

MAIMONIDES AS CODIFIER OF JEWISH LAW

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Edited By

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PROCEEDINGS

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PREFACE

The year 1985 has been generally accepted as the 850th anniversary of the birth of Maimonides, and on this occasion the Ministry of Justice has declared 1985 to be "Maimonides' Year".

Within the framework of Maimonides' Year the Ministry of Justice, arranged, in association with the Israel Bar Association, a series of lectures, workshops and seminars on the teachings of Maimonides. In addition, the book "Maimonides and the Law of the State of Israel" has now been published. This volume sets forth the ruling of Maimonides, parallel to and alongside provisions enacted by the Knesset, on a variety of questions of civil law. Maimonides' observations can now be seen in a new light. In the same way, a better understanding is now possible of the laws of the Knesset in the light of Jewish law. Jewish law indeed has served as an important source for the Knesset in its legislative work.

In honor of Maimonides' Year it was decided that an international seminar be held on the topic "Maimonides as Codifier of Jewish Law". This seminar, held in cooperation with the New York County Lawyers' Association, is the second in a series of international seminars dealing with the topic "The Sources of Contemporary Law: The Bible and Talmud and their Contribution to Modern Legal Systems".

The first seminar was held in 1983, and the lectures delivered there were collected in *Jewish Law and Current Legal Problems* (Jerusalem, 1985).

Preface

The participants at the present seminar included over 100 judges, lawyers, and scholars of various faiths, who came from different countries to learn about the contribution of Maimonides to legal thought and to contemporary legal questions.

All the papers appearing here were delivered at the conference; the program of the conference appears in the appendix. Also printed in this volume is a bibliography on "Maimonides and Law," that was delivered for publication by Prof. I.I. Dienstag. In addition, the article "Maimonides as Codifier of Jewish law," appearing here, stems from a lecture given by the undersigned at the First International Congress on the Life and Works of Maimonides, held in Cordova (Spain) in September 1985.

The organizers of the conference wish to pay tribute to the memory of Rabbi Dr. Aaron Greenbaum, one of the contributors to this volume, who recently passed away: *Yehi Zichro Baruch*.

Finally, I wish to express my thanks to all those who assisted in the publication of this volume. Jeffrey Vandel assisted in the preparation of the manuscript, Peter Ellman translated several of the articles and Prof. Ben-Zion Greenberger provided useful comments and suggestions.

N.R.

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OPENING ADDRESS

Nahum Rakover

Your Excellency, Mr. President, the Chief Rabbi of Jerusalem, R. Shalom Messas, Prof. Bertels of UNESCO, Honourable Officers of the Congress, Judges and Rabbis, Ladies and Gentlemen.

On behalf of the Organising Committee, I have the honour to declare this International Congress on “Maimonides as Codifier of Jewish Law” open.

I welcome all of you who have come from distant lands to take part in the Congress.

In the 850th year since the birth of Maimonides, the Ministry of Justice declared 1985 as “Maimonides’ Year”.

The Jewish people does not perpetuate the memory of its great sons in monuments of stone. It delves into the depths of their thinking – “Their words are their memorial” (*divreihem hem hem zichronam*). This Congress is meant to discuss, analyze and illuminate the figure of R. Moses ben Maimon who again and again has shed light on the problems that confront us to this very day.

Our people, renewing itself in its own State in this land, has also restored its sacred and crowning glories of the past.

The striving for law and justice, those priceless treasures of society, dominated the life of Abraham. Of him God said, “I have known him in order that he may command his children and his household after him to keep the way of the Lord to do justice and law” [*Gen. 18:19*].

The conjunction of these two values, justice and law – *zedakah*

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u'mishpat – presents a challenge to the world, for its realisation has not yet been achieved. Maimonides successfully drew our attention to the different ways in which justice and law are related. Indeed, partially for that very reason, he has earned a place of honour in Jewish culture and generally in the culture of the world. Hence the declaration by UNESCO of 1985 as “Maimonides’ Year.” Hence also the efforts of the Governments of Spain and Morocco and of different communities in N. America to pay tribute to Maimonides.

Maimonides sketched for us a picture of an ideal world even when we were in exile, distant from our own land and subject to an alien-government. But we were filled with the hope of returning and fashioning once again our system of law and order.

In recent years the State of Israel severed the link which had bound it to English law for many decades. Instead, it has now established a new and independent relationship with “the principles of justice, equity, freedom and peace of the Jewish heritage,” as the Foundations of Law Act enacted by the Knesset in 1980 declares. By so doing the State has renewed the link between the Jewish people and its heritage stretching over thousands of years.

In that heritage Maimonides occupies a foremost position and his teachings form an integral part of the law of the State of Israel.

The aim of this Congress is to consider these teachings with reference to the legal and social problems of our times. We hope that it will make a contribution towards meeting our modern needs – not merely of the legal community – but of generally advancing and restoring our society.

GREETINGS BY THE PRESIDENT OF ISRAEL

Chaim Herzog

My Friends,

As one who has always been concerned with the contribution Jewish law can make to Israeli legislation, I look forward, along with all of you here, to the lectures we shall be hearing on Maimonides as Codifier of Jewish Law.

Perhaps the outstanding aspect of Jewish civilization is its inherent justice and the fact that the concept of justice occupies a paramount place in the hierarchy of values. Consider that many principles of human justice currently accepted as a matter of course in civilised countries – an acceptance which is, historically speaking, of comparatively recent vintage – are the principles expounded to mankind by our Jewish forebears over 3000 years ago. These principles of justice are non-existent today in the overwhelming majority of the nations of the world.

We Jews have given to the world a legal system which recognises the existence of a special reciprocal tie between law and morality, a tie that stems from the common origin of both concepts in Judaic sources. The common origin of the concepts of law and morality remained a guideline for Judaism in all periods and generations. “Thou shall not kill” and “thou shall not steal” are enjoined with the same finality as “Thou shall love thy neighbor as thyself; I am the Lord.” Indeed, Jewish law, functioning as a legal system, itself impels recourse to a moral imperative, and in so doing prepares the way to conversion of the moral

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imperative into a fully sanctioned norm. Thus, a legally sanctioned norm is to be found in the direction to act *lifnim mishurat ha-din* (i.e. leniently, beyond the requirements of the Law), a direction which became in the post-talmudic period a fully fledged norm enforced in certain instances by the courts.

The fundamental principle of procedural justice is equality. "What is justice in the process of law?" asks Maimonides, And he replies: "It is the equalisation of both parties for all purposes; not that one should be allowed to speak as he pleases and the other cut short. . . not that one should stand and the other be seated, or that one should sit above and the other below, but both should stand or sit next to each other. . . you may not hear one party in the absence of the other; not only may you not make a decision without having heard 'the other party' first, but you must hear both parties in the presence and hearing of each other" [M.T. Sanhedrin 21:1,3,7]. Incidentally, this latter injunction is an innovation peculiar to Jewish law, and these principles were enunciated some 850 years ago on the basis of the principles handed down from the mishnaic and talmudic period 1000 years earlier. Thus, our sages, echoing the Bible, the Prophets and the Psalmists, never tire of accentuating the paramount importance of the right administration of justice which they regard as one of the three pillars supporting the entire edifice of civilised society.

"For on three things the world exists, on the law, on truth and on peace" [M. Avot 1:17].

Without entering into specific aspects of the subject, I should like to express gratification at the renewed study and emphasis growing out of this widely observed 850th anniversary of the Rambam's birth. It is an anniversary that speaks to the heart and mind of Jewry, for the Rambam left his mark upon Jewish thought and history as very few other individuals have done throughout the ages. His influence was and continues to be a living one, not merely a matter of archival research or purely scholarly analysis.

I can recall my own father's [R. Isaac H. Herzog, Chief Rabbi of Israel, 1936-1959] relationship to this giant of our past. The intellectual atmosphere in our home was suffused with reverent remembrance of the Rambam and application of his concepts. My father's first journey outside Jerusalem was to his grave. What my father felt, reflected

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the approach of generations of rabbinical scholars to the Rambam's unrivaled eminence as Talmudist and codifier. Surely he must be seen as outstanding shaper of the legal framework of Jewish existence.

It is not only the extraordinary intellectual achievement of the Mishneh Torah that we must celebrate. We must also honour the exalted spirit that pervades the Mishneh Torah no less than it does the philosophical depths of the "Guide for the Perplexed." That spirit may be described as the luminous rationalism and open-mindedness of the Rambam. Wonderful in its time, it remains impressive in our modern era of nuclear development and space exploration; an era which in the paradoxical manner of human development, is strangely and perilously marked by fanatical irrationality in many societies and cultures. The Rambam, master of the scientific and philosophic knowledge of his time, was all the more rooted and dedicated in his Jewish faith and feeling. How striking a lesson for our time! And how significant it is that Jewry's great son left a strong impact upon the Scholastic philosophers of Europe and upon the Islamic culture he so respected.

There is still another inspiring aspect of his personality: the moral stature that was so clearly his. This is the man who went into minutest detail to ensure equality for all before the courts. This is the physician who treated his patients not only with medical skill but with enormous patience and psychological insight. This is the man whose legal and philosophical work stresses the ethical approach to human problems and situations. This is the man whose noble last testament asserts: "Truth and justice are the adornments of the soul and give strength and victory to the body."

May this Seminar, so rich in scholarly perceptions, be an experience worthy of the Rambam's memory, enriching to all who have come from so many lands and Israel itself.

GREETINGS
BY THE MINISTER OF JUSTICE*

Moshe Nissim

In almost every generation, there appear great individuals who light the paths of mankind. But there are very few individuals whose greatness reaches beyond the bounds of their time and place, and whose personalities enlighten the whole history of civilization. One such undisputed giant was Moshe ben Maimon, Rambam, whose 850th birthday we celebrate this year.

Rambam was one of those spiritual giants who seems to grow steadily in stature with the passing of time. He was a man of faith, yet a man of action; a pure philosopher, yet with a practical involvement in day-to-day life.

Maimonides contemplated the heavens, but his ladder was firmly set on earth, and thus the philosopher became the man of the Halakhah and the Law, who emphasized the principles of ethics and justice which are the foundations of the law.

His deep belief and vision bestowed upon him the power to give humanity that greatest and most comprehensive code of laws – HaYad haHazakah – which includes everything said and written from the time of Moses' giving of the Torah to the people of Israel up to the Rambam's own time. Rambam was the first to undertake the monumental task of codification of Jewish law, and in a model and ideal form. The force of influence of his codification led to the other later codifications of Jewish law, such as the Tur and the Shulhan Arukh.

* Given as a closing Address.

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Rambam had the courage to include in his code of laws, principles which had no significance for his own generation. He believed in and foresaw the revival of Israel, and set out the guidelines for the establishment of a legal and judicial system, the principles of peace and war, the principles of proper relations among nations, and the treatment of minorities.

In the many sessions of your conference, you dealt with the whole range of topics naturally connected with the teachings of Rambam, beginning with the basic question of the establishment of norms and their codification, in an effort to determine their relevance to a legal system whose goal is the development of legal principles which change and develop with time.

The investigation of political ideas in the teachings of Rambam emphasized his significant contribution to that field, both among Jews as well as among other peoples who drew the basic principles of his views from translations. Thus, there were lectures on the authority of the government, on the one hand, and on the other hand, about the authority of the public in democratic legislation by means of takkanat hakahal.

In the field of family law, the lecturers enlightened us with respect to family life – from that of 12th century Egypt as revealed in the Cairo Genizah, and up to the solution of problems in our own time, such as Rambam's views on forcing compliance by a recalcitrant husband.

It is equally enlightening to consider how the thoughts of Rambam have served as a basis for the discussion of modern problems of medical ethics, such as the problems of abortion and euthenasia.

Consideration was given to problems in the field of criminal law, such as the criminal liability of the mentally defective and the problem of self-defence, alongside the discussion of problems in the civil law field, such as the views of Rambam on the law of guarantors, as compared to the views of the Geonim who preceded him.

It was also most interesting to learn, from one of our conference lecturers, that the Supreme Court of the United States has based a number of its decisions on the principles of the Rambam.

This Conference, whose proceedings are now in their closing stages, is the climax of the activities of the Ministry of Justice in the year of Rambam, declared in honour of the 850th anniversary of his birth. For

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the Ministry of Justice, it will also hopefully strengthen our efforts to infuse the laws of Israel with the legal heritage of Rambam. The pure Hebrew of Rambam is a classic model for effective drafting, and the laws of Rambam, based as they are on the principles of justice and honesty in the Jewish heritage, are worthy guides for the Israeli legislator, and a well-spring from which we can constantly draw in our efforts to improve the quality of life.

Let me finally express the hope that this Conference will improve our ability to draw – in fullest measure – from the richness and greatness of the teachings of the Rambam.

Codification and Sources

MAIMONIDES AS CODIFIER OF JEWISH LAW

*Nahum Rakover**

In reviewing the contributions of Maimonides to Jewish law, *Halakhah*, as the author of the most comprehensive treatise ever written in this field, we recall the massive legal codifications of ancient and modern times.

The question that suggests itself is whether Maimonides' creation is to be regarded as a codification. What indeed is codification? What are its characteristic features? Several things distinguish codification: completeness, system, abstraction, breadth of vision and innovation.¹

By these tokens, we may regard Maimonides' *magnum opus* as a codification, provided we resolve one problematic point.

Can There Be a Codification of Religious Law?

The "innovation" inherent in a codification is that it replaces all earlier sources. On the presumption that religious law is Divine, can its codification set aside the original religious sources?

The answer to this question must have regard to the singular nature of Jewish law, based as it is on the "Written Law" and on the "Oral

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¹ See A. Barak, "On the Codification of Civil Law", 3 *Iyunei Mishpat* (1973-4) 9; Lobingier, "Codification", 2 *Encyclopaedia of the Social Sciences* (1930) 606, 609, 612; Bayitch, "Codification in Modern Times", in *Civil Law in the Modern World* (1965) 161, 162 ff.; Stone, "A Primer on Codification", 29 *Tul. L. Rev.* (1955) 303.

Law". The origin of the Written Law is Divine but its interpretation lies in the Oral Law, the bearers of which are mere mortal humans. There is the well-known story of the "Oven of Akhnai" related in the Tractate *Baba Metzia*.² In a dispute between R. Eliezer and R. Yehoshua regarding some question of religious law, the former sought to prove that he was right by appealing to a number of supernatural events, but such proof was rejected with the incisive dictum of R. Yehoshua "The Law is not in Heaven." At this, even the Holy One Blessed be He concurred with delight, proclaiming: "My sons have defeated me."³

The true question, therefore, of the codification of religious law is not whether it is possible, but rather the limitations the codifier places upon himself. Among other limitations, the codifier must refrain from violating norms beyond the scope of his power or authority to repeal. (For example, altering Biblical prescriptions or clear Talmudic decisions, as Maimonides explains – see later). Assuming the human legislator is conscious of this limitation, then even if he errs in interpreting the law he has codified, his interpretation remains the law, since the law, *Halakhah*, "binds" itself to human error.

While in theory Divine origin is the supreme norm of Jewish law, in practice the determinative norm is the human understanding of the Divine law.

In Maimonides' description of the importance of his treatise and the most significant fact that it replaces every prior treatise, he asserts that henceforth the entire law can be known by first inquiring into the written Torah and then studying his book. As he puts it in the Introduction to *Mishneh Torah* (hereinafter *Introduction*):

I have therefore called this treatise *Mishneh Torah* (i.e., "Secondary to the Bible") because a person first reads the Written Law and then upon reading this treatise will learn the whole of the Oral Law without need to read any other book.

Thus, Maimonides underlines the primary place of the Written Law as the source of the entire *Halakhah*, but the interpretation of the Written law he prescribed in his work.

² *Baba Metzia* 59b.

³ See *M.T. Yesodei haTorah* 9:1.

Maimonides as Codifier of Jewish Law

In contrast, with regard to the Talmud, Maimonides proceeds differently. He points out that in order to know the law it will no longer be necessary to study the Talmud since his treatise has set down clearly, incisively and exhaustively all that the Talmud states:

And I deemed it proper to set out the matters that are clear in all these treatises with regard to what is forbidden and what is permitted, what is unclean and what is clean and the rest of the rules of the Torah, all in plain and concise language, to the end that the Oral Law be readily available and known to all without difficulties. Refraining from noting that one authority says one thing and a second authority another – but rather clear decisions; matters are recorded that are evidently correct according to the law as it has been explained in all the volumes and commentaries from the time of our holy teacher [R. Yehuda Hanasi] until today; the rules and commandments are all properly laid out for the young and the old, including the regulations made by Sages and the Prophets. The main principle is that, in order to obviate the need for any other treatise on Jewish law, this work gathers together the Oral Law along with the regulations, the customs and the decrees that have been instituted from the time of our holy teacher Moses until after the final compilation of the Talmud, as interpreted by the Geonim in their post-Talmudic writings.

A related question is whether according to the understanding of Jewish law a later scholar may set aside what his predecessors have said, and more particularly, what is contained in the Talmud? The answer to the former question is affirmative but to the latter question negative. No scholar is bound by the interpretation given by another scholar. Each is sovereign in the sense of not being subject to the opinion of others. Hence derives the authority of a scholar, like Maimonides, in codifying the law to prescribe rules that are based on his own decisions and in this manner annul the judgements of his predecessors. In the language of Maimonides (from his *Introduction*):

If one of the Geonim taught that the law was so and so and it becomes apparent to a later court that the law was stated differently in the Talmud, the former need not be binding, but instead one may follow one or the other as the mind inclines.

However, this assumption is limited with respect to matters stated in the Talmud. Maimonides writes in his *Introduction* that everything prescribed by the Talmud has in fact been adopted by and is therefore binding upon the Jewish people as a whole:

Everything, however, that the Babylonian Talmud states must be followed by all Jews. Each city and each province is compelled to follow the accepted customs and practices of the Sages of the Talmud, to enforce their decrees and abide by their regulations, since all such statements of the Talmud have been concurred in by all Israel.

For this reason, no post-talmudic scholar can set aside the validity of talmudic prescription. As pointed out before, while any talmudic scholar is authorized to interpret its prescriptions, a scholar may never alter the actual decisions of the Talmud. Thus, the authentic interpretation of talmudic prescription is a matter left to the individual scholar – who is not subject to what others have said.

We can now better understand how Maimonides proceeds in his codification. He emphasizes that the Talmud is not easy of comprehension and obstacles may arise in grasping it and drawing conclusions from it. He therefore endeavored to prepare a compendium of clearly expressed rules, distilled from the massive and complex Talmudic material. As he writes in his *Introduction*:

Today we are beset with trouble, circumstances press upon us all and the wisdom of (our) wisemen will perish and the understanding of (our) sages will be hidden [see *Isaiah* 29:14]. Hence those commentaries and rules and responsa which the Geonim authored and considered evident have now become difficult to comprehend and there are few who properly understand; it goes without saying that the whole Talmud, consisting of the Babylonian and the Palestinian, Sifra and Sifre and the Tosefta, require broad knowledge and wisdom of thought and long periods of time to reach any apprehension of the right course in matters of prohibition and permission and the rest of the law. I therefore girded my loins, I, the Spaniard, Moshe ben Maimon . . . and I supported myself on the Rock, Blessed be he, and delved into all these books and deemed

it proper to write down the things which are dealt with in these treatises . . . in clear and concise language.

Vivid expression of the difficulty of deciding the law from the Talmud itself had earlier been given by R. Yosef ibn Migash, whom Maimonides held in high esteem. He was asked whether a person “who had never learned *Halakhah* with a teacher . . . but had read many of the responsa of the Geonim . . . but did not understand the principle of a rule nor where it appeared in the Talmud, was permitted to instruct others, or might be relied upon in any matter.” The reply of ibn Migash was that “such a man is more fit to instruct than many others who today presume to do so . . ., who purport to instruct after examining the *Halakhah* but stop at the Talmud – these are rightly to be prevented, because at the present time there is no one fit to do so, among them those who have arrived at the wisdom of the Talmud by merely studying it and without having regard for the views of the Geonim.”⁴

It follows from all this, that although theoretically the binding force of the Talmud may not be abrogated, in practice nowadays there is no one who can rely solely on the Talmud. Thus, today the Talmud has no “practical” value in deciding the law. One must, according to ibn Migash, find support in the rulings of the Geonim; whilst, according to Maimonides, the writings of his treatise obviate the need to refer to the earlier literature and full reliance can be placed on his work. As he states in his Introduction to his Book of Commandments (*Sefer haMitzvot*):

In general, no need will arise to consult any other book in order to learn anything that may be required for knowing the law, whether Scriptural or rabbinical.

If we define codification as being “innovative” when theoretically it does not derogate from other norms but explains them, we may conclude that Maimonides’ work is a work of codification in the full sense.

What is Novel in Maimonides’ System of Codification?

It seems that Maimonides was very bold in his mode of codification. Earlier scholars had indeed summed up the rules of Jewish law. The

⁴ Resp. R. Yosef ibn Migash, 114.

most comprehensive of them was R. Yitzhak Alfasi, RiF, whose *Sefer Halakhot* follows the order of the Talmud with omission of the argumentation and confines itself to the conclusions reached. RiF was also “practical” in his approach and left out rules of no contemporary impact or application, such as those operative only when the Temple existed. Some of the Geonim, preceding Maimonides, adopted another path: R. Hai Gaon wrote a systematic treatise on Sale, and R. Shmuel b. Hofni on Guarantee.

Maimonides, however, is the first to cover the entirety of Jewish law. The new path that Maimonides took was to depart from the Talmud in his classification of the material, in his form of presentation and in language. He classified all the material known until his time in 14 volumes in an architectonic form he had fashioned himself. The classification was in itself creative. To bring things together into categories required the definition of concepts and finding the right place for them in the general arrangement.

As regards form of presentation, Maimonides not only does not conform to the precise Talmudic formulation, but also avoids citing the Talmudic source of any rule that he prescribes. Thus he doubtlessly obviated, consciously or not, the possibility of debate and of disputing the manner in which he reached his conclusions with regard to the rules so unrelated to any period or source. He does not even try to persuade us why he adopted one and not the other ruling. Everything is sealed. Thus, Maimonides gained his “independence”.

As regards language, he was also innovative in abandoning the Aramaic of the Talmud and adopting Hebrew; coining new terms and setting out new definitions which translation made essential.

In doing this, Maimonides completely exhausted the task of codification as far as it can be contemplated in connection with Jewish law.

The Scope of Codification

Maimonides allotted those areas of the law which are today considered as “pure law” to the last four books of his treatise: Obligations (*Sefer Nezikin*), Acquisitions (*Sefer Kinyan*), Judgment and Judges (*Sefer Mishpatim* and *Sefer Shoftim*), and the fourth book, Women (*Sefer Nashim*). However, he included, contrary to RiF, even law not

contemporarily applicable. This is not a quantitative matter but one of real substance. He undertook to embrace the entirety of Jewish law.

Maimonides explains in his Introduction to *Sefer haMitzvot* the reason he arranges all the Biblical Commandments in his enumeration of the beginning of the *Mishneh Torah*, “so that they are preserved and nothing escapes me to be discussed.” Moreover, even as regards those matters that were not explained in his treatise, Maimonides lays the foundations for resolving these problems that may arise:

And I have included everything that is to be established and clarified from the words of the Torah so that no pertinent matter in question is excluded, or at least I refer to the basis by means of which a matter may easily be elucidated without close examination.

Maimonides incorporated, as stated, all the laws, even those with no contemporary application, and he attached great significance to this completeness. The laws lacking contemporary application include rules not only relating to the Temple, but also those regarding the building of a new Jewish state, its law and its administration, when the Jewish people return to their natural homeland. In doing so, he laid firm foundations for realizing the dream of future generations. Jewish law is not to be regarded simply as it is in the days of exile. Its true nature will come to full expression when the Jewish people returns to Eretz Yisrael, its home. Now that the dream is being realized and the State of Israel has become a fact, Maimonides provides us with the substructure for all those laws which concern not only the relations between man and God but also those that concern man and society. He lays the foundation for political leadership in Israel and its relations with other peoples. His political ideas have over time become pillars of the theory of the state in general, as a result of his work being translated into Latin and other languages.

One further important point: Maimonides includes in his work the laws of faith. He set out carefully their boundaries in areas which may be considered as abstract. He introduced the ordering of faith into the ordering of life by placing the Book of Knowledge (*Sefer haMada*) in the forefront of his great treatise, the very first of the 14 books comprising the treatise. “To know that there is a God is the foundation of

all things and a pillar of wisdom”⁵ is thus basic to the whole halakhic system of Maimonides. In this manner he embraces existence in its entirety and incorporates every aspect of life in his monumental treatise.

The Moral Value of the Law

The course Maimonides adopted in placing the laws of faith at the head of his treatise is also apparent in other parts thereof. Many of the rules he prescribes rest on moral foundations. Thus, for example, he makes mention of the command of helping one’s enemy, and at the end of the laws relating to Murder and Preservation of Life (*Rotze’ah uShmirat Nefesh*), the duty of putting the murderer to death because of the gravity of the wrong of spilling blood.⁶

A codifier might be expected to be content with stating the law, but Maimonides combines *Halakhah* and *Aggadah*, law and morals. By supplementing the practical world with matters of spirit, by suggesting that there is a link between the legal approach and the philosophical, he demonstrated why the author of *Mishneh Torah* was also the author of *The Guide for the Perplexed*.

In giving the law a moral foundation, Maimonides arrived at what the law strives to attain. The modern concept of the Rule of Law affirms or implies, not the mechanical and formalistic application of the law but its substantive impact. It is insufficient for the law to be prescribed; it must itself be examined in the light of the scale of values that stands outside the technical law. The law must be moral, non-discriminatory and free of moral defect. In this sense, Maimonides anticipated the legal approach of modern times.

At the end of the *Guide for the Perplexed*, his philosophical work, Maimonides deals with the verse in *Jeremiah*:⁷

Thus saith the Lord: Let not the wise man glory in his wisdom, nor let the mighty one glory in his might, let not the rich man glory in his riches; but let him that glorieth glory in this, that he understandeth Me, that I am the Lord who doeth mercy, justice and righteousness on earth, for in these things I delight, saith the Lord.

⁵ *M.T. Yesodei haTorah* 1:1.

⁶ *M.T. Rotze’ah uShmirat Nefesh* 4:9.

⁷ *Jer.* 9:22–23.

Maimonides as Codifier of Jewish Law

Maimonides comments: “Having mentioned this verse . . . let me round off what it contains, that God is not satisfied merely to express the sublime which is His achievement, for if that were his purpose he would have said ‘Let him that glorieth in this, that he understandeth and knoweth Me’ and stopped there . . . ; but the verse goes on to explain that the deeds which we are under a duty to know and to parallel are mercy, justice and righteousness . . . Only then does He conclude ‘For in these things I delight, saith the Lord,’ that is to say, His purpose is that there should be mercy, justice and righteousness among us, as I have explained in the Thirteen Attributes of God, and that these characteristics are to be imitated by us in all that we do.”

In these observations Maimonides expresses the aim of combining philosophy, morality and justice. This conclusion of *The Guide for the Perplexed* is the key to understanding the essence and the foundation of Maimonides as the author of the most important codification of all times.

THE CODIFICATORY METHOD AND JEWISH LEGAL THEORY

*Haim H. Cohn**

The Maimonidean Codification¹ raises two questions of jurisprudential principle, one formal and one substantial: the formal is the question of validity, the substantial a question of compatibility. Both have, in some context or other, engaged the attention of Rambam himself and were answered by him in various, sometimes contradictory terms. They have agitated rabbinical minds for centuries and have never been wholly laid at rest.

Both validity and compatibility of codification in Jewish law have recently been considered in depth by Menahem Elon.² Starting from the premise that “codification”, in its usual and proper legal meaning, is the work of a legislature and derives binding force from the legislative authority of its promulgator, he rightly concludes that codification by a human agency is *prima facie* incompatible with the divinity ascribed to *Halakhah*. The Maimonidean and other codes are not, therefore, in the nature of “codifications” – as neither Rambam nor the other codifiers ever pretended to be vested with legislative

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¹ The same considerations apply *mutatis mutandis* to the later codifications, especially those of Yaacov b. Asher (*Tur*) and Yossef Karo (*Shulhan Arukh*).

² M. Elon, *Jewish Law: History, Sources, Principles* (Jerusalem 1973) Vol. 3, 946 ff. (in Hebrew); “*Meni'im ve-Ekronot baKodifikatzia shel haHalakhah*”, in *Hagut ve-Halakhah*, ed. Eisner (Jerusalem 1968) 86 ff.

CODIFICATION AND SOURCES

authority. The codes are in reality “compilations”³ or (as they are called in American law) “restatements” which are not primary but only secondary sources of law. For finding the law, a court may well rely also on secondary sources, such as, for instance, a textbook written by a renowned scholar, or the Restatement of the Law by the American Law Institute. Similarly, there can be no objection to a court relying on *Mishneh Torah* for finding Jewish law.

But just as you may choose to rely thereon, so you may choose not to rely thereon, either at all or in any particular instance. Indeed, as we shall see, some authorities abstained from relying on the Rambam and some explicitly forbade it. Elon goes on to state that the codificatory method adopted by the Rambam is, as a matter of principle, “sufferable (*nisbelet*) in the world of the *Halakhah*,”⁴ which means that notwithstanding its invalidity or incompatibility, we are expected or required to “suffer” its existence in Jewish law. Elsewhere, he reiterates that notwithstanding any incompatibility of codification with *Halakhah*, “from the standpoint of the validity attaching to such compilatory work and the possibility of deciding in terms of it, it has been regarded not merely as constituting presumptive evidence (of the law), but as carrying also the authority of a proper codex.”⁵ In other words, the code may be incompatible, but it is valid: we are left in the dark as to how that validity is acquired in the absence of legislative authority.

Validity and Compatibility are intertwined: one is the counterpart of the other. If codification is formally valid as binding law in its own right, it would almost go without saying that it must be compatible with the system from which it derives, and within which it enjoys, its binding force. If, on the other hand, it is conceded that codification as such can have no validity as binding law, the question of compatibility may, though still open, become irrelevant from a strictly legal point of view. Incompatibility retains its interest and relevancy on the assumption that, though not claiming validity as “a proper codex”, the compilation or restatement claims some authority as “presumptive evidence” or its

³ Cf. M.D.A. Freeman, “The Concept of Codification”, 2 *Jewish Law Annual* (1979) 169–170.

⁴ Elon, *Jewish Law* 947 (see note 2 above).

⁵ M. Elon, “Codification of Law”, in *The Principles of Jewish Law*, ed. M. Elon (Jerusalem, 1975) 122 and 5 *Encyclopedia Judaica* (Jerusalem, 1972) 631.

equivalent. The question of validity is important – not so much because it matters today whether or not any formal validity was ascribed to the Maimonidean code, but rather because Rambam himself appears to have been troubled by this question. It will be submitted that even if he did succeed in solving the issue of validity, nevertheless, his solution did not answer the question of compatibility.

In his Introduction, Rambam clarifies his purpose in setting out the whole binding law: “All the matters in the Babylonian *Gemara* are binding upon all Israel, and all towns and provinces shall be compelled to conduct themselves according to the customs introduced by the sages of the *Gemara*, to decree their decrees and to follow their regulations, because all these matters in the *Gemara* have been consented upon by all Israel.”⁶ This gratuitous statement is puzzling at first sight: the authority of the *Halakhah* as settled in the Talmud has never been attributed to any general or popular consensus, nor has its binding force ever been made dependent or conditional upon any such consensus. Nor can this statement be related back to a preceding paragraph where local customs and rules which had not found general dissemination are contradistinguished: Rambam had already explained before that the knowledge and practice of talmudic (as distinguished from local) rules had spread everywhere: “their decrees and their rules and customs had spread throughout Israel wherever they resided.” The consensus of all Israel must therefore, in the eyes of Rambam, have played a role in the conferment of validity on his restatement of the talmudically settled *Halakhah*. While one can perhaps trace the notion of such consensus back even to the revelation on Mount Sinai,⁷ it has, to the best of my knowledge, never before been adduced as a principle of validity or validation. Ludwig Blau was the first to note a possible

⁶ “*Hiskimu alehem Kol Yisrael*”; Introduction to his *Commentary on the Mishnah* ed. Rabinowitz (Jerusalem 1961) 41. The general consensus (*haskamah*) is confined to such customs and regulations as were enacted for the welfare of the public, without adding to or diminishing from divine law. Indeed, insofar as such regulations are concerned, their continuously binding force depends upon whether they are in practice still observed by all Israel: *M. T. Mamrim* 2:7–8.

