not be expected to greet each enactment, praises and laudations attributed to God were in fact soon forthcoming from the mouths of the human legislators themselves – some of them clothed in quasi-normative dicta, others just in edifying hermeneutics. He who "despises the word of the Lord" (*Num.* 15:31) is said to be the one who disregards and disavows the Oral Law;[46] and for the purpose of certain criminal sanctions it was laid down that transgressing the words of the Scribes may be more serious even than transgressing the words of the Torah.[47] People were solemnly exhorted to take greater care with the words of the Scribes than with the Written Law, because the commands and interdictions of Scripture are each accompanied by some particular sanction either at the hand of God or prescribed by earthly courts, but transgressors of the words of the Scribes (or, presumably, of those transgressions to which no particular sanctions are attached) will be liable to death,[48] being deemed "breakers of the hedges" whose fate is to be bitten to death by snakes.[49]

A more serious threat of capital punishment is based on the Biblical law by which disobedience to the teachings of priests, levites and judges is punishable by death (*Deut.* 17:12). These "teachings", it will be remembered, were held to include all those interdictions which were introduced by the Sages "to strengthen the faith and to better the world".[50] This capital offence was eventually restricted to cover only the case of the Rebellious Elder – a fully qualified member of the Sanhedrin who dissented from the majority and then instructed or caused the public to follow the minority and discard the majority opinion.[51] It has been said that the offence of the Rebellious Elder – which, according to tradition, has never actually been commited by

[46] *Sanh.* 99a.
[47] *M. Sanh.* 9:3.
[48] *Er.* 21b.
[49] *Eccl.* 10:8 as interpreted in *Av. Zar.* 35a, *T. Hul.* 2:23.
[50] Maimonides, *Hilkhot Mamrim* I, 2.
[51] *Sanh.* 88a–b; Maimonides *op. cit.* III, 4–6.

anybody – was a reflection of the dichotomy suggested between the legitimate pluralism of opinions and the illegitimate pluralism of practices (Menahem Elon); and it is noteworthy that the capital punishment imposed by the Written Law on individual disobedience to orders of courts, was switched by Oral Law to befall legislators whose action might endanger the enforcement of the law established by the majority. The threat to the authority of the legislators posed by dissidents from within was, indeed, much greater than that possibly posed by any individual transgressor from among the public.

Having thus found within the ambit of Written Law ample authority for the assumption of legislative powers, the Sages proceeded to exercise these powers profusely and courageously in all branches of law and ritual. The "divinity" claimed also for the Oral Law may be attributed to it not so much because of any divine inspiration by which the Sages were purportedly moved, as rather because of the divine authority by which they could well claim to be acting. It is, I believe, the unique phenomenon of Jewish law – and by far its greatest contribution to the evolution of law in general – that the divinity of the Oral Law is in actual practice achieved, and freely admitted to be conditioned, by human agencies, operating with human methods for human ends, motivated by human reason and human needs, and ever conscious of human frailties and human limitations. Divinity is not artificially superimposed on the final human achievement, but is actually inherent in the whole process of creation and of change. Adapting the words of the Psalmist (*Ps.* 90:17), we might say that the beauty of the Lord our God was upon the Sages and He made the work of their hands prosper – and so the work of their hands was divine indeed.

EMERGENCE OF THE HALAKHIC LEGAL SYSTEM

Classical and Modern Perceptions

*Meyer S. Feldblum**

The present halakhic corpus was shaped by more than 3500 years of Jewish history and experience. Its future course will be influenced by perceptions concerning the nature of the Oral Law, the interpretive and legislative processes, and the literary history and composition of the major Tannaitic and Amoraic sources, i.e., the *Mishnah*, *Tosefta*, and Babylonian Talmud. In this brief presentation, I should like to delineate some of the ways in which the rabbinate and the yeshivot on the one hand, and university Talmudic scholarship on the other, perceive the halakhic legal system differently. The future of Jewish law will be greatly determined by the success of those in the scholarly world, including those in the law schools, in bridging some of these differences.

Jewish law is primarily the preoccupation of three groups:

1. the Orthodox rabbinic community, its courts and yeshivot;
2. the Talmudic scholarly community associated with university Talmud departments; and
3. Jewish Law departments in law schools.

While there are methodologies and perceptions that are common to all three, there are also significant areas of tension. The questions we must ask are: what are the differences that can be eliminated, which

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differences are unlikely to be reconciled, and what are the implications of these varying differences for the future of Jewish Law?

In dealing with any topic in Jewish Law, one must generally be concerned with two distinct issues:

a. The literary history of the sources of Jewish Law; i.e., one must be aware of the history, formation, and composition of the *Mishna, Tosefta, Midrashei Halakhah* and the Babylonian Talmud, and their subsequent textual history;
b. The history of the laws within these sources. The literary sources are likely to have originated between the first and fifth centuries,[1] while the laws themselves may often have had earlier origins. They may be products of tradition, Pentateuchal interpretation, Rabbinic legislation, or evolved customs.

In reference to the second issue, the history of any given halakhic rule, the rabbinic world and the scholarly world differ substantially in their points of departure. The rabbinic world follows the Midrash which states:

> Why is *shmitah* particularly mentioned in association with (the giving of the Torah) on Mount Sinai? Were not all the precepts proclaimed there? Just as all its rules and minutiae were declared there, so also were all rules and minutiae declared there.[2]

This statement implies that all details go back to Sinaitic tradition, except when the sources themselves make it clear that the details are products of legislation or custom. This approach minimizes the value of investigating the historical and socio-economic forces that may have been important factors in the shaping of the *Halakhah*. Naturally, one would not pay much attention to new social realities that may affect the halakhic process if all the details of the *Halakhah* were already given at Sinai.

[1] Tannaitic literature, i.e. *Mishnah, Tosefta* and *Midrashei Halakha*, was reaching this final form of composition by the end of the third century. Talmudic-Amoraic sources were being formulated up to the end of the fifth century. However, a great amount of material from the Saboraic and Gaonic era was intentionally or inadvertently inserted into the Babylonian Talmud up to the end of the eighth century.

[2] *Sifra* to *Lev.* 25:1.

In contrast, the scholarly world, most of whose members in fact belong to Modern Orthodoxy, perceives Jewish Law as evolving during many phases of Jewish history, with a potential for a continuing process. Thus, for this group, historical and socio-economic factors are important and worthy of study and analysis.

On this issue, there is a good chance that the difference in assumptions and perceptions can be narrowed. Maimonides states unequivocally[3] that any law about which a controversy is recorded cannot be of Sinaitic tradition. He goes even a step further and states in his *Sefer haMitzvot* (*Shoresh Bet*) that unless we have convincing evidence that Talmudic sources considered a law to be Sinaitic, we may consider it derived by either legislative or interpretive methods. Even Nahmanides, who disagrees vehemently with Maimonides on some of these issues, supports Maimonides on this point. Moreover, it is interesting that Maimonides himself begins his discussion of the Oral Law by quoting the famous *Midrash* cited above.[4]

In light of the above, we may conclude that according to Maimonides and Nahmanides, more than 90% of the Oral Law as we know it today is a product of our halakhic process.[5] Once this view is accepted within the present-day rabbinic world, the rabbinate could perhaps more easily assimilate the results of modern scholarship.

In reference to the first issue, the literary history of the halakhic sources, let me take the varying perceptions of the Babylonian Talmud as an example. The difference between the classical and modern views has important implications for the future of Jewish Law.

In rabbinic circles, the Talmud is perceived as a carefully edited work by the two great sages of the fifth century C.E., Rav Ashi and Ravina. One should note, in this context, that the anonymous segments in the Babylonian Talmud exert an enormous influence, for we use the Tannaitic and Amoraic sources as understood and at times as corrected by these anonymous commentators.

Talmudic scholars, however, see the picture differently. In their view, material continued to enter the Talmud for about four hundred

[3] *Hilkhot Mamrim* XI.
[4] Maimonides' introduction to his Commentary to the *Mishnah*.
[5] Those laws that Maimonides considers to be of Sinaitic origin he identifies as such.

years after Rav Ashi and for about three hundred years after the last Ravina. A large percentage of this anonymous material became part of the very fabric of a Talmudic *sugyah* (discussion), while some of the material appears to be barely integrated commentary. When separated from the core of the *sugyah*, these comments would constitute the "Rashi" and the "Tosafot" of 450–750 C.E.

The recognition of this status of "anonymous material" provides a different approach to the analysis of any *sugyah*. The two methodologies, the rabbinic and the scholarly, are unlikely to be fully reconciled. However, the differences may perhaps be narrowed significantly. Through scholarly research, there is cumulative evidence that some Gaonic writers, as well as Alfasi and, particularly, Maimonides, used Talmudic sources as if they were aware of this phenomenon. Thus, they quite often disregarded the implications of the anonymous Talmudic *sugyot*.[6] It is true that Maimonides considered the "end" of the Talmudic period to be the end of the fifth century. We have no explicit statement of his views on the activities and status of the sixth, seventh and eighth century writings that entered the Talmud.

There are basic differences in the rabbinic and scholarly worlds about the composition of each of the Tannaitic, Amoraic and early Gaonic sources.[7] Thus, there are different perceptions about their proper usage for halakhic and historiographic purposes. A better understanding within each of these worlds of the differences between the two could help bridge the gap between the rabbinic and scholarly viewpoints and reintroduce some dynamism into the halakhic process.

I should now like to examine two topics:

1. annulment of marriage, and
2. qualification of women and non-observant Jews as witnesses in marriage and divorce.

In each of these topics, I will illustrate how different lines of analysis resulting from different premises lead us in different halakhic directions.

[6] See M.S. Feldman, "The Impact of the 'Anonymous Sugia' On Halakhic Concepts" in *Proceedings of the American Academy for Jewish Research*, XXXVII (1969), 19–28.

[7] For an introductory discussion of the composition of these sources see the relevant entries in the *Encyclopedia Judaica*.

Nature and Scope of Annulment of Marriage

Various situations in Talmudic literature either explicitly state or implicitly assume that an annulment of a marriage has taken place. Inspired by these sources, many proposals have been made that we try to solve our unfortunate *aggunot* problems (e.g., where husbands disappear without a trace, or recalcitrant husbands refuse to obey court orders to divorce their wives) by granting a marriage annulment. Is this approach halakhically feasible?

Marriage annulment was not explicitly formulated until the beginning of the fifth century C.E.;[8] however, it may be traced implicitly to as early as the Second Temple period.[9] The situation where the Talmud uses the term annulment or may be implying it can be classified into three models, with one noteworthy principle evident in each model.

> ***Model 1 :*** Improprieties existed in the betrothal or marriage procedures, e.g., the man used intimidation or coercion with the woman. Though technically the marriage may have been valid, the sages often invalidated such marriages with the power of annulment.[10]
>
> ***Model 2 :*** Under certain circumstances, bills of divorce should have been invalid. However, for various reasons, the sages granted them validity, backed by the principle of annulment.[11]
>
> ***Model 3 :*** There is testimony by unqualified witnesses that the husband is dead. In cases of marriage and divorce, there is a fundamental requirement that two qualified Jewish men serve as witnesses. After a protracted controversy at the end of the first century C.E., the law slowly moved towards deeming sufficient just one witness, and finally even a non-qualified witness such as a

[8] It is recorded in the name of Rav Ashi (d.427), *Yeb.* 110a, and in some other tractates as indicated in the margin *ad locum*.

[9] See the last *Mishnah* in *Yeb.* According to some commentators the acceptance of one witness is predicated on the principle of annulment. See Rashi to *Shab.* 145b.

[10] *B.B.* 48b and *Yeb.* 110a.

[11] *Gitt.* 33a.

woman, a minor, or at times even a non-Jew. Some post-Talmudic commentators consider the law to be supported by the principal of annulment.[12]

What is noteworthy in all these models and cases is that the annulment is never publicly declared or even known to the parties involved. In Model 1, the general perception is that marriage under duress is not valid. In Model 2, the woman has a bill of divorce, and she is considered a divorcee. In Model 3, the husband is presumed dead and the woman is declared to be a widow. In all cases, the annulment is well disguised or not even applied. In no cases does the court invalidate a marriage outright or grant a bill of divorce on its own.

As time went on, rabbinical courts would not move to new models, and there was even a tendency not to apply marriage annulment to any new cases within the accepted three models. There was a feeling that contemporary courts could not expand on Talmudic traditions.[13] That is the perception that currently holds sway in rabbinic circles. In contrast, the talmudic scholar, attuned to the legal and literary history of these models' evolvement, and of the cases within these models, sees the legitimacy of introducing new cases within these models and even of forming new models given the same circumstances that generated the emergence of the Talmudic models. It is essential to be aware of the premises of the rabbinate and of the boundary lines that it believes it can not safely cross. Dialogue and discussion may indicate that the boundary line can be safely redrawn, or that it is rather unsafe at the present lines.

Unqualified Witnesses

The problem of qualified witnesses is creating many complications and is a source of increasing tensions in the contemporary Jewish community. The issue of marriages, divorces, and conversions as well as the issue of the ordination of women within the Conservative movement is centered on this issue: the qualification of witnesses in

[12] See note 8.

[13] For cases of annulment in post-Talmudic times, see A.H. Friedman, *Seder Kiddushin V'Nissuin* (Jerusalem, 1945).

marriage, divorce and conversions, and the personal qualifications required to be a member of a *bet-din*, a Jewish court.

In the Pentateuchal law, nothing is mentioned about qualifications to be a witness. A witness is obligated to give testimony, and he should be thoroughly cross-examined to assure his truthfulness.[14] In the Tannaitic sources we find a list of people who are to be disqualified as witnesses.[15] These are categories of people whose truthfulness in the given case is suspect. The Talmud subsequently provides hermeneutically supported exegesis of Biblical verses for the disqualification of these witnesses.[16] This exegesis caused many commentators to consider the disqualifications as Pentateuchal in status and authority as well as possibly in origin.

It appears that Maimonides had a definite approach in classifying such laws. If no echo of controversy was found, and the exegetical process was convincing, he would assume that the law was derived exegetically and was thus not necessarily of Pentateuchal origin. If the exegetical process was not convincing, he would lean towards considering the law old tradition and very likely of Sinaitic origin. If a trace of controversy was apparent, he would consider the law as being either exegetical or legislative in origin.

Given this approach, it is clear that each category of disqualified witness must be examined separately to determine its proper origin.

In conclusion, may I suggest that the first stage of assimilating the methodology and findings of modern Talmudic scholarship is the full appreciation and application of this scholarship in the seminar papers, dissertations, and faculty output of the Jewish Law departments in the law schools. Then, with time, much of this will enter into general rabbinic circles.

One must emphasize the danger that a great deal of rabbinic literature and atmosphere is becoming alien to university trained scholars. Unitl a hundred years ago, all of our great minds were in the yeshivot and rabbinate. There was hardly a problem that was not noticed or sensed. However, since these minds operated under different premises

[14] *Lev.* 5:1, *Deut.* 19:15–18, *Ex.* 23:1.
[15] *M. San.* 3:3–4.
[16] *Sanh.* 27b–28a.

and guidelines, they were often forced to what Talmudic scholars may consider unacceptable solutions or conclusions. Consequently, the understanding of the new premises or findings of Talmudic scholarship is essential for the future of Jewish Law.

EXTENSIVE AND RESTRICTIVE INTERPRETATION

*Norman Solomon**

Any attempt to describe rabbinic legal reasoning must somehow account for the *middot*. The lists of *middot* which occur in early rabbinic writing are the first attempt we know of to enumerate and characterize the modes of inference from Scripture.

Daube[1] and Lieberman[2] both saw clearly that the *middot* are not principles of logic, and that Schwarz[3] and others erred in contending that they derived, perhaps through Shemayah and Avtalyon, from the Aristotelian syllogism. Such links with Greek thought as may exist were rather with the Alexandrian commentators and rhetoricians. Aristotle himself[4] distinguished cleary and emphatically between logic and rhetoric, syllogism and enthymeme. A further distinction between rhetoric and hermeneutics is important, and it is to the latter category that the *middot* belong.

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1 D. Daube, "Rabbinic Methods of Interpretation and Hellenistic Rhetoric", *H.U.C.A* 22 (1949), 239–264. *Id.*, "Alexandrian Methods of Interpretation and the Rabbis", in *Festchrift Hans Lewald*, (Basel 1953) 27 ff.; *Id.*, "Texts and Interpretation in Roman and Jewish Law", *Jewish Jour. of Sociology* 3 (1961), 3–28.

2 S. Lieberman, *Greek and Hellenism in Palestine* (Jerusalem, 1962), 47 ff.

3 A. Schwarz, *Der Hermeneutische Syllogismus in der Talmuidischen Literatur* (Karlsruhe, 1901).

4 Aristotle, *cf. Analytica Priora* 70a and *Rhetorica passim*.

Little attempt has been made to describe the development in the use of *middot* beyond the tannaitic period; there has, indeed, been a tendency to regard the system, or at least its specific versions, as arising fully-fledged from the brain of select individual *tannaim* such as Rabbi Ishmael. The dating of talmudic texts and the establishment of the correctness of their received attributions being so problematic, this failure to perceive the growth of the system is not surprising. Michael L. Chernick's[5] recent study, based on form criticism, of the use of *kelal uferat* and *ribbui umi'ut* is thus warmly to be welcomed, though regrettably it was not available in time to be taken into consideration fully in the present study. The work is important not only within rabbinic studies themselves, but also in assessing the historical links, if any, between rabbinic and other systems, for instance, between Jewish and Hellenistic or Roman thought. Both Lieberman and Daube commit errors which arise from the failure to establish correctly just when and where which particular Hellenistic rhetor, Roman jurist or rabbi actually formulated the idea or principle under discussion.

Here I propose to make some observations about a particular group of *middot*, those relating to the interpretation of general and specific terms. These are sometimes expressed in a terminology revolving around the words *kelal* and *perat*, sometimes in that built around the words *ribbui* and *mi'ut*. Similar stages of development could certainly be shown in the use of the other *middot*.[6]

Origin of Terminology

A well-known passage,[7] of which we possess several versions, attributes seven *middot* to Hillel, amongst them *kelal uferat* and perhaps also *perat ukhelal*. *Sifra*[8] in a section which has found its way into the daily liturgy, lists no less than 9 *kelal uferat* – related *middot* amongst the nominally 13, but in reality 16, it attributes to Rabbi Ishmael (1st

[5] Michael L. Chernick, "*The Development of Kelal U'ferat U'khelal and Ribui U'miut We-ribbui in the Talmudim and Midrashim*" – a Ph.D thesis (unpublished) at Yeshivah University (1978).

[6] Compare, for instance, the third stage development in the systematization of *hekesh* and *gezerah shavah* as reflected in a *sugyah* such as *Gitt.* 41b.

[7] *T. Sanh.* 7 (end); *Avot de R. Natan* 37.

[8] *Sifra*, Introduction. It may be significant that in *Sanh.* 86a the 'thirteen *middot*' are cited without reference to Rabbi Ishmael.

and 2nd centuries C.E.). Can we take it, then, that the basic *middah* of *kelal uferat* was first formulated by Hillel at the beginning of the first century, and then more than a hundred years later was elaborated by Rabbi Ishmael to include some more exotic forms of inference? An examination of the extant materials relating to Hillel and Rabbi Ishmael fails to support this view. In the admittedly scant sources we have for Hillel's teachings there is not a single instance of his use of *kelal uferat*, whether in those terms or otherwise, though the reports[9] of his debate with the Bnei Bathyra do carry recognizable instances of his use of other *middot*. The materials relating to Rabbi Ishmael have recently been comprehensively studied by Gary L. Porton,[10] who finds that seven of the nine *kelal uferat*-related *middot* attributed to Rabbi Ishmael are nowhere in the sources attributed to him.[11] *Kelal uferat* itself is attributed to him once in *Sifra* on *Numbers*, three times in the Jerusalem Talmud and once in the Babylonian; *kelal uferat ukhelal* is found in his name once in the *Tosefta* and three times in the Jerusalem Talmud. One might add to Porton's findings that nowhere in the *Mishnah* does either word, *kelal* or *perat*, occur in the technical sense in which it is used in these *middot*; one can hardly put this down to the provenance of the *Mishnah*, from the school of Akiva, especially as Porton has shown that the alleged difference in exegetical method between the schools of Ishmael and Akiva is largely illusory.

A close examination of those texts in which Rabbi Ishmael is represented as using *kelal* and *perat* reveals by and large that they do not purport to be authentic statements of Rabbi Ishmael, but rather legitimate uses of an exegetical principle he is said to have propounded. Typical is the *sugyah* (discussion) in *Y. Ter.* 11:2 dealing with the liability of a non-Cohen to payment of the value plus a fifth of *terumah* liquids he drank in ignorance of their status. In justifying the view of Rabbi (E)liezer, who holds him liable, the Jerusalem Talmud suggests the his view coincides with that of Rabbi Ishmael, for an interpretation by *kelal uferat* of *Lev.* 11:34 would support the view that one would be liable for value plus a fifth after consuming *any* liquids produced from

[9] *T. Pes. 4; Pes.* 66a ff.
[10] Gary L. Porton, *The Tradition of Rabbi Ishmael*, 4 vols. (Leiden, 1976–82).
[11] *Ibid.* Vol.4, 201 ff.

terumah. Note that there is no claim here that R. Ishmael himself used the *middah* of *kelal uferat* in this context, or even that he ever spoke about the problem at all. There are other *sugyot* – for instance, that in *Erubin* which we shall discuss at length later – in which the *kelal uferat* inference is important, but which were nevertheless presented in their earliest form without the name of R. Ishmael; the *Erubin sugyah* occurs in *Sifre* and the Babylonian Talmud without Ishmael's name, but in the Jerusalem Talmud with it.

It seems, therefore, that despite the attribution of *kelal uferat* to Rabbi Ishmael and his teacher, Neḥunyah ben Hakaneh, and notwithstanding the tradition tracing it back to Hillel, the actual terminology was not commonly used, perhaps not even coined, until the late second or early third century. Evidently it swiftly became popular. As it was associated with the name of Rabbi Ishmael, perhaps being developed by his disciples, an attempt was made in third century Palestine to attach his name to arguments couched in the characteristic terminology. It is likely that this attempt was made in the Palestinian schools, for scarcely any such arguments are attributed to him in the Babylonian Talmud; even the well-known statement that he used the *kelal uferat* hermeneutic is attributed there[12] to the Palestinian R. Yoḥanan.

The *ribbui umi'ut* terminology is considerably older, at least in the form of verbs rather than abstract nouns, being found in the *Mishnah* and in indisputably early tannaitic materials. It is worth noting, so often is it glossed over, that the traditional view[13] is that R. Ishmael used not only *kelal uferat* but also *ribbui umi'ut*; conversely, we have examples[14] of the attribution to R. Akiva of the use of *kelal uferat* hermeneutics, though these are far fewer than the examples of the attribution to R. Ishmael of the use of *ribbui umi'ut*. Close examination, moreover, shows that those traditions – at least one of them a *Mishnah* – in which Rabbi Ishmael is said to use *ribbui umi'ut* are not only older than the *kelal uferat* ones but present the *ribbui* argument as an integral part of the tradition, not in a form from which it appears, as with the *kelal uferat* instances, that the name of Rabbi Ishmael has

[12] *Shevu.* 26a.
[13] See the references in Meir Ish Shalom's commentary on *Sifra* (Breslau, 1915), 20.
[14] e.g. *Y. Erub.* 3:1.

been grafted on at some stage or that the author is presenting an argument which he puts into the mouth of Rabbi Ishmael but which is not a genuine tradition of the master.

Kelal Uferat, Ribbui Umi'ut – *The First Stage*

We are now in a position to describe the first stage in the development of the *kelal uferat* and *ribbui umi'ut* hermeneutic rules.

Up to approximately 200 C.E. rabbinic hermeneutics had progressed on the whole on nonformal lines, that is, the modes of inference were not themselves formalized. It is unlikely that the terms *kelal* and *perat* were used other than rarely and then only towards the end of the period, though that is not to deny that specific inferences, later formulated in *kelal uferat* terminology, were in fact made earlier. The nouns *ribbui* and *mi'ut* were probably not in common either, though the verbs from which they are derived were certainly part of the rabbinic vocabulary of inference at a much earlier stage; they are "natural" Hebrew terms with which to express the ideas of inclusion and exclusion. But whilst one can easily say "*marbe ani et...*" or "*mema'et ani et...*", the verbs *klal* and *parat* are not so used in second century Hebrew – "*poret ani...*" indeed, would mean "I itemize" rather than "I exclude". Moreover, all four abstract nouns – *kelal, perat, ribbui* and *mi'ut* – tend to disjoin the syntax when they are actually used in the inferential process. Their natural place is not in the process of inference itself, but in *talking about* the process of inference; they are "meta-inferential", a "second-order language" about inference. Hence we need not be surprised to discover that their use beeomes common only after 200 C.E. This is the period of the late tannaitic schools, of which we still lack a comprensive picture. The Ushan period, from about 140 C.E., has been well and often[15] portrayed by the indefatigable J. Neusner as that in which the conceptual basis of the laws received its characteristic mould, and he has recognized the immediate post-Ushan period as one of systematization. The first half of the third century saw the evolution of the schools who bridge the gap between the *tannaim* and *amoraim*, and I am suggesting that this is

[15] e.g., in J.Neusner, *History of the Mishnaic Law of Purities* (Leiden, 1977) Vol. 22, 294.

the period in which talk *about* inference from Scripture, rather than the actual *making of* inferences, becomes important.

Why should such a change take place just at this time? Whereas the period from 70 C.E. had seen much genuine legislative activity, with scriptural justification mainly in a supporting role, and even at Usha such activity continued while the system was being ordered and articulated, it came to be severely circumscribed upon publication of the *Mishnah* itself. The legislators became interpreters, and there could be no development other than through accepted, agreed modes of interpretation; hence the need to talk *about* ways of interpretation, to name and categorize them, and to form them into an effective tool in their own right for progress in Torah. It is a serious error of historical perspective to view the rabbis of the first and second centuries as being guided and restrained in either legislative activity or biblical interpretation generally by norms, such as the *middot* ascribed to Rabbi Ishmael, which belong to the third and later centuries.

There is ample evidence of the formulation of different vocabularies for expressing modes of inference from Scripture. Albeck[16] has pointed out how consistently the terminology of each of the halakhic midrashim is shaped. He writes: "It should also be noted that the individual terminologies of sections of the *midreshei halakhah* derive not only from their sources, but have been formulated and fixed by the compilers." As a simple example he instances the use of *lehotsi* for "exclude" (as a mode of inference) in *Mekhilta*, and in *Sifre* on *Numbers*, whereas *Sifra* and *Sifre* on *Deuteronomy*, use *perat 1....* He notes how when citations from the *midreshei halakhah* appear in the Talmuds they often lack their distinctive "home" terminology. It would appear, therefore, that the early third century bore witness to the emergence of a number of competing terminologies in which to formulate and describe the processes of scriptural inference. *Kelal uferat*, *ribbui umi'ut*, were the two basic terms which emerged for expressing extensive or restrictive interpretation; though *ribbui umi'ut* had stronger roots in conventional Hebrew usage, the new tendency to the utilization of abstract nouns put the two on a par.

It is important to understand that at this stage the two 'languages' do

[16] H. Albeck, "*Mavo Latalmudim*" (Tel Aviv, 1975), 99.

not necessarily indicate two different inferential procedures, though in the second stage (see below) the attempt is made to distinguish between them as modes of inference. In this first stage, though, it is simply that some schools – tradition instances that of R. Ishmael – use *kelal uferat* language, while others – some instance that of Rabbi Akiva – use *ribbui umi'ut* language.

In view of all this it comes as no surprise that, as Porton has shown,[17] there is little in fact to choose between the extant exegetical traditions of R. Ishmael and those of R. Akiva. Nor, indeed, need we puzzle over the confusion which exists as to the allegiance of others, for instance Rabbi,[18] to one school or another, or raise our eyebrows when the Jerusalem Talmud[19] names Rabbi Akiva as the originator of *kelalot uferatot*! Nor is it by any means necessary to appeal to the distinction between aggadic and halakhic methods of inference in order to explain how it is possible for the 32 *middot* attributed to Rabbi Eliezer, son of R. Jose of Galilee (2nd century C.E.) to include *middot* expressed in each of the languages; at this early stage, the languages were not yet seen as contradictory.

Bearing in mind that at this stage the terms are understood simply as forms of expression to clarify and systematize earlier inferential procedures, we can also see how easily lists would have been compiled of the *middot* used by earlier rabbis, notwithstanding the absence of explicit tradition. In ascribing a list of *middot* to Hillel or other rabbis, the third century teachers were neither reminiscing nor romancing; they were trying to describe, largely in their own language, what sort of inferences their predecessors had made. The increasing complexity of the hermeneutic process was perceptively expressed by them in the attribution of increasing numbers of *middot* to a sequence of generations; seven to Hillel, thirteen to Rabbi Ishmael, thirty-two to the Ushan Rabbi Eliezer son of Jose. The listing is a characteristic activity of this period, perhaps alluded to almost contemporaneously by R. Abbahu[20] in his amiable application of 1 *Chron.* 2:55 to those who "turn the Torah into numbers.... 15 women exempt their sisters-in-law

[17] Porton, *op. cit.* 205 ff.
[18] *Men.* 28b.
[19] *Y. Shek.* 5:1.
[20] *Ibid.*

from levirate marriage, 36 offences in the Torah carry the penalty of excision, there are 13 rules about the remains of a clean bird". Though Rabbi Abbahu's examples are all to be found in our *Mishnah* there are independent grounds on which to consider several of them late incorporations; but exactly who the *sofre sefurot* were who "turned the Torah into numbers" we do not yet know.

In sum, in the first stage a far-reaching innovation occurs in rabbinic Judaism. No longer are we simply making inferences from Scripture, we are considering and discovering *how* we make those inferences, and we are forced to create a new terminology to make such discourse possible. We indicated above that the decline in the legislative freedom and authority of the rabbis was a factor in this move to enhance the power of interpretation, to demonstrate its certainty. In the ongoing polemic with Chistianity in Palestine another factor is to be seen: if only it were possible to demonstrate and establish incontrovertible methods of scriptural interpretation, the Christian claim to scriptural fulfilment could be firmly discredited.

Kelal Uferat, Ribbui Umi'ut – *The Second Stage*

Although we have said that the use of two "languages", that of *kelal uferat* and that of *ribbui umi'ut*, did not necessarily presuppose two basically different systems of inference, the momentum arising from the purely linguistic differences would of itself tend to create differences in the range of application of the rules. That such is the case we may readily infer from a *Tosefta*[21] passage – probably the earliest passage to represent Rabbis Ishmael and Akiva as differing in their allegiance to *kelal uferat* and *ribbui umi'ut* respectively, though neither is presented as exclusively using one or other of the formulae. Commenting on *Lev.* 5:2 the *Tosefta* maintains that Akiva found *kelal uferat* inapplicable to the verse, whereas Ishmael (but some read Simeon!) did apply it.

Only at a much later stage do we find the two formulae regarded as contradictory principles of interpretation. The *terminus a quo* for this position would be the first half of the fourth century, for we find Abbaye commenting on it; however, the difficulty of dating the source

[21] *T. Shebu.* 1:7 (Zuckermandel ed.) 449.

materials means that one cannot definitively rule out a somewhat earlier date.

Let us now examine what is perhaps the main *sugyah*[22] in which an attempt is made to define the precise modes of operation of *kelal uferat* and *ribbui umi'ut*, and hence the difference between them.

Deut. 14 states that the tithe, both of animals and of crops, must be taken to Jerusalem and consumed there. The rabbis refer this passage to the Second Tithe, *ma'aser sheni,* brought in the first, second, fourth and fifth years of the sabbatical cycle. The produce itself need not be taken to Jerusalem, but may be commuted to money, and the money spent in Jerusalem: "There you shall spend it as you will on cattle or sheep, wine or strong drink, or whatever you desire" (*Deut.* 14:26).

There are three terms, or groups of terms, in this sentence. "Spend it as you will" is general; 'cattle or sheep, wine or strong drink' is a string of specific terms; "whatever you desire" is again general.

This verse would seem to be irresistible to anyone wanting to test out a hypothesis about the interpretation of general and particular terms. *Kelal uferat ukhelal, ribbui umi'ut veribbui* – how can one miss it? Yet *Sifre* did miss it, for it uses neither terminology in inferring from the verse that one may buy with one's *ma'aser sheni* money only *peri miperi vegidulo min haarets* – food, drink or condiments made from "fruit that reproduces" (*i.e.*, food of vegetable origin) or "that which is nourished from the earth" (*i.e.*, animal foodstuffs) but not salt or water.

We could not hope to find a better illustration of the way in which third century exponents of the various schools of interpretation worked over the material before them and married it, with or without the bride's consent, to their own systems of exposition. For in passages which must surely date from late in the same century both Talmuds cite what can only be rehashed versions of the *Sifre*. The verse is the same, the conclusion is the same, and it is even expressed in the same idiosyncratic wording – but the terminology of the schools has been subtly woven in. The *ribbui umi'ut* schools – according to the Babylonian Talmud, Rabbis Judah ben Gadish and Eliezer (Eleazar?) – interpret the verse in their own terms, Rabbi Eliezer (or whoever puts the words

[22] *Erub.*27b, 28a and parallels.

in his mouth) concluding that "brine" is excluded from the list of permitted purchases, Rabbi Judah ben Gadish that salt and water are excluded. The *kelal uferat* school – the Babylonian Talmud gives no names, the Jerusalem instances both Ishmael *and* Akiva – interpret in *their* terms, the resulting exclusions ranging from salt and water to such exotica as truffles and locusts. All of them offer recognizable versions of the *peri miperi* summation.

I am concerned here not with the literary development of the *sugya* but with changes in the use and understanding of the *middot*. We can already see one aspect of the second stage of development. No longer are the *middot*, as earlier, merely convenient labels for conventional inferential processes; they have taken on a life of their own, and the unnamed rabbis who use them pseudepigraphically are shaping them into well-defined hermeneutic procedures. The Jerusalem Talmud here is less well-developed than the Babylonian, for it still allows a wide range of interpretation to arise from the use of *kelal uferat,* and thus finds it possible to ascribe its use to *both* Rabbi Ishmael and Rabbi Akiva. The Babylonian Talmud has defined its use of *kelal uferat* in a more circumscribed fashion; it therefore assumes that a slightly different interpretation of the verse, a smaller list of exclusions, could only arise because a different principle of interpretation, to wit *ribbui umi'ut*, was being used.

It is essential, if we are to make sense of the development of talmudic reasoning, to describe the relationship between *kelal uferat* and *ribbui umi'ut* as conceived in the Babylonian Talmud at this stage.

The basic problem faced by the rabbis confronts any jurist, judge or lawyer who is called upon to interpret a text or a statute or to apply a precedent. How extensive or restrictive should his interpretation be? If the text or statute is couched in general terms, which particular instances does it comprehend? If – as in a casuistic system or one where precedent is to be taken into account – specific instances are given, how does one move from the specific instance to a case which is not identical with it in all respects? Every jurist would dearly like to have some rule of thumb by which to make such inferences; the rabbis, devising the *kelal* and *ribbui* rules, were trying to provide just this. They are suggesting that close investigation of the biblical text reveals general and specific – extensive and restrictive – terms, and that by attending

carefully to these terms one can determine just how broad or narrow one's interpretation should be. Imagine three concentric circles. The outermost corresponds to the *kelal* or the *ribbui*; the innermost corresponds to the specific instance or instances, *peratim* or *mi'utim*. The middle circle includes all those instances to which the law should apply; it is of greater radius than the circle which is defined only with reference to the specific instances, but of lesser radius than defined by the law as based on the general term. How do we fix the radius of the middle circle? Here, in the second stage of development, this is still to some extent dependent on the individual interpreter. Nevertheless, one definite indicator emerges; if we interpret with *ribbui umi'ut* language we will define a circle of greater radius than if we use *kelal uferat* language.[23]

The second stage is that in which we see the descriptive vocabularies of the first stage transformed into fairly clearly defined rules for interpretation.

What are the causes of this transformation?

Up to a point, it results from the inner dynamic of the hermeneutic process, that is to say, the tendency of its language habits to consolidate themselves as rules.

The transformation would also seem to satisfy a basic need of the later *tannaim* and their successors. Inference from general rules to specific cases[24] is very much less problematic than that from specific to general, or from specific to other specific cases. The former can often be represented in deductive form, that is, with formal logical validity. The latter can never be represented in this way but always implies the use of some more general rules by which the inference can be justified. Jurists have referred[25] to such general rules as 'second order rules', and they have speculated as to how far such rules can or ought to be incorporated in the law system itself, and how they relate, for instance, to general social or philosophical considerations. Now, in the active

[23] Compare the treatment of the two systems of interpretation as it appears in *Bekh.* 37a/b.

[24] See N. McCormick, *Legal Reasoning and Legal Theory* (Oxford, 1978). 2 and 3 deal with deductive justification, essentially the inference from general to particular.

[25] *Ibid.* Ch. 5.

phase of rabbinic legislation, which we may take as ending at Usha, we find that the rabbis, whether consciously or not, tend to be guided in their decision-making by those ethical, social and political considerations which belong to the realm of 'second order rules'; texts are easily interpreted in conformity with such considerations, though this fact is obscured often enough by the weight of hermeneutic devices later inserted in our source materials. After Usha, however, there is a fundamental change, a reluctance to rely on second order justification, a search for certainty within the received holy text itself. The elevation of the hermeneutic rules to the role of prime justification for textual interpretation fills the vacuum created by the reluctance to argue on the basis of general ethical and moral principle. A rational approach, one which would reach decisions by weighing up circumstances and principles, yields to what is perceived as a safer, rule-based, mechanical one.

Once again one senses overtones of the polemic with Christianity. If Scripture is to be the final court of appeal, the best defence lies in securing the process of interpretation, not in argument on general principles.

Kelal Uferat, Ribui Umi'ut – *The Third Stage*

The third stage focuses on the attempt to make the utilization of the *middot* an exact technique.

The circle analogy in the previous section points to a defect in the technique as it stood at the second stage. The middle circle represents the extension of the law when the terms defining the outer and inner circles have been taken into consideration. But how is one to gauge the distance between the inner and middle or middle and outer circles? A man is taller than a mouse but shorter than a carthorse; this enables us to distinguish him from an ant or an elephant, but how do we know how to relate his size to that of a kangaroo?

The rabbis saw the need to *quantify* the *middot*, to determine exactly the radius of the middle circle – if they could not succeed in this, interpretation, even by means of the *middot*, would retain an element of subjectivity, for one rabbi might interpret more or less extensively than another. They attempted to achieve this aim by grafting into the *middot* their notion of *tsedadim*, "relevant aspects" of particular cases

or caterories in law. Each case (category etc.) has some *tsad* or *tsedadim* in virtue of which it is decided in a particular way.(The relationship between this and *ratio decidendi* should be explored). The concept of *tsedadim* is at least as old as the completed *Mishnah*. For instance, in the first *mishnah* of *Baba Ḳamma*, where the main categories of tortious liability are set out, we read that *hatsad hashaveh shebahen*, their common *tsad*, or operative factor, is that they are likely causes of damage, that the owner is responsible for them, and that if they cause damage the person responsible must make restitution with the best quality land. As well as the *tsad hashaveh*, the common operative factor, the *Mishnah* lists the specific operative factors (it does not actually use the word *tsad*) of the individual categories of liability. It is certainly of importance that the development of the rabbinic idea of the *tsedadim* be studied in depth; perhaps it has been neglected as it is not included in any of the formal lists of *middot*. Jacob's excellent study[26] of the relationship between *binyan ab* and Mill's 'method of agreement' highlights the logical aspects of this form of argumentation, but it needs to be supplemented by (a) a careful historical account of ways in which the technique of investigation of 'relevant aspects' developed, and (b) an assessment of the juristic significance of the concept of *tsedadim*, including its relationship with *ratio decidendi*.

At any rate, we find that by late amoraic times *tsedadim* are being used in an attempt to quantify degrees of similarity between cases; the rabbis are asking, with regard to how many *tsedadim* can we compare case A with case B? The *sugyah* discussed above illustrates this. The question raised[27] is whether *kelala kama davka* or *kelala batra davka;* in a *kelal uferat ukhelal* sequence, which *kelal* is definitive, the first or the second? If the second (the argument goes), the *middah* operates as follows: *perat* is followed by *kelal*, and the rule of *perat ukhelal* is that everything similar to the *perat* in even one respect (*tsad*) is included; the first *kelal* restricts the application of the law to cases that resemble the *perat* in two *tsedadim*. If, on the other hand, it is the first *kelal* which is definitive, the *middah* operates as follows: one starts with *kelal uferat*, and the rule of *kelal uferat* is that application of the law is

[26] L. Jacobs, *Studies in Talmudic Logic and Methodology* (London, 1961), 9 ff.
[27] *Erub.* 28a.

restricted to the instances enumerated in the *perat*; the final *kelal* is instrumental only in extending the application to instances closely similar to the *perat*, that is, to those similar in *three tsedadim* or aspects. Applying the analogy of the circles, we find that they are now conceived as having radii whose lengths are determined as small whole multiples of the length of one standard *tsad*. The innermost circle contains only the cases actually enumerated in the *perat*, the next circle cases which share three common factors with the *perat* (if *kelala kama davka*) or two common factors (if *kelala batra davka*), and the outermost circle contains those cases which resemble the *perat* even in one respect. Beyond the outermost circle lie all those cases which are not thought to resemble the *perat* in any way.

It is significant that though the *sugyah* in *Erubin* applies this analysis only to the *kelal uferat* system, a parallel *sugyah* in *Nazir*[28] applies it to *ribbui umi'ut*. This shows conclusively how late a development is this attempt to graft the *tsedadim* idea into the mainstream system of *middot*. It is not, of course, possible at this stage to assign an exact date to the process. However, it is clear that it was a Babylonian development not earlier than the fifth century. I find no trace of it in the Jerusalem Talmud (though commentators have tried to read it in), and in the Babylonian it occurs in discussion of a ruling attributed to Ravina and is presented in language which is at least late amoraic and possibly saboraic.

There is a high degree of artificiality in this third stage type of argument. Is the quantification of degrees of legal relevance at all a possible enterprise? Can one ever be sure that one has exhaustively enumerated all the operative features in a legal decision, let alone that the maximum allowable number of such features is just four? Surely there should be some system of weighting as between *tsedadim*, for some must be more important than others? As in so many enterprises the search for certainty produces a system which may have inner coherence and consistency but which has broken contact with the outer world in which it is to be applied.

We need not be surprised that after the talmudic period rabbinic

[28] *Naz.* 35b. As in the *Erubin sugyah* this analysis is absent from the parallel Jerusalem passage.

legal development eschewed use of all hermeneutic *middot* other than the *ḳal vaḥomer*; even those authorities[29] who held that in principle all *middot* other than *gezerah shavah* could be applied without a supporting tradition refrained in practice from applying them.

Analogy with the Development of Moral Thought

It might be thought that there is some analogy between the account given here of the development of rabbinic modes of legal reasoning and that given by Lawrence Kohlberg[30] of what he claims is a universal human pattern in the development of moral thought.

Kohlberg treats of three levels of moral development, subdivided into six stages. The three levels are labelled[31] by him preconventional, conventional and postconventional, the last being referred to also as autonomous or principled. Important for us are stages 5 and 6, the subdivisions of the postconventional level. At stage 5 there is an emphasis upon the possibility of changing law in terms of rational considerations of social utility (rather than freezing it in terms of stage 4 "law and order"). At stage 6 logical comprehensiveness, universality, and consistency guide the decisions of conscience. Kohlberg is adamant that stage 6, just because it provides a more adequate basis for moral decision-making, is "more moral"[32] than the earlier stages. However, it is unclear what he means by "more moral" (he dismisses some of the obvious interpretations) other than "providing a more adequate basis for moral decision-making".

[29] *cf. Tosafot Sukk.* 31a *s.v. veri savar.*

[30] Lawrence Kohlberg, "From Is to Ought", in *Cognitive Development and Epistemology*, ed. Theodore Mischel (New York, 1971), 151–235.

[31] *Ibid.* 164, 165.

[32] e.g. at 214 ff. He uses impressive words like *differentiation, integration, prescriptivity* and *universality* (all at 216) to demonstrate the 'formalistic adequacy' of stage 6. But in describing, as sensitively as he undoubtedly does, the ways of *sui generis* moral reasoning of the stage 6 decision-maker, he is surely not showing that the stage 6 individual has finer moral perceptions than people at earlier stages but only that he is better at reasoning out his decisions. H.L.A. Hart, *The Concept of Law* (Oxford, 1961), Ch. 7, has argued for a balance, in law, between formalism and rule-scepticism. But whereas law, as an instrument of social control, depends on the predictability which can only be ensured by a positive body of rules, it is by no means as clear that moral decision-making is enhanced by 'formal adequacy', and it is a 'naturalistic fallacy' to confuse morality with facility to reason about morals.

It might be thought that our move through three stages is something like Kohlberg's move from stage 5 to stage 6. Certainly, the rabbis in the days before the formulation of the *middot* were behaving in a sort of Kohlberg-5 fashion, making decisions which involved the change (they would said interpretation) of law in terms of rational considerations of social utility. Our third stage rabbis might, superficially, be described as acting in Kohlberg-6 fashion. They probably thought they had developed a system both comprehensive and consistent for solving their problems, though they might have been troubled over the application of the word "universal" to their system; they could certainly not have used it as Kohlberg does, for they were dealing with techniques of interpretation and not with universal moral values. Here, indeed, lies the weakness of the analogy with Kohlberg. We are not comparing like with like. Kohlberg is concerned with the development of moral decision-making by the individual; we are concerned with attempts to consolidate a legal system and to derive decisions from it. There is absolutely no reason to suppose that legal systems would or should develop in the same way as the individual human perception of moral values. Indeed, a virtue in one can very easily become a vice in the other. It may be good (I do not in fact believe it is) for the individual to make his decisions by reference to a "universal principle of justice". It would certainly be bad law, and almost certainly bad social policy, for a judge to decide in that way, other than in the rather rare circumstances in which he has to appeal to "second-order" rules because the rule-system does not adequately cover his problem.[33]

Despite the evident superficiality of the comparison there is one significant misconception shared by Kohlberg and the late rabbis. It is the seductive notion that because something is more logical, because it facilitates decision-making, it somehow rises superior to the less organised system, the system in which decisions are hard. Kohlberg is very careful indeed in claiming only greater 'moral adequacy' for his stage 6, not objective moral superiority, a concept which he sensibly avoids handling. But why should he assume that a *formalistic* meta-ethical conception has greater moral adequacy than, say, an intuitive one? It may well be that ethical decision-making – unlike the application of

[33] See, for instance, R. Dworkin, *Taking Rights Seriously* (London, 1977) Ch. 4.

law – is essentially an intuitive process, and it is clear that subjectively at least intuition yields greater certainty than rational decision in accordance with universal principles. Even as an objective procedure rational decision manifestly fails to achieve either agreement or certainty. The rabbis likewise erred in thinking that a self-contained system of legal interpretation would guarantee certainty, correctness or even widespread agreement in Torah-law, and the system was speedily abandoned by their successors. (In fact the system was never utilized significantly, for the very rabbis who devised it used it not for any inportant legislative activity of their own but peseudepigraphically in the elaboration of the traditions of their predecessors. At no time were the *middot* the actual determinants of development in Jewish law.)