⁷ *Ex.* 19:8: “And all the people answered together.” See *Mekhilta*, ed. Ish Shalom (Vienna 1870) *Yitro, Parashat haHodesh* 62,63,66: “when they travelled they were in dispute and when they camped they were in dispute, but here they were of one heart.”

connection between this Maimonidean concept of consensus and the *Idjma* of Islamic jurisprudence: his hypothesis was that Rambam transplanted Muslim ideas into Jewish legal theory.⁸

In Islam, the search for and exposition of divine law had in fact been carried out by religious leaders and scholars exercising their own judgment as to what the law ought to be (*idjtihad*). Then there came a time when, in the figurative expression of Muslim jurisprudence, the “gate of independent reasoning” was closed: the doctrine which “denied the further responsibility of independent reasoning (*ijtihad*) sanctioned officially a state of things which had come to prevail in fact.”⁹ In third-century Islam the idea had begun to gain ground that only the great scholars of the past who could not be equalled, and not the epigones, were qualified exponents of the law; and in the course of the fourth century (that is, about a hundred years before the *Mishneh Torah*) “the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application and – at the most – interpretation of the doctrine as it had been laid down once and for all.” The closing of the gate by virtue of that consensus meant “the unquestioning acceptance of the doctrines” and rules which had by then crystallized as the whole body of divine law.¹⁰ Such powerful effect was attributed to the consensus for the reason that it was inconceivable that the whole community of God’s faithful servants could ever err unanimously.¹¹

The common element between this Islamic consensus and the Jewish consensus which Maimonides postulates is that both relate not only to the legal norms which at the given time had crystallized, but also – and

⁸ L. Blau, “Das Gesetzbuch des Maimonides Historisch betrachtet”, in *Moses ben Maimon – sein Leben, seine Werke und sein Einfluss*, ed. Guttman (Leipzig 1914) Vol. 2, 351 ff.

⁹ J. Schacht, *Introduction to Islamic Law* (Oxford 1964) 69.

¹⁰ *Ibid.*, 70–71. See H. Cohn, “The Secularisation of Divine Law”, in *16 Scripta Hierosolymitana* (1966) 55–103, reprinted in *Jewish Law in Ancient and Modern Israel*, ed. H. Cohn (New York 1971) 31–32.

¹¹ I. Goldziher, *Vorlesungen ueber den Islam*. Hebrew translation by Rivlin (Jerusalem 1951) 45–46.

perhaps mainly – to the unsurpassable authority of the sages who had laid down those norms or invested them with binding force. The passage in the Introduction to *Mishneh Torah* immediately following the statement relating to the consensus of all Israel, refers to “those sages who enacted the rules or decreed the decrees or laid down the customs or adjudicated the laws and taught that the law should be this or should be that” – and those were “all or most of the sages of Israel” – meaning the totality or majority of the sages up to the completion of the Babylonian Talmud, by which time the law must be taken as having been finally settled.¹² But in speaking of the “totality or majority” of sages (as he must, because of the prevalence of the majority rule in determining the *Halakhah*¹³), he *ipsissimis verbis* divested the consensus of what is in Islamic thought its main element, namely the lack of any dissent. In Islamic conception, the divinity of the law could be deduced only from total unanimity: if there was a majority and a – however small – minority among the sages, there was no real consensus; and while the law could reasonably and pragmatically be settled by virtue of the majority rule, its validity could not be said to flow from “consensus”.

I have tried elsewhere¹⁴ to reconcile the majority rule with the consensus concept, and shall content myself here with leaving the question open whether Rambam did, or indeed needed to, call a total consensus in aid to support the validity of the *Halakhah* as settled in the Talmud. We may well assume that this validity was anyway axiomatic for him. But the emphasis laid by him on the consensus of all Israel appears to me to indicate a test of validity which he anticipated, and aspired to, for his own code.

Maimonides considered his code to be final, not only in the sense that nobody would need “any other book in the world for any law of the laws of Israel,”¹⁵ or that there would be no need “after the Torah

¹² Cf. *Rashbam* to *Baba Batra* 130b, s.v. “*ad sheyomru*”. Rav Ashi and Ravina mark the termination of lawgiving (*sof hora'ah*). Cf. *Tur*, *Hoshen Mishpat* 25:5.

¹³ *M. Eduyot* 1:5; *Baba Metzia* 59b, *Sanhedrin* 3b, *Hullin* 11a and elsewhere. See *M.T. Mamrim* 1:3.

¹⁴ H. Cohn, “Maimonidean Theories of Codification”, 1 *Jewish Law Annual* (1978) 26–27.

¹⁵ Maimonides, Introduction to *Mishneh Torah*, last paragraph.

for any book other than this to find any norm of the Written or of the Oral law,"¹⁶ but also in the sense that "in future times, when there will be no more envy nor lust for power, all Israel will content themselves with this book alone and will no longer resort to any compendium of *Halakhah* other than this one."¹⁷ It is, of course, highly significant in this context that Maimonides contemplated his code to be valid even in messianic times: he purposely also incorporated in his code all those rules which have no practical applicability so long as the Temple is not rebuilt, the land redeemed and the exiles gathered.¹⁸ In order to become the final and exclusive book of law, the only necessary and authoritative "code", the consensus of all Israel would be a *conditio sine qua non*: the authority – and hence the validity – of the code would stand and fall with its acceptance throughout Israel. In this vein, Rambam wrote in one of his letters that he was certain "that in the times to come, when jealousy and lust for power will have disappeared, all Israel will resort to (the code) only and discard everything else without a doubt."¹⁹ It is this anticipated consensus of all Israel which was, in the eyes of Maimonides, apt to confer upon his code its validity. Indeed, needless to say, its validity would, by virtue of that consensus, never be assailed or contested.

It is the alleged preceding consensus of all Israel on the *Halakhah* as settled in the Talmud, which appeared to Maimonides to be the *causa causans* of the consensus to which he could reasonably aspire for his own code: even his own halakhic additions and deletions²⁰ could not derogate from the overall authority, nay sacrosanctity, of the *Halakhah* which he only compiled and restated. As far as the *literary* form was concerned in which he restated the *Halakhah*, no additional

¹⁶ *Idem*, Introduction to *Sefer haMitzvot*, first paragraph.

¹⁷ *Igrot haRambam*, ed. Baneth (Jerusalem 1946) 52.

¹⁸ S. Zeitlin, *Maimonides* (New York 1935), wrote that what Rambam had in mind was the promulgation of a constitution for a reconstituted independent Jewish state (61); if he had a Jewish state in mind, it was not, of course, the secular Jewish state of today, but the state to arise in messianic times.

¹⁹ *Kovetz Teshuvot haRambam veIgrotav* (Leipzig 1859) Vol. 2, 30.

²⁰ J. Levinger, *Maimonides' Techniques of Codification* (Jerusalem 1965) 211–226, (in Hebrew) lists 177 *halakhot* which Maimonides describes as his own or his teachers' rulings; and see *idem*, "Maimonides as Philosopher and Codifier", 1 *Jewish Law Annual* (1978) 138 ff.

authority was required or contended for; but his *jurisprudential* reform in establishing a new “equivalence between authority and anonymity”²¹ by codification could not prevail without some new consensus. If no formal validity – and hence no consensus – was required for a mere textbook or restatement, the very search for some cause of validity may well indicate that Rambam had much higher aspirations than just writing a treatise.

Nor was it only Rambam himself who perceived a general consensus to be indispensable for vesting his code with authority. His great glossator, Rabbi Avraham ben David (Rabad), had exactly the same perception – and it was with a view to emphasising that no such consensus could possibly be assumed that he clothed his glosses in such vehement and uncompromising language. It is well established that he fully recognized the outstanding brilliancy and eminent scholarship of Rambam: many of his *Hassagot* are in essence but concurring opinions. Again and again scholars have asked themselves what could have prompted such a saintly man as Rabad to use invective against Rambam;²² but none of the many theories propounded to explain such stridency²³ is quite satisfactory. There can be no doubt that there was some purpose and policy behind the harshness of the disavowal.

A seventeenth-century historian wrote that Rabad did not oppose Rambam, “God forbid, because of hatred or jealousy or heated rivalry . . . his intention was to criticise for the sake of future generations: that they should not codify the law in accord with his opinion in all matters, thinking that his formulation of those laws is indisputable. They should know in truth that those laws are controversial and are not as he authoritatively laid down.”²⁴ This is quite an accurate description, remarkable for its psychological insight no less than for its jurisprudential discernment.

²¹ I. Twersky, *Introduction to the Code of Maimonides* (New Haven 1980) 100.

²² We find Rabad writing that what Rambam held was but *hevel u-re'ut ruach* (“vanity and vexation of spirit”); that his explanations have “neither flavor nor fragrance and are great foolishness”; that his formulations provide only darkness and no light” and that “there is neither salt nor spice in them” (see I. Twersky, *Rabad of Posquieres* (Philadelphia 1980) 178) and warning the reader not to let himself be led astray by his concoctions.

²³ Twersky, 179 ff. op. cit.

²⁴ David Konforte, *Koreh haDorot* (see Twersky op. cit. 182).

Indeed, Rabad's objections go to the root of both the validity and the compatibility problems: he wants to make it abundantly clear that the codificatory method is inadmissible in Jewish law. He has spelt out the reasons for this inadmissibility in his gloss at the end of the Introduction to *Mishneh Torah* – and it turns out that one of his reasons for the invalidity of the code is its incompatibility. First he speaks of an unjustifiable deviation from the ways of the ancients, e.g., by not giving reasons or proofs and withholding the names of the authors of the norms. Only thereafter does he proceed to protest against the Maimonidean pretences of infallibility and finality and the obligatoriness of his choice and selection: “why should I rely upon his choice when it is not acceptable to me, and I do not know whether the contesting authority is competent to differ or not. It can only be that there is in him an overbearing spirit.”²⁵ Even assuming that indeed Rambam bore no “overbearing spirit” but a spirit of geniality and inspiration, and not necessarily one of superiority and arrogance – Rabad's objection to the admissibility of codification stands unanswered and unimpaired.

However much Maimonides aspired to have his code accepted and validated by general consensus, he himself foresaw that the code might “fall into the hands of jealous and wicked persons who would defame its praiseworthy features . . . and not recognize its value but consider it worthless”²⁶ – a premonition possibly born of disappointed hopes. His forebodings were later confirmed by Alharizi in similar disdainful language: he wrote that after Rambam's death opposition to his code was widespread, and “every fool opened wide his mouth throughout Spain, France, Eretz Yisrael and Babylonia. . . . They breached the walls which the genius had raised – little foxes despoiling the vineyard. Had they spoken in his presence, they would have melted as wax by the fire of his anger.”²⁷ Had it only been fools or villains who deprecated the

²⁵ *Kol kevel di ru'ah yatirah beh* (“because a surpassing spirit was in him” *Dan.* 6:4), where the *ru'ah yeterah* is used in a positive sense, in praise of the overmastering spirit of Daniel as distinguished from that of the ministers of Persia. Rabad clearly uses it in a negative sense to deprecate false pretences of superiority; cf. *Pesahim* 113b.

²⁶ Letter to Joseph b. Judah (Twersky, *Introduction* (note), 520.

²⁷ Yehuda b. Yossef Al-Harizi, *Tahkemoni* (J. Silver, *Maimonidean Criticism and the Maimonidean Controversy* (Leiden 1965) 41).

code, their opposition might have been discarded *in limine* as flowing from ignorance and malice, but it was the uncontested eminence of the opponents, and the good faith and scholarly acumen with which they made and reasoned their opposition, that prevented any consensus from being reached until centuries had passed.

Gradually, it appears that a general consensus came, indeed, to prevail to confer upon the Maimonidean code that kind of validity which its author himself seems to have considered necessary. But even if such consensus – ratified as it was by the continuation by Rabbi Yaacov b. Asher and Rabbi Yossef Karo of the codificatory method – did confer on the codes a certain brand of validity, the question of their compatibility appears to have remained open.

One of the main reasons adduced for the incompatibility of codification with talmudic jurisprudence, was the anonymity of the rulings codified. It is, of course, good mishnaic tradition not to transmit the saying of any person without disclosing his name.²⁸ In addition, there is mishnaic authority to the effect that not only the identities of scholars according to whose views the *Halakhah* was settled should be perpetuated but also the identities and views of the dissenters²⁹ (an authority which Rambam quotes in defence of anonymity!³⁰). Maimonides thought that the divergency of legal opinions (“that the one holds this way and the other holds the other way”) and the multiplication of names of authorities would only confuse people and impede the desired certainty of the law – a real danger of which talmudists had already been aware.³¹ Notwithstanding this danger, the study and perpetuation of all the divergent views, being all within “the words of the Living God,” was repeatedly demanded as a cardinal requirement of divine law.³² As Rabad had rightly observed, there is an element of selectivity and a reservoir of choices in the plurality of legal opinions. The talmudic approach had been that uncertainty was the lesser evil as

²⁸ *M. Avot* 6:6.

²⁹ *M. Eduyot* 1:4–6; *T. Eduyot* 1:4.

³⁰ See H. Cohn, “Maimonidean Theories of Codification”, (note 14) 28–29.

³¹ *Hagiga* 3b; (that a person may come to say how can I learn Torah).

³² *Hagiga* 3b; *Eruvin* 13b; *Sanhedrin* 34a; *T. Sotah* 7:11–12; *Y. Berakhot* 1:4, *Y. Yevamot* 1:6 and elsewhere.

compared with selectivity, while Maimonides held the certainty of the law to be the overriding consideration.

In reply to critics of the anonymous transmission of legal rules, Maimonides later gave an additional and entirely different reason: “I chose not to give any possible opportunity to the heretics to prevail, for they contend that we base our observance of the law upon the opinions of individuals, which is entirely false. . . . My endeavour and purpose in composing my work was that every *halakhah* should be cited unqualifiedly (anonymously), even if it is in fact the opinion of an individual and should not be reported in the name of so-and-so. This would destroy the position of the heretics (*minim*) who rejected the entire Oral Law because they saw it transmitted in the name of so-and-so and imagined that this law had never been formulated before, but that the individual had originated it on his own.”³³

Whilst at the time this may have been a perfectly reasonable and useful course of action, it has nothing to do with the jurisprudential principles underlying talmudic law. Nor does that reason still hold good when the danger of heretical misinterpretation has become a matter of past history. An inherent incompatibility is not cured or affected by exigent and time-serving concessions. It rather shows that even Maimonides would not hesitate – if present exigencies so demanded – to deviate even from fundamental principles in order to serve an all-important purpose. Moreover, while such deviations are explicitly and repeatedly legitimized by him as temporary measures,³⁴ here the exigency furnishes him with the cause for permanent and final codification.

The anonymity and de-individualisation in the code are but symptoms of its incompatibility: the root lies in its purported finality and exclusiveness, its purported authority to make the last and eternally binding selections. This incompatibility was strictured by contemporaries of Maimonides such as Moshe Ha-Cohen of Lunel,³⁵ Shmuel b.

³³ From the letter to Pinhas b. Meshullam, Dayan of Alexandria (Twersky, *Introduction* (note) 35).

³⁴ *M.T. Sanhedrin* 24:4–10; *M.T. Mamrim* 2:3–9; *M.T. Rotze'ah* 2:3–5 and elsewhere.

³⁵ *Hassagot haRamaq*, ed. Atlas (Jerusalem 1969), *passim*.

Ali of Baghdad,³⁶ Daniel b. Saadia of Damascus³⁷ and Meir b. Todros haLevi Aboulafia of Toledo who proposed to change the title of the code from *Mishneh Torah* to “Meshanneh Torah,” i.e. not restatement but change of the Torah.³⁸ A century later, the lead was taken by Asheri (*Rosh*) in disavowing the authority of the Maimonidean code: he said that it read like prophecies from heaven, without logic or proof; and he warned against relying on Maimonides without checking the talmudic sources;³⁹ he expressed the opinion that Rabbi Yitzhak Alfasi, and Rabbenu Yitzhak haZaken Ba'al haTossafot, and the Rabad were more reliable than Rambam.⁴⁰ The warnings against finalized codes were echoed by Rabbi Yitzhak b. Sheshet (*Ribash*)⁴¹ and his contemporary Rabbi Hasdai Crescas.⁴² In later periods, codification was deprecated not only because it impinged on in-depth study of the talmudic sources,⁴³ but also because it prevented individual judges and scholars from making their own selections from those sources.⁴⁴

A sixteenth-century scholar, Rabbi Hayim b. Bezalel, a brother of the famous Rabbi Judah Loew of Prague (*Maharal*), and a contemporary of the great codifiers, Rabbi Yossef Karo and Rabbi Moshe Isserles (*Rema*), was one of the most outspoken critics of the codificatory method. Both Maimonides and Karo were modest and judicious enough to concede that they had no halakhic authority to lay down the law; but having made that admission, they then proceed to do exactly what was beyond their authority, namely, lay down the law: “it is like a man who says, I have the greatest respect for what you say, but you are lying.”⁴⁵ Hayim b. Bezalel’s main objection was not with respect to the validity of the code, but rather, to the compatibility of codification: “as

³⁶ S. Assaf, “Kovetz shel Igrot R. Shmuel b. Ali”, 1 *Tarbitz* (1929) 102.

³⁷ Rabbi Avraham, son of Rambam, included the strictures with his replies thereto in his *Birkat Avraham* (Lyck 1859).

³⁸ Cited in Twersky, *Introduction* (note) 525.

³⁹ *Resp. Rosh* 31:9.

⁴⁰ *Ibid.* 94:5.

⁴¹ *Ibid.* 44.

⁴² Introduction to *Or HaShem* (Vienna 1859).

⁴³ *Viku'ah Mayim Hayim*, quoted by Elon, *Hagut ve-Halakhah* (note 2) 101. See also Rav Tza'ir (Tchernovitz), *Toledot haPoskim* (New York 1947) Vol. 3, 93–100.

⁴⁴ Rabbi Shalom Shakhna (16th century), Elon, *op. cit.* 109.

⁴⁵ A. Tobias, “Hayim b. Bezalel” 7 *Encyclopedia Judaica* 1507.

by the nature of creation every man differs from every other man, so one must assume that wisdom is still differently distributed among men, and each has his own measure. . . . Even one and the same person may differ in his mind from time to time, and may one day decide differently from what he had decided previously: there is no mutation or deficiency in the fact that there are many valid doctrines; on the contrary, this is the way of the Torah that all of them are the words of the One Living God.”⁴⁶ Paraphrasing Deut. 8:3, he writes: “not by one book (the Code) alone shall man live, but by whatever he can gather from all other books.”⁴⁶

More recently, the incompatibility of codification with the spirit of Jewish law was forcefully exposed by Samuel David Luzatto (1800–1865). He asserts that the Maimonidean codification worked to our detriment, as prior to the code “the words of the sages had been like stimuli to the masses to prompt each scholar to choose what appeared to him proper and useful in the circumstances of time and place – and Rambam had transformed them into hard and fast, ironclad rules immovably fixed. . . . The rulings of dissenters were preserved in the *Mishnah* so that later generations could know them all and investigate into their reasons and determine the *Halakhah* according to the view of the one or the other, to the best of their own judgment and to meet the needs of their times. Were it not for Rabad who had stood out against Rambam and stopped the gap, maybe the *Mishnah* and *Talmud* would already have been forgotten, and we and our children and our children’s children have become enslaved to Rambam.”⁴⁷ (Luzatto’s criticism was not confined to the Maimonidean code: he sharply criticised Rambam also for his reliance on Aristotelian philosophy).

Qua rescuer (as it were) of *Mishnah* and *Talmud* from oblivion, Rabad is here allowed to join the ranks of Ezra the Scribe, Rabbi Akiva, Rabbi Hiya and his sons,⁴⁸ and, according to Rambam, also Rabbi Yehuda haNasi⁴⁹ – but then there is nothing in the Maimonidean code to justify any apprehension of such oblivion: on the contrary, the study of *Mikra*, *Mishnah* and *Gemara* is explicitly prescribed

⁴⁶ Introduction to *Viku’ah Mayim Hayim* (note 43).

⁴⁷ Cited by Elon, *Jewish Law* (note 2) 1018 from *Kerem Hemed* Vol. 3 (1838) 66.

⁴⁸ *Sukkah* 20a; *Sifrei* Deut. 48; *Midrash Tanna'im*, ed. D. Hoffman, 43.

⁴⁹ Introduction to *Mishneh Torah*.

in the code.⁵⁰ Nor do I know of any code which proscribes research into its sources – and neither did Rambam: his code was intended not to proscribe academic study but to prescribe norms of practical conduct.

It is as *the* final statement of eternally binding law that the compatibility of codification with talmudical jurisprudence is contested: “from the standpoint of rabbinism there is no code, and none can exist, to supersede the Torah,”⁵¹ including both the Written and the Oral Law. But the opponents of the codificatory method have by now fallen silent: the consensus to which, as we have seen, Rambam had aspired, has at last tacitly been achieved. That does not mean that the arguments against codification have lost weight or have ever been refuted: anonymity, exclusivity, finality and immutability are as incompatible today with the spirit of talmudical jurisprudence, as they have ever been. The aversion to authoritarian decree or papal infallibility has indeed always been inbred in the Jewish character. It is true that the practical value of uniform codification in general, and the unsurpassed beauty and mastery of the Maimonidean code in particular, can be denied by none; but it is no less true that codification (or legislation) *sub specie aeternitatis* intended to lay down the law for evermore, must, in the course of time, render it anachronistic and archaic. It was precisely the variety and plurality of equally valid doctrines and outlooks which held a grandiose potential of a continuous flow of legal creativity. But Rambam thought he had to choose between certainty and selectivity, between uniformity and plurality – and in choosing the former, he was convinced that he chose not only the lesser evil but also the greater good. He was determined to replace that selectivity and plurality and do away with them once and for all: he saw his immediate task in purging the law of its disputatiousness and all its individualistic and pluralistic imprints. His purpose was pragmatic and utilitarian; and he readily incurred the risk that his great reform might petrify and strait-jacket the law in order to achieve what he strongly believed to be essential for the survival of Jewish law and Jewish nationhood.

⁵⁰ *M.T. Talmud Torah* 1:11–12. See *Guide* III:54.

⁵¹ L. Ginzberg, “The Codification of Jewish Law”, in *Jewish Law and Lore* (2nd ed., New York 1962) 183.

CRITERIA FOR DESIGNATING LAWS

Traditions, Derivations from Biblical Exegesis, and Legislative Enactments

*Meyer S. Feldblum**

This paper will explore the criteria Maimonides used to classify laws as: (a) traditions, (b) derivations from biblical exegesis and (c) legislative enactments. I will also touch upon the historical and halakhic significance of this classification.

Apart from the laws that are stated explicitly in the Torah, Maimonides divides the corpus of Jewish law into three major categories. The first category is tradition, the oral law given at Sinai. The second is interpretation or Midrash, laws derived exegetically from the Bible through the aid of hermeneutic rules. The third category is rabbinic legislation, such as *takkanot* and *gezerot*.¹

Maimonides is unique among the codifiers of Jewish law in his careful and systematic assignment of laws to these specific categories. What is even more intriguing, however, are the criteria that Maimonides used in deciding into which category a law falls, without seeming to have any evidence from talmudic sources. Such categories are significant both halakhically and historically. The criteria used by Maimonides can be illustrated by examining one law in Maimonides' *Mishneh Torah*, typical of his style and halakhic philosophy:

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¹ *M.T. Mamrim* 1:2. In the Introduction to his *Commentary on the Mishnah*, Maimonides subdivides the laws into five categories.

Relatives are disqualified to be witnesses by pentateuchal law, for it is written ‘fathers shall not be killed on account of sons.’ We have it *by tradition* that this prohibition includes the rule that fathers shall not be killed by the mouth of sons nor sons by the mouth of fathers, and this is true for other relatives. *Pentateuchally (me-din Torah)* only paternal relatives are disqualified, that is, father and son, brothers from the same father and their children and paternal uncles and nephews. Maternal relatives, however, or relatives by marriage are disqualified only under *rabbinic legislation*.²

The two key terms in this excerpt, “tradition” and “rabbinic legislation,” are very significant. Maimonides notes that paternal relatives are disqualified by tradition, while maternal relatives are disqualified only by rabbinic legislation. It is particularly noteworthy that, in the talmudic sources, no mention is made of either tradition or legislation in its discussion of this witness-disqualification rule. Indeed, most codifiers disagree with Maimonides and consider the entire list of relatives to be disqualified on the basis of pentateuchal authority.³

This straightforward example can serve as a useful model for examining Maimonides’ relation to his sources. The Torah and the other biblical sources do not tell us that any group or any type of people are disqualified from being witnesses.⁴ The Torah states that every issue shall be decided on the evidence of two or three witnesses.⁵ No mention is made anywhere in the Bible regarding who is and who is not qualified to serve as a witness. In the millennium after Sinai contemporaneous sources are silent as to the law or practice regarding disqualification of witnesses.

² *M.T. Edut* 13:1 (emphasis added).

³ See *Hoshen Mishpat* 32:2 and commentators *ad loc*.

⁴ The verse in *Ex. 23:2*, *al tashet im rasha lehiot ed hamas* (“you shall not join hands with the evil to act as a malicious witness”), refers either to a prohibition against giving false testimony or to a prohibition against joining with someone who is a false witness. See translations and commentaries to this verse. In the Talmud, however, it is quoted in abbreviated form, as follows: *al tashet rasha ed*, and gives the impression that the disqualification of a *rasha* (evil person) is explicitly pentateuchal. See *Sanhedrin* 25a and 27a.

⁵ *Deut.* 19:15.

Criteria for Designating Laws

The following 500 years, the period of the Second Temple, are halakhically obscure. Thus, the first code of law after the Torah that can be considered is the *Mishnah*.⁶ In *Sanhedrin*,⁷ the *Mishnah* lists a number of relatives who are disqualified to serve as witnesses. This list includes both parental and maternal relatives. An interesting comment however, is appended: “R. Yosi said the above list is R. Akiva’s but the first *Mishnah* [*halakhah*] has uncle and cousin and whoever is in the line of inheritance [i.e., only immediate paternal relatives].”

In the Babylonian Talmud,⁸ the question is raised as to the biblical source for this *Mishnah*. The Talmud quotes a midrashic *beraita* which examines the biblical verse “fathers shall not be killed on account of sons,”⁹ and interprets it to mean that fathers shall not be killed on account of the testimony of sons and vice-versa. This, notes the Talmud, indicates that paternal relatives may not be killed on account of each other’s testimony. The Talmud then elaborates and points out that maternal relatives are to be disqualified under the same verse.

Most codifiers list all relatives, paternal and maternal, as a group and rule that all are disqualified by the Torah on the basis of the above verse.¹⁰ It is only Maimonides who makes a distinction between paternal and maternal relatives. The approach and criteria that Maimonides uses in drawing this distinction, rests on three principles that serve as his guidelines.

First, Maimonides states that whenever divergent opinions are recorded on a given topic, it is fairly certain that there is no Sinaitic tradition on the matter.¹¹ This is because there are no controversies about Sinaitic traditions.

Second, Maimonides emphasizes the importance of ensuring that rabbinic legislation be designated specifically as such and not claimed

⁶ The *Mishnah*, in its final form, dates from approximately the third century. Its content encompasses a period of more than 1700 years. However, its literary history – the process of formulating and arranging the law – is unknown. The process may have begun after the destruction of the Temple or 500 years earlier. See *Y. Shekalim* 48b.

⁷ *M. Sanhedrin* 3:4.

⁸ *Sanhedrin* 27b.

⁹ *Deut.* 24:16.

¹⁰ See note 3 above.

¹¹ *M.T. Mamrim* 1:3.

to be derived from the Torah. Maimonides makes this point in analyzing the biblical verse: “Thou shall not add to it [the Torah] nor diminish from it.”¹² What is the meaning of this verse, asks Maimonides, since rabbinic legislation did add to and at times even suspended laws of the Torah. His answer is that the verse is designed to ensure that rabbinic legislation be clearly designated as such.¹³

Maimonides’ third guideline is never stated explicitly, but is implicit throughout his code. It may be formulated as follows: any rabbinic interpretation of a Torah verse that results in a law must be philologically defensible, even if it is derived by the 13 hermeneutic principles for interpreting the Torah. If the interpretation is not philologically convincing, then the law must belong to one of the other two categories. Either the law belongs to the category of Sinaitic tradition and is alluded to in the verse in question (*remez* or *asmakhta*), or it originated in rabbinic legislation or practice and was attached to a biblical verse solely for didactic or organizational purposes (*asmakhta*).¹⁴

We can now reread Maimonides’ formulation of the disqualification rule (cited above) in light of these three guidelines.

It is philologically far-fetched for the verse “fathers shall not be killed on account of sons” to refer to the testimony of witnesses. Thus, the law regarding disqualification of family witnesses must belong to one of the other two categories – it must be either Sinaitic tradition or rabbinic legislation.

The law regarding maternal relatives cannot be from Sinaitic tradition because, in the *Mishnah*, such relatives were included only in R. Akiva’s list and not in the earlier *Mishnah*, according to Maimonides’ first principle, that whenever there is a controversy about a law, it cannot be from Sinaitic tradition. Only the disqualification of paternal relatives is agreed to by all sources and is designated in the first *Mishnah*. This suggested to Maimonides that disqualification of those relatives was of Sinaitic tradition. As a tradition from Sinai, and only as such, could the rule then serve as the base for expansion through the process of legislation known as *takkanot* and *gezerot*.

¹² *Deut.* 4:2.

¹³ *M.T. Mamrim* 2:9.

¹⁴ Maimonides, Introduction to *Commentary on the Mishnah*.

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To know whether a law is pentateuchal or rabbinic in origin is of great significance, both for halakhic purposes and for historical understanding. For example, with regard to *Halakhah*, the disqualification of witnesses can have ramifications on the effect of certain marriages and divorces. Particularly in the United States, it is not uncommon for cousins to serve as witnesses at weddings and divorces. If the cousins are maternal, the question of whether the wedding or divorce is invalid pentateuchally or rabbinically can effect the personal status of both the woman and the children.

From a historical perspective, if a law is pentateuchal it is not subject to abrogation. Only in unusual circumstances may it be temporarily suspended by the Great Sanhedrin. If, however, a law is derived from rabbinic interpretation, it is fully within the jurisdiction of any Sanhedrin to reinterpret as it sees fit. If the law is derived from rabbinic legislation, it is only subject to amendment by a more prestigious Sanhedrin.¹⁵

In conclusion, I wish to emphasize that Maimonides' care in assigning laws to their respective categories is uniquely intertwined with his philosophy and perception of the halakhic process. Maimonides' criteria for classification are based on a careful philological and literary analysis of the underlying sources in each given case.¹⁶

¹⁵ The different processes for each halakhic category are formulated clearly by Maimonides in the first two chapters of *Mamrim*.

¹⁶ See M.S. Feldblum, "Decisions of Maimonides in Light of His Attitude to the Anonymous Material in the Babylonian Talmud", *PAAJR* (1979–80), Vol. II, 111–20.

MAIMONIDES: THEORY OF JURISTIC REASONING

*Martin P. Golding**

One of the very intricate topics in the jurisprudence of Jewish law turns on the recognized division between scriptural (*de-orayta*) and rabbinic (*de-rabbanan*) law. Although the assignment of a rule or practice to one or the other category is quite clear in some instances, e.g., those rules or practices designated as enactments (*takkanot*) or decrees (*gezerot*), the classification issue is much more complicated in the case of rules and doctrines that are juristically developed through the application to Scripture of the principles of interpretation (*middot*) or by the use of analogy and common forms of reasoning. Some light can be shed on this issue by examining Maimonides' views on the nature and legal status of the juristic expansion of the law. This discussion does not purport to be complete, since a full treatment would require an analysis of the numerous occurrences of such terms as *me-kabbalah* (by tradition) and *me-pi ha-sh'muah* (by oral transmission) in Maimonides' Code *Mishneh Torah*, as well as other key terms and subjects.

Maimonides held a rather broad view of the scope of rabbinic law, probably broader than that of any other post-talmudic figure. His *Book of Commandments* (*Sefer ha-Mitzvot*) proceeds on two fundamental assumptions: first, that among the totality of biblical commandments there is a set comprised of 613 special commandments and, second, that the majority of the laws are derived by application of the

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traditional 13 principles of interpretation. Since these latter laws number thousands, it follows that not all of them can be included in the 613 Commandments. Maimonides therefore specifies that only those derived laws explicitly designated in the talmudic sources as scriptural are to be included in the special 613 Commandments; all other derived laws are excluded because they are rabbinic in origin.

The assertion that these other derived laws are of *de-rabbanan* status stands in contrast to the position stated by Nahmanides in his Commentary on the Rambam's *Sefer ha-Mitzvot*: "We should say the contrary, namely, that anything derived in the Talmud by one of the 13 *middot* is *de-orayta*, unless we are told that the derivation is an *asmakhta*, a literary conceit." Despite this more expansive view of the scope of scriptural law, Nahmanides of course retains the concept of the special set of 613 Commandments. Underlying his approach is the proposition that the designation *de-orayta* also covers rules of law that are not contained in the special 613. Insofar as Maimonides admits that the *de-orayta* details of a commandment are not to be counted as separate elements of the 613, he can accept this proposition. Nevertheless, there remains disagreement between the two positions over the status of much of the derived law.

Nahmanides raises a host of objections against Rambam's position. One of them is especially pertinent here. According to Rambam, interpretations of Scripture that are known *me-kabalah* (from tradition) are scriptural, *de-orayta*, in status. But if the 13 *middot* are valid principles of interpretation – for as Maimonides himself holds, in his Introduction to the *Commentary to the Mishnah*, these principles were given at Sinai along with the traditional interpretations – why then are the derived laws not also of scriptural validity? This question goes to the heart of the issue of the nature of the juristic expansion of the law as Maimonides conceives it. A possible explanation of the disagreement between the two positions will be offered later.

Over the centuries there have been many attempts to mediate between the two views. Much of the discussion has concerned Maimonides' classification of certain rules as rabbinic in status. For instance, in the *Sefer ha-Mitzvot*, Maimonides states that betrothal by contract (*sh'tar*) and money payment (*kesef*) are not scriptural.¹ Yet, in his

¹ *Sefer ha-Mitzvot*, Positive Commandments, 213.

later *Mishneh Torah*, he classifies betrothal by contract as scriptural, but retains money payment as being *mi-divray sofrim* (scribal), that is, rabbinic in status.² Many subsequent commentators suggest that Maimonides in fact held that rules classified as *divray sofrim* actually are *de-orayta* but were called “scribal” merely because they are not as explicit in the text as the other scriptural laws.

A very important article entitled “*Mi-divray Sofrim*,” by Rabbi Yosef Kapah has shown, however, that this suggestion is an error. An examination of Maimonides’ own emendations to the *Code* and of other sources, it is argued, demonstrates that Rambam’s position on the status of *kesef* went through three stages, in the last of which scriptural standing is ascribed to betrothal by money payment. On this view, Maimonides’ use of the term *divray sofrim* should be understood literally, and “scribal” laws are not scriptural in status. There is, in any case, no fundamental change in the view that derived laws are rabbinic unless they are designated as *de-orayta* in the Talmud or other classical sources. (I would add, though, that “designated” has to be construed so as to include what is designated by implication).

If we put aside *takkanot* (enactments), *gezerot* (decrees) and laws that are explicit in Scripture, the difficulty of distinguishing between scriptural and rabbinic rules arises from the fact that derivations from the text are offered in the Talmud for both types. Since Maimonides gives a “test” for determining the category to which a derived law belongs, it clearly must be his opinion that mere inspection of a derivation itself generally will not enable us to determine the status of a law. But the test of whether a rule has *de-orayta* status should not be confused with what it means for a law to have that status, anymore than a test for the illness mononucleosis is identical with the meaning of the term. Maimonides characterizes *de-orayta* rules in these words: “There are laws that are interpretations [of Scripture] that descend by tradition from Moses, our master. Regarding them there is no disagreement, but proof is brought for them by application of one of the 13 principles of interpretation. For from the artistry of the text (*hokhmat ha-katuv*) it is possible to find some indication (*remez*) in support of the traditional interpretation or an argument in its favour, as we

² *M. T. Ishut* 3:20.

have explained [in the Introduction to the *Commentary to the Mishnah*].” Such traditional interpretations stand in contrast to *halakhot le-moshe me-sinai*. According to Maimonides, these are Mosaic laws that have no basis in the text whatsoever. Thus, when the Sages refer these latter rules to Scripture, the references are *asmakhtot*, mere literary conceits, not derivations.

In sum, *de-orayta* derived laws have three features: first, they are received interpretations of Scripture; secondly, they are not subject to dispute by the classical jurists; and thirdly, they are genuinely grounded in the text itself. This means that although they can be *validated* by reference to Scripture, they are *known as valid* independently of supporting arguments or derivations. It is important to note that while Maimonides generally speaks of derivation in terms of the 13 *middot*, the methods of validation are not confined solely to the principles of textual interpretation. The methods also include forms of reasoning such as analogy and *sevarah* (common sense). Maimonides refers to an example of the latter type of supporting argument in his discussion of the Sabbath prohibition of transportation of articles between private and public domains.³

We may conclude, then, that with respect to scriptural laws, on Maimonides’ view, the activity of the jurists is concerned with exposition and the process of validation, and not with juristic innovation or discovery. Juristic development and expansion of the law occurs within the sphere of rabbinic, *de-rabbanan*, law.

Let us now consider the general features of rabbinic law. On two points the contrast with scriptural laws is quite clear. Rabbinic laws are not “interpretations of Scripture that descend from Moses, our master,” to use Maimonides’ phrase describing derived *de-orayta* rules. And although there are undisputed rabbinic traditions, rabbinic derived laws *are* subject to possible disagreement on the part of jurists, as Maimonides asserts a number of times in the Introduction to his *Commentary to the Mishnah*.

What about the third feature, relationship to scriptural text? R. Kapah sums up Maimonides’ general position in this way: “Rambam’s words are clear and plain. There is no scriptural law that is

³ *Commentary to the Mishnah, M. Shabbat 1:1*

learned merely by one of the principles of interpretation, nor is there any *de-rabbanan* law that is at all derived by one of the principles.” He thus understands Maimonides to hold that rabbinic-law derivations are not genuinely grounded in the artistry of the text (*hokhmat ha-katuv*), but are rather *asmakhtot*, literary conceits. This understanding is based on phraseology in Maimonides’ formulation of the “test” mentioned earlier, that is, a derived law may be regarded as *de-orayta* “only if the Sages say it is an essential of the Torah or is scriptural, because the transmitters of the Oral Law say it is scriptural in status. But if they do not thus explain it or do not say so explicitly, then it is rabbinic, because there is no verse that supports it.” R. Kapah takes the last few words to imply that rabbinic-law derivations are a sort of spurious interpretation of Scripture, in contrast to *de-orayta* law derivations, which genuinely ground the rules in the text. This is not to say that a scriptural-law derivation is equivalent to the “plain meaning” (*peshat*) of a verse. Rather it is the validation of a received interpretation by the application of valid modes of interpretation and reasoning.

The position that R. Kapah attributes to Rambam is alluded to by some medieval scholars, and may in fact have been an element in the so-called Maimonidean controversy. Yet it seems to me that another analysis is possible. I want to suggest that Maimonides’ assertion that there is no scriptural support for rabbinic laws is not equivalent to the proposition that such derivations necessarily are a sort of spurious interpretation or literary conceits. My analysis, I shall try to show, fits Maimonides’ theory of juristic reasoning. As far as I am aware, Maimonides nowhere says that rabbinic-law derivations are *asmakhtot*. The difficulty with R. Kapah’s account, I think, is that derived rabbinic laws would all have the status of legislative enactments (*takkanot*). But while there may be a limited sense in which this is correct, as I shall indicate later, Maimonides always classifies rabbinic enactments separately from derived rabbinic rules.

We saw above that Maimonides contrasts derived scriptural and derived rabbinic laws on three points: (a) whether a law is a textual interpretation that descends from Moses; (b) whether a law is subject to disagreement; and (c) how the law is related to the text. The first two points play an important role in the Introduction to the *Commentary*

to the *Mishnah*. Maimonides maintains that there is no disagreement in the talmudic sources over any law that descends from Moses; regarding these laws the Sages may, however, offer differing validations, that is, alternative groundings in the artistry of the text. As mentioned earlier, such laws are distinguished from *halakhot le-moshe me-sinai*, traditional Mosaic rules that are not genuinely grounded in Scripture, according to Rambam. And while these latter laws also are not subject to dispute, it should be noted that he regards them as scribal, *me-divray sof'rim*, as he states in a *responsum*.⁴ He also asserts that where there is a dispute over a particular legal rule, we can be sure that the law in question is not of Mosaic origin; it is, rather, rabbinic in status. While there are rabbinic rules that are not disputed, I believe it to be Maimonides' position that every rabbinic law *could* be the subject of disagreement.

In order to develop the significance of this point, it is useful to compare the position of Nahmanides with that of Rambam. Nahmanides, as mentioned earlier, has a broader view of the scope of scriptural law than the latter. He apparently rejects Maimonides' claim that every scriptural law is an interpretation that descends from Moses. And while he of course agrees that rabbinic laws may be subject to juristic disagreement, he also holds that this applies to derived *de-orayta* laws; they, too, are subject to dispute. Nahmanides' conception of juristic reasoning is succinctly stated in his Introduction to the *Sefer ha-Milkhamot*:⁵ "In this science," he says, "there are no demonstrative proofs as in geometric and algebraic calculations." Now it is important to notice that Maimonides fully accepts this statement, but for him its significance lies solely within the realm of rabbinic law: it is precisely because of the absence of demonstrative proofs that disagreements can arise over derived *de-rabbanan* laws. And it is in the light of this theory of juristic reasoning that we should understand Maimonides' assertion regarding a rabbinic-law derivation, namely, that "there is no verse that supports it." This is to say, I think, that there is *no conclusive validation* from Scripture of any derived rabbinic laws, i.e., no rabbinic law can be conclusively shown to be valid. In the case of derived *de-*

⁴ Maimonides, *Responsa* ed. *Mekitze Nirdamin*, p. 162.

⁵ Gloss on the *Rif*, in which Nahmanides generally responds to the interpretations of the *Ba'al ha-Maor*.

orayta laws, on the other hand, these are known to be valid independently of any arguments in their favour.

This analysis of Maimonides' position fits his various discussions of juristic reasoning. It might be noted that in his very early work on *The Terminology of Logic* he explicitly refrains from including a treatment of the *middot* of interpretation, perhaps because he already held that they lacked the logical force of demonstrative forms of argument. Be this as it may, it should be kept in mind that juristic method is not confined to the principles of textual interpretation. A concise statement of method is given in the section of *Mishneh Torah* dealing with Torah study:

The time allotted to study should be divided into three parts. A third should be devoted to the Written Laws; a third to the Oral Law; and the last third should be spent in investigation, inferring conclusions from premises, developing implications of statements, comparing dicta, studying the principles by which the Torah is interpreted, until one knows the essence of these principles, and how to infer what is permitted and what is forbidden from what one has learned. All this is called Talmud.⁶

This is the method of the Talmud itself, concerning which Maimonides writes: "What Joshua and Pinhas do in matters of juristic investigation is the same as what Ravina and Rav Ashi do."⁷

This last statement sums up, in basic features, Rambam's elaborate account of the expansion of the law after the death of Moses. "Those things," he says, "that were not heard from the prophet (Moses) are subject to give and take, and the law is derived in investigation by application of the 13 *middot* that were given to him at Sinai." As is well known, Maimonides rules out any role for prophecy in the juristic development of the law. "Prophecy is of no avail in investigation of interpretations of the Torah. . . . God did not permit us to learn the law from prophets, but rather only from the men of reason and argument."⁸

⁶ *M.T. Talmud Torah* 1:11.

⁷ Maimonides, Introduction to *Commentary to the Mishnah*.

⁸ *Ibid.*

“Reason and argument,” which include the application of the principles of interpretation to Scripture, result in the juristic innovations which constitute derived rabbinic law, according to Maimonides. Some of these derived laws, however, were disputed. And the reason why they were disputed relates to the nature of juristic reasoning, concerning which Rambam’s position is like that cited earlier from Nahmanides. Some derived laws, he says, achieved general acceptance but over others there were opposed views, for one jurist “gave his argument and felt sure about it and another gave his argument and felt sure about it – because such incidents will occur with the consequences of dialectical argumentation.”

As far as I can determine, there is no suggestion in the above account that rabbinic-law derivations, in-so-far as they involve application of the principles of interpretation, are *asmakhtot*, literary conceits. What, however, does emerge is that there can be no conclusive validation of a derived *de-rabbanan* rule. And the underlying reason for this, I think, is that *human judgment* plays an essential role in the give and take of juristic expansion. Maimonides puts this in more medieval phraseology. Differences of opinion over matters of law arise because, as stated in another context of the Introduction to the *Commentary*, “human intellects vary as much as climate and weather.” The reason why so few disagreements are found between Hillel and Shammai, as he explains, is that they were close to each other in intellectual ability and in their grasp of juristic methodology. Because this was not true of their students, disputes on points of law proliferated.

It is obvious that a legal system that leaves the law in dispute is unsatisfactory. Some procedure for the final resolution of disagreements on matters of law is necessary. And such a procedure is found in Jewish law when it is fully functioning. This procedure is treated in detail by Maimonides in the section of his *Mishneh Torah* on *Mamrim*, the Law of the Rebellious Elder. One provision of that law is relevant to our subject. Maimonides there explains that the High Court in Jerusalem is the foundation of the Oral Law and that there is a commandment to follow its rulings on three types of issues: those things that have been learned by oral reception (*me-pi ha-sh’muah*); those matters that have been derived according to the judges’ own insights, by application of one of the principles of interpretation; and those things

that they have enacted or decreed. On all of these types, disputed questions of law are decided by majority vote of the High Court. (This is the limited respect in which derived rabbinic laws are like legislative enactments). Concerning the second type we find the following provision: "If the High Court, by application of one of the *middot*, concludes that in its opinion the law is such and decides cases accordingly, and then a later High Court finds a reason to overturn that ruling on the law, it may do so, and decide cases according to its opinion on the law."⁹ What we learn from this is that the finality of a ruling persists, theoretically, only for the life-time of a particular High Court.

But we learn other important matters as well. We learn that in theory every derived rabbinic law is subject to disagreement and that there can be no conclusive validation of a derived rabbinic law. The nature of juristic reasoning is such that its results are always open to dispute. I think that herein lies the deep explanation of why Maimonides is so anxious to distinguish the spheres of scriptural and rabbinic law: rabbinic law is in principle changeable, but Torah law is eternal.

I have only touched the surface of Maimonides' views on the juristic expansion of the law and the theory of juristic reasoning. There remains much to be gleaned from his exposition of the Law of the Rebellious Elder. I think it would be interesting to consider Maimonides' views on a matter that is debated in contemporary secular discussions in jurisprudence, namely, whether there is a uniquely correct answer to every question of law. Interesting comparisons on this issue could also be made with other figures in Jewish jurisprudence, such as the Maharal of Prague. These matters, however, must be postponed to a future time.

⁹ *M.T. Mamrim* 2:1.

THE BIBLICAL FOUNDATION OF JEWISH LAW ACCORDING TO MAIMONIDES

*A. Sáenz-Badillos**

Maimonides is not formally counted among the exegetes, for, after all, he did not write a complete commentary to any of the biblical books. Nevertheless, Scripture is certainly central to philosophical and juridical thinking, “the cornerstone which bears the gigantic edifice of his system of thought.”¹

The main purpose of Maimonides’ *Guide for the Perplexed* is not philosophical or theological, as we might think, but rather truly exegetical:

The first purpose of this Treatise is to explain the meanings of certain terms occurring in the books of prophecy. . . . The present Treatise is directed to one who has studied philosophy and has knowledge of the true sciences, but believes at the same time in the matters pertaining to the Law and is perplexed as to their meaning because of the uncertain terms and the parables.²

In the same vein, at the beginning of the Third Part of the Guide, he states: “We have already made it clear several times that the chief aim of this Treatise is to explain what can be explained of the Account of

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¹ I. Friedlander, “Maimonides as an Exegete,” *Past and Present* (Cincinnati 1919) 194.

² Maimonides, *Guide for the Perplexed*, ed. and transl. S. Pines (Chicago 1963). Part I, Introduction.

the Beginning and the Account of the Chariot, with a view to him for whom this Treatise has been composed.”³ Maimonides utilizes exegeses to identify the *ma’aseh bereshit* with Physics and the *ma’aseh merkabah* with Metaphysics. This is for him the only way to the knowledge of God, “which is the true science,” and the way to His love. “Through it man is man.”⁴

What is the place of *halakhah* in the Maimonidean system? “All the actions prescribed by the law . . . that all is not to be compared with this ultimate and does not equal it, being but preparations made for the sake of this end.” As Rambam writes, according to the Sages, man is required first to obtain knowledge of the Torah, then to obtain wisdom, then to know what is incumbent upon him with regard to the legal science of the Law – I mean the drawing of inferences concerning what one ought to do.”⁵

In the first part of this paper several Maimonidean texts which reflect his attitude with respect to the biblical exegesis will be analyzed, in an attempt to present the unity and coherence of his systems. In the second part, I shall pay attention to the way in which the Scriptures function as source and foundation of the *halakhah* according to Maimonides.

In describing principles of faith relating to Biblical exegesis, he states: “According to the eighth fundamental principle, “The Torah came from God. We are to believe that the whole Torah was given as through Moses our Teacher entirely from God.” Moses “acted like a secretary taking dictation.” And “The authoritative commentary on the Torah is also the Word of God.” The ninth fundamental principle “is the authenticity of the Torah, i.e. that this Torah was precisely transcribed from God and no one else;”⁶ or as he expressed it in the Introduction to the *Mishneh Torah* and in the Introduction to the *Commentary on the Mishnah*: “All the precepts which Moses received at Sinai were given together with their interpretation, as it is said ‘and I will give unto thee the tables of stone, and the Law (*Torah*) and the

³ *Guide III*, Introduction.

⁴ *Ibid.*, III, 54.

⁵ *Ibid.*

⁶ Maimonides, *Commentary to the Mishnah*, Introduction to Chapter 10 of *Sanhedrin* (*Perek Helek*).

Commandment (*mitzvah*)' (*Ex. 24:12*). 'The Law' refers to the Written Law; 'and the commandment,' to its interpretation."

The Scriptures have been written as a guide for all the men, for the "multitude."⁷ "It is presented in such a manner as to make it possible for the young, the women and all the people to begin with it and to learn it. Now it is not within their power to understand these matters as they truly are."⁸ Even if it is true that "the Torah speaketh in the language of the sons of man,"⁹ it is full of "secrets and mysteries" that not everybody can understand. They have been hidden "because at the outset the intellect is incapable of comprehending them,"¹⁰ and needs a particular education to assist in penetrating these mysteries.

The apparently obscure words of the Torah have an external and an internal meaning: "the internal meaning of the words of the Torah is a pearl, whereas the external meaning of all parables is worth nothing . . . , the pearl is there, but man does not know where it is."¹¹

In a very significant paragraph of Commentary to the *Mishnah*, Chapter 10 of *Sanhedrin (Helek)*,¹² Maimonides distinguishes three groups of people according to their way of interpreting the "words of the Sages." This distinction is directed firstly to interpretation of Rabbinical writings but at the end he states that "this is the case also with Holy Scriptures." We may regard these groups as representative of different kinds of students. The first group, the largest, "accept the teachings of the Sages in their simple literal sense and do not think that these teachings contain any hidden meaning at all." It "destroys the glory of the Torah and extinguishes its light."

The second group "consists of persons who, having read or heard the words of the Sages, understand them in their simple literal sense and believe that the Sages intended nothing else than what may be learned from their literal interpretation. . . . Inevitably, they ultimately declare the sages to be fools."

⁷ *Guide I*, 26.

⁸ *Ibid.*, I, 33.

⁹ *Ibid.*, I, 26; I, 33; II, 13; and *M.T. Yesodei haTorah* 1:9. See also *Yevamot* 71a, *Baba Metzia* 31b.

¹⁰ *Guide I*, 33.

¹¹ *Ibid.*, I, Intro.

¹² According to the translation of J. Wolf, 15 *Judaism* (1966) 99.

The third group “know that the Sages did not speak nonsense, and it is clear to them that the words of the Sages contain both an obvious and a hidden meaning. Thus, whenever the Sages spoke of things that seem impossible, they were employing the style of riddle and parable which is the method of truly great thinkers.” “If you belong to the third group, when you encounter a saying of the Sages which seems to conflict with reason, you will pause, consider it and realize that it must be a riddle or parable. You will sleep on it, trying anxiously to grasp its logic and its expression, so that you may find its genuine intellectual intention and lay hold of a direct faith.”

These paragraphs offer a succinct description of Maimonides’ hermeneutics. From his own words we understand how the philosophico-allegorical interpretation of the Bible was for him truly necessary in his way towards the true life.

If we sum up here the various clues offered by Maimonides in the *Guide*, we can distinguish several steps or elements that aid penetration of the “mysteries of the Torah” – which not always have been adequately differentiated. In his Introduction to the *Guide*, Maimonides set out his purposes:

(a) “To explain the meaning of certain *terms* occurring in books of prophecy. Some of these terms are equivocal . . . , others are derivative . . . , others are amphibolous terms . . .” The meaning of those biblical terms may be among the primary causes of perplexity for the religious person. Hence a large part of the first book of the *Guide* is devoted to an explanation of the meaning of the equivocal, derivative or amphibolous terms that are applied to God in the Scripture and could wrongly suggest the idea of God’s corporeity or multiplicity. This is the philological element of Maimonides’ exegesis.

(b) “The explanation of very obscure *parables* occurring in the books of the prophets.” Only the internal meaning of those parables can deliver the reflecting man from his perplexity. “The key to the understanding of all that the prophets . . . have said, and to the knowledge of its truth, is an understanding of the parables, their import and the meaning of the words occurring in them.”¹³

The allegory is closely united to prophetism itself – one of the typical

¹³ *Guide* I, Introduction.

points of Maimonides' thought which we are not analysing for the moment: "The matters communicated to the prophet in a prophetic vision are communicated to him in allegorical form. Its interpretation is immediately impressed upon his mind, simultaneously with the vision, so that he grasps what it means." Some "recited the allegory together with its interpretation. Others only gave the interpretation. Sometimes, as in the case of Ezekiel and Zechariah, they only recited the allegory. All the prophets prophesied in allegories and riddles."¹⁴

Maimonides presents his own classification of the parables: "Know that prophetic parables are of two kinds. In some of them each word has a meaning, while in others the parable as a whole indicates the whole of the intellectual meaning . . ." Thus Jacob's ladder (*Gen.* 28:12–13) is a parable in which each word has a meaning. The woman of valor (*Prov.* 7:6–21) is a parable of the second kind, "a warning against the pursuit of bodily pleasures and desires," in which we cannot look for an allegorical meaning in each detail occurring in the parable. These "riddles and parables" justify at the same time the need for an allegorical approach to the Scripture and the search for a more profound level of meaning in Maimonides' hermeneutics.

(c) "Something should likewise be known about *figurative* uses and *hyperboles*, for they sometimes occur in the text of the prophetic books. And if the words are understood according to their precise meaning, without knowing that they constitute a hyperbole or exaggeration, or if they are understood according to their primary conventional meaning without knowing that they are used figuratively, incongruities arise."¹⁵ An example of hyperbole: "cities great and walled up to heaven (*Deut.* 1:28). "And He opened the doors of heaven, and caused manna to rain upon them" (*Ps.* 78:23) is a simile, a kind of figurative language.¹⁶

(d) "The *stories* recounted in the Torah, the telling of which is thought to be useless," which possess "a necessary utility for the Law." The genealogies and enumerations in the Scriptures belong to this category and all of them have been included in the sacred text with a definite purpose.¹⁷

¹⁴ See *Prov.* 7:3.

¹⁵ *Guide* II, 47.

¹⁶ *Ibid.* and II, 29.

¹⁷ *Ibid.*, III, 50.

According to Maimonides, if you are able to distinguish and understand the above elements, “all the prophecies will become clear and manifest to you,”¹⁸ the end of perplexity and the beginning of wisdom.

God has a kind of pedagogical intention in respect to men: the human intellect is not prepared at the outset for understanding the “secrets and mysteries of the Torah.”¹⁹ “Because of the greatness and importance of the subject and because our capacity falls short of apprehending the greatest of subjects as it really is, we are told about those profound matters . . . in parables and riddles and in very obscure words.”²⁰ Understanding all those things, man can advance, helped by his own discoveries and those of others to attain perfection, “the mysteries of the Torah are communicated to him.”²¹

Maimonides did not give a wholly new orientation to Jewish exegesis with this hermeneutics. He had predecessors, especially in his allegorico-philosophical approach. We may merely recall the Greek philosophers Aristobolus or Philo, who developed a rather different kind of allegorical exegesis. Clear to the time of Maimonides, some Spanish exegetes like Shlomoh ibn Gabirol,²² Abraham ibn Ezra and especially Abraham ibn Daud had proposed similar allegorical interpretations of many difficult passages of the Scripture, deriving philosophical attitudes similar to Maimonides.

Despite his insistence on the allegorical interpretation of obscure passages of the Bible, Maimonides did not deny the validity of the *peshat*, the literal meaning of the Scripture, which was generally the usual and the obvious one for him. Indeed, even if he does not need to theorize about this kind of exegesis, he uses it almost constantly in all his writings. In the second principle enunciated in the Introduction to *Sefer-ha-Mitzvot*, he mentions the words of the Sages “a scriptural verse never loses its literal sense.”²³ Not less than other literal exegetes, he sometimes defends the need of taking account of the context

¹⁸ *Ibid.*, II, 47.

¹⁹ *Ibid.*, I, 33.

²⁰ *Ibid.*, I, Introduction.

²¹ *Ibid.*, I, 33, 35, 70.

²² A Sáenz-Badillos, “La exegesis de la creación y el paraíso en la obra de Solomoh ibn Gabirol”, *Palabra y Vida*, Homenaje a J. Alonso Díaz (Madrid 1984) 369–82.

²³ *Sefer haMitzvot*, ed. and transl. C. Chavel, II, 375. See *Shabbat* 63a.

of the biblical words: “Remember that it is not right to take a passage out of its context and to draw inferences from it. It is imperative to take into consideration the preceding and following statements in order to fathom the writer’s meaning and purpose before making any deductions.”²⁴

Maimonides was acquainted with the works of Hayyuy, ibn Yannah and other Spanish exegetes who could be considered representatives of the purest “literal” or “philological” exegesis. But even though Maimonides does not deny the value of the *peshat*, he is not interested – like Rashi’s disciples²⁵ – in defending its value against the more traditional exegesis of *derash*. Maimonides in fact goes further: “Do you not know that some verses of the Holy Torah cannot be understood literally? We have rational proofs that some words were not written in their literal sense, and for that reason the Translator translated them into a form comprehensible by the intelligence.”²⁶

However, all this is not to say that Maimonides was against the traditional interpretation of the Scripture, derived by use of the 13 *middot* (hermeneutic principles).²⁷ For instance, he has no difficulty in accepting the inclusive interpretation of the particle *’et* according to the Sages.²⁸ Examples of derashic exegesis can be found in his writings, as Bacher already noticed,²⁹ even if they are not very significant in his theoretical construction. Almost exceptional is the famous passage in the *Epistle to Yemen* where he uses *gematria*: “Incidentally, it may be stated that there are other verses in the Torah which contain cryptic allusions in addition to their simple meaning. For example, the word *r’du* in the remark of Jacob to his sons (*Gen. 42:2*) . . . has the numerical value of 210, and hints at the duration of Israel’s stay in Egypt. Likewise, the statement of Moses . . . “*noshantem*” (*Deut. 4:25*) embodies a numerical reference to the duration of Israel’s stay in Palestine from the date of their arrival to their exile in the time of

²⁴ *Guide* II, 29 and Maimonides, *Epistle to Yemen*.

²⁵ See F. Talmadge, *David Qimhi: The Man and the Commentaries*, (Cambridge and London 1975) 73.

²⁶ Maimonides, *Epistle on Astrology*.

²⁷ Maimonides, Introduction to *Commentary on the Mishnah*.

²⁸ *Guide* II, 30.

²⁹ See W. Bacher, *Die Bibelexegese Moses Maimūnis* (Budapest 1896) 30ff and Maimonides, *Commentary to the Mishnah*, *Peah* 5:6; *Guide* II, 30.

Jehoiakim, which was 840 years. Similarly many other verses could be cited. The interpretation of Balaam's prophecy (*Num. 23:23*) as "a veiled allusion to the date of the restoration of prophecy to Israel" included in the word *ka-'et*, "an extraordinary tradition which I received from my father . . . going back to our early ancestors who were exiled from Jerusalem, and it is in that sense absolutely exceptional."³⁰

In a different context, in order to establish the number of the 613 Commandments, Maimonides accepts another instance of *gematria* mentioned by the Sages. The numerical value of the word *Torah* plus "I am the Lord thy God," and "Thou shalt have no other gods before me" complete the number of the *taryag*, 613.³¹ This leads us to the next concern of this paper.

Scripture as Source and Foundation of the Law

In which sense are the Scriptures the source and foundation of the *halakhah*? First of all, knowledge of the internal meaning of the Scriptures, according to Maimonides, yields a deeper understanding of the Law: "A person ignorant of the secret meaning of the Scriptures . . ., if he could only fathom the inner intent of the Law, would realize that the essence of true divine religion lies in the deeper meaning of its positive and negative precepts, each of which will aid man in his striving after perfection."³²

And knowledge of the Scriptures cannot be separated from the practice of the *halakhah*: The Sages . . . mention likewise that man is required first to obtain knowledge of the Torah, then to obtain wisdom, then to know what is incumbent upon him with regard to the legal science of the Law – I mean the drawing of inferences concerning what one ought to do.³³ A correct interpretation of the Bible – especially of its most difficult or mysterious passages – brings us to the truth; "only truth pleases Him . . .," and "the Laws are absolute truth if they are understood in the way they ought to be."³⁴ Thus, the philosophical method of Maimonides establishes a clear connection between exegesis and *halakhah*.

³⁰ Maimonides, *Epistle from Yemen*.

³¹ *Makkot* 24a; Maimonides, *Sefer haMitzvot*, Pos. Com. 1; Third Principle.

³² *Loc. cit.*, note 30.

³³ *Guide* III, 54.

³⁴ *Ibid.*, II, 48.

Rambam departs from the basic distinction of the Laws as *de-orayta* or *de'rabbanan* (*dikduke soferim*, according to his terminology), and states, following the Talmud,³⁵ that the “613 Commandments were declared to Moses at Sinai” and as a consequence “we are not to include in this enumeration the commandments having only rabbinic authority” and “we are not to include in this enumeration (laws) derived from Scripture by any of the thirteen exegetical principles by which the Torah is expounded, or by *Inclusion*.”³⁶

It is known that the Maimonidean conception with respect to deduced or derived commandments is particularly not shared by many other scholars. There are many instances of laws not directly stated in the Scriptures but received by tradition from Moses, where the Sages offer evidence based on the 13 *middot* in proof of such laws. For Maimonides, “we should not conclude from every law we find to have been derived by the Sages by one of the 13 *middot* that it was declared to Moses on Sinai.”³⁷ However, this does not necessarily mean that if a given law has found support in the Talmud in one of the 13 *middot* it ought to be considered *de'rabbanan*. If the Sages “clearly affirm that” it is of the essence of the Torah, that law must be counted among the 613 Commandments. Such is the case in Negative Commandment 135 – “an uncircumcised priest eating *terumah*” – where he states: “This prohibition is not expressly laid down in Scripture, but is derived by means of a *gezerah shawah*; and the bearers of Tradition further explain that it is a scriptural and not merely a rabbinical prohibition.”³⁸

Generally speaking, we can say that in *Sefer ha-Mitzvot* almost each of the 613 Commandments has its own biblical foundation, which is introduced as a rule by the formula: “It is contained in His words,” or “This injunction is expressed in His words,” etc. Commandments without biblical foundation or reference (see Pos. Com. 97–108 and Neg. Com. 248), or with partial mention (see Pos. Com. 95, “revocation of the vows”) are rather exceptional.

Only in a few cases does Maimonides depart from the *peshat* or literal interpretation of the biblical verse and resort to deduction, as in

³⁵ *Makkot* 23b.

³⁶ Maimonides, Introduction to *Sefer haMitzvot*, First and Second Princ.

³⁷ *Ibid.*, Second Principle.

³⁸ *Sefer haMitzvot*, ed C. Chavel, vol. 2, 126.

Pos. Com. 18 as to “acquiring a Scroll of Law.” “This injunction is expressed in His words (exalted be He): Now therefore write ye this song for you (*Deut.* 31:19). Since it is not permissible to write (only) certain sections of the Torah, it follows necessarily that the words “this song” mean the whole of the Torah which includes “this song.”

Scripture as foundation of the *halakhah* is often closely connected with the traditional interpretation. Many times we find the following scheme in Maimonides’ words: (1) biblical foundation of a law; (2) interpretation by the Sages; (3) deductions and conclusions.

A very important theme in Maimonides’ system is the rational foundation of the Laws, the *ta’ame ha-mitzvot*. Not less than 25 chapters of the Third Book of the *Guide* (25–50) are devoted to the search for the rational element or final cause of the Commandments. For him, this question is closely connected with biblical interpretation: first, because he is looking for the meaning of the Torah both as moral guide and as divine Law, and the divine intention in each one of the Commandments becomes clear only when the biblical words are correctly interpreted in their true meaning; and secondly because we find a certain parallelism between the search for the hidden causes of the Commandments and the exegesis of the “secrets and mysteries” of the Torah. The hermeneutical method is the same, and the affinity of both questions seems to be clear.

Maimonides differs with the conviction of many scholars of his time that it is proper to divide the laws into two categories: those founded in the divine will and others founded in wisdom and reason. Even if this classification was widespread among Muslim and Jewish thinkers,³⁹ for Rambam, since all the laws are of divine origin, not a single one is based only in human reason or in something similar to the “natural law” of the Scholastics, but at the same time all of them are “rational,” “have a cause, though we ignore the causes for some of them and we do not know the manner in which they conform to wisdom.”⁴⁰ Or, as he asserts in the *Epistle on Astrology*: “What these books have made

³⁹ J. Faur, “The Origin of the Classification of Rational and Divine Commandments in Medieval Jewish Philosophy,” 9 *Augustinianum* (1969) 299–304 and *idem*, “The Basis for the Authority of the Divine Commandments According to Maimonides” 38 *Tarbiz* (1968–69) 43–53 (in Hebrew).