One day, perhaps, it may be possible to construct a logically coherent system which will embrace our agreed moral judgments and perhaps another coherent system, related to the former in a simple fashion, which can articulate cleary the laws needed to govern society. Advances in philosophy, individual and social psychology, and certainly neurophysiology will be necessary before this can be done. The danger is that in prematurely constructing a system we will over-simplify and distort the few clear moral perceptions we have. The fifth century Babylonian rabbis fortunately did not in practice reach decisions of any importance by recourse to such contrived techniques as that of the *tsedadim*; such decisions as they made were subjected to other checks. The more elevated Kohlberg-6 scheme of decision by reference to universal principle is, in practice, also constrained by cross-checks; only self-deception can lead a man to think that his decisions are reached by deduction from general, universal moral principles, for in practice he usually proceeds in precisely the opposite way, constructing general principles out of his specific intuitions and being guided in their usually problematic application by those same intuitions.

Summary and Historical Question

Stage One – late Tannaitic – the *middot* are listed in an attempt to describe the processes of inference used by earlier *Tannaim*, whose dicta are reformulated in the new terminologies.

Stage Two – up to fourth generation Amoraic, both Palestinian and Babylonian – clearer definition of the *middot* raises problems of their mutual consistency. Hermeneutic rules rather than general ethical or religious principles have come to dominate exegesis.

Stage Three – late Amoraic, Babylonian, perhaps Saboraic – the grafting of the learning on *Tsedadim* (legally relevant aspects) into the *kelal uferat* and *ribbui umi'ut* systems in an attempt to afford the *middot* quantitative precision.

One would like to be able to relate these developments to developments in, say, Hellenistic rhetoric or Roman law, as Lieberman and Daube have tried to do with regard to rabbinic hermeneutics in general. Lieberman, in fact, having led us to expect links between the *middot* and the methods of Hellenistic commentators and rhetoricians, says nothing about *kelal uferat*. Daube at least attempts to draw some analogies and suggests some tenuous links between Roman lawyers and *kelal uferat* rabbis. A lot has happened in Jewish scholarship since Daube wrote on this topic, however, and I expect he would nowadays readily admit that he was working on a faulty historical basis. His analogies are sound, but we cannot accept them as, for instance, evidence for Hillel's indebtedness for his ideas on *kelal uferat* to the predecessors of Celsus;[34] we can no longer confidently associate Hillel with this *middah*. Experts in Roman legal history may likewise be circumspect about taking at their face value attributions in the *Digest*. When both Roman lawyers and rabbinic scholars have progressed in dating their sources it will become possible to ascertain whether they are actual points of contact, rather than mere analogies, between Roman and Jewish methods of legal argumentation. Indeed, it is already easier to envisage some influence, whether direct or not, of Celsus and other Roman lawyers on late tannaitic developments, which we have seen to be a crucial period for rabbinic exegesis, than to envisage comparable influence in the days of Hillel. On the other hand, one does not expect to find links between Rome and fifth century Babylonian developments.

[34] D. Daube, "Rabbinic Methods of Interpretation and Hellenistic Rhetoric", *H.U.C.A.* 22 (1949), 253.

Law in Changing Societies

THE KIBBUTZ AS A LEGAL ENTITY

*Yedidya Cohen**

Introduction

The *kibbutz* is one of Zionism's most famous creations; there are even those who consider the *kibbutz* Israel's finest social achievement. The late Martin Buber called it "a singular non-failure". By this he must surely have meant that its mere continuing existence for three or four generations and its ability to remain true to basic values are indications of "non-failure" despite the difficulty in ascertaining whether or not the *kibbutz* has succeeded in solving long-range problems. In any case, it is an unusual achievement in a society used to innumerable failures.

The jurist is interested in the *kibbutz* not only from the social aspect, but juridicially and ideologically as well. According to the *kibbutz* canon (recently ratified by all *kibbutz* Movements) five basic points emerge which clarify the juridical status in which the *kibbutz* member sees himself and his framework.

a. The *kibbutz* is the organising of a group for communal living and creation. (In the Religious *Kibbutz* Movement, this community is based on the Torah and fulfilling of commandments.)
b. *Kibbutz* members do not "invest" money in their *kibbutz*, and do not "buy shares". Their investment lies in their partnership in the community and their sharing of the work load.

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c. No "personal" or "private" property exists. The *kibbutz* distributes to every member according to his needs, and according to the ability of the *kibbutz* and its institutions.

d. A member is not allowed to "bequeath" his possessions expect for those things having sentimental value. If he leaves the *kibbutz*, he does not receive part of the *kibbutz* wealth, except for an allotted amount which is based on the number of years of membership, number of children, etc.

e. Decisions made by a *kibbutz* institution or elected committee are binding. However each decision is subject to democratic appeal and the final decision lies in the hands of the General Assembly, where each member has an equal vote. The General Assembly is able to authorise regulations, as well as to change them.

With the foregoing in mind, to which known judicial-social framework is the *kibbutz* comparable?

On the surface, it resembles a partnership, a co-operative in which the ownership of the means of production belongs to the workers themselves. But things are not that simple. Firstly, ownership does not mean only a sharing of the means of production but of all consumer goods as well. (Here, by the way, lies the main difference between the *kibbutz* and the co-operative *moshav*.) Secondly, it cannot be a partnership since members are not "owners" of the accummulated *kibbutz* property.

All of Israel's *kibbutzim* were established with the help of capital provided out of national funds (the Jewish National Fund on the one hand and the Israeli government on the other). In most *kibbutzim*, the loans thus obtained have been repaid over the years. Who, then, are the owners of *kibbutz* property? The answer is simple – the *kibbutz*! From a modern juridical standpoint, there is no problem because the *kibbutz* is an independent legal entity, subject to special registration and amenable to all the legal regulations and rulings of the Knesset.

Does this juridical creation have a source in the *Halakhah*? We believe that it has and would like to present a few ideas and some sources which support this answer.

The Socio-Legal Aspect

It should be noted at the start that the *kibbutz* was preceded by a similar creation earlier in Jewish history, that of the group called the Essenes. The first to describe them was Philo of Alexandria from whom, it seems, Josephus Flavius derived his information. Thanks to the Dead Sea Scrolls, we know much more about the Essenes today. The following is a passage quoted directly from Philo:

> Our lawgiver stimulated many of his pupils to a communal life, These were called Essenes. The decision (of acceptance to the group) was not made according to family lineage but on the basis of one's dedication to good character and love of one's fellowman. The remuneration which each individual receives for his labours is handed over to the person designated as treasurer; the latter, upon receiving the money immediately buys the every-day essentials and provides the group with all the necessities of life. This group, then, live together, dining together at one table, content in their equal lot, satisfied with a minimum and avoiding luxuries. Not only do they share their food, but their clothing as well... and anyone who so wishes may rightfully take whatever he cares to since what belongs to one belongs to all.... Similarly the wealth of the group is considered to be that of each individual. And if someone happens to fall ill, he will receive medical treatment at the expense of the group as well as personal care and attention. This life style of the Essenes was therefore highly praised and admired not only by the common man but by great kings and princes as well.[1]

All the basic principles which we have mentioned in connection with the *kibbutz* are mentioned here: economic partnership, communal ownership, the desire for communal living, being satisfied with a minimum of material goods and distribution of wealth according to the capacity of the group and the needs of the individual.

According to Philo, the source of interest in this way of life is the Law of Moses, and consequently its legal aspects are to be found in the

[1] Cited in D. Rokah, *Pirkei Philon* (Jerusalem, 1976), 140.

Mishnah and *Talmud*. There are several relevant passages in our sources, but I will mention only four.

Par Ha'elem Davar Shel Tsibur

Lev. 4:13–21 tells us that if the whole congregation of Israel commits a sin unwittingly, and the thing is hidden from the eyes of the assembly, the assembly shall offer a young bull for a sin offering and the priest shall make atonement for them and they will be forgiven.

The bull brought as a sin offering by the entire congregation is called *par ha'elem davar shel tsibur*. The offering is made in the event of an error on the part of the Sanhedrin, which has caused the entire congregation unknowingly to sin. This is the first, if not the only, occasion where the *Torah* refers to the entire assembly as a legal or juristic entity. How illuminating, therefore, is the dispute between the Sages in the *Mishnah*:[2]

> Rabbi Meir stated: If the court made a [wrong] decision, and the congregation or a majority of it acted accordingly – a bullock... must be brought. R. Judah said: The twelve tribes bring twelve bullocks [one for each tribe]... R. Simeon said: Thirteen bullocks... one for each tribe, and one for the court.

The dispute is explained by the Palestinian Talmud.[3]

> R. Meir says: The duty lies on the court. R. Judah says: On the *tsibur* [the Congregation]. R. Simeon says: It is the duty of the court as well as the *tsibur*.

What emerges, it seems to me, is that a whole community does not sin unwittingly *just by chance*. The source of the error must lie in the Sanhedrin.[4] Who, then, must bring the sacrifice? According to R. Meir, the entire responsibility is the Sanhedrin's, and the people are only *anusim*, forced to do what they did by a court order. In the Babylonian Talmud,[5] we learn that in such a case, members of the court are considered to be partners, so they bring one bullock

[2] *M. Hor.* 1:6.
[3] *Y. Hor.* 1:8.
[4] See *Torah Temimah* to *Lev.* 4:13 (note 49).
[5] *Hor.* 6a.

together. R. Judah, on the other hand, thinks that the sin of carelessness, of not knowing – and therefore of erring – lies not only in the leadership, but also on the people themselves. Everyone is responsible, and if ignorance-by-negligence is communal, then the offence is communal as well and the sacrifice must therefore be one and communal. According to him, the *tsibur* is defined tribally and so the sacrifice has to be brought accordingly – twelve bullocks one for each tribe. Now we can readily understand R. Simeon's view: The whole congregation, the twelve tribes, are at fault, but no less at fault is the court, the leadership responsible for the transgression, and so all parties have to bring the sacrifice.[6]

Thus, not only were sacrifices offered by the entire congregation in daily Temple worship, in the hope that the Divine Presence would dwell in Israel, but sacrifices were also offered in cases of error or failure. There are occasions when the responsibility is a joint one and therefore the sacrifice has to be brought by the *tsibur*, by the entire congregation.

The Scapegoat Atonement on Yom Kippur

Maimonides writes:[7]

> Because the scapegoat makes *atonement for all of Israel*, the High Priest has to confess over it in the terms of the whole of Israel, as it is said [in *Lev.* 16:21] 'And shall confess over it all the iniquities of the People of Israel.' The scapegoat atones for all the sins in the *Torah*... if repentance is made; but if not, the scapegoat atones only for minor transgressions.

This paragraph is difficult for several reasons. According to Rabbi Joseph B. Soloveitchik:[8]

> Firstly, the first sentence is unnecessary – does Maimonides merely want to teach us the verse from the *Torah*? Secondly, in the

[6] It is worthwhile noting that Maimonides, *Hilkhot Shgagot*,XII 1, ruled on the one hand as R. Judah and charged the *court* with 12 oxen, and as R. Meir, on the other hand.

[7] *Hilkhot Teshuvah*, I,2.

[8] J.B. Soloveitchik *Al haTeshuva* (Jerusalem, 1975), 69 ff.

> preceding rule, Maimonides says that all atonements, such as sacrifices, sufferings... even death do not bring full forgiveness without repentance. How, then, has the scapegoat the power to bring full pardon even without repentance (be it only for 'minor' sins)?

This is not the time or place to examine fully Rabbi Soloveitchik's analysis, but we would like to stress the central point, in the present context. There is a difference between a sacrifice *brought by partners* (*shutafim*) and a sacrifice brought by a *tsibur* (a whole congregation). A partnership-sacrifice has *many* owners – as many as the number of the partners, (this is important, for example, in the matter of *semicha* where all the owners place their hands on the head of the goat) but the *tsibur* sacrifice has just *one* owner – the *tsibur* itself, the congregation, the tribe, the nation. As Rabbi Soloveitchik says:

> The *tsibur*, the whole of Israel, which is not – according to Jewish law, the general sum, the arithmetical summation of so many individuals – but a special unique personality unto itself... The *Knesset Yisrael* is a juridical-individual, an indivisible personality.

And furthermore, he states later, all the above is not only relevant to Temple-rites, but to our ownership of Eretz Yisrael as well. In other words, our relationship to Eretz Yisrael is not a *joint partnership* but one belonging to the whole nation as one integral, unique and indivisible entity.

Hence, the scapegoat in Maimonides' view, is a *tsibur*-sacrifice, a sacrifice of the entire congregation. Atonement on Yom Kippur is effected in two ways; through each individual's repentance and also through the repentance of the People of Israel as one entity. (this also explains the closing sentence of the central prayer on Yom Kippur: "The King of Kings, Who pardons and forgives, our sins and the sins of His People – Israel"). When the individual repents, atonement is dependent upon *teshuvah* but in the case of atonement of the *tsibur* – pardon is not dependent upon an individual's actions. However, if an individual breaks his ties with the general community (for example, by committing a sin which is punishable by death or by swearing falsely by which he severs himself from the Covenant) – then and only then will the *tsibur*-atonement not include him.

We can conclude, therefore, that the entire congregation bears a general responsibility and presents a joint sacrifice not only in the case of an error on the part of the court, but on the promise of atonement and purification as well; Jewish law teaches us that the entire congregation as one integral entity can be considered a "legal personality" in the modern legal sense.

Synagogues in Villages and in Cities

In the Mishnah[9] we read:

> If the townspeople decide to sell the town square, they may buy a synagogue with the money; if they sell a synagogue, they may buy an Ark [in which to place the Scroll of the *Torah*]; if they sell an Ark, they may buy a wrapping [for the *Torah* Scroll]; if they sell a wrapping, they may buy scrolls [other than that of the *Torah*]; if they sell a Scroll, they may buy a *Torah* Scroll.

The idea is that in objects of *kedushah*, holiness, you can "go up but not down", you can sell a city square (which is used for praying in Fast Days only)[10] to buy an Ark, which has more *kedushah* – but you cannot (as the *Mishnah* states further on) proceed the other way: you cannot sell a *Torah* Scroll, for example, and buy an Ark and so on.

In any case, the congregation may sell its synagogue, if it so desires, but both Talmudim – the Babylonian and the Jerusalem – differentiate between a synagogue in a city and a synagogue in a village. The former is not allowed to be sold! It is interesting to see the different reasons given for this rule by each Talmud:

Babylonian[11] R. Samuel b. Nahmani said in the name of R. Yonatan: The rule in the *Mishnah* refers only to a synagogue in a village. A synagogue in a large town may not be sold since people come to it from all over.

Jerusalem[12] R. Samuel b. Nahmani said in the name of R. Yonatan: What was stated [in the *Mishnah*] refers to a synagogue belonging to an individual, but a synagogue belonging to the many *(rabim)* may not be sold. I say that one who lives at the far end of the world shares a part in it.

[9] *M. Meg.* 4:1.
[10] *M. Ta'an.* 2.
[11] *Meg.* 26a.
[12] *Y. Meg.* 3:1.

The Tosafists[13] observe that, according to the Babylonian Talmud, "in spite of the fact that many gave nothing towards the synagogue's construction – it still cannot be sold because it was built with their agreement and knowledge". In other words, because a city is a centre, through which many people pass and use its synagogue, and since the synagogue was built with this function in mind, the local congregation cannot be owner-partners in it, but rather it belongs to the general *tsibur* and therefore cannot be sold. On the other hand, it seems that the Jerusalem Talmud thinks otherwise, for its reason for the prohibition is a "technical" one; perhaps one of the citizens of the city, who is also a "partner" in the synagogue, lives far away, at the "other end of the world", and cannot be reached, and without his agreement a sale may be not be effected. Apparently the Jerusalem Talmud is not aware of the abstract concept of the special legal-personality of the *tsibur*, and sees the city's inhabitants only as partners.

We may note that Rosh, *ad locum*, writes that there is no difference between the Talmudim, but *Or Zaru'a*,[14] observes that the *Halakhah*, the final decision, is according to the Babylonian Talmud – which shows that the Talmudim do differ... Rashba,[15] and also Maimonides and *Shulhan Arukh*, decide according to the Babylonian Talmud and the Tosafot.

About a Torah Scroll of a City

Elswhere in the Babylonian Talmud[16] a *Baraita* appears which rules that "If a Torah Scroll was stolen from the people of a city [and the thief apprehended] the judges of that city may not try him [the accused], nor may its inhabitants give evidence [against him]."

The rule is clear: the judges are interested parties; the scroll belongs to and is used by them, and so they cannot be *objective* as is essential to officers of the law.

The Talmud offers a solution to the problem, by suggesting that the witnesses and the members of the court agree to renounce their ownership in the scroll, thus becoming non-interested and objective, as is necessary. The answer is that the case of a Torah Scroll is different,

[13] *Meg.* 26a, *s.v. Kaivan.*
[14] Cited in *Hagahot Asheri ad loc.*
[15] *Novella* to *Meg.* ed. Demitrovsky (1981), 185.
[16] *B.B.* 43a.

because it is for public reading. And Rashi[17] explains: "one cannot renounce the partnership..., since one uses the scroll to fulfil his duty in hearing the reading in synagogue, unless one moves away to another city, where he will not use this scroll." What Rashi is actually saying is that there is "property" which belongs to the *tsibur*, the general public, and not in any way to individuals comprising that general public as partners, because such property was meant *to serve the general public as such* and not for individuals to enjoy by personal use.

There exists, therefore, a clear halakhic concept of the "legal personality" of the *tsibur* which, existing as an abstract legal personality, can be the owner of property, buy and sell it (except, as in the case mentioned above, a city synagogue) and naturally and most importantly use it.

The late Rabbi Moshe Amiel[18] expanded this idea:

> One cannot say that each of the city's inhabitants has a fixed share, because it is not given especially to these individuals as individuals, but only as citizens of the city, and if they leave the city and others come in their place, the latter will have exactly the same rights as the previous citizens. It is also obvious that if one of the citizens gives his right away – one cannot look upon it as a *Kinyan*, where he "sells" his right to the other citizens – because not only do they not need it, but they have in any case exactly the same right they had before as citizens of the city. The concept ot "Inheritance" is completely irrelevant here, because the children living in the town are citizens in their own right and not as heirs. What we have here then is not a concept of "Partnership" but indeed one of *tsibur*... because something which belongs to the *general public* – rightfully belongs to each individual, not as an individual but as one of the community.

Thus we can understand the connection beween public ownership and the *kibbutz* principle of inheritance. Just as the individual does not own any part of the general property, so he does not have the right to bequeath because it is not his.[19]

[17] *Ad loc.*

[18] In *Jubilee Book in Honour of B.M. Levine*, (Jerusalem, 1940), 300–17, 312.

[19] For a more detailed discussion, see the present writer's: "The *Prat* and *Klal* in

Let us summarise: Using four examples, we have found that a concept of "public ownership" existed in ancient Jewish law, where the public, the *tsibur*, was an independent legal entity, not a partnership of individuals; although all four examples come from the religious-ritual area, they nevertheless substantiate what we really were looking for, the existence of such a concept. Furthermore, a synagogue and a Torah Scroll are clearly property-objects, and though used for ritual purposes, they are still relevant to our discussion of the laws of ownership, and we can certainly use them to draw conclusions about other aspects of public ownership and public property.

It seems to me, therefore, that in attempting to define the *kibbutz* as a "legal creation" according to Jewish law, we can define it as a *tsibur*, an integral-Jewish-congregation, one which seeks to maintain its ownership of public property in its capacity as an abstract legal entity and not as a partnership consisting of the individual person forming the congregation.

The Social-Spiritual Aspect

In addition to legal definition, an important spiritual-theoretical meaning also exists. *Tsibur* in Jewish law is significant in matters of prayer. According to the *Halakhah*, as is well known, certain prayers can only be said in *tsibur*, with a quorum of at least ten adult males (*minyan*), like the *kaddish*, *kedushah*, *bar'khu*, the reading from the Torah, etc. The late Rabbi Kook refers to this in his commentary on the *siddur* (prayer-book):[20] the individual who prays alone cannot but think of himself and his own private interests while praying, and so there cannot be absolute holiness. But with the *tsibur*, even the private materialistic interest becomes a spiritual value; only then can a perfect holiness be present.

In an article in his *Eretz Hefetz* Rabbi Kook states that anyone who occupies himself with the well-being and economic prosperity of the Holy Land – contributes to raising the Land to a higher degree of spiritual and moral holiness.

Halakhah" in *Hayahid v'haTsibur baHayim haDatiyim Shel haKevutsah* (Tel Aviv, 1970). For another point of view, see Rabbe Naftali Bar Ilan, "The Kibbutz as a Partnership and a Congregation in *Halakhah*" *Tehumim* (1980) 414–422.

[20] *Olat Ra'aya*, on the *Kedushah* of the morning prayers. (first ed. Jerusalem, 1930; second ed. Tel Aviv, 1974).

This may perhaps clarify another legal aspect. The *Halakhah* gives the *kahal*, the community, the power to legislate.[21] Legal validity attaches to what the public has altogether agreed upon, and those decisions which were agreed upon democratically bind the entire public including any opposing minority. Whilst, however, these decisions are indeed arrived at democratically, the consent of a great scholar is also necessary so as to ensure that nothing unjust is decided, and the spirit of Jewish law and logic maintained.

The modern *kibbutz* is interested in building an authoritative, powerful community. It is concerned with all the domestic problems, material and spiritual; at the same time it is completely and totally independent – socially, spiritually, culturally and economically. Therefore, it is fully justified to call it a *tsibur*, and thus the ownership of anything which serves the public is in *public-ownership* (as defined above) and not a joint partnership of individuals. This justifies the ruling (in the *kibbutz* canon) which states that a member who leaves his *kibbutz* is not entitled to any part of the general public property, nor can a member bequeath his "share" in that property.

The community is open to any person who wishes to join it, if he meets the necessary conditions and criteria. Once accepted, he is entitled to enjoy everything available to the general public and is equal, in every way, to the veteran members.

In my opinion, this special legal framework wonderfully suits the pioneering mission of the *kibbutz*. From its first days, more than 70 years ago, its mission was to build up and settle the land. It never saw itself reclining comfortably on the grass or sitting in slippers in front of the television. The ideal was never the accumulation of money but a joint creativity, a togetherness in action where the main consideration was the good of the whole society, the entire nation.

Thus we find that the legal definition gives meaning to the inner content, and this, in turn, determines the framework, and everything together is mutually influencing, integrally connected in order to construct a better society.

[21] The source of this power of legislation is a famous passage in the *T.B.M.* 11,23, cited in *Shulhan Arukh Hoshen Mishpat* 163.

THE LEVIRATE AND HUMAN RIGHTS

*Reuben Ahroni**

The levirate institution *(yibbum)* in Israel has undergone a strange development with many convolutions. The laws prevailing today in Israel with respect to the levirate are very perplexing, indeed paradoxical. While *yibbum* per se has been legislated out of existence and is no longer operative in Israel, its painful impact upon certain widows is still strongly felt. The death of a childless husband who has a brother or brothers automatically thrusts his widow into a bizarre situation: her widowhood does not release her from her matrimonial ties. This is so because her childless husband's death immediately puts her in a state of *zikka* ("bond" or "tie") to her brother-in-law, the levir. Unless the latter releases her from this bond through the ceremony of *halitsa*, prescribed in *Deut.* 25:8–10, she will not be legally eligible for remarriage. Thus, the status of such a widow is virtually comparable to that of the *agguna*, a wife whose husband deserted her without divorcing her. In both cases the *Halakhah* does not sanction remarriage. The purpose of this paper is to focus on the salient features of the development of the levirate in Israel and to show that the existing laws pertaining to the levirate are not only antagonistic to basic human rights of women but are also totally incompatible in letter, spirit and purpose with the levirate insitution as originally conceived in Israel.

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The levirate, as has been amply demonstrated by scholars, is not a unique phenomenon in Israelite and Jewish tradition. Indeed, it is widely held that its origins are in pre-Israelite society. Comparable features of the levirate find expression in ancient Semitic jurisprudence, in Assyrian, Hittite, Nuzi, Ugaritic and other ancient laws. Moreover, diverse customs akin to the levirate have long been detected by scholars among widely scattered tribes, particulary in India and Africa. Despite its wide variations in non-Israelite societies, it is generally agreed that the levirate has its raison d'être in the view that a wife is the exclusive property of the family by virtue of the dowry or the brideprice that was paid for her. Hence the family is entitled to inherit her along with the other possessions of her deceased husband. In order to retain the widow within the family's fold, she would usually be given to her brother-in-law, or to his next-of-kin, customs varying with different societies and circumstances.

It should be stressed that the extant sources pertaining to the levirate in ancient Israel (*Gen.* 38; *Deut.* 25:5–10, and the book of *Ruth*) do not reflect a uniform and well-crystallized mode of operation. Rather, they are characterized by variations in details, and in some respects by vagueness and loose formulations. This is particularly true of the two narratives (*Gen.* 38 and the book of *Ruth*) where we are given a glimpse of the levirate in operation. Thus, for example, one may infer from the former that while the duty of the levirate rests mainly upon the brother of the deceased, it may also be performed by a next-of-kin (in this case, Judah, the father-in-law of Tamar). According to the Book of *Ruth* even a far-distant relative (Boaz) may assume the levirate obligation. This and several other differences make it abundantly clear that the levirate either existed in varied forms in ancient Israel or underwent various developments. *Deut.* 25:5–10 may reflect a codification of one of the various customs of the levirate or one of the stages of its development.

Despite the possible pre-Israelite origins of the levirate, the custom as was operative in Israel in all its variations, stands in sharp distinction to that of other societies and cultures both in purpose and motivation. As has been mentioned above, the levirate customs in non-Israelite societies generally drew their justification from the marriage contract which granted the family exclusive authority over the widow. The

emphasis there is on the rights of the living members of the deceased's family. The levirate in Israel, to judge from the three extant Biblical sources, has its social sanction in the motive to raise up an offspring for the childless deceased as a means of carrying on his name. Perpetuation of the name of the childless is, therefore, the main motivation for the levirate in Israel, "so that his name may not be blotted out of Israel" (*Deut.* 25:6). That this is the focal point of *yibbum* is made abundantly clear from the command given by Judah to his son Onan, "Go in to your brother's wife and perform the duty of the brother-in-law to her, and raise up offspring for your brother" (*Gen.* 38:8). Indeed, Onan's resort to *coitus interruptus*, spilling his semen to the ground whenever he went in to his brother's wife, was prompted by his reluctance to raise up a seed which "he knew... would not be his" (*ibid.* 38:9). The motive of the levirate, to beget an offspring for the childless deceased, is reiterated in *Ruth*, where Boaz views the marriage with Ruth as a pious act which will "restore the name of the dead to his inheritance" (*Ruth* 4:5).

While the distinctive motivation of levirate in Israel is to secure a progeny for the childless deceased, the concern for the human rights and protection of the widow should not be overlooked, as these are repeatedly underscored in the pertinent Biblical sources. In several instances the Bible refers to the widow as one example of the unfortunate social categories, extremely vulnerable to exploitation and acts of injustice. Evidently, the lot of the widow of a childless husband was far more pitiful. In the absence of progeny, she was not entitled to any portion of her husband's property. The levirate provides for the widow the care, protection and sustenance needed for her, since a son begotten as a result of her union with the levir secures for her rights in her husband's property. "Spread your skirt over your maidservant," implores Ruth, addressing Boaz, "for you are next of kin" (*Ruth* 3:9). It is noteworthy that among the merits of the levirate Josephus stresses its provision for "the solace of wives under their affliction".[1] No wonder both Tamar and Ruth, fully aware of the redemptive aspects of the levirate, sought to achieve the fulfillment of the obligation, even through crafty and unconventional means.

[1] Antiq. IV, 8,23

Both *Gen.* 38 and *Deut.* 25:5–10 differ from *Ruth* in that they present the levirate as a sacred and mandatory obligation which should not and ought not be evaded or circumvented. Onan's attempt to nullify his duty by resorting to *coitus interruptus* evoked the wrath of God, who brings death upon Onan (*Gen.* 38:10). *Deuteronomy*, which formulates the levirate rites in legal terms, does not inflict the death penalty for evasion of the duty. It does, however, view the refusal of a man to raise up seed for his deceased brother as a grave moral offense. Furthermore, it prescribes for the recalcitrant brother an extremely humiliating public censure, know as the ceremony of *halitsa*. In this ceremony, which is designed to expose and disgrace the unwilling brother, the widow pulls the sandal off his foot, spits in his face and declares, "So it shall be done to the man who does not build up his brother's house" (*Deut.* 25:9). Moreover, the recalcitrant brother is further stigmatized by the label "the house of him that had his sandal pulled off" (*ibid.* 25:10), which would henceforth be attached to his family. It should be reiterated that the *halitsa* ceremony is not conceived by *Deuteronomy* as an alternative to the levirate, or as an escape mechanism from its obligation. Its punitive severity is rather intended to discourage evasion of the sacred duty.

Post-biblical writings (the *Mishnah* and the Talmud) reflect an extensive preoccupation with the topic of the levirate. An entire tractate of the Talmud (*Yebamot*) is dedicated to it. The talmudic approach is characterized by a strong tendency to minimize the number of cases which call for the consummation of the levirate duty. Extensive exegetical resources and rabbinic hermeneutics were employed in order to circumscribe this institution. Thus the tractate of *Yebamot* begins with the enumeration of various categories of widows of childless husbands who are exempt from levirate marriage and *halitsa*. The whole tractate is characterized by its inclination to a wide application of these laws of exemption. Indeed, the levirate institution emerges from the extensive talmudic discussion as a very intricate topic bristling with difficulties. The rabbis' meticulous treatment of the levirate and their strong inclination to reduce its application stem mainly from their grave concern with the apparent discrepancy between *Deuteronomy* and the Priestly Code (*Leviticus* and *Numbers*) with respect to this institution. *Lev.* 18:16 and 20:21 categorically prohibit sexual relationship between

a man and his sister-in-law and label it an incestuous union. This, together with the fact that the Priestly Code makes no mention whatsoever of levirate, give the impression that it legislates it out of existence. Confronted with two contradictory biblical ordinances recognized as equally binding, the rabbis sought to reconcile them by maintaining that both commandments "were pronounced in one divine utterance." *Lev.* 18:16, they contended, lays down the general principle which deems sexual relationship between a man and his brother's wife incestuous. The law of the levirate, they added, applies to the exceptional case prescribed in *Deut.* 25, directed to the specific purpose of raising up an offspring for a childless deceased brother. This, they stressed, is the sole justification of the levirate, and the only case which allows the suspension of the Priestly prohibition. Yet, the grave concern with the possible violation of the law of incest prompted the talmudic rabbis to extensively deal with the complexities of the levirate, to accurately define its terms, and to introduce many modifications into it.

The theological predicament which prompted the curtailment of the applicability of the levirate duty also accounts for those strong reservations which several talmudic rabbis voiced with respect to the fulfillment of the levirate obligation. The present generations, contend the rabbis, are morally defective compared to those of the past. In the past, they claim, the parties contracted the levirate union for the sole purpose of fulfilling a commandment, namely, to raise up an offspring for the deceased. Nowadays, however, they go on to say, the precept is carried out for other motives. The *tannah* Abba Saul [2nd century C.E.] sternly warns: "If a levir marries his sister-in-law on account of her beauty, or in order to gratify his sexual desires or with any other ulterior motive, it is as if he has infringed the law of incest; and I am even inclined to think that the child [of such a union] is a bastard".[2] These anti-levirate scholars, however, could not allow themselves to entirely sweep away a divinely-ordained institution, unequivocably sanctioned by the Deuteronomic legislator. Their strongly antagonistic attitude towards this institution spurred a radical change in their attitude towards *halitsa*. This ceremony which was originally intended to

[2] *Yeb.* 39b; 109a

disgrace and stigmatize the recalcitrant levir was "rehabilitated" and propagated as a commendable escape-mechanism from the levirate obligation: levirs are strongly encouraged to evade their duty by availing themselves the *halitsa* provision. A man should always cling to *halitsa*, taught Bar Kappara, and keep away from *yibbum*,[3] echoing Abba Saul who maintained that *halitsa* always takes precedence over *yibbum*.[4]

The talmudic and post-talmudic views, however, were far from being in agreement on the question. The above discussed positions were strongly contested by other tannaitic, amoraic and gaonic rabbis, who continued to cling to the levirate duty and view it as far preferable to *halitsa*. Indeed the history of the levirate institution in Israel is that of controversy between those who maintained that *halitsa* takes precedence over *yibbum* and those who taught that *yibbum* takes precedence over *halitsa*. The former view was consistently maintained by the Palestinian amoraim, but disputed by the Babylonian academies. The sages of the Sura academy gave preference to *yibbum*, while those of Pumbedita favored *halitsa*. This dispute continued throughout medieval times, with Rashi as a proponent of *halitsa* and Maimonides of *yibbum*. Indeed the literature on this topic reveals varying attitudes, subject to times and regions. In some cases a choice was allowed between *halitsa* and *yibbum*, following Rab's ruling: "If you wish, submit to *halitsa*; if you wish, perform *yibbum*... the choice is yours".[5] In other cases *halitsa* was declared mandatory; in still others – *yibbum* was deemed compulsory. It should be stated that the well-known *takkana* of the tenth-century Rabbenu Gershom, which forbade polygamy, dealt a deadly blow on *yibbum* among Ashkenazi Jewry. Since then *halitsa* has generally been the only permissible procedure among Ashkenazi communities (not so among Sefaradim!). Thus, we learn from the fifteenth century Ashkenazi Rabbi Yehuda Obernik of the Jewish communities that "they and their forefathers kept away from *yibbum*, for it was ugly and repulsive in their eyes." With the establishment of the State of Israel and its absorption of the Sefardi Jewish

[3] *Yeb.* 109a
[4] *Bekh.* 1:7
[5] *Yeb.* 39 b

communities along with Ashkenazim, *halitsa* became the only permissible mode of procedure both in Israel and the diaspora.

As we have stated above, release of a widow of a childless husband can be obtained only through *halitsa* that has to be granted to her by her brother-in-law through a well-defined and prescribed ceremony conducted by the rabbis. Without such ceremony the widow's *zikah* ("tie") to the levir will not be dissolved and consequently she will not be able to remarry. This *zikah* situation virtually puts the widows at the mercy of levirs who have in many cases proved to be greedy and unscrupulous. It should be noted that it is the widow who is put at a disadvantage by the *zikah* bond, not the levir, who is legally permitted to marry, regardless of the bond. The many recorded cases pertaining to this topic indicate that the rabbis are generally reluctant to apply punitive measures to compel levirs to grant *halitsa* and that the widows are encouraged to provide levirs with monetary inducements in order to obtain their release. Such inducement, however, does not work for a widow whose brother-in-law lives in a distant land. The legal status of the widow in this respect is worse than that of the *agguna* (the deserted wife). The latter can obtain a divorce through a *shaliah* (messenger), while the former has to personally confront her levir in a rabbinic court. Subsequently, if the levir refuses to come and grant *halitsa* or if his location is unknown, the widow would remain *agguna* all her life, "until her hair turns grey." In cases where the deceased leaves a surviving brother of minor age, the widow would have to wait until the brother attains puberty (age of thirteen years and one day) when he will be legally eligible to grant *halitsa*.

Study of the levirate institution from post biblical times until the present reveals a most pitiful chapter in Jewish life, marked by the tears and anguish of widows, whose pain of losing a husband is extremely aggravated by *zikah* status and its unfortunate consequences. In the past she was thrust into the centre of the theological dispute between the pros and cons of the levirate marriage; at any rate, the choice whether to marry the widow or to release her through *halitsa* was generally the exclusive privilege of the levir, and the widow had to wait for that decision. Now, with the abolition of levirate marriage, the widow whose brother-in-law lives in a distant land. The legal status of release. The plight of widows in this category, as well as that of the

agguna, has been exacerbated by the successive wars in the State of Israel, which have multiplied the numbers of widows in need for *halitsa* and raised significantly the number of unscrupulous and greedy responses on the part of levirs. True, much has been done by the rabbis to mitigate difficulties by exerting pressure upon the levir and expediting procedures. These actions, commendable as they are, do not, however, solve this basic problem. The misfortune of both the levirate and the *agguna* are still a potential threat to women, hanging over their heads like the sword of Damocles.

What is the solution? In the past some rabbis sought to obviate the complex problems to which women are extremely vulnerable (refusal of a husband to yield to rabbinic ruling to grant divorce to his wife, *agguna*, and levirate) by resorting to the basic idea of the conditional bill of divorce, which, according to a talmudic statment,[6] was operative in Biblical times. The purpose of the conditional *get* or conditional clauses introduced in the *ketubbah* (marriage contact) was to allow the rabbis to declare the marriage of the persons involved retroactively null and void whenever circumstances call for it. This meritorious solution was, however, strongly opposed by rabbinic opinion and has fallen into disuse. The levirate is an anachronistic institution, outmoded, outdated and no longer applicable to our time. Its *Sitz im Leben* was the patriarchal family structure of the ancient Israelite society, as strongly suggested by the casuistic structure of the law, which makes the levirate obligation contingent upon "brothers dwelling together" in one corporate household (*Deut.* 25:10). Moreover, this law evidently presupposes a society where polygamy was permissible. Only in such a society could a brother be called upon to fulfill the levirate duty regardless of his marital status. With the weakening or dissolution of the cohesive family structure, the levirate became less operative. It was optional or ignored, as evidenced in the Book of *Ruth* and in the Priestly Code.

It is difficult to quarrel with the rabbinic understanding of "dwelling together", which renders the Deuteronomic ordinance as binding, regardless of the social family structure. Widely differing interpretations of biblical phrases are not an uncommon phenomenon in Scriptural

[6] *Ket.* 9b

exegesis. But the rabbinic attempt to adjust the law of *Deuteronomy* to that of *Leviticus* is, to say the least, very questionable. The rabbis wished to discharge an obligation to both, and ended by doing injustice to the Deuteronomic law, whose *raison d'être* is the desire to perpetuate the name of the childless deceased by raising an offspring for him through his brother. Admittedly, this is no longer the concern of the rabbis, as evidenced by their antagonism to *yibbum*, ultimately legislating it out of existence. To declare *halitsa* a commendable substitute for *yibbum* is to misrepresent, if not totally undermine, the essential spirit and purpose of the levirate institution. The *halitsa* ceremony is intended to stigmatize the violator of the levirate duty. The label *haluts hanna'al* which is attached to the house of the recalcitrant brother (*Deut.* 25:15) is not a blessing for "performing a *mitsvah*", as the *halitsa* is now conceived, but rather a *curse* directed at discouraging evasions of the levirate obligation. Not to allow the consummation of the levirate duty and at the same time to impose upon the levir the punitive measure, the *halitsa* ceremony, which states, "So shall it be done to the man who does not build up his brother's house," is totally incongruous.

Torah and *Halakha* have never been conceived as a compendium of suspended theoretical absolutes but, as evidenced by the talmudic and post-talmudic rabbinic approach, as a viable system continually responding to changes and contemporary needs. By sound employment of hermeneutic and exegetical resources, the Talmudic and Geonic sages managed to preserve the vitality and relevance of the Torah for Jewish life. Indeed, the source of the strength of the *Halakhah* lies in its capability to safeguard its essential moorings and yet respond to the vicissisitudes and fortunes of Jewish life. Several halakhic laws pertaining to women cry out for reinterpretation and rectification. Orthodox Judaism cannot afford to continue ignoring the new awareness of feminine equality.

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Judicial Process

COMPROMISE

*Haim Shine**

Jewish law, embodying both civil and religious elements, is generally formulated in casuistic as distinct from abstract terms.[1] Nevertheless, it should be borne in mind that Jewish law is not an exclusive product of time and circumstance alone.[2] Underlying the legal system are various opinions, meta-legal principles and beliefs,[3] which are often difficult to point out, since they are buried under a web of legal discussions, exegetical comments and legendary tales,[4] all collected in a comprehensive literature of Codes, Decisions and Responsa.

Here, I would like to illustrate how one legal institution[5] – compromise – while expressing precise meta-legal principles, may consti-

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1 M. Silberg, *Talmudic Law and the Modern State* (New York, 1971) Ch.II.

2 B. de Fries, *Historia Shel ha'Halakha haTalmudit* (Tel-Aviv, 1962), 169–78; I.Z. Kahana, *Mehkarim beSifrut haSheilot vehaTeshuvot* (Jerusalem, 1973) 108–10; Sh. Albeck, *Dinei haMamonot baTalmud* (Tel-Aviv, 1976) 192–97.

3 A. Gulak, *Yesodei haMishpat haIvri* (Berlin, 1923) 5–7; B.Z. Eliash, "*Sharshehah haRa'ayoni'im shel haHalakhah – Perek Bihilkhot Ribit baMishnah ubaTalmud.*" *Shnaton haMishpat haIvri*, 5 (1978), 7–8.

4 M. Elon, *haMishpat HaIvri* (Jerusalem, 1973) 144–46; E. A. Finklestein, "*Midrash Halakhah veAgadot*" in *Sefer haYovel Le Yitshak Ber* (Jerusalem, 1961) 28–47.

5 For a general study, see J.R. Pennock & J.W. Chapman (ed), *Compromise in Ethics, Law and Politics* (New York, 1979) 161–204; D. Fosket, *The Law and Practice of Compromise* (London, 1980). For Jewish Law, see B. Cohen, *Jewish and Roman Law* (New York, 1966) 651–709; J. Bazak, "*Yishuv Sikhsukim beDerech*

tute a powerful instrument in solving problems of the highest order encountered in the modern legal world, such as justice delayed, miscarriage of justice, abuse of judicial discretion and modification of general laws when their universality is not appropriate in particular circumstances.

Aristotle recommended us "to prefer arbitration to litigation – for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity."[6]

This idea has been elaborated by Rabbi J.B. Soloveichick in respect to Jewish law. "In other legal systems, the judge may recommend compromise or arbitration. By doing so he relinquishes the right to settle the case. In Judaism compromise and strict legality are treated equally."[7]

Jewish law is unique in making arbitration and compromise integral parts of legal procedure. Judge and arbitrator, do not stand in contradiction to each other; they are in the Halakhah one and the same.

But first we must clarify the nature of compromise. Compromise is an instrument for settling pecuniary issues[8] between litigating parties. It is generally attained outside of court without recourse to the relevant applicable law. Underlying it is a consensus deriving from the free will of the parties. As explained by the Maharsha,[9] "compromise is reached by mutual will and agreement, as opposed to law, the allegation of which is never waived by the losing party, even though the successful party duly won his case in a court of law."[10] Consequently, a compromise reached due to mistake, duress or coercion, which limits or nullifies the exercise of free will, is treated as being void.[11] In every compromise, there is mutual waiving by each of the parties, the

Shel Psharah baMishpat haIvri" Sinai, 71 (1972), 64–77; M. Elon, *Encyclopedia Judaica*, Vol. 5, 857–59 ("Compromise").

6 *Rhetoric*, I.13 1374b (translated by R. McKeon in *The Basic Works of Aristotle* (New York, 1941), 1372.

7 *Shiurei haRav*, (New York).

8 Meiri, *Beit haBekhira*, to *Sanh.* 6a.

9 Samuel Eliezer Edels (1555–1631).

10 *Hidushei Halakhot*, *Sanh.* 6a.

11 *Resp. R'I Migash*, 152; *Resp. Rambam*, 250; *Resp. Marshal*, 36; *Resp. Maharshdam*; *Even haEzer*, 25.

plaintiff forgoing his claim and the defendant admitting his obligation. This is also the reason why in Jewish law, a compromise requires *kinyan*[12] [an act of assignment or conveyance] even when it is reached in open court. The *Tosafot*[13] explain that *kinyan* is necessary in order to preserve the validity of the compromise.[14]

Compromise is not concerned with revealing objective truth, nor are the parties concerned with the relevant law. On the contrary, by means of entering into a compromise, the parties do not apply the law at all and very often intend to circumvent it.

Despite various defects, compromise carries with it definite benefits, the main one being the amicable settlement of the controversy, something not obtained in a legal judgement. As Rabbi Yehoshua Ben Korhah puts it, "Surely where there is strict justice there is no peace and where there is peace, there is no strict justice! But what is that kind of justice with which peace abides? – We must say: compromise."[15]

The main treatment in the Babylonian Talmud of the subject of compromise is to be found in Tractate *Sanhedrin* which reports a debate between three principal *tannaim* of the second century. Rabbi Eliezer, the son of Jose the Galilean, takes the view that "It is forbidden for the court to effect a compromise... Let the law cut through the mountain,"[16] that is, let the law take its course. At the other extreme Yehoshua ben Korhah is of the opinion: settlement by arbitration is a meritorious act, a *mitsvah*.[17] The intermediate position is taken by Simeon ben Manasya who is of the opinion that compromise is an option open to the court, provided it has not yet made up its mind.[18]

The Talmud rules in the name of Rav[19] that the law is as stated by Yehoshua ben Korhah, that it is a *mitsvah* to compromise.[20] The

[12] *Sanh.* 6a; *Shulkhan Arukh Hoshen Mishpat*, 12:8; *Resp. Ribash*, 148.
[13] The leading Talmudic commentators (French and German) of the 12th and 13th centuries.
[14] On *Sanh.* 6a, *s.v. Tsrikha Kinyan*; Sh. Albeck, *Batei haDin biTkufat haTalmud* (1981) 54–7.
[15] *Sanh.* 6b; Z. Falk, *Erkei Mishpat veYahadut* (Jerusalem, 1980) 66–8.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] One of the most distinguished of the first generation Amoraim.
[20] *Sanh.* 6b.

Talmud further states that it is a *mitsvah* to ask the parties at the outset of the proceedings whether they desire legal adjudication or a compromise.[21] At a much later period, the author of *Shiltei Gibborim*[22] expressed the opinion that even after the close of the proceedings it is still permissible to bring the parties to a compromise.[23]

It may be interesting, both historically and conceptually, to examine the roots of the talmudic debate. From the conceptual point of view one would expect the Jewish religion, based as it is on the norm of divine law, to look askance at the idea of compromise, the outcome of which may actually be diametrically opposed to strict law and may even afford a way to circumvent it. On the other hand, the law, it could be urged, is merely a concrete expression of public or social order which may more effectively be attained by bringing the parties to an amicable settlement, rather then proceeding by litigation.[24]

Asher Gulak[25] and Louis Finkelstein[26] give some historical insight into the Talmudic debate over the legitimacy of the court's intervening to effect a compromise.

The essence of compromise in Jewish law, it should be stressed, is that it is not a mere device. That is made amply clear in the *Braita* Tractate *Sanhedrin*: " 'Justice, justice shalt thou pursue' [*Deut.* 16:20]. The first 'Justice' refers to a decision based on a strict law; the second to a compromise.

On examination, compromise has a special function in four distinct areas –

a. where the relevant law is not altogether clear;
b. where the objective facts are not susceptible to clear determination;

[21] *Sanh.* 7a; Maimonides *Hilkhot Shoftim*; *Sanh.* 22:4; *Shulhan Arukh Hoshen Mishpat*, 12:2.
[22] Rabbi Yehoshua Boaz (16th century).
[23] Rabbi Shabbetai Kohen, *Shakh, Siftei Kohen, Hoshen Mishpat*, 12:6.
[24] See *Derashot haRan*, Ch. 11; J. Albo, *Sefer haIkarim* 3:24; for an opposing view, see *Maimonides, Hakdama LePerush haMishnah* (Jerusalem, 1968) 55.
[25] Gulak, *op. cit.* Vol. I, 5–7; I. Herzog, *The Main Institutions of Jewish Law* (London, 1936), Vol. I, 56.
[26] In his commentary on *Sifre*, *Deut.* 17.
[27] *Sanh.* 32b; *Resp. Maharit*, 85,98; *Resp. Shvut Yaacov*, 2,144; from the aspect of Justice, see Ch. Shine, "The concept of Justice in Jewish Law," in *Jewish Law in Our Time*, ed. R. Salinger (New York, 1982), 45–52.

c. where a strict application of the law would lead to an unjust result; and
d. where, as a consequence of litigation, the controversy between the parties would survive legal adjudication.

A classical example of a case where the relevant law is not altogether clear is given in the Talmud:

> Where two boats sailing in a river meet; if both attempt to pass simultaneously, both will sink [through collision]; whereas if one makes way for the other, both can pass [without mishap].... How then should they act? If one is laden and the other unladen, the latter should give way to the former. If one is nearer [to its destination] than the other, the former should give way to the latter. If both are [equally] near or distant [from their destination], make a compromise between them, the one [which is to go forward] compensating the other [which has to give way]."[27*]

Another and more modern example is to be found in a case that was dealt with by the Rabbinical Court of Tel-Aviv.[28] In an action for divorce, the husband alleged that his wife was a *moredet* (rebellious spouse) and refused to maintain conjugal relations. On the other hand, the wife alleged that her husband was impotent and not capable of having sexual intercourse. The difficulty lay in determining the facts since, according to the Talmud, sexual intercourse is not allowed to be effected in the presence of other people and no direct evidence was avialable. The Court therefore followed the ruling of the *Shulkhan Arukh*, that "the judge has jurisdiction to set down the law in the manner of a compromise... and he is not permitted to refrain from resolving the case."[29] That means that in cases such as these, the court is given the power to compel a compromise solution.[30]

Again, Rabbi Yehezkel Landau,[31] the author of the responsa *Noda*

[27*] *Sanh., ibid.*
[28] *A.* v. *B.* (1961), 4 *P.D.R.*, 267.
[29] *Hoshen Mishpat* 12:5.
[30] *Ibid.*, 12:2.
[31] Poland and Austria (1713–93).

biYehudah, was asked about the will of a widow, under which she left all her property to a woman named Trienalle. Two women named Trienalle appeared, each maintaining that the will referred to her. The Rabbi analysed the facts to find out whether either had enjoyed a preferred status vis-a-vis the testatrix during her lifetime and came to the conclusion that "since the outcome is not at all clear... it is therefore preferable to effect a compromise."[32] There are many other examples of cases that presented difficult questions of interpretation, as a result of which it was necessary to effect a compromise.[33]

Most interesting is the use of compromise in cases where a strict application of the law would lead to unjust results. This is especially important in a context where the law is presumed to be a perfect expression of Divine will and justice.

Rabbi Kook, a contemporary of ours, explains in his responsa *Orah Mishpat*:[34]

> judges should proceed on two levels. Primarily they must choose the method of judgement. If they find the law to be close to the equity of the case, they should apply the law. But if they find the law to be too overbearing... or in conflict with the principles of equity, they should effect a compromise.

A good example of the situation is found in the responsa of Rashba.[35] A man died childless and was survived by a wife and a brother, with whom the widow refused to enter into levirate marriage since she did not find him to be an upright person. Despite the initial *mitsvah* of levirate marriage, Rashba ruled: "even though the widow cannot be compelled to live with a *levir* who is not an upright person, the brother too cannot be compelled to release the widow by *halitsah*, thus the status quo prevails until the parties reach an acceptable compromise."[36]

[32] *Hoshen Mishpat*, *Mahadura Tanina*, 48.
[33] *Resp. Rif* 184; *Resp. Maharit* 112–30; *Resp. Shvut Yaacov*, *Even haEzer* 109, 125.
[34] *Resp.* 1.
[35] Rabbi Shlomo ben Aderet, Spain, 13th century.
[36] *Resp. Rashba* 7, 421.

Another example may be found in the responsa of the Maharshdam.[37] The case before him involved a woman who had received a golden ring as a pledge for a debt owed to her, which was half the amount of the value of the ring. The woman made a will directing the ring to be returned to the debtor gratuitously, waiving the debt owed to her. Her surviving children searched for the ring but could not find it. The debtor sued them for its return. The Maharshdam examined the question from the point of view of the law of wills and reached the conclusion that had the woman known that the ring was lost, she would not have willed it to the debtor. He then continued: "Therefore, it would seem that on the basis of the strict law, the debtor has no ground of claim. However, on the basis of equity, it would be preferable that a compromise be effected."[38]

A large part of currency law is regulated in Jewish law by means of compromise, beyond the strict letter of the law. When the modern system developed and rates of exchange fluctuated, various problems arose in view of the prohibition regarding the taking of interest which might result from the differences in the rates of exchange. Here, too, are to be found numerous responsa illustrating the necessity for compromise, often against the strict law.[39]

Finally, compromise is resorted to in cases where legal adjudication does not finally resolve the controversy between the parties. *Responsa Meshiv Davar* by Rabbi Naftali Zvi Yehuda Berlin[40] reports a dispute which arose in a certain community between a faction which prayed according to the Sefaradi rite and one which prayed according to the Ashkenazi rite. Rabbi Berlin responded that "if the law cannot lead to a peaceful settlement, it is imperative to effect a compromise... and this is what our Sages meant when they said that the Second Temple was destroyed because the letter of the law alone was applied."[41]

In conclusion, it may be said that the institution of compromise in Jewish law is an integral part of the judical process and by means of its

[37] Rabbi Samuel De Modena, Greece, 16th century.
[38] *Hoshen Mishpat*, 98.
[39] Sh. Warhafting, *Dinei Matbeia baMishpat haIvri* (Jerusalem, 1980) 189–97. *Id.*, *Din uPeshara beShinui Erekh haMatbeia* (Jerusalem, 1976).
[40] Russia, 19th century.
[41] *Resp. Meshiv Davar*, III, 10.

sophisticated use, equitable solutions are found for many important legal problems arising out of a regulated legal system. Modern law would benefit greatly if judges were given jurisdiction to move the parties to compromise – and in certain instances even to compel it. If this occurred, much no doubt might be achieved in avoiding delay and miscarriage of justice, sorrowfully witnessed in the practice of law today.

Political Theory

THE CHURCH FATHERS AND HEBREW POLITICAL THOUGHT

*Emanuel Rackman**

For a quarter of a century I taught the history of political theory. During that period I used many different text-books in order to force myself almost annually to revise my presentations to the students. However, in virtually no textbook that I used was reference ever made to the contribution of the Bible to political and social thought. One of the most used text-books is George Sabines *History of Political Theory*. The Jews are mentioned in it once – in connection with Nazi persecution. Dunning was commited to the idea that only the Teutons and Anglo-Saxons had a genius for political science. Nisbet felt that Judaism, unlike Chritianity, was not a universal religion and therefore one should begin one's study of the relationship between religion and community with Christianity. For almost all the writers, political thought begins with the Greeks and the Romans, and Christianity then saved that heritage for the West and transmitted it to the modern world. It were as if there had been no Hebrews and no Bible.

Because of this, one can readily understand why I welcome this international seminar. It is not only the Bible's contribution to the legal systems of the West that warrants study but the Bible's contribution to political and social thought in general – for all law is either the cause or the effect of that thought.

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True, the Bible's contribution to political thought in Christianity's second millenium is acknowledged. All theorists quote it either as conserving the status quo or effecting change or revolution. Similarly in American political and social thought the influence of the Bible is keenly felt. But why was the Bible of so little importance during the first millenium, especially the first five or six centuries?

There was a time when I believed that the writers of the text-books were responsible for ignoring the Jewish antecedents to Christianity and focussing only on the Greek and Roman sources. My research, however, now prompts me to place the blame on the Church Fathers themselves.

A.J. Carlyle in his *History of Medieval Political Theory in the West*[1] also ignores the Old Testament and deals only with the political theory of the New. He concedes that "behind the New Testament there lies the literature of the Old Testament, whether belonging to the earlier history of Israel or to the period between the Exile and the advent of Jesus". He adds that it "is especially in the literature, whether canonical or apocryphal, of this later period, that we have to look for the explanation of many of the phenomena of New Testament theory: unhappily the field is as yet but very imperfectly explored."

I agree with him that there are "obscure and perplexing" questions about the period. But certainly the Church Fathers had the Pentateuch before them and all of it by any criterion was written before the Exile. How can anyone therefore gainsay its influence on the Church Fathers, who, wittingly or unwittingly, engaged in the controversies from which there emerged the fundamental ideas upon which democratic institution were ultimately founded? Why their silence with respect to the Bible?

For example, at least three Church Fathers interpret a passage of the New Testament as supporting the view that Paul must have had some conception of natural law since a few words in the New Testament allude to it. Paul seemed to agree that there is a law written in men's hearts, recognized by man's reason, and distinct from the positive law of the state and the law revealed by God. Why should anyone have doubted that Paul had such a conception? It is abundantly clear in the

[1] (New York, 1909), Vol. I, 82.

Pentateuch itself. Carlyle too suggests that Paul might have entertained the conception because it was part of "the general stock of ideas current among the more educated Jews." But it was current among Jews because it is authentically Biblical.

In the Bible Abraham is described as challenging God when God wanted to destroy the righteous with the wicked in the cities of Sedom and Amorah and Abraham tells God that He may not do so. "Will the judge of all the earth not do justice?" (*Gen.* 18:25). Is Abraham's argument not based on his heart and reason? Or take a passage in Deuteronomy in which we are told that fathers will not be executed for the sins of their sons or sons for the sins of their fathers but everyman for his own crime (*Deut.* 24:16)? Or still another passage in Deuteronomy in which Moses pleads with the Jewish people to appreciate the inherent righteousness of the laws given to them. The laws may have been revealed but only because they came from God does not give them their validity – man's reason by itself can vouchsafe how just they are. What better source for natural law than this! Or a passage in Exodus in which judges are told not to pervert justice by following a majority when it is wrong or favoring the poor in a lawsuit since justice must be blind (*Ex.* 23:2–3).

It is the thesis of this paper that the failure of the Church Fathers to give the Bible the attention it deserved was responsible for a delay of at least one thousand years in the advancement of human rights. In the second millenium, especially during the period of the Renaissance and Reformation, a change took place but during the first millenium it was reliance on the Greek and Roman sources instead of the Bible that impeded the march of mankind to more freedom.

How does one explain the failure of the Church Fathers to make Hebraic political and social thought the basis for their own theories? There are several possibilities. It may be that the Christians were so intent upon establishing the superiority of the New Testament over the Old that they shut their eyes to the mine of material in the Old, and since they found very little in the New Testament that was relevant to political thought they preferred to link whatever ideas they expressed to the Greek and Roman heritage.

Or it may be – as many scholars now claim with respect to other fundamental notions – that early Christians wanted a complete break

with Judaism. They wanted to detach themselves from roots and give the new faith a truly new image. Thus, for example, they substituted a thoroughgoing universalism for Judaism's dialectical tension between particularism and universalism. Or it may be that they wanted to attract the intelligentsia of the pagan world by basing their ideas on Cicero and Seneca rather than disdained Jewish sources. Stoicism was the delight of the then existing intelligentsia. The Bible was not. Or it may be that they so loathed the legalism of Judaism that they preferred to ignore all the Biblical passages that are legal in character and they searched elsewhere for political ideas.

Judaism, Stoicism and Christianity were all committed to the doctrine of the equality of men. In Judaism the doctrine contributed not only to the principle of equality before the law but also to the value of personal freedom as distinguished from slavery. This was not true of Stoicism and Christianity.

The Church Fathers did find in the Bible convincing justification for the equality of men – the fact that all human beings are descended from common ancestors – Adam and Eve.

Augustine wrote:[2]

> It was God's pleasure to propagate all men from one, both for the keeping of human nature in one social similitude, and also to make their unity of origin be the means of their concord in heart. Nor would any of this kind have died had not the first two (the one whereof was made from the other, and the other from nothing) incurred this punishment by their disobedience.

Parenthetically I must point out here that even Tom Paine, in his classic *Rights of Man*,[3] could find no better argument for the equality of men than that God created all of us from one Adam and Eve. He may have ridiculed the Bible but to prove his point he had to resort to the fact that while God created everything in the plural number, he created one Adam and since all of us have our origin in the one source, none can claim superiority in birth.

[2] *City of God*, quoted in Michael B. Foster, *Masters of Political Thought* (London, 1942) Vol. I, 198–199.

[3] T. Paine, *Rights of Man*, (New York, 1954), 42–3.

Judaism and Christianity were united in this conception. Especially Christianity in her commitment to a universal church for all mankind had to stress the equality of men in the eyes of God for ultimate salvation. Judaism was not committed to a universal church. On the other hand, it preferred a multiplicity of nations and languages. And it saw in the enormous differences among people an added reason for admiring God's omnipotence that despite the origin of all men in one man, this differentiation exists.

However, what must surprise one is that the two faiths differed so radically on the issue of slavery, and what is especially surprising is that Christianity was reconciled so easily to the existence of slavery despite the doctrine of equality.

Aristotle justified the existence of slavery because by nature some men are born to be masters and others slaves.[4] The equality of men was not for Aristotle a principle of natural law as it was for the Stoics and Christians. The Church Fathers, however, undertook to defend what they found to be a universal practice, the institution of slavery, and attributed its existence to man's sinfulness. Moreover, the slave was expected to accept his status as punishment and not seek to be free.

For Stoics so to hold was understandable. The Stoics wanted every man to be totally indifferent to his physical condition whether free or slave. Only the soul mattered and no man need feel that his soul was enslaved. But how did scholars who presumably knew the Bible ignore its preoccupation with freedom – its clear, unmistakable preference for the state of freedom? Apart from the many references to the importance of freedom, the Pentateuch prohibits the return of a runaway slave to his master. Even the master's right to property – which according to some lawyers of the period was a principle of natural law – yielded in Judaism to the slave's right to seize his freedom if only he could.

As a matter of fact Augustine repudiates the notion that the precedent of the liberation of the Hebrew slaves in every seventh year (a misreading of the text on his part) might be applied to the case of the Christian slave. Slaves should obey their masters because it is God who has made some to be masters and others servants.

[4] *Politics*, I, 5.

In one of the canons of the Council of Gangrae (362) the anathema of the Church is laid upon anyone who under the pretence of godliness teaches a slave to despise his masters or to withdraw himself from the master's service.[5]

The Church Fathers generally held that the law of Moses was given because men had failed to obey the natural law. Jerome, for example, held that the whole world received the natural law but the law of Moses was given because the natural law was neglected or destroyed.

However, in connection with slavery, the law of Moses seemed to afford them with no guidelines whatever. Instead, they accepted the Stoic doctrine which in a way even glorified the lack of physical freedom because the lack of physical freedom creates more of a challenge for the cultivation of spiritual freedom. This is a far cry from the Hebraic view that a man in physical freedom shall exercise his free will to be God's servant. Without that physical freedom he may be free in his heart but he cannot prove his righteousness as a totally free, self-directing individual.

Once again, the Church Fathers abandoned the position of the mother faith and contributed immeasurably to the rise of slavery in the second millenium and the tragedies that befell the United States because of it.

That Judaism which was committed to the doctrine of the equality of men opted, unlike Christianity, for the elimination of slavery may be due to the fact that, without so stating, it had a limited conception of natural law. It was humanity's loss that this Jewish perspective was not clearly stated and acted upon. In this respect the Jewish point of view was superior to that of the Greeks and Romans although it later became the view of the Roman lawyers.

In Greek and Roman literature two sources for natural law are mentioned – man's reason and the universal practice of mankind. Aristotle specifically includes in natural justice "that which everywhere has the same force and does not exist by peoples thinking this or that."[6] Roscoe Pound[7] speaks of the natural law that is based on pure reason as *a*

[5] See Carlyle, op. cit., 121.
[6] *Op. cit.* I. 2.
[7] *Formative Era of American Law* (1938), 21–7.

priori while the natural law based on the univeral practice of mankind is *a posteriori.* He further states that when legal development was based on the *a priori* – man's pure reason – it was progressive – it liberalized. When it was *a posteriori* – it was reactionary, conservative. Especially was this true in the United States. The Roman lawyers did finally differentiate between the *ius naturale* based on the human heart and human reason, and the *ius gentium* which was based on the universal practice of mankind. And the institution of slavery was justified by the Church Fathers not on the basis of natural law but rather by reference to the *ius gentium*. As a result, the abolition of slavery was delayed for centuries. If Jewish sources had prevailed in Christian thought rather than Roman sources, the situation might have been quite different.

In Jewish law the *ius gentium* was of little importance, if any. Consequently, and especially in connection with slavery, the natural law was all *a priori.*

The rabbis did not call it natural law but it appears again and again in the Bible and in the Talmud in the form of a protest as if asking "Is that just?" The classic instance in the Bible, already mentioned, is Abraham's protest when he heard from God that God intended to destroy cities of iniquity. Abraham's response was, "Will You destroy the righteous with the wicked? Will the Judge of all the earth not do justice Himself?"

In the Talmud it also appears in the form of a protest. "Will *A* sin and the punishment be imposed upon *B*?"[8] The instance which is most moving is the one involving the debate between the School of Shamai and the School of Hillel with regard to a slave who is half slave and half free.[9] This would occur, for example, when one of two partners or heirs emancipated the slave. He could only do so with respect to his half interest. As a result the slave was still bonded to the other partner or heir. The school of Hillel felt that this created no problem. The slave could work three days a week for himself and three days for his master. The School of Shamai protested. "You have provided for the master's interest. But what of the slave? A free woman he cannot

[8] *Mak.* 11a.
[9] *Git.* 41a–b.

marry because he is half slave. A slave woman he cannot marry because he is half free. How is he to fulfill God's will to populate the earth?" Needless to say, if his status does not allow him, because of divine law, to populate the earth, then he is under no obligation to do so. It is God's law that stops him. But the School of Shamai was concerned with the slave's natural right – he is not to be denied his humanity. And the School of Shamai ruled – with the concurrence of the School of Hillel – that the slave should be emancipated totally. He shall give the master who did not want to free him a promissory note to indemnify him for his loss and repayment was to be made by the erstwhile slave – now a freeman.

One may ask why did Judaism accept only the *a priori* natural law while it never permitted the universal practice of mankind, the so-called *a posteriori* natural law, to play any role in its awareness of natural law. To me it seems that in Judaism there is such emphasis on being unlike the Gentiles that what the Gentiles did could never be a criterion for what is just. As everyone knows, the constant repetition in the Bible of the command to be different – never to practice what the neighbors practiced – made impossible resort to what was the prevailing usage in the world at large.

In any event, in Judaism natural law plays an important role but only the *a priori* type – based on the human heart and human reason. The Church Fathers could not possibly have been unaware of it, but it seems that they preferred to rely on the writings of pagans, especially the Roman ones. And instead of moving in the direction of the abolition of slavery as Judaism did, it gave Church support to the institution for more than a millenium.

It may be that if the Church Fathers in the first five centuries of the Common Era had embraced and propagated Old Testament views on natural law and slavery, the institution would not have been eliminated anyway. However, I do not think that this can be said of their failure for a long time to appreciate two other Biblical ideas that lie at the very heart of democratic institutions. One is the notion which may be called the right to question the legitimacy of the exercise of authority. The other may be called the need for the existence of two authorities in society – the temporal and the spiritual – in two distinctly separate persons or institutions.

The first idea was stated very well by the late Professor Jacob I. Talmon.[10] He wrote that when political theorists of the West spoke of oriental despotism they meant that

> the Orient did not know the problem of the legitimacy of power. Power to them was a datum, or fact of nature, an elemental, amoral force to be taken for granted like sunshine and rain, storm and plague. It not always must be tyrannical and malign, it might be as benign as one could wish. But it is given, it is there, and we have to bow to it.

The sovereignty of God and God alone – His being the ultimate source of law and values – required that all authority that is exercised by one person over another must be legitimatized by reference to the Book.

> It is not enough (wrote Professor Talmon) that the law is promulgated by the authority which is recognized to have power to legislate. King, Parliament, sovereign people, even pope and council, must at all times exhibit their credentials in the face of divine or natural law. Natural law, is of course, of the Hellenistic and Roman provenance. Yet it is fair to say that without its being amalgamated with divine law, it would have failed to become the great formative influence that it did.

The Church Fathers did not fathom the revolution that the Bible had wrought – that power must be legitimatized with reference to it. They also did not realize until Gelasius made the point that the Biblical pattern of government calls for a separation between temporal power and spiritual power.

Milford Q. Sibley, in his *Political Ideas and Ideologies*,[11] wrote that "throughout most of their political experience and speculation, Hebrew thinkers repudiate the notion that the priestly and royal function should be exercised by one man. No doubt this separation of functions is in part to be attributed to the very ambivalence with which the Hebrews tended to look at kingship. It is also possibly rooted in a feeling that the priesthood must be independent of direct royal control if it is to be a critic of kingly government."

[10] *The Unique and the Universal* (New York, 1966), 64–90.
[11] (New York, 1970), 20.

The net result of the Biblical insistence that God is the one and only Sovereign is that the legitimacy of the exercise of authority by one man over another may always be questioned; the unlawful seizure of power must be prevented; power must be diffused; and to make possible the challenging of authority the temporal and spiritual powers must be kept separate from each other.

Why did the Church Fathers ignore these ideas and make total obedience to civil government a virtue even if that government is unjust? Why did they reconcile themselves to unjust government as punishment for sin? Of course, they found some Biblical verses on which to rely but the greater weight of the evidence favors Talmon's and Sibley's views as I have quoted them above.

One answer might be that they wanted to put an end to the anarchical proclivities of many Christian sects even as they tried to put an end to the preference of some for communism. This was a period when the Church was trying to become very institutionalized and it had to discourage any ideas that would be subversive of this goal.

The centuries that followed found the popes engaged in major controversies with the kings, many of them bloody. What the Bible had visualized was co-existence with neither having ultimate sovereignty which inheres only in God. Everyone else has only limited authority in a world in which power is diffused so that none will usurp the role that only God has.

To document the theses of Talmon and Sibley would make this essay unduly long. Suffice it for me to submit only a few of the Biblical ideas which support their conclusions.

First, the Bible is unequivocal that the establishment of any state – and even the very constituting of the nation – was the result of a covenant between the people and God. Each party to the covenant assumed obligations. As the rabbis of the Talmud, contemporaries of the Church Fathers, understood it, the covenant obligated God to be bound by His own law. Professor Silberg argued that this meant that God Himself was bound by the rule of law.

Second, all authority was to be exercised pursuant to that law. A king, if appointed, was also subject to it. That he should never forget this he was to have a copy of the law with him all the time.

Third, no king was to be appointed unless the people asked for one.

This is crystal clear from the relevant verses in Deuteronomy. And they were to choose him. The qualifications were set forth in Scripture.

Fourth, the law was exoteric. It must be promulgated and made known to all so that they would be able to know on what basis to question the legitimacy of authority – all would be learned in the law.

Fifth, every person is capable of achieving the gift of prophecy and the people themselves are to judge who is a false prophet and who is a true one.

Sixth, the people were to nominate the persons from among whom Moses was to pick the judges and administrators. (Hooker of Connecticut made this point in one of his sermons).

Seventh, those who rebelled for more authority than was permitted to them were severely punished.

Eighth, those to whom spiritual authority was delegated were to be landless.

Ninth, Moses assigned the spiritual authority to the members of his tribe but temporal authority was given to Joshua of another tribe. In this way he divided the succession to himself. In later Jewish history Joshua's authority passed to Saul and finally to the Davidic dynasty of the tribe of Judah. (The rabbis were critical of the Maccabees who arrogated to themselves kingship and priesthood).

All of these sources were sadly neglected. If they had gained an early acceptance, humanity might have been spared much sorrow. Needless to say, this is a point with regard to which one can only conjecture.

Law and Religion

THE INFLUENCE OF RELIGION UPON LAW

*John Wade**

This is a daunting topic. The writer knows little of religion having studied it far too little; and little of the law having studied it far too much. Nevertheless I stand in the position of a fool rushing in where scholarly angels fear to tread.

To ask what has been the influence of religion upon the law, is really one part of the broader question of what is the influence of religion upon human culture? For law is but one aspect of culture. From such a large topic, several areas will be briefly mentioned – many other topics worthy of discussion have been omitted due to time and ignorance.

Definitions

There are many possible definitions of both "law" and "religion". Rivers of ink and forests of paper have been expended over the centuries in attempts to define these two elusive concepts. At the broadest, these concepts virtually merge. For example, "religion" can be described as any step of faith acted upon to some extent which indicates that life has meaning and goals; and "law" is the expectation within any human grouping concerning how people ought to behave. Thus religion provides the goals of life and then law fills in the norms necessary to reach those goals.

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However when very narrow definitions are adopted, then the concepts have virtually nothing to do with one another. For example, "religion" might be described as a repetitive ritual which earns divine approval, good luck and/or psychological peace. Law might be narrowly described as that which judges and Parliament do. Thus each activity can take place without any reference to or influence upon the other.

For the purposes of this paper, a broad description of religion will be used – namely a belief, acted upon to some extent, that human life has meaning and goals. Law will be described as the expectations of how people ought to behave as administered by authority figures such as judges, administrators, legislators and policemen.

In these senses, it is clear that the various religions have had, and will always have, some influence upon the legal system. Examples of this religious influence on law will be suggested in what follows under the following headings:

a. The past religious influence upon the Western legal heritage.
b. The past influence of individual Prophet-lawyers.
c. The desire to both expel and embrace religious influence.
d. Modern prophetic influence of religion upon the law.
e. The present religious influences upon the law in the "Multicultural" society

Past Religious Influence upon the Present Legal Heritage

In many societies, including Israel after the Exodus, the interconnection between religion and law is easily identifiable – for the law is expressed to be the will of a god; it is interpreted by priests or church courts; and one element of the legal sanctions may include excommunication or penance.

In the fourth century, the conversion of the Roman emperors to Christianity led to direct changes in the substantive law:

> The Christian emperors of Byzantium considered it their Christian responsibility to reform the laws, as they put it, "in the direction of humanity" – to eliminate iniquity, to protect the poor and oppressed, to infuse justice with mercy. Under the influence of Christianity, the Roman law of the post-classical period reformed family law, giving the wife a position of equality before the law,

> requiring mutual consent of both spouses for the validity of marriage, making divorce more rigorous, abolishing the father's power of life or death over his children; reformed the law of slavery, giving a slave the right to appeal to a magistrate if his master abused his powers and even, in some cases, the right to freedom if the master exercised cruelty, multiplying modes of manumission of slaves, and permitting slaves to acquire rights by kinship with freemen; and introduced a concept of equity into legal rights and duties generally, thereby tempering the strictness of general prescriptions. In compiling their great collections of law Justinian and his successors were inspired in part by the belief that Christianity required a systematization of law as a necessary step in its humanization.[1]

The development of English law is of course particularly relevant to Australia. The oldest written English law, contained in the dooms of Ethelbert, was given about A.D. 600 by "a Christian King to a Christian people". And the laws of King Alfred (about 890 A.D.) start with a recitation of the Ten Commandments and excerpts from the Mosaic law.

By the twelfth century, the Popes had proclaimed and obtained the complete political and legal independence of the church and also asserted their own supreme political and legal authority over the entire clergy of Western Christendom. The visible hierarchical Roman Catholic church then proceeded to provide models for the secular legal system by its systematisation and collection of laws; by its hierarchy of courts; by its emphasis upon the accused's guilty or innocent conscience; and by its use of deductive reasoning from general principles.

From the fourteenth century onwards the common law in England became subject to modification by the activity of the Chancellor who was supposedly the Keeper of the King's Conscience – and consciences were then deeply affected by a sense of accountability to the Judeo-Christian God of Abraham. This was especially so until the Reformation, as the Chancellor and his staff were almost always clerics. These Chancellor's Courts of Equity were used to decide cases where the

[1] H.J. Berman, "The Influence of Christianity upon the Development of Law", Okla. L. Rev. 12 (1959), 91.

general rules of the common law caused hardship in particular situations. Today, the moral principles of equity survive as a vast field of learning which still attempts to implement fair play in many areas of human activity.

Additionally, by the sixteenth and seventeenth centuries ultimate legal and political authority was conceived as lying in the eternal dictates of natural justice, reason, or equity; or, in its theological aspect, in the law of God. A high water mark was reached when in 1653 Mr. Justice Keble[2] could say:

> There is no law in England but is as really and truly the law of God as any Scripture phrase, that is by consequence from the very texts of Scripture: for there are very many consequences reasoned out of the text of Scripture: so is the Law of England the very consequence of the very Decalogue itself: and whatsoever is not consonant to Scripture in the law of England is not the law of England...: whatsoever is not consonant to the law of God in Scripture, or to right reason which is maintained by Scripture... it is not the law of England.

Likewise:

> In 1676 Sir Matthew Hale laid it down in *R.* v. *Taylor* (1976) 1. Ventr. 293 that "Christianity is parcel of the laws of England and therefore to reproach the Christian religion is to speak in subversion of the law". This view was applied in the eighteenth and early nineteenth centuries as a precedent for convicting persons of what was really heresy unaccompanied by any offensive or indecent expressions. For example, in *R.* v. *Woollston* (1729) Fitzy, an argument that the Gospel miracles were merely allegorical was held to amount to blasphemy; in 1763 in *R.* v. *Annet* 1. Wm. Bl. 395, an attack on the Pentateuch was so regarded; in 1819 in *R.* v. *Carlile* 3 B & Ald. 161, the publication and sale of Paine's 'Age of Reason' was held to be blasphemy; in 1841 in *R.* v. *Moxon* 2 Townsend's Mod. State Trials 356, Shelley's 'Queen Mab' was held to be a blasphemous libel, and in 1842 Holyoake was

[2] Cited in B.D. Bayston, "Common Law and the Church", *Vox Reformata* 30 (1978), 1.

> convicted and sentenced to six months' imprisonment for asserting that he did not believe there was such a thing as God. The latest case which falls under this head is *Cowan* v. *Milbourne* (1867) L.R. 2 Ex. 230 where a hiring out of rooms was held to be for an unlawful purpose because the tenant took the rooms for the purpose of giving lectures entitled 'The Character and Teachings of Christ; the former defective, the latter misleading' and 'The Bible shown to be no more inspired than any other book'.[3]

However, this cultural domination by Christianity began to wane in the second half of the nineteenth century. The attempted large scale equation of English law with the laws ascertainable in the Bible, ended at the very latest in 1917 in *Bowman* v. *The Secular Society* [1917] A.C. 406. In *Bowman's* case the validity of a bequest to a society whose main object was the propagation of anti-Christian doctrines was challenged. The bequest was held to be valid by the House of Lords. It was made clear that the *whole* of Christian ethics ought not to be translated into the law of England.

Thus by the twentieth century, the English legal system grudgingly acknowledged that there were many minority groups in English society which ought not to be governed *in toto* by Christian ethics as interpreted by the Church of England.

Nevertheless our present legal heritage continues to reflect many ethical propositions derived from former Christian convictions. One particular example in our legal heritage is the special respect accorded to those who are civilly disobedient on the basis of conscience:

> Christian worship was itself illegal under Roman law in the first centuries. The Christian doctrine of civil disobedience is thus an ingrained part of Christian history. The moral right to violate a law which infringes Christian faith is not only an inference to be drawn out from theology; it is a fundamental truth which the Christian Church has lived from the beginning of its history – a truth established by the living Church as a whole, which in the first centuries had to decide whether or not it would – literally – go underground.[4]

[3] L. Blom-Cooper and G. Drewry, *Law and Morality* (London, 1976), 252.
[4] Berman, *loc. cit.*

Some writers are quick to raise the question of how can the traditional norms of our culture and legal system survive when the religious convictions which spawned them are gone?[5] In answer to this question it seems that at least one or two generations can live upon the religious reflexes and capital of their forefathers. But thereafter all of the traditional norms will not survive, and some will be replaced with norms and legal systems which reflect the new religions.
Harold Berman[6] has sounded the following warning:

> Christianity itself is losing its public character, its political and legal dimension, and (in Jürgen Moltmann's phrase) is becoming "privatized." For the most part, people go to church as individuals, or as individual families, to gain spiritual nourishment to sustain them in activities and relationships that take place elsewhere.
>
> We are thus confronted with a combination of a "religionless Christianity" and what may be called a "Christianity-less religion." The question this raises for law is whether – and if so, how – such a combination can command sufficient authority to carry forward into a new age the great principles of Western jurisprudence established so painfully during the past two thousand years: the principle of civil disobedience, the principle of law reform in the direction of greater humanity, the principle of the coexistence of diverse legal systems, the principle of the conformity of law to a system of morals, the principle of the sanctity of property and contract rights based on intent, the principle of freedom of conscience, the principle of legal limitations on the power of rulers, the principle of the responsibility of the legislature to public opinion, the principle of predictability of the legal consequences of social and economic actions, as well as new socialist principles of the priority of state interests and of public welfare. These principles may appear to some to be self-evident truths, and to others they may appear to be utilitarian policies, but for Western man as a whole they are, above all, historical achievements created main-

[5] e.g, id., *The Interaction of Law and Religion* (Nashville, 1974) 25, 36–45, 134–8.
[6] See also J. Ellul, *The New Demons* (New York, 1973) and J.A. Walter, *Sacred Cows* (Michigan, 1979).

ly out of the experience of the Christian church in the various ages of its life: the underground church of the first centuries, the theocratic state-church of Byzantium and of the early Middle Ages in the West, the independent transnational visible corporate church of the later Middle Ages, the invisible Lutheran church within the nation, the congregational church of Calvinism, and increasingly today the church of the private individual. These successive ages of the church have created the psychological basis, and many of the values, upon which the legal systems of democracy and socialism rest.

It is supposed by some – especially intellectuals – that fundamental legal principles, whether of democracy or of socialism, can survive without any religious or quasi-religious foundations on the basis of the proper political and economic controls and a philosophy of humanism. History, however, including current history, testifies otherwise: people will not give their allegiance to a political and economic system, and even less to a philosophy, unless it represents for them a higher, sacred truth. People will seem to them to correspond to some transcendent reality in which they believe *in* with their whole beings, and not just believe *about*, with their minds. That is why countries of democracy and socialism that have abandoned traditional religions turn ultimately to religions of race, of country, or of class (or of all three). The intellectuals feel betrayed by this; they continually anticipate that people will develop a new style of consciousness, secular and rational like their own, but they do not realize that their own belief in political and economic systems and in a humanist philosophy is equally transrational and equally self-interested – it is the religion of the intellectual.

Past Influence of Individual Prophet-Lawyers

It has been suggested that the nineteenth and twentieth centuries witnessed a decrease in the *general* influence of the Christian religion upon Western legal systems. Instead, non-theistic religions such as nationalism, racism, materialism, rationalism, humanism and hedonism appear to have exerted the main influence.

Nevertheless, the Western legal system has experienced various

prophetic voices in the lives and constructive criticisms of individual lawyers. Only a few will be mentioned here.

As part of a strange legacy to the West, the persecutions of Nazi Germany led to an exodus of Jewish scholars, including brilliant lawyers like Max Rheinstein, Otto Kahn-Freund and Wolfgang Friedmann. With vision perhaps sharpened by personal suffering, these three became the pillars of constructive legal reform in many areas, especially family law, in the 1950's and 1960's in western democracies.

Christian jurists of particular fame have included Hugo Grotius (1583–1645), the father of international law; William Blackstone (1723–80), the prototype commentator upon the English common law; Simon Greenleaf of Harvard, the American authority on common law evidence in the nineteenth century; William Wilberforce (1759–1833) and Lord Shaftesbury (1801–85), the successful nineteenth century reformers of slavery and child-labour laws in England.

Of special note in this list of notables is the present Master of the Rolls in the English Court of Appeal, Lord Denning. Although it is not clear how many of his kind could be tolerated in a workable legal system, he has indeed been salt to a stable judicial loaf and a goad to a bogged Parliament. He has refused to sacrifice litigants at the alter of stable precedent and division of powers; he has refused to wait indefinitely for inert or impotent legislators to correct injustice. His judgements are witty, pithy and pungent. He is the master of the short sentence. He is also eighty-two years old. His style has invariably brightened the bleak and barren forest of words which confronts the weary law student. He is in fact worshipped and adored by law students throughout the Commonwealth. But few have asked whom he worships. Few know him as the president of the Lawyer's Christian Fellowship in England. This appears to be part of a modern conspiracy of silence against God – or more politely against theism. As sex was supposedly the embarrassed Victorian taboo, thus has God become the modern equivalent, especially in Australia. For example, in 1980 there was an international bicentennial celebration of the life of the lawyer William Blackstone. However, in the many learned analyses, this writer did not hear a single mention of Blackstone's devout faith and Christian writings. We constantly praise the antiquated creations

of our cultural forefathers, without inquiring into, or mentioning, their antiquated relationship with their creator.

The Desire to Both Expel and Embrace Religious Influence

The past influence of religion upon the law has of course many dark chapters. Christianity and Islam especially have been used to justify a frightening array of legal crimes including the Inquisition, the Crusades, slavery, apartheid and various attempts at genocide. It is especially ironical that groups allegedly guided by the Old Testament have persistently persecuted the people of the Old Testament. In many subtle ways, powerful Christians have had, and continue to have, moral blindspots. Today, despite the attempted separation of state and theistic religion, new non-theistic religious "isms" also justify catalogues of legal horrors especially behind the Iron Curtain, in South Africa and South America. These new non-theistic steps of faith include of course Marxism, socialism, nationalism and materialism.

Thus the influence of religion upon law is an equivocal affair. Where the greatest good lies, so too the greatest evil is close at hand. Accordingly there have been repeated attempts in western legal systems to reduce the influence of at least theistic religions upon the law. For example both the U.S. Constitution (First Amendment) and to a lesser extent the Australian Constitution (sec. 116), outlaw laws which establish any religion or which prohibit the free exercise of any religion.

One can well understand these attempts to separate church and state. The religion presently dominant in the legal system tends to perpetuate its power; the historical record of powerful religions includes many gross evils; a single dominant religion tends to conflict with the many religions in a multi-cultural society. However, balancing these arguments in favour of church-state separation, it should be noted that firstly there is no such thing as a religious vacuum – a religion of some kind will always enter to influence laws and politics. And secondly, the legal system always needs to reflect religious convictions, in order to give it vitality, direction and enforceability.

Thus multi-cultural western democracies tend to attempt to walk the tightrope of providing conditions where *any* religion can flourish, while not favouring any particular religion over others, while pretending that the existing legal system is not subject to any religious influence.

Modern Prophetic Influence of Religion upon the Law

It has already been mentioned that, in the past, Jewish and Christian prophets have spoken out mightily against the evils of political and legal systems. And usually they have been persecuted for righteousness sake. However today the prophetic voice of Christians at least is often muffled by committees and rambling reports. So aligned with wealth, the status quo and middle class morality are we in the church that we are often blinded to our own sins. Thus prophetic criticism of cultural and legal bondage has, as usual, often come from "outsiders", such as Karl Marx, Ralph Nader and the feminists. Too often modern-day Christian "prophecy" has been marked by dishonest statistics, sloppy exegesis, a lack of empathy and a fascination with "private" morality. Of course, there are many exceptions, with possibly the best known being Dietrich Bonhoeffer, Martin Luther King, Steve Biko, Aleksandre Solzhenitsyn and Jacques Ellul. As this list suggests, our culture and legal system appear to have been influenced not so much by prophetic words and ink, as by words and blood – by the martyr more than the scholar.

Among other issues such as poverty, the Third World, racism and the arms race, the question of abortion on demand will continue to test the prophetic and caring gifts of the Christian church. It does appear today that the most dangerous place on earth for a child is in its mother's womb.

The Present Religious Influences upon Law in the "Multi-cultural" Society

It is submitted that it is beyond dispute that our present western legal system has been fundamentally shaped in substance and procedure by Judeo-Christian ideas and disciples. But it appears to be likely that it is subject to that ongoing influence to a much lesser extent today. We no longer live in the predominantly Christian uni-culture of nineteenth century England. Ours is a multi-cultural society with many religions present.

In such a society, two recurrent questions for the legal system arise – first, to what extent ought the legal system to take notice of and tolerate the beliefs and lifestyle of each group whether they be Hindu, Muslim, Hare Krishna, hedonist, socialist, Aboriginal or Jehovah's Witness? Secondly, to what extent ought there to be separate legal rules,

or even courts, to adjudicate upon Muslim divorce, Aboriginal criminal law, and other disputes *within* each religious or cultural community?

In contrast to these problems for the legal system, it is argued by some that underneath this apparent religious diversity there is a common religion which has captured the majority in the West and which is worshipped from afar in the Third World. The multi-cultural society is allegedly moving again towards a uni-cultural society. This unity finds its roots in the religion of technological materialism, hedonism and quiet comfort. Its priests and priestesses are the advertisers and scientists. Its heaven is the lottery win or superannuation collection. Its influence on law and culture is extensive. The great interest in consumer protection law and tax (avoidance) law is probably symptomatic.

Although there may be signs of disillusionment with the lack of meaning in materialistic hedonism, there is also uncertainty concerning which religious option to turn to next. However, whichever religion is chosen by individual leaders in society or by the majority of society, it will certainly continue to influence the legal system.

THE TEN COMMANDMENTS IN AMERICAN LAW

*Bernard Meislin**

Through its legal treatment of the Decalogue, we can trace America's changing notions of morality. From a fidelity to the Ten Commandments so strong in Colonial America that a respected authority in his 19th century lectures was moved to observe, "The people of Massachusetts adopted the laws of Moses,"[1] to our own day when that fidelity has shifted to a policy of exclusion, the attitude of American courts and legislatures to the Commandments reflects changing moral patterns. The Ten Commandments have gone from fertile citation as controlling law handed down from Sinai to dwindling moral reference (mainly in dissenting opinions), to ostracism and, in some cases, back to exile in the desert.

We may also observe courts in the throes of a still unresolved constitutional dilemma – the touchy matter of the state's relation to religiously inspired legal teachings, teachings universally acknowledged as fundamental ethical precepts. The position of the Commandments, subject as they are to varying sectarian versions, divides the United States Supreme Court, a court in transition dealing with a First Amendment in transition. While the law is always moving, the

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[1] Henry St. George Tucker, *Commentaries on the Laws of Virginia* (Winchester, 1831) I, 6–7.

Supreme Court in the past half century has sought to keep the state neutral where religion is concerned. Whether the Court's view has been in part responsible for the current de-emphasis of the Ten Commandments, or whether changing social attitudes are the true force behind that Court's reasoned opinions, the Ten Commandments have received no constitutional assistance in recent times.

Wariness of religious entanglement is not a recent American concern; but it is not an old one either. For roughly half of American history, from the beginnings of colonization to well after 1776, religious division through official colonial and state religious establishments was the political order of those days.[2] Not until 1791 were the ills of incorporating any religious preference as federal doctrine condemned; the making of laws respecting religious establishment was denied in that year to the national Congress and quarantined in the several states by the Constitution's First Amendment. Earlier James Madison had warned that "a zeal for different opinions concerning religion" was a "cause of faction... sown in the very nature of man."[3] So, while the First Amendment restrains that zeal by prohibiting Congress from enacting laws repecting the establishment of religion, man's natural religious bent is indulged in the same sentence of the same Amendment by a federal guarantee of the free exercise of religion.

Before reviewing the Ten Commandments and the Constitution, let us examine the interaction of American law and the Ten Commandments uncomplicated by First Amendment dialectics. The cases which arise in state courts under state law afford the clearest picture of that interaction. State court opinions reflect moral standards under the impact of a world in upheaval – a world intellectually indebted to Freud for non-judgmental "no fault"; to Einstein for an elegant relativity, boosting a poor relation, ethical relativism, into orbit; and to Marx for a determined and uncompromising levelling. How have the blunt Commandments fared in this ideological tumult? The 20th century American judge has been swayed by these movements in his formal

[2] See William H. Marnell, *The First Amendment* (New York, 1964); Bernard J. Meislin, "Jewish Law in America" in *Jewish Law in Legal History and the Modern World*, (ed. B.S. Jackson, Leiden, 1980).