⁴⁰ *Guide* III, 26.

clear to me is the rationality of all the Commandments; everybody should know that there is nothing as rational as 'what is commanded in the Scripture.'"

Maimonides' general vision is very simple and can be summarised briefly: "The Law as a whole aims at two things: the welfare of the soul and the welfare of the body."⁴¹ He turns to an old and traditional classification of the Laws: "Those commandments whose utility is clear to the multitude are called *mishpatim*, and those whose utility is not clear to the multitude are called *hukkim*."⁴² Some of the Commandments have a clear cause and are of manifest utility. They follow directly from the plain and literal sense of the Scriptures, and there is no doubt about their biblical foundation. "No question concerning the end need to be posed with regard to such commandments. For no one was ever so perplexed as to ask why we were commanded by the Law that God is one, or why we were forbidden to exercise vengeance and retaliation, or why we were ordered to love each other. The matters about which people are perplexed . . . are the commandments from whose external meaning it does not appear that they are useful . . ."⁴³ There is an external and internal meaning in those commandments, and Maimonides' explanation tries to clarify the internal meaning, the hidden cause or utility of these Laws. From this point of view, he divides the commandments into 14 classes, seeking out the utility of each group, which many times seems to him "manifest".⁴⁴ In the chapters dealing with the utility or the reason of the concrete Commandments, biblical quotations, interpretation of scriptural verses and pure reasoning merge together in a very characteristic way. Following on that, Maimonides deals with the interpretation of the hidden or internal meaning of the stories and enumerations included in the Torah, and it seems evident that for him both problems are of the same nature and absolutely parallel.⁴⁵

Maimonides' Code, the *Mishneh Torah*, is full of biblical quotations, closely connected with the different laws collected in it. Professor I.

⁴¹ *Ibid.*, III, 27.

⁴² *Ibid.*, III, 26.

⁴³ *Ibid.*, III, 28.

⁴⁴ *Ibid.*, III, 35.

⁴⁵ *Ibid.*, III, 50.

Twersky has analyzed in a very convincing manner the expository-exegetical material included by Rambam in his Code. "In many respects," he writes, "it turns out to be a suggestive and selective commentary cast as a code."⁴⁶ In his splendid study, he has collected many samples of philological-lexicographical material, citations for emphasis or embellishment, new exegesis or new application of verses, popularization of certain interpretative views, polemical usages, integration of biblical narratives into the halakhic context, use of midrashic motifs with scriptural verses, etc. In the opinion of Prof. Twersky, Maimonides in the *Guide* "is primarily concerned with rational-philosophic exegesis . . . for his aim is to show that the precepts are both wise and meaningful. In the *Mishneh Torah* Maimonides concerns himself primarily with spiritual-ethical exegesis for his purpose there is to imbue the observance of the Commandments with ethical significance."⁴⁷ This is a very adequate description of Maimonides' exegesis in his two great works in respect to the *Halakhah*.

I shall end this paper by comparing Maimonides' interpretation of a biblical verse including a precept, with that of a typical Spanish literal exegete, probably from the 10th century. I would like to show in this way the peculiarity of Maimonides' method and his main interest.

A commentary to *Deut. 22:9 (kilay he-kerem)* attributed to Menahem ben Saruq by Abraham ibn Ezra interprets the words *pen tikdash* in the most literal sense: "lest it shall become holy." The author takes into consideration the agricultural customs of his time and explains that it is not possible to collect at the same time the grain and the grapes, since there is the danger of damaging one of the two species. The part of each one due to the priests would in this way make "holy" or forfeit the whole of the vineyard. Abraham ibn Ezra accepts this interpretation, which can be considered as a good sample of *peshat* combined with personal observation of reality. Maimonides, however, follows a very different way. This Biblical verse is for him the foundation of two negative Commandments, which forbid the eating (193) and sowing (216) of grain and grapes together in the vineyard. In *Sefer*

⁴⁶ I. Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven 1980) 143.

⁴⁷ *Ibid.*

ha-Mitzvot, he accepts the rabbinic interpretation of the words *pen tikdash: pen tukad 'esh* "lest it be consumed by fire,"⁴⁸ without asking further philological questions, and departing from the *peshat*. In his exposition in *Mishneh Torah* he states simply that "the mixture is forfeit," that beneficial use of both ingredients is forbidden and both must be burned.⁴⁹ He combines here the *peshat* and the traditional interpretation, adding an element – the burning – which is not expressly mentioned in the biblical words. In the *Guide* he searches out the reason of the Commandment: he had read in a book on "The Nabatean Agriculture," about the practices and the cult of the Sabians, that it was their custom to sow barley and grapes together (for the prosperity of the vineyard, as a kind of superstition). These and similar customs smack of idolatry or lead to it, and for this reason the Law has forbidden them.⁵⁰ Exegetical foundation, traditional interpretation and rational analysis of the causes: here we have the three main components of Maimonides' methodology in his approach to Bible and *Halakhah*.

⁴⁸ *M. Kilayim* 8:1, *Kiddushin* 39a; *Hullin* 115a.

⁴⁹ *M.T. Kilayim* 5:7.

⁵⁰ *Guide* III, 37.

SURETY FOR THE PERSON OF THE DEBTOR: MAIMONIDES' GEONIC SOURCES

*Aaron Greenbaum**

The laws of guarantee (*a'revut*) comprise two basic levels: the “general guarantor” (*a'rev stam*) and the “contracting guarantor” (*a'rev kabalán*). In the case of the general guarantor, his liability is limited to a situation where the borrower already defaulted. The contracting guarantor, on the other hand, takes the place of the borrower. The creditor can thus go directly to the guarantor and claim repayment of the loan without first approaching the borrower.¹

However, although the law of guarantee is generally accepted, as the Talmud clearly states that it is the regular practice in courts of justice,² there is an underlying weakness in the obligation assumed by the guarantor. The undertaking of a guarantor suffers from a legal flaw known by the juridical expression *asmakhta*. This technical term implies that an obligation was assumed in circumstances which cast doubt on the absolute resolve or intent of the person to live up to the obligation.

There are adequate grounds to believe that the person obligated himself under the assumption that the need will never arise where he would actually be required to make good on his promise. In other words, he did not seriously consider to obligate himself.

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¹ *M.T. Malveh veLoveh* 25:3–4.

² *Baba Batra* 173b.

Rav Ashi, the renowned 4th century *Amora*, pointed out that *asmakhta* and *a'revut* are not interdependent. *A'revut* or surety is effective due to a certain consideration obtained by the guarantor. This is in the form of a psychological satisfaction, that due to his trustworthiness, the creditor was ready to lay out the money.³

But while *asmakhta* was thus eliminated as a drawback for *a'revut*, it continues to lurk in the background, impeding the application or validity of certain guarantees.

Maimonides is particularly cautious in this respect. As an illustration I cite the following section of Maimonides' Code.

If the guarantor or the *kablan* obligated himself conditionally, even though *kinyan* was performed, he is not bound because it is *asmakhta*. How is this to be understood?

Where the guarantor said to the creditor: "Give to him and I will give to you if such an event occurs or if such an event does not occur," the guarantor is not bound because he who undertakes an obligation which he does not owe and makes it dependent upon the occurrence or non-occurrence of an event, does not bind himself with that finality of determination, which is required by law.⁴

Rabad,⁵ the noted critic of Maimonides, is more resolute in the elimination of *asmakhta* as a deterrent in the application of the laws of surety.⁶

Maimonides cites in his *Code* a form of surety for which there is no apparent talmudic source. Following is the quotation:

If a man said to another, "Lend him and I am guarantor for the debtor's body, that is I am not a guarantor for the money itself, but I will bring the debtor to you at any time you so desire"; or if he said to the creditor, after the latter had lent the money to the debtor and made demand on him, "Let him go and I will bring him to you at any time you may so demand" and *kinyan* was performed in connection therewith, the guarantor according to some of the Geonim is bound to pay if he does not bring the debtor.

³ *Ibid.*

⁴ *M.T. Malveh veLoveh* 25:8.

⁵ Rabbi Abraham ben David of Posquieres, 12th century.

⁶ *M.T. Malveh veLoveh* 25:7.

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There were however others who taught that even if the guarantor stipulated saying, “If I do not bring him or he dies, or absconds, I shall be liable to pay” it is *asmakhta* and he is not bound. And to this my own opinion inclines.⁷

Rabad vigorously rejects this position on *asmakhta*. If the guarantor stipulates that he will pay in case the debtor does not appear, there is no ground to assume that the guarantee should not be binding. But even if he did not expressly obligate himself to pay, the guarantor must appear instead of the debtor.

The commentators of Maimonides *ad loccum* take special note of this physical guarantee type of surety.

*Magid Mishneh*⁸ notes that many of the Geonim are in accord with the first view, that physical guarantee is binding. However, he observes that Maimonides’ ruling is consistent with his position that any conditional guarantee is subject to the *asmakhta* limitations. He is critical of the Rabad’s opinion. In particular, reference is made in his commentary to the instance where the guarantor is unable to locate the debtor and where the Rabad concludes that the guarantor must present himself in person instead of the debtor until a settlement is reached.

Magid Mishneh remarks almost sarcastically as follows:

What will the bodily presence of the guarantor do in court? If he comes to court and declares: “I cannot bring the debtor.” What pressure can the court apply, if not payment? Will they imprison him until he settles with the creditor, or will he remain there forever? Where do we find such coercion?⁹

This comment is of particular interest in the understanding of the nature of this type of a guarantee, as will be noted below.

*Migdal Oz*¹⁰ is equally critical of the Rabad’s opinion.¹¹ But neither of the above commentators indicate any talmudic source for this law.

⁷ *Ibid.* 25:14.

⁸ R. Vidal Yom Tov of Tolosa, Catalonia (14th Century).

⁹ *M.T. Malveh veLoveh* 25:14.

¹⁰ Rabbi Shem Tov ibn Gaon, 14th century, Spain.

¹¹ *M.T. Malveh veLoveh* 25:14.

We noted that Maimonides cites the Geonim as his source, without mentioning any specific Gaon. By a kind providence parts of the book on *Arevut and Kablanut* by the Gaon Shmuel b. Hofni has survived. It was my privilege to edit *Genizah* fragments dealing specifically with the issue of a guarantee for the person of the debtor.¹² It should be noted that larger fragments of this book of the Gaon were published by Prof. S. Asaf in 1945.¹³ Shmuel b. Hofni was head of the Sura Academy approximately from the year 997 until the year of his death in 1013.¹⁴

From this manuscript we learn that the guarantee for the presence of the debtor is intrinsically valid. However it is flawed by the principle of *asmakhta*. To overcome this drawback an additional stipulation is required. The guarantor must specify that the obligation which he is assuming is effective as of now and not when the actual situation of seeking out the debtor arises. This term is known as *me'akhshav* (from now on). The specification removes any semblance of indecision which *asmakhta* implies.¹⁵ The overall significance of this ruling is that the guarantee for the person of the debtor is in no way an aberration or departure from the general talmudic principles governing the laws of guarantee.

Maimonides does not include the remedying formula of *me'akhshav*. Some doubt exists among commentators on this point. Does Maimonides reject this type of guarantee completely, or is his ruling against the validity of this guarantee due only because of the *asmakhta* defect.

A number of outstanding authorities interpret Maimonides' ruling in a way that places it in complete harmony with the Gaon's position. They comment that since the entire problem is one of *asmakhta*, this deficiency can be remedied by the *me'akhshav* clause. Such a solution

¹² See 46 *Kiryat Sefer* (1971) 154. The manuscript No. in the Jewish National and University Library, Jerusalem, is Heb. 4^o,577,4/48.

¹³ *Sinai*, (1945) 135.

¹⁴ A. Greenbaum, *Commentary on Torah of Rav. Shmuel b. Hofni, Gaon* (Jerusalem 1939) 15.

¹⁵ Due to lacunae in the manuscript, it is not clear what the position of the Gaon is when the guarantor simply said "I guarantee the debtor's presence" without any additional stipulation of payment in case of the debtor's absence. Some maintain that the general guarantee is as binding as the specified one. See *Magid Mishneh*, *loc. cit.*

appears in the commentaries of both Rabbi Shmuel of Sardinia in the 12th–13th centuries,¹⁶ and of Rabbi Yoel Sirkis, a 16th century Polish authority.¹⁷

Thus, the *Genizah* fragment provides us with the source of Maimonides' ruling on this form of guarantee. However, this very discovery has prompted scholars of comparative law to examine the origin of the legal concept underlying this type of surety. The fact that the law was actually formulated about two centuries before Maimonides, in the very heart of Moslem political and cultural domination, indicates according to some scholars that Moslem legal influences are reflected in this form of guarantee.

In Moslem law physical bondage is a legitimate method in the collection of debts. In talmudic law this is completely rejected in principle.¹⁸ The acceptance of a surety for the bodily presence of the debtor engenders an association or linkage between that law and the general physical bondage of the debtor, recognized in Roman and Moslem law.¹⁹ However, a certain historic anomaly comes to light in this comparative approach. Maimonides as well as the Gaon of Sura, Shmuel b. Hofni, have reservations about this bodily surety; even though, as noted, both lived and wrote their books in Arabic lands and to a large extent in the Arabic language. On the other hand, Rabad of Posquieres, the distinguished critic of Maimonides, is firm in upholding this type of guarantee unconditionally. Yet, he lived in Southern France and was certainly far from Moslem legal systems and their impact.²⁰

The overriding problem in connection with the guarantee for the person of the debtor is that it has been regarded as an aberration in the talmudic concepts of debt obligation. Indeed, the very mention of the person of the debtor was viewed as alien.

¹⁶ *Sefer Haterumot*, Part I, Section 35, Ch. One, par. 7.

¹⁷ His commentary to *Tur*, *Hoshen Mishpat* 131:13.

¹⁸ Later socio-economic developments in this sphere are not discussed here. See, M. Elon, *Freedom of the Individual in the Collection of Debts in Jewish Law* (Jerusalem 1964) 255 ff.

¹⁹ See Abeles, "Bürge und Bürgschaft Nach Talmudischen Recht", *Monatsschrift für Geschichte und Wissenschaft des Judentums* (1923) 170, and his interpretation of *M. Baba Batra* 10:9. See also M. Elon, *Proceedings of the Fourth World Congress of Jewish Studies* (Jerusalem 1967) Vol. I, 199.

²⁰ Y. Meron, *The Connection between Jewish Law and Moslem Law* (Hebrew, in stencil).

The significance of the *Genizah* fragment is that it shows that guarantee for the person is part of the talmudic frame of reference. The Gaon Shmuel b. Hofni treats the subject of physical guarantee in the context of the talmudic consideration of guarantee in general. He actually directs our thinking to the fact that the Talmud itself used the terms *gavra ashlimah li*, *gavra ashlima lakh*: “You entrusted me with a man and a man I handed over to you.” Here is the core of the guarantee for the person of the debtor.

The Talmud cites the opinion of Rabba and R. Yosef, two distinguished Babylonian Amoraim of the 3rd century, that *a’revut*, guarantee, is basically for the debtor’s presence and not for payment in case of default. The Talmud vigorously rejects this notion. The Talmud affirms that the law of guarantee applies to the monetary obligation which binds the guarantor, in case of non-payment of the debts.²¹

The question still arises what if a guarantor explicitly limits his guarantee to the bodily presence of the debtor and the creditor agrees. Is such a limited guarantee valid? It has been generally assumed that the opinions of Rabba and R. Yosef are totally dismissed. In other words, a bodily guarantee is without significance.

The Gaon Shmuel b. Hofni as well as Maimonides maintain that an explicit guarantee for the person of the borrower is binding, as implied by Rabbah and R. Yosef. It is however subject to the *asmakhta* reservations. Rabad is more extreme. If the guarantor does not specify payment in case of the absence of the debtor, the guarantor is obligated to present himself to the creditor and negotiate with him instead of the borrower for a settlement.

It is noteworthy that this understanding of the Talmudic text is reflected in subsequent commentators. I refer to two widely recognized talmudic commentators. One is R. Yom Tov b. Avraham Ashbili of Spain in the 13th century, known as *Ritva*.

His comment to the positions of Rabbah and R. Yosef is as follows:

Nevertheless it appears that if one stands surety that another will appear to stand trial, he thereby binds himself and charges [his property]. . . . Where he charged himself to pay a sum of money

²¹ *Baba Batra* 173b.

Surety for the Person of the Debtor

without *asmakhta* to appear to stand trial, he will only be bound to pay in the event of the other failing to do so.²²

The second one is Shlomo Helma, in 18th century Poland. He is even more explicit in affirming that the position of Rabbah and R. Yosef, the distinguished heads of the Pumbedita Academy, were not without significance. His comments are to Maimonides' Code.

He writes as follows:

We learn in *Baba Batra* 173b: "What is the reason that Rabbah and R. Yosef both state you entrusted me with a man and a man have I handed over to you." And their view was not rejected. But how do we know that a typical guarantor guarantees the physical presence of the debtor? We understand, however, from them that if he explicitly guarantees the physical presence of the debtor, he is relieved of his obligation (if the debtor is present). This, nevertheless, implies that he must present the debtor, as he said "his person I will hand over to you." Some Geonim conclude, that if the guarantor failed to present the person of the debtor, he is liable to pay. Such is the opinion of Rabad, but according to Maimonides one can conclude that it is certainly an *asmakhta*.²³

The *Genizah* manuscript fragment containing this particular section on the "physical" guarantee of the borrower, establishes the source of Maimonides' ruling. It also clarifies that this type of a guarantee is completely within the context of talmudic law. The principle is intrinsically implied in the assertion of the leading Babylonian Amoraim, Rabbah and R. Yosef.

²² Ritva to *Baba Batra* (ed. Blau; New York, 1952), 173b.

²³ *Merkevet haMishneh* on *M.T. Malveh veLoveh* 25:14.

MAIMONIDES AS BINDING AUTHORITY

Mara De'atra in Eretz-Yisrael and Yemen

*Ratzon Arusi**

Introduction

Maimonides' position as halakhic decision-maker for Israel and the Yemen involves the important institution known in halakhic literature as *maray de'atran* or *mara de'atra* (the local rabbinical authority). In the past Maimonides was considered such authority in many countries apart from Israel and the Yemen, in Egypt, Spain, North Africa and in the Balkans.¹ Today, however, the situation has changed. In these countries for many centuries, Maimonides has been replaced by the *Shulhan Arukh* as *mara de'atra*. Whilst opinion is divided over his status in Israel, he clearly remains the authoritative halakhist in the Yemen.² With the establishment of the State and the gathering of various Jewish communities, each community in Israel continues to preserve its own spiritual tradition: Sefardim normally follow Yosef Karo and Ashkenazim Moshe Isserlis and the Yemenites Maimonides.³

Literally the phrase *maryah de'atrim* or more frequently *mara de'atra*⁴ means "the master of the place," the decisive authority.

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¹ See Y.Z. Kahana, *Studies in the Responsa Literature* ("The Debate over Deciding the Halakhah according to Maimonides").

² Arussi, "The Communal Factor in Halakhic Decision", 10–11 *Dinei Yisrael* (1981–83) 131–148.

³ *Ibid.* 125–26.

⁴ *Mariah de'atrin* is found frequently in the decisional literature.

Evidence is available, already from talmudical times, of the almost complete hegemony of such local rabbinic authority. Thus “in the place of R. Eliezer” wood was cut on the Sabbath to make charcoal for banging the iron for a circumcision knife to be used in a circumcision that was to take place on the Sabbath, in contrast to the ruling of R. Akiva that any work that could be effected on the eve of the Sabbath did not displace the Sabbath prohibition but only the act itself of circumcision.⁵ The same source tells us that “in the place of R. Jose the Galilean the flesh of fowl was eaten with milk.” And from another source we learn that Levi, a talmudic Rabbi, happened to visit one Yosef a fowler and was served a meal of fowl cooked in milk without any protest on his part. When Rabbi asked him why he had not issued a ban, his reply was “because it was the place of R. Yehudah b. Bathyra and I suppose that he expounded to them the view of R. Jose the Galilean who had said that a fowl is excluded (from the prohibition) since it has no mother’s milk.”⁶ It is also related of R. Abahu that when he happened to be in “the place of R. Yehoshua b. Levi” he would carry candles on the Sabbath in accordance with the latter’s view but when he was in the place of R. Yohanan he did not.⁷ It is clear that one does not publicly protest a usage in opposition to the ruling of the local rabbi.⁸ Again, whilst R. Elazar b. Pedat (of the second and third generation of Amoraim) was called in Babylon “the master of the land of Israel,” the most authoritative scholar regarding menstrual flow, when he came to Pumbedita, “the place of R. Yehuda,” he refused to pass any opinion since R. Yehuda was exclusively the halakhic authority there.⁹

In post-talmudic times as well, a rabbi might have local halakhic hegemony and that even after his passing and perhaps with greater force. In this period the writings of RiF, Maimonides, Rosh, Tur and Karo were disseminated and closely studied throughout the Jewish

⁵ *Yevamot* 14a; *Shabbat* 130a.

⁶ *Hullin* 116a.

⁷ *Yevamot* 14a.

⁸ *Eruvin* 94a, regarding Rav’s practice in the place of Shemuel. But see *Hullin* 53b and Rashi *as locum*.

⁹ *Yoma* 9b; *Gittin* 19b; *Niddah* 20b and Rashi *ad loc*. See A. Heineman, *The History of the Tannaim and Amoraim*, sub R. Elazar b. Pedat.

world and halakhic decisions drawn from them. In some communities special respect was paid to one or the other halakhic authority in every regard as the *mara de'atra*.¹⁰

Two different meanings attached to the appellation – a narrow one, applying to a local rabbi during his lifetime when the correctness of a decision he had given might be disputed with him, since under the *Halakhah* (the validity of a) decision depends not only on the authority of the rabbi who rendered it but on its intrinsic correctness;¹¹ and a broad meaning applicable to the authoritative nature of the writings of certain Sages that persists beyond their lifetime and whose decisions are not disputable. In this sense the institution of *mara de'atra* is somewhat problematic halakhically.¹²

The theme of this paper is the status of Maimonides as *mara de'atra* in the broad sense, and the question is how far the institution in this sense accords with the halakhic rulings of Maimonides himself.

Halakhic Ruling under the Sanhedrin

“The High Court in Jerusalem is the main source of the Oral law, the pillar on which judicial rulings rest, and from it law and justice goes out to Jewry.” “All who do not act according to its ruling transgress a negative commandment. . . . This applies to matters it knows from tradition, which is the Oral Law, to matters that it deduces by way of one of the principles of biblical exegesis, which it deems correct, as well as matters it effects in order to make a fence around the Torah and deal with exigencies by way of *gezerot*, *takkanot* and usage.”¹³

We may infer from these passages that the High Court was the central institution, the exclusive authority in all areas of the *Halakhah*, its rulings and law-making and all other courts in Jerusalem and elsewhere in the country were merely conduits for transmitting such halakhic rulings to the wide public.

¹⁰ *Resp. Ohel Yosef, Yoreh De'ah; Resp. Bet Dino shel Shlomo, Oreh Hayim 4*. On Maimonides being the *mara de'atra* of Israel, see Kahana, *op. cit.*, 47–71.

¹¹ A student who sees his master erring in judgment must draw his attention to that: *Sanhedrin 6b*; cf. *Baba Batra 130b*. On the position of a sage who though he knows that the Sanhedrin has given a mistaken decision, acts in accordance therewith as others do because he thinks he is so required, see *M.T. Shegagot 13:5*.

¹² Particularly Maimonides, for which Rabad was highly critical of him.

¹³ *M.T. Mamrim 1:1,2*.

“Whilst the High Court existed there were no disputes in Israel. When doubt arose over a particular rule, the local court would be approached and if it knew the answer (*yadu*) it would tell the inquirer; otherwise he and the local court or messengers would go up to the Temple Mount court in Jerusalem and if it knew the answer would reply and if not, all would turn to the High Court sitting in the Hall of Hewn Stone and put the question. If the High Court knew the answer whether by tradition or by exegetical rule, it would immediately give its decision; if not, a vote was taken . . . and the majority followed and the inquirers all told that such was the Halakhah.”¹⁴

The source of Maimonides’ observations is a *beraita* describing the situation when the Sanhedrin existed.¹⁵ He treats it as descriptive of the actual situation – not, as some, as utopian, an idealisation¹⁶ – as a constitutional process in order to ensure the uniformity of the *Halakhah* and prevent its disintegration. In the present context, it follows that during the period of the Sanhedrin there was no institution of a *mara de’atra* wielding hegemony in deciding the law.¹⁷ As *mara de’atra* local courts and those in Jerusalem merely passed on to the public what they learned from the Sanhedrin.

For all its powers, however, the Sanhedrin consisted only of fallible human beings and halakhically was not followed when it erred. If a

¹⁴ *Ibid.* 1:4.

¹⁵ *T. Hagiga* 2:9; *T. Sanhedrin* 7:1; *Y. Sanhedrin* 1:4; *Sanhedrin* 88b. According to Maimonides, apart from the Sanhedrin, no court will make a ruling from personal knowledge of the law.

¹⁶ B.De Vries, “The Debate,” 53 *Sinai* 296, contrary to other writers, does not regard this *beraita* as an authentic historical source. See also H. Mantel, *Society and Religion during the Second Temple* (1983) 28, and G. Alon, *The History of the Jews in the Period of the Mishnah and Talmud* (1977) 123,195.

¹⁷ The Sanhedrin in effect ceased to function after the destruction of the Temple, although it continued to exist: see *M. Sotah* 9:11; *M.T.*, Introduction (*ad finem*); *M.T. Ta’anit* 5:14. Certain aspects of its criminal jurisdiction had been taken from it previously. The position had in any event become difficult because of the differences between Bet Hillel and Bet Shammai, and it was even difficult to convene it: *T. Hagigah* 2:11–12; *T. Shabbat* 1:3 and elsewhere in the Talmuds. All this is what emerges from Maimonides. A similar picture is given by S. Albek, “The Sanhedrin and its Presidents,” 8 *Zion* (1943) 173–74 note 28. But see Alon, *op. cit.*, 123, 193, 196–97, 295; Gilat, *The Teaching of R. Eliezer b. Horkanos* (Tel Aviv 1968) 324 note 60; Z. Frankel, *Darkhei haMishnah*, 71–72. See M. Elon, *Jewish Law*, Part 3, 6–17 and Mantel, *Studies in the History of the Sanhedrin* (Jerusalem 1969) 98.

Sage of halakhic competence became aware that the Court had given an erroneous decision that was being followed generally but kept silent, thinking that one was commanded to listen to the court even if it had erred,¹⁸ the community was treated as having acted inadvertently or in ignorance and was not required – as an individual might – to bring a sin offering; the Court alone had to make the appropriate sacrifice and the Sage in question to bring a sin offering to atone for his mistake. Although the Bible tells us that “thou shalt not turn aside from the judgment they shall declare unto thee, to the right or to the left,”¹⁹ this was understood to mean that a court was only to be followed when it correctly says that the right is the right and the left left.²⁰

According to all this, every halakhically competent scholar must examine the court rulings according to his halakhic understanding. He must bring to the notice of the High Court any error he discovers and argue the matter before it; if his argument is rejected, he must yield and abide by the decision of the High Court. Conversely, if his argument is persuasive, the Court would certainly amend its decision, since truth and not merely authority is the foundation of the *Halakhah*. Pending decision by the Court, the disputed decision was not to be followed if the matter involved a prohibition.²¹

The High Court was further strengthened by the fact that its law-making by way of *gezerot* and *takkanot* was entrenched and no subsequent High Court had a power of repeal unless it was greater in number and wisdom.²² This was in contrast to the power of repeal that existed when the original ruling had been derived by one of the exegetical principles provided there was good reason to do so, since the High Court could only decide in accordance with what appeared to it

¹⁸ *M.T. Shegagot* 13:5.

¹⁹ *Deut.* 17:11; *M.T. Shoftim*, 17.

²⁰ *Y. Horayot* 1:1.

²¹ This explanation is given by Nahmanides in his critical notes to Maimonides' *Sefer haMitzvot*, ed. Shavel (Jerusalem 1981) 17. See also R. Margalio, *Margalio haYam to Sanhedrin* 6b, and Y. Tamar, *Alei Tamar al Yerushalmi Nezikin* (Tel-Aviv 1983) 297. Nahmanides understands the rule in the same way as Maimonides in his Commentary on *Deut.* 17:11. For a different view, see *Sefer haHinnukh*, ed. Shavel, Commandment 505.

²² *M.T. Mamrim*, 2:2.

to be right; one is only enjoined to take one's disputes to "the judge that shall be in those days."²³

In the period of the Sanhedrin there was no place for a *marā de'atra*. Authority to decide cases and make law lay exclusively with the Sanhedrin. The local rabbinical authority merely transmitted the rulings of the Sanhedrin. Thus uniformity was ensured. Nevertheless both the Sanhedrin and each individual were subject to the truth. The Sanhedrin's rulings were open to review by every competent scholar. While the law-making of the Sanhedrin was entrenched as explained above, its judgments could be reversed for good reason by a subsequent Sanhedrin.

Rules of Decision-Making Subsequent to the Period of the Sanhedrin

In the absence of a Sanhedrin, the halakhic decision, seemingly, is left to every competent Sage. Here, two serious questions arise – (i) from whom should the mass of the people who have little or no knowledge of the *Halakhah* take their rulings; (ii) what effect does this have on uniformity for there can be as many rulings as there are competent Sages.

Maimonides prescribes the following rule (which also obtains when a decision of the Sanhedrin is pending):

When two scholars or two courts differ . . . at the same time or at different times . . . and it is not known which way the law should go, in matters of scriptural law the stringent ruling must be followed whilst in matters of rabbinical law the lenient ruling may be followed.²⁴

The source is a *beraita* (hereafter called "*beraita A*"):

If one consulted a sage and he declared [the thing] unclean, one should not consult another sage [or vice versa]. If two sages were present and one said that [the thing] was permitted and the other that it was prohibited, . . . if a third sage is present he is asked, otherwise the one who was stringent [in his decision] must be fol-

²³ *Ibid.* 2:1.

²⁴ *Ibid.* 1:5.

lowed. R. Yehoshua b. Karha said: In matters of scriptural law, the stringent view is followed, in rabbinic law the lenient view.²⁵

Maimonides does not cite the first part of the *beraita* but only the opinion of R. Yehoshua b. Karha.

If that is the guiding rule, it does not apply to the two questions posed above. On the contrary it is a cause for surprise. Is everyone a scholar acquainted with the views of the different decisors? Moreover, are all scholars certain as to what is scriptural law and what rabbinical? And do even competent scholars know in every case of a scriptural prohibition what is the stringent view? Thus, do we decide stringently by following R. Eliezer, as above, and profane the Sabbath by preparing the circumcision knife in order to carry out the scriptural command of circumcision, or do we follow R. Akiva and so not profane the Sabbath? Again, the rule to act stringently in scriptural matters is impractical where a multiplicity of opinion prevails. Many rules surround the scriptural command regarding *tefilin*, their making and binding, on which opinion differs. To take only one example, there is the well-known difference between Rashi and Rabbenu Tam over the order of the scriptural passages placed in the *tefilin*, and some have advised that two pairs should be worn, each satisfying one and the other.²⁶ But there is a third view of Rabad.²⁷ The Vilna Gaon indeed dismissed the idea of putting on two sets of *tefilin* since, having regard to these three views and other critical differences among the authorities, one would have to put on 64 sets, if this solution was adopted, a number which would increase to more than 200 if a Geonic view were taken into account.²⁸

²⁵ *T. Eduyot* 1:5. This part of the *beraita* is cited in *Avodah Zarah* 7a. The glossators treat it as the law: RiF and RaN *ad loc.*, give different explanations. Maimonides makes no mention of the rule, perhaps because in his view every halakhic decision depends on the truth and not on a mere passing remark, and one may not defer to a sage out of respect: see *Sanhedrin* 33a.

²⁶ *Tur, Orah Hayim* 34; *Orah Hayim* 34:2. The differences of view are very old: see S. Goren, *Torat haMo'adim* ("The Tefilin from the Judean Desert in the Light of the Halakhah") (Tel Aviv 1964) 496.

²⁷ Notes by R. Margalio to *Resp. Min haShamayim* (Jerusalem 1957) 46.

²⁸ *Ma'aseh Rav*, 7; *Keter Rosh* 13–14 and gloss of *Ohalei Hayim*. See *Perush haGeonim to Taharot, Kelim* 18a; *Eruvin* 95b.