[3] *The Federalist Papers*, No. 10.

schooling and, more importantly, has felt their vibrations in the environment about us all.[4]

In searching for a legal doctrine which perforce comes to grips with morality, we are led to the law of defamation. Defamation, according to the hornbooks, is that division of tort law which deals with assertions made by the tortfeasor to a third party about the plaintiff. Among those assertions which qualify as defamatory are allegations of "immorality". Do American courts treat allegations of Decalogue violation as prima facie actionable? If they do, then the Ten Commandments would be a *legal* measure of morality. But this promising line of inquiry ends inconclusively. Some courts do equate Decalogue violation with immorality and others do not. As Wisconsin's high court, which made its own survey of the subject, observed in a 1980 opinion: "The decalogue, or some other scriptural inhibition, has been thought sufficient by some courts to conclusively ascribe moral turpitude to an act."[5] But there are other courts which take a different view:

> Several courts have denied that any such characteristic inheres in mere assault and battery, even when the act charged was whipping a mother (*Speaker* v. *McKenzie*, 26 Mo. 255); or 'shaking his mother out of doors by the hair of her head... the day before she died' (*Billings* v. *Wing*, 7 Vt. 439). It is probably true that moral turpitude depends on the conception of the community, which is reflected in the utterances of its judges.

Proceeding in this vein and with an eye to its own prized dairy industry, the Wisconsin court philosophized, "Wisconsin finds moral turpitude in selling watered milk. *Geary* v. *Bennett*, 53 Wis. 444, 10 N.W. 602. We confess to the view that such an act is in no considerable degree lower in the moral scale than physical violence to one's mother." Wisconsin votes for the Fifth Commandment and for unadulterated milk, but notes that not all states are as pure.

[4] "The law, at any given time, is administered and expounded by men who cannot help taking for granted the prevalent ideas and attitudes of the community in which they live". Morris R. Cohen in *Harv. L. Rev.* 29 (1915), 622.

[5] *Starobin* v. *Northridge Lakes Development Co.*, 94 Wis. 2d 1, 287 N.W. 2d 747 at 753.

For example, in New York recently a lower court judge[6] sought to supercede the language of a lease confining apartment occupancy to the named tenant by allowing her to take in her aged parents on the authority of the Fifth Commandment, "Thou shalt honor thy Father and thy Mother". He was unanimously reversed in an opinion which studiously avoided any mention of the Decalogue, an implied admonition that the Commandments do not have the force of positive law.[7]

As might be expected, no Commandment's legal perambulations offer a better tour of 20th century American mores than the peripatetic Seventh Commandment in its New York meanderings.

Until past mid-century adultery was the only ground for divorce in the state, as well as constituting a crime. It was so morally reprehensible that a spouse divorced in New York was banned from marrying again within its precincts during the lifetime of his or her former spouse.[8] So sensitive was that repository of moral conscience, the New York State legislature, that on April 29, 1933, it outlawed common law marriage because the concept was a convenient cover for sin.[9] It was not the first time it had done so. At the turn of the century, by Chapter 339 of the Session Laws of 1901, it had previously prohibited marriages contracted otherwise than in the manner prescribed by statute. In 1907, the year of a historic financial panic, it thought better of its earlier action and repealed it.[10] With the coming of the great Depression, it was able to turn its attention once more to abolishing common law marriage. Why there appears to be a correlation between economic distress and marital legislation is an intriguing puzzle best left to the sociologist.

Adultery was once regarded as moral turpitude *per se* and immigration cases in the early 1900's regularly report the refusal to admit, and the extradition of, immigrants whose matrimonial records show remarriage after Jewish religious divorce not recognized as valid by civil authority.[11] Thus, even technical adultery was ground for banishment

6 Judge Herbert A. Posner in *Equity Investments* v. *Paris*, 108 M. 2d 404 (1981).
7 113 M. 2d 681 (1981).
8 New York Domestic Relations Law Section 6 subd. 1 and Section 8 (prior to September 1, 1967).
9 New York Domestic Relations Law Section 11; Ch. 606 of the laws of 1933.
10 Ch. 742 of the laws of 1907. *Pemberton* v. *Pemberton*, 60 N.Y.S. 2d 655 (1946).
11 *See in re Spiegel*, 24 F. 2d 605 (S.D N.Y., 1928); *Petition of Horowitz*, 48 F. 2d 652

from America's shores some sixty years ago. Things are quite different today: in 1983, for example, New York's legislature has rushed to the aid of unrelated couples living together, adulterously or otherwise, and has passed a bill, signed into law by the Governor, to protect them from landlords who would evict for violation of lease provisions limiting occupancy to named tenants only.[12]

Leaving the Seventh Commandment, a 1960 concurring opinion by New Jersey's highest court, written by Chief Justice Joseph Weintraub, typifies the broader trend.[13] The case concerned the indictment of a police officer for misconduct in office. He had "encouraged a parking meter repairman to steal meter receipts for his own [i.e., the police officer's] benefit." The Chief Justice is led to reflect on moral standards for public officials. An earlier decision had taken the position that "If a public officer were under no duty imposed by law to regulate his official conduct in accordance with basic moral principles, then he could violate such principles and still be immune from indictment and prosecution for misconduct on office. *State* v. *Weleck*, 10 N.J. 355, 369 (1952)." This merger of law and morals, at least with respect to public officials, troubles the Chief Justice, a public official himself, who orders divestiture, stating, "Men may not agree upon what is immoral". His opinion continues, "The State wisely leaves much to the sanction of private contempt and censure. Few of the Ten Commandments found their way into criminal law. I could not agree that a public officer is guilty of crime in office if he fails to honor his mother or father, or takes the name of God in vain, or covets the house, wife, or anything else that is his neighbor's, or labors on the Sabbath as some judges find they must." So New Jersey's legal view of the Ten Commandments, even with regard to the conduct of public officials, is that the Decalogue is a private and unofficial moral standard. Any official sanction for its application must come from the legislature: "The question

(E.D. N.Y., 1931); *U.S.* v. *Zaltsman*, 19 F. Supp. 305 (W.D. N.Y. 1937). See also *Petition of Schlau*, 41 F. 2d 161 (S.D. N.Y. 1941), remanded on appeal, 136 F. 2d 480 (2d Civ., 1943).

[12] New York Real Property Law Section 235-f, added by Chapter 403, Section 39, of the Laws of 1983. This so-called "roommate law" legislation was enacted to overturn the decision of New York's highest court, the Court of Appeals, in *Hudson View Properties* v. *Weiss*, 463 N.Y.S. 2d 428 (1983).

[13] *State* v. *Cohen*, 32 N.J. 1 at 11.

whether immorality shall be denounced as criminal falls solely within the province of the Legislature, the spokesman of the social conscience."

Other state criminal law cases of recent times emphasize the divergence of American Law from Mosaic injunction. A 1967 New York appellate court decision[14] found reversible error in a murder conviction, where the prosecutor recited "Thou shalt not kill" to the jury. "Such an appeal", the appeals court wrote, "might well have persuaded one or more jurors that, if the question of guilt were close, there was nevertheless an imperative, supervening law that demanded satisfaction." In 1969 the same court,[15] over a strong dissent, reversed another murder conviction because the prosecutor asked "the jury to disbelieve an adulterous defendant," thereby turning, in the court's words, "admitted acts of adultery into the equivalence of guilt of violation of the Ten Commandments, for which moral offenses appellant was not on trial." The dissenters wryly noted, "the prosecutor's reference to the Ten Commandments and some of its specific mandates may hardly be realistically considered such an awe-inspiring revelation to an adult jury as to warrant attributing to it the prejudicial significance suggested by the majority." But to the majority the fatal defect in the People's case was "overzealous advocacy" which "portrayed a person on trial for violation of the higher and moral law." So New York criminal courtrooms are prohibited from simultaneously accomodating God's law and the case of the People lest the jury be confused as to which one governs.

Such segregation was not always American law, not even the law of New York. Some 170 years ago, in a prosecution for blasphemy,[16] the common law was held to incorporate scripture and the Third Commandment in particular. One of the New World's ablest judicial minds, Chancellor James Kent of New York, the "father of American equity", devoted his earnest eloquence to affirming the conviction of a blasphemer in an opinion which today we regard, charitably, as archaic. Among other things, the Chancellor declared: "the authorities

[14] *People* v. *Fields*, 27 A.D. 2d 736, at 737; 277 N.Y.S. 2d 21 at 22.
[15] *People* v. *Canty*, 31 A.D. 2d 976, 299 N.Y.S. 2d 524.
[16] *People* v. *Ruggles*, 8 Johns. 290, 293–4 (1811).

show that blasphemy against God... or the holy scriptures (which are equally treated as blasphemy) are offenses punishable at common law."

The opinion, in a number of ways, spotlights the quandary of the avowedly Jewish American. Our initial inclination is to encourage Ten Commandment enforcement. Yet, on reflection, we should expect that in a Christian society, a Christian version or interpretation of the Commandments will, in such event, be invoked. That is just what we find with Chancellor Kent. His judicial wrath is poured out upon a poor soul charged with taking the Lord's name in vain, who questioned the parentage of Jesus and accused his mother of conduct unbecoming a virgin. To us as Jews, the criminal charge appears to be a taking of the Third Commandment in vain. But are American Jews to insist that American civil courts apply the Ten Commandments in their Jewish construction?

On the one hand, isolating law from morality, sealing off the Decalogue, totally separating church from state, makes it difficult for essentially Jewish concepts to receive that public and legal recognition which we believe would benefit society at large and, at the same time, achieve for America's Jewish minority respect in the very area of ethics and morality where we as a people have made our preeminent contribution to civilization. Furthermore, an unbending exclusion of all matters religious from the civil courtroom would deny legal sanction to Jewish divorce enforcement, kosher labelling requirements and to other matters of peculiarly Jewish concern. On the other hand, championing Ten Commandment application by America's civil courts in a Christian interpretation would be urging a form of state sanctioned apostasy. To insist on Ten Commandment application only in Jewish form is unrealistic, i.e., presumptuous and doomed to failure. This dilemma underlines Madison's wisdom im warning against that "zeal for a different opinion concerning religion" which is a cause of "faction" in nations.

Turning to the more convoluted area of American constitutional law and the Ten Commandments, we find that a pattern similar to state court development emerges: an early easy and comfortable association of Bible and Constitution, slipping slowly and circuitously into estrangement.

A brief and simplified history of the Religion Clauses of the First Amendment must preface the constitutional segment of this talk. From 1791 to the 1930's the general understanding was that the First Amendment meant what it said: Congress, meaning the federal government, was prohibited from legislating an established church for the country; and, secondly, it was unlawful to interfere with any person's free exercise of his religion. That interpretation has undergone drastic change directly traceable to the adoption of the 14th Amendment following the Civil War. The 14th Amendment directs that each State of the United States shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This language, after much controversy over whether it was meant to bind the State to the first ten amendments to the Constitution, was definitively construed in 1940 by the United States Supreme Court to incorporate the Religion Clauses of the First Amendment.[17] In the words of the court: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." What has followed since 1940 has been an elaboration upon the anti-establishment feature of the First Amendment which has brought it to its present construction. Not only may one religion not be preferred over another, but religion may not be preferred over no religion.[18] The United States Supreme Court has made its decision for neutrality. It has in its wisdom concluded that for government, state or federal, in any manner, to side with any sect would, to use Madison's term, invite "faction".

An interesting illustration of neutrality in action with respect to one of the Commandments is the analysis which Chief Justice Warren made to support the decision of the United States Supreme Court in upholding Sunday closing laws.[19] While acknowledging the religious origin of the Sabbath, he found that the state had a legitimate interest in encouraging its citizenry to take one day of the week to renew their

[17] *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213.
[18] *Everson* v. *Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).
[19] *Braunfeld* v. *Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961).

strength for labor on the other days. The fact that Sunday, the day chosen by the several states, happened to coincide with the Christian Sabbath was merely a constitutionally permissible coincidence. His argument is a purely secular one; it certainly differs from the Jewish conception of the Sabbath as a holy day.[20]

Guided by the principle of neutrality the United States Supreme Court in 1980 prohibited the posting of a Christian version of the Ten Commandments in Kentucky classrooms.[21] Another decision by a lower federal court earlier in the same year struck down a North Dakota statute, prescribing such posting as a means, according to that state's legislature, of teaching the Christian religion.[22] Since, of necessity, any posted schoolroom version of the Commandments will offend some sect, the Supreme Court's decision will make it exceedingly difficult, if not impossible, to post the Ten Commandments in public schools, and, possibly, in any public place.

With awareness of the trend of Supreme Court thinking in mind, a bold attorney for a convicted Kentucky killer appealed the verdict of guilty against his client, in all seriousness, on the ground that his client was tried before his peers in a courtroom in which the Ten Commandments were prominently displayed. Since all present knew the defendant had lived his life in violation of them, he was prejudiced by their presence and the uncomfortable moral atmosphere they created. The appellate court, probably also attuned to the Supreme Court's outlook, dismissed the appeal on the ground that while it was true the Ten Commandments hung in the courtroom, there was no evidence that the jury had paid any attention to them.[23] Neutrality in the face of morality had been preserved!

[20] "Labor is the means towards an end, and the Sabbath as a day of rest, of abstaining from toil, is not for the purpose of recovering one's lost strength and becoming fit for the forthcoming labor. The Sabbath is a day for the sake of life. Man is not a beast of burden, and the Sabbath is not for the purpose of enhancing the efficiency of his work." Abraham Joshua Heschel, *The Earth is the Lord's and Sabbath* (New York, 1963), 14.

[21] *Stone* v. *Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199, reh. den. 449 U.S. 1104, 101 S. Ct. 904, 66 L. Ed. 2d 832.

[22] *Ring* v. *Grand Forks Public Sch. Dist. No. 1*, 483 F. Supp. 272 (1980).

[23] *Lenston* v. *Commonwealth of Kentucky*, 497 S.W. 2d 561 (1973).

It is not urged that the Ten Commandments should be applied as ruling law in complex factual situations in place of specific statutes or controlling decisions; they are too rudimentary and too broad for that. However, neither should they be banished from the American courtroom entirely. The judge, as has been noted, plays a significant role in molding opinion and influencing public conceptions of morality. In the words of the Wisconsin Supreme Court, "It is probably true that 'moral turpitude' depends on the conception of the community which is reflected in the utterances of its judges."[24] The judge then is in a position, if not to enforce morality, to state it, and through its formulation to reinforce basic ethical principles common to Jewish and Christian and, in fact, Western civilization. Those basics, according to Exodus, were engraved in stone. They have an ethical permanence in the public mind which the civil judge should have a right to seek to perpetuate, particularly in an age when seemingly enduring values are subject to assault by the intellectual and the ignorant alike.[25] The tablets of the Decalogue are touchstones of morality which speak with the authority of the ages. Their citation in dicta would lend force to ethical teaching, a not inappropriate role for the judge. They would furnish the stage for and the guidelines of civilized conduct. To cite, for example, "Thou shalt not bear false witness" in support of a criminal code section on perjury, makes for a far sterner warning and does no violence to the statute. To rule the Ten Commandments off-limits for the civil judiciary would be to rob the community of perhaps its most potent ethical spokesmen, judges speaking from the bench, and also would diminish,

[24] See note 5, above.

[25] Separating ethics from law is repugnant to Jewish thinking. See *Mak.* 24a. Rashi's explanation of the reduction of the 613 commandments of the Written Law (by King David to eleven, by Isaiah to six, by Micah to three, and by Amos and Habbakuk to one) is that such reduction was required because of the deterioration of the passing generations. As Justice Haim Cohn observes, Rashi "seems to indicate that however much the generations would deteriorate, at least the ethical part of the law was to be and could be observed in all ages by all people." What is significant in the reduced number of principles is "that all of these reduced principles are ethical in nature... In other words: the whole of the law is ethics, is justice and equity; and the right method to explore and expound the law is to grasp its essence". Haim Cohn, "The Methodology of Jewish Law," *Modern Research in Jewish Law,* ed. B.S. Jackson (Leiden, 1980), 135. Cf. Oliver Wendell Holmes, "The Path of the Law", *Harv. L. Rev.* 10 (1897), 457–62.

in a secular society, the impact of that society's universally recognized source of law. While the Commandments are numbered differently in different sectarian versions, and their gloss differs, often significantly, among those versions,[26] fundamental similarities far exceed the differences, and appeals to that civilized consensus, where supportive of civil law, should not be inadmissible.

There is persuasive legal precedent for such supportive citation. The Supreme Court of the United States has held that the coinciding of civil law and religious law does not violate constitutional standards, particularly where the civil rule had its origins in the religious requirement.[27] Specifically, in rejecting the argument that Jewish ritual slaughter, as sanctioned by the Humane Slaughter Act, tends to establish religion, the federal courts have held that ritual slaughter as prescribed by Jewish religious law, coincides with humane slaughter practices contemplated by federal legislation on the subject, and such overlapping, therefore, is consistent with the First Amendment of the Constitution.[28] The coinciding of ethical standards declared on Sinai with modern legal rules, where such happy union occurs, rather than a cause for constitutional concern, may be legitimately celebrated in judicial dicta.

[26] The Ten Commandments standing alone are not subject to the volumes of controversy which surround their interpretation. See Charles, *The Decalogue* (Edinburgh, 1923). However, even the basic Commandments are expressed differently. In Bible Belt Kentucky, and in parts ot North Dakota where the Calvinist/ Wesleyan wing of Protestantism dominates, the version posted in the schoolrooms was that of the King James Bible (substantially truncated in many cases). In Grand Forks, North Dakota, where the dominant religions are Catholic and Lutheran, the posted version was essentially that of those faiths, with the Second Commandment against graven images deleted and the rest moved up a notch, and the final one ("Thou shalt not covet") broken into two, i.e., "Thou shalt not covet thy neighbors house" becomes the ninth and the balance of the passage the tenth.
In the English Church Prayer Book, which predates the authorized version of the Bible, the Sixth Commandment is rendered as, "Thou shalt do no murder".

[27] This is the rationale of *Braunfeld* v. *Brown*, note 19 above. The United States Supreme Court's decision invalidating state law abortion restrictions distinguishes between trimesters of pregnancy, just as Jewish law does, *Roe* v. *Wade*, 93 S. Ct. 705 (1973), but this similarity does not violate the First Amendment.

[28] *Jones* v. *Butz*, 374 F. Supp. 1284 (1974), cert. denied by the U.S. Supreme Court, October 15, 1974.

Today, muted by constitutional interpretation and mooted by changing mores, the Ten Commandments have achieved that "brooding omnipresence in the sky"[29] which Oliver Wendell Holmes assured us the law is not. Perhaps, appropriately, they shine there as reminders that while they may not be the law in the United States today their moral lessons overarch the law, to be ignored at society's peril.

[29] Dissenting opinion in *Southern Pacific* v. *Jensen*, 244 U.S. 205, 218 (1917). A similar thought is expressed in the story of the oven of Aknai, a favorite reference for illustration of the law's supremacy: *B.M.* 59 b. See Moshe Silberg, "Law and Morals in Jewish Jurisprudence", *Harv. L. Rev.* 75 (1961), 306, 310. Rabbi Joshua delivers the decisive opinion: "The Law is not in heaven... Since the law had already been given at Mount Sinai, we pay no attention to a Heavenly Voice...".

Penal Law

MAIMONIDES' VIEWS ON CRIME AND PUNISHMENT

*Ya'akov Bazak**

The classical penologists of the 18th century – like Montesquieu, Beccaria, Bentham and others – have discussed very extensively the problem of identifying the appropriate principles and considerations that should guide criminal courts in their sentencing functions. First and foremost, they sharply criticized the harsh system of brutal penal punishment prevailing in their day. They protested against the exaggerated use of capital and corporal punishment, without any differentiation between grave and less grave crimes. At the same time, they laid down the principles that should guide legislatures and courts in fixing the proper punishment for various offences.

Six centuries earlier, in the 12th century, Maimonides, in his *Guide for the Perplexed*, had expounded the principles which, in his view, govern Biblical penology. Except for two cases, Maimonidies did not reveal the Biblical or Talmudical sources from which he had derived these penological principles. It seems, however, quite certain that Maimonides had drawn his conclusions by an analysis and comparison of all the Biblical passages that fix various punishments for all kinds of offences.

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In this paper, we shall compare the principles of punishment emerging from these two completely different sources. It is interesting, even amazing, to discover the similarity in the penological principles developed by the classical penologists and the Biblical principles as expounded very clearly and systematically by Maimonides in the 12th century.

The factors that should govern the nature and the extent of punishments according to the classical penologists were primarily the following:

a. Among crimes of equal magnitude, those which can be committed more easily should be punished more severely in order to deter the commission of such crimes.
b. Heavier punishments should be fixed for cases where it is more difficult to detect the offender.
c. The frequency of the occurence of a certain crime should be considered an aggravating factor justifying more serious punishment.
d. The greater the inducement is for the commission of a certain crime, the heavier the punishment should be.
e. The severity of the punishment should always be in proportion to the gravity of the crime; the more dangerous the crime, the heavier the punishment.

Let us now examine the Biblical principles of penology as expounded by Maimonides in the third part of his *Guide for the Perplexed* (Chapter 41). Regarding the frequency of the crime and the ease of commission, Maimonides[1] has this to say:

> Know that the more frequent the kind of crime is and the easier it is to commit, the greater the penalty for it must be, so that one should refrain from it. On the other hand, the penalty for a thing that happens seldom is lighter.

William Paley in his *Principles of Moral and Political Philosophy*, published in 1785, emphasized the same principles: the factors taken into account in determining the degree of the severity of the punishment for

[1] *The Guide for the Perplexed*, ed. S.Pines (University of Chicago Press, 1963), 559.

any given crime should be the facility with which it can be committed, the difficulty of its detection, as well as the danger it presents to the community. Consistent with this point of view, Paley[2] unreservedly supported capital punishment for sheep – and horse – stealing, not because these crimes "are in their nature more heinous than many simple felonies which are only punished by imprisonment or transportation, but because this property, being more exposed, requires the terror of capital punishment to protect it".

The punishment according to the Torah for similar offences is quite different. It involves neither capital nor corporal punishment, but rather monetary compensation. However, the principles determining which offences should be punished more heavily are the same in both sources. Maimonides explains the reasoning for the different laws governing the robber and the thief. A robber in the terminology of the Torah is one who forcibly and without concealing his identity takes someone's property; a thief is one who does so unnoticed or while his identity is concealed. The Biblical penalty for a robber is merely to return the amount stolen, while the thief must pay double (and in certain cases four and even five-fold) the value of the property.

Why the difference in these two cases? Maimonides explains that the robber does not have to pay an additional fine "due to the rare occurrence of robbery". Stealing is more frequent than robbery for it is possible to commit it in all places, whereas in towns robbery can only be carried out with difficulty. Furthermore, articles that have been concealed and safeguarded with care can be stolen, whereas only those that are openly and visibly exposed can be robbed; one can, by the proper steps, take precautions and safeguard property against a robber but not with regard to a thief. Moreover, as the identity of the robber is known he can be charged and an effort made to effect recovery of the property concerned, whereas the thief's identity is not known. For all these reasons the thief, and not the robber, is sentenced to pay a fine.

The penalty for "regular" theft is two-fold, that is the value of the object stolen and an equal amount taken from the property of the thief. The penalty for the stealing of sheep, however, is four-fold. The reason for the difference in fines, according to Maimonides, is the

[2] L. Radzinowicz, *A History of English Criminal Law*, Vol. 1 (London 1948), 251.

frequency of sheep stealing and the relative ease of its commission in comparison with the theft of other kinds of property:

> Know that the more frequent the kind of crime is and the easier it is to commit, the greater the penalty for it must be, so that one refrain from it. On the other hand, the penalty for a thing that happens seldom is lighter. Therefore the fine imposed on him who steals sheep is double the fine imposed for the theft of other transportable objects, I refer to fourfold reparation, the condition being that he has let them go out of his possession by selling them or has slaughtered them. For they are always stolen in the majority of cases because they were in the fields where they cannot be watched over the way it is possible to watch over things that are in towns. And therefore those who steal them generally make haste to sell them so that they should not be recognized while being in their possession, or to slaughter them so that they disappear. Hence the penalty for such cases of theft as are in the majority is greater. The fine imposed for the theft of an ox is even greater than the value of the thing stolen, for it is easier to steal them. The sheep graze together, so that the cowherd can see all of them, and in most cases it is only by night that they can be stolen. Oxen, on the other hand, graze far apart from one another... so that the cowherd cannot watch over them, and accordingly they are more often stolen.[3]

It is amazing to see how the same line of reasoning was used in a recent decision of a British court. In 1964, a criminal appeals court upheld a sentence of three years imprisonment for the stealing of sheep by a forty year old English farmer. The court pointed out that such offences disturb the relationship of trust that are vital between neighbouring farmers in the valleys where cattle graze together in open fields.[4] The same principles prevailed in a case of 1975, where a sentence of six months imprisonment was upheld for a man "of good character" who admitted making three false tax returns involving a loss to the Revenue of £176. The court explained that, "this kind of offence is very

[3] Maimonides, *loc.cit.*
[4] Cited in D.A. Thomas, *Principles of Sentencing*, (London, 1970), 14,n.1.

prevalent... it is an offence which requires a deterrent penalty from the very fact that it is... not easily detectable."[5]

Another principle advocated by many penologists is the individualization, rather than standardization, of punishment, a principle which has been gaining more and more support in recent years.

But already in the 12th century, Maimonides held that the intention underlying the punishment by flagellation was to secure individualization of punishment: "There is also wisdom in the number of the strokes, for it is determinate with regard to maximum and indeterminate with regard to the individual. For an individual may receive only such flogging as he can bear, but the maximum number of strokes is forty, even if he can bear one hundred."

In general Maimonides states summarily the four principles which determine the severity of punishment according to the Torah:

> Know that whether a penalty is great and most grievous or small and easy to bear depends on four things being taken into consideration. The first is the seriousness of the crime: for actions from which great harm results entail a heavy penalty, whereas actions from which only small and slight harm result entail but a light penalty. The second is the frequency of the occurence of the crime: for a crime that occurs rather often ought to be prevented by means of a heavy penalty, whreas a slight penalty suffices to prevent one that is rare.... The third is the strength of incitement: for a man can be made to desist from an act towards which he is tempted – either because desire draws him strongly toward it or because of the force of habit or because of feeling great hardship when refraining from it – only by fear of a heavy penalty. The fourth is the ease with which the action can be commited in secret and concealment, so that others are unaware of it: the deterrent for this can only be the fear of a great and heavy penalty.[6]

The fact that the same principles appear six centuries later in the writings of the classical penologists, as well as in most modern court decisions, is certainly worthy of notice. Since *The Guide for the Perplexed*

[5] *Ibid.*
[6] Maimonides, *loc. cit.*

was written in Arabic and was translated into Latin as early as 1240, it may have influenced the classical penologists and, through them, modern legal thought.

Another explanation for this similarity between these legal principles may be due to the inherent truth in the unchangeable penological principles which cause them to emerge independently in different and remote cultures. Perhaps a careful linguistic examination of the texts concerned may clarify this question.

EXTRADITION

*Yehuda Gershuni**

Before addressing this topic directly, a few words of introduction are in order concerning the judical system within which extradition functions in Jewish law.

Rabbeinu Nissim[1] delineates two judicial systems which exist side by side in Jewish law. The following is a summary of his thesis.[2]

Society needs a system of government, for without it "one man would devour another"[3] and society would collapse. Part of such a system is a judiciary for determining the disputes that may arise between individuals. In this respect the Jewish people is no exception. But, besides this general need, the Jewish people require a separate judiciary to accomplish the special task of establishing firm foundations for Torah law and dealing with those who transgress that law. The two judiciaries exercise sway in different realms and have different functions. The "religious judiciary" must apply criteria of absolute truth; the "secular judiciary" is concerned with the good of society at a specific time and its criterion is a relative one.

God commanded the appointment of judges and the Sanhedrin to do absolute justice: "and they shall judge the people with righteous (true)

* Rabbi, Jerusalem.

1 R. Nissim b. Reuben (Spain, 1310–1375).

2 *Drashot* XI.

3 *M. Ab.*III, 2.

judgement".[4] The purpose of their appointment is that they judge the people with an absolutely just and truthful law – hence the stringent talmudic requirements for the interrogation of witnesses:

> Our rabbis taught: [The witness is asked], Do you know him? ... Did you warn him? Did he acknowledge the warning? Did he acknowledge his consequent liability to the penalty? Did he murder immediately after the warning?[5]

This type of thorough interrogation is apposite for ensuring that only absolute justice be done. A man is not to suffer the death penalty without his knowing that he has wilfully involved himself in a capital crime with all the consequences entailed. He must therefore acknowledge the warning, and the testimony must fulfil all the technicalities enumerated in the Talmud. This is the true "righteous judgement" entrusted to the *dayanim*.

However, if punishment for crime were to be meted out only in this strict fashion there is a danger of the collapse of the social order. Violent crime would increase and the perpetrators would not go in fear of punishment. In order, therefore, to preserve society, the Torah commands the appointment of a king: "when thou art come unto the land... thou art surely to set a king over thee."[6] The king would set up a judicial system that could judge criminals without adherence to halakhic technicalities, (the preliminary warning by competent witnesses and so on), consistent with what might from time to time be necessary for the preservation of society.

We find, then, that the appointment of a king (and a state judiciary) has the same purpose for the Jewish people as for others – the preservation of the social order. But the appointment of *shoftim* (judges) under the religious judicial system is distinctive so that the people be judged with "righteous judgement" in the realm of absolute justice. We also find that it is altogether possible that the laws of other nations would be more appropriate for keeping society intact than some of the Torah laws but these would not be left wanting because the king would complete them as society might demand.

[4] *Deut.* 16:18.
[5] *Sanh.* 40b.
[6] *Deut.* 17:14–15.

With the dual judicial system in mind we can understand the story in the Talmud:[7]

> When they [The Sanhedrin] saw that murder was widespread and could not be dealt with properly, they said it would be better for them to move from place to place rather than proclaim the murderers guilty, for it is written "And thou shalt do according to that which they shall tell from that place" which means that "the place" [the seat of the Sanhedrin in the Chamber of Hewn Stone on the Temple Mount] it is that matters.[8]

At first glance, one wonders why the Sanhedrin should, so to speak, abolish itself specifically when murder was rife. The answer is that justice of the Sanhedrin was replaced by royal justice under which the death penalty could be imposed without adherence to strict halakhic rule, on the testimony of a single witness, by one judge sitting alone and the like as is the law for other nations.

What then was the sin of the people when they asked the Prophet Samuel for a king?[9] Their sin was that they wanted a total abrogation of Torah Law in favor of royal (state-secular) law: "now make us a king to judge us like all the nations."

According to Maimonides:[10]

> A person who kills another without there being clear proof, or without forewarning even by one witness... may be executed by authority of the king for the good of society as the circumstances may require.

Or Sameah[11] explains *ad locum* :

> It seems to me that Maimonides posits that just as a non-Jew may be sentenced on the testimony of one witness so can the king pass sentence on the testimony of one witness. Only when the Sanhedrin

[7] *Av. Zar.* 8b.
[8] The abandonment by the Sanhedrin of their official seat involved the cessation of judging capital cases.
[9] 1 *Sam.* 8:1–22.
[10] *Hilkhot Melakhim* III, 10.
[11] R. Meir Simcha haCohen (Russia, 1843–1926).

> is sitting in judgement... does the Torah demand two witnesses. Royal law which is responsible for the correct ordering of society is equivalent to the laws of the Torah regarding gentiles.[12]

The law of the king (secular law) is directed to maintaining social order, religious law (e.g. violation of the Sabbath) belongs to the Sanhedrin alone and not to the State. In the light of all this, we can understand why the tribe of Judah handed Samson over to the Philistines[13] since his offences were of a capital nature as well as involving matters of property. The relevant laws, as opposed to religious law, are international in scope.

Turning to the main topic: May the State of Israel extradite a Jewish criminal to another country for trial at the locus of the crime?

The book of *Judges*[14] recounts the material damage Samson had caused to the ruling Philistines and his being handed over to them. The commentaries debate why it was permissible for the people of Judah to do so. Three grounds are set out. First, he was endangering the public by being a "pursuer" (*rodef*). Second, the law which states that an individual should not be handed over to gentiles for execution, even if that will constitute a public danger, unless he warrants the death penalty like Sheva b. Bikhri,[15] implies even though he may be liable to the death penalty only according to the King's law and not Torah law. Samson was clearly liable under Philistine law.[16] Thirdly, Samson agreed to his extradition,[17] which would make Samson's case similar to that of the Martyrs of Laodicea who gave themselves over to the authorities to save the public from collective punishment for the murder of a princess.[18] Had Samson fought his extradition it would not have been permissible to extradite him.

[12] One could conclude that since royal law is to be the same for all nations, extradition (see below) should be superfluous. A criminal could be tried in Israel for a crime committed elsewhere. This point needs further study.

[13] *Judg.* 15. See below.

[14] *Judg.* 15:4–13.

[15] Who "lifted up his hand against the King": 2 *Sam* 20:21 (see below). See Maimonides, *Hilkhot 'Yesodei haTorah* V,5.

[16] *Or Sameah* to Maimonides, *Hilkhot Melakhim* III, 10. Malbim (R. Meir Loeb b. Yehiel Mikheal, Rumania, 1809–1879) Commentary to *Judg.* 15.

[17] Radak (R. David Kimchi, Provence, 1160–1235) Commentary to *Judg.* 15.

[18] *Taan.* 18b; Rashi *ad locum.*

Again the book of *Judges*[19] relates the case of the murder of the concubine of the Levite in the Benjaminite town of Gibeah. When the other tribes heard of the heinous crime they demanded the extradition of the perpetrators in order to do justice. The Benjaminites refused and there ensued a civil war which resulted in the near eradication of the tribe of Benjamin.

Nahmanides[20] in his commentary on the *Torah*[21] discusses at length whether the tribe of Benjamin or the other tribes were in the right. He concludes that both erred. The other tribes erred in going to war over an internal tribal issue while the tribe of Benjamin erred in not doing proper justice to criminals in their midst.

Abravanel[22] in his commentary on *Judges*[23] disagrees. He claims that the collective body of people, including the Sanhedrin, had the right to intervene in intratribal affairs. No individual tribe would have this right since "each tribe is commanded to judge its own people"[24] but all of Israel together clearly has the right to intervene.

Thus, according to Nahmanides, in matters of criminal justice each tribe is totally autonomous, while according to Abravanel this autonomy does not preclude the intervention of the Sanhedrin representing the nation as a whole. In the view of the former, the Benjaminites were in the right regarding the war – they went out to battle and thereby endangered themselves to protect the divinely given responsibility and right to establish justice within their own tribe. They felt, and correctly so, that justice was important enough an issue to fight for because it goes to the very fabric of society. Without a judicial system society and the nation would collapse. The Benjaminites were willing to endanger their lives over this lofty issue.

This extreme reaction of the Benjaminites fits well with a law found in Maimonides:[25] "Thou shalt not fear any man.[26] You should not say 'this person is wicked; perhaps he will burn down my silo, perhaps he

[19] *Judg.* 19, 20.
[20] R. Moshe b. Nahman (Spain, 1194–1270).
[21] *Gen.* 19:8.
[22] Issac b. Judah Abarvanel (Spain, 1437–1508).
[23] *Judg.* 19.
[24] *San.* 16b.
[25] *Hilkot Sanhedrin* XXII, 1.
[26] *Deut.* 1:17.

will cut down my plantation, perhaps he will kill my child.' " One does not compromise justice even for *pikuah nefesh* (danger or fear of loss of life). Although justice is not listed along with the three matters[27] which are not abrogated for *pikuah nefesh,* it ranks equally with them because without a proper judicial system a nation cannot exist. Just as we are commanded to endanger ourselves and go to war in a *Milhemet Mitsvah*[28] against an attacker to save the nation, so too must we endanger ourselves to save the judicial system, which is also a form of saving the nation.

One therefore could conclude from the above that Israel should stand firm on its right and responsibility to judge Jewish criminals in Israel and not extradite them.

The *Midrash*[29] relates the following story. When Nebuchadnezzar came to subjugate Jehoiakim, he set up camp in Daphne, near Antioch. The Sanhedrin went and asked him, "Has the time of the Temple's destruction arrived?" He answered, "No, Jehoiakim the King of Judea has rebelled against me. He must be yielded up to me." The Sanhedrin then went and told Jehoiakim, "Nebuchadnezzar wants you to surrender to him", to which he asked "Is it proper to sacrifice one life for another? Is it not written 'Thou shalt not deliver a slave unto his master'?"[30] They retorted "Did not your grandfather do likewise to Sheva b. Bikhri as it says 'behold his head shall be thrown to thee over the wall'?"[31] Jehoiakim did not listen to them and consequently they took him into custody.

The story is completed by a different *Midrash.*[32] "How did they chain him? R. Eliezer and R. Simeon disagree. R. Eliezer says he was alive. R. Simeon says he was dead. R. Joshua b. Levi said, 'I can reconcile both views. They chained him alive but since he was delicate he died in their hands.' "

[27] Idolatry, adultery, murder.
[28] There are three types of just war – (a) conquering the seven Canaanite nations (b) destroying Amalek (c) defensive war. See Maimonides, *Hilkhot Melakhim* V,1.
[29] To *Vayigash* 94.
[30] *Deut.* 23:16.
[31] 2 *Sam.* 20:21.
[32] *Midrash Rabba, Metzorah*, 6.

These Midrashic sources seem to contradict the assertion of Maimonides:[33]

> If gentiles demand a particular individual from a group of people for execution or otherwise the entire group will be killed, then, if the individual is liable to the death penalty as Sheva b. Bikhri was, they may hand him over. One does not, however, tell them so in the first instance. If the individual is not liable to the death penalty, it is better that they all be killed rather than hand over a single Jewish life.

How then did the Sanhedrin deliver King Jehoiakim to Nebuchadnezzar? A commentary on Maimonides, *Avodat Hamelekh*,[34] answers by claiming that Nebuchadnezzar had not specified his intent to execute Jehoiakim. Also since the Midrash, according to R. Simeon, says that he was already dead when handed over, there would be no problem. One could also resolve the contradiction by recalling the various opinions as to why the people of the tribe of Judah were allowed to hand Samson to the Philistines, as above. Here, too, we may say that Jehoiakim endangered the public, was liable to the death penalty under royal law or that they were trying to convince him to surrender willingly.

The Palestinian Talmud relates:[35]

> If a group of travellers comes face to face with gentiles who demand that one of the group be handed over to be killed, otherwise the whole group will be killed, it is better that they all be killed and the life of a fellow Jew not be surrendered. If, however, the gentiles specify who they want, as was the case with Sheva b. Bikhri, they should surrender him and not be killed. R. Simeon b. Lakish said that this is so only if he is liable to the death penalty as Sheva b. Bikhri was. R. Yohanan said, even if he is not... Ulah b. Kushav was demanded to be delivered up by the [Roman] government. He fled to Lod where R. Joshua b. Levi resided. Government troops came and surrounded the city and threatened to

[33] *Hilkhot Yesodei haTorah* V, 5.
[34] R. Menachem Krakowski (Lithuania, 20th century).
[35] *Y. Ter.* VIII, 4.

> destroy it, if Ulah were not surrendered. R. Joshua b. Levi went to him and convinced him to surrender himself. Elijah of blessed memory had been wont to appear to R. Joshua b. Levi but after this event stopped appearing. R. Joshua b. Levi fasted several fasts and Elijah reappeared. Said Elijah to him, "Should I appear to a *moser*?"[36] R. Joshua b. Levi answered, "Did I not do according to the Law?" Elijah resorted, "Do you think that this is a law for the Righteous?"

The last part of this Talmudic passage seems to be the source for the rule in Maimonides that even when one may hand over a fellow Jew to the gentiles, it should not so be ruled from the outset for it is not a "law for the Righteous."

Bayit Hadash[37] in explaining the above Talmudic passage claims that if the specified individual is liable to the death penalty under Torah law as Sheva b. Bikhri was, then he may be surrendered even in the first instance. If he is only liable under gentile law, he may be given over, but this rule is not to be proclaimed in the first instance. According to this analysis, the argument between R. Simeon b. Lakish and R. Yohanan is that the former requires the specified individual to be liable to the death penalty under Torah law, while for the latter it suffices that he is liable under secular law. If the individual is not liable to the death penalty under either law, R. Yohanan would agree that it is forbidden to hand him over for execution even if the entire community is threatened. Maimonides' statement[38] then fits the view of R. Yohanan. Apparently Maimonides purposely worded his last phrase to be "if the individual is not liable to a death penalty," without mentioning the case of Sheva b. Bikhri, to indicate that the specified individual is not liable to a death penalty even under the secular law.[39]

Turei Zahav[40] to *Shulhan Arukh* points out that the passage quoted above from the Palestinian Talmud makes no mention that Ulah b.

[36] One who gives over Jews to the gentiles.
[37] By R. Joel Sirkes (Poland 1561–1640) to *Shulkan Arukh*.
[38] In text to note 33 above.
[39] This analysis answers the questions posed by *Kesef Mishne ad locum*. Likewise Meiri explains the passage "liable to the death penalty as Sheva b. Bikhri was" to mean that Sheva b. Bikhri was liable in Israelite law.
[40] By David b. Samuel HaLevi (Poland 1586–1667).

Kushav necessarily was to be executed. He therefore concludes that the intended punishment is inconsequential. One should not hand over a fellow Jew to the gentiles even if he be specified and the intended punishment is a money fine or imprisonment.[41]

The Talmud[42] relates:

> R. Eliezer b. R. Simeon [having been charged with the task by the Roman goverment] proceeded to apprehend [certain] thieves. R. Joshua b. Karhah sent word to him, "Vinegar, son of wine,[43] for how long will you send the people of our God to their deaths?" He answered, "I weed out thorns in the vineyard." [R. Joshua] retorted, "Let the owner of the vineyard himself come and weed out the thorns." ...A similar thing happened to R. Ishmael b. R. Jose. Elijah met him and said to him "Until when will you send the people of our God to their death?" "What should I do?", He answered, "it is the command of the king?" Said Elijah to him, "Your father fled to Asia [Minor], you flee to Laodicea."

Ran[44] writes that one who in the Diaspora has the king's mandate to deal with capital crimes may do so only if the death penalty is warranted both in Torah and the King's law. The king's mandate is not enough if the Torah law does not designate a death penalty.[45] (Hence the wrath with R. Eliezer b. R. Simeon and R. Ishmael b. R. Yossi).

Ritvah,[46] however, disagrees and says[47] that R. Eliezer b. R. Simeon had the right to execute without witnesses or warning since he was acting as the king's agent. The King's law allows execution without witnesses or warning in order to correct society's ills. David did the same when he executed the Amalekite proselyte.[48] The king's agent has the same rights and authority as the king.

[41] This contradicts *Avodat Hamelekh* cited at note 34 above.
[42] *B.M.* 83b.
[43] "Evil son of a righteous father."
[44] To *Sanh.* 46a.
[45] Nor is the king's mandate to handle capital crimes enough to allow execution if *Torah* law designates a death penalty but the King's law does not.
[46] R. Yom Tov b. Abraham Ishbili (Spain, 1250–1330).
[47] Quoted in *Shita Mekubetset* to *B.M.* 83b.
[48] 2 *Sam.* 1:15, 16.

Ran's opinion leads us to conclude that only where there is complete congruence between Torah law and the King's law can the king's mandate be valid. The Rabbis chastised R. Eliezer b. R. Simeon and R. Ishmael b. R. Yossi because theft does not carry with it the death penalty under Torah law. Extradition is only conceivable when there is complete congruence between the other state's law and Torah law regarding the matter in hand.

COERCION IN CONJUGAL RELATIONS

*Nahum Rakover**

Introduction

The right of a man to have sexual relations with his wife against her will has come under legislative discussion in recent years in Israel.

According to section 152(1)(a) of the Criminal Law Ordinance of 1936,

> Any person who (a) has unlawful sexual intercourse with a female against her will by the use of force or threats of death or severe bodily harm, or when she is in a state of unconsciousness or otherwise incapable of resisting... is guilty of a felony and is liable to imprisonment for fourteen years. If such felony is committed under paragraph (a) hereof it is termed rape.

This section was replaced by section 345 (marginally headed "Rape") of the Penal Law, 1977. (This Law is a consolidated version of existing statutory criminal law, prepared by the Constitution, Law and Justice Committee of the Knesset under its general power but without authority to change the substance.[1]) Section 345 originally read as follows:

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[1] Sec. 16(e) of the Law and Administration Ordinance, 1948.

> A person who has sexual intercourse with a female, not being his wife, against her will by the use of force or threats of death or severe bodily harm... is liable to imprisonment of fourteen years.

The original term "unlawful" was thus construed in the 1977 version so as to exclude from the offence of rape involuntary intercourse during marriage, on the view that "rape" of a wife is not "unlawful." When objection was raised to this assumption of the role of the interpreter, there were second thoughts by the Knesset and "unlawful" was restored and "not being his wife" deleted from the final text of the 1977 law.[2]

That, however, still left open the question whether to force intercourse upon one's wife was an offence under the Penal Law or, indeed, rape at all.[3] Later in 1978 a Knesset committee, dealing with possible changes in the law of rape, was divided over retaining "unlawful" in section 345 of the Penal Law.[4]

This aspect of the matter was subsequently considered by the Ministry of Justice in connection with a bill for a sexual offences enactment, in the relevant section of which "unlawful" does not appear. The introduction to this bill now before the Knesset emphasises that marriage is no defence to a charge of rape.

The present study is concerned with the position taken by the Jewish law, the *Halakhah*, in this regard. The subject, almost inevitably, falls into two parts. First, does a wife owe her husband any duty to have sexual relations and, if so, the extent of the duty? Secondly, is the duty, if it exists, enforceable? The effect this study has had upon Israeli case law and the recent legislative proposal is set out in an appendix.

The Duty to have Sexual Relations – Source and Nature

a. The duty of the husband

The duty which a husband bears towards his wife in respect of sexual relations is derived from Scripture (contrary, as we shall see, to the wife's corresponding duty). According to *Exodus* 21:10, *she'erah*

2 See sec. 16(h) *ibid.*

3 See *Abu-el Kia'an* v. *Attorney General* (1954) 18*PD*(IV) 200 and *Khatib* v. *Attorney General* (1960) 20 *PD*(II) 136.

4 The Committee's conclusions (Part 2) were submitted to the Ninth Knesset on 14 June 1978.

kesutah ve'onatah lo yigra, usually translated as "her food, her raiment and her conjugal rights he shall not diminish". Some of the authorities seek to base the husband's duty on the term *onatah*, others on the term *she'erah*, and still others derive it by logical inference.[5]

There is also the view of R. Eliezer b. Yaakov in the Talmud which, as understood by a Gaonic authority, obviates the need for any scriptural proof text.[6] This view has been explained by a leading rabbi of the last century, the Netziv of Volozhin, in the following manner:

> Reason tells us that (the man) is so bound. It is, as we all know, for this purpose that a bride enters into marriage, and she is forbidden to find her pleasure elsewhere because of her husband. Hence, if he denies her sexual relations, she is deprived of her right. Even for denying her the pleasure of bearing children, he may be compelled to divorce her and pay her *ketubbah*...since she is not his captive to be deprived of her pleasures.[7]

Here the right of the woman to sexual relations is stressed and from that follows the correlative duty of the husband.

Although the source of the husband's duty lies in the religious precept (*mitsvah*) of conjugal relations, R. Solomon b. Aderat (Spain, 1235–1310) points out that in addition spouses are mutually bound in conjugal obligations as a necessarily implied incident of marriage.[8]

[5] *Mekhilta de R. Yishmael*, *Mishpatim* 3, ed. Horowitz-Rabin 258–9, "*ve'onatah* means sexual relations according to R. Yoshiah. R. Jonathan said: How do we know sexual relations? By inference – since the matters for which *ab initio* she was not married may not be diminished, all the more so regarding that for which she was so married. Rav said: *She'erah* mean's sexual relations." *Ket.*47a–48b.

[6] *Ket.* 48a: *She'iltot de R. Ahai Gaon*, 60. Commentary of R. Solomon b. Shabtai Anav to *She'iltot* III, ed. Mirsky, 187; for an identical view, cf. *Y. Ket.*V,7 for the parallel passage to the *Mekhilta*, note 5 above. According to *Sefer Yere'im* 191, the duty to have sexual relations is not Biblical but rabbinical. *Semag*, Negative precepts 81, is to the same effect.

[7] *Birkat haNetsiv* to the *Mekhilta ad loc.* Cf. *haEmek She'elah*, *ibid.*

[8] *Novellae* of Rashba to *Ned.*15b. Cf. *Shitah Mekubetset* to *Ket.* 63a, that sexual relations are fundamental to marriage. See also *ibid.* 71a, and BaH to *Shulhan Arukh Even haEzer.* Likewise, Nahmanides to *B.B.* 126b. Cf. also Maimonides, *Hilkhot Ishut* XIV,6; *id. Hilkhot Nedarim* XII, 9; the apparently contrary view expressed by Maimonides in the passage preceding the last citation can be explained.

And he goes on to say further that the religious precept is dependent upon the obligation. In the absence of the obligation, the religious precept will not come into effect. "The religious precept arises only because of her and not him, since he is bound to her", with the result that if a husband solemnly vows to abstain from intercourse with his wife, thus putting an end to his obligation towards her, the religious precept will no longer apply to him.[9]

Discussion of the different sources to which the husband's duty is attributed is not merely an academic exercise but involves significant practical consequences. If the source is Scripture, he may be debarred from "contracting out" and any condition he may seek to introduce is a nullity.[10] If his duty rests on his presumptive obligation, the spouses may validly agree to a condition releasing the husband from maintaining conjugal relations.

Moreover, there is some authority for saying that even if the source is Scripture, release from the duty may be obtained by the woman agreeing on her part to waive its observance[11] or by stipulation prior to marriage.[12] In this view, therefore, because the duty of conjugal relations is *jus dispositivum* and not *jus cogens*, it depends upon the husband.[13]

[9] See further on the obligation of conjugal relations, B. Schereschewsky, *Family Law in Israel* (Jerusalem, 1967) 180 (Hebrew).

[10] *Ket.* 56a and Rashi *ad loc.*Cf. Maimonides, *Hilkhot Ishut* VI,10 who distinguishes between sexual relations which may not be made conditional and the other incidents which, as matters of property, may. *Y.B.M.* VII,7 seems to take the view that sexual relations may also be made conditional (S. Lieberman,*Tosefta Kipeshuta*, (*Kidd.* III,7) note 29).

[11] *Resp. Tashbetz* I,94, in dealing with conditions, observes that although the rule is that if the man stipulates that he is under no obligation, the stipulation has no effect, it is otherwise where the condition is that the woman will forego intercourse. See the *Novellae* of Nahmanides to *B.B.* 126b; K. Kahana, *Birkat Kohen*, 79.

[12] *Havat Yair* to Rif, *B.B.* VII (54a,5), relying on Rashi to infer a new rule – where a man stipulates before marriage that his wife should not be entitled to food, raiment and conjugal rights from him, the stipulation (even as regards conjugal rights) will be valid.

[13] See *Gilyone HaShas* to *Ned.*15b: "it appears that the entire obligation derives from what he himself has undertaken, and if he wishes not to bind himself in this manner he is entirely free to do so. Hence it is not divinely ordained". Cf. Rashba as in text to note 9 above.

It should be noted that the *mitsvah* of conjugal relations differs in important respects from the *mitsvah* of bearing children. The former will subsist even when the latter has already been fulfilled or when for some reason the woman cannot conceive.[14] Again, whilst the husband can be released by his wife's waiver from conjugal relations, he cannot be so released from the precept to have children.[15] "The precept of conjugal relations and the precept to have children are obviously separate matters and independent of each other".[16]

b. The duty of the wife

There is no Biblical or talmudic source which directly imposes upon a wife the duty of conjugal relations. It may, however, be inferred from the Talmudic discussion of the case of a woman taking a vow debarring her husband from having intercourse with her, where the view is taken that he need not formally annul the vow to dispose of it (as in other instances he might), since she is bound (subject) to him in this respect.

> If she vows 'The pleasure of cohabitation with me is forbidden to you', why do we need annulment; she is in any event bound to accord it to him? If, however, she says 'The pleasure of cohabitation with you is forbidden to me', it is as R. Kahana stated: Where the vow is the pleasure of cohabitation with me is forbidden to you, she may be compelled to cohabit; but if it is that the pleasure of cohabitation with you is forbidden to me, he can annul the vow.[17]

As we observed above, Rashba explains that to be bound to have

[14] *Resp. Igrot Moshe, Even haEzer* 102: "conjugal relations do not depend on the possibility of conception but are part of a husband's obligation towards his wife, to give her pleasure and not cause her pain, just as is the case with food and raiment, as explained by Tosafot to *Ket.*47b".

[15] Maimonides, *Hilkhot Ishut* XV,1: "A woman may permit her husband after marriage to abstain from conjugal relations provided that he has fulfilled the command of 'be fruitful and multiply' by having children. Otherwise he remains bound by the obligation until children are born to him, for that is a positive commandment of the Torah".

[16] *Maggid Mishneh ad loc.*

[17] *Ned.* 81b; see also *ibid.*15b and *Ket.* 71b and text to note 42 below.

sexual relations follows from the mutual obligation of spouses to cohabit. His argument is that although the woman is not commanded to have conjugal relations, any vow by her denying them to her husband will be of no effect and for that reason will obviously not require annulment since she is bound to him.

R. Abraham MinHahar (Carpentras, 14th century) regarded this "servitude" as a concomitant of the *kinyan* of sexual relations based on the term "take" in the verse "If any man take a wife" (*Deut.* 22:13).[18]

A similar approach is taken by the Netziv of Volozhin in explaining that *kinyan* in the context of marriage involves being bound only as regards sexual relations.[19] Beyond that, no *kinyan* occurs. Accordingly, if a wife takes a vow prohibiting her husband from having sexual relations with her, formal annulment of the vow by the husband is unnecessary and she will be compelled to yield to him, since it is for this purpose that she was "taken". When Scripture speaks of "the purchase of his money" (*Lev.* 22:11)[20] in connection with the acquisition of servants, that goes only to the fruits of their labour. Similarly, a wife is only subject to her husband with regard to conjugal relations,[21] because although a wife is generally compared to her husband's servants, it was clear to the Sages that whatever she earns by her own labours belongs to her and therefore the only matter in which she is subject to him (like his servants) is in regard to conjugal relations.

As regards such conjugal relations, whilst the man cannot forbid himself intercourse in contravention of the explicit precept "her conjugal rights shall not diminish", no similar prohibition affects the woman. Her duty in this regard is implied from the verse "If any man

[18] Commentary to *Ned.* 15b, cf. *RaN* to *Ned.* 20b and *Shitah Mekubetset*, *ibid.*, to the effect that a man may do as he pleases with his wife since the Torah places her in his possession (*kinyan*).

[19] In this regard, see *Novellae* of Rashba to *Gitt.* 75a; *Resp. Mahane Hayim* II, *Even haEzer* 44; *Resp. Sho'el u-Meshiv* III, iii,9 (*ad. finem*).

[20] See *Yeb.* 66a.

[21] *Torah Temimah* to *Lev.* 22:11: "the term *kinyan* applies to all things that come to a person by right and not merely those he acquired by money purchase (as in *Ruth* 4:5,10) but this does not mean that a wife is in reality something purchased like a slave, since a slave becomes the absolute property of his master whereas only the income of the wife's possessions are acquired by her husband and that not according to Biblical law but by rabbinical *takkanah*".

take a wife and go in unto her" (*Deut.* 22:13). Hence for this purpose alone is she "taken" by him.[22]

c. Conjugal relations when the husband is repulsive to his wife

It would appear from Maimonides that the wife's obligation to permit conjugal relations is limited:

> A woman who denies her husband sexual relations is called a *moredet* [a rebellious wife]. If, upon being asked why she has rebelled, she replies that her husband has become repulsive to her and she cannot willingly cohabit with him, the husband will be compelled duly to release her since she is unlike a captive woman with whom he may cohabit despite her aversion.[23]

Whilst many of the early authorities are not in agreement with Maimonides, that the man must give his wife a divorce in these circumstances,[24] they uphold the underlying principle that the woman's obligation ceases when she finds him repulsive.[25,26]

[22] *Resp. Meshiv Davar* IV,35.

[23] Maimonides, *Hilkhot Ishut* XIV,8.

[24] On the various views relating to compulsory divorce on the grounds of "repulsiveness", see M. Shapira, "Divorce for Reason of Repulsiveness", (1971) 2 *Dine Yisrael* 117; Z. Warhaftig, "Compulsory Divorce in Practice", (1976–1977) 3–4 *HaMishpat HaIvri* 153, 183; A. Halevi-Hurwitz, *Kuntres haBerurim* (Bnei Brak, 1975).

[25] It could be advanced that in Maimonides' view the wife's plea that her husband is repulsive to her does not release her from conjugal relations and these remain in full effect, but because he is hateful to her and she is therefore unable willingly to have sexual relations with him, she is entitled to a divorce to release her from her duties. (Divorce, however, is not intended merely to protect the woman against involuntary relations since were it so, in the event of there being no suggestion of that, he could not be compelled to give her a *get* and the wife would be entitled to conjugal relations, but because she does not obtain satisfaction by reason of his repulsiveness she becomes entitled to a divorce.) To this argument, it may be said that even assuming that it is correct, Rema in fact decides that where a woman has good grounds for the plea of repulsiveness she may be allowed separation from her husband (*Shulhan Arukh Even haEzer* 77, 3) and therefore she is under no obligation to maintain conjugal relations. (This form of separation must be distinguished from that where it is a woman's right, approved by the court, to live apart from her husband in another place until the matrimonial residence is changed, or where the husband applies to court. In these cases separation does not arise in order to negate

Moreover, the implications of Maimonides' formulation of the rule is that a woman will only become a *moredet* if she denies her husband conjugal relations in order to aggrieve him. This aspect is repeated a number of times by Maimonides in regard both to a woman being declared a *moredet* and to her duty to permit conjugal relations. "If she has rebelled against her husband in order to aggrieve him, saying that she has done so because he acted in some way or another..."[27]; "She is treated in this manner if she has rebelled in order to cause him anguish".[28] And in speaking of her obligation: "The Sages also commanded the wife to be chaste in the home...and not refuse her husband in order to pain him...but at all times attend to his wishes".[29,30]

the husband's right to conjugal relations: see M. Korinaldi, "The Relief of Temporary Separation... and its development in the Rabbinical Courts", *HaMishpat HaIvri* 1(1974) 184; Warhaftig, *op. cit*,, 169–172.)

[26] See *Rabbinical Courts Judgments* I, 327, citing *Bne Ahuvah* to Maimonides, *Hilkhot Ishut* XIV,15, who maintains that according to Maimonides a wife is not in the same category as a captured woman, nor equally, when the husband claims she is distasteful to him, will he be held captive to her. The court reasoned that in such a case the husband has no need to force himself upon her if she is so distateful, whereas in the reverse situation the wife suffers greatly and needs protection. The court, however, did not deal with the question whether the husband may lawfully compel his wife to submit to his advances.

[27] Maimonides, *Hilkhot Ishut* XIV,9. See text to note 36 below.

[28] *Ibid.*, XIV,11–12 ("a betrothed woman who refuses to marry in order to hurt the man is truly a *moredet*").

[29] *Ibid.*, XV, 18. Cf. the difficulties raised by *Hagahot Maimoniot* from *Shab.* 140b and by *Lehem Mishneh*, *ad loc.* and the solution suggested by *Birke Yosef* to *Shulhan Arukh*, *Even haEzer* 15, 3 and *Ma'aseh Roke'ah* to Maimonides, *ad loc.*. According to *Eliyahu Rabba* to *Shulhan Arukh Orah Hayim* 240, 17 it is a serious transgression for a woman to ask, even jokingly, for some material consideration before allowing intimacy.

[30] Equally regarding the husband's duty to his wife, Maimonides lays down that the husband will transgress the negative precept in *Ex.* 21: 10, if he denies her in order to cause her distress; *Hilkhot Ishut* XIV,7. See also his *Sefer haMitzvot*, Negative Commandment 262. *Shulhan Arukh Even haEzer* 76, 11 is to the same effect. According to *Resp. Alshekh*, 52, a transgression will also occur when the husband has no intention of aggrieving his wife. See in addition *Be'er Hetev* to *Shulhan Arukh Even haEzer* 100,16 and *Ma'ase Roke'ah* to Maimonides, *Hilkhot Ishut* XIV,7. According to Ritba, cited in *Shitah Mekubetset* to *Ket.* 48b, a husband's refusal to have intercourse when unclothed for reasons of modesty will make a *get* exigible from him; in the same circumstances, the wife will be treated as a *moredet*, "for this is not the way of love." See also a response of Rav Kook printed in *Tehumin* I, 9–10 and Kanievski, note 68 below. *Resp. Mahane Hayim* (R. Hayim

The view that a wife is not subject in any way to her husband in their conjugal relations is apparently taken by R. Moses b. Joseph of Trani, Mabit (Safed, 1500–80). In his *Kiryat Sefer* on Maimonides, he writes:

> The *moredet* who says her husband is repulsive or that she wishes to pain him for some reason or another is not compelled to cohabit with him since she is unlike a captive woman who can be compelled to submit to sexual relations with a man she does not desire. Just as she is not compelled to accept food and raiment if she does not wish to be maintained (by her husband), so also with regard to conjugal rights. Alternatively, Scripture speaks of 'her conjugal rights' and not simply of 'conjugal rights', with the result that these depend on her own free will; the rights are hers and not the husband's.[31]

That the wife cannot be compelled to have sexual relations and the right is hers exclusively must not, however, be taken literally since a woman who refuses sexual relations to her husband may well be declared a *moredet*, with all that involves.[32] Mabit must therefore be taken to have in mind only the matter of compulsion but no further; the right is equally that of the husband and sanctions will attend impairment of that right.

Compulsion of the Wife

a. General – the absence of consent

We have seen that in some circumstances (as when the husband is repulsive to her) a woman is not under obligation to be intimate with her husband. Where, however, the obligation is fully effective the question arises whether the husband may, so to speak, take the law into his own hands and enforce the obligation by forcing himself upon her and ravishing her. Apart from the whole problem of "self-help" in Jewish law, it is enough to say that forcible sexual relations differ so

Sofer) *Even haEzer* II,41, distinguishes between permanent and temporary rebelliousness: the latter occurs when the intention is to cause pain, the former when there is no such intention. (According to *Mahane Haim*, *onah* consists of the act of intimacy. See *Resp. Ketav Sofer Even haEzer* 102 and *Rabbinical Courts Judgments* I, 344.)

[31] *Kiryat Sefer* to Maimonides, *Hilchot Ishut* XIV. See text to note 37 below.

[32] Further on the law relating to the *moredet*, see Schereschewsky, *op. cit.*, 185 ff.

substantially from voluntary relations that they do not constitute "self-help" and effectuation of the right to voluntary cohabitation.

The answer to the question posed above is to be found in the source of the obligation generally. As we said earlier, the source lies in the obligations undertaken by a woman on entering into marriage and its scope must be delimited accordingly. Any agreement by the woman on that occasion to her husband having his desire against her wish forcibly will clearly be of no effect.[33] We need not discuss the validity of an express condition between spouses regarding involuntary sexual relations or the effect of such a condition should the woman subsequently retract.[34] Assuming even that the condition takes effect and that the woman may not go back on it, is it to be implied from the very existence of marriage? The answer is that although the woman's duty is a necessary concomitant of marriage, there is no condition implied that her husband may ravish her.[35]

What then, it may be asked, is the value of the woman's obligation if it depends upon her own free will to have intercourse? What is there to prevent her from "blackmailing" her husband and obtaining benefits

[33] Even were it contended that in earlier times a woman would consent to forcible intercourse, it is the existing situation as it is today that concerns us.

[34] On the application of the negative commandment, "thou shalt not add thereto" (*Deut.* 4:2; 13:1), see the observations of Luria, note 35 below. The view of Luria given by the Talmudic Encyclopedia, title "*Hovel*" (XII, 681 note 23, and 683–84), that waiver is effective, is not acceptable. Even in the absence of such a negative commandment, a person cannot stipulate irrevocably to suffer in his or her person, mentally or physically, and may therefore always resile from the stipulation. See the distinction made by Abulafia, *Yad Ramah* to *M.B.B.*II,80, between the acquisition by submission of a right that affects property adversely (*hazakah*) and a similar right affecting a person (or creating a serious nuisance like malodour or invading a person's privacy). The distinction and the "victim's" right to abrogate any conditions that might have been made voluntarily are explained more fully and succinctly by Nahmanides, *Novellae* to *B.B.* 59a.

[35] Cf. Lnria, *Yam shel Shlomo* to *M.B.K.* III, 21, who demonstrates that the talmudic rule that a husband is liable to damages for hurting his wife physically during intercourse applies with equal force to other circumstances, even under provocation, on the presumed ground that by virtue of marriage she is under the implied obligation to hearken to his wishes. Even if a condition in this regard were to be implied by entering marriage, it would have no effect since it would be in contravention of "Thou shalt not add thereto". The rule, Luria adds, applies to intercourse which is clearly basic to marriage; a man must control and moderate his desires and not hurt his wife; *a fortiori* in any other situation.

in consideration of their cohabiting? Although the woman must agree and in this sense is "bound" to do so, and non-compliance may entail sanctions, the conjugal relations may not occur through physical force; they may only be "coerced" through the legal measures prescribed in the case of a *moredet*, the loss of the value of her *ketubbah* and of her other rights, and delivery of a *get*. As Maimonides puts it,

> If she has rebelled against her husband in order to aggrieve him, saying that she has done so because he acted in some way or another or because he reviled her or because he provoked quarrels with her and the like, she is to be warned by the *bet din* that if she persists in her rebellion, she might well incur loss of her *ketubbah*.[36]

b. Refusal of the woman to cohabit

(a) Where a refusal to cohabit is not such as to distress her husband grievously and is indeed justified, a wife will not necessarily lose any of her rights since she is not bound to cohabit in circumstances such as these.

Thus, with regard to the frequency of cohabitation, R. Joseph of Trani, *Maharit* (Turkey, 1568–1639) took the view that the wife's duty is proportionate to the husband's duty to maintain conjugal relations (in accordance with his calling and status as explained in *M. Ket.* 5:6), and no more, since she is not captive to him to have intercourse at all times.

> Certainly she is not subject to him incessantly when she does not wish it, and she will not become a *moredet* unless she contends that he is repulsive to her or distresses her but if she claims that she need only submit to conjugal relations on the occasions prescribed by the *Torah* she may not, it seems, be compelled.[37]

R. Rafael Aaron b. Shimon in his *Bat Na'avat haMardut* reports a case that came before his *bet din* in Egypt, in which on a complaint that the husband came to her incessantly during the night, leaving her intolerably

[36] Maimonides, *Hilkhot Ishut* XIV, 9. See text to note 27 above.

[37] *Resp. Maharit* I,5, cited in *Knesset HaGedolah Even haEzer* 77; *Tur* note 7, *ibid.*, and *Be'er Hetev*, *ibid.* See also *Bat Na'avat haMardut* (Jerusalem, 1917) II, 1.

sleepless and exhausted, the wife was not declared a *moredet* and was exonerated from refusing intercourse; she was also permitted to claim divorce without loss of any of her rights, although the husband insisted that as the woman was his lawful wife his desires had to be met in accordance with Scripture.[38] The circumstances showed that the woman was suffering real torment and that the husband was behaving like an animal.

This judgement and the observations of Maharit cited above were adopted by R. Avadyah Hadayah in the Jerusalem Supreme Rabbinical Court: "A woman is not to be declared a *moredet* on the complaint of her husband when she is justified in her refusal"[39] to have excessive intercourse.

(b) We have already noted that in dealing with a *moredet* whose husband was repulsive to her Maimonides held that a wife is not the captive of her husband in matters of intercourse "to her aversion". What is the situation where aversion is not an element? According to Mabit, the rule is not confined to "repulsiveness" but extends to a refusal in order to cause him grievous pain. Thus a woman is released from any duty to cohabit unwillingly.[40]

R. Solomon Luria (Poland, 1510–1573), a contemporary, it may be observed, of *Mabit* of Safed, took the same view. Dealing with the case of a woman being compelled to work, he shows that Maimonides' rule that she may be chastised into obedience must give way to the remarks of Rabad that he had never heard of a woman being so chastised. Luria goes on to say that although according to one Talmudic authority a refusal to work may also make a wife a *moredet*, the question is why should she be penalised by being declared a *moredet* and losing her *ketubbah*, if chastisement is available. The idea of a person not living in a "hornet's nest" will not apply because the husband controls his wife and may punish her. Granted that a *moredet* with regard to cohabitation cannot, we say, be chastised since she may not be forced into sexual intercourse that is obnoxious to her, but in the case of work that argument is not available.[41] From all this it follows that Luria held

[38] *ibid.*, II,2.
[39] *Resp. Yaskil Avdi* V, 69.
[40] Clearly this "liberty" may entail loss of her rights as a *moredet*.
[41] *Yam shel Shlomo* to *M.B.K.*III,21. Cf. the observations of *Resp. Divre Hayim* II

quite simply that a wife is not to be chastised regardless of whether she is a *moredet* because of "repulsiveness" or because she wishes to aggrieve her husband.

c. Coerced cohabitation

We may now return to our Talmudic sources. It is possible perhaps to infer a right in the husband to compel his wife to fulfill her duty towards him in accordance with R. Kahana's dictum in the Talmud that where a woman forbids her husband cohabitation with her under vow, she may be compelled to cohabit.[42] The term "compelled", however, in the context of marital relations, is sometimes construed as imposing a duty contrary to the wishes of the person concerned and, in the event of a refusal, enforcing observance of the duty by denying that person certain of his or her rights, but not by physical means. Hence R. Kahana's dictum as such cannot be understood as empowering the husband to use physical compulsion.[43]

Thus, for example, regarding the duty to live in Israel, we read:

> Where (the husband) wishes to go up (to the Land of Israel) and (the wife) does not, she may be compelled to do so; otherwise she may be divorced without her *ketubbah*. If she wishes to go up and he does not, he may be compelled to do so; otherwise he must divorce her and give her her *ketubbah*.[44]

On this passage, R. Shimon b. Zemah Duran (Algiers, 1361–1444) commented: "This compulsion is only financial, the loss of the *ketubbah*, physical chastisement not being mentioned but divorce. Wherever compulsion is mentioned without divorce it is financial".[45]

Even haEzer 41, that the rules regarding a *moredet* do not arise in the case of a woman who, though in love with her husband, "rebels" because her father finds him distasteful.

[42] *Ned.* 81b. See text to note 17 above.

[43] A. Wasserman, *Kovetz Shi'urim to Ketubot*, (Tel Aviv, 1964) 231, finds the term "compel" difficult, since her children would be the issue of ravishment, included in the nine groups referred to in *Ned.* 20b (see text to note 60 bellow). This difficulty is, however, dispelled by the view taken in the text.

[44] *Ket.* 110b, the source of which is *T. Ket.* XII,5, where the reference to divorce and the *ketubbah* does not, however, appear.

[45] *Resp. Tashbetz* III,86.

The exclusion of physical chastisement is not restricted to those cases where the express sanction is loss of the *ketubbah* or divorce with the *ketubbah*, but it applies generally; where compulsion is mentioned without divorce, it is of a financial nature.[46]

The term "compelled" also occurs in connection with the work which a woman is bound to perform, and opinion is divided over its precise meaning. According to the *Mishnah*: "R. Eliezer said that even if she brought (her husband) a hundred bondswomen, he may compel her to work in wool since idleness leads to unchastity."[47]

Maimonides holds that "they compel any woman who refuses to work at anything she is under obligation to perform, even by physical chastisement".[48] To this Rabad objected, "I have never heard of women being physically chastised; instead their requirements and maintenance are reduced until they give way".[49] Maimonides, however, does not permit the husband to do the compelling himself but assigns the process to the court;[50] as he says, "they compel, etc." As we observed above, Maimonides rules that a woman who pleads her husband's repulsiveness as the reason for not having intercourse is released from her obligation in this regard since she is not his captive.

[46] See *Resp. Mabit* I,139, and *Rabbinical Courts Judgments* I,98. According to *Resp. Rashba* I,1192, where a woman urges that she wants to bear a son who will support her in old age, her husband will not be actually compelled to divorce her in spite of the reference in *Yeb.* 65 to compulsion where it is taken to be financial, her *ketubbah* being supplemented. See also *Resp. Rosh* 53,6.

[47] *M. Ket.* V,5 (*Ket.* 59b). At *Ket.* 61b as well it is stated: "For it was taught: (the husband) may not compel her to wait upon his father... but he may compel her to feed straw to his cattle. R. Judah said: Nor may he compel her to work flax".

[48] Maimonides, *Hilkhoṭ Ishut* XXI, 10.

[49] Cf. *Rabad, Hasagot* to Maimonides *loc. cit.* and his remarks cited in *Ritba Novellae* and *Shitah Mekubetset* to *Ket.* 63a, that in the view of R. Huna a woman who refuses to work is not treated as a *moredet*. "But if her *ketubbah* cannot be reduced, how is she to be compelled? Mere words will be of no avail. To use the rod and the scourge is not something one does to a woman. Compulsion is therefore only exercisable through the *ketubbah*". See *Migdal Oz* on this passage.

[50] Me'iri, *Bet haBehirah* to *Ket.* 63a, notes in the name of Maimonides that he may himself compel her by beating and imprecation. *Yam shel Shlomoh* on *M.B.K.*III,21, also notes that Maimonides permits the husband himself to use physical force, if his wife refuses to work, just as a master may compel his servant. See *Ma'ase Roke'ah* to Maimonides *ad loc.*

d. "A man may do whatever he wishes with his wife"

There is another source that requires examination:

> R. Johanan said: the Sages held that the law does not follow the view of Johanan b. Dahabai, but a man may do whatever he wishes with his wife.[51]

That "a man may do whatever he wishes with his wife" would suggest that he has no need to obtain his wife's consent to intercourse. This, however, is not the case, as emerges from the development of the argument in the *Gemara*. The argument begins with a statement by Johanan b. Dahabai:

> The Ministering Angels told me four things: people are born lame because (their parents) overturned their table (unnatural intercourse), dumb because they kiss that place, deaf because they converse during cohabitation and blind because they look at that place.

That means a person may not follow the practices referred to and if he does the issue he may have will be maimed in one way or another. To this, R. Johanan asserts as above, implying that these practices are not morally reprehensible and no dire results need be feared. It is in this sense that his remark is to be understood since there is nothing in the *Gemara* to indicate that a wife may be forced to submit to the practices mentioned.

e. Unnatural cohabitation

The view that a woman cannot be forced into having sexual relations is not inconsistent with the foregoing. The *Gemara* immediately goes on to tell of

> A woman [who] appeared before Rabbi and complained: I set a table before my husband but he overturned it, to which Rabbi replied, My daughter! The Torah has permitted you [to him] and what can I do for you? A woman appeared before Rav and complained: I set a table before my husband but he overturned it, and

[51] *Ned.* 20b. See Rosh *ad loc.* on the meaning of "overturning the table".

> Rav replied: How does it differ from a *binita* [a small fish which may be cooked in any way one wishes]?

Here again there is no mention of intercourse being carried out by force. The fact that the women complained can be explained by their apprehension that their respective husbands were not allowed to act in the manner indicated, but not that they were in fact opposed to such cohabitation. The only inference to be drawn is that a woman must agree, but not that the man may thus force himself upon her against her wishes.[52]

This is what Rabad has to say in the matter. The unnatural practices which the Sages permitted may only occur when a wife has been persuaded to indulge in them. If, however, they are forced upon her, he is certainly a sinner of whom it is said, "the soul that is without knowledge is also not good" (*Prov.* 19:2). The second part of this verse, "And he that hasteth with his feet sinneth", the Sages observed, refers to a man who insists on repeated intercourse. It is he who is called a sinner even when he wishes thereby to ensure that he has male children, *a fortiori* when he engages in unnatural practices without his wife's consent. Some authorities hold that a man may have unnatural intercourse when his wife desires intercourse but not in the particular form he wants it, thus differing from the case where he wants repeated intercourse against her wishes, since then her refusal goes not to the form of the act but to the act itself, witness the case of the woman who appeared before Rav in the account above. According to these authorities, this was a case where the woman was unwilling. Rabad, however, argues that that is not sufficient since it is possible that the woman was persuaded to act as she did and that all she came to ask was whether any religious prohibition was involved.[53]

[52] It is not to be necessarily inferred from Naziv (president of the Bet Din in Altona, Hamburg and Wandsback), *Atze Arazim* to *Shulhan Arukh Even HaEzer* 25,1, that the husband is empowered to use force but that it depends upon the wife's wishes because she must consent, for otherwise she becomes a *moredet*. So also Netziv of Volozhin in his *Resp. Meshiv Davar* IV,35 who may be held to take the view that compulsion consists of the woman being declared a *moredet*, as explained in the text to note 42 above.

[53] *Ba'ale haNefesh*, *Sha'ar haKedushah*(ed. Ka'apah), 122–23. See the comment of RaN mentioned in note 18 above. Apparently he does not permit this to be done forcefully. See also *Resp. Igrot Moshe*, *Even haEzer*, 63,3.

Rabad's view that a woman may not be compelled to have abnormal intercourse unwillingly is cited as the law in *Tur*.[54]

A stringent decision is reported by R. Elazar Azkari:

> Here in Zefat in the year 5308 [1548] a woman appeared before R. Joseph Karo, R. Isaac Masud, R. Abraham Shalom, R. Joseph Shagis and a number of other rabbis and complained that her husband had unnatural intercourse with her, and they excommunicated and publicly disgraced him, saying that he ought to be burned at the stake. Finally they expelled him from Erets Yisrael.[55]

In a later case, a woman who "rebelled" against her husband because he indulged in unnatural intercourse with her was held not to be a *moredet* and the husband was ordered to divorce her.

> Where the man is evil in his ways and always has unnatural intercourse, such as sodomy, God forbid, and it is known that the woman has suffered very much physically, and this has gone on for so long a time that she can no longer bear it and she rebelled against him because he was repulsive,[56] in these circumstanes, R. Abraham di Boton [the author of the commentary *Lehem Mishneh* on Maimonides] decided that the woman was not a *moredet* at all and must be given a divorce without loss of her *ketubbah* and her interim maintenance, since the situation was irremediable and the intimacies of marital life could not be supervised.[57]

R. Avadyah Hadayah held similarly in a case involving an appeal of a woman who complained of unnatural cohabitation. After citing the view of Rabad, that the woman's consent is essential for the practice to be permissible, he went on to say that "even those who would permit it do so only when the woman is willing, but if a husband forces it upon

[54] *Tur*, *Even haEzer* 25. See *Be'er haGolah* to *Shulhan Arukh Even haEzer* 25,6, referring to *Shne Luhot HaBrit* 100 which seems to rely on *Sefer Haredim* (see next note). See also *Eliyahu Raba* to *Shulhan Arukh Oreh Hayim* 240,2.

[55] *Sefer Haredim*, *Mitsvat HaTeshuvah* II (*ad finem*).

[56] *Bat Na'avat HaMardut* II,3.

[57] *Resp. Edut beYa'akov* (R. Abraham di Boton) 36. See *Resp. Yabia Omer* V,14, regarding exemption from providing maintenance.

the woman he is called a sinner... All the more so when a man indulges excessively in unnatural intercourse against the wife's wishes".[58]

f. The prohibition of intercourse against the wife's wish

Not only is there no source to be found entitling a man to ravish his wife, but there is Talmudic authority for positively prohibiting marital relations against the woman's desire.

> Rami b. Hama said in the name of R. Assi: A man is forbidden to force his wife to abide by the precept (of marital relations) since it is written: And he that hasteth with his feet sinneth (*Prov.* 19:1). R. Joshua b. Levi stated: Whoever forces his wife to abide by the precept will have unworthy children... So again was it taught: Also without consent the soul is not good (*ibid.*), refers to the man who forces his wife to abide by the precept.[59]

And again, R. Levi, commenting on the verse, "And I will purge out from among you the rebels and them that transgress against me" (*Ezek.* 20:38), observed: "This refers to children of the (following) nine categories – children of fear, children of ravishment...."[60]

According to Ran *ad locum*, the "rebels" and the "transgressors" are the children conceived in the course of a transgression. Rabad, on the other hand, interprets the verse as referring to the male participant when either the wife was raped or the intercourse took the form of one of the above categories, both the child and the male himself being affected and the latter called a rebel and transgressor.[61]

Further, the extra-canonical Tractate *Kallah* states that children

[58] *Resp. Yaskil Avdi* VI,25. See *Ben Ami* v. *A.G.* (1964) 18 *P.D.* (III) 225,231–32, where Cohn J. points out that in contrast to the situation in England, Jewish law does not treat unnatural intercourse with a woman as an offence since it is explicitly permitted in the Talmud, citing the sources referred to in the text to notes 51 and 52 above. But as has been explained in the text, "overturning the table" is only permissible with the woman's consent; otherwise it is forbidden by the Torah.

[59] *Erub.* 100b. According to Emden, *ad loc.*, this is so although done in performance of the commandments regarding conjugal relations and the bearing of children. To the same effect Y. Keltz, *Sefer HaMusar*, VI.

[60] *Ned.* 20b.

[61] *Ba'ale haNefesh loc.cit.*, 122. See *Bet Yosef* to *Shulhan Arukh Oreh Hayim* 240, who so understands from Rabad.

born of sexual relations by ravishment suffer from defects – lameness, blindness, muteness, deafness – from their very conception, because, as R. Eliezer says, intercourse occurred without the woman wanting it or, as R. Joshua said, because during intercourse she cried out that she was being raped.[62]

Explaining the difference between these two opinions, Rabad remarks that it turns upon whether the woman was ultimately persuaded to have intercourse, as the passage from *Erubin* indicates.[63]

The prohibition of intercourse by force is given as the *Halakhah* by Maimonides: "And the Sages forbade... a man to come upon his wife by force when she is in fear of him";[64] or alternatively, "a man may not ravish his wife and have intercourse by force but only when she consents and in joyful circumstances".[65] Likewise, the *Shulhan Arukh* rules: "A man may only have intercourse when his wife is willing; if she does not desire it, he must persuade her,"[66] or again, "if he is wrathful with her, intercourse is forbidden until she is persuaded".[67]

In recent years R. Jacob Kanievski has written that "according to *din Torah* it is forbidden to have intercourse when the wife is not induced by physical contact, embrace and kisses and desires to have connection. Otherwise, as explained in *Pes.* 49b ("just as a lion tears its prey and devours it and has no shame, so an *am ha'aretz* strikes and cohabits and has no shame"), it is a heinous offence to act in a manner that causes one's wife anguish even if with the best and most pious of intentions, since a man may not treat his wife as a captured slave".[68]

[62] *Kall.* 8, cited in *Menorat haMe'or* (Alnaqua) X and Keltz *op. cit.* VI. See also *Kallah Rabbati* I,11.

[63] *Ba'ale haNefesh loc. cit.* See *Pri Megadim* to *Shulhan Arukh Oreh Hayim* 240 and I. Seligman, *Ma'ayan Ganim* 6a, commentary on *Kall.* Rabad is cited in *Tur Oreh Hayim* 240 and *Tur Even haEzer* 25.

[64] Maimonides, *Hilkhot Issure Bi'ah* XXI,12.

[65] *Hilkhot Ishut* XV,17. In *Hilkhot De'ot* V,4, this rule figures among those especially recommended to the *talmid haham* for conducting himself in a pure and holy manner.

[66] *Even haEzer* 25,2.

[67] *Oreh Hayim* 240,3. That the children of a hated wife may become rebels and transgressors (*Ned.* 20b) is probably the reason for not compelling a *moredet*. See Ritba *Novellae* to *Ket.* 63b. See also Ra'ah *Novellae ad loc.* and *Resp. Yabia Omer* V, *Even haEzer* 14.

[68] *Igeret Kodesh* (Jerusalem, 1968) 7, published anonymously.

Conclusions

Unlike the marital duty of the husband which derives from Scripture, the corresponding duty of the wife emerges from talmudic inference as part of the obligations she undertakes on entering marriage.

This difference is of importance when defining the extent of the wife's duty. Her duty is not to be extended by implication to include submitting to ravishment since to that she certainly did not agree or undertake to tolerate when she married. Accordingly, a husband is not entitled to force sexual relations upon his wife.

On the other hand, it cannot be denied that the wife's refusal will entail sanctions, but these are remedial, in the area of family law: the woman may be declared a *moredet*, she may be divorced, lose her *ketubbah*, and so on.

There is nothing to confute this view in the talmudic sources which indeed condemn sexual compulsion itself as being sinful, although several other sexual practices are regarded as permissible. Further, cases are at hand in which the courts have actually treated with the utmost severity husbands who have forced themselves upon their wives against their wishes.

The Sages regarded unseemly relations as disrespectful of the woman and contrary to the precept that a man should honour his wife more than himself.[69] For the Sages marriage was a source not of pain and anguish but of life.[70]

Appendix

Originally this study took the form of an opinion written by the author at the request of counsel in the first case heard in Israel that directly raised the question of whether a man can be guilty of the rape of his

[69] *Yeb.* 62b, and Maimonides' *Hilkhot Ishut* XV, 19: "the Sages pointed out that a man should respect his wife more than himself and love her as he loves himself".

[70] *Ket.* 61b. See *Resp. Maharan b. Barukh*(ed. Prague) 81, who condemns any man who transgresses the precept to excommunication and dire punishment. See also *Yam shel Shlomoh* to *M.B.K.* III,21, who cites the above and expands on it; *Shulhan Arukh Even haEzer* 154,3 and the notes of Rema and *Be'er haGolah*, *ad loc.*; *Resp. Tashbetz* III,8; H. Palagi, *Kaf haHayim* I,11.

wife: *Cohen* v. *State of Israel* (1981) 35 *P.D.* (III) 281. This opinion was put in before the District Court at first instance, by consent of the parties (*State of Israel* v. *Cohen* (1980) *P.M.* (1) 245).

In two earlier cases before the Supreme Court the matter had been discussed but not decided since in neither was the woman held to be the lawful spouse of the accused.

The facts in *Cohen* were fairly simple. The defendant was charged with having on two occasions attacked his wife with violence in order to have intercourse with her against her wish and having caused her injury; on the first occasion he had his way with her but on the second her brother came to her assistance. The parties were subsequently divorced.

In the District Court the indictment was (in addition to assault causing actual bodily harm under section 380 of the Penal Law, 1977) for rape under section 345. The defendant argued that the facts could not sustain a charge of rape since that was an offence that could not be committed between spouses, in view of the meaning of "unlawful" in the relevant section of the local Criminal Code Ordinance and the state of the law in England and in most jurisdictions in the U.S.A. where the common law rule generally prevailed, although some departure from it had occurred in recent times.

After considering in some detail the opinion of the present writer, the court adopted in full the conclusions at which he had arrived, more particularly the view that even if the wife's duty regarding intercourse was an implied condition of marriage, the husband had no right to compel its fulfilment by the use of force which in fact was forbidden; that of course did not preclude the remedies available to the husband in a proper case of a "rebellious wife". In the result, the defendant was convicted and sentenced to three years' imprisonment.

The defendant appealed against conviction and sentence. After an exhaustive analysis by Bekhor J. (who delivered the main judgement of the Court) of the relevant statutory provisions of the Penal Law, 1977, and such previous Israeli cases that were in point, the Supreme Court dismissed the appeal. The lower court was upheld in its finding that "unlawful" was a constituent element of rape. This term was to be construed by reference not merely to the enactment in which it appeared but to the law generally which in this instance clearly

comprehended Jewish law. "Unlawful sexual intercourse" would occur where the man had no right under law to have intercourse with the woman in question. That law included the personal law of the parties, as defined by the Palestine Order in Council of 1922; in the present case that was indisputably Jewish law. That the term was not to be taken as referring merely to a woman who was not the wife of the defendant, was evident from the amendment of section 345 of the Penal Law, 1977, after doubts had been voiced as to its exact import.

The Supreme Court then contrasted the position in Anglo-American law and other legal systems and referred to some of the literature on the subject. The judgement went on to cite with approval views voiced in the earlier cases highly critical of the common law rule as being inconsistent with human rights and the institution of marriage.

Since the applicable personal law here was Jewish law, the Court carefully reviewed the present writer's opinion, its arguments and the authorities cited and found that modern enlightened view on the question accorded with the talmudic rule that a man may not force intercourse upon his wife.

The Court also adverted to a parallel opinion by another expert, Dr. B. Lipshitz, put in by the defendant. This opinion concurred in express terms with the conclusion of the present writer but maintained that the wife's refusal did not abrogate the husband's right but merely limited it by excluding the use of coercion without attaching any legal consequences. The Court refused to adopt this understanding of the law. It accepted fully the distinction made by the present writer between the wife's refusal to fulfil her marital obligations other than that relating to intercourse and her obligation regarding intercourse. In the latter case, the use of force is expressly forbidden. The argument that, although debarred from forcing himself upon his wife, the husband is nevertheless not rendered criminally liable if in fact he does so (especially as in Jewish law no express penalty is prescribed for the act), was rejected by the Court. Intercourse will be unlawful and constitute an offence within the meaning of section 345 of the Penal Law, 1977, if it occurs against the wishes of the wife, is effected by the use of force and is prohibited by the parties' personal law. A wife is a free human being, not given over to her husband's caprice.

Whilst the above appeal was pending, the bill of the seminal Law of

the Fundamentals of Law (which in general terms replaces reference to English law under the previous rule by reference to the Jewish heritage, in the event of no solution of a problem being found in enacted law or by analogy) was debated in the Knesset. In the course of the debate and in reply to hostile criticism from certain quarters about the regressive nature of Jewish law, the then Minister of Justice, Mr. Sh. Tamir, cited *inter alia*, as a concrete example of the progressiveness of Jewish law, the District Court's judgement in *Cohen* and the findings of the present opinion that the wife is not in any absolute sense bound to submit to intercourse and if she refuses, physical coercion may not be resorted to, the "remedy" available to the husband being to have her declared a *moredet*, if at all, by proper process of law.

Self-Incrimination

THE PRIVILEGE AGAINST SELF-INCRIMINATION IN ANGLO-AMERICAN LAW

The Influence of Jewish Law

*Isaac Braz**

The privilege against self-incrimination is comparatively recent in the common law; it originated in the 17th century and it has no firm basis in the prior law or precedents of England. The privilege seems to be unique to Anglo-American law and was introduced into English law gradually in the late 17th century. There is no first or 'leading' case which clearly and plainly enunciates the doctrine. There is no Parliamentary Act, declaration, petition or bill of that period which puts forwards this privilege.

Neither in the Petition of Rights of 1628 nor in the Bill or Rights of 1688 was the privilege mentioned. Two arbitrary and oppressive tribunals, the Court of Star Chamber and the High Commission for Ecclesiastical Causes, existed in England before the Puritan Revolution (1642–1649). Parties brought before those courts were tried in secret and compelled to answer under oath questions which tended to incriminate them. That was legal, proper and customary practice in those tribunals. The Puritans and other dissenters who constituted the majority of such defendants protested against such compulsion.

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The ordinary courts like King's Bench, Common Pleas and Exchequer had used compulsion on parties and witnesses to give testimony that might incriminate them and continued to do so after the abolition of Star Chamber and High Commision for Ecclesiastical Causes. Compulsory self-incrimination had been due process of law for many centuries. The doctrine about self-incrimination was something distinct from due process of law. It is noteworthy to mention that in the Fifth Amendment to the U.S. Constitution, there are separate clauses, one on compulsory self-incrimination: "No person shall be compelled in any criminal case to be a witness against himself", and another on due process, "No person shall be deprived of life, liberty or property without due process of law".

The doctrine that an accused person should not be required to incriminate himself was in the 17th century a novel doctrine and stated a new principle. The source of the doctrine lies in the Jewish Talmudic law.