Another guiding rule is provided by a second *beraita* (hereafter called “*beraita B*”) which appears more practical and which seemingly Maimonides overlooked:

The *Halakha* is always in accordance with Bet Hillel but he who wishes to act . . . according to the restrictions of both Bet Shammai and Bet Hillel, of him Scripture says “but the fool walketh in darkness” [*Ecclesiastes* 2:14] and he who adopts the leniencies of both Bet Shammai and Bet Hillel is a wicked man. One should act either according to Bet Shammai both in their lenient and in their stringent rulings or according to Bet Hillel both in the same manner.²⁹

This *beraita* prescribes three rules: (i) the *Halakhah* is always in accordance with Bet Hillel, (ii) it is wrong to act according to the stringent rulings of both authorities or according to their lenient rulings and (iii) to be consistent one should adopt the views of either of them in their entirety. We learn from the Talmud that the second and third of these rules can be applied to every tannaitic or amoraic dispute of the same nature as that between Bet Hillel and Bet Shammai.³⁰ Thus it is possible for some people to choose one disputant as their *mara de’atra* in every respect and for others the opposing disputant. This is a very practical rule, for the mass of the people while not fully cognizant of the *Halakhah* are well able to choose a rabbi for themselves and learn from him what is permitted and what forbidden. True, the uniformity that prevailed in the period of the Sanhedrin will suffer but that is inevitable in the absence of a Sanhedrin, and to maintain uniformity further restrictive rules are necessary, such as that forbidding the creation of opposing factions or sects.³¹

This rule is not expressly stated by Maimonides and the question is whether he would accept it since it conflicts with the rule of *beraita A*.

²⁹ *T. Eruvin* 2:3; *T. Yevamot* 1:13 and elsewhere. The *beraita* reveals an inconsistency; its first rule is that *Halakhah* is always according to Bet Hillel whereas the two following rules enable practice to follow Bet Shammai. On this inconsistency, see A. Witman, “Halakhah keBet Hillel”, 82 *Sinai* 187 and notes 13–16; for some reason no reference is made to S. Lieberman, *Tosefta kiPeshuta*, *Yevamot* 9, note 42.

³⁰ *Eruvin* 7a.

³¹ *Yevamot* 14a.

It may be noted that Karo employs *beraita* B in defence halakhically of those communities which regarded Maimonides as their *mara de'atra*. On being asked whether such communities could be compelled to act in accordance with Tur in view of their being in a minority, Karo replied categorically that they were not to be compelled to diverge from Maimonides and he infers this *a fortiori* from *beraita* B having regard to Maimonides being the greatest of authorities followed by communities in Israel and elsewhere. He does not regard the maintenance of the particular usages of different communities in some geographical area as a breach of the prohibition of creating dissident factions.³² Each community must be treated as a unit on its own.³³

Did, however, Maimonides rely on *beraita* A and ignore or overlook *beraita* B, whilst Karo did the reverse?

On further reflection, however, we shall see that the two *beraitot* are not inconsistent. Each is a different type of person and a different situation. The phenomenon of usages and rules varying with locality because of different halakhic approaches was very frequent in the period of the Mishnah and the Talmud, as we saw in the case of *mara de'atra*. Likewise there were differences between Judea and Galilee, between Palestine and Babylon, between cities both in Palestine and in Babylon.³⁴ It is difficult to say that R. Jehoshua would not have recognized the halakhic validity of a local custom and would have obliged local people to follow the rule that in scriptural law one must adopt the stringent view and in rabbinical law the lenient view. That is indeed how Rashba treats the two *beraitot*. On being asked, when the decisors are divided, whether to rely on the one who takes the lenient view or to be guided by RiF or Maimonides in all respects,³⁵ he rejected the first alternative unless the decisor in question was great in wisdom or

³² *Resp. Avkat Rokhel*, 32. The Baal haTurim is meant, but see Kahana, *op. cit.*, 68 note 177.

³³ *Resp. David haKohen*, 11.

³⁴ *M. Pesahim* 4:5, regarding working on the eve of Pessah; *Y. Rosh Hashanah* 4:6 and *Y. Pesahim* 4:1 and 10:6 regarding the Mussaf Service on Rosh Hashanah; *M. Ketubot* 4:12 and *Y. Ketubot* 24:6, regarding a widow's *ketubah* and her maintenance. For other differences between regions, see *Y. Ta'anit* 4:6; *Ta'amit* 29b. See S. Assaf, *Tekufat haGeonim veSifrutah* 241–78.

³⁵ *Resp. Rashba*, Part 1, 253, who mentions *beraita* A in express terms but seems to have in mind *beraita* B as well.

immense loss would ensue in not following him, and to this end he relied on *beraita* A. He states that in those areas where Maimonides is followed, people have made him their rabbi, even to the extent of easing a scriptural proscription. He distinguishes, however, between the narrow and broad meaning of *marā de'atra*. In the former instance, the ruling of an acting rabbi may not be ignored because of respect for him. In the broad sense, people have merely made him their rabbi, and if a competent halakhic scholar adduces good reason one may act contrary to his decision. Thus according to Rashba, *beraita* A deals with those cases where there is no rabbi and *beraita* B where there is a rabbi.³⁶

Although Rashba may assist in resolving the apparent inconsistency between the two *beraitot*, certain difficulties remain. First, where do we find that respect for a rabbi entails following his decisions in every respect? On what basis does the existence of good reason countermand the decision of a local rabbi: that seems to be contrary to the incidents we have already cited from the Talmud. Moreover, it would seem from Rashba, that where the relationship of student and teacher exists, the student must follow his teacher in every respect, whereas *beraita* B which covers such a situation leaves the matter open to voluntary decision.

To return to Maimonides, the rule he gives, that where one does not know which way the law goes, one must adopt the stringent view in scriptural matters and the lenient view in rabbinical matters, in accordance with *beraita* A, this rule applies where a person understands the difference between scriptural and rabbinical law. Such a person will know a matter is in dispute but in the specific case before him finds it difficult to decide. The rule, it should be observed, does not apply to the disputants themselves because each of them is sure of the law and has his own good reasons for the position he has taken. What of those who are not halakhically competent? Clearly *beraita* A is not directed to them, since they may not always be aware of a dispute, and even if they are, may not know how to get to the bottom of it. What are they

³⁶ *Novellae Rashba* to *Hullin* 44a suggests another way of reconciling the two *beraitot*, like Nahmanides to *Hullin* 43b. See also *She'ilat David*, 2, which gives another explanation.

to do? Clearly they must follow their rabbi, not out of a duty to honour and respect him but because they do not know the law except through their rabbi. This approach to the problem is that of Hazon Ish.³⁷ He also takes the view that the original disputants must act in accordance with their own views, even if one is greater in wisdom and number (of adherents). It is enough that each is halakhically competent. According to Hazon Ish, students follow their teacher, thereby accepting in principle Rashba's view that *beraita* A deals with those who have no rabbi and *beraita* B with those who have a rabbi. He does not, however, distinguish between the two meanings of *mara de'atra* nor mention the duty to respect and honour one's rabbi. On the other hand he defines the student-teacher relationship by stating that "any one who is close to a rabbi and in most rulings follows his traditions" has the status of a student, irrespective of whether the rabbi is still alive or not, provided the views of the rabbi are known to him either through oral transmission or from his writings. According to Hazon Ish, anyone who has no rabbi is to follow one who, he knows, is great in wisdom and any one who has a rabbi must follow that rabbi. Just as the rabbi is not subject to *beraita* A, the student is also not so subject.

It is respectfully submitted that the approach of Maimonides is similar to that of Hazon Ish. The *beraitot* are not inconsistent. *Beraita* A deals with the rule applicable to those halakhically competent. *Beraita* B lays down no rule but reflects halakhic reality – a student will follow his teacher but not out of respect for him. Maimonides' *M.T. Talmud Torah* makes no mention of any rule that under law a student owes respect to his master, although he may not propound the *Halakhah* in the presence of his master but if he does not act as a halakhic authority and knows that his rabbi has erred in a decision he must draw attention to the error;³⁸ likewise the student may not act like his master and permit a prohibited thing so long as he has not debated the matter with the latter and been convinced by him. It is therefore clear that if a student acts like his master, as described in *beraita* B he does so not out of respect but because he knows no other rule than that which he

³⁷ Hazon Ish, *op. cit.* 5. To the contrary, *Novellae Ritba* to *Avodah Zara* 7a and *Yevamot* 14a. See also Hazon Ish, *op. cit.*, 1.

³⁸ *M.T. Talmud Torah* 5:2–3.

has received from the master. That is possibly the reason why Maimonides does not cite *beraita* B in precise terms since it is obvious and basic to the study of the law or decision-making in Jewry. The Torah is a way of life and its study is primarily directed to knowing how to live according to it in practice.³⁹ Hence no student will recognise any binding source other than his master.

Maimonides, we submit, cannot be said to deny the institution of *mara de'atra* in its broad sense. Otherwise a serious question is raised why he wrote *Mishneh Torah*. Many have asked the question and tried to discover Maimonides' purpose in compiling it.⁴⁰ Doubtlessly, among his many purposes was that the book should serve as code for the whole of Jewry. He could not, therefore, have been opposed to the *mara de'atra* idea in its broad sense. Furthermore, we are convinced that he affirmed the existence of this institution in order to ensure uniformity in Jewry. We may recall that before Maimonides, at the time of the Sanhedrin, that body ensured the resolution of all disputes. Thereafter halakhic decision lay with every competent teacher. How could differences then be contained? Although students might follow their master, sects, groups and streams arose equal in number to the number of such masters. Nevertheless we find Maimonides laying down a decisional rule for the post-talmudic period, that "each Jew must act according to everything in the Babylonian Talmud . . . since all Jewry has adopted it."⁴¹ There is no question that if every post-talmudic decisor is subject to the decisions in the Babylonian Talmud, that restricts differences. In this regard the Talmud is in the nature of a Sanhedrin after the real Sanhedrin had ceased to function. In turn, the Talmud no longer subsists as the competent authority for the post-talmudic period, with which debate can be carried on, but as competent authorities whose rulings are extant and we are enjoined to study

³⁹ This is Maimonides' approach: *Igrot*, ed. Y. Kapah (Jerusalem 1972) 136 (to his disciple Yosef b. Yehudah); *M.T. Sanhedrin* 22:2.

⁴⁰ See Maimon in his Introduction to a new edition of *Mishneh Torah*, Venice (Jerusalem 1955) 5-7; S.Z. Havelin, "Mishneh Torah leRambam – Sof Ge'onut" 5 *haMa'ayan* (1965) 41-59; I. Twersky, "Sefer Mishneh Torah leRambam" in *Proceedings of Israel Academy of Sciences*, vol. 5 (1972) 1-22; Kapah, Introduction to new edition of the *Mishneh Torah*.

⁴¹ Introduction to *M.T.* 9 (ad finem).

Maimonides as Binding Authority

and distill from them halakhic decisions for our own times. This situation is precisely that of the *mara de'atra* in the broad sense, which, we may recall, is characterised by the work of a deceased writer being pondered and serving as a source for decision. In *Mishneh Torah* Maimonides sought to bring to a close the geonic period, just as R. Yehudah Hanasi closed the period of the Tannaim and R. Ashi the period of the Amoraim. Maimonides found it necessary to gather together the whole of the Oral law, the Mishnah and the Talmud in the form of a Code without giving variant views and setting out the sources, a Code that might stand on its own merit.⁴² He knew that his writings had become widely spread and decision made in accordance therewith. He was also aware that it had evoked opposition but he did not prevent their dissemination and expressed the belief that in the future need would be found for them.⁴³

We still have to clarify one important halakhic detail in this regard. We have already noted that the halakhic basis for *mara de'atra* is the identity existing between student and master by reason of the student knowing the dicta of his master and having no other way to decide than that of the master. Thus he acts according to his master and is not subject to the rule of *beraita* A. In our own times, the writing down of the Oral law having become permissible especially with the advent of printing, many students, even those who have attained halakhic competence, study the many books that exist and are cognizant of the views and the disputations of the decisors. In view of all this, has not the halakhic basis for *mara de'atra* been overturned? Indeed, in face of this new situation, one writer is opposed to a given community

⁴² Havelin, *loc. cit.*

⁴³ *Igrot haRambam* 126; *Resp. haRambam* (Freimann) 69. Maimonides indeed mentions six groups of opponents to his views. It may be noted that differences over principle preceded him, which were rearoused because of his writings – which has priority, decisions based on the Talmud or those on the codes? The first was propounded by Paltoi Gaon (*Resp. haGeonim, Hemdah Genizah*, 110), the second by ibn Migash (*Resp. ibn Migash* 114). Rosh opposed deciding on the basis of Maimonides without reference on the Talmud on the ground that he might be misunderstood (*Resp. Rosh* 31:9). This view has been countered by noting that the risk of misunderstanding the Talmud, because of its form and elliptical language, is greater than misunderstanding Maimonides: Kapah, *op. cit.*, 18–20. See Havelin in *25 Tarbitz* 418–20 (1956).

deciding according to a particular *mara de'atra* in matters of religious, as opposed to civil, law. In talmudic times, the institution subsisted because a student had one master. Today the authors of the many treatises that have been and are still written are all our masters. Hence in a case of doubt we must decide scriptural problems according to the stringent view.⁴⁴

Hazon Ish refers to this approach and accepts part of the argument. Whilst in talmudic times, he says, a student had only one master and would follow him although others might differ from the master, today the situation is that many of the early authorities (RiF, Rosh, Maimonides, Nahmanides, Rashba, Ritva, RaN, Mordekhai, Rashi and the Tosafists) have become the outstanding masters of all times, and when they differ among themselves, "the matter is left to the decision of each scholar either to adopt the stringent view or choose which of them to follow; when no decision is made the matter is left in doubt."⁴⁵ Thus four possibilities present themselves today: (i) to decide substantively the differences among the authorities; (ii) to choose the most stringent approach; (iii) to decide to follow one of the authorities; (iv) to leave the matter open and apparently to apply the rule that in case of doubt over scriptural ruling one is to adopt the stringent path and in the case of rabbinical ruling the lenient path.

According to Hazon Ish, the choice of a *mara de'atra* still exists today. He distinguishes study from decision. In the case of study of the various views, the rule under *beraita* A does not necessarily apply. Maimonides apparently goes further than Hazon Ish in holding that the rule regarding doubtful cases is intended only for those who are halakhically competent and since there are none such today, each may choose his own master to follow in every respect. Moreover Maimonides attaches halakhic importance to the consensus of scholars. For him the Babylonian Talmud is consensually binding on all Jewry. Accordingly, consensus to follow one *mara de'atra* would confer the necessary authority, but this subject requires further investigation.

Consensus Creative of Authority

Maimonides' view that consensus creates authority is a broad one,

⁴⁴ *Resp. Mahari ben Lev* (Jerusalem 1959) 183.

⁴⁵ *Op. cit.* 8.

not confined to the binding force of the Babylonian Talmud. It embodies a general rule without which the *Halakhah* could not have continued to exist after the Sanhedrin ceased to function and more particularly in the post-talmudic period. The following is the evidence in support of this view taken from Maimonides himself.

a. Revival of the Sanhedrin

According to the *Halakhah* the existence of the Sanhedrin depends upon the existence of judges authorised in an unbroken chain from the time of Moses (*semikhah*).⁴⁶ This chain has been severed, and the Sanhedrin will only be renewed in the future because the Prophets have so prophesied.⁴⁷ How will this occur without the required continuity of authority? Maimonides rejects the possibility of the Messiah renewing *semikhah* as a continuous unbroken line since that would be contrary to the *Halakhah* and no prophet has power to do so. Maimonides suggests that the sages of the land of Israel will choose for themselves “a head of the academy” and this concurrence is equivalent to the force of unbroken *semikhah*.⁴⁸ Surprisingly, if one acted in this manner halakhic rule would be prejudiced. Unlike the Messiah, however, the act would not be of individuals but of a group agreed upon this course, and it is this agreement which for Maimonides is creative of halakhic authority and enables it to be reintroduced.⁴⁹

b. The powers of local courts in the post-talmudic period

Careful examination of Maimonides’ observations demonstrates that he conferred on the local courts in the post-talmudic period the legislative (*gezerot, takkanot, usages*) and judicial powers of the High Court, except that the latter extended to Jewry at large and subsisted by virtue of scriptural prescript, whilst the powers of the local courts are limited geographically and their range depends upon “popular” consent. Only the High Court of 71 judges represents overridingly the entire house of Israel, unlike the local courts whose decisions are only locally binding.⁵⁰

⁴⁶ *M. T. Sanhedrin* 4:1.

⁴⁷ *Ibid.* 4:4; Commentary on *M. Sanhedrin* 1:3.

⁴⁸ *Ibid.*

⁴⁹ For bibliography on the renewal of the Sanhedrin, see N. Rakover, *Otzar haMishpat* (Jerusalem 1975) 161–63.

Israel, unlike the local courts whose decisions are only locally binding.⁵⁰

That being the case, agreement as to a *mara de'atra* carries the same force. The question, however, remains, whence did Maimonides derive the rule that consensus creates halakhic authority. The following seems to be possible.

i. One of the decisional rules in the period of the Sanhedrin, as we have seen, was that a later court cannot revoke a rule established by a predecessor unless greater in number and wisdom. The Talmud gives an exception to the rule, the eighteen *gezerot* enacted by Bet Hillel and Bet Shammai together,⁵¹ which will persist even after “the coming of Elijah the Prophet,” since they have spread among the majority of Jews.⁵² Maimonides saw in this a rule that applies to all *gezerot* made by the High Court to set a fence around the Torah: no subsequent High Court can set aside such *gezerot* even if greater in number and wisdom, if they have spread throughout Jewry. “Where general consensus has been reached on any of these *gezerot*, they may not be transgressed in any manner, and as long as a prohibition persists among Jews there is no way to set it aside and even the Prophets cannot give release from it.”⁵³

ii. The *Mishnah* that provides that no High Court may set aside the decision of another High Court unless it is greater in wisdom and number⁵⁴ does not explain how one High Court can be greater in number: each must comprise 71 judges. Maimonides replies that the number refers to “the number of contemporary scholars who have agreed to accept without dissidence the ruling of the High Court.”⁵⁵

⁵⁰ Introduction to *M.T.* (ad finem). Maimonides holds that one *bet din* exercising its legislative power cannot bind the inhabitants under the jurisdiction of another *bet din*. Immediately thereon he provides that a court is not bound by a decision of a *ga'on* or other early authority but must decide on the evidence. This is similar to the power of overruling possessed by High Court in Jerusalem.

⁵¹ *Shabbat* 13b.

⁵² *Avodah Zarah* 36a but cf. *Y. Shabbat* 1:6 which is the ground for the view of the Tosafot to *Gittin* 36b.

⁵³ *M.T. Mamrim* 2:3. See also Commentary to *M. Shabbat* 1:3, regarding the eighteen *gezerot* of Bet Shammai, enacted in the presence of all the leading Sages.

⁵⁴ *M. Eduyot* 1:5.

⁵⁵ *M.T. Mamrim* 2:2. I have been unable to find the source for this understanding of Maimonides. Rabad, it may be observed, in his commentary on the *Mishnah* in

iii. Maimonides seems to infer the powers of local courts from various talmudic sources relating to the differences in local usage, as explained above. It is against this background that the rules against applying to one court after another in this regard,⁵⁶ against setting up sects and the legitimation of the decisions of courts in different localities⁵⁷ were developed.

iv. Another important source is the ruling that the *Halakhah* is according to the views of Bet Hillel. The differences between Bet Hillel and Bet Shammai grew more widespread and crucial and threatened the unity of the people. The two groups would at times not meet socially or intermarry and attempts at reaching some agreement became difficult, until finally a Heavenly Voice proclaimed that the *Halakhah* was according to Bet Hillel.⁵⁸ Some commentators say that this Heavenly Voice was by way of being prophetic. Although well aware of the incident of the Oven of Akhnai, in which the colleagues of R. Eliezer rejected the declaration of a Heavenly Voice, they distinguish between a Voice that issues against an halakhic rule, in that instance against the majority view, when it is not hearkened, and a Voice that supports the majority rule, here that of Bet Hillel, when it is hearkened.⁵⁹ Maimonides does not accept such an approach. His attitude to prophetic intervention in halakhic matters is more stringent. He regards the Torah as having been given from Heaven as divine truth and eternal. Any prophetic attempt to add to or derogate from it is a capital offence; not even a halakhic interpretation or decision that is represented to be of prophetic force is to be accepted.⁶⁰ Moreover he does not appear to

Eduyot ubi supra considers that "greater in number" refers to age. He relies seemingly on the Yerushalmi but without giving any precise reference.

⁵⁶ *M. Pesahim* 1:6.

⁵⁷ *Yevamot* 14a.

⁵⁸ *M. Yevamot* 1:6; *T. Yevamot* 1:10-12; *Yevamot* 14a; *Y. Yevamot* 1:6; *Eruvin* 13b; *Y. Berakhot* 1:7. See also *Berakhot* 51b, *Eruvin* 6b, *Pesahim* 114a, *Yevamot* 14a, *Y. Yevamot* 1, *Y. Sotah* 3:4, *Y. Kiddushin* 1:1.

⁵⁹ We need refer only to *Tosafot* to *Eruvin* 1b, *Yevamot* 14a, *Baba Metziah* 59b. It is not claimed expressly that a Heavenly Voice is prophetic in nature but that is clearly implied, probably under the influence of *T. Sotah* 13:1-6.

⁶⁰ *Guide for the Perplexed*, ed. Kapah, Part 2; Commentary to *Mishnah Sanhedrin* 10:1; *M.T. Yesodei haTorah* 9; *Igrot haRambam* 37-40; Urbach, *op.cit.*, 3 note 25, and 20; idem, "Matai Paskah haNevuah" 17 *Tarbitz* (1946) 5 note 33. See Arussi, "Nitzhiyut haTorah beMishnat haRambam," in *Ahavat Melekh* (Kiryat

consider a Heavenly Voice as a matter of prophecy⁶¹ but, it is submitted, in the case of Bet Hillel the assent of the Sages to decide according to Bet Hillel, whose views were in fact followed. It is to be remembered that in matters of “ordinary” *Halakhah* the decision is according to the majority “that is before us,”⁶² that is the majority of a clear forum of the High Court that has discussed and decided a matter, and since the High Court of the time was not functioning properly and each sage decided as he deemed proper.⁶³ Bet Hillel had earned the agreement and esteem of most.⁶⁴ There were, however, rules laid down by Bet Shammai that also became widespread.⁶⁵ A situation was thus created in which the two schools could not exist side by side without endangering national unity. The Sages assembled and agreed to follow the majority “that is before us” and accordingly the general rule was adopted that the *Halakhah* is according to Bet Hillel – since its views are most widely accepted – apart from those instances in which most

Ono 1986) 30–42; E.E. Urbach, “Halakhah uNevuah,” 18 *Tarbitz* 1–27 (1947). Although he advances the view that prophecy can intervene in the *Halakhah* and that a Heavenly Voice is an alternative to prophecy, he admits that Maimonides’ approach is different in being dogmatic and rational. On further sources on this matter, see Rakover, *op.cit.*, 8–9.

⁶¹ See *Guide*, *loc.cit.*, in association with the Commentary to M.Yevamot 16:5.

⁶² *Hullin* 11a for the distinction between a majority that “is (and is not) before us.” For the attempts to rely on a majority that was not present in the time of R. Gamliel and Akiva, see *T.Berakhot* 4:12; *T.Betzah* 2:12; *T.Demai* 5:24. Witman, *op.cit.*, 194 note 43, 196 note 46.

⁶³ *M. Yevamot* 1–4; *T. Yevamot* 1:9–13. That is, however, presented in the Gemara (*Yevamot* 14a) as a question whether Bet Shammai acted on their own view, but it is concluded that they did: see glossators *ad locum*.

⁶⁴ *Eruvin* 13b. There a Heavenly Voice announced that the utterance of both Bet Hillel and Bet Shammai were the words of the living God but that the *Halakhah* was according to Bet Hillel because they were “kindly and modest.” Tosafot expresses surprise at this statement (Karo in his commentary on *Sefer Halikhot Olam* by Rabbi Yehoshuah haLevi, II, ch. 1). According to Maimonides, without a final decision, each would act in accord with his own views, and hence their words are the words of the living God but because Bet Hillel were kindly and taught the law, their views spread. On the latter aspect, see *M.Avot* 1:12; *Avot de R.Natan* 2 (ad finem); Urbach, “Ma’amad veHanhagah” in *Proceedings of the Israel Academy of Sciences*, vol. 2, 37–38 (1969).

⁶⁵ *Introduction to the Talmud* attributed to Shmuel haNaggid (printed after *Be-rakhot*); Shimshon Makinon, *Sefer Kiritot* (Jerusalem 1965) Part 4:3 at 179–80; *Halikhot Olam*, *loc. cit.*; *Encyclopedia Talmudica*, Vol. 9, 282–83.

people followed Bet Shammai.⁶⁶ The attempt of R. Eliezer, however, to vary halakhic decision in an ordinary matter (where to follow the majority is the best course) either because of extra-halakhic considerations or because usage was purported to be on his side, such an attempt was rejected, since such reasons cannot avail against the majority “before us.” Thus in one way or another Maimonides found an important source for the rule that consensus halakhically creates authority. Accordingly the institution of *mara de’atra* has strong foundation in Maimonides’ decisional rule.

We must now turn to consider whether Maimonides was in reality *mara de’atra*.

Maimonides as Mara De’atra in the Land of Israel at the Present Time and in the Future

We have already dealt with Maimonides as *mara de’atra* in the past. Whether he is still and will remain so is discussed by contemporary authorities.

i. Hazon Ish thinks that Maimonides is not *mara de’atra* at the present time since things have radically changed and people follow other decisors. He would, however, agree that for Jews of the Yemen he continues to be *mara de’atra* both in the Yemen and in this country, just as Ashkenazim continue in this country to decide in accordance

⁶⁶ This appears to be the view of Maimonides about the law following Bet Hillel. See I. Halevy, *Dorot haRishonim*, 214, who thinks that the decision to follow Bet Hillel began immediately on the death of Yohanan b. Zakai and lasted three years. In his view all matters in dispute were decided by the majority present. Albek (in his additions to *M. Yevamot* 1:4) takes the same view. Heinemann (*Toldot Tannaim veAmoraim*, sub “R. Akiva”) thinks the decision was made in the time of R. Gamaliel. So also Urbach, *op. cit.*, 43–44 note 42. Lieberman, *Tosefta kiPeshutah*, *Yevamot* thinks that the matter was decided by a majority vote but does not explain whether the vote went to all matters. Witman, *op. cit.*, 194 ff., is of the opinion that in the Yavneh period most people acted in accordance with Bet Hillel and the rule that the *Halakhah* was according to Bet Hillel developed later as an extension of the rule that one follows the majority. He surmises that this may have been a consequence of taking into account a majority who were “not before us,” which renders it possible that even after the formal statement about the rule of following Bet Hillel, there were *tannaim* who did not accept it at once.

with Isserlis and not Karo who had become *mara de'atra* in this country after Maimonides.⁶⁷

ii. Rabbi Ovadiah Yosef is of the opinion that this country has two *mara de'atra*, Maimonides and Karo and one may follow either of them. The Jews of the Yemen will follow Maimonides in this country not merely because they did so in the Yemen but also because this country is also “the place” of Maimonides.⁶⁸

iii. Rabbi Yosef Kapah is of the view that this country is “the place” of Maimonides alone. Karo himself held that here one should continue to decide in accordance with Maimonides and condemned those who did not do so.⁶⁹ Thus the custom that has spread in this country to follow Karo is essentially mistaken.⁷⁰

To sum up: according to all three views, Maimonides remains the *mara de'atra* in Israel for Jews from the Yemen; according to Kapah, he also remains so for all other communities; for Ovadia Yosef, both Sefardi and Ashkenazi Jews may follow him.

As to the future, a difficult problem presents itself. On the one hand, each community continues to preserve its own tradition. On the other hand, most national institutions are common to all the communities – education, kashrut, the rabbinate, rabbinical jurisdiction and so on. This situation may lead to “a conflict of laws” and that calls for an immediate basic solution in the interest of social integration under the *Halakhah*.⁷¹ The ideal solution would be the resuscitation of the Sanhedrin but that involves halakhic difficulties: the attempt to do so in the 16th century by Rabbi Ya'akov Berab failed, and the effort of Rabbi Maimon in our own times was solitary. An alternative has been

⁶⁷ Hazon Ish, *Yoreh De'ah*, on the rules relating to respecting one's master. This was followed by the present Rabbinical court: see *Piskei Din shel Batei Din Harabboni*, vol. 4, 112 and 289. See further *Resp. Divrei Rivot*, 162; *Resp. Havot Yair*, 126; *Resp. Bet David*, 149.

⁶⁸ *Resp. Yabia Omer*, III, 292, although the case dealt with there concerned a Yemenite couple, the sources quoted do not refer to the Yemenites, from which it may be inferred that the rule is generally applicable.

⁶⁹ *Resp. Avkat Rokhel*; Kesef Mishneh to *M.T. Terumot* 1:11.

⁷⁰ Kapah, *Mishneh Torah lehaRambam* (Jerusalem 1984); *Mada*, 22.

⁷¹ See Arussi, “Poskei Yamenu” to be published by the Institute of Contemporary Jewish Thought, where conflict of laws in rabbinical intercommunal decisions in Israel is comprehensively covered.

suggested, to set up a High Court in Jerusalem – not a Sanhedrin – with jurisdiction over all existing problems confronting Jewry, but this also presents difficulties because of the variance of rabbinical opinion and outlook.⁷² Another approach lies in the fact that halakhic authorities look upon Israel as a country in which established usage exists under the institution of the *mara de'atra* and all who come to settle must abide by the decisions of its leaders. Most such authorities regard Karo as the *mara de'atra*, and indeed they rely on his ruling that local usage prevails for newcomers from a country with a different usage,⁷³ whether a majority or not. At the beginning this practice was followed but has now been abandoned.⁷⁴ If renewed it would still leave open the question whether Maimonides is the *mara de'atra*.

The choice of the *mara de'atra* is crucial. Halakhic-historical reality shows that whenever the proliferation of opposing views presented a danger to national unity, some halakhic development occurred to prevent it. That happened in the case of the Bet Hillel-Bet Shammai differences, in the resolution of tannaitic differences by the compilation of the Mishnah and in the case of amoraic differences by the preparation of the *Gemara* and convergence on the Babylonian Talmud. It also happened when the large part of eastern Jewry concentrated on the compendium of RiF and then Maimonides, Rosh and Tur, when Sefardim gave their allegiance to Karo and Ashkenzim to Isserlis. It is possible that were a complete Code written today appropriate to our times, it would replace the *Shulhan Arukh* as the *Shulhan Arukh* replaced *Mishneh Torah*. That, however, has not yet happened although the time is ripe in view of inter-community problems, the confrontation of the *Halakhah* and modern problems, the queries presented by the establishment of the State. In the absence of such a Code, it would

⁷² Y.M. Tukechinsky, *Ir haKodesh vahaMikdash* (Jerusalem 1970) 114–132. This is also the view of haRav Kook, *Igrot haReiyah*, vol. 4 (Jerusalem 1984) 80. The problem centres on the differences in rabbinical outlook regarding the *Halakhah*. See Tukechinsky, *op.cit.*, 334, 337.

⁷³ *Resp. Avkat Rokhel*, 212, although this view has been challenged.

⁷⁴ Tukechinsky, *op.cit.*, 329–34. For haRav Kook the matter is simple, each community will follow its leaders: *Resp. Ezrat Kohen* (Jerusalem 1969) 379; *Igrot haReiyah*, 193. Recently R. Ovaddiah Yosef has reviewed this approach: *Likutei Kol Sinai*, 332.

not be anomalous to adopt Maimonides' *Mishneh Torah*, and that for the following reasons. The rules of decision-making give preference to the decisor as against the commentator or glossator, especially to the decisor who has embraced the entire Oral and Written law in one compendium. We have already observed that the Babylonian Talmud is binding on all Jews. Maimonides' Code is the most talmudical of the law books that were compiled subsequent to him, and it is largely confined to extracting from the Talmud halakhic principle.⁷⁵ One factor that assists in the reception of one decisor as *mara de'atra* is practicality, and the *Mishneh Torah* would appear to be most practical as regards language and arrangement as well as content. It is the only code that embraces *hilkhata lemeshiha* which the establishment of the State has already made necessary. His rational frame of mind is an added advantage, if we wish to have a code acceptable to those who do not rest their beliefs on the Torah and faith. The *Shulhan Arukh* in its present form and content cannot be such a code for integrating the people because it combines the two different approaches of the Sefardim and Ashkenazim.⁷⁶ The argument that Maimonides does not give his sources was pertinent when attachment to the rule of *hilkhata kebatrai* was still followed. Today, however, when even Ashkenazim concentrate on Isserlis and there is generally a growing reliance on the *Shulhan Arukh* (even without reference to Bet Yosef) and different manuals, it would appear proper to depend upon Maimonides and face the challenge of discovering his sources, a process which indeed has been going on since he wrote his magnum opus in the rabbinical academies, thus demonstrating that Maimonides did not obstruct the study of the Talmud but rather reinforced it.

Under the decisional rules of Maimonides there is place for a *mara de'atra*. He himself was such in the land of Israel. At the present his position is questioned. For the future there appears to be need for him in view of the developments that have overtaken the Jewish people in Israel as well as because of the striving for the integration of its various parts in accordance with the *Halakhah*, as one people with one Torah.

⁷⁵ H.H. Medini, *Sdei Hemed, Klalei haPoskim*, 8:2 and 9; 5:1; Kapah, *op.cit.*, 22–25.

⁷⁶ Cf. Kahana, "Sifrei haKitzurim," in *Studies in the Responsa Literature*, 89–96. D. Mashraki, *Shetilei Zetim* (Jerusalem 1966) Introduction; Gaguin, *Keter Shem Tov* (London 1948) 16; H.J. Zimmels, *Ashkenazim and Sephardim* (London, 1969) 54–58.