There is a striking similarity between the Talmudic principle that "a person may not inculpate himself" (*ein adam mesim atsmo rasha*),[1] and the third clause of the Fifth Amendment that "no person shall be compelled in any criminal case to be a witness against himself." The Talmud antedates the English common law by a thousand years and therefore it stands to reason that the common law privilege was influenced in various ways by Talmudic law. Jewish law and Talmudic jurisprudence constitute one of the main streams that converged to form the unique common law doctrine against self-incrimination.

There were three chief factors which combined in 17th century England to develope a doctrine against compulsory self-incrimination. Two of them stem from Jewish law. The third was professional, the legal activity of Edward Coke (1552-1634) as barrister and as judge, a genius who has been described as the greatest common lawyer of all time.

The first two influences, broader and more general, were (a) the main influence of the Puritans and other dissenters, and (b) the class influence of professional scholars, the brilliant group of English Hebraists and primarily John Selden, who was a lawyer, a member of

[1] See, e.g. *San.* 9b.

Parliament, a scholar who wrote outstanding textbooks on Jewish law. John Selden was the first to bring to the knowledge of Englishmen the Jewish doctrine against self-incrimination. It was Talmudic Jewish law, by virtue of rabbinic interpretation of Scripture, which already in ancient times developed the principle against self-incrimination. The commands of Scripture were interpreted, developed and expanded by Jewish scholars into a considerable body of lore, much greater in volume than the Torah. The bulk of such traditional rules was set down in the *Mishnah* and in the *Talmud*.

Maimonides[2] stated the talmudic principle against self-incrimination as follows:

> It is a decree of Scripture that the court may not execute or flog a person upon his own admission but only upon the testimony of two witnesses... The Sanhedrin may not inflict the penalty of death or lashes solely on the admission of the party, for it is possible... that he was one of those who in misery and bitterness of soul long for death and thrust the sword into their own bodies or cast themselves down from roofs. Perhaps this was the reason that prompted him to confess to an act he had not committed so that he might be put to death. To sum up the matter, (the principle that no man is to be declared guilty on his own admission) is a divine decree.

Torture as a mode of investigation is virtually unheard of in Jewish history. The police authorities gain nothing from confession and the accused loses nothing by such confession. Perhaps the obviation of torture as a judicial tool was the very intention of Biblical law and rabbinic interpretation.

Roman Law, Canon Law and Early Common Law

According to Roman criminal procedure, both under the Republic and under the Empire, interrogation of the accused was the regular practice. In the later Empire more inquisitorial elements were introduced into criminal procedure and the accused was now subject to torture.

[2] *Hilkhot Sanhedrin* XVIII.6.

The practice of interrogation on mere suspicion (*Infamia*) became the usual procedure in ecclesiastical courts throughout Christendom including England. Interrogation was initiated by the judge himself acting simply by virtue of his office.

The use of the oath ex-officio in the spiritual courts of England does not mean that the secular courts, the courts of the common law, protected the accused against self-incrimination. Holdsworth in his *History of English Law*[3] says: "Right down to the middle of the 17th century, the examination of the accused is the central feature of the criminal procedure of the common law. We do not read anywhere that a witness could refuse to answer on the ground that his answer might incriminate him. Torture was used to extract confessions; it was never seriously contended that such confessions were inadmissible against the victim."

Coke enunciated the maxim: *nemo tenetur prodere seipsum*, but in actuality the phrase in accordance with Canon law is *licet nemo tenetur seipsum prodere, tamen proditu per famam tenetur seipsum ostendere utrum possit suam inocentiam ostendere et seipsum purgare* ("Although no one is compelled to accuse himself, yet one accused by rumor is compelled to present himself to show his innocence if he can and to clear himself".) The origin of *nemo tenetur prodere seipsum* as a practical principle of law, is the subject of controversy. It is suggested that in enunciating this maxim, Coke was distorting the meaning the words had within the context of the Canon Law. The case to which he applied them indicates that he never thought that persons duly charged and indicted by the Crown should not be compelled to testify against themselves. He merely expressed that doctrine by neatly truncating the principal clause of the full sentence quoted above and omitting the initial *licet* in contradiction to the real import of the maxim.

Throughout his career Coke was determined to make the common law supreme over the Ecclesiastical Courts, Chancery and even the King.[4] Thus when in 1589 as a barrister of ten years standing he asserted in argument *nemo tenetur prodere seipsum*, in *Collier* v. *Collier*,[5] in which he

[3] W. Holdsworth, *History of English Law*, Vol. 9 (London, 1926) 199.
[4] Maguire, *Essays in History and Political Theory.*
[5] (1590) Leo. 194.

opposed the jurisdiction of an Ecclesiastical tribunal, it was the opening of a life-long campaign to accomplish that task. For almost fifty years during a formative period of the common law, Coke in a real sense created a great deal of law. Chief Justice Best said in *Garland* v. *Jekyl*:[6] "The fact is that Lord Coke had no legal authority for what he states, but I am afraid we should get rid of a great deal of what is considered law if what Lord Coke says without authority is not law".

That there was no Canon law maxim *nemo tenetur prodere seipsum* nor any principle or doctrine to that effect is plain from Esmein's authoritative book.[7] Exactly the opposite was the principle and practice of Canon law down to modern times. Holdsworth says: "The Canonist maxim *nemo tenetur prodere seipsum* must be put down as an inadvertence on Coke's part".[8]

Indeed the phrase itself seems to be his creation as an argument of counsel phrased in Latin. It was a bad argument and expressed bad law. Lord Coke, I repeat, never thought that persons duly charged and indicted should not be compelled to testify against themselves. When he died in 1634 no such rule prevailed. He had merely opened the door slightly and it was the Puritans who, after his dealth, pushed it wide open.

Puritan and Other Nonconformist Influence

The Puritans were the chief group of nonconformists who suffered in prosecutions before Star Chamber and High Commission for Ecclesiastical Causes from the practice of compulsory oath and resulting self-incrimination. In fighting the tyranny of Charles I they appealed to the word of God as expressed in the Old Testament. "It is an historical fact that in the great majority of instances in early Protestants, defenders of civil liberty derived their political principles chiefly from the Old Testament".[9] The Puritans applied Mosaic law in the regulation of both public and private matters. They studied the Hebrew Scripture assiduously. The great John Milton who knew Hebrew and even wrote Hebrew poetry, cited and relied upon the Hebrew Scripture in his *Tenure of Kings and Magistrates* (1649).

6 (1824) 130 *E.R.* 320.
7 *Op. cit.* Vol. 5, 168.
8 *Op. cit.*
9 W. Lecky, *The Rise and Influence of Nationalism in Europe* (1865).

Generally, in the 17th century Hebrew teachings were a vital influence in the discussion of political and social questions and recourse was made to the Bible especially on matters of public law and the principles of justice. Not the clergy alone, not only the Puritans, but lay scholars generally cited and relied upon Hebrew Scripture as authority.

Thus, John Selden's criticism of the system of tithes of the established Church was replete with references to Jewish Law. And Coke, in the course of his argument for supremacy of the common law, declared that Moses was "the first reporter or writer of law in the world". In this manner the Christians in England became acquainted with traditional Jewish interpretation of "God's Law", that torture or cruel punishments were prohibited and that persons charged with crime could be convicted and punished only on competent testimony of two or more witnesses and not on their own admission alone.

The 17th Century English Hebraists

The Renaissance gave birth to a deep interest in Hebrew scholarship, and a brilliant group of English Hebraists emerged during the 17th century, whose work was one of the factors that contributed to the development of a privilege against self-incrimination in English law. Chief among them was John Selden whose erudition in Rabbinic lore had no equal among non-Jewish scholars. He was renowned as a jurist and orientalist and a man who actively participated in English political life, and it was he who first brought to the knowledge of Englishmen the Jewish doctrine against self-incrimination. Almost all of Selden's works quote and refer to rabbinic opinion. In his *De synedriis veterum ebraorum* (Concerning the Courts of Ancient Hebrews) the first formulation is to be found of the doctrine against self-incrimination.

> By an old law, moreover, it became established that no person should be delivered up to be executed or for punishment (by lashes) by his own confession, but only by the testimony of others. Undoubtedly, so that, out of feelings of powerlessness and because of the malicious and bold attack of his accusers, he, having been persuaded unwittingly, should not be pressured falsely into confessing altogether to the charge of which he was accused, for the sake of avoiding a wretched and troublesome trial. Maimo-

> nides adds: 'and this entire matter arises out of Royal Decree'. As is well known, according to Jewish law in civil causes the admission of a party is worth a hundred witnesses.[10]

Maimonides had described the Talmudic rule against self-incrimination as "Divine Decree". By that phrase he meant to convey and to emphasize the thought that this rule was not a matter of reason or logic. Although it was not in accordance with rational principles of proof (like those applicable in civil causes), it must be followed as a divine command similar to many other "arbitrary" statutes of the Torah. The principle against self-incrimination is a religious principle which was engrafted upon the common law. The privilege is grounded in certain cardinal principles of Jewish tradition, the sanctity of the individual personality, the mercy and graciousness of God, a man's duty to pattern himself after Him.

It is true that Anglo-American law against self-incrimination is not totally and completely identical with Jewish law; Anglo-American law prohibits involuntary confession whereas Jewish law prohibits all criminal confessions, but the principles and doctrines are similar and as has been shown Jewish law influenced the introduction into Anglo-American law of the doctrine against self-incrimination.

American Law

In *Miranda* v. *Arizona*[11] Chief Justice Warren, giving the opinion of the Supreme Court, says that the roots of the privilege against self-incrimination go back to ancient times. He refers to Maimonides' *Hilkhot Shoftim* and *Hilkhot Sanhedrin* (in their English translation) as well as to an article by Rabbi Lamm.[12]

Again in *Garrity* v. *New Jersey*[13] (conviction of police officers for conspiracy to obstruct justice), the Supreme Court of the U.S. (Justice Douglas, delivering the judgment) held that where police officers who are being investigated are given the choice either to confess their offences or to forfeit their jobs and they chose to make confessions, the confessions were not voluntary but were coerced and the Fourteenth

[10] *Ibid.* Vol. 2, 545.
[11] 384 U.S. 436 (1966).
[12] "The Fifth Amendment and its Equivalent in *Halakhah*", *3 Judaism* (1950) 53.
[13] 87 S.C. 616 (1967).

Amendment prohibited their use in subsequent criminal prosecution. The judgment also refers to the above article by Lamm.

In conclusion, we may note that the *Halakhah* does not distinguish between voluntary and involuntary confessions and it is here that one of the basic differences exists between Talmudic and American constitutional law. According to the latter a man cannot be compelled to testify against himself. The provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The *Halakhah*, however, does not permit self-incrimination testimony. It is inadmissible, even if voluntarily offered. Confession in other than a religious context or in civil cases is simply not an instrument of law.

SELF-INCRIMINATION

*Arnold Enker**

The thesis of my presentation today will be that exaggerated claims have been and are being made for the sources of self-incrimination in Jewish law, and for the notion that important lessons can be learned from Jewish Law with respect to self-incrimination.

Jewish law does not allow self-incrimination – that is true. In fact, Jewish law carries the point more extremely than does the common law and United States law in that under the common law and under American law, self-incrimination is allowed. Coerced self-incrimination is not allowed; you can not compel a confession of the defendant. You can not compel him to plead guilty, to answer questions and the like, but he may voluntarily waive his right to silence, his right against self-incrimination.

In Jewish law, this is not waivable. If the defendant gets up and says to the court, "I'm guilty," the court will say, "We don't want to hear a word from you, we don't want to hear what you have to say. You are of no interest to us: your admissions are not admissible, your confessions are not acceptable. The only way we can possibly convict you is by the testimony of two witnesses."[1]

That is the black letter statement of the Jewish law. So it is clearly, on its face, a more extreme position than the Anglo-Saxon common law.

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[1] Maimonides, *Hilkhot Sanhedrin* XVII, 6.

Maimonides, in codifying the law, offers a tentative explanation for the law. He suggests that it has to do with a perhaps exaggerated fear of the possibility that the defendant may be lying – that perhaps he is one of those psychologically disturbed persons who want to commit suicide, but does not have the strength of character to stab himself or to take poison and kill himself and adapts this indirect way by confessing to the crime, expecting that the court will thereby convict him and execute him.[2] Or perhaps in the case of a crime that carries with it the penalty of flogging he will be punished somewhat less, but he will thereupon induce the punishment upon himself. That, as I say, is the explanation, tentatively offered by Maimonides as a possible explanation for the rule.

Now that explanation always disturbed me, and I shall come back to this a little bit later. But at this stage I shall just mention why it disturbed me. To the extent that you are concerned with possibilities of false confession even if not coerced, you can accomodate that concern, you can account for it and take care of it by requiring some corroboration.

If you are very disturbed by the possibility of false confessions, you can tighten up your requirements of corroboration and make them more strict. But in any normal legal system you deal with such concerns in this manner, by requiring corroboration; you do not automatically exclude the confession absolutely. After all, the confession can be weighed, its credibility can be weighed together with all the other evidence, and if there is anything in the defendant's personality to cause us to believe that the defendant is disturbed, is emotionally or mentally disturbed, then we can, under those limited circumstances, exclude the confession.

But why exclude it in all or every case? Why not say: let's admit it together with all the other evidence, and weigh it together with all the other evidence, and if there is any lingering doubt, that can be the basis for an acquittal, but don't exclude it as an item of evidence. I am going to have to come back to that in my explanation of how I understand self-incrimination in Jewish law.

Now, in order to understand self-incrimination – and, I would say,

[2] *Ibid.*

any other rule of the special technical (so-called) rules of procedure and evidence in Jewish criminal law – one must understand the two-level structure of Jewish criminal law.

Jewish law functions on two levels. There was some confusion about it this morning in some of the discussion after Judge Bazak's presentation; some people did not quite grasp that point. On one level, the law is absolutely mandatory – there is no discretion in the judge with respect to the punishment. The Torah says that this particular offense carries the death penalty – it carries the penalty and the court has no discretion.

But to balance that, the Sanhedrin in administering the Divine law, in punishing someone for violating the Divine law, has some very very strict requirements: two witnesses who may not contradict each other in any material matter; the requirement that the defendant must be warned before he commits the offense – that the warning must be accepted by him, and that he nonethelesss go ahead and commit the act knowing that he will be punished; the requirement of direct evidence which excludes any circumstantial evidence.

Apparently, the notion that prevails here is that the court is acting as the enforcer of the Divine law – punishing someone for rebellion against the Divine Will, for knowing wilful rebellion against the Divine Will. It is only in the most extreme cases of wilfulness and proven guilt that the court enforces this Divine law and exercises this mandatory punishment of death or flogging.

That is the level of mandatory law in which the Sanhedrin has no discretion. The rules of evidence and of procedure are constructed in such a way as to limit these cases to the most narrow of all situations in which there is certainty as to guilt and certainty as to the level of guilt, as to the wilfulness, the deliberateness of the rebellion against God's Will.

But Jewish law operates as well on a second level. And that is a level of law enforcement that is not concerned with enforcing the Divine Judgment against someone who has rebelled against God but of protecting society against criminals, against rapists and against thieves and against assaulters, and against all sorts of other people who would violate the rights of citizens in society. On this level, obviously, we can not be so particular in our demands. For example, we cannot insist that

nobody be punished unless he has been given advance warning and has accepted the warning and says: nonetheless, I will violate the law.

On this level, the court exercises great freedom. On this level, there are no restrictions or almost no restrictions on the court's reception of evidence. On this level, the court accepts all relevant evidence and freely weighs the evidence. It is not limited to two witnesses. It can accept circumstantial evidence, the testimony of relatives, of people who have an interest in the outcome, and all these factors will be weighed in terms of credibility of the evidence. And it is on this level that the court (whether it be the court of the king's law – as it is called in Jewish law – which means the secular, civil authority, or the Rabbinic court which sometimes functions on this discretionary level) also has great discretionary powers in the sentences it can impose. It need not impose (in fact it may not impose) the Torah punishment because it has to indicate clearly that it is functioning on a different level, on a discretionary level, not of Torah law, but of social protection law, so to speak. And then it has discretion in the sentences and in the punishments it may impose. It may impose flogging. It may impose jailing; it has done so during periods of Jewish history. It may impose a death penalty of sorts – but not the same forms of death penalty as imposed under Torah law. And it may impose fines, social sanctions, excommunication, banishment, and various other punishments – all in the court's discretion.

In order to understand any rule of Jewish law we have to determine on which level the court is operating. Is it operating under the strict level of mandatory law where the court has no discretion – which is balanced by very strict rules of procedure and evidence. Or is it operating on the second level of, let us call it, social protection law in which the court exercises broad discretion as to punishment, and equally broad discretion as to the procedures it is to follow and the evidence it may receive.

Now, when we come to the question of self-incrimination, the absolute rule forbidding self-incrimination is a rule that operates when the court is functioning in the strict, non-discretionary mode, when the court is enforcing the Divine law. When the Sanhedrin is enforcing Torah law, then it can not receive any evidence of the defendant. Then, it can convict the defendant only upon the evidence of two

witnesses who do not contradict each other, who are not related in any way to any of the parties, etc.

But when the court functions in the discretionary mode as a court acting for social protection, or when the king's court, the civil courts act as any civil (civil in the sense of secular) court exercising criminal jurisdiction, in that situation there is no rule forbidding self-incrimination.

We have a responsum of the Rivash, a rabbi of North Africa in the Middle Ages, who was asked this specific question.[3] There were Jewish communities in North Africa and Spain that had criminal jurisdiction during the Middle Ages, by authorization, of course, of the local kings and princes. And the Rivash was asked whether a Jewish court, so operating, may hear the defendant and accept his confession? The Rivash's answer was that it may, since it was not operating as a Torah court enforcing Divine law. Accordingly the defendant's confession could be accepted and weighed together with the other evidence to clarify the matter and determine whether the proof of his guilt is convincing, though less than the full Talmudic requirements.

Now against that background, it seems to me we can more readily understand the rule that Maimonides expounds and the reason he offers.

I suggested before that when Maimonides says that the reason for not accepting a confession is this lingering fear of the remote possibility that maybe the defendant seeks to inflict punishment or even death upon himself, and is lying in his confession, we could solve that by corroboration requirements. That is a system that would work, and does work, when you are acting under a discretionary system. The court exercises judgment and discretion to evaluate the confession's credibility in light of the corroborating evidence. In a system, however, which disallows discretion, corroboration requirements tend to become as formal and technical as the other rules.

There is another difference between the two systems that is relevant here. In the so-called rigid Torah system – as distinguished from most contemporary legal systems – the parties to the proceeding are not

[3] *Resp. Rivash* 234–39 See A, Kirschenbaum, *Self-Incrimination in Jewish Law* (New York 1970), 83–90.

witnesses. Parties to the proceedings and witnesses are two separate categories. Parties can not testify. This does not mean that they are not heard. But parties are heard in pleadings, not in testimony.

The court questions the parties very, very carefully as to the nature of their pleadings. On the basis of these questions, the court may even rule in favor of or against one of the parties, because there are certain presumptions created by certain kinds of pleadings. There are substantive rules of law that when the pleadings take certain shapes – if the plaintiff pleads thus and thus, and the defendant pleads thus and thus, then the plaintiff prevails or the defendant prevails under certain circumstances.

The point about the parties' disqualification as witnesses is that after the pleadings and the pre-trial discovery – if the pleadings and the pre-trial discovery disclose an issue that requires proof, that issue can not be proved by the parties' own testimony. That must be proved by outside evidence.

In such a system, if a party's admission or confession is allowed, it is heard as a pleading, a judicial admission, and that is the end of that issue in the case. This is how a civil case is tried in Jewish law. Now, if a party's admission of guilt were to be accepted under Jewish law in a criminal case, it would be accepted not as testimony, which can be rebutted, but as a pleading that would be the end of the case. There would be no occasion for calling witnesses because in effect the defendant has pleaded guilty.

And therefore, the issue that confronts Jewish law, in modern terms, is not whether a confession should be admitted as one item of evidence among others. In the context of the systems of procedure and evidence described above, the issue is whether a confession should be admitted as a pleading, as the sole and exclusive basis for convicting the defendant.

I would suggest that in that case, Maimonides' explanation is perfectly valid. We should not convict somebody *solely* on the basis of his confession because maybe the man is confessing falsely to a crime he never commited.

As we know, Israeli law and certain states in the United States require corroboration of confessions because they will not convict somebody solely, exclusively on the basis of his confession. In other

jurisdictions in the United States, the federal rule applies and no corroboration is required. Since the structure of Jewish law is such that the issue is in effect whether to convict somebody solely and exclusively on the basis of his confession, Jewish law excludes the confession. However, when Jewish law operates on the discretionary level, not on a level of formal distinctions between parties and witnesses, but on a level of free admission and free evaluation of the evidence, as it did, for example, in that case that came before the Rivash in the Middle Ages, Jewish law has no special rules rejecting the confession, and accepts it to be weighed with all the other evidence.[4]

[4] For a more elaborate treatment of the ideas expressed in this paper, see, A. Enker, "Self-Incrimination in Jewish law (A Review-Essay)", *Diné Israel* 4 (1973) cvii–cxxiv.

THE RATIONALE FOR EXCLUDING INCRIMINATING STATMENTS

U.S. Law Compared To Ancient Jewish Law

*Malvina Halberstam**

Introduction

The privilege against self-incrimination – the right of the accused not to be a source of evidence against himself – is one of the most ancient, yet one of the most controversial rules in the administration of criminal justice. In ancient Jewish law the ban was absolute; one could not be convicted on his own incriminatory statement, even if it was voluntary.[1] In United States law the fifth amendment to the Constitution provides that one can not be *compelled* to testify against himself;[2] if a person chooses to do so he may.

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[1] Maimonides, *Hilkhot Sanhedrin* XVIII, 6.

[2] The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in times of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation (emphasis added).

It is difficult to justify this proscription of using the accused as a source of evidence against himself rationally. Such prominent legal theorists as Jeremy Bentham were highly critical of this rule,[3] arguing that if proper safeguards are taken to ensure reliability, an admission is the most probative evidence.[4] The *Tanaim* too were fully aware of the probative value of an admission. With respect to civil actions they said *hoda'at ba'al din kemayah edim dami* – the admission of a litigant is worth a hundred witneses.[5] The only explanation given in the Talmud for the ban in criminal cases is *ein adam masim atzmo rasha* – a person does not make himself evil.[6]

Maimonides tried to justify the rule barring confessions in criminal cases rationally, suggesting that some individuals may confess falsely, motivated by a death wish. It was however, a very tentative suggestion. He said, "*Perhaps* he was one of those who was in misery, bitter in soul who longs for death". But he concluded, "The principle that no man is declared guilty on his own admission is a divine decree." [7] Quoting this passage in his excellent book on self-incrimination in Jewish law, Professor Kirshenbaum states, "a sure sign that Maimonides considered the rule non-rational."[8] David Ibn Zimra (Radvaz), in his commentary on Maimonides, Similary advances a justification that is non-rational. The explanation he offers for disallowing confessions is *ein nafsho shel*

[3] See J. Bentham, *A Rationale of Judicial Evidence* (Garland ed. 1978) 209, 232. See also S. Hook, *Common Sense and the Fifth Amendment* (1957). Dean Griswold, who argued in favor of the privilege, conceded that none of the "many efforts" to "rationalize the privilege" prior to his book were "wholly satisfactory." Griswold, *The Fifth Amendment Today* (1955) 7.

[4] *See* J. Bentham, *supra* note 3 at 124–30, 210. Compare *Adamson v. California*, 332 U.S. 46, 60–1 (1946) (Frankfurter, J., concurring). Even Justice Douglas, a staunch defender of the Bill of Rights, stated, "As an original matter it might be debatable whether the provision of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice." *Rochin v. California*, 342 U.S. 165, 178 (1952).

[5] *Git.* 40b.

[6] *Sanh.* 9b.

[7] *Hilkhot Sanhedrin* XVIII: 6.

[8] A. Kirschenbaum, *Self Incrimination in Jewish Law* (New York, 1970) 63. Professor J. Bleich disagress with this interpretation. In his view the term *gezerat hakatuv* (divine decree), used by Maimonides, means only that it is an absolute biblical rule admitting of no exception; he notes that Maimonides does not employ the term *hok*, which is the usual term indicating an arational statute.

adam kinyano ella kinyano shel Hakadosh-baruh-hu – a person's life is not his property but the property of the Holy One Blessed be He.[9]

I would like to suggest that the justification for the rule is not rational but moral; the belief that it is morally repugnant to condemn a person – and particularly to condemn him to death – by his own words.[10]

United States Supreme Court Decisions Barring Confessions

In Unites States law the fifth amendment privilege against self-incrimination was included in the Constitution as a reaction to the Star Chamber torture procedures in England,[11] as already described by Judge Braz. Over the years, the Supreme Court has offered different rationales for the exclusion of confessions, and has based its decisions variously on the fourteenth amendment due process clause, the fifth amendment privilege against self-incrimination, and the sixth amendment right to counsel. The proposition I wish to explore is that recent decisions of the Supreme Court come close to the position that using the words of the accused as the source of his own condemnation is inherently wrong[12] and to application of the absolute ban on such use of ancient Jewish Law.[13]

(a) Trustworthiness Rationale

The earliest Supreme Court decisions barring use of the accused's

[9] Radvaz, commenting on Maimonides, *Hilkhot Sanhedrin* XVIII:6. I am indebted to Professor J. David Bleich for calling my attention on this commentary.

[10] Cf. Greenawalt, "Silence as a Moral and Constitutional Right", 23 *William & Mary. L. Rev.* 15, 39–40 (1981) ("the moral basis for the right to silence in ordinary criminal cases is the inhumanity of forcing admissions").

[11] See, e.g., L. Levy, *Origins of the Fifth Amendment* (1968) 368.

[12] See *infra* and especially quotes in text at notes 30 and 38 infra. The proposition that using the words of the accused as a source of his own condemnation is inherently wrong would, taken to its logical conclusion, require exclusion of the defendant's in-court incriminating testimony as well, which, of course, is not the case in the U.S. See note 2 and accompanying text *supra* and note 13 *infra*.

[13] There is, of course, one very important difference. The U.S. cases barring the use of the accused's incriminating statements deal with extra-judicial i.e., *pre-trial* statements only; if the accused decides to testify *at the trial* and to admit his guilt, the admission may be used to convict him. While this difference is very significant in theory, there is little difference in result. In most U.S. cases the incriminating statements offered at the trial were made extra-judicially. It is rare for a defendant who has not made an incriminating statement before trial to confess at the trial.

incriminating statments were based on due process and the trustworthiness rationale. Confessions obtained through torture were excluded because they were unreliable. The rule barring confessions was designed to protect the integrity of the fact-finding process.

The landmark case is *Brown v. Mississippi*,[14] decided in 1936. In that case the defendants were brutally beaten until they confessed. The facts were summarized by the Court, as follows:

> The crime with which the defendants, all ignorant negroes, are charged, was discovered about one o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail, ... and while on the way, ... the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.
>
> The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the

[14] 297 U.S. 278 (1936).

> jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.[15]

In reversing the conviction, the Court repeatedly emphasized that the confessions were the only evidence against the defendants. Its ruling, barring the use of the confessions, was clearly intended to assure the integrity of the fact finding process. As Justice Jackson stated in a subsequent decision,

> men are so constituted that many will risk the postponed consequences of yielding to a demand for a confession in order to be rid of present or imminent physical suffering. Actual or threatened violence have no place in eliciting truth.[16]

(b) Police Brutality

In later cases the emphasis shifted from the reliability of the confession to the methods used to obtain it. A confession could not be used, even though there was no question as to its truth, if it was obtained by "measures which are offensive to concepts of fundamental fairness."[17] For example, in *Watts v. Indiana*[18] the Court reversed the conviction of Watts, who was subjected to relentless questioning for many hours at a time by relays of officers over a period of almost a week before he confessed, even though "[c]hecked with external evidence [it was] inherently believable and [was] not shaken as to truth by anything that occured at the trial."[19] As Justice Frankfurter expressed it in *Rochin*:

[15] *Ibid.* at 281–2.
[16] *Ashcraft* v. *Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting).
[17] *Ibid.* at 159.
[18] 338 U.S. 49 (1949).
[19] *Ibid.* at 58 (Jackson, J., concurring).

> Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true.[20]

Over the years, the Court barred confessions that were obtained by progressively less onerous methods, from use of force,[21] threats,[22] prolonged interrogation,[23] to psychological pressures.[24] But, until the decision in *Massiah*,[25] the emphasis was on the incompatibility of the particular police practice with the requirements of due process.

(c) Beyond Untrustworthiness and Police Brutality

While it is arguable that the Court's decisions barring the use of the defendants' incriminating statements in *Massiah*,[26] *Escobedo*,[27] *Miranda*[28] and *Brewer*[29] were also designed to deter the police from engaging in conduct that the Court disapproved, the evidence excluded in those cases was neither unreliable nor obtained by police conduct so offensive to concepts of fundamental fairness that it had to be suppressed even at the price of freeing heinous criminals.

In *Massiah* the defendant had a conversation in his car with a co-defendant turned government informer. The conversation was overheard by police officers through a radio transmitter hidden in the car. Massiah was out on bail; he was not questioned by the police, but talking to a co-defendant. There was no possibility of "coercion". Holding that the government could not use at his trial "evidence of his

[20] *Rochin* v.*California*, 342 U.S. 165, 173 (1952).
[21] *Brown* v.*Mississippi*, 297 U.S. 278 (1936) (defendants severely beaten).
[22] *Lymun* v.*Illinois*, 372 U.S. 528 (1963) (defendant told that aid to her children would end, unless she "cooperated").
[23] *Ashcraft* v.*Tennessee*, 322 U.S. 43 (1944) (36 hours of questioning).
[24] *Spano* v. *New York*, 360 U.S. 315 (1959) (defendant told by his friend on the police force that he would lose his job if defendant did not confess).
[25] *Massiah* v. *United States*, 377 U.S. 201 (1964).
[26] *Ibid.*
[27] *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).
[28] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).
[29] *Brewer* v.*Williams*, 430 U.S. 387 (1977).

own incriminating words,"[30] the Court reversed the conviction. The decision was based on the sixth amendment right to counsel. One wonders, would "his own incriminating words" have been admissible if counsel had been sitting at his side during his conversation with the co-defendant? Since counsel was unaware of the radio transmitter, he would have had no reason to advise Massiah to refrain from making the statements in question.

The same term the Court decided *Escobedo v. Illinois*.[31] The Court there said:

> We, hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent ... no statement elicited by the police during the interrogation may be used against him at a criminal trial.[32]

Escobedo had in fact consulted counsel and been advised of his right to remain silent prior to his interrogation.

Two years later, in *Miranda v. Arizona*,[33] the Court eliminated the requirement of *Escobedo* that the defendant ask for counsel. Miranda had kidnapped and raped an 18 year old girl. He was arrested several days after the incident. At the police station, the victim picked Miranda out of a lineup, and two officers took him into a separate room to interrogate him. Soon thereafter, Miranda gave a detailed oral confession and then wrote and signed a brief statement admitting and describing the crime. As noted by Justice Harlan in his dissent, "All this was accomplished in two hours or less without any force, threats or promises ... "[34] The Court reversed the conviction. It held that a

[30] 377 U.S. at 206.
[31] 378 U.S. 478 (1964).
[32] *Ibid.* at 490–1.
[33] 384 U.S. 436 (1966).
[34] *Ibid.* at 518 (Harlan, J., dissenting).

confession is not admissible unless the state first warns the defendant that:

> He has a right to remain silent, that any statement he does make will be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.[35]

Moreover, the Court said:

> Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent the interrogation must cease.[36]

Justice Harlan commented:

> The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorate suspect, *and ultimately to discourage any confession at all.*[37]

Justice White wrote in *Miranda:*

> As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, *the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not[,]... that it is inherently wrong for the police to gather evidence from the acccused himself.*[38]

The last case I want to discuss is *Brewer v. Williams.*[39] In that case, a ten year old girl was kidnapped and killed. The suspect surrendered to the police on the advise of his attorney. The attorney told him he had a

[35] *Ibid.* at 444.
[36] *Ibid.* at 473–4.
[37] *Ibid.* at 505 (Harlan J., dissenting) (emphasis added).
[38] *Ibid.* at 537–8 (White J. dissenting) (enphasis added).
[39] 430 U.S. 387 (1977).

right to remain silent and advised him to do so. He was also informed of his "*Miranda* rights" by a judge, by another attorney, and by the police officers who were driving him back from Davenport, where he surrendered, to Des Moines, Iowa, where the homicide occurred.

While driving back with the defendant, the police officers told him that since it was snowing, the body might never be found if he didn't show them where it was hidden and that the girl's family would be deprived of a Christian burial. The defendant didn't say anything at the time, but when they passed the town where the body was hidden he directed them to it. Chief Justice Burger said in dissent:

> Williams is guilty of the savage murder of a small child... While in custody, and after no fewer than five warnings of his rights to silence and to counsel, he led police to the concealed body of his victim... [H]e was not threatened or coerced and... he spoke and acted voluntarily and with full awareness of his constitutional rights.[40]

Nevertheless, the Supreme Court resversed his conviction for murder, holding that the information he gave the police en route from Davenport to Des Moines was improperly admitted into evidence.

The case was decided by the Burger Court, not by the Warren Court. The decision was based on the right to counsel, as *Massiah*, rather than on the privilege against self-incrimination, as *Miranda*. The majority reasoned that by deliberately eliciting the information from the defendant while he was en route from Davenport to Des Moines, without counsel at his side, the detectives denied him the right to counsel. Since the defendant had already been advised several times that he had a right not to speak about the matter and, indeed, twice, that he should not, what else could counsel have done if he had been at his side? Would it have even been proper for counsel to insist that the defendant not tell the police where the girl's body – perchance still alive[41] – was hidden?

[40] *Ibid.* (Burger, C.J., dissenting).

[41] *Ibid.* at 439 (Blackmun, J., dissenting). It is sometimes argued that under such circumstances, i.e., where the victim may still be alive, the police should be permitted to question the suspect but the evidence obtained should not be admissible against him. While this may seem a good practical compromise, it is not

Summary and Conclusion

To sum up, in ancient Jewish law the privilege against self-incrimination was absolute: One could not be convicted on the basis of his/her confession. The reason given for this is: *ein adam masim atzmo rasha* – a person does not make himself evil. In United States law we have moved from 1 – exclusion of a confession obtained by use of torture or other coercive methods likely to produce confessions that are unreliable, to 2 – exclusion of a confession regardless of how reliable it is, if it was obtained through torture or other means that offend concepts of fundamental justice, to 3 – *Miranda* and its progeny, which come very close to an absolute bar on extra-judicial confessions. The exclusion of a confession obtained by torture or other means that may render it unreliable is, of course, justified by the search for truth as the ultimate goal of the fact-finding process. The exclusion of a confession obtained by such means, but shown to be reliable by external evidence cannot be justified by the search for truth – indeed, it may inhibit the search for truth – but may be justified on the ground that some practices are so repugnant to civilized standards of decency that it is preferable that the most heinous criminals go free than that government engage in these practices. While it might be argued that *Miranda* and *Brewer* can also be explained on that basis, I think few of us would take the position that questioning a suspect for less than two hours, without any physical abuse or threats, or asking a man where the body of a child, possibly still alive, is hidden, when they drive in the vicinity where it is believed to be, are so reprehensible that it is preferable to let a murderer, rapist, or kidnapper go free than to have government sanction such practices. The proposition I suggest for your consideration is that, perhaps, as the privilege approaches the absolute it cannot be

logically tenable under a deterrence rationale. Under this rationale, the reason for excluding evidence is to deter the police from engaging in conduct deemed so reprehensible that permitting a criminal to remain at large is considered preferable to permitting the police to engage in the conduct in question. Where the police conduct is not only not reprehensible, but authorized, there is no reason for excluding the evidence and permitting the criminal to go free. Permitting interrogation of the suspect while barring use of the incriminating evidence against him would, of course, be entirely logical if exclusion of the self-incriminating evidence were based on the belief that it is immoral to use the accused as a source of evidence against himself.

justified logically. It must be justified, if at all, only morally, as in ancient Jewish law (i.e., it is morally wrong to convict a person on the basis of his/her own words).

Epilogue

I would add one caveat. Whether a secular state should, or even can, consistent with its obligation to protect the citizenry from criminals, function on such a moral plane is an entirely different question. Even in ancient Israel, there were exceptions: One was *hora'at sha'ah* – emergency.[42] The other was what Professor Kirshenbaum calls "*the extra biblical system of the law of the king*".[43] Explaining this, *Rashba* said,

> Punishment is meted out by royal prerogative... even on the basis of the confession of the accused himself.... for royal justice seeks the truth only. For if you do not grant this but insist strictly upon Torah law as fulfilled by the Sanhedrin, *the world would be destroyed.*"[44]

In the United States, too, many have argued that full application of the privilege would prevent the conviction and restraint of dangerous criminals. An anonymous author, obviously critical of the rule even as it existed prior to *Massiah*, *Escobedo*, *Miranda* and *Brewer*, penned the following:[45]

[42] Kirschenbaum, *supra* note 8 at 67.
[43] *Ibid.*
[44] *Ibid.* (emphasis added).
[45] Anonymous, "An Honest Confession May be Good for the Soul But Not For the FBI", in L. Hall, Y. Kamisar, W. Lafave, J. Israel, *Modern Criminal Procedure* (3rd ed. 1969) 461.

ANONYMOUS – AN HONEST CONFESSION MAY BE GOOD FOR THE SOUL, BUT NOT FOR THE F.B.I.

Scene Office of F.B.I.
A few straight chairs, a desk, at which is seated an investigator for the F.B.I, reading the recent decision of *McNabb v. the United States*, decided by U.S. Supreme Court March 1, 1943.

Enter A hillbilly backwoodsman.

Hill Billy Is this the F.B.I.?

Investigator Yes. Is there anything I can do for you?

H.B. Yes, sir. I've killed a revenooer and I want to confess.

F.B.I. Wait a minute. I'll have to hunt you an upholstered and plushcovered chair. A man can't confess unless he is comfortable. It's been so held by the court.

H.B. But I'm only uncomfortable in mind. I don't keer to set.

F.B.I. You surely must not have read the ruling of Judge Frankfurter in which he held that you could not have a man uncomfortable who is about to confess a murder.

H.B. Shore nuff?

F.B.I. Where are your kin folks?

H.B. I ain't got none lessen you think my mother-in-law's kin.

F.B.I. You can't confess unless you brought your relative along.

H.B. Well, me and her ain't speakin' and she won't help me none.

F.B.I. Did you graduate from college?

H.B. Did I what?

F.B.I. How far did you get in school?

H.B. To the 4th grade.

F.B.I. I'm afraid you can't qualify. The Supreme Court has held that confessions by men who had not passed the 4th grade were no good. You've got to be educated to confess.

H.B. But that's again the Preacher and the Good Book. They say confess yer sins, and they don't say nothin' about schoolin' and kin folks.

F.B.I. But it's the law, brother. Furthermore, I haven't seen your lawyer. Where's he?

H.B. Mister, you don't seem to understand. I want to tell the truth – not to git around it. I don't have to hire a lawyer before I can tell the truth, do I?

F.B.I. I'm sorry, but your notions are old fashioned. It used to be the law that a criminal could confess, provided no force or violence was used, and provided no promise or reward was made to him, and provided he was not put in fear or duress... Now a criminal must have his kin folks with him, must be comfortable, must have a lawyer, whether he asks for one or not, must have been educated past the 4th grade, and must have traveled at least further than Jasper. By the way, how far have you traveled away from home?

H.B. I ain't ever been out of the state in my life. I never run away. I jes' decided I'd stay and take my medicine.

F.B.I. Hell, that lets you out. You haven't got a single characteristic of a qualified confessor.

H.B. But mister, I killed a man –

F.B.I. Stop! I've been talking to you now nearly an hour, and that alone would disqualify you.

H.B. But the parson says that an honest confession is good for the soul.

F.B.I. I sympathize with you, brother, but there are only two courses left open to you: One is to bear your trouble in silence; the other is to go back to school then travel abroad, marry you some kin folks, hire

you a lawyer, and bring them down here with you. In the mean time, I'll try to get this office airconditioned, and also have a nice overstuffed chair for you. Then I will hear your confession. But remember, you will have to make it short and snappy.

H.B. (Departing perplexedly) Well, I'll be damned.

Justice Jackson, noting that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances,"[46] said,

> I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot question him before? Our system comes close to the latter.[47]

Justice Jackson wrote these words in 1949 in *Watts*. In the years since, our system has come very much closer still to the latter.

[46] *Watts* v. *Indiana*, 338 U.S. at 59 (Jackson, J. concurring).
[47] *Ibid.*

DUE PROCESS IN RABBINICAL AND ISRAELI LAW

Abuse and Subversion

*Stanley Levin**

Jewish criminal law and procedure originated in the Bible and was continually developed and modified by Talmudic and later Rabbinic interpretation. It provided specific due process protections for the accused. However, there were factors working within the official system which limited these protections and thus derogated from these rights. For example, the concept of *hora'at sha'ah* (emergency measures justified by the gravity of the situation)[1] is found even in Biblical sources. Starting with Moses who put to death (upon Divine command) the blasphemer (*Lev.* 24:14) and the man who gathered wood on the Sabbath (*Num.* 15:32), followed by Joshua who executed Achan basing his judgment on the latter's confession (*Josh.* 7:19), Gideon who punished the men of Sukkot and Penuel (*Judg.* 8:16,17), using extra-legal measures according to the medieval commentator Abarvanel, Yiftah who killed the men of Efraim (*ibid.* 12:6), King David who killed the Amalekite, basing his judgment on the latter's confession or alternatively on the King's law (2 *Sam* 1:15), and finally King Solomon who disposed of Joab and others (1 *Kings* 2:25, 34,44), in all these instances the principle of *hora'at sha'ah* was used.

In addition, there was a system of secular courts which exercised jurisdiction parallel to that of the official Torah courts. These secular

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1 See generally *Encyclopedia Talmudit*, "Hora'at Sha'ah".

courts were headed by the King and were not strictly bound by the Biblical and halakhic principles of due process relating to evidence, procedure and admissibility of confession (*Ex.* 23:2; *Deut.* 19:15). Federbush[2] gives a full explanation of how the secular courts operated. For example, if a person was suspected of rebellion against the King or the state, he could be summarily punished. Some commentators explain Solomon's execution of Joab (2 *Kings* 2:25) as based on this power of the king.

The courts based on *Halakhah* developed principles and adopted procedures which ignored and violated the very principles of due process which were its basis and which were codified in the Talmud.[3] They expanded the principle of *hora'at sha'ah* and used it to rationalize their deviations from due process.[4] Summary executions, ignoring the rules of evidence and relying upon confessions are examples of this abuse of due process. *Tur Hoshen Mishpat* states that even if there is no firm evidence to convict but there are persistent rumors, then, if the exigencies of the hour demand it, the court can convict and punish.[5]

During the Middle Ages, these violations reached their peak and seem to have become the norm in the rabbinical courts. Jewish communities had a large measure of self-government, especially in Spain, and the rabbinical courts exercised wide judicial powers. Rivash rules in one instance:

> In capital cases, however, according to the strict letter of the law, we do not pay attention to the confession because no one can be convicted and executed on the basis of his own words, but only on the basis of evidence given by two witnesses. In these days, however, the Jewish courts are not permitted to judge capital cases except by authority of the king and so it is necessary to adopt emergency measures.[6]

In modern Israel, the Knesset inherited the judicial authority exercised by the Exilarch in Babylonia, the Seven City Councillors in Europe,

[2] Federbush, *Mishpat haMelukhah be'Yisrael* (Jerusalem 1952).
[3] *M.Makk.* 1:10; Maimonides, *Hilkhot Sanhedrin* XVIII,16.
[4] *Encyclopedia Talmudit, loc cit.*
[5] *Tur Hoshen Mishpat* 2.
[6] Y. Baer, *A History of the Jews in Christian Spain*, Vol. 2 (Philadelphia, 1961).

the various Councils (*Vaad Arba Aratsot*, for example), and the traditional rabbinical courts.

There is a development in Israel parallel to the one outlined above – i.e., a definite, conscious, planned erosion and violation of due process rights. Although Israel has no formal constitution or Bill of Rights in the Anglo-American tradition, it has adopted many of the principles embodied in the concept of due process. For example, "coerced" confessions are theoretically inadmissible in evidence, counsel is provided in certain types of criminal cases, the accused is presumed innocent until proven guilty, certain evidence illegally obtained is not admissible and the state must prove its case beyond a reasonable doubt.

Yet in practice, the judicial system violates these principles and does not prevent the police from doing so. Although the police tell the arrested suspect why he has been detained and that he may remain silent, in many instances they do not have to tell him of his right to a lawyer. However, if he does request counsel, they cannot prevent him from contacting his lawyer. The fact that the police suspect that the meeting with a lawyer may cause the accused not to cooperate with police is in itself not enough cause to prevent the accused from conferring with his counsellor. There must be a good reason to keep the accused from meeting with his attorney. At times the reason used is that the suspect is in the midst of being interrogated!

The police must, however, bring the arrested man before a magistrate within 48 hours of his arrest. The magistrate can detain him for 15 days and extend this period once again. Finally, with the consent of the Attorney-General, the court can hold him up to 90 days and can even order him to be incarcerated pending consideration of his trial. Some of the criteria for such a long detention are (i) that the defendant is dangerous to society – this has been often applied to a person charged with taking bribes, (ii) public pressure in certain cases, (iii) fear that the accused might interfere with the police investigation, destroy evidence or threaten witnesses. Asher Yadlin was held because the prosecution feared that he would interfere with the investigation and destroy evidence.[7] Of course, anyone can have his friends or confederates

[7] *Yadlin* v. *State of Israel*, (1979) 31 *P.D.* (I) 671.

do this for him even though he himself is in jail. Public pressure should not be a factor in these instances.

Even in cases not involving the security of the state, those accused of white collar and other essentially non-violent crimes are often held without bail for relatively long periods of time pending investigation and even pending trial. Bail is not granted as a matter of course in these cases, for the three reasons listed above. This practice is diametrically opposed to the principles of due process as developed and practised in England and the USA. The Israeli Supreme Court very often turns down appeals against this denial of bail. In effect this practice has nullified the principle of the accused being presumed innocent until proven guilty. Confessions are often induced by confining prisoners and suspects under conditions which lead them to confess just to be freed from custody.

Modern Israeli criminal law and procedure follow the principle that exigencies of the situation ("law and order", for example) justify departure from the traditional rules and principles of Biblical and Rabbinical theoretical due-process and from the known common law principles thereof. In reality, these rules and principles are a foreign graft on ancient, medieval, East European and Near Eastern theories and practices which exalt the supremacy of King and State over the individual. *Hora'at sha'ah* in its modern guises is the guiding principle in the law today.

Despite the praise heaped upon Israel as an advanced, modern democracy, praise which is deserved in most areas, its criminal law and procedure lag behind standards set by England and the USA. Unless traditionally apathetic organized Bar and Judiciary show more interest and leadership in this area, there is little hope for improvement.

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Medical Ethics

TRANSPLANTS

*David A. Frenkel**

One of the branches of Israeli contemporary law which has been effected by the advent of Jewish law is that of medical law.

The borderline between medical ethics and the law relating to medicine is ill-defined. It is rather difficult to define what exactly is meant by "medical ethics". The term is usually interpreted broadly to mean the moral as opposed to the legal obligations in the practice of the medical professions. However, such distinction is not exact, as some of the standards known as medical ethics have legal effect and even become part of the law.

Sometimes, rules of a certain legal system become the ethics followed in another system. Thus, rules of Jewish medical law became a part of medical ethics in Israel and at a further stage were even accepted as a part of its statutory law.

The field of human organ transplants may serve as one example of this.

One of the controversial questions in Israel was whether a minor or an incompetent person, like a mentally sick or retarded person, may serve as a donor of organs for transplantation. Courts in the U.S.A. and twice in Israel have granted permission to remove organs from live incompetents, minors, retarded or mentally ill, in order to transplant

* Hebrew University of Jerusalem; Ben Gurion University of the Negev.

them in others.[1] They based their decisions on consent of parents, psychiatrists and priests. Sometimes the courts stated that the incompetent person "agreed" or even "desired" that the operation should be performed. Strong opposition to this view was taken in various articles which appeared in the legal journals in Israel and abroad,[2] and this opposition was recently accepted by the District Court of Jerusalem in a judgement delivered in May 1982.[3]

The acceptance of the "consent" of other people, for a non-therapeutic medical procedure which is not for the sole benefit of the minor or the incompetent, means granting to others proprietary rights in the body of the minor or incompetent. Furthermore, it gives people the power to force others to accept dangers in order to save another's life. The same result would happen if the courts satisfy themselves with the "consent" of a minor or of an incompetent. From their status as "incompetents" it follows that they have no capacity to give a legally valid "consent". On the contrary, they are in a position in which the law recognizes their need for protection.

For a long time Jewish law has been dealing with this question which is mainly ethical though it has legal application.

The first question raised is whether a person is bound to save the lives of others. If the answer is affirmative, the second is whether a person is bound to save the lives of others even in the event of endangering himself? And, if yes, to what extent? The third question is whether there is a right to force someone to endanger himself or to sacrifice an organ of his body in order to save the life of another.

Leviticus 19:16 – "neither shalt thou stand idly by the blood of thy

[1] For further details see D.A. Frenkel, "Incompetents as 'Donors of Organs' " *Mishpatim* 3(1971), 238–58.

[2] E.g., Curran W.J., "A Problem of Consent: Kidney Transplantation in Minors", *N.Y.U.L.Rev.* 34(1959), 891; Louisell D.W., in *Law and Ethics of Transplantation*, ed. Wolstenholme G. and O'Connor M. (London, 1968), 85–86; Daube D., *ibid.*, 189–99; Castel J.G., "Some Legal Aspects of Human Organ Transplants in Canada", *Can. B. Rev.* 46(1968), 345, 370; Woodside F.C., "Organ Transplantation: The Doctor's Dilemma and the Lawyer's Responsibility", *Ohio St.L.J.* 31(1970), 66, 76–80; Dworkin G., "The Law Relating to Organ Transplantation in England", *M.L.R.* 33 (1970) 353, 360; Meyer D.W., *The Human Body and the Law*, (Edinburgh, 1970), ff.; Frenkel, *op. cit.* note 1 above..

[3] *A.G. & al.* v. *Cividali & al.* (1982) *P.M.* (1) 225.

neighbour" – is the source from which our Sages concluded that there is a duty to save life.[4]

Maimonides[5] ruled that anybody who is able to save life and does not do so transgresses "thou shalt not stand idly by the blood of thy neighbour", and this rule also appears in the *Shulhan Arukh*.[6]

Now comes the second question: is the duty to save life absolute or limited? May a person endanger his own life in order to save the life of another, or is he only bound to save life provided he does not put himself in a situation which endangers his own life?

To this question the answers differ. According to one opinion, and this opinion is found in the Jerusalem Talmud – a person is bound to take personal risks in order to save the life of another. A person should put himself in a "possible danger" in order to save another who is clearly in danger.[7]

The other opinion, which is that of the majority, is that no such duty exists. This view is based on the Babylonian Talmud.[8]

As one can see, on this question there is no unanimous answer. Nevertheless, even among those who say that there is no duty to take personal risks in order to save another, there are differences. Whilst some[9] hold that one is prohibited from taking personal risks in order to save life, others, including Rabbi Moshe Feinstein,[10] urge that one is not prohibited from doing so but may not be forced into it.

Another matter is whether a person must or even may save the life of another by sacrificing any of his organs, when there is no clear danger to his own life.

Such a question was brought before the Radbaz in the 16th century.[11] The facts were as follows: A king demanded that the organ of a person be cut off, an operation which would not be lethal. Were

4 *Sanh.* 73.
5 *Hilkhot Rotseah*, I, 14.
6 *Hoshen Mishpat*, 426: 1.
7 *Y. Trum.* 8:4.
8 *HaRefuah le'Or ha'Halakhah* (Medicine in the Light of the *Halakhah*), The Institution for Research of Medicine in *Halakhah* (Jerusalem, 1983), 70–72.
9 *Ibid.*
10 *Igrot Moshe*, *Yore Deah*, 2:174.
11 *Resp. Radbaz* 3:685, cited in *Pithei Teshuva* to *Shulhan Arukh Hoshen Mishpat*, 426.

that person to refuse, a friend of his would be killed. Radbaz was asked whether that person should agree to having one of his organs severed. The answer was that he did not have any duty to risk any of his organs even if it meant death to his friend, but he was permitted to do so if he wanted to.

When kidney transplants began to become common, this question was raised again. May a person donate his kidney in order to save the life of another? According to one opinion, a person may not allow his kidney to be removed while he is alive in order to transplant it into another body, when there is even a remote possibility of endangering the life of the donor. This is the view of Rabbi Ephraim Waldenberg who is a member of the Great Rabbinical Council of Israel.[12] The contrary opinion, expressed by the former Chief Rabbi of Israel, Rabbi Ovadia Yossef, also a member of the Great Rabbinical Council, is that where there is expert medical opinion that the risk to the donor's life is remote, then the transplant is permissible and even encouraged as it is a good deed – *a Mitzvah*[13] – but in any case no one should be forced to donate any of his organs even if it is to save life.[14]

If this is the rule regarding healthy and mentally sound adults, it is more so as regards a minor or incompetent. Neither minor nor incompetent is bound to perform *mitsvot*. In addition, they are not capable of giving a real "consent". In practice they are forced, even subconsciously, to donate organs as a result of the wish of their parents or guardians. Furthermore, due to this, their lives, mainly those of the mentally ill persons, are at risk and danger. A mentally ill person, after a healthy organ has been removed from his body, might later need such an organ, either as a result of an accident or because of an illness. It is very doubtful that any person will donate an organ for the incompetent.

As a matter of practice, surgeons in Israel have refused, for ethical reasons, to accept minors or other incompetent persons as live donors of organs for transplantation.

[12] *Tsits Eliezer*, 9:45; 10:25, (para. 7); and also the proviso at para. 28.
[13] *Yehavei Da'at*, 3:84.
[14] *Resp. Radbaz* note 11 above, and Elon M., "Jewish Law and Modern Medicine", *Isr.L.Rev.* 4(1969), 467, 475 ff.

The Israel Legal Capacity and Guardianship Law as amended in March 1983[15] stipulates that a court is not allowed to order the performance of any operation or other medical procedure in respect of a minor or an incompetent, unless the court is convinced, by medical opinion, that the procedure is needed in order to guard the physical or mental health of the minor or incompetent.

To conclude this part one can say:

a. though there is a duty to save life in Jewish law, there is no duty to take personal risks in order to save the life of another.
b. there is no duty to give up any organ in order to save the life of another.
c. donating organs during lifetime for transplantation in order to save the life of another is a good deed – *mitsvah* – and should be encouraged.
d. in no way should a person be forced to give up any of his healthy organs, even if it is for saving the life of another.
e. minors or incompetent persons should not be used as donors of organs.

Another controversial matter in Israel is the removal of an organ from a corpse for transplantation.

Even when a person is undoubtedly dead, and no question regarding the fact of his death is raised, there are three points which should be considered in relation to any operation performed on the corpse.

Jewish law prohibits contempt of the dead through desecration of the corpse; it prohibits any advantage from the corpse, and it imposes a duty to bury the dead.[16] It seems as though there is no way to remove organs or even tissue from a corpse for transplantation. But looking more deeply into the matter, it appears to be otherwise.

As to contempt of the dead, the rationale of its prohibition is based on *Job* 14, 22: "But his flesh grieveth for him, and his soul mourneth over him", as though when the soul departs it continues to observe its bodily habitation and is grieved when it sees it desecrated. But as explained by a former Chief Rabbi of Israel, the late Rabbi Ben-Zion

[15] Sec. 68(2).
[16] Halevi H.D,. *Assei Lekha Rav*, 4:64

Hai Uziel, when the desecration is not done in order to despise or belittle the dead but to help others, it is not contempt of the dead.[17] This was said in regard of anatomical autopsies for research and study. It would apply with greater force when the purpose is to save life and help others by transplantation.

The Chief Rabbi of Tel-Aviv, Rabbi Haim David Halevi, in a responsum dealing with transplants, wrote that removal of organs for transplantation makes the soul of the dead happy: as everyone wants to help others during one's lifetime, the soul of the dead, he says, is no doubt happier when it sees that by transplanting an organ removed from its body a sick person will be restored to health. That does not amount to contempt or belittling the corpse, he concludes.[18] As to the prohibition of gaining advantage from the corpse, the opinion of many Rabbis is that this is not an advantage in the usual sense but a matter of saving life, which prevails over all other rules.[19] Furthermore, the prohibition of gaining advantage only applies to the dead parts of the corpse. The organs which are tansplantable are not dead but alive.[20]

As to the duty to bury the dead – again as these transplantable organs are not dead, there is no duty to bury them as long as they remain viable.[21]

There is almost a unanimous understanding that in order to save life, removal of organs from a corpse for transplantation is permitted, even though there is a dispute about what is *Pikuach Nefesh*, a matter of life or death.

At least two scholars – Chief Rabbi Immanuel Jakobovitz of England and Rabbi Meir Steinberg of Israel – are even of the opinion that storing organs in a "bank" is permitted because in practice there may be a need for an organ any minute even if we do not know in advance who might need it.[22]

[17] *Mishpetei Uziel*, (Tel Aviv, 1935), Vol. 1 *Yore De'ah* 28 and 29.
[18] Halevi, *op. cit.* note 16 above, 2:56.
[19] *HaRefuah le'Or haHalakhah*, note 8 above, 1044 ff.
[20] Chief Rabbi Untermann I.J., *Shevet Miyehuda* (1955) 313; Rosner F., *Modern Medicine and Jewish Law* (New York, 1972), 162.
[21] Untermann *op. cit.* note 20 above; Rosner, *op. cit.* note 20 above.
[22] Jakobovits I., *Jewish Medical Ethics*, (Jerusalem, 1966), 185 (Hebrew); Rosner, *op. cit.* note 20 above, 165.

Regarding the need for consent to remove an organ from a corpse, there is an opinion that even if it is intended for saving life the removal of an organ from a corpse may be performed only if the deceased consented to it during his lifetime.[23] But the general approach is that in case of saving life there is no need for the deceased's consent.[24] In all other cases there is a need for such consent.

In conclusion:

a. there is no prohibition of removal of organs from a corpse for transplantation, when the deceased agreed;
b. when there is a case of a life that may be saved by an organ transplant, there is no need for the express consent of the deceased or his family.

The Israeli Anatomy and Pathology Law as amended in 1983 accepted this approach of Jewish law by stating that where the deceased consented to removal of organs for transplantation or even for research, such a removal is permitted even where the family objects.

In life–saving cases, there is no need for consent, and removal of organs from a corpse for transplantation is permitted save in cases where the deceased objected or in cases where the deceased did not express his view and his family objects.

The law states also that, without derogating from the generality of the term "life-saving cases", the following examples shall be included in it: use of a cornea for transplantation in order to save a person from blindness, use of any part of the corpse in order to prevent a defect in sight or hearing, kidney transplant, and the use of skin tissue for transplantation to save life.

These examples are taken from responsa and commentary dealing with life-saving cases in Jewish law.

These are only some of the many questions raised in the matter of transplants, to which this paper has been limited, but even so one can see the remarkable effect of the Jewish law on modern Israeli statutory law.

[23] Glickman I., "The Law of Transplanting Cadavers in Sick Persons", *Noam*, 4(1961), 11; Waldenberg, *Tsits Eliezer* Vol. 4 (Jerusalem, 1954) sec. 14.
[24] Furer I., "In the Matter of Transplanting a Cadaver in an Alive Person", *Noam* 4(1961), 1.

ARTIFICIAL INSEMINATION

Is It Adultery?

*Moshe Drori**

Introduction

Artificial insemination is a relatively new issue that raises many varied problems of religion, ethics, law and sociology. Jewish Law, as a religious legal system, encompasses all these aspects while attempting, on the one hand, to follow or at least to base itself upon the accepted halakhic sources, and on the other, to find a halakhic answer suited to the needs of the present day. The tension thus created between the halakhic sources and legal policy will constitute one of the main subjects of this discussion.

Artificial insemination in general, and artificial insemination where the donor is not the husband in particular, gives rise to many halakhic problems: the emission of seed for the purpose of insemination; insemination and the laws of ritual purity; the fulfillment of the commandment "Be fruitful and multiply"; the relationship between the donor and the child for the purpose of determining personal status and financial obligations (maintenance, inheritance, etc.); and the effect of artificial insemination on various aspects of the relationship between husband and wife. Can artificial insemination be invoked to refute a claim of divorce based on grounds of a childless marriage? May one party demand that the other be artificially inseminated, against her

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will? Does insemination from the semen of a man not the husband (A.I.D.) constitute adultery, with all its halakhic ramifications?

It is this last question which will be examined in the present article. The other problems, also very thought-provoking, require separate discussion, beyond the scope of this paper.[1] However, these problems are closely connected with the problem of adultery, as we shall see.

The Biblical Prohibition on Adultery

The Torah prohibits adultery, and prescribes grave punishments for adulterers.[2] The laws of divorce stipulate that an adulterous wife is forbidden to her husband, who may – and strictly speaking must – divorce her without paying her *Ketubbah* (marriage settlement), even without her consent.[3] The Written Law does not define adultery precisely, neither does it deal in any way with artificial insemination. The Biblical commentators, however, and particularly those of medieval times, wrote commentaries on the Law and on the laws of adultery, thus furnishing secondary sources which the authorities today may use in deciding whether or not A.I.D. constitutes adultery.

The commentators based themselves mainly upon the prohibition contained in the verse in *Lev.* 18:20: "And thou shalt not implant thy seed into thy neighbour's wife, to defile thyself with her". There are some who hold that adultery is prohibited because of the fear that the uncertainty surrounding the child of an adulterous union and the resultant confusion could lead to incest.[4] Thus, in the above verse, they

[1] I have discussed these at length in a study on the subject of "Artificial Insemination in Jewish Law", carried out at the Institute for Research in Jewish Law at the Hebrew Unviersity, Jerusalem, under the guidance of Professor Elon, now a Judge of the Israel Supreme Court, and with the medical advice of Dr. Z. Palti, Head of the Gynaecology Department of the Hadassah University Hospital, Mount Scopus, Jerusalem.

[2] See e.g. H.H. Cohn, "Adultery", in ed. M. Elon, *The Principles of Jewish Law* (Jerusalem, 1975), 488–489.

[3] See e.g. B. Schereschewsky, "Divorce", ibid., 418.

[4] On this issue, the most recent halakhic authorities base themselves on the *Sefer Ha-Hinukh*, Commandment 35, ed. H.D. Chavel (Jerusalem, 1962), 92: "And the Lord Blessed be He desired that each element of His world would bear fruit, each of its own kind, and that one kind should not intermingle with another. And He desired that it may be established to whom the seed of a man belonged, and that the seeds should not intermingle... and we should fail in what we have been commanded, that a man should not know his sister nor many women, and all will be laid

emphasize the words "and thou shalt not implant thy seed"[4A] and consider it to be adultery when a strange man plants his semen in a married woman, even though sexual intercourse has not taken place.[5] Another approach stresses that the prohibition falls upon the desire of the woman to be implanted with strange semen, even without sexual intercourse, and as such, it is not sexual relations which are prohibited – as in the case of incest – but rather, the implantation of seed.[6]

An opposite approach regards sexual relations as being the basis for the prohibition of adultery, and therefore interprets the verse to con-

waste because of adultery, for a man will know not his kin". (*Sefer Ha-Hinukh* is an anonymous work (attributed to Rabbi Aaron Ha-Levi of Barcelona, 14th century) giving the reasons and the details of the 613 commandments: S.Z. Havlin, "Ha-Hinukh", *Encyclopedia Judaica* (Jerusalem, 1971), 1122–23 (hereinafter – *E.J.*).

[4A] On this point, many of the modern halakhic authorities have relied on Nahmanides' interpretation of the verse: "It says, *l'zara* [for the purpose of begetting children] in order to mention the reason for the prohibition, since it will not be known to whom the child belongs, and as a result, great and wicked abominations may be done by both. Now Scripture did not mention [this expression when it speaks] of the punishment, because even for intimacy for the first stage without emitting seed, he is already liable [to punishment]. It is for this reason that [in the case of a suspected adultress] Scripture states, 'and a man lie with her carnally', for it is on account of the seed that he suspects her": ed. H.D. Chavel (Jerusalem, 1960) vol. 2, 105. (Nahmanides was one of the classical commentators on the Bible and a halakhic authority, who lived in Spain, 1194–1270. On his life and works, see 12 *E.J.* 774–82).

[5] E.g. *Resp. Ma'arakhei Lev, Even ha'Ezer*, 73 (photocopied from Kishinev ed. 1932, Jerusalem, 1971, 138), compiled by Rabbi J.L. Zirelson (1860–1941), Chief Rabbi of Bessarabia: 16 *E.J.* 183. R. Zirelson regards A.I.D. as real adultery forbidden by Divine Law (p. 141). Some authorities adopt R. Zirelson's reasoning but view this verse only as a source of the prohibition, not as a divine prohibition itself. See, e.g. *Resp. Tzitz Eliezer*, part 3, 27 (Jerusalem, 1951) 126, 128. Recently, Rabbi Waldenburg adopted the approach of *Ma'arakhei Lev* in its entirety, that the prohibition is Divinely ordained: *Resp. Tzitz Eliezer* (Jerusalem, 1978) part 13, 97. *Resp. Tzitz Eliezer* was compiled by Rabbi E.Y. Waldenburg who for many years has served as the President of the Jerusalem District Rabbinical Court and is considered to be one of the most prolific decision-makers today on questions of *Halakhah* in general and of medicine in particular (14 *E.J.* 93–94; *ibid.* 15, 1337). Another authority who has relied on the verse in *Leviticus* and has regarded the prohibition as being based on the impurity of receiving strange seed is Rabbi Ovadiah Hadayah, *Resp. Yaskil Avdi*, part 5, 10 (Jerusalem, 1958) 138, 141. R. Hadayah (1891–1969) was a judge in the Jerusalem Rabbinical Court; 14 *E.J.* 93.

[6] See Rabbi Margolit, *Resp. Margaliot Ha-Yam, Sanhedrin*, part 2, 54B (Jerusalem, 1958). R. Margaliot was a rabbinic scholar and author of many books on Talmud and *Halakhah*: 11 *E.J.* 957–78.

tain a prohibition on "lying carnally".[7] Some commentators conclude from the context in which the prohibition on adultery is found that it applies when sexual relations have taken place and not in the case of artificial insemination.[8] Those who view sexual relations as being the basis of the prohibition arrive at the conclusion that the prohibition applies only when there have been sexual relations; in every other case, such as artificial insemination, we may not institute new regulations extending the prohibition to that case.[9]

One may ask whether exegesis of the narrative portions of the Bible constitutes a legitimate and binding source of law according the *Halakhah* today. This exegesis constituted an important source of the law, particularly in the Tannaitic [10] period, but after the redaction of the Talmud, and specifically from the middle of the Gaonic period, it almost totally ceased to serve as a legal source.[11] In the halakhic literature, a decision based on exegesis from the narrative portions of the

7 Many Rabbis advocate this approach. We shall name only a few, e.g. Rabbi D.Z. Katzbourg, editor's note, *Tel Talpiot* 1931, 79, 89: R. Katzbourg (1856–1937) was a Talmudic scholar in Hungary: 10 *E.J.* 827–8. *Resp. Helkat Ya'akov*, part 1, 24 (Jerusalem, 1951), compiled by Rabbi M.J. Breisch, President of the Rabbinical Court in Zurich: 14 *E.J.* 193.

8 E.g. Rabbi H. Mendik, "A Short Responsum on the Issue of Artificial Insemination", Hapardess, 27, 11 (5713), 3–4.

9 This view is to be found mainly in *Resp. Mishpetei Uziel*, *Even haEzer*, part 3, 19 (Tel Aviv, 1938); *Piskei Uziel le-She'elot haZman*, (Jerusalem, 1977) 280. The same answer is given in *Resp. Mishpetei Uziel*, *Even haEzer*, n.49 (Jerusalem, 1964) compiled by B-Z.M.H. Uziel (1880–1953), Chief Rabbi of Israel: 12 *E.J.* 1527–8. Today, this view is advocated vigorously by Rabbi M. Feinstein, one of the leading halakhic authorities of the time, whose rulings are accepted as authoritative by Orthodox Jews throughout the world. See *Igrot Moshe*, *Even haEzer* (New York, 1961) 10; part 2 (New York, 1964) 11; part 3 (New York, 1973) 11. R. Feinstein does not accept the view that the essence of adultery is the entry of strange semen into the woman's body, and in his discussion of Nahmanides' commentary, he suggests the possibility that this commentary is not authentic but rather the words of a mistaken pupil (*ibid.* 2, 11). On the subject of abortion, too, R. Feinstein attributes early sources which do not fit in with his approach to a misguided pupil – see his article "On the Law of Killing a Foetus" in *Sefer Hazicharon le-Rav Yehezkel Abramski*, ed. J. Buxboim (Jerusalem, 1978), 181. And see D.B. Sinclair, "The Legal Basis for the Prohibition of Abortion in Jewish Law (with some Comparative Reference to Canon, Common and Israeli law)", *Shenaton haMishpat haIvri*, V (1978), 177, 193–4.

10 See in general Elon, "Interpretation", in Elon, op. cit., 57ff.

11 See Elon, *Jewish Law*, *History, Sources and Principles*, (Jerusalem, 1973), vol. 2, 326–33.

Bible is viewed critically.[12] Thus, on the subject under discussion, we find a number of halakhic authorities, including the most important of them, who question the recourse to this method in order to solve the problem of the halakhic attitude to A.I.D. These authorities hold that today, the Talmud and the classical authorities alone constitute binding legal sources.[13] Some of them conclude that in the absence of intercourse, the prohibition on adultery does not apply,[14] and others, basing themselves on different sources, as we shall presently see, regard A.I.D. as adultery, but they deny that the prohibition is based on exegesis of the Scriptual narrative.[15]

The Talmud – The Woman who Conceived in the Bath

The Talmud, which is the primary legal source of the *Halakhah*, does not deal with artificial insemination specifically. However, in one instance we find discussion of the possibility of a woman conceiving without having had intercourse. This instance is used as a basis for treatment of the subject in modern halakhic literature.

The following passage appears in the Talmud:[16]

> Ben Zoma was asked: May a High priest marry a maiden who has become pregnant? Do we [in such case] take into consideration Samuel's statement, for Samuel said: I can have repeated sexual connections without [causing] bleeding; or is perhaps the case of

[12] "It amazes me that a holy man can say this, for after the redaction of the Talmud, how may any sage derive a new law on the basis of Scriptural exegesis?" *Lehem Yehudah* on Maimonides, *Hilkhot Ishut* (Livarno, 1745) 24, by Rabbi Yehuda b. Yitzhak Ayash, (Algeria 1700–1760). And see on this point and on reactions of other authorities, M. Drori, "The Concept Shgaga in Jewish Law: Mistake of Law and Mistake of Fact", *Shenaton haMishpat haIvri*, I (1976) 72, 85–6.

[13] See Rabbi J.J. Weinberg, "The Law of Children Born from Artificial Insemination", *Hapardess*, 25 (1) (5711),6, 7 (This was republished in Rabbi Weinberg's *Seridei Esh*, part 3, (Jerusalem, 1966) 15), and the discussion there of the comments of Rabbi Zirelson (note 5 above). "But it is not for us to interpret the Scriptures and we must solve the questions on the basis of the Talmud and the halakhic authorities". R. Weinberg (1885–1966) was a Talmudic authority in Europe: 16 *E.J.* 339–40.

[14] See previous note, and also Rabbi Feinstein's point in note 9 above.

[15] See *Resp. Menachem Meshiv*, 20, by Rabbi M. Kirshbaum, and *Resp. Yabiah Omer*, part 2, 1 (Jerusalem, 1956), compiled by Rabbi O. Yosef, former Chief Rabbi of Israel: 16 *E.J.* 857.

[16] *Hag.*, 14b–15a.

> Samuel rare? He replied: the case of Samuel is rare, but we do consider [the possibility] that she may have conceived in a bath.[17] But behold Samuel said: A spermatic emission that does not shoot forth like an arrow cannot fructify! In the first instance, it has also shot forth like an arrow.

The plain meaning of the passage is that a woman who thus conceives in a bath is not regarded as having been rendered a non-virgin and therefore unable to marry a High Priest. One may thus conclude, *a fortiori*, that it is only sexual relations which are forbidden by the *Halakhah* and when these do not take place, there can be no adultery. A.I.D., therefore, is not considered adultery, because there has been no sexual intercouse – the woman has conceived by being implanted with semen, as in the case of the woman who conceived in the bath.[18] However, a number of authorities have rejected this line of reasoning and have pointed out that the case of the woman in the bath differs substantially from that of A.I.D. In the bath, the woman conceived unintentionally and without even knowing that she did so, and therefore, is allowed as a "virgin" to marry a High Priest. In the case of A.I.D., however, the woman participates deliberately and actively by agreeing to be implanted with strange semen: therefore, she commits adultery, and is henceforth forbidden to her husband.[19] There are some who say that no analogy can be drawn from the case of the bath to that of A.I.D., for the former deals with a virgin and a High Priest, and a woman who conceives in a bath is still a virgin because her hymen is intact. On the other hand, a married woman who allows herself to be implanted with semen violates the strict prohibition on adultery.[20]

[17] "into which a male has discharged semen", note 5 above, (based on Rashi's explanations).

[18] This is also the opinion in *Resp. Mishpetei Uziel*: see note 9, above; see a collection of the opinions of other halakhic authorities in Rabbi D. Kreuzer, "Artificial Insemination", *Noam*, 1 (1958), 111, 119ff.

[19] See, for example, *Resp. Helkat Ya'akov* (note 7 above).

[20] *Resp. Tzitz Eliezer* (note 5 above). It is noteworthy that in this responsum, R. Waldenburg does not say definitively that the woman is committing adultery: on the contrary, he stresses that "logically, there are ample grounds upon which to say that in this case a woman will not be forbidden to her husband, because after all it is not a case of 'lying with a woman'." But Rabbi Waldenburg says that "from the Gemara in *Hagigah*, in my humble opinion, there is no basis for allowing it". See note 5 above for the change in R. Waldenburg's approach.

According to Rabbi Hananel's[21] interpretation of the Talmudic passages, that the question is one of tainted birth and not of the virgin being forbidden to the High Priest, it is evident that no analogy can be drawn from that passage to the case of A.I.D.[22]

Further Sources

There are three sources in medieval literature from which the authorities attempted to learn about the case of A.I.D., but an enumeration of the sources or discussion of the deductions made from them is beyond the scope of this paper. Suffice it to say that the first source is wholly based on legend, and it is doubtful whether it would be recognised as a legally-binding halakhic source.[22A] The other two sources deal with ritual purity – the prohibition on a woman lying on her husband's sheets[23] or bathing, on the night of her ritual immersion, in water in which her husband bathed;[24] the analogy drawn from these cases to A.I.D. is very complex and somewhat forced, and many authorities therefore reject them as binding sources.[25]

Legal Policy

The principal legal question which arises on the subject of A.I.D. and adultery is whether adultery is defined as a married woman having sexual relations with a man other than her husband or as a married woman being implanted with semen from a man other than her husband. Although the authorities base their views on different sources, it is clear that the underlying question is one of legal policy; upon which moral considerations are the decisions of each authority based?

[21] Rabbi Hananel b. Hushiel (died 1055) was one of the famous commentators on the Talmud: 7 *E.J.* 1252–1253.

[22] See *Resp. Tzitz Eliezer* (note 20 above), and Fred Rosner, *Modern Medicine and Jewish Law* (New York, 1972), 95.

[22a] The reference is to the legend surrounding the birth of Ben-Sira from semen which his father, Jeremiah, discharged in a bath and which impregnated Jeremiah's daughter who bathed after him: *Responsa Tashbetz*, part 3, 283; *Likutei HaMaharal*, 5.

[23] *Hagahot HaSemak* in the name of Rabbi Peretz, cited in the *Bayit Hadash* on *Tur Yoreh Deah*, 195, 1; *Turei Zahav* on *Shulkhan Arukh Yoreh Deah*, 195, 7.

[24] Rabbi Shlomo of London, cited in *Birkhei Yossef*, *Even haEzer* 1, 14.

[25] I hope to discuss these subjects at length in the course of the research project mentioned in note 1 above.

The first and foremost consideration is the desire to help a woman whose husband is sterile and enable her too to bear children (as opposed to adoption), in this way bringing her fulfillment, and, what is even more important, preserving the marriage (a basic Jewish value).[26] However, some people point out that from a psychological point of view, A.I.D. is detrimental to the marriage, for it makes the husband feel deficient and lacking function. The couple may thus become estranged, thereby frustrating the whole purpose of allowing A.I.D., which was to create conjugal harmony.[27] If the woman wants children, say these authorities, she may ask for a divorce on the grounds of her husband's sterility, and can then remarry and have children.[28] According to this approach, wanting children is not a valid reason for undergoing A.I.D. and A.I.D. is therefore prohibited.

At this stage it is appropriate to consider a factor which has not yet been mentioned. Is the husband's knowledge or consent relevant to the question of adultery? The laws of adultery deem the husband's prior consent or his consequent approval irrelevant: his wife is forbidden to him and he must divorce her, for "there can be no consent to do what is prohibited by the law".[29] Therefore, those who equate A.I.D. with real adultery attach no significance to the husband's prior consent. However, those who have doubts about such an equation and those who reject it do attach great importance to the husband's consent

[26] Rabbi Sh. Z. Auerbach expressed this clearly in "Artificial Insemination", *Noam*, 1 (1958), 145, 159:

> And even though it is unnecessary to dwell on the abomination and the impurity of the matter... and it may be right to keep one's distance from the ugliness and not to discuss it at all... however, because it is really a matter of vital importance for the woman who comes to ask about the matter and who is willing to undergo the insemination... I therefore think that as long as the authorities of our generation have not proclaimed a clear prohibition on it, it is up to us to clarify whether it is permitted or prohibited according to *Halakhah*.

R. Auerbach concludes that A.I.D. is permitted if the semen is from a non-Jewish donor, for there is no suspicion of bastardy: see in particular the summary, *ibid.* 165–66.

[27] See e.g. *Resp. Tzitz Eliezer* note 5 above, part 13, 97. Indeed, in medical literature we find evidence of the serious psychological effect of A.I.D. on the husband: see e.g. M. Heiman and J. Kleegman, "Insemination: A Psychoanalytic and Infertility Study", *Fertility and Sterility*, 17 (1966), 117–25.

[28] *Resp. Tzitz Eliezer*, *loc. cit.*

[29] Schereschewsky *op. cit.* note 3 above, 418.

or more precisely to his disapproval. Where the husband does not know, or does not approve, of A.I.D., they may adopt one of two approaches. The first is the technical legal approach, according to which the husband has a "lien" over his wife: if she undergoes A.I.D. she violates the lien unilaterally, for she cannot now have sexual relations with her husband, cannot care for the house and involves him in significant financial expenditure, both for her care and for maintenance of the child[30] (if indeed he is liable for these[31]). The second, wider approach regards A.I.D. as a fundamental breach of faith between the couple, and therefore the wife is regarded as having violated religious law and must be divorced and lose her *Ketubbah*.[32] For those who do not regard A.I.D. as adultery, however, if the husband consents he may not claim that the woman was in violation, and he does not, therefore, have any grounds for divorce.[33,34]

We have, until this point, dealt with the considerations and legal policy concerning the specific couples who resort to A.I.D. But legal policy is directed at society as a whole and incorporates other considerations, moral ones concerning the act itself and practical ones concerning the outcome. In the halakhic literature, we find many expressions of spiritual opposition to the act itself. Some of the authorities have termed A.I.D. ugliness, abomination, prostitution and licentiousness, and some even have used the expression "gave of his seed to the Moloch of artificial insemination".[35] They regard A.I.D. not only as a

[30] See, e.g. Rabbi Katzbourg (note 7 above), 79; *Ma'arakhei Lev* (note 5 above) at 141; *Resp. Tzitz Eliezer* note 5 above, part 13, 97.

[31] For a detailed discussion, see Y. Indig, "The Problem of Support of a Child Born of Artificial Insemination", *Diné Israel*, II (1970), 83–115, 108ff (in Hebrew).

[32] *Resp. Helkat Ya'akov* note 7 above, 22; *Resp. Tzitz Eliezer* (note 5 above).

[33] *Ibid.* 23.

[34] R. Feinstein, note 9 above, who permits A.I.D., discusses the husband's consent in two places. From the first (*Igrot Moshe*, 71), we learn that if the husband does not consent, A.I.D. is prohibited. From the second, however (*ibid.*, 10), we learn that the dissent of the husband only entails an exemption from support of the child and from the medical expenses of the woman, but it does not mean that A.I.D. is prohibited. And for the Israeli law on the requirement that the husband's consent to artificial insemination be obtained, and for the effect of artificial insemination on the marital relationship, see Carmi, *Medicine and Law*, (Tel Aviv 1971) 86–7 (in Hebrew).

[35] We find this in almost all the halakhic sources on the subject. See e.g. *Resp.*

general breach of morality; they also hold that the techniques of A.I.D. are unacceptable, in that a naked woman is handled by doctors.[36]

Should A.I.D. be permitted, there arises the grave moral fear that semen of one donor, or a group of donors, may be used to "produce" a whole generation, justified on the eugenic grounds of improving the strain. This would lead to genetic selection, which is detrimental to the institution of the family and to the basic idea of the individuality of each man. The *Halakhah* could not condone such a development.[37]

There are some authorities who forbid A.I.D. because of the halakhic problems which would arise should it be permitted. Thus, for example, a woman who was a real adultress could claim that she had conceived by artificial insemination, or a woman undergoing A.I.D. might be brought to real adultery with the donor.[38]

Some authorities fear that A.I.D. could lead to incestuous marriage,[39] especially if, in the future, the fact that the child was conceived through A.I.D. were to be forgotten; or that the husband's heirs would be prejudiced due to the child conceived through A.I.D. being regarded as his son;[40] and others have similar doubts concerning the

Ma'arakhei Lev note 5 above, 141: "Shame on a Jewish girl who abandons herself to artificial prostitution"; R. Weinberg (note 13 above, 8): "An ugly deed, the abomination of Egypt"; *Resp. Tzitz Eliezer* (note 5 above) part 3, 27: "who gives of his seed to the Moloch...". R. Feinstein (note 9 above) does not accept this approach and retorts strongly to the claim that A.I.D. is a form of prostitution, saying: "These words are unfounded", op. cit. 71; and see Rabbi Weiss's view in the next note.

[36] See Rabbi I. J. Weiss, *Resp. Minhat Yitzhak*, (London, 5727), 4, 5. According to R. Weiss, the improper position adopted by the woman as the doctor attempts to inject the sperm into her womb is a form of licentiousness. R. Weiss (b.1920) served as a rabbi in Manchester, England and is presently the President of the Edah Haradit Court in Jerusalem: 14 *E.J.* 93. A similar line was taken in *Resp. Tzitz Eliezer*, note 5 above, part 13, 97.

[37] In this vein, see A. Steinberg, "Artificial Insemination According to Halakha", in *Sefer Assia* ed. A. Steinberg (Jerusalem, 1976), 128, 133–4 (in Hebrew).

[38] *Resp. Yaskil Avdi*, note 5 above, 139.

[39] See e.g. Rabbi Katzbourg, note 7 above, at 79; Rabbi H.F. Epstein, *Teshuvah Shelemeh Even haEzer*, (St. Louis, 1941) 8; *Resp. Tzitz Eliezer* note 5 above, part 3, 27. Cases have occured in which a couple about to be married discovered that they were brother and sister, since their mothers were impregnated by the same donor; Steinberg, *op cit.*, note 37 above, 134.

[40] See e.g. Rabbi M. Meiri, "Concerning Artificial Insemination", *HaPardess* 30, (5716), 14, 15.

future.[41] This does not mean, however, that these authorities who forbid A.I.D. in the first instance because of these fears, or those who hold that one may be strict and make regulations on family matters,[42] would come to the conclusion that A.I.D., if it was in fact performed, constitutes adultery: not always does an initial negative position maintain itself after the fact.

Conclusion

The basic sources of the *Halakhah* do not provide one clear answer to the question whether A.I.D. constitutes adultery under Jewish Law. The halakhic authorities of our generation are therefore left with the task of developing this whole field. We have seen that the methods of exegesis of the narrative portions of the Bible and interpretation of Talmudic texts have been used and attempts made to adduce a solution from medieval sources. However, underlying it all is the legal policy advocated by each individual authority on the basis of his own reasoning. Various approaches have been adopted: to give a restrictive interpretation to the prohibition on adultery and confine it to a prohibition on sexual relations, the policy here being to consider the woman's need and not to prohibit something which need not be prohibited; to include the implantation of seed, even without intercourse, in the prohibition of adultery, the policy here being to regard the purity of the Jewish family as an important basic principle.

Unlike secular legal systems, in which central legislative and judicial bodies create a more or less monolithic legal structure, and unlike religious legal systems in which there is one authority whose utterances reflect the binding religious law, Jewish Law, with no unified religious leadership, allows for halakhic pluralism.[43] When views on a halakhic

[41] Similar reservations were made by R. Meiri, *ibid.*, and *Resp. Tzitz Eliezer*, note 5 above.

[42] An illustration of the extension of the prohibition on A.I.D. based on such considerations and readiness to introduce new legislation forbidding A.I.D. is the analysis of Rabbi J. Teitelbaum of Satmar (previous head of the extremist section of ultra-Orthodox Jewry in the U.S.A. today), cited in *Otzar HaPoskim*, 9 (Jerusalem, 5725) addenda and corrigenda, 127ff.

[43] This idea is referred to on numerous occasions in Elon *op. cit.* (note 11 above) and is an operative factor in the origin and development of the legal sources of the *Halakhah*.

issue differ, some people attribute importance to the number of authorities holding one view rather than another (the principle of numerical majority), whereas others consider the relative weight carried by each authority (the principle of qualitative preference).[44]

Since on this issue, two camps have already formed, the halakhic authorities of our generation are in a dilemma, for they are faced with a complex and sensitive issue, involving basic principles of family law. For that reason, they hesitate to ascribe to the lenient view and prefer the "no-risk" policy – their doubts lead them to be strict and to prohibit A.I.D.[45] Nevertheless, it should be remembered that in the State of Israel Jewish Law is followed in the field of marriage and divorce;[46] hence, an Israeli Jew whose case involves A.I.D. will be judged according to the criteria of the judge in the Rabbinical Court, and this decision will become part of the positive law in Israel.[47,47a]

[44] Some scholars present the Rabbinic view on the issue without discrimination or selection; see: Rosner note 21 above; Indig, note 31 above. Steinberg maintains that those who hold that A.I.D. is adultery are a minority (*op. cit.* note 37 above, 135). In yet another treatment there is an almost total disregard for those views maintaining that A.I.D. is adultery, and the view of Jewish Law is presented in most liberal terms, i.e. the woman is not guilty of adultery – E. Rackman, *One Man's Judaism* (Tel-Aviv, 1970), 112–115 (originally cited in "Morality in Medical-Legal Problems: A Jewish View", *N.Y.U.L.Rev.*, 31 (1956), 1205, 1208–10.

[45] R. Rackman, who served for many years in the U.S. Rabbinate and is currently President of Bar-Ilan University, sees this as a tendency on the part of the rabbis to avoid coming to a substantive decision, based on the belief: "If in doubt about the permissibility of a particular deed, the best course is to avoid action", and he labels this the "No-Risk Approach": E. Rackman, "*Halakha* – Orthodox Approaches," *E.J.* Yearbook (1975/76) (Jerusalem, 1976), 134, 136. As an illustration of this approach, he discusses the present topic in the following terms: "One does not... bring into being children by artificial insemination with the donor someone other than the husband because one rabbi or another expressed the view that such offspring may suffer the taint of bastardy, even though the overwhelming majority of authorities hold the contrary view (There can be no bastardy according to *halakha* unless actual sexual intercourse has taken place)".

[46] The Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953, esp. section 2. And see also Schereschewsky, *op. cit.*, (note 3 above) 423–4.

[47] Consequently, R. Waldenburg, who takes a strict view and regards A.I.D. as adultery, held in the Jerusalem Rabbinical Court, that a woman who conceived through A.I.D. "commits a trespass against both the Lord and her husband and is therefore required to accept a divorce", *Resp. Tzitz Eliezer*, note 5 above, part 13, 97. It should be stressed that this responsum is a decision of the Rabbinical District Court of Jerusalem and is binding. In passing, it might be noted that in the comment at

In conclusion, we should emphasise that the above-mentioned principles and considerations are equally relevant with respect to the new techniques of genetic engineering developed in recent years.[48] From the discussions that ensued after the birth of the first test-tube baby in 1978, we see that those who prohibit A.I.D. as adultery adopt the same line with regard to the test-tube baby,[49] or at the very least, they see it as a doubtful case of adultery[50] even though no real sexual intercourse occured and conception took place outside the woman's body.[51]

Should we try to forecast the *Halakhah's* attitude to cloning, we would conclude that those who consider sexual relations to be the main element of adultery would not regard cloning as adultery (for if A.I.D. is not adultery, then *a fortiori*, neither is cloning), whilst those who regard A.I.D. as adultery, and base this view on the interpretation of

the end of the decision, R. Waldenburg points out that even if the woman was impregnated with a mixture of her husband's seed and that of another man, the same law would apply and the woman would be forbidden to her husband. The fertile seed is that of a strange man and the husband's contribution is "required solely to assuage the husband's feelings and to give him the albeit illusory notion that the child is also formed from his seed".

[47a] In Israeli law the only existing precedent concerning A.I.D. is *Salama* v. *Salama*, (1979) 34 P.D. (II), 779. In this case the Supreme Court held that by consenting to A.I.D., the husband undertook an implied obligation to support his wife's child, although the consent was only inferred by the court from the husband's conduct, which was neither written nor verbal. The court's decision compelled the husband to pay support to the child even after he had divorced his wife. (Regarding this case see note by P. Shifman, "First Encounter of Israeli Law with Artificial Insemination", *Is.L.Rev.*, 16 (1981), 250). Needless to say, this case has no effect upon the main topic in this article, whether A.I.D. is adultery, since, under the legal system in Israel, this issue falls strictly within the jurisdiction of Rabbinical Courts, which apply Jewish law, and hence secular Israeli law has no bearing whatsoever upon the issue.

[48] See in general: M. Drori, "Genetic Engineering: A Preliminary Glance at the Legal and Halakhic Aspects", in *Tehumin – A Forum for the Elucidation of Problems of Halakhah and the State*, ed. I. Warhaftig (1979).

[49] See e.g. A. Steinberg, "Test Tube Babies", *Assia*, 6 (1979) 11, 15–6.

[50] That the matter is in doubt may be deduced – although the treatment is far from comprehensive – from the responsum of Rabbi O. Yossef, written at the time of the birth of the test-tube baby and still unpublished. I would like to thank R. Yossef for furnishing me with the hand-written original of the responsum (parts of which were cited in my article referred to in note 48 above).

[51] See in general: J.D. Bleich, "Survey of Recent Halakhic Periodical Literature – Test-Tube Baby", *Tradition*, 17, (1978), 86–90.

the verse in *Leviticus* as a prohibition on implanting strange semen in the woman's body,[52] would hold that cloning does not constitute adultery, because the foetus was not conceived as a result of the woman being injected with semen. However, it may be assumed that the reasoning of those authorities who prohibit A.I.D. for fear it may lead to licentiousness and impairment of the family structure, would hold good in the case of cloning. Cloning would therefore be prohibited and a woman who produced clones with a strange man would be classified as an adultress.[53]

[52] See, note 5 above.

[53] See in detail: M. Drori, "Cloning – Halakhic and Legal Aspects", *Assia*, 6 (1979) 17, 21–3. See also M. Drori, note 48 above, text to notes 50–6.

MEDICAL MALPRACTICE

*Hershel Schachter**

The most popular treatment of a malpractice issue in the Talmud is the famous discussion, or *sugyah*, of *shikul hada'at*.[1] This discussion centers around the situation where a judge errs in his decision and awards money to the wrong person, without it being possible to retrieve the money. The Talmud then clarifies under what circumstances the judge is held responsible for his erroneous decision and is required to repay the person whose money was unjustly lost.