Morals and Laws

LAW AND MORALITY IN THE THOUGHT OF MAIMONIDES

*Marvin Fox**

Moses Maimonides is uniquely important in the history of Jewish legal thought. It was he more than any other figure who took the protean materials of the Talmud and the other primary sources and gave them the form and structure which are today taken for granted in all discussions of Jewish law. Even those who do not accept many of his legal decisions cannot afford to neglect his formulations and reformulations of the talmudic materials. His modes of categorization, organization and classification are fundamental to all later studies in Jewish law. To this day we continue to employ the conceptual structures which he first developed. One can hardly conceive the discipline which we call Jewish legal thought without the foundations which were laid by this greatest of all post-talmudic Jewish thinkers, and his views concerning the relationship between law and morality are of the highest importance.

Modern legal theory has devoted much effort to exploring and clarifying the relationship between law and morality. Even those who accept the extreme view that all law rests on morality have not thereby solved their difficulties. Such a theory of law only pushes the problem back one step, since we are then forced to ask about the foundations of morality itself. If the law rests on morality, we must ask the obvious questions. Whose morality? What justifies any particularly moral

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claim? On what theoretical grounds does morality rest? These are uncomfortably difficult questions which we tend to avoid because they threaten both our moral and our legal systems. Yet, all serious legal thinkers and all moral philosophers know that these questions cannot be ignored if we are to reflect honestly and soberly on the problem of law and its relationship to morality.

In contemporary studies in Jewish legal theory the problem of the relationship between law and morality has become especially important. The general question of the role of moral rules within Jewish law has been the source of much debate and lies beyond the limits of this brief paper.¹ We restrict ourselves to an examination of this issue within the thought of Maimonides. To begin with, we must recognize that the distinction between the legal and the moral does not accurately reflect the issues as they emerge internal to the Jewish legal tradition. If we are to understand a medieval Jewish thinker such as Maimonides, we must not make the mistake of imposing on him categories and distinctions which he did not recognize.

As a major halakhic authority, Maimonides was fully attuned to the nuances of the Jewish legal system, and he held that the category "morality" is not an independent element in that system. This is not to say that there are no moral elements or moral concerns in the

¹ The following is a sampling of the studies which have attracted attention in recent years: M. Silberg, *Hok uMussar beMishpat haIvri* (Jerusalem 1952); *idem*, "Law and Morality", Ch. IV in his *Talmudic Law and the Modern State* (New York 1973); L.E. Goodman, "Maimonides' Philosophy of Law", I *The Jewish Law Annual* (1978); E. Dorff, "The Interaction of Jewish Law with Morality", XXVI *Judaism* (1977); N. Lamm and A. Kirschenbaum, "Freedom and Constraint in the Jewish Judicial Process", I *Cardozo Law Review* (1979); D.W. Halivni, "Can a Religious Law be Immoral?", *Perspectives on Judaism*, ed. Arthur Chiel, (New York 1978); S. Shilo, "On One Aspect of Law and Morals in Jewish Law: *Lifnim miShurat haDin*", 13 *Israel Law Review* (1978); S. Berman, "*Lifnim miShurat haDin*", 26 and 28 *Journal of Jewish Studies* (1975 and 1977); W. Wurzbarger, "Law as the Basis of a Moral Society", 19 *Tradition* (1981); M. Fox, "Maimonides and Aquinas on Natural Law", 3 *Dine Yisrael* (1972); *idem*, "Law and Ethics in Modern Jewish Philosophy", 43 *PAAJR* (1976); *idem*, "The Doctrine of the Mean in Aristotle and Maimonides: A Comparative Study", *Studies in Jewish Religious and Intellectual History*, ed. S. Stein & R. Loewe (Alabama 1979); A. Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of *Halakhah*?", *Modern Jewish Ethics*, ed. M. Fox (Columbus 1975); N.L. Rabinovitch, "Halakha and Other Systems of Ethics: Attitudes and Interactions" (*Ibid.*).

Halakhah. Quite the contrary. All students of Jewish law know how frequently such moral concerns make themselves felt. The key question is whether these concerns are an independent force in the law, a force which rests on independent sources and sanctions, or whether they are simply part of the internal structure and methodology of the halakhic system itself. This paper starts from the premise that for Maimonides there is no independent moral dimension in the *Halakhah*. In defense of that premise I shall try to present in this paper some of the strongest evidence that is available from his *Commentary on the Mishnah* and *Mishneh Torah*. Throughout this study I shall understand by “morality” those principles and values which we commonly identify with the ethical teachings of high western culture in general and with the ethical principles of Judaism in particular.

Before turning to the substantive question, we must first consider a methodological issue, namely, whether from works of commentary and codification we can learn anything about the thought of the commentator/codifier. Is Maimonides simply collecting materials and organizing them without giving us any clue to his own views? It is generally agreed that Maimonides is far more than a mere compiler. As Isadore Twersky points out, “his task was one of collecting and systematizing authoritative sources and hallowed traditions, and this inevitably entailed a large measure of interpretation as well as selection.”² Elsewhere Twersky calls to our attention the fact that, “When asked by the Lunel scholars about a provocative halakhic formulation. . . . Maimonides confidently replied that originality of interpretation was a fact of scholarly life.”³ There are a few instances in which Maimonides explicitly identifies a legal decision as his own view in direct opposition to other authorities, but these represent only the tip of the iceberg as far as his originality goes. As commentator and codifier he selects from the vast body of earlier sources, decides which of a number of opinions or rulings to adopt, frequently gives his own interpretation of the meaning or significance of a law, and shows the perceptive reader his own way of understanding the law and its values. Consequently, when the materials of his Code and Commentary are used judiciously they constitute indispensable sources for the original thought of Maimonides.

² I. Twersky, *Introduction to the Code of Maimonides* (New Haven 1980) 60–61.

From a study of Code and Commentary we conclude that there is in Maimonides' legal work no consistent pattern of giving independent place or authority to what we call the moral dimension. In fact, it is very difficult in Jewish law to find any distinction between law and morality. As David Halivni has pointed out, a biblical or rabbinic law cannot be viewed within the system as immoral.⁴ To consider a law to be a divine commandment and also immoral is a contradiction in terms. What God commands must be good, otherwise the commander is not God. It is for this very reason that we can find no clear distinction in the *Halakhah* between moral commandments and ritual commandments. Both come from the same source and both fully obligate those to whom they are addressed. This is why teachers of the law, even in our own time, repeatedly make the point that when the law offends our individual moral sense, we must set aside our own judgment in favor of the law. Otherwise, we would be rejecting the divine teaching and the divine mandate, and giving priority to human judgment over that of God.⁵

Maimonides makes a similar point when he argues that the law is concerned with the general welfare and that consequently it may at times be injurious to the interests of particular individuals. In an important passage in the *Guide for the Perplexed*,⁶ he states that:

The Law was not given with a view to things that are rare. For in everything that it wishes to bring about, be it an opinion or a moral habit or a useful work, it is directed only toward the things that occur in the majority of cases and pays no attention to what happens rarely or to the damage occurring to the unique human being because of this way of determination and because of the legal character of the governance. For the Law is a divine thing; and it is your business to reflect on the natural things in which the general utility, which is included in them, nonetheless necessarily produces damages to individuals. . . . In view of this consideration also, you will not wonder at the fact that the purpose of the Law is

³ *Ibid.* 56.

⁴ Halivni, "Can a Religious Law be Immoral?" (see note 1).

⁵ For a striking contemporary discussion of this point see, Hazon Ish, *Al Inyanei Emunah, Bitahon, Ve'od* (Jerusalem 1954) 21–43 and *passim*.

not perfectly achieved in every individual and that, on the contrary, it necessarily follows that there should exist individuals whom this governance of the Law does not make perfect.

If we start from our contemporary notions concerning Jewish moral principles, then Maimonides' thought will be for us a maddening paradox. His Code seems to move between the extremes of high moral sensitivity and a total disregard for "ordinary" principles of morality. He sets down laws most contemporary Jews would view as an offense to morality, and he does so without comment, apology, or attempt at moral justification. At times he merely reproduces the primary sources without comment, but at other times he adds to those sources comments, explanations or observations which are contrary to our notions of Jewish ethics. So long as it is the law, as he understands it, Maimonides records it or comments on it with neither hesitation nor apology. These supposedly negative elements in his Codification and Commentary are often ignored by those who find them disturbing. Let us begin by considering some examples so that we can reflect on the question of law and morality in Maimonides' thought with the relevant evidence before us.

To begin with, there are instances in which the law itself makes available a moral interpretation which Maimonides rejects. A striking case occurs in his interpretation of the *Mishnah* which prohibits a prayer in the form, "May Thy mercies extend to a bird's nest." The reference is to the biblical law which requires us to send away the mother bird before taking her baby birds from the nest. It is perfectly natural to construe this law as rooted in moral feeling. It is reasonable to suppose that we are instructed to send away the mother bird in order to save her from the agony of seeing her children robbed from her nest, and, in fact, in the *Guide for the Perplexed*, in a non-legal context, Maimonides offers just this interpretation. In the course of his discussion of the reason for the commandment to send away the mother bird before taking the eggs or the baby birds from the nest, the only consideration he sets forth is compassion for the mother bird and the development of compassionate feelings toward human beings:

If then the mother is let go and escapes of her own accord, she will not be pained by seeing that the young are taken away. . . . If the

Law takes into consideration these pains of the soul in the case of beast and birds, what will be the case with regard to the individuals of the human species as a whole?⁷

In his legal works, however, Maimonides adopts a very different approach. There he records the rule of the *Mishnah* and goes on to explain that we must not pray in this fashion because it would suggest that God's command concerning the mother bird was motivated by compassion. Maimonides rejects this notion and insists that these commandments are simply *gezerat hakatuv*, divine decrees. He adds the argument that if the underlying explanation were the feeling of compassion, then that very same feeling should deny us the right to slaughter animals for food.⁸ In rejecting the moral explanation, Maimonides is following one of the opinions recorded in the talmudic discussion on this *Mishnah*. However, we must note that there is another opinion expressed in that same discussion, an opinion which sustains the moral interpretation and which he might have adopted. While Maimonides, the philosopher, sees in this law a concern for developing in us compassion for living beings, Maimonides, the commentator and codifier, rejects out of hand a readily available moral explanation of the law.

In another case, he rejects a ruling of a *Mishnah* which is explicitly moral in its purpose. The biblical law of *yibbum*, levirate marriage, was originally considered preferable to *halizah*, the release of the levir from his obligation. With changing circumstances at a later time *halizah* was preferred to *yibbum*. The reason given in the *Mishnah* is a purely moral one. So long as *yibbum* was performed with the pure motivation of fulfilling a divine commandment, it was a commendable act. However, in later times and with changed social conditions the motivation of the levirs was no longer pure. They were not acting to fulfill a *mitzvah*, but rather, were attracted by the wealth or the beauty of their widowed sisters-in-law. Such marriages were held to be grossly improper and under these circumstances *halizah* was to be preferred.⁹

⁶ Maimonides, *Guide for the Perplexed*, III, 34 (hereinafter *Guide*).

⁷ *Ibid.* III, 48.

⁸ Maimonides, *Commentary on the Mishnah*, *M. Berakhot*, 5:3; *M. T. Tefillah* 9:7; *Guide* III:48. Space is too limited to take up here an explanation of the difference between Commentary/Code and the *Guide*.

⁹ *M. Bekhorot* 1:7.

One talmudic sage even went so far as to equate such a wrongly motivated levirate marriage with incest and suggested that the child of such a marriage borders on being a *mamzer*.¹⁰ Maimonides follows other opinions which treat these levirate marriages as fully legitimate, and he gives them priority over *halizah*. He rules that the death of the husband who left a childless widow automatically removes the incest prohibition from her marriage to his surviving brother. Therefore “marriage is permissible, even if the levir consciously intended that it should not be for the purpose of fulfilling a *mitzvah*. Consequently, the law is that *yibbum* takes precedence over *halizah* in all such cases.”¹¹ It is evident from this case that Rambam did not always take advantage of the opportunity to base the law on moral considerations or to interpret the law in moral terms.

Let us examine some other cases in which he also rules against widely accepted moral principles. If there is any single value commonly thought to be central to Jewish morality, it is the doctrine of the dignity of man, which teaches that every human being, by virtue of his humanity, is worthy of respect and of humane treatment. Man is created in the image of God, and as bearer of the divine image every person is held to be uniquely precious. One would expect then that the legal writings of Maimonides would reflect that moral ideal consistently and unequivocally. However, even a cursory examination of the materials forces us to recognize that such is not the case at all. We already commented earlier on the extent to which his selection, arrangement, and emphases reflect his own contribution. His specific formulations, the language he uses, the force and pungency of some of his comments, all tell us a great deal about his own thought.

It is not difficult to find examples of legislation in which Maimonides seems to deny all claims to innate intrinsic human dignity. The Torah teaches, “Thou shalt not plough with an ox and an ass together.” Although no reason is given in the Torah, some latter-day commentators understand this to be a case of human concern for the weaker animal which would be hurt when yoked to a stronger one. This point does not come out in the standard rabbinic sources. What does come

¹⁰ *Yevamot* 39b.

¹¹ *Commentary on M. Bekhorot* 1:7; cf. *M.T. Yibbum* 1:2.

out, however, is that the prohibition does not include a similar restriction on teaming together a man and an animal. Maimonides simply follows this ruling and states that a man may be teamed with any animal for ploughing. He expresses no concern over the indignity to a human being that this implies, and sees no need either to mitigate the ruling of the *Mishnah* or to give it a morally acceptable explanation.¹²

The law requires that one who has injured another person must compensate him in various ways. The compensation includes *boshet*, payment for the shame and embarrassment that the injured person suffered. A *Mishnah* rules that in determining the extent of payment for *boshet* we take into account the social position of the injured party. In that *Mishnah* Rabbi Akiva argues that even the poorest and most degraded members of society must be treated as dignified human beings, capable of embarrassment, and are thus entitled to compensation for their humiliation.¹³ Maimonides, however, takes the position of the *Mishnah* literally and rules that the norms of fixed compensation for embarrassment apply only to people of recognized social standing. In explanation, he tells us that there are types of people who are not worthy of any such consideration. "There are vulgar human beings who have no concern for their own embarrassment (i.e., have no sense of self-worth). They constantly degrade themselves in a variety of ways." For a penny or two they voluntarily make themselves the objects of scorn by the lowest elements in society.¹⁴ While R. Akiva seeks to protect even such people from embarrassment, Maimonides apparently feels that they are almost sub-human and hardly worthy of such concern.

The law requires a wife to perform certain household and personal services for her husband. This is part of her duty as agreed to in the marriage contract. A wife who refuses to perform these services may be coerced by law, but Maimonides goes even further. He adds, in a comment that seems to have no identifiable rabbinic source, that she may be coerced even by whipping.¹⁵ His contemporary critic, Rabad, expresses astonishment and notes that he has never heard of it being

¹² *Commentary on M. Kilayim* 8:6, citing *Sifre*.

¹³ *M. Baba Kamma* 8:6.

¹⁴ *M.T. Hovel uMazzik* 3:8–11.

¹⁵ *M.T. Ishut* 21:10.

permissible for a man to whip his wife in order to force her to carry out her household responsibilities. Here again we have a case in which Maimonides seems not to be concerned with the dignity of persons.

Perhaps the most striking of all cases is that which exhibits the tension between the command to love our fellow Israelites and the obligation, under specific conditions, to reject or even despise them. Maimonides formulates the former in touching language.

Every person is obligated to love every member of the community of Israel as he loves himself, as Scripture teaches, "Thou shalt love thy neighbor as thyself." Therefore each of us is bound to praise his neighbor and to exercise the greatest care for the protection of his property, just exactly as one would protect his own property and seek his own honor.¹⁶

Elsewhere Maimonides includes such duties as visiting the sick, comforting mourners, burying the dead, providing the needs of brides, etc. under the general rubric of the commandment to love our neighbor as ourselves. He adds that, "Everything that you want others to do for you, you should do for your brother in Torah and mitzvot."¹⁷

At the same time, Maimonides sets forth certain situations in which we are commanded to reject our fellow Jews, even to despise them. He rules that in order to be considered a member of the community of Israel (*kelal yisrael*) one must accept without question all thirteen of the articles of faith which he has outlined. Whoever accepts these articles, even though he sins, is a member of the community whom we must love and deal with compassionately. However, one who denies or doubts any one of the articles of faith has thereby automatically excluded himself from the community of Israel. Such a person is a heretic, "and it is our duty to despise him and to destroy him. Concerning him the Psalmist said, 'O Lord, You know I hate those who hate You, and loathe Your adversaries.'"¹⁸

What is particularly instructive is that Maimonides feels no need to temper or mitigate the call to hatred of the heretic. Many later authorities felt pressed to reinterpret the obligation that the law imposes on

¹⁶ *M.T. De'ot* 6:3.

¹⁷ *M.T. Avel* 14:1.

¹⁸ Introduction to *Commentary on M. Sanhedrin* 10, at the end of introductory essay.

us to hate certain categories of Jews. They were apparently ill at ease with the seeming immorality of such hatred and sought ways to make it more palatable. The founder of Habad hasidism, for example, in the *Tanya* explains that even when we are commanded to hate fellow Jews, “there still remains the duty to love them also, and both are right: hatred because of the wickedness in them; and love on account of the aspect of the hidden good in them, which is the Divine spark in them. . . . Compassion destroys hatred and awakens love. . . .¹⁹ In contrast, Maimonides feels no moral need to explain, justify, or explain away the commandment to hate Jews who are deficient in the correct principles of faith.

A last and most telling instance makes the point with great force. Maimonides codifies the law that in a monetary dispute between a Jew and non-Jew the Jew may choose to have the case judged by whichever legal system gives him the advantage. If the non-Jewish system is more advantageous, he may choose that, or the Jewish system if that will be better for him. Here, Maimonides feels a need to respond to the legalization of an apparent inequity, one which borders on dishonesty. However, his justification may be more offensive to common morality than the law itself. He reassures us that we need feel no compunction, saying,

Let this not appear to you problematic, just as it is not problematic that we slaughter animals (for food) even though they are not guilty of any wrongdoing. The reason is that a being who does not possess the perfection of human virtues is not truly a member of the category “human” at all. The purpose of such beings is simply to serve the needs of those who are truly human.²⁰

There could hardly be a more explicit denial of the intrinsic value of man as man, or a more severe rejection of the doctrine of the natural dignity of all men.

¹⁹ *Likkutei Amarim*, 32.

²⁰ *Commentary on M. Baba Kamma* 4:3. For a different explanation which is in the nature of a moral justification for the seeming inequity, see *M. T. Nizke Mammon* 8:5. For still a third approach, see *M. T. Melakhim* 10:12. For an elaboration of the opinion expressed here, see *Guide* III:51 (S. Pines/tr., 618–619).

These cases of seeming unconcern with morality are balanced by numerous passages in which Maimonides exhibits the greatest possible moral sensitivity. He codifies established laws which are morally elevated, makes independent rulings which reveal profound moral concern, and adds to his codification of established laws explanatory comments which express the most exquisitely delicate moral feelings. Let us consider some examples of his moral sensitivities.

He explains the somewhat puzzling laws of *temurah* as motivated by the purpose of saving men from their own impulses of greed and meanness of spirit. At that point he issues a general pronouncement to the effect that most of the legislation of the Torah is divine counsel aimed at bringing us to a state of refined character and virtuous action (*letakken hade'ot uleyasher kol hama'asim*).²¹ Thus, he argues that the primary purpose of the entire law is moral. This general pronouncement, which has its counterpart in the *Guide for the Perplexed*,²² serves as a framework for much of the legislation which he codifies and expounds. The same Maimonides, who rules in one legal context that whole classes of men are subhuman and are by nature impervious to insult and shame, rules elsewhere that insulting even the most ordinary member of the Jewish community is “a major sin” and adds that whoever is guilty of this sin is nothing but a “wicked fool.”²³

Maimonides shows remarkably sensitive concern for the needs of the poor, for their feelings and for their dignity. No codifier or decisor in Jewish law has exceeded him in zeal for protection of the needy or in eloquence in legislating their cause. He repeatedly insists, for example, that festive celebrations must be characterized not primarily by involvement in our own pleasures, but first and foremost by providing food and other needs for the deprived members of society. He teaches that true rejoicing on the festivals consists in the satisfaction which comes from helping those who are in need. In an especially sharp phrase he says, with open contempt, that a festival whose rejoicing is characterized by eating and drinking well, while giving no thought to

²¹ *M.T. Temurah* 4:13.

²² *Guide* II:39,40; III:27; III:33 where he states that “to the totality of intentions of the Law, there belong gentleness and docility; man should not be hard and rough . .

²³ *M.T. Hovel u-Mazzik* 3:7.

the poor, is not *simhat mitzvah*, rejoicing in the holiness of divine service, but *simhat kereso*, nothing more than vulgar pleasure in one's belly.²⁴

In another case, he sets down the rules for receiving converts into the Jewish faith. Then he adds the requirement that they must be cautioned concerning the severe sins of neglecting to leave for the poor the gleanings, forgotten sheaves, and the corner of the field, or of overlooking the tithe for the poor.²⁵ His concern with charity is so deep that he makes an awareness and acceptance of these commandments a condition for valid conversion.

One of the highest Jewish duties is *kiddush hashem*, and Maimonides stands watch over all legalized behavior which might bring about moral contempt for Jews and thus profane the name of the God of Israel. He faithfully codifies all legislation which seems to deny non-Jews (or, at the very least, to idolators) the same advantages which the law extends to believing Jews. Yet, after expressing himself on this subject openly and sometimes severely, he hastens to introduce the strong qualification that none of this permissive legislation is operative in any case where it may lead to *hillul hashem*.²⁶ In a similar vein

²⁴ *M.T. Yom Tov* 6:18. For other instances of this same principle see *M.T. Megillah* 2:17; *M.T. Matnot Aniyyim* 9:4; *M.T. Hagigah* 2:14. For general instances of his attitudes to the poor see *Matnot Aniyyim* throughout and *Malveh ve-Loveh* 1:1-3. The theme recurs with regularity throughout the *Mishneh Torah*.

²⁵ *M.T. Issurei Bi'ah* 14:2. Maimonides, of course, bases his ruling on *Yevamot* 47a-b which already sets down this requirement for the instruction of converts. In this respect, he cannot be credited with originality. What is significant, however, is just the fact that he decided to include it in his ruling. We are aware that he had no hesitation, even in this very instance, about adding to or subtracting from the formulation in the Talmud. In *Tur* and *Shulhan Arukh* 268 this requirement is no longer included in the formula for instructing converts. On the other hand, it is retained both by Meiri in *Bet ha-Behirah*, *Yevamot* 47a, and in *SeMaG*, Negative Commandment 116.

Maimonides may well have retained it in the light of his ruling that these agricultural gifts to the poor are required even outside the land of Israel by rabbinic ordinance (see *M.T. Mattenot Aniyyim* 1:14). In any case, it is clear that in this instance he took the opportunity to include in the instruction of converts their specific responsibilities to the poor, a rule which was not followed by authorities. For a discussion of this matter see I. Twersky, *Introduction to the Code of Maimonides*, 425, 474 n.292, 475 n.295. I am indebted to Twersky for this and many other important insights into the method and the doctrine of Maimonides.

²⁶ See, e.g., *M.T. Gezeleh* 11:1-4.

Maimonides stresses the absolute duty to be meticulously honest in all one's dealings, maintaining rigorously correct weights and measures as well as all other modes of correctness in business transactions. These obligations extend equally to Jews and gentiles.²⁷ Anything less would profane God's name. Here again a supreme value determines the law.

In some cases the value scheme even requires us to restrict our own rights so as to protect others from wrongdoing. A classic instance is that of respect for parents. Maimonides sets forth the whole range of laws which give to parents almost unlimited claim on the respect of their children. These laws apply to children of any age. He then adds a strong restraint which he formulates in an original manner.²⁸ "Even though we have been commanded with respect to honoring parents, it is *forbidden* for parents to impose a very heavy yoke on their children and to demand of them every detail of honor which is due. So as not to put a stumbling block in their way, it is proper that parents should ignore failures of respect and forgive their children for them." The deep concern is to prevent violation of the law on the part of children in relationship to their parents.

A different kind of moral concern is expressed in those laws which condemn behavior which undermines social order. Most destructive of human society is the murder of the innocent. In recording the laws concerning murder, Maimonides follows the primary sources closely. In the process of codification he adds comments of his own which underscore his special moral concern. Here Maimonides teaches that murder is uniquely destructive. It threatens the civilized community as no other crime does. Although there may be transgressions which from a purely technical, legal perspective are more severe, from the perspective of man and society no crime exceeds in its destructive effects the crime of murder. In his view, for this reason, the Torah was more deeply concerned with preventing murder than with any other sin.²⁹ Here again a system of moral values is expressed in Maimonides' unique formulations.

This same concern also takes the form of justifying unusually severe measures of punishment when they are needed to protect society from

²⁷ *M.T. Genevah* 1:1,2; 7:8; *M.T. Mekhirah* 18:1.

²⁸ *M.T. Mamrim* 6:8,9.

²⁹ *M.T. Rozeah* 1:4; 4:9.

destructive forces. In various places Maimonides records laws which permit the imposition of severe penalties, including death, on transgressors who cannot be brought to justice under the strict rule of law. Although they cannot be convicted and punished by the judicial system, they pose such a threat to society that the law permits non-judicial means of penalizing them.³⁰ Speaking, for example, of the severe threat posed by those who seek to lead the people into idolatry, Maimonides justifies non-judicial penalties with the argument that “cruel treatment of those who would mislead the entire nation into the way of vanity is compassion to the world.”³¹ In the *Guide* he generalizes the same point with the statement that: “Pity for wrongdoers and evil men is tantamount to cruelty with regard to all creatures.”³²

Finally, we should note among the moralistic elements in Maimonides’ codification of the law all those cases which he labels *middat hasidut*. These are supererogatory rules which are not legally required, but which define the behavior of the truly pious. For the most part they consist in denying oneself privileges which the law permits in cases where to claim the privilege would involve seemingly improper behavior. Maimonides rules, for example, that there are no restrictions on sexual behavior in marriage. Every form of sexual expression is permitted. Nevertheless, he adds, true piety requires men to discipline themselves so as to avoid vulgarizing the conjugal relationship. That relationship should be imbued with the spirit of holiness and not be reduced to unrestrained animal lust.³³ Similarly, the truly pious exercise restraint in asserting even their just claims to property. Where there is any slight question, even though the law is on their side, they will return lost articles and forego other property rights which the law grants them.³⁴ In the case of slaves, who are the property of their owners, the law permits one to work them mercilessly. Yet, Maimonides teaches, *middat hasidut* requires the owner to be compassionate and

³⁰ *M.T. Sanhedrin* 18:4,5.

³¹ *M.T. Sanhedrin* 11:5. For some other instances of great severity see e.g., *M.T. Malveh ve-Loveh* 1:4; 1:6; *M.T. Sanhedrin* 20:4.

³² *Guide* III:39.

³³ *M.T. Issurei Biah* 21:9.

³⁴ For some instances see: *M.T. Matnot Aniyyim* 4:8; *M.T. Gezelah* 5:10; 11:17; *M.T. Mekhirah* 12:12; *M.T. Shekhenim* 14:5.

gentle with his slaves. He should never impose the yoke of excessively heavy labor on them. He should treat them as cherished members of his family, not as unfeeling labor machines.³⁵

We see that the range of Maimonides' treatment of moral issues in the law extends from what seems to be the deepest moral sensitivity to an apparently complete indifference to moral issues. The same codifier who enjoins us to treat even the Canaanite slave with the compassion that human dignity demands, also teaches us that a wife may be whipped if she fails to do her household tasks. He, who treats man as an exalted being, also considers some Jews virtually sub-human and thus incapable of shame or embarrassment. What then is the relationship between law and morality in Maimonides' legal works?

For Maimonides the question itself is poorly formed. It wrongly presupposes that he affirms the distinction between the legal and the moral. He might grant such a distinction within those systems of law which he contemptuously dismisses as "the nomoi of the Greeks and ravings of the Sabians."³⁶ Conventional law which has been created by men is subject to imperfections. Such law might in fact be in conflict with morality. But, "The Law of the Lord is perfect,"³⁷ and it aims at leading all men who abide by it to realize their own human perfection. When we judge the law by our own standards of morality, we make the error of attempting to reduce the divine perfection to our finite capacity to know and understand. Using conventional moral standards, we represent some of the divine law as morally elevated and some of it as morally degraded. Maimonides would have rejected all such external evaluations. As codifier, it was his task to set forth the whole of the law without regard to personal sentiments. While he is completely confident that the divine law, in all its details, is the perfect instrument for promoting human welfare, he acknowledges that he cannot always provide a fully satisfactory explanation of the way in which each particular law serves that end. Yet, he neither praises the law for being morally sound, nor criticizes it for being morally deficient, since the only morality we know is that which is set down in the law. In studying

³⁵ *M.T. Avadim* 9:8.

³⁶ *Guide* II:39.

³⁷ *Ps.* 19:8. This verse is cited by Maimonides in support of the perfection of the Law in *Shemonah Perakim*, and in *Guide* II:39.

MORALS AND LAWS

Torah we can achieve some insight into its value structure, and, following this insight, we must try to remain faithful to Torah values as we extend the law to new circumstances. At the foundation of all Maimonides' work in this area is the conviction that when we deal with divine law we must not introduce law *and* morality as separate categories since the divine law alone *is* morality.

META-ETHICS IN THE THEORY OF MORALS OF MAIMONIDES

*Andre Neher**

Since the present year is not only the Year of Maimonides but also the fiftieth anniversary of the death of Rav Kook, I shall commence with a quotation from the latter.

There is a constructive holiness and a destructive holiness. Constructive holiness is manifestly good. Destructive holiness is covertly good because it destroys in order to build something that is loftier than that which it replaces.

He who perceives the secret of destructive holiness can reform many souls. The extent of his reformatory work is commensurate with the reach of his perception. From destructive holiness emerge great warriors who bring blessing to the world. The merit of Moses, the author of *Yad Hahazakah*, is that he shattered the two Tablets.¹

The source is *Shabbat* 87a: "How do we know that the Holy One blessed be He approved? Because it is written 'which thou didst break' (*Ex.* 34:1) and Resh Lakish understood this as 'All strength to thee that thou didst break.'" I am sure that Rav Kook was referring to Moses ben Maimon: "from Moses (the Law giver) until Moses (ben Maimon) there was none like Moses."

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¹ *Orot haKodesh*, vol. 2, 314.

In saying this, I deny the classic impression of Maimonides as the great compromiser who spans the extremes, who counsels the golden mean, who builds without destroying. In all areas, particularly in that of ethics, justice and law, the conclusion of *The Guide for the Perplexed*, among others, is demonstrative of this view.

For all that, Maimonides at times makes a leap from ethics to meta-ethics. He “breaks the Tablets” at certain decisive stages of his spiritual world.

In the architectonics of *Mishneh Torah* the destructive holiness is already manifest. The new and wonderful structure of the *Mishneh Torah* emerges from breaking down the equally wonderful architectonics of the Six orders of the *Mishnah*. Without dismissing the building put up by Rabbenu (R. Yehuda Hanasi, 3rd century B.C.E.), Maimonides would have been unable to erect his own new edifice. It was not in vain that he named his work *Yad Hahazakah*, comparable to the strong hand of the Patriarch Moses who broke the Tablets. Maimonides broke the tablets of Rabbenu haKadosh and was thereby able to put up his own new structure.

In the area also of metaphysics the strength of Maimonides lay not in following in the footsteps of Aristotle but the contrary. He only went along with Aristotle up to a certain point, and alone in the Middle Ages he ventured to say to Aristotle “Thus far and no further.”

The question remains whether in the field of ethics Maimonides set up an impassable barrier. Is he in the area of law and justice, as we have said, the great compromiser, who spans the extremes, who brings the poles together, who counsels the golden path?

I shall try to show that in the field of ethics and law Maimonides also deviated from the criteria of a mediating ethic. Here are three examples to which I am not the first to draw attention.

- a. The treatment of rights-obligations (*M.T. Teshuvah* 3) does not proceed ultimately according to the ethical-mathematical calculation that Maimonides details at the outset. A decision is reached by balancing a transcendental supreme conception (*M.T. Teshuvah* 3:2) and an immanent lower force (*M.T. Teshuvah* 3:3, “the righteous man is the foundation of the world”), which gives preference to a metaphysical (even “kab-

- balistic”) approach to the problem of reward and punishment.
- b. There is a conflict between the “immediacy” of prophetic illumination about “the person who is replete with all the good qualities” that Maimonides lists expressly (*M.T. Yesodei haTorah* 7:1) and the “potential” (*M.T. Teshuvah* 7:5) which renders prophetic illumination dependent upon the charismatic caprice of the Creator. According to the language of Maimonides (“and although . . .”), in this respect as well the potential inherent exceeds the avowals of ethics.
 - c. The authority, the free choice subsumed by human ethics (*M.T. Teshuvah* 5) is challenged by the unbridgeable metaphysical distance between the Creator and creation. Here again, one finds the chasm of the “perhaps” in a world of certainty (see the critique of Rabad in this connection) and stress is placed upon the “possible.”

Although these examples are based on the theological principle of divine omnipotence, the concept may well entail confusion in the human perspective of ethics but it assures the absolute purity of ethics on the part of the Divine.

I wish, however, to enlarge on quite a different example that rests on the theological concept of the Covenant. This concept runs throughout Judaism from scriptural times down to the present and gives rise to a serious problem in ethics in two respects, from the viewpoint of creation and from the viewpoint of the Creator.

The covenant requires that both – the Creator and creation, God and man – should “seize the cloak” of history. History in its perceptible and ethical and metahistorical dimensions does not operate except through the conjunction of heavenly and terrestrial forces, acting in reciprocal fashion. This conjunction restricts simultaneously the capacity of creation (in any event limited) and the capacity of the Creator since the latter depends on the free choice of the former.

This restriction of Divine capacity introduces into ethics a state of uncertainty, the potential as against the actual, the spontaneous as against the mechanical, the possible as against the determined. It places the entire complex of creation in doubt simultaneously from the side of the created and from the side of the Creator. The created cries

“All this and (only) perhaps!”² and the Creator cries in the very act of creation “My world, My world, would that it persist.”³

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An instructive example of two-dimensional moral uncertainty is to be found when judgment is given. A murderer is sentenced to death and is executed in accordance with the law of the Torah that was given to the Jewish people on Sinai. Observe how the greatest Sages cast doubt on the entire matter and how Maimonides left it questionable instead of seeking a compromise between law and ethics.

The tragedy of passing judgment is two-fold, the human and terrestrial and the Divine and heavenly. In the contemplation of human understanding, law and justice are seemingly done on earth. The procedure ordained by the Torah is so precise that we can be sure that were an iota of doubt in favour of the accused to remain, the court would not pass sentence of death. We know that a court which pronounces the death sentence once in seven years (and some say once in seventy years) was regarded as a bloody assize. On earth all are satisfied when the law is carried out. Even “the relatives (of the executed person) came and greeted the judges and witnesses, as if to say, we have no ill-feelings against you.”⁴

Thus it is on earth but not in heaven. There, God may not be happy with the carrying out of the law for in His heart the fear may lurk that justice and law were not done. He does not condemn the judges or the witnesses, not even the murderer sentenced to death, but Himself. “When man suffers, R. Meir said, what does the Divine Presence ut-

² *Hagigah* 4b: “When R. Ami came to the following verse he wept – ‘Seek righteousness, seek humility, perhaps ye shall be hid in the day of the Lord’s anger’ (*Zeph.* 2:3). He said ‘All this and (only) perhaps?’ R. Assi when he came to the following verse wept – ‘Hate evil and love the good and establish justice in the gate, perhaps the Lord will be gracious’ (*Amos* 5:15). He said ‘All this and (only) perhaps?’” See also *Ta’anit* 25a regarding R. Elazar b. Pedat – “All this and (only) possibly?”

³ *Bereshit Rabba* 9:4 – “R. Hama b. Hanina said ‘A king built a palace and was pleased when it was finished. He said “Oh palace, may you always give me pleasure as you do now.’” Thus the Holy One blessed be He says of His universe ‘Oh My universe, may you be pleasing to Me at all times as you please Me now.’”

⁴ *M. Sanhedrin* 6:6.

ter? 'My head is too heavy for Me, My arm is too heavy for Me.' And if God so grieves over the blood of the wicked that has been shed, how much more so over the blood of the righteous."⁵

The quality of such Divine grief, the significance of the anthropomorphisms in R. Meir's remarks is debated in the *Gemara* by Abaye and Raba, a debate which asks for further explanation.⁶ Most commentators, not unexpectedly, follow the royal path of rationalisation and endeavour to veil the challenging aspect of the theological conception of R. Meir. Clearly, however, here as in many other places R. Meir took an irrational course, the path of the esoteric. I cite only two commentators who took the same path. One is R. Simeon ben Yohai, the leading disciple of R. Meir himself. The other is the author of the celebrated commentary on the *Mishnah*, *Tiferet Yisrael*, Rabbi Yisrael Lipschitz, the Rabbi of Danzig in the 19th century. We shall see to which side Maimonides leaned in his Commentary on the *Mishnah* at the very middle of the period that stretches between R. Meir and *Tiferet Yisrael*.

Midrash Bereshit Rabbah (22:23) does not deal with the ordinary murderer but with the first, Cain, as the archetype, and we can see at whose door R. Simeon ben Yohai lays the guilt. "R. Simeon ben Yohai said: It is difficult to say and one cannot explain it – Two athletes were wrestling before the king. The king might if he so wished release them both but he let one overcome his rival and kill him. He shouted, 'Who will declare the law before the king?' So 'the voice of thy brother's blood crieth unto Me' (*Gen.* 4:10)."

In the same manner as R. Simeon ben Yohai, the expression "who will declare the law before the king" is explained by Rabbi Issachar Ber the son of Rabbi Naftali Katz in his *Matanot Kehunah*.⁷ "The stricken man shouts 'Who will claim my law and my blood from the king since my blood is upon his head for had he wished he could have stayed the hand of the striker.' The words "my blood is upon his head" echo the obscure phrase in the *Mishnah* "My head is too heavy for

⁵ *Ibid.*, 5.

⁶ *Sanhedrin* 46b.

⁷ *Matanot Kehunah* is a commentary on *Midrash Rabba*, first published in Cracow in 1597 and still to this day esteemed as the classic commentary in the popular editions of *Midrash Rabba*.

Me.” Thus according to both R. Simeon ben Yohai, the disciple of R. Meir, and the Rabbi of the sixteenth century, the disciple of Maharal of Prague, what is difficult to voice and explain is the search for ontological guilt in the evil of murder. The conclusion is that the responsibility does not rest upon the created (nor upon the judge or witness or even the murderer himself) but as it were on the Creator.

In precisely the same manner *Tiferet Yisrael* explains the matter:

Had I no misgivings it would seem to me that what is involved in the debate between Abaye and Raba centers on what has been said (*Sukkah* 52b) that every day God repents for creating the Evil Inclination. What this means is that when man is punished for his sins the Divine Presence mourns over the eclipse of His honour in two respects. First as to His wisdom, since the wise man foresees the future that man can certainly avoid sinning, and the seat of wisdom in man lies in his mind and why did God create it? Secondly, His omnipotence has been diminished because He cannot save man from his affliction and punishment and his acts have prevented the arm of the Lord to be manifested to him. . . . All this involves two kinds of diminution. According to Abaye, it is said respectfully. According to Raba it is a diminution of honour in the eyes of mankind that is led to think that there is no force in His wisdom or capacity.

And here is Maimonides' explanation:

That is to say, what can the One who directs mankind utter when He wishes to respond to a person who grieves in his suffering? “There is no pleasure in this deed nor in its remission.” And as for what was said in the days of R. Meir “My head is too heavy for Me, My arm is too heavy for Me,” God says “The death of this sinner entails the ruin of all existence but to leave him alive is not good.” And that is said of the guilty, how much more so of the one who has killed innocently.

Maimonides does not evade the difficulty of the problem. On the contrary, he accepts the bold approach of R. Meir and R. Simeon ben Yohai, so admirably phrased by the author of *Tiferet Yisrael* in our

own time.⁸ Maimonides equally bases his explanation on the presumed incapacity of the Divine, a presumption that apparently conflicts with Maimonides' usual optimism with regard to law and justice. It is he who is the well-known propounder of improvement of reality by the good and the right and their reward and of the deficiency of reality that lies in sin and evil which will in the fullness of time be duly punished. He sees in the death of the sinner the collapse of existence since here the ethical perspective is not human but Divine.

He puts us in the very centre of the "perhaps" and lays aside the problem of evil. Is not this a case of the breaking of the Tablets? To Maimonides also, in my view, there is due the praise that Resh Lakish extended to the Patriarch Moses, the praise with which Rashi ends his commentary on the Torah "You did well in breaking the Tablets."

⁸ Rabbi Yisrael Lipschitz lived in the last century (1782–1860). His commentary on *M. Sanhedrin* was published in Danzig in 1845.

LAW AND JUSTICE IN THE THOUGHT OF MAIMONIDES

*Yonah Ben-Sasson**

Introduction

Inquiry into the meaning of the values of “law” and “justice” in the thought of Maimonides draws on his views on the subject set out in different chapters of *The Guide for the Perplexed*, and this in the spirit of the *Guide* itself, that if one wishes to grasp the totality of the treatise, each chapter must be taken in close association with the others.¹

The inquiry has two aspects: On the one hand, to the extent that the meaning attaching to these values – which are also the very basis of the *Halakhah* – converge, elucidation is necessary. On the other hand, to the extent that inconsistency and contradiction manifest themselves, then according to the guidelines of Maimonides himself they are part of his thought and call for further study. Thus, the *Guide* tells us at the very outset that the contradictions and inconsistencies it may reveal are deliberate and requisite for its purpose, that they are accountable by the fifth “cause”, the need for study and understanding, and by the seventh, “the necessity to conceal some parts and disclose others regarding very obscure matters.”² They are not, however, inconsistencies of view on a particular matter or its essentials.” If divergencies are to

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¹ *The Guide for the Perplexed, Introduction to the First Part.*

² *Ibid.*

be found, in this treatise, they are due to the fifth and seventh causes.³ Such inconsistencies acquire further deliberation so as to establish the reason and purpose thereof. Only in this manner may the essence and profundity of his thought be conceived.

As for the methodological foundation of Maimonides, one must commence by explaining that the force of his thinking lies in the fact that he addresses himself to the fundamental nature of things, and their significance with regard to existence in its entirety. Hence, if one wishes to understand the teaching of the *Guide* on any particular matter – in the present case the meaning of law and justice – one must delve into the very nature of the subject in the context of existence to the fullest extent. Only then will the answer be forthcoming.

It will become apparent that Maimonides' teaching about law and justice derives from two "alternative" sections of the work – one which deals with his ethical-social teaching propounded as part of his views on the rationale of the Commandments; the other which deals with his religious metaphysical teaching treated in the course of elucidating the theological-metaphysical significance of law and justice.

The Ethical-Social Understanding of Law and Justice

Two "intents" or purposes are subsumed by the reasons for the *mitzvot* generally, as given by the *Guide*: an individual-intellectual "intent" – the welfare of the soul, the essential of faith regarding iniquity, and a social-moral "intent" – the welfare of the body, directed towards the attributes of virtue and moral conduct.

The Law as a whole aims at two things: the welfare of the soul and the welfare of the body. As for the welfare of the soul, it consists in the multitude's acquiring correct opinions corresponding to their respective capacity. As for the welfare of the body, it comes about by the improvement of their ways of living one with another. This is achieved through two things. One of them is the abolition of their wronging each other. This is tantamount to every individual among the people not being permitted to act according to his will and up to the limits of his power, but being

³ *Ibid. ad finem.* Nowhere in the *Guide* are inconsistencies termed contradictions but alternatives.

forced to do that which is useful to the whole. The second thing consists in the acquisition by every human individual of moral qualities that are useful for life in society so that the affairs of the city may be ordered.⁴

It follows from all this that the social-moral aspect rests on utility, “the benefit of the whole,” “useful qualities,” mainly concerned with society and the proper ordering of societal affairs.

It is clear that the ethical-social view of law and justice belongs by its very nature to those Commandments inspired by a social-moral intent, and indeed the *Guide* suggests this in the course of examining the rationale for the Commandments concerned with physical well-being where the social-moral reason is expressly mentioned.

Four of the fourteen “general” classes of Commandments set out in the *Guide*⁵ pertain to the social-ethical area and these can be classified into “law” and “justice”.

Law serves as a description of a general grouping of Commandments concerned with the administration of law. This description is proposed as being appropriate to these Commandments.

The fifth class comprises the *commandments* concerned with prohibiting wrongdoing and aggression. They are those included in our compilation in the *Book of Torts* [*Sepher Neziqin*]. The utility of this class is manifest.

The sixth class comprises the *commandments* concerned with punishments, as for instance *laws concerning thieves and robbers and laws concerning false witnesses* – in fact most of the matters we have enumerated in the *Book of Judges* [*Sefer Shophetim*]. The utility of this is clear and manifest, for if a criminal is not punished, injurious acts will not be abolished in any way and none of those who design aggression will be deterred. . . .

The seventh class comprises the laws of property concerned

⁴ Part III, ch. 27, 5.

⁵ *Ibid.* ch. 35. There is in fact a fifth group pertaining to this area, which propounds the ideal of personal morality. The third group consists of Commandments enumerated in the *Laws relating to Opinions* and it is well known that by virtue of moral qualities human society is perfected, which is essential for the proper ordering of human affairs.

with the mutual transactions of people, such as loans, hire for wages, deposits, buying, selling, and other things of this kind. Inheritance also belongs to this group. These are the *commandments* that we have enumerated in the *Book of Acquisition and Judgments* [*Sepher Qinyan ve-Mishpatim*]. The utility of this class is clear and manifest. For these property associations are necessary for people in every city, and it is indispensable that rules of justice should be given with a view to these transactions and that these transactions be regulated in a useful manner.⁶

The ethical-social significance of these groups of Commandments is patent. Each group lays emphasis upon the rationale of utility and its ethical-social benefit. *In toto* the category “law” is the core of the central intent of the theory of physical well-being, as that is set out at the beginning of the section dealing with the rationale of the Commandments.⁷

In the practical field *justice* characterizes the views of the *Guide* in the widest conception of this term and is commensurate with most aspects and features of this field – the Commandments in the Book on *Zera'im*, the laws relating to valuations and anathemas, the rules regarding creditors and debtors and slaves. The area over which justice so ranges and the multiplicity of its modes in the *Guide* follow necessarily from the moral-social principle: the objective of physical well-being from the viewpoint of an ordered society which works for the benefit of the whole “so that the affairs of society are properly ordered.”⁸

The aggregate of the Commandments of “justice” come within the fourth group. This group includes the Commandments concerning charity, loans and gifts and what ensues therefrom, such as valuations, anathemas, the law relating to loans and slaves and all those commandments set out in the Book of Seeds (*Zera'im*). Their rationale is clear since their utility accrues to every one, “for one who is rich today . . . will be poor tomorrow,” and vice versa.⁹

⁶ *Ibid.*

⁷ *Ibid.* ch. 27.

⁸ *Ibid.*

⁹ *Ibid.* ch. 35.

In the chapter dealing with this system of Commandments, the *Guide* proposes a more detailed explanation of the socio-ethical theory of “justice” in respect of personal qualities and deeds, general and particulars:

The *commandments* comprised in the fourth class. If you consider all these *commandments* one by one, you will find that they are manifestly useful through instilling pity for the weak and the wretched, giving strength in various ways to the poor, and inciting us not to press hard upon those in straits and not to afflict the hearts of individuals who are in a weak position.

As for *gifts to the poor*, their meaning is manifest . . .

As for the *second tithe*, it is commanded that it should be spent exclusively on food in Jerusalem. For this leads of necessity to giving some of it in alms; for as it could only be employed on nourishment, it was easy for a man to have others have it little by little. Thus it necessarily brought about a gathering in one place, so that brotherhood and love among the people were greatly strengthened.

As for the *fourth-year fruit of planting* it falls into the same class as the prescriptions concerning the *offering*, the *cake of dough*, the *first fruits*, and the *first of the fleece*; for all first produces have been assigned to God so that the moral quality of generosity be strengthened and the appetite for eating and for acquisition be weakened. The *Priest's receiving the shoulder, the two jaws, and the stomach* has the same meaning.

With regard to all the *commandments* that we have enumerated in *Laws concerning the Sabbatical Year and the Jubilee*, some of them are meant to lead to pity and help for all men.

All the *commandments* that we have enumerated in *Laws concerning Estimations and Anathemas* likewise deal with charitable donations. Some of these go to the *priests*, others for *repairing the Temple*. Through all this, likewise, the moral quality of generosity is acquired, and the result achieved that man holds property in slight esteem where God is concerned, and is not miserly. For most of the evils that arise among people in the cities are due only to a furious desire for possessions and for increasing them and to the passion of acquisition.

Similarly if you consider one by one all the *commandments* that we have enumerated in *Laws concerning the Lender and the Borrower*, you will find that all are imbued with benevolence, pity, and kindness for the weak; . . . It is said: ‘Thou shalt not deliver a slave unto his master’ (*Deut. 23:16*).¹⁰

The substance of this chapter of the *Guide* teaches that *justice* rests on two conjoint cornerstones of ethics – personal qualities and social acts. The first which leads the individual and society to acts of “justice” is mercifulness (compassion and clemency) and beneficence. These qualities are frequently mentioned in express terms in the *Guide*.

Justice is also intended to avert the negative qualities that work against beneficence – the craving for wealth and honors “for most of the evils that arise among people in the cities are due only to a furious desire for possessions and for increasing them and to the passion of acquisition.”

The connection between moral qualities and action are abundantly explained. The finer qualities are acquired by practising beneficence and helping others. For this reason the *Guide* also lays bare the educational aspect of acts of “justice”: some such acts have as their purpose not the practical utility that lies in benefitting others but their moral educational importance for the actor – the inculcation of beneficence and mercifulness and the eradication of the negative qualities of craving for wealth and honors. An act of singular “justice” – working righteously for human freedom and not yielding up slaves – is also directed to nursing the important quality of “helping those who help us.”

The Religious-Metaphysical Aspect of Law and Justice

This aspect is propounded in the *Guide* in the course of clarifying the terms “law” and “justice” in their theological-metaphysical sense. Here, as with other terms, reliance is placed on the theory of the *Guide* regarding the distinction between the two modes of interpreting the language and terms used in Scripture: the philological that explains the content of an expression linguistically, and the contextual.

Know with regard to every term . . . we open a gate and draw your attention to such meanings of that particular term as are useful for

¹⁰ *Ibid.* ch. 39.

our purpose, not for the various purposes of whoever may speak the language of this or that people. As for you, you should consider the books of prophecy and other works composed by men of knowledge, reflect on all the terms used therein, and take every equivocal term in that one from among its various senses that is suitable in that particular passage. These our words are the key to this Treatise . . .¹¹

The *Guide* lays down clearly that the concern of his commentary is directed towards the substance of a matter in its spiritual universe. Such an approach, it is affirmed, is basic to and governs the understanding of *The Guide for the Perplexed*. According to this mode of interpretation, the latter forms an integral part of speculation in this area. The terms “law” and “justice” are defined in this light, and the discussion demonstrates that their substantive place lies in the complex of Divine qualities:

This chapter includes an interpretation of the meaning of three terms that we have need of interpreting.

The word *sedaqah* is derived from *sedeq*, which means justice; justice being the granting to everyone who has a right to something, that which he has a right to and giving to every being that which corresponds to his merits. But in the books of the prophets, fulfilling the duties imposed upon you with regard to others is not called *sedaqah* in conformity with the first sense. For if you give a hired man his wages or pay a debt, this is not called *sedaqah*. On the other hand, the fulfilling of duties with regard to others imposed upon you on account of moral virtue, such as remedying the injuries of all those who are injured, is called *sedaqah*.

Therefore it says with reference to the returning of a pledge: *And it shall be sedaqah unto you (Deut. 24:2)*. For when you walk in the way of the moral virtues, you do justice unto your rational soul, giving her the due that is her right. And because every moral virtue is called *sedaqah*, it says: *And he believed in the Lord, and it was accounted to him as sedaqah (Gen. 15:6)*. I refer to the virtue of faith. This applies likewise to his dictum, may he be

¹¹ *Ibid.* Part I, ch. 8 and the beginning of ch. 10.

exalted: *And it shall be sadaqah unto us if we take care to observe (Deut. 6:25).*

As for the word *mishpat*, it means judgment concerning what ought to be done to one who is judged, whether in the way of conferring a benefit or of punishment.

Thus it has been summarized that *hesed* is applied to beneficence taken absolutely; *sadaqah*, to every good action performed by you because of a moral virtue with which you perfect your soul; and *mishpat* sometimes has as its consequence punishment and sometimes the conferring of a benefit.

. . . . When refuting the doctrine of divine attributes, we have already explained that every attribute by which God is described in the books of the prophets is an attribute of action. Accordingly He is described as *hasid* [*one possessing loving-kindness*] because He has brought the all into being; as *saddiq* [*righteous*] because of His mercy toward the weak – I refer to the governance of the living being by means of its forces; and as *Judge* because of the occurrence in the world of relative good things and of relative great calamities, necessitated by judgment that is consequent upon wisdom. The *Torah* uses all three terms: *Shall the Judge of all the earth (Gen. 18:25); Saddiq [righteous] and upright is He (Deut. 32:4). And abundant in hesed [loving-kindness] (Ex. 34:6).*¹²

Thus the main thrust of the *Guide* regarding “law” and “justice” is to their theological-metaphysical significance. Every term descriptive of the Divinity points to acts of mercy, in which respect God is *tsaddik* (righteous), and to acts required by law consequent upon wisdom, in which respect He is *shofet* (judge).

Moreover, the definition of “law” and “justice” as basic values, as set out in the *Guide* synecdochically, is entirely subsumed under the four following matters.

1. As to the nature and force of the obligations which law and justice involve, the *Guide* explains that “law” is an act which “the law entails consequent upon wisdom,” a legal obligation, and that also emerges from the acts of “law” detailed in the context. “Justice”, however, is defined as a matter of ethics. “Every good action you perform by reason of moral virtue.” The *Guide* indeed distinguishes between

obligations required by law and “wisdom” and that “by reason of moral virtue” – “in the Prophetic Books the obligations which you owe to others . . . for if you give a hired man his wages or pay your debts, this is not called *tsedakah*.”

It is pertinent to note that this fundamental distinction is also to be met in certain formulations of modern ethical theory. “A moral law asserts ‘This is good in all cases’ . . . and a law, in the legal sense, ‘It is commanded that this be done, or be left undone, in all cases.’”¹³

Nevertheless, one should bear in mind that the theological-metaphysical quality of “law” and “justice” preponderates when the nature and force of the obligations involved are reacted to beyond the letter of the law and beyond normal morality.

2. The area of application of acts of *law* and *justice* as values is inherent in the sphere of the Divine, the *Guide* informs us when defining them. In their metaphysical generality they are valued determined by existence in its full manifestation. “Law” is that which “transpires in the world” and in context this implies the world in its full actuality. The meaning of “justice” is clearly defined – “to carry out the obligation you owe others”; that is to say, the human world as the area of application forms but part of the larger expanse in which they operate, which is existence in its entirety.

3. The apprehension of law and justice. Law as defined in the metaphysical sense in relation to the degree of its apprehension lies concisely in its being “consequent upon wisdom,” and the nature of this wisdom, according to the *Guide*, is elucidated by connecting one chapter with another.¹⁴ In this manner, what is said about legal acts of the Divine is in Its universe and the attribute “judge” has reference to what is set out in detail regarding the Divine action and the acts of a human leader who likens himself to the Divine.

- a. “Every attribute by which the Divinity is described . . . is an attribute of action . . . According to what recurs in the world

¹² *Ibid.* Part III, ch. 53. This chapter is central for the theological-metaphysical view of Maimonides.

¹³ G.E. Moore, *Principia Ethica* (1965) 126.

¹⁴ See text to note 1 above.

from the concurrence of good things and great evils . . . He is called *Shofet*.”¹⁵

- b. “Those who govern the world . . . should be likened by these attributes . . . Sometimes they should be merciful and clement . . . Sometimes . . . they should be zealously watchful.”¹⁶

Since a relationship exists between the Divine actor in His capacity of “Judge” and of “Governor”, it is reasonable to compare the degree of apprehension in both respects, except that one must draw inference from the explicit to the implicit, from other sources to what is implied regarding the law.

- i. “Law is consequent upon wisdom.”¹⁷
- ii. “Wisdom” is “the apprehension of the truth, the purpose of which is the apprehension of the Divinity.”¹⁸
- iii. “the knowledge of [God’s] attributes is conveyed in his saying: *Show me now Thy ways, that I may know Thee (Ex. 33:13)*. Consider the wondrous notions contained in this dictum. For his saying, *Show me now Thy ways, that I may know Thee*, indicates that God, may he be exalted, is known through His attributive qualifications; for when he would know the *ways*, he would know Him. . . . For he was told: *I will make all My goodness pass before thee (Ibid. 33:19)*. This dictum – *All my goodness* – alludes to the display to him of all existing things of which it is said: *And God saw every thing that He had made, and, behold, it was very good (Gen. 1:31)*. By their display, I mean that he will apprehend their nature and the way they are mutually connected so that he will know how He governs them in general and in detail. This notion is indicated when it says: *He is trusted in all My house (Num. 12:7)*; that is, he has grasped the existence of all My world with a true and firmly established understanding. For the opinions that are not correct are not firmly established. Accordingly the apprehension of these actions is an

¹⁵ *The Guide Part III.*, ch. 53.

¹⁶ *Ibid.* Part I, ch. 54.

¹⁷ *Ibid.* Part III, ch. 53.

¹⁸ *Ibid.* ch. 54.

apprehension of His attributes, may He be exalted, with respect to which He is known.¹⁹

These three sources clarify the level of the apprehension of the wisdom needed to foster the “law”.

This process of inference is necessitated also by the terms common to the three conjoined sources – wisdom, truth, attributes, awareness of the Divine – as well as by the features common to the sources: the comparison between the content of an act of judgment and that of the modes of governance, and the comparison necessary following therefrom regarding the levels of apprehension required to attain these activities.

In the metaphysical sense “justice” is also directed to Divine intervention “embracing the pillars of the universe.”

“*Tsedek*” means “granting to everyone that which he has a right to, and giving to every being that which corresponds to his merits . . . According to His governance of living beings by virtue of their power, he is called *shofet*.”²⁰

Thus justice as well bears a relationship to the degree of Divine wisdom, in the sense of a knowledge of existence and its governance. Accordingly a degree of perceiving the law is also called for in respect of acts of justice in the metaphysical sense, except that here apprehension in the realm of justice perception manifests itself also in the inner world of man and forms a complete spiritual autonomy. And justice applies to every good you do to perfect your spirit.²¹

To elucidate, the *Guide* does not propound that in the human world the attainment of law and justice can prevail in perfection. Instead it outlines them as an ideal that man should contemplate so as to rise to such level of apprehension as he is capable of effectuating in exercising law and justice.

4. The purpose of law and justice in the metaphysical conception “The judgment is God’s” (*Deut.* 1:17). This verse has a profound meaning in its theological-metaphysical significance. Judgment is not founded

¹⁹ *Ibid.* Part I, ch. 54.

²⁰ *Ibid.* Part III, ch. 53.

²¹ *Ibid.*

on reasons of utility alone but includes the striving towards the good ordering of the universe in the manner which the standards of “wisdom” require, “the true understanding” of existence and its proper ordering as a Divine act.²²

That is also true of “justice”. Here also, what is determinative is the striving towards the due benefit of all existence. Furthermore, the theological-metaphysical conception of “justice” is directed towards man and his inner world. Utility and the good of others are not alone its basis. Metaphysically an act necessitated by virtue of justice means that the good should be done as a moral virtue for the perfection of one’s own spiritual qualities.

The purpose of acts of law and justice consists theologically-metaphysically of two things: an endeavour to order the universe according to Divine purpose – in the sense of Divine wisdom – the density of the world and everything therein, the values of faith as part of his very soul.

The Conjunction of the Two Views of Law and Justice

The two views of law and justice are complementary. They come together to form one complete entity. The foundation is the theological-metaphysical, the secure substantive structure of these values which sustains and directs creation. Its mission is to man as a believer who is perfected in his innermost part.

The ethical-social represents the “descent” of law and justice into the practical human world, actual existence of faith. At this level they determine the operation of wisdom and the act of “benefitting” in human terms in order to set up a perfect society and a perfect man within human existence. The ethical-social aspect of law and justice, that it is concerned with the continuous ordered legality of the universe of human society, lies in this area in the substantive translation of the objectives of law and justice as understood in religious-metaphysical terms that embrace the entirety of the universe and its hidden parts.

Finally, the importance of this dual understanding of law and justice merits elucidation. The fact that the ethical-social finds its roots in the

²² See Y. Ben Sasson, *The Elements of the Ethics of Society and the Family in the Thought of Maimonides* (1976).

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theological-metaphysical bestows on law and justice in their realisation in the human world the force and eminence of the Divine. The exaltation of Divine qualities and the level of their apprehension reach into the mystery of the Divine.²³

²³ The Jewish view of the Commandments and the *Halakhah* as Divine law attaches to this emanation a concretely defined meaning.

MAIMONIDES AND EQUITY

*Aaron Kirschenbaum**

Aristotle defines equity as follows:

This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.¹

In the course of developing this definition of equity, Aristotle makes a number of points:

- a. A law is always a general statement.
- b. In order to make a general statement the law takes into consideration the majority of cases – consideration of all cases would render the formulation of a general statement impossible.
- c. Thus the law is not unaware of the inadequacy of its generalization.
- d. This does not imply that the law is wrong, for the inadequacy – inherent in every generalization – is not in the law nor in the lawgiver but in the special nature of the case.

Aristotle continues:

When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the law's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and

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¹ Aristotle, *Nicomachean Ethics* 5:10.

would have enacted if he had been cognizant of the case in question. Hence, while the equitable is just . . . , it is not superior to absolute justice but only to the error due to its absolute statement.

The Aristotelian exposition of the concept of equity finds its fullest expression in Jewish literature in the homiletical commentary of R. Isaac Arama on the Pentateuch.² R. Arama's ideas were adopted by Don Isaac Abarbanel and expounded by the latter in a simpler and more pedagogic form.³ We therefore present R. Abarbanel's commentary on *Deuteronomy* 17:11 which states: "According to the law which *they* shall teach thee, and according to the judgment which *they* shall tell thee, thou shalt do; thou shalt not turn aside from the sentence which *they* shall declare unto thee, to the right hand, nor to the left."

The pronoun *they* in the verse refers to the priests, Levites and judges who sit in judgment in the place which the Lord shall choose (verse 9), *i.e.*, the High Court (*Sanhedrin*) in Jerusalem.

Taking the last words of the verse as their point of departure, the *Tannaim* enunciated the following statement: "Even if they declare that left is right and right is left, obey them."⁴

Commentators disagreed as to the exact intent as well as to the underlying rationale of this rabbinic dictum. Is blind obedience to the decisions of the High Court really what the Rabbis promulgated on the basis of the scriptural verse? Some say, No: It may appear to an observer that the Court is declaring left to be right and right to be left, but he is mistaken. The verse (in its rabbinic formulation) does not describe the actual facts of the matter but, rather, the subjective impression of the individual citizen; *he* believes the Court to be committing an error. Scripture in effect commands him, Do not be misled by your own opin-

² R. Isaac Arama, *Akedat Yizhak*, Yitro, ed. H. Pollack (Jerusalem 1961) para. 4.

³ The relationship of Don Isaac Abarbanel to R. Arama is a complicated matter; *cf.* B. Netanyahu, *Don Isaac Abarbanel: Statesman and Philosopher* (Philadelphia 1953) 296, note 92.

⁴ *Sifrei*, *Cf.* Finkelstein ed., for variant readings and relevant literature; also H. Ben Menahem, *Extra-Legal Reasoning in Judicial Divisions in Talmudic Law* (unpubl. doctoral diss., Oxford 1978) 192, note 72; also 192–202, which contains an interesting discussion of this rabbinic dictum as essentially a duty-imposing rather than a power-conferring rule.

ion, obey the decision of the Court, for they are undoubtedly correct; after all, they are the many, you are but one, they are scholars, you are inexperienced.

Other commentators view the dictum as indeed legislating absolute obedience, but subdivide into two groups as to the rationale for such obedience.

The first category maintains that the stability of society demands discipline. It is better to have authorities obeyed always, *including the rare instances* when they may be in error, than to have their directives subjected to the scrutiny and scepticism of the citizenry. When each man acts in accordance with his own understanding of right and wrong, the breakdown of law and order is inevitable.⁵ Others maintain that the Torah may not be viewed objectively. Rather it was given to man to be understood and obeyed in accordance with the teachings of the Sages; hence, by definition the Court cannot err.^{6,7}

⁵ *Derashot haRan*, ed. L.A. Feldman (Jerusalem 1973) XI, 200.