Elsewhere,[2] the Talmud discusses the laws of malpractice with reference to a craftsman who, when engaged to do a job, accidentally causes damage to the object he is working on. The specific case under scrutiny in that of a *shohet* who is given an animal to slaughter in accordance with Jewish law. Proper *shehitah* would render the animal fit for the consumption of Jews, but the *shohet's* hand slips and he does not slaughter the animal correctly. The meat is now classified *neveilah* and may only be sold to non-Jews or fed to animals but not eaten by Jews. Since the meat is not *kasher*, it is not as valuable as it would have been with proper *shehitah*. The Talmud delineates just when we hold the *shohet* responsible for the damage he has caused.

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1 *Sanh.* 33a.

2 *B.K.* 99b.

The topic of medical malpractice is dealt with by the *Tosefta* in three different places.[3] All of the laws cited in the *Tosefta* are then quoted in the *Shulhan Arukh*.

Interestingly, instead of being quoted in *Hoshen Mishpat,* the part of the *Shulhan Arukh* which deals with monetary laws, these rules relating to malpractice are listed at the end of *Yoreh De'ah*. There the *Shulhan Arukh* deals first with the laws of visiting the sick and then those of treating and healing illness. Pursuing the topics chronologically, the *Shulhan Arukh* next examines any consequences that arise when a doctor is unsuccessful and his patient dies, and finally *Yoreh De'ah* concludes with the laws of mourning. It is near the end of the laws of treating the sick[4] that the principles governing medical malpractice are briefly cited. They are:

a. If a doctor had applied standard procedure, or had performed a standard operation which was medically acceptable *at the time of its performance,* doing so in the same fashion as any other doctor would have done, and only at a later date is it discovered that the procedure was harmful to patients and should never have been used, the doctor is nonetheless not considered a *hovel behavero* (one who injures another), and is not held responsible for the injuries he caused.[5] The *Torah*[6] permits qualified doctors to practice medicine according to the level of medical expertise of each generation. It is precisely for this reason that special Biblical permission is needed to allow the practice of medicine. Although the accepted procedures of any given generation may be erroneous and may harm or even kill the patient, nevertheless, the *Torah* permits doctors to practice medicine to the best of their ability.[7]

3 *T.B.K.* 6:6, 9:3; *T. Gitt.* 3:13.

4 *Yoreh De'ah* 336.

5 *Arukh haShulhan, ibid.*

6 *Ex.* 21:9 "and he (the one who caused the injury) must see to it that he (the one injured) is cured." The Talmud (*B.K.* 85b) derives from this verse the permissibility of practicing medicine.

7 See Nahmanides, *Torat ha'Adam* in *Kitvei Ha'Ramban*, ed. Chavel (Jerusalem, 1964) Vol 2, 41.

b. In a situation where there is standard accepted procedure, but a doctor slipped or erred, if the doctor is being paid for his services, then of course[8] the patient need not pay the doctor his fee. Even if the doctor has already been paid, and only later does his defective treatment become evident, the doctor should be obligated to return his fee. The *Ketsot haHoshen*[9] (one of the commentaries on the *Shulhan Arukh*) points out that if one engages a painter to paint a house but the painter does such a poor job that in order to bring about the desired result, one must paint the whole house over again, then the painter is paid nothing for his inferior work. It might have been argued that a first rate job would have been worth $1000 and therefore a second rate one, even if not originally contracted for, should command a $500 fee. This reasoning, however, is rejected; since this was not the type of work agreed upon at the outset, even the lesser value of the inferior work is not payable. While the author of *Hazon Ish*[10] questions somewhat this view of the *Ketsot haHoshen*, he does not disagree with the conclusion drawn.

c. The major topic discussed in the *Shulhan Arukh* is whether a doctor has to pay, and, if so, how much, for accidentally injuring his patient. The *Torah* tells us that when one person injures another bodily, he must make five different payments. These are enumerated by the *Mishnah*[11] as *nezek, tza'ar, ripui, shevet* and *boshet. Nezek* is the difference between the injured person's worth had he been sold on the slave market before his mishap and his worth if sold now, after the mishap;[12] *ripui* is the medical

[8] This point will be reinvestigated later on in this paper.

[9] To *Shulhan Arukh Yoreh De'ah* 227, 11.

[10] On *B.K.* at 7:18 (at end).

[11] *M.B.K.* 8:1. Regarding the collection of these payments today (when our religious courts do not have authentic *Semikhah*) see *Shulhan Arukh Hoshen Mishpat,* 1, 2 and Nahmanides to *Ket.* 14b–15a (in the pagination of the glosses of R. Issac Alfasi) in the name of the Geonim.

[12] According to the *Halakhah*, value is always established by how much the object would sell for in the market – at the time and in the place in question. See *Arak.* 23a, and *Torat Michael* (Forschlagger) (Jerusalem, 1967) 3a. Any special sentimental value an object may possess for a specific person, is not recognized. See also *T. Pes.* 1:4 regarding one who marries a woman by giving her a valuable object which, according to religious law, he is forbidden to sell. The object is declared

expenses and *shevet* the loss of earnings. These three payments are not overly difficult to estimate. *Tsa'ar* is compensation for the pain caused, whilst *boshet* is payment for the embarrassment the person will now have to suffer while going through life as a cripple. These last two payments present greater difficulties in their estimation. According to the explanation of Rabbi Meir Simcha of Dvinsk,[13] *boshet* is only paid when one intended to embarass or at least to injure.[14] Normally a doctor clearly has neither intention. *Tsa'ar, ripui,* and *shevet* are paid only in a situation when the one who caused the injury was negligent.[15] This would not be the case with a conscientious doctor who caused injury to his patient purely by accident. The only payment the doctor would be obligated to pay would be *nezek*, because the *Halakhah* declares one responsible to pay that even if the injury was caused completely unintentionally.

The *Tosefta*, however, presents the following problem. In view of the danger of being sued for injuries caused completely unintentionally, why would any conscientious individual decide to enter the medical profession? The only people who would not be deterred would be the less conscientious. The same problem exists with regard to rabbinical judges: if they err in their decision and award money to the wrong party, they must make good the loss out of their own pockets, and the fear arises that conscientious rabbis would be afraid to participate in *dinei-Torah* (legal cases), and the field would be left to the less competent.[16]

The Sages developed one solution for both of these problems: *netilat reshut* (authorization). Through this institution, expert doctors, as well as the most qualified judges, were exempted from payments by the *bet din*. Since *dina demalkhuta dina* (the law of the state is the law), and a *bet din* has a right to function as a branch of the government (*hefker*

valueless, due to the fact that it has no legitimate market value. See also *Kohelet Ya'akov* (by Rabbi Ya'akov of Karlin) to *Pes.* 21b.

[13] *Or Samei'ah, Rotzei'ah* 5–6.

[14] *B.K.* 27a.

[15] See *Nemukei Yosef* to *B.K.* 11b.

[16] See *Tosafot* to *Sanh.* 3a, *s.v. ellah me'ata.*

bet din hefker),[17] therefore a *bet din*, like the government, has the right to relieve either the doctor or the judge of payment.[18]

In a case where the doctor should have paid *nezek*, but is relieved, we are told that although the courts will not obligate him to pay (*patur midinei adam*), yet morality dictates that he should still pay on his own (*hayav bedinei shamayim*).[19]

Neither the *Tosefta*[20] nor the *Shulhan Arukh*[21] distinguishes between a doctor who treats his patients gratis and one who charges a fee. This poses a difficulty, for the Talmud[22] does make such a distinction regarding the craftsman who accidentally damaged the object that he was working on. Only if he were getting paid is he held responsible for the damage he caused. Why should the doctor be dealt with more strictly and obligated to pay *nezek* for harming a patient even in a case where he did not accept any fee?

In fact, a closer look reveals that every doctor is considered by Jewish law to be working without fee, for according to *Halakhah*, a doctor is never allowed to charge for his services. Just as a rabbi may not charge for teaching *Torah*,[23] so too, anyone who is obligated to do any *mitsvah* is not permitted to charge a fee.[24] Healing the sick is a Biblical obligation included under the *mitsvah* of *hashavat aveidah* (returning a lost article), for if one is obligated to restore another's lost property, how much more so must one restore another's sick body to good health.[25] A doctor is therefore only permitted to charge the same as a rabbi who teaches *Torah*.[26] Both may only receive *sekhar batallah*, being paid not for the work they do, but rather for not taking other

[17] See *Dvar Avraham* vol. 1, 12a, and the present writer in *Journal of Halacha and Contemporary Society*, 1 (1981), 110, for further elaboration of this point.

[18] This is clearly the understanding of Nahmanides, *Torat ha'Adam*, note 7 above, vol. 2, 42. Some later commentaries who did not have access to *Torat ha'Adam*, misunderstood the concept of *reshut*, and thought that it meant that no doctor was allowed to practice medicine without a license. (See *Achiezer*, vol. 2, 16, 6).

[19] See *Or Samei'ah*, note 13, above.

[20] See note 3 above.

[21] See note 4 above.

[22] See note 2 above.

[23] *Ned.* 37a.

[24] *Bek.* 29a. See comments of Rabbi Yitschak Ze'ev Soloveichik *Ibid.*

[25] *Sanh.* 73a.

[26] *Shulhan Arukh Yoreh De'ah* 336, 2, and *Siftei Cohen* ad locum, 4; *ibid.* 246, 5. See

jobs. By not assuming other commitments, they leave time free to teach *Torah* and to heal the sick gratis.[27]

In view of the above, an observant doctor who does not charge is not responsible for injuring his patient, since he works without a fee. Why then do the *Tosefta* and *Shulhan Arukh* discuss how much a doctor must pay? Surely they are discussing only the case of the doctor who violated the law and did charge a fee for his services.

The answer to this question is to be found in the *Mishnah*[28] and will become evident after a few more facts are established. Actually, there is another reason, connected to the nature of the damage involved, why a doctor should be exempt from paying anything. Returning briefly to the analogy of a judge, we see that a judge who erred in his decision must make up the loss, even though he did not physically hand over the money from one party to the other. The judge did not do a direct act of damage (*mazik biyadayim*) for which one is Biblically liable. Nor was his action only indirectly the cause of the damage, in which case he would have been totally exempt from payment. Rather, his act was partially but not wholly indirect. Such an action is categorized *garmi*, and its perpetrator, though Biblically exempt from paying, is subject to a Rabbinic penalty which requires him to make amends.[29] Since, however, the nature of the payment is merely rabbinic, the penalty is only applicable when the damage is done intentionally.[30] *Lo kansu shogeg attu mazid.*[31]

But the judge did not intentionally award the money to the wrong party, and yet he is penalized by the Rabbis. He must make good the loss, unless he has *reshut*. Why not relieve the judge from payment, even if he has no *reshut*, on the basis of unintentional *garmi*?

also *Resp. Har Zvi, Orah Hayim*, 1, 204, where the permissibility of charging patients treated on *Shabbat* is discussed, considering that a religious doctor would not have then undertaken any other job.

[27] It is for this reason that one who is bound by a vow not to give any *hana'ah* (pleasure or benefit) to another person, is nevertheless allowed to teach him Torah (*Ned.* 25b). The inability to charge for doing a *mitsvah* is derived from the concept that all *mitsvot* are done for God, and not for one's fellow man. See *Ket.* 108a; the present writer in *HaPardes* (1970) 19–20.

[29] See *Siftei Cohen* to *Shulhan Arukh Hoshen Mishpat*, 386 (beginning), where he accepts this opinion of the *Tosafot*. The view of Nahmanides is that even one who causes damages by *garmi* is also biblically obligated to pay.

[30] *Tosafot* to *B.B.* 2a, *s.v. omer lo.*

[31] *Gitt.* 53b–54a.

To this the *Tosafot*[32] answer that the error of the judge is considered an act of negligence. This is clearly an allusion to the *Mishnah Abot*[33] which states that an error in *Torah* committed by a Rabbi in issuing a halakhic ruling is considered intentional.

In his commentary on *Abot*, Rabbeinu Yonah writes that the rule of the *mishnah* applies to both *Torah* and *mitsvot*. When a person makes an error while performing a *mitsvah* (such as healing the sick), and thereby causes damages, he too is treated as an intentional violator of the law.

This ruling may be understood based on the fact that one is rewarded by Heaven for all *Torah* and *mitsvot*. Our belief in reward and punishment thus has an effect upon the laws of the *Hoshen Mishpat*: the rabbinical judge who errs in his decision, as well as the doctor who accidentally injures his patient, are both considered as if they were being paid to do their jobs – the heavenly reward promised them by the *Torah*[34] – and therefore they, like the hired *shohet*, can be held responsible for the damage they do.

In light of this point, that doctors may not charge for their services – they may only take *sekhar batallah*, for not assuming another job, but the actual medical services are done gratis – we must rethink one of the points of *Halakhah* mentioned above. The fee taken by the doctor would not have to be returned, even if we assume that a doctor who acts incompetently does not get paid at all. For the doctor is not being paid at all for the services he renders; he is paid for not taking another job. That obligation he discharged in full.

Only if the doctor is charging more than *sekhar battalah* and is in violation of the *Halakha*, do we say that the fee is being charged for the services. Then the fee must be refunded if the quality of the services is not what was promised in advance.

[32] To *Sanh.* 33b, *s.v. she'irvan*.

[33] *Rashash* to *Sanh. ibid.*

[34] See *B.K.* 56b, where R. Joseph declares one who is guarding someone else's lost article to be a *shomer sakhar* (a paid bailee). Two reasons are advanced to explain this opinion, the second of which runs as follows: since it is a *mitsvah* to guard the lost article and one is rewarded by Heaven for all *mitsvot*, that Heavenly reward is enough to make the person a paid bailee. (See *Or Samei'ah* to Maimonides, *Hilkhot Sekhirut*, X, where it is claimed that this line in the text of the *Talmud* was added by the Savorai who lived after the sages of the *Talmud*).

EUTHANASIA

*Yitzchak Shapira**

The world of science excels in its efforts to examine, define and classify those things that are similar and to differentiate between those that are not. This approach works well in the exact sciences but in the world of morality, classification and the purely rational approach are likely to fail our aim.

The subject of Euthanasia demonstrates this perfectly. The concept of mercy expresses one of the attributes of God. "Merciful and gracious, long suffering, abundant in goodness..." (*Ex.* 34:6). The world is built on mercy and loving kindness, as we read in the *Psalms* (89:3). Death portrays the function of life and the destruction of the world.

Euthanasia is a paradoxical concept since on the one hand we want to act mercifully towards the patient and on the other our actions are contrary to the ideal of mercy. Killing is an expression of cruelty while mercy is a sign of ideal goodness, and to combine these two features satisfies only the wish to ease a momentary problem without thought to the everlasting negative effects which can ensue from fortuitous consideration. We all know too well what diabolic acts were performed under the banner of merciful scientific research.

In *Isaiah* 45:18 we read about the creation of the world by God, not as a wasteland, but to be inhabited. God wants the world to exist and

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to develop. He gave it to us in order that we maintain it and everything that exists on it. And we may not destroy any part of it. As we say in the Burial Sevice, "The Lord giveth; the Lord taketh away. Blessed be the name of the Lord" (*Job* 1:21). He is the One who gives us life and only He is ordained to take it from us.

In discussing Euthanasia from the point of view of the *Halakhah*, we must first analyze its various aspects; religious, moral, psychological and legal, and their various consequences.

The main problem that arises is whether the life of a person as he is living it at the moment is called "life" or whether only life that is meaningful is considered true living. Furthermore, who is to decide that a life is true living – what is the precise meaning of true living and is it defined in Judaism?

Another problem may then arise if we conclude that a certain kind of life is no longer true living. Are we entitled to decide this on the basis of the momentary situation? Do we measure life in terms of quality or quantity, on a combination of these, or on neither? Can doctors really decide that a specific killing is true mercy? Is this so-called kindness objective or subjective? Will the decision be influenced by tangential considerations? Again, to whom are we really doing *hesed* (loving-kindness) – to the patient, to his family or to society? Is the concept of *hesed* fixed in connotation or will a time come when our perspective will change and the act now done as an act of mercy be considered murder? Does this act of kindness solve the problem or create new problems?

Let us try to answer these questions in the light of Talmudic lore. In the limited time available, it is not possible to cite all the sources in Jewish thinking.

Two specific rules of law[1] exist which seem to contradict one another, but in resolving the difference we come to understand the philosophy of the *Halakhah* regarding these problems. On the one hand we learn that a person in the grasp of death is considered as living – he can inherit and may pass on an inheritance;[2] he may not be moved

[1] See *Shulhan Arukh Yoreh Deah*, 339.
[2] *M. Sem.* 1:1.

until he has actually died and whoever does any act which hastens his death is considered a murderer.[3] Rabbi Meir used to say that he can be compared to a candle which is flickering and which the moment it is touched is extinguished. Anyone who even closes the eyes of a dying person is considered to have taken his life: one may not even remove his pillow or his cover from under him.[4]

A number of fundamentals follow which are pertinent here:

a. A person even in the process of dying is considered alive;
b. it is forbidden to shorten such a life;
c. whoever shortens such a life is considered a murderer and transgresses the sixth commandment "Thou shalt not kill";
d. neither the patient nor his family has the right to determine if this is considered living or not. The inclusion of the dying person among the ranks of the living is a divine commandment.

Our source continues to inform us that if, however, there is something present which will prevent his death, one is permitted to remove it because this is not considered a direct action upon the patient but only the removal of an impediment. This rule seems to contradict the first, but on closer examination no contradiction arises. Let us explain more carefully what lies behind the second rule.

An action that does not speed death but only removes a device which causes the lengthening of life artificially is permitted. However, even this action is allowed only if there is no direct contact with the person himself. The implications of all this are very broad and necessitate consultation with rabbinical experts before the rule can be applied in any particular case.

We now turn to examine the attitude of Jewish law to life in its qualitative and quantitative aspects and to its derivative rules.

If one throws a child from a roof-top sufficiently high that upon reaching the ground it will surely die and another person catches it on the edge of a sword, the latter is liable to the death penalty.[5] It follows that the shortening of a life already considered doomed is nevertheless treated as murder.

[3] *Ibid.* 1:3; *Shab* 151b.
[4] *M. Sem.* 1:3.
[5] *B. K.* 26b.

Let us proceed to a more critical example. If a person is buried under the debris of a collapsing building on the Sabbath, one must dig for him until no doubt exists that the buried person is no longer alive. If he is found alive but so shattered that his life expectancy is a matter of minutes one must continue to remove the debris.[6] The Talmud explains that temporary life is still considered life. The commentaries explain that perhaps in the remaining moments he will repent and confess his sins. This is derived from the *Ethics of the Fathers* that "One hour of repentance and good deeds in this world is better than a whole life of the world to come."[7]

The next question is whether a person may request euthanasia. The Talmud[8] relates that Hanina b. Teradyon, one of the Ten Martyrs, was accused by the Romans of having learned Torah and subsequently sentenced to be executed in a horrible fashion. They wrapped him in a Torah Scroll, placed bundles of branches around him and set them on fire. They then put tufts of wet wool on his heart to prolong his agony. Seeing him in this terrible plight, his students called out to him, "Open your mouth so that the fire will enter you and your agony will come to an end." He answered them, "It is better that He who gave it to me take my soul than that I do it to myself." Maimonides rules that a person is not even allowed to wound himself.[9] The rule is explained elsewhere[10] on the ground that the soul of a person is not his property but that of God, "All souls are mine!"(*Ezek.* 18:4)

"Perforce you were born, perforce you live and perforce you will die."[11] A man's life and death belong to God, as we pray every day upon arising in the morning; "You have breathed it [my soul] into me and you have preserved it within me and you will one day take it from me."

Furthermore, the Torah's attitude towards suffering is that it serves as an expiation for sins that have been committed.

In the Talmud it is written:[12] "A man cannot even move his finger in

6 *Yom.* 85a.
7 *M.Ab.* 4:22.
8 *A. Zar.* 18a.
9 *Hilkhot Hovel uMazik* V,1.
10 haMe'iri to *Yom.* 13.
11 *M.Ab.* 4:29.
12 *Hul.* 7b.

this world unless it is preordained on high." This expresses the Jewish belief in providence, the total divine supervision of the individual. There is no action without activation from high. This supervision is revealed in the kind of life a person is awarded, whether it be to the good or filled with suffering.

> Behold, I set before you this day a blessing and a curse; the blessing, if you obey the commandments of the Lord your God, which I command you this day; and the curse if you will not obey the commandments of the Lord your God, but depart from the way which I command you this day, to go after other gods which you have not known (*Deut.* 11:26–27).

The *Midrash Tanhumah* observes, "Why does suffering come to the world? Because of mankind, in order that they may see and say, He who sins will be smitten."[13] Similarly the Talmud states, through R. Ammi, "There is no suffering without sin."[14]

Our sages give special characterization to the Jewish people on the subject of suffering. Thus the Talmud asks in relation to the verse "The Lord called thy name a leafy olive tree fair and of goodly fruit" (*Jer.* 11:16), why is Israel compared to the olive? Just as the olive yields its oil only after pounding, so Israel does not repent except through suffering."[15] And in commenting on the verse "And God saw everything that he had made and behold it was very good" (*Gen.* 1:31), our Rabbis, in *Midrash Rabba*, observed that the expression "very good" indicates that the creation included the experiencing of pain: because through it man earns the world to come in that his sins are atoned.[16] Again Scripture says: "Whomever the Lord loves He disciplines" (*Prov.* 3:12).

We are of course forbidden to bring upon ourselves suffering. This prohibition is so strong that a *nazir* even has to bring a sin offering to atone for his transgression of refraining from wine.[17] God gave us a world to enjoy and not to seek suffering.

[13] To *Lev.*, *Metsora* 4.
[14] *Shab.* 55a.
[15] *Men.* 53b.
[16] *Gen. Rabbah* 9.
[17] *Num.* 6:14; *Naz.* 19a.

Our sages explain that a man has to be grateful to God when subjected to suffering because suffering draws him nearer to his Creator and he will be induced to pray.[18]

The subject of suffering may be concluded with a quotation from the *Mishnah*.[19] "A person must recite a blessing when evil befalls him just as he would when good overtakes him." For this reason we recite the blessing at the time of a funeral: "Blessed be the true Judge." Suffering is an integral part of human life. If we will know how to live with suffering, our life will be meaningful. If pain is imposed on a person, it must serve an aim – to ready him to spiritual accounting and bring him closer to his Maker. To escape pain through death undermines its true purpose.

From a philosophical point of view, we learn: "Even a person who has a sharp sword at his throat does not despair of pity from God."[20]

We believe that God can do everything, including the resurrection of the dead and the healing of the sick. There are many cases of sick people, clinically considered dead, who after medical treatment become well even if only for a short time. There is no doubt that often when a sick person expresses a wish or even gives his consent to a mercy killing it is because he has simply given up hope. Is there no reason to suspect that were such a person or members of his family given a chance to reconsider the situation, they might have feelings of guilt or remorse? Is it not reasonable that we should save them from a temporary crisis and thus prevent them suffering from this guilt feeling? Furthermore, we may suspect that the decision to implement euthanasia is not always motivated by purely objective thoughts of mercy but rather by economic, psychological or other lesser considerations. Sometimes emotional inability to face the cries of the sick person is the factor that brings about his "death sentence", but it is more convenient to clothe it with the mantle of kindness.

Let me add a last but important consideration. If a physician is aware that he must exert every effort and direct all his thoughts and professional skills to curing his patient without the possibility of letting

[18] *Tanhuma Deut.* 2.
[19] *M. Ber.* 9:5.
[20] *Ber.* 10a; *Sifre veE'thanan* 3:26.

him simply die, he may possibly discover new methods of treatment that in time will become standard. If we allow euthanasia, we perhaps show kindness to a particular patient, but who knows how many other patients could have been saved were there more concentrated effort to find a cure? The great discoveries of science are, we know, largely the result of untiring effort and continuous experimentation.

To conclude, the philosophy of the *Halakhah* which forbids euthanasia in nearly every case rests on true and eternal kindness. It takes into consideration all aspects of the problem.

THERAPEUTIC ABORTION

*Netanel Roberg**

This Conference, although very wide in its scope, pursues an axiomatic theme – the contribution of Jewish law to modern legal systems. We have heard, right from the opening lecture by Justice Cohn, about the dialectic between revealed Divine law and the human contribution which sometimes has even defied the precepts of that law in certain circumstances, showing the dynamic of Jewish law and paving the way for the relevance of subsequent generations in the adaptation of the law to modern society. We heard later from Professor Lapidot about the importance of isolating specifically Jewish law from what the world still mistakenly calls the Judeo-Christian tradition of law and morals. Thereafter, we enjoyed the elucidation and crystallisation by Professor Rackman of the thesis of the retardation of the Jewish contribution to the ethics and morals of the world because of a deliberate, intentional break which New Testament civilisation sought to impose to gain adherents to the new religion and render it dominant.

Here, I would like to outline briefly a theme which I think the Christian, and even more unfortunately, our own Jewish world, does not fully appreciate. It is this that Jewish ethics are neither autonomous nor yet dogmatic but governed by a labyrinth of logical laws always rational, always analysed and dissected down to the minutest detail and finally reassembled to produce both the law and ethical

* Rabbi, England.

value it contains. I must assert that on the face of it there seems much in Jewish law which points to a natural law view. Consequently, this gives a quasi-autonomous sphere of influence to ethics and values, but I must point out that there is at this moment an ongoing debate on this very assertion, and all I am willing to say at this stage is that the naturalists do not have it all their own way in view of Professor Bernard Jackson's paper due to be published shortly on this subject.

It is the positive elements of Jewish law that often *create* the ethic to a certain degree. It is true that we *can* read into Biblical and post-Biblical statements a general stand upon the ethics regarding, for example, slavery, sexual mores, the treatment of the disadvantaged classes, and the rights of the married woman. But what is often overlooked, in trying to understand Jewish law and Jewish ethics in particular, is that the treatment of the concrete problem, when it comes either to court or to the personal decision of an individual, is governed by an objective system of laws which ranges over an entire spectrum, from ritual law to public international law, from laws about extradition to Sabbath laws. The interplay and cross-fertilisation of this many-sided system may produce just one decision in one particular compartment of law. The subjective ethic, roughly defined as the wish to dispense goodness, is many times involved and somehow falls into place only after due processes of the law have had their say. We are not here discussing a general basic ethic such as the wish that life should be saved. What we are discussing are the grey areas, where contradictory ethics come to the fore, where human rights are considered against freedom of the individual, when one life is weighed against that of a whole community. Here, the ethic is grounded in halakhic principles and, instead of the subjectivity of a human response deciding a conflict of ethical principle, it is as if the law itself sits as both judge and attorney in deciding the case at hand.

I have no doubt that ever since the time of Paul[1] the Rabbis have been attacked for their overweening zeal for casuistry and legalism on account of this fundamental and basic misconception that the spirit of the law, its ethic, was, according to Paul and subsequently the Church

[1] Our own Rabbi Jeremiah, after having been evicted from the schools for over-subtle argumentation, was allowed back at the end: *B.B.* 23b and 165b.

fathers, deemed missing from Jewish law, that it had been superseded and crushed by the letter of the law, the *Halakhah* itself. In face of this trenchant criticism, repeated many times, if we are indeed to believe the Gospels, the way was now open for the Church to distance itself from authentic Jewish tradition. The will to see the ethic as dogma and to transplant the divinely ordained written law and the hermeneutics of rabbinic oral law around this assumption has caused much hardship to the Jewish people both from within and without. This is what writers on jurisprudence call the Judeo-Christian tradition, when in reality it is no more than a New Testament tradition of seeing human law abrogated and its place taken by a rigid subjective ethic which, although dogmatic in one respect, paradoxically is open to change with the shifting sands of time, when social custom demands a new ethic.

Let me illustrate my point with a parable taken from the world of medical ethics. I see before me a cripple, paralysed from the waist downwards. I would like to help him to be able to move around, so I decide to construct a wheelchair for him. It is an intuitive idea that has come to me. I have never seen a wheelchair before and therefore I cannot copy one. I have to construct a new thing, the only one in the world, as far as I am aware. I can go about this task in one of two ways. I can make a series of drawings, construct a mathematical module to provide all the angles, work out the mechanics and movements of the different components from the physics I know, the density of the substances I wish to use from the chemistry I know, and, assembling all these components, I carefully set about the construction of the chair. The other way is to see in my mind's eye the type of chair I wish to construct and decide upon the materials to be used through a purposeful decision and to set about the construction of the chair, by-passing the drawing-board stage. It is not impossible that the second method will produce a superior article, but in essence the first method possesses infinite advantages. It is based on a firm foundation. It has been planned and thought out before actual execution. It may fail to provide relief for certain types of invalids, because it cannot be adapted, at the drop of a hat, to meet their specific needs. It may therefore be limited in scope, but it can be developed into a wheelchair, Mark II. It does have solidity, and it does fulfil the general ethical purpose, namely, relief for a medically handicapped person.

It is in this way that the halakhic component vis-a-vis the ethic should be understood. The *Halakhah* is a self-integrated system which harnesses all its resources to provide a resultant ethical solution even if a conflict in ethical values occurs.

The field of medical ethics is also a fertile area to illustrate the bipartisan, reciprocal dialectic between the *Halakhah* and its ethical content. I shall use the case of therapeutic abortion, involving danger to life, as an illustration, and will demonstrate Maimonides' approach to this very problem.

The basic halakhic attitude governing abortion practice is recorded in the *Mishnah*[2] in the declaration that when "hard travail" in labour endangers the life of the mother, an embryotomy may be sanctioned and the embryo may be removed, member by member. This ruling is given by Maimonides.[3] The halakhic principle underlying this provision, incorporated in the text of the *Mishnah*, is that the mother's life has priority over that of the foetus. In the last part of the *Mishnah* a distinction is sharply drawn between the foetus and a newborn infant. The *Mishnah* stipulates that from the moment birth is considered to have taken place (as halakhically defined) no interference with natural processes is to be permitted, since one life cannot be set aside in favour of another.

In the talmudic discussion ensuing from this *mishnah* the rationale for sacrificing the child before birth is given that the child is in effect an aggressor, "pursuing" or, as we might say "endangering", the life of the mother. The concept is called *rodef*. As such, its life is forfeit to save that of the innocent victim, the mother so pursued. At this stage, the question is raised: why should an embryotomy not be performed even in such circumstances as the final stage of birth? The answer given is that the law of "pursuit" does not apply where the mother is "pursued by Heaven".[4] That is, her danger is what Maimonides defines as "the natural way of the world" as opposed to deliberate human action. The inference arising from this discussion seems to show that the rationale of "pursuit" need not be used to justify the destruction of the foetus prior to birth.

2 *M. Ohel.* 7:6.
3 *Hilkhat Rotse'ah* I, 9.
4 *Sanh.* 72b.

Maimonides codifies the law emerging from this discussion in the following manner:

> This also is a negative precept: not to have compassion on the life of a pursuer. Therefore the Sages ruled in the case of a pregnant woman experiencing difficulty when giving birth that it is permitted to excise the foetus in her womb either by medication or by hand, for it (the foetus) is to be considered as one who is pursuing her in order to kill her; but if its head has already emerged, it may not be touched – for one life may not be put aside for the sake of another life.

This passage poses some difficulties. Maimonides cites the law of pursuit as justification for embryotomy in the early stages of labour, whereas it is to be inferred from the Talmud that to sacrifice the life of the unborn infant can be allowed because its life is only secondary in importance to that of it mother.

The "pursuer" rationale, a segment of criminal law, has become the focal point of a moral dilemma: the saving of one life for another's. The post-talmudic authorities are forced to analyse underlying principles of criminal law, perhaps with philosophic axioms of causality attached, to consider how to resolve this ethical problem. The paradigm of the "pursuer", who in Jewish law may be killed, applies only if he commits an overt act of homicide. If, however, he causes the death of the pursued indirectly, through starvation or incarceration, the criminal law of pursuit does not apply. In this light, how far are we to follow the analogy of pursuer in our case of the foetus, where an overt act of homicide does not seem to have taken place? Furthermore, if the pursuer argument is rigidly applied, according to the explanation of Rabbi Chaim Soloveitchik (d.1919)[5] and also Rabbi Yeheskel Landau (circa 1770)[6] of Maimonides' position, therapeutic abortion would be strictly limited to where *this* argument can be applied: where the threat to the life of the mother is the *direct* result of the pregnancy. But if a pregnancy merely aggravates an already present medical condition, this in itself would not suffice calling for a therapeutic abortion. In this

[5] *Novellae* to Maimonides, *Hilkhot Rotse'ah* I, 9.
[6] *Noda biYehudah*, *Hoshen Mishpat* 52.

case, the foetus cannot be deemed an aggressor, since the mother's life is placed in jeopardy by the disease afflicting her. It is the latter, rather than her pregnant condition, which is the proximate cause of the impending tragedy. Again, may the law of pursuit be invoked in questions of doubt? In its original setting, the act of homicide which is about to be perpetrated must be definite.

Even a cursory perusal of the Responsa literature on this topic will highlight the manifold permutations of basic judicial principles in their interplay with the ethical problem at hand. Perhaps one further instance of this abortion problem will illustrate the ongoing objective legal basis leading to the moral decision whether the doctor may kill the child or let nature take its course, which is in fact the orthodox Catholic stand on abortion for many centuries, that "two deaths are better than one murder".

The *Mishnah*[7] quite clearly rules against embryotomy once the major portion of the infant has been delivered. The inference is that the very abandonment of one life will indeed save the other. In cases where inaction leads to loss of both mother and child, no precise halakhic ruling exists in the primary sources. The discussion of this case is left to Rabbi Israel Lipschitz (1782–1860), author of *Tiferet Yisrael*, a commentary on the *Mishnah*, who has recourse to a Biblical precedent to resolve this question.[8] You will, of course, remember, the story of Sheva ben Bikhri [9] whom Joab, the commander of King David's forces, had pursued and to whom he laid seige in the town of Abel. Joab demanded that Sheva be delivered up to the forces of the King, otherwise he threatened to destroy the entire city. Maimonides records the law derived from this story:

> If heathens have said to Israelites, 'Surrender one of your number to us, that we may put him to death, otherwise, we will put all of you to death,' they should all suffer death rather than surrender a single Israelite to them. But if they have specified an individual, saying, 'Surrender that particular person to us, or else we will put all of you to death,' they may give him up, provided that he was

7 Note 2 above.
8 To *M. Ohel.* 7:6.
9 2 *Sam* 20.

> guilty of a capital crime like Sheva ben Bikhri. But this rule is not told them in advance. If the individual specified has not incurred capital punishment, they should all suffer death rather than surrender a single Israelite to them.[10]

The authorities, when dealing with the medical application of the Sheva ben Bikhri paradigm, follow Rashi,[11] the *Tosefta*[12] and the Palestinian Talmud[13] where the pivotal argument is whether two prior conditions must be satisfied, that the person must be specified *and* have been guilty of a capital offence, or whether the absence of any supporting guilt should still warrent the surrender to the enemy. Maimonides requires that both conditions be met and prima facie in the medical context, since the infant is never guilty of any crime, the infant as "pursuer" cannot be harmed. However, the matter does not rest here. Many authorities, by analysing the Sheva ben Bikhri precedent and all the situations in the Talmud where it is cited or alluded to, come to varying conclusions as to the degree of the crime necessary to fulfil the second condition of Maimonides. The suggestion is put forward that if in fact a linkage can be established between the specification condition and the crime condition, we may be able to perform the embryotomy on the foetus.

It is only Rabbi Joel Sirkis (mid 17th century)[14] who uses a straightforward moral argument in trying to adjudicate one such case in a non-medical context. Generally, by a keen interplay of the law of "pursuer" and the Sheva ben Bikhri case, we do in many cases sacrifice the life of the infant. Naturally, every case has its own ramifications. What we do see, is that the decision is never a rigid, dogmatic ethic ("better two deaths than one murder"), never arbitrary ("who has the last word, parent, doctor, State?"), because these choices are purely ethical and not based on Jewish law in a firmly delineated codex. Some years ago, Rabbi Eliezer Y. Waldenberg,[15] a foremost authority of *Halakhah* overrides personal choice; the ethic, in turn, is dependent

[10] *Hilkhot Yesodei haTorah* V, 5.
[11] To *Sanh.* 72b.
[12] *T. Ter.* 8.
[13] *Y. Ter.* 8.
[14] *Resp. Bayit Hadash* 43.
[15] *Resp. Tzitz Eliezer* 8, 239.

pregnant woman was suffering from terminal cancer. Doctors predicted that completion of pregnancy to term would curtail her life, but the expectant mother was firm in her resolve to be survived by a child. *Halakhah* overrides personal choice; the ethic, in turn, is dependent on the *Halakhah*, and personal choice therefore becomes irrelevant. In this particular case, Rabbi Waldenberg was able to reconcile the halakhic rulings on embryotomy, which is itself regarded as a danger to the life of the mother in some circumstances, and, after due consultation with the doctors, to arrive at a decision which coincided with the wishes of the mother, and no embryotomy was performed.

In another case, Rabbi Waldenberg[16] was asked a question to which halakhic ethic required action rather than inaction, but again the decision was grounded firmly in the Biblical and Talmudic sources rather than on a personal ethic of choice. A soldier posed the question: if, whilst serving with the IDF, he saw a comrade on the battlefield badly wounded, was he obliged or allowed to put his own life at risk by trying to rescue the wounded soldier under enemy fire? Outside of Jewish law, the answer would certainly be, "this is a matter of conscience and the individual has to decide". Rabbi Waldenberg adopted an entirely different attitude. After proving conclusively that had this been a non-war situation, a person is not allowed to risk his own life in order to save another, the fact that the question arose in a war situation warranted an altogether different halakhic response, with innovative precedents. The verdict he reached declares an obligation to save life in such circumstances.

It was the late Justice Silberg[17] who described with great perception the logical, sometimes even mathematical, basis of the concepts of *Halakhah* and suggested that it was possible to apply even concepts taken from the laws pertaining to esoteric and, to us, remote subjects of sacrifices, to all parts of the civil and criminal code in a modern state. He further advised that many of the moral dilemmas of the day would vanish if we could but objectify our very subjective choices, when we meet the thin line between morals and the law, thus finding our way between the crossfire of competing ethical principles. Perhaps

[16] *Ibid.* 12, 57.
[17] "The order of Kodshim – a juristic creation *par excellence*", *Sinai* 52 (1963) 8–18.

it was his mathematical training which brought his cogent arguments again and again to these thoughts.

In conclusion, I think it pertinent to reflect again on the Psalms and Psalm 19 in particular, where perhaps a difference of interpretation between Jewish and Christian commentators bears out the variant understandings of the function of the *Halakhah*. The first half of the Psalm records the author's attitude to nature and creation in all its glory; the second forms a hymn in praise of the Torah and all its precepts. There is no intermediary verse to link these two seemingly disparate themes. This led the probably greatest Christian scholar of Judaica since Reuchlin, Herman Lebrecht Strack, to the most emphatic conclusion that two separate authors are at work in this Psalm.[18] Two separate Psalms, he thinks, have been cobbled together. This is not the opinion of most Jewish commentaries, both modern and classical. For them, the juxtaposition of Nature and the Torah tells us much about nature and creation, but even more about what ought to govern our attitude towards the Torah. Just as the natural world surrounds us with a picture of constancy, logicality and immutability, these same attributes can be equally applied to the Torah; the reason why we can trust the Lord and his precepts and be confident in our own human understanding of the law is precisely because the basis of the law is constructed on solid foundations. Strack and his school find it difficult to accept such an almost unanimous Jewish view, and with all their profound knowledge of Judaica, they remain nonetheless the heirs to the myth of the Judaeo-Christian tradition which Paul created. Our own judicial tradition has been in the past a great inspiration to the world in multiple spheres. Now, in the last few years, the study of *Mishpat Ivri* is gaining in momentum thanks to the efforts of all three of our major Israeli universities, each making great strides in the exposition of Jewish law as a living, vibrant and substansive element in the study and actual practice of the law in all its departments.

[18] H.L. Strack and O. Zoeckler, *Kurzgefasstes Bibelkommentar* (1901–1905).

APPENDIX

SEMINAR PROGRAM

CHAIRMEN

Professor Nahum Rakover
Deputy Attorney General
Israel

Judge Alfred Kleiman
Supreme Court
State of New York

Monday August 15, 1983

Reception hosted by

Mr. Mayer Gabay
Director General, Ministry of Justice, Israel

Professor David Libai
President, Israel Bar

Judge Alfred Kleiman
Supreme Court of the State of New York

Professor Nahum Rakover
Deputy Attorney General, Israel

Opening Ceremony, Keynote Address

The Hon. Haim H. Cohn
Deputy President Emeritus,
Supreme Court of Israel

Seminar Program

Tuesday August 16, 1983

Session 1

HUMAN RIGHTS

CHAIRMAN

Mr. Jules Braunschvig (France)
President, Alliance Israelite Universelle, Paris

LECTURERS

Professor Shmuel Shilo (Israel)
Faculty of Law, Hebrew University of Jerusalem

DEMOCRATIC IDEAS AND IDEALS IN THE RESPONSA LITERATURE

Professor Gerald J. Bildstein (Israel)
Ben Gurion University of the Negev

"IN HIS IMAGE"

Mr. Justus Weiner, Esq. (Israel)
Ministry of Justice, Jerusalem

HUMAN RIGHTS IN THE ADMINISTERED TERRITORIES:
Philosophy and Practice

Session 2

PUBLIC LAW AND INTERNATIONAL RELATIONS

CHAIRMAN

Professor Ruth Lapidot (Israel)
Faculty of Law, Hebrew University of Jerusalem

LECTURERS

Professor Emanuel Rackman (Israel)
President, Bar-Ilan University

THE CHURCH FATHERS AND HEBREW POLITICAL THOUGHT

Rabbi Yehuda Gershuni (Israel)

EXTRADITION

Tour of the Israel Museum
Reception hosted by Mr. David Bergman,
Deputy Mayor, City of Jerusalem

Seminar Program

Wednesday August 17, 1983

Session 3

LAW IN CHANGING SOCIETIES
LEGAL INTERPRETATION

GREETINGS

Mr. Avraham Harman
Chancellor, Hebrew University of Jerusalem

CHAIRMAN

The Hon. Edward Sadowsky
City Councilman of the City of New York

LECTURERS

Dr. Yedidya Cohen (Israel)
Tel-Aviv University

THE KIBBUTZ AS A LEGAL ENTITY

Rabbi Professor Meyer S. Feldblum (U.S.A.)
Yeshiva University, New York

THE EMERGENCE OF THE TALMUDIC LEGAL SYSTEM: CLASSICAL AND MODERN PERCEPTIONS

Rabbi Dr. Norman Solomon (England)
London

EXTENSIVE AND RESTRICTIVE INTERPRETATION

Mr. Chaim Shine, Esq. (Israel)
Bar-Ilan University

COMPROMISE

Reception hosted by *Mr. Moshe Nissim*, Minister of Justice,
At the Knesset

Seminar Program

Thursday August 18, 1983

Session 4

RELIGIOUS HERITAGE IN MODERN LEGAL SYSTEMS

CHAIRMAN

The Hon. Lee B. First (U.S.A.)
Judge, Workmens' Compensation Court,
State of New York

LECTURERS

Mr. Elyakim Rubinstein (Israel)
Legal Advisor,
Ministry of Foreign Affairs, Jerusalem

PEACE TREATIES BETWEEN ISRAEL AND ITS NEIGHBORS

Mr. Bernard J. Meislin, Esq. (U.S.A.)
New Jersey

THE TEN COMMANDMENTS IN AMERICAN LAW

Professor Reuben Ahroni (U.S.A.)
Ohio State University

THE LEVIRATE AND HUMAN RIGHTS

Session 5

CRIMINAL LAW

CHAIRMAN

The Hon. Stewart F. Hancock (U.S.A.)
Appellate Division, Supreme Court of the State of New York

LECTURERS

Professor Ya'akov Bazak (Israel)
Judge, District Court, Jerusalem

MAIMONIDES' VIEWS ON CRIME AND PUNISHMENT

Professor Nahum Rakover (Israel)
Deputy Attorney General,
Ministry of Justice

COERCION IN CONJUGAL RELATIONS

Session 6

PANEL DISCUSSION: SELF-INCRIMINATION

CHAIRMAN

The Hon. Samuel Collins (U.S.A.)
Public Defender,
Poughkeepsie, New York

PANEL

The Hon. Isaac Braz (Israel)
Judge, Magistrate Court, Ramat Gan

Professor Arnold Enker (Israel)
Faculty of Law, Bar-Ilan University

Professor Malvina Halberstam (U.S.A.)
Benjamin N. Cardozo School of Law, New York

Dr. Stanley Levin, Esq. (Israel)
Petah Tikva

Judge Jerome Hornblass (U.S.A.)
Supreme Court of the State of New York

Seminar Program

Friday August 19, 1983

Session 7

MEDICAL ETHICS

CHAIRMAN

Professor Amos Shapira (Israel)
Dean, Faculty of Law, Tel-Aviv University

LECTURERS

Dr. David A. Frenkel (Israel)
Ben Gurion University of the Negev

TRANSPLANTS

Mr. Moshe Drori, Esq. (Israel)
Jerusalem

ARTIFICIAL INSEMINATION: IS IT ADULTERY?

Rabbi Hershel Schachter (U.S.A.)
Yeshiva University, New York

MEDICAL MALPRACTICE

Rabbi Yitzchak Shapira (Israel)
Chief Rabbi of Haifa Hospitals

EUTHANASIA

Rabbi Netanel Roberg (England)

THERAPEUTIC ABORTION

Luncheon with The *Hon. Moshe Landau*
President Emeritus, Supreme Court of Israel

Greetings: The *Hon. Haim H. Cohn*

Sunday August 21, 1983

Gala Farewell Dinner

Greetings

The Hon. Alfred H. Kleiman (U.S.A.)
Supreme Court of the State of New York

Remarks

Mr. Yitzchak Tunik (Israel)
State Comptroller, State of Israel

Speaker

Professor Emanuel Rackman (Israel)
President, Bar-Ilan University

Closing Remarks

Professor Nahum Rakover (Israel)
Deputy Attorney General, Ministry of Justice

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