⁶ Nachmanides, *Commentary on the Pentateuch, Deut. 17:11*; *Derashat HaRan*, 198–199. Cf. the statements made by (1) Justice Charles Evans Hughes: “We are under a Constitution, but the Constitution is what the judges say it is. (Bartlett’s *Familiar Quotations*, 14th ed., 864), and (2) Justice Robert Jackson: “We are not final because we are infallible, but we are infallible because we are final,” *Brown v. Allen*, 344 U.S. 443, 540 (1953). In religion, however, the problem of how one is to understand the phenomenon of authorized interpretation is a most subtle and complicated question. The Catholic doctrine of Papal Infallibility is a good example. One may view Papal Infallibility as merely asserting that Church doctrine in matters of faith and morals is authoritatively set down, defined or clarified by the Pope; thus, by definition, the Pope cannot err: cf. Hastings’ *Encyclopedia of Religion and Ethics* (1915), s.v. “Infallibility.” Catholics view it otherwise, as “positive perfection,” “a gift of the Holy Spirit”: cf. *The New Catholic Encyclopedia* (1967), s.v. “Infallibility,” “Primacy of the Pope,” “Ex Cathedra.” Nahmanides, cited at the beginning of this note as expounding the doctrine of infallibility by definition, also alludes to a (probable) infallibility by divine grace (see note 8 below). We find both views similarly expressed by Rabbi A.I. Karelitz, *Hazon Ish Hoshen Mishpat, Baba Batra* 8:1 and 12:6 (“Civil law was given to the Sages for definition and exposition”), and *Kovez Iggerot Hazon Ish* I;32 (Divine Providence accompanies exegesis and interpretation). See further: R. Yom Tov Abraham of Seville, *Hiddushai Ritva to Eruvin* 13b, s.v. “elu ve-elu.”

⁷ Y. *Horayot* 1:1 (45,4), cites a tannaitic statement entirely opposed to the Sifrei: It was taught: One might have thought that even if they declare that right is left and left is right, one should obey them. Scripture therefore says [neither] to the right nor to the left – only if they declare that right is right and left is left.

In reviewing the opinions expressed, Don Isaac Abarbanel expresses his opposition to all the above approaches. To say that the High Court – made up of the students, scholars and saints of Israel, and enjoying the Divine Presence in its midst⁸ – could err is utterly inconceivable. To say that the Rabbis are alluding to the subjective impressions of the observer is contradicted by the plain reading of the text.

Abarbanel thereupon offers the following interpretation.

The laws of the Torah are general statements, just and fair. Such, for example, is the rule that the burden of proof rests on the plaintiff. There may be an individual case, with its peculiar circumstances, however, where the rigorous application of Torah law in its generalized form would actually result in a miscarriage of justice. A tribunal faced with this quandary – where the fulfilment of the law denies justice and the fulfilment of justice violates the law – must turn to the priest, Levites and judges of the High Court in Jerusalem, “for the blessed Lord has permitted them and has empowered them to set the Torah law straight and to correct it at their discretion in a specific matter.” To such cases do the words of Scripture, *Thou shalt not turn aside from the sentence which they shall declare unto thee, to the right hand nor to the left*, apply. For despite the fact that they have moved toward “the right” although the letter of the law points to “the left” (or vice versa), in the unique case at hand their “right” is indeed the “right” of the matter, the appropriate decision demanded by the peculiarities of the circumstances. By granting this authority to the Sanhedrin, the divine wisdom of the Torah is able to include and to cope with all people and all cases.

Cf., however, R. Israel Eisenstein, *Amudei Yerushalayyim*, *ad. loc.* Moreover, it is more than doubtful that Talmud *Yerushalmi* would reject the interpretation of Arama and Abarbanel herein presented. In any event, the tannaitic statement as cited in the *Yerushalmi* reminds one of the declaration made by James Otis, “The Parliament cannot make 2 and 2, 5; omnipotency cannot do it. The supreme power in a state is *jus dicere* only; *jus dare*, strictly speaking, belongs only to God”; *cf.* Gordon S. Wood, *The Creation of the American Republic 1776–1787* (University of North Carolina Press 1969) 264.

⁸ *Cf.* *Ps.* 82:1 (referring to every court; T. *Sanhedrin* 1 at end), *Ez.* 45:4 and *Ps.* 37:28 (referring to the Sanhedrin; Nahmanides on *Deut.* 17:11); Nachmanides on *Deut.* 19:19.

Although Don Isaac merely alluded to the rule of civil procedure which places the *onus probandi* on the plaintiff and did not elaborate upon it, he undoubtedly⁹ had the following incident in mind:

There came a brother to Mari b. Isak from [the town of] Be Hozai, saying to him, "Divide [my father's estate] with me."

"I do not know you," he replied. So they went to R. Hisda.

R. Hisda said to the plaintiff, "He [Mari] may be speaking the truth to you, for it is written, *And Joseph knew his brethren, but they recognized him not* (Gen. 42:8), which teaches that he had gone forth without a beard and now appeared before them with one. [So Mari may not recognize you, too, even if you are his brother.] Go then," he continued, "and produce witnesses that you are his brother."

"I have witnesses," he replied, "but they are afraid of him because he is a man of violence."

Thereupon R. Hisda turned to Mari, "Go you, and bring witnesses that he is not your brother."

"Is that the law?," he exclaimed. "The onus of proof lies on the claimant?"

"Thus do I judge in your case," retorted R. Hisda, "and for all other men of violence of your like."

"But after all," he argued, "witnesses will come and not testify [the truth]."¹⁰

"They will not commit two wrongs," he rejoined.^{11,12}

A plain reading of the account yields a bold departure on the part of the judge from the established rules of procedure. A violent defendant may easily stifle all the testimony which is to his disadvantage. Thus, R. Hisda did not hesitate suspending the basic rule which places the burden of proof on the shoulders of the plaintiff and passing it instead

⁹ It is cited in the work of R. Arama upon which Abarbanel based his exposition.

¹⁰ "If they are afraid of me, they will certainly testify in my favor whether it be the truth or not" (Soncino trans.)

¹¹ Witnesses who can testify to your disadvantage may repress their evidence through fear of you, which is one wrong; but they will certainly not commit another by testifying falsely in your favor (Soncino).

¹² *Baba Metzia* 29b; *Ketubot* 17b.

to the defendant himself. People who live by violence are thereby put on notice that they may be subjected to suits in which they will have to provide proof of their innocence even if the actions are instituted by others.¹³

Most commentators do not allow so sweeping a generalization. Shall men of violence who also possess means be made free-for-all targets of meritless law suits? Rather: (a) the court must be convinced that the defendant is in fact a man of violence capable of terrorizing members of the community; (b) the plaintiff does have witnesses and does allege that they have been intimidated; and (c) *then* the burden of proof is placed upon the defendant, *i.e.*, unless the selfsame (intimidated) witnesses testify actively on behalf of the defendant, he will lose the case; the silence of the witnesses thus (exceptionally) works to the disadvantage of the defendant.^{14, 15}

To the superficial observer, R. Hisda's decision was to "the left" whereas the law was to "the right", *i.e.*, he had violated the basic law which places the burden of proof on the plaintiff. Under the specific circumstances of the case, however, R. Hisda's decision was truly to "the right". After all, elementary justice requires that the formal rules of procedure are not to be abused by men of violence for their own benefit.

Thus, when the Rabbis interpret Scripture as commanding the Israelite to obey the priests, Levites and judges of the Sanhedrin even if the latter declare right to be left and left to be right, the wording of their declaration neither indicates that the deviation is the subjective impression of the observer – the deviation is indeed a fact. Nor does their declaration imply that the holy men sitting in the Sanhedrin are fallible – no error in judgment is being committed. The Rabbis are referring to those instances – of no inconsiderable number – where the Court by the necessary dictates of justice is, in the words of Rabbi Isaac Arama and Don Isaac Abarbanel, "correcting" the law because

¹³ *Kesef Mishneh to M.T. Eduṭ 3:12* (at end).

¹⁴ *Rashi; Shittah Mekubezzet (Baba Metzia 29b); M.T. Eduṭ 3:12; cf., however, Tosafot Baba Metzia 29b s.v. "zil"; Resp. Ribash 372.*

¹⁵ In the light of (c) the last exchange between R. Hisda the judge and Mari b. Isak, the defendant, takes on added significance.

of its general nature and applying its true meaning to a specific case – of unique circumstances. Echoes of Aristotle!

Did R. Hisda then deviate from the law or did he fulfil it? Both! He deviated from the letter of the law – in its general formulation. He did not deviate from the law proper. The law as required in the particular circumstances achieved its proper fulfillment.

Thus, when Mari b. Isak objected, “Is that the law?!” the judge retorted, “Thus do I judge in your case” – without answering, “Yes.” For it was indeed a deviation from the formal wording of “The onus of proof lies on the claimant.” We find, however, a variant reading of the talmudic passage, which states, “Indeed, that is the law in your case . . .”¹⁶ It is the law!¹⁷

The doctrine of the “correction” of the Law was rejected by Maimonides. The character of law as a general statement was expressed classically in his *Guide*. He wrote:

Among the things that you likewise ought to know is the fact that the *Torah*, the Law of Scripture, does not pay attention to the isolated case. The *Torah* was not given with a view to things that are rare. For in everything that it wishes to bring out . . . it is directed only toward the things that occur in the majority of cases and pays no attention to what happens rarely or to damage occurring to the unique human being because of the way of determination and because of the legal character of governance. . . . In view of this consideration, it also will not be possible that the laws be dependent on changes in the circumstances of the individuals and of the times, as is the case with regard to medical treatment, which is particularized for every individual in conformity with his present temperament. On the contrary, governance of the *Torah* ought to be absolute and universal, including everyone, even if it is suitable for certain individuals and not suitable for others; for if it were made to fit individuals, the whole would be corrupted and *natata devarekha le'shiurin*, “you would make out of it something that varies.” For this reason, matters that are primarily intended in the

¹⁶ B.M. Lewin, *Otzar ha-Geonim to Baba Metzia* 74.

¹⁷ See the codified formulation in Maimonides, *loc. cit.*; *Tur* and *Shulhan Arukh Hoshen Mishpat* 28:5 and commentaries.

Torah ought not to be dependent on time or place; but the decrees ought to be absolute and universal.¹⁸

In this statement, Maimonides expounds the idea that the *Torah*, the Law, does not pay regard to the isolated case, cannot be dependent on changes in the circumstances of the individuals and of the times; its decrees are absolute and universal. As a result, the rare case or the unusual circumstances may not be covered by the *Torah* in its generality, and the individual involved may be done an injustice.¹⁹

The Maimonidean expressions connoting generality are: *la-rov, al derekh ha-rov*, “according to the majority of cases.”

In a most learned article, the late Professor E.S. Rosenthal has shown the Aristotelian roots of the Maimonidean formulation, which he translates as “for the most part.”²⁰ It is Professor Rosenthal’s contention, however, that the Aristotelian roots of the Maimonidean formulation produced nothing more than the concept of the generality, absoluteness and occasional callousness of the law. With the (Aristotelian) idea of the correction of the (divine) law, bringing it in line with the just, the upright and the good, Maimonides, the Jewish theologian, parts ways. *Torah* law suffers no exception. Divine law – heteronomous – brooks no correction by man and his autonomous ethic.²¹

Thus, there exists a significant chasm between Maimonides’ interpretation of the law and the Aristotelian view of equity. It will be recalled that R. Isaac Arama and Don Isaac Abarbanel²² had adopted

¹⁸ Maimonides, *The Guide for the Perplexed*, ed. and transl. S. Pines (University of Chicago Press 1963) III, 34.

¹⁹ See further *Resp. Rambam*, ed. Blau, 252 (p. 460) and more directly to the point 224 (pp. 398f.)

²⁰ “Al Derekh Harov”, 1 *Peraquim* (1967–1968) 183–224; 2 (1969–1974) 381–383.

²¹ Rosenthal, *op. cit.* 199–204.

²² As to when exactly the Aristotelian concept entered Jewish intellectual circles, historical scholarship has not yet determined. S. Rosenberg, “Once again concerning *Al Derekh Harov*” (Hebrew), in *Jewish Spiritual Leadership in our Time* (Tel Aviv 1982) 90, has shown that at least one hundred years before R. Isaac Arama, Moses b. Joshua of Narbonne in Spain had expressed the idea that one of the functions of the Sanhedrin was to “correct” the law when the formal rules were inappropriate for a case involving unusual circumstances. He has also shown that R. Joseph b. Shem Tov, an older contemporary of R. Arama, similarly adopted the Aristotelian concept of equity.

the Aristotelian doctrine explicitly and *in toto*, utilizing it to explain a number of aspects of Jewish law.

The difference between Maimonides and R. Isaac Arama (*et al*)²³ is best understood by reference to the Mari bar Isak case as adjudicated by R. Hisda. Although civil procedure regularly places the burden of proof on the plaintiff, R. Hisda accepted the allegation of the plaintiff that his witnesses were afraid to testify against Mari bar Isak. The judge therefore ruled that the burden of proof was to be shifted on to the shoulders of the defendant.

How did Maimonides react to R. Hisda's judicial conduct? He simply codified it and included it among all the other rules of procedure and evidence.²⁴ He took no cognizance of its exceptional character and made no mention of the deviation involved. The conclusion is inescapable: Maimonides neither regarded it as exceptional nor viewed it as a deviation of the law. R. Hisda is perceived as simply applying a law that was there all the time.

In a similar fashion Maimonides formulated equitable rules of procedure neither as "corrections" of more general ones nor as relaxations of more formal ones – but rather as rules of procedure pure and simple.²⁵

It would seem to me, therefore, that the divergences between Maimonides and R. Arama regarding equity in Jewish law may be summarized as follows: Maimonides appears to emphasize the general nature of law and the tendency of that general nature to create hardships – even injustices – in certain individual cases. Such cases undoubtedly exist, for the law does not easily bend to adapt itself to

²³ After expounding his (Aristotelian) interpretation of the process of "correcting" general *Torah* law in the name of the *Torah* and rendering a decision appropriate for the individual (or minority) situation, R. Isaac Arama himself states: "However, in Chapter 34 of the same part, he [Maimonides] appears to have been discussing the laws of the *Torah* as being just in a general way [but] not [necessarily] when it comes to specific details. Ponder over his position, for what we have written is correct; the perfection of the divine *Torah* demands that it be as we have written." The influence of R. Arama on subsequent generations is easily discernible; e.g., R. Joshua b. Alexander Hakohen Falk (Poland, 1555–1614), *Derishah* to *Shulhan Arukh*, *Hoshen Mishpat* 1:2.

²⁴ *M. T. Edut* 13:12.

²⁵ *M. T. Edut* 24:1.

exceptional circumstances. R. Arama appears to place greater emphasis on those instances where the law does not depart from the general norm in its desire to achieve greater justice, *i.e.*, the justice appropriate to the facts of the particular case. Thus, whereas R. Arama saw R. Hisda as “correcting” the law because of its general nature, Maimonides understood R. Hisda as merely explaining the law as it is in itself: R. Hisda was correcting not the law but the unreflective impression the literal and superficial wording of the law gives. According to R. Arama, R. Hisda deviated from the law in its generalized form; according to Maimonides he merely appears to deviate from the law.

According to R. Arama, equity in adjudication and equity in legislation have this in common: they are both the product of the deliberate attempt of the Rabbis to have the everyday administration of the *Halakhah* conform to the true meaning and the true endeavour of the Divine Legislator.²⁶ According to Maimonides, rabbinic legislation creates new provisions in the law; rabbinic adjudication creates nothing new.

More to the point, reading Maimonides one gets the feeling that equity in legal interpretation and in decision-making is achieved essentially by the halakhic authority unawares.²⁷ On the other hand, R. Arama and his school conceived equity as being accomplished consciously, knowingly and deliberately. We thus have arrived at a Jewish medieval anticipation – albeit inchoate – of the classical modern jurisprudential debate as to judge-made law and judge-discovered law.²⁸ Whether the Maimonidean approach, being a more static picture of the law, actual-

²⁶ Cf. the comparison made by Benjamin Cardozo of the task of the judge with that of the legislator. Each of them is “legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open space in the law . . . [His] action [is] creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator’s wisdom.” See further D’Amato, “Judicial Legislation”, 1 *Cardozo Law Review* (1979) 63–97.

²⁷ Cf. Rosenthal, *op. cit.*, 234, last paragraph.

²⁸ The debate in Jewish legal literature is a most limited one. The overwhelmingly dominant view (from *Sifrei* to *Lev.* 25:1 to Y. Blaser, *Ohr Yisrael* 89b–90a) is that the law has always been there waiting “to be discovered.” This doctrine has been succinctly expressed by the famous declaration, “Even that which a distinguished student may yet expound in the presence of his teacher has already been declared to Moses at Sinai”; *Y. Pe’ah* 2:4; cf. *Megillah* 19b.

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ly leads to legal conservatism or whether the approach of R. Arama, being more dynamic in its conception of the legal-judicial process, leads to greater legal activism – remains a matter for interesting speculation.²⁹

²⁹ A similar matter for speculation is whether we have here a rare example of a more simplistic view of the law on the part of Maimonides; cf. H. Soloveitchik, “Rabad of Posquieres: A Programmatic Essay”, *Studies in the History of Jewish Society in the Middle Ages and in the Modern World* (Jerusalem 1980) 19.

Political Theory

POLITICAL AND LEGAL PHILOSOPHY IN THE GUIDE FOR THE PERPLEXED

*Eliezer Goldman**

Maimonides' *Guide for the Perplexed* is hardly a work in political philosophy. Yet from a careful study of the *Guide*, one may glean some of the basic principles of politics and law which underlie Maimonides' legal code. This paper is an attempt to present the master's political philosophy in a manner which should facilitate comparison and contrast with current conceptions. Hence, in placing Maimonides' thought within the context of the history of political philosophy, we shall hardly be concerned with his proximate sources such as Alfarabi and Ibn Bajja. There *will* be some reference to Plato and Aristotle with whom most of us are familiar to some degree. Since Maimonides' code (*Mishneh Torah*) is no less important a source for his political and legal theory, a presentation based solely upon the relevant discussions in the *Guide* will, perforce, be partial. Nonetheless, the references in his philosophical work are indispensable for a proper understanding of Maimonides' main principles of political and legal philosophy.

Anthropological Assumptions

- a. Human nature is regarded by Maimonides as both uniform and constant. The uniformity follows from the Aristotelian conception of the "nature" of a species. Human nature is what it is to

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be human. Differences between individuals cannot be accounted for by differences in their natures. Were they to differ in nature, only one of them could be human. The constancy follows from the Aristotelian notion of the eternity of natural species.

- b. Differences between individuals of any species are “accidents” which result from the diversity of the material composition of their bodies. In the human species, this complexity of material constitution gives rise to variegation which is much greater than that found among the individuals of any other kind.¹
- c. Man is by nature political. Individual men are unable to provide their elementary needs, “for the foods through which he exists require the application of some art and a lengthy management which cannot be made perfect except through thought and perspicacity, as well as with the help of many tools and many individuals every one of whom devotes himself to some single occupation.” The same is true of clothing and shelter.²
- d. This is the natural (final) cause of human rationality. However, activity governed by technical and practical reason is not the highest perfection attainable by man. That is identified with the purely contemplative activity, the highest form of which is prophecy.³

The Ends of Political Authority

The social cooperation, which is a condition of a truly human life, cannot be attained without political authority. At the lowest level, this is the case because, in the absence of such an authority, there is nothing to prevent the strong from taking advantage of their strength to the detriment of the weak.

If someone asks you: Has this country a ruler? You shall answer him, yes, undoubtedly. And if he asks: What proof is there for this? You shall tell him: The proof is to be found in the fact that while this money changer is, as you see, a weak and small man and

¹ Maimonides, *Guide for the Perplexed*, II, 40, 381. All page references are to Pines’ translation (Chicago 1963).

² I, 72, 191.

³ See especially III, 54, 634–636.

a large amount of dinars is placed before him, the other, a big, strong and poor individual is standing before him, asking a *carob* of grain as alms and the money-changer does not do so, but reprimands him and drives him off by words. But for fear of the ruler, the poor man would have been quick to kill him or drive him away and take the wealth that is in his possession.⁴

At this level, Maimonides recognizes the existence of what might be called a Hobbesian aspect of the social situation. Such disorderly consequences can only be averted by assertive political authority, which maintains order in society.

It should also be emphasized that the legal order associated with political authority has a positive function as well, most evident in the civil law. Property transactions are requisite for promotion of the welfare of people in any community. "It is indispensable that rules of justice should be given with a view to these transactions and that these transactions be regulated in a useful manner."⁵

Nevertheless, the primary function assigned by Maimonides to political authority is that of overcoming the natural diversity of men, their character traits and preferences. He believes that such diversity conflicts with the need for social cooperation.

As the nature of the human species requires that there be these differences among the individuals belonging to it and as in addition society is a necessity for this nature, it is by no means possible that society be perfected except – and necessarily so – through a ruler who gauges the actions of the individuals, perfecting that which is deficient and reducing that which is excessive, and who prescribes actions and moral habits which all must practice in the same way, so that their natural diversity is hidden through the multiple points of conventional accord and the community becomes well ordered.⁶

This notion of Maimonides is of considerable interest. It raises what, for us, should be a vexing problem – namely, the limits of pluralism.

⁴ I, 46, 97.

⁵ III, 35, 536.

⁶ II, 40, 382.

Few of us would be ready to accept Maimonides' belief that the social order requires suppression of individual differences. The nurturing of such differences is valued by us both for its contribution to the psychic well-being of individuals and as an all-important source of cultural and social innovation. We can hardly follow Maimonides in regarding it as an aberration due to variability in the material composition of human bodies, without spiritual value. At the same time, we cannot entirely dismiss the question of the degree of pluralism which is compatible with social solidarity and community.

It is, however, this conception of Maimonides which enables him to present the Torah as a political constitution. If a primary function of political rule is to "prescribe actions and moral habits" which all members of the community practice, this is certainly accomplished by the halakhic regime in its various ramifications, *including the ritual laws*.

Such a view accords with the conception of the functions of the polity which the philosophical tradition inherited from Plato and Aristotle. The city's highest achievement is the production of men capable of realizing the good life. What is life lived as human life should be lived? This question must be answered not by reference to individual preferences, but to the essence of the human species and its naturally determined perfections. This is both uniform and constant.

Maimonides is aware that this end of politics can be achieved only at the cost of hardship to some individuals. This he considers inevitable, even as it is inevitable that in the natural course of events some individuals come to grief.

The law was not given with a view to things that are exceptional. For in all things that it wishes to bring about, be it an opinion or a moral habit or a useful work, it is directed only toward things which occur in the majority of cases and pays no attention to what happens rarely or to the damage that occurs to the unique human being because of this way of determination and the legal character of governance. For the law is a divine thing, and it is your business to reflect on natural things in which the general utility, which is included in them, nonetheless necessarily produces damage to individuals, as is clear from our discourse and from the discourse of others.⁷

⁷ III, 34, 534.

In this respect, as well as in others, it is no coincidence that the discourse on theodicy in the *Guide* comes immediately before the discussion of the reasons for the commandments.

Such is the peculiar twist given in the *Guide* to the classical idea that the political and legal order are *Kata Ten Physin*, in accordance with nature. Not only are communal living and political authority necessitated by human nature, but even the ideal constitution – which for Maimonides is identical with the divinely revealed law – is modelled after the order of nature. “For the law always tends to assimilate itself to nature, perfecting natural matters in a certain respect.”⁸ The law, like nature, is teleologically organized but, unlike nature, achieves its ends intentionally. This is as true of human legislation as it is of human rule under Divine law.

It is noteworthy that on this matter Maimonides deviates from Aristotle. The latter also appreciated that precisely because of the generality of law it could not always fit the particulars of concrete cases. In such instances one brought into play a method of adjudication known to the Greeks as *epieikeia*, commonly translated into English as “equity”. The equitable is defined by him as “a rectification of law where the law is defective because of its generality.”⁹

It is true that the halakhic system provides procedures such as arbitration which are alternative to formal legal procedure, and that recourse to such procedures is sometimes specifically recommended. However, *dayanim* before whom a case has been brought for adjudication according to halakhic principles do not have the discretion possessed by Athenian courts to deviate from formulated law. True, there is ample room for interpretation, even a possibility of resorting, in certain cases, to minority opinion (a possibility which would have been considerably curtailed had Maimonides’ code indeed become the authoritative source for halakhic decision as he had intended), but the closest analogy in halakhic law to *epieikeia* is actually a form of enforceable supererogation.¹⁰ Maimonides had in mind not only the

⁸ III, 43, 571.

⁹ Aristotle, *Nicomachian Ethics*, 1137B26 (Rackham’s translation, Loeb Classical Library (Cambridge 1962)).

¹⁰ This matter has recently been the subject of considerable discussion. See E.S. Rosenthal, “Concerning for the Most Part”, 1 *Perakim* (1968) 183–224; S. Rosen-

civil and criminal law, but the *halakhah* in all its ramifications. He was thus unable to avoid the conclusion that, because of the generality of halakhic principles, the intended end might not be attained in every instance. Where Maimonides differed with Aristotle, however, was in viewing this not as an interpretation of the law, but rather as necessitated by the human condition.

Law and Moral Education

In yet another respect, Maimonides follows the classical tradition. The quality of life in the political community is dependent on the character traits of its members. "It is well known that human association and society are perfected through the fine moral qualities."¹¹ An important function of the law is moral education, brought about by reward and punishment, which reinforce virtuous habits and restrain vicious ones, by systematic training of the instincts through mandatory practices and avoidances, and by a publicly instituted course of required learning. Maimonides is of the opinion that many of the laws belonging to the class of commandments between man and God, and which appear to promote moral and intellectual virtues pertaining to the individual alone, lead, in fact, to perfecting relations between men, though only in the long run and by devious routes.¹²

This leads us to an important distinction made by Maimonides between laws of primary and secondary intention; laws instituted to bring about acts and omissions desirable for their own sake, and those enacted for the sake of the consequences indirectly promoted by their observance. The best known application of this conception is the laws concerning sacrifices which, in the religious milieu of the time, were indispensable for eradicating idolatry and directing all worship solely to God. However, the idea is capable of generalization as a principle of legal policy. Once we accept the notion that it is a legitimate function of law to shape attitudes and instincts so as to perfect social coopera-

berg "For the Most Part Again", in *Spiritual Leadership in Israel* (ed. E. Belfer) (The Institute for Judaism and Contemporary Thought, Bar Ilan University); A. Kirschenbaum, "Equity in Jewish Law", 13 *Da'at* (1984); J. Levinger, "Halakha and Personal Perfection", *ibid.* In the present context, I have had to state my own view succinctly and therefore dogmatically.

¹¹ *Guide*, III, 35, 335-336.

¹² at 538.

tion within the commonwealth and to promote the tendencies of individuals to be law-abiding, we have a justification for legislation which does not lead directly to the attainment of a desirable goal or the avoidance of an unwanted situation. One may demand or prohibit practices which, while indifferent in themselves, still tend to inculcate habits which protect desirable institutions or prevent infringement of other laws.

The Regulation of Opinion

Since the highest perfection of man is spiritual, the ideal commonwealth is concerned with the intellectual attainments of men, no less than with their material welfare and moral virtue. By its concern with conveying spiritual truths the ideal constitution, one established by prophetic inspiration, may be distinguished from ordinary human legislation.¹³

To understand Maimonides' position properly, one must take into account the esoteric nature attributed by him to knowledge in its highest reaches. Maimonides never failed to emphasize the Socratic distinction between knowledge proper and true opinion. Knowledge was not a matter of subjective conviction, and the religiously oriented knowledge which was man's highest attainment was not a matter of "faith". Unless one's beliefs were firmly grounded in first principles or in demonstration they were not knowledge in the full sense of the word. It was precisely in this kind of knowledge that both the highest human and the highest religious attainment consisted. It could, of course, never be established by legislation. The sole method of achieving it was rigorous intellectual discipline. Even the inspiration of prophecy was available only to those who had attained such knowledge.

However, "scientific" knowledge could be possessed only by a small minority of men who had both the moral and intellectual qualifications. Such knowledge, in its genuine form, could not be communicated to the masses. This was true not only of theology and metaphysics. Even the findings of natural science, as understood by Maimonides, must be withheld from them. If, for the initiates, knowledge was established by its procedures of proof and tested by autonomous

¹³ II, 40, 384.

criteria, for the masses there were opinions which must be dogmatically inculcated by way of law. The latter fell into two groups: true opinions which were of importance just because they were true. Their full import might not be properly understood, but could be grasped in their essentials. Thus, even women and children must come to know that God is incorporeal, though none of them may appreciate the implication that no emotions may be attributed to Him. In fact, the belief that He may be angered by the actions of men belongs to the second category of opinions the teaching of which must be provided by law. These are opinions which may not be literally true. "Such, for instance, is our belief that He, may He be exalted, is violently angry with those who disobey Him and that it is therefore necessary to fear Him and to dread Him and to take care not to disobey." The law calls for the adoption of such beliefs, "necessary for the sake of political welfare."¹⁴

The initiates know that in the ordinary sense of the words it is not true that God may be angered. But they also know what contributes to political welfare, why political welfare is the condition of a decent human life, how it aids man in the attainment of his highest good, and that this good is an intrinsic good with respect to which reward and punishment is irrelevant, being its own reward. For the masses, belief that they may anger God by their wickedness, literally and not merely parabolically, is necessary, if they are to be law-abiding.

In this, Maimonides was no doubt attempting to justify the kind of religious dogmatics which he was instrumental in developing. For the notion of beliefs "necessary for the sake of political welfare" he could appeal to a philosophic tradition stemming from the tenth book of Plato's *Laws*.

We, of course, tend to be taken aback at the very idea of laying down opinion by law. In gaining a perspective on Maimonides' views in this matter two factors must be considered. The first is that our own aversion to dictation of opinion is due partly to our "fallible" conception of human knowledge. All that counts as knowledge is, for us, liable to revision. The probability that our errors will be corrected is seen to depend on an open market in ideas and beliefs. The other

¹⁴ III, 28, 512.

factor, of course, consists in our entirely different conception of the moral and intellectual capabilities of ordinary men and women.

The Theory of Punishment

Most of what Maimonides has to say on legal philosophy must be gleaned from scattered remarks. However, he devotes a fairly sustained discussion to his theory of punishment. This is of some interest because of the way he appears to distinguish the purpose of punishment from the criteria for the justice of punishment.

Punishment is indispensable to the polity. Various institutions of the commonwealth, such as the judiciary, are concerned with meting out punishment. One of the chief functions of the ruler is to back the authority of the judges. He in turn draws strength from them.¹⁵ The end of punishment is deterrence, and it is the need for deterrence which dictates the severity of punishment for different kinds of wrongs. Maimonides enumerates four considerations which dictate the harshness of penalties: a) the seriousness of the crime, b) its frequency, c) the temptation to commit the crime – which must be countered with measures sufficient to offset its effects; and d) the ease with which the crime may be performed in stealth. These criteria follow from the deterring function of punishment.

The question of the *justice* of punishment is raised only where liability arises on account of a wrong done to another person. Here again Maimonides seems to be influenced by an Aristotelian conception that justice in such cases is a matter of restoring a state of equality. “In all this the intention is to make the penalty equal to the crime, and this too is a meaning of the expression: *righteous judgments*.¹⁶ So seriously does Maimonides take this idea that he overlooks Aristotle’s statement that such restoration of equality is not to be taken as retribution in the strict sense. What is even more astonishing is that, contrary to rabbinic teaching and to what he himself sets down in his Code, he understands the verse in the Torah, “As he hath maimed a man, so shall it be rendered unto him,” literally. He justifies it by the rather strange explanation that his present purpose “is to give reasons for the texts and

¹⁵ III, 41, 562.

¹⁶ at 559.

not for the pronouncements of legal science.”¹⁷ Possibly, it was the opinion of Maimonides that the texts define the principle of penal justice, whereas the deviant interpretation of the texts arises from considerations other than that of justice.

Be that as it may, the desired deterrent effect of punishment modifies the principle of retribution. Penalties are varied, even in cases of injury to others, by considerations relevant to effectiveness of deterrence.

¹⁷ at 558.

LOCAL LEGISLATION AND INDEPENDENT LOCAL LEADERSHIP ACCORDING TO MAIMONIDES*

*Aharon Nahlon***

Introduction

According to the *Halakhah* the organised body of people of a locality are competent to carry out various functions and to enact binding regulations. The halakhic sources date first from the mishnaic period, where the organised body is called “the townspeople” or “the members of the town.”¹ These townspeople could delegate their powers to the local leadership.² The sources mention various office-holders, such as “the town wardens” (*parnessei ha'ir*)³ and in general the local leaders, “the seven good men of the town”, or as it is put in the Jerusalem Talmud, “the seven members of the town as such.”⁴

The Taxing Powers of the Townspeople

Maimonides holds that “the members of a town may compel one another to erect a wall with gates and cross bar [for the town’s

* In memory of my dear son Elazar who lost his life as a pilot whilst flying over the Suez Canal during the Yom Kippur War, Friday, on the eve of Shabbat Hol Hamoed Succot 16 Tishrei 5734. May he rest in peace.

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¹ *Baba Metzia* 78b and *Tosefta. Baba Metzia* 11:23.

² *Y. Megillah* 3:2.

³ *T. Megillah* 2:12.

⁴ *Ibid.* 26:1, 27:1; *Y. Megillah loc. cit.*; G. Elon, *The History of the Jews in Palestine in the Period of the Mishnah and Talmud* (1953) 109.

fortification], to build a synagogue, and to purchase a Torah Scroll and the Scriptural Books.”⁵

For this rule, Maimonides combines two different sources. The first is mishnaic: “One may be compelled to contribute to the building of a wall, gates and crossbar.”⁶ Nothing is said here about who may be compelled or who has the power to compel. A *Tosefta* is, however, more explicit: “Members of a town may compel one another to build a synagogue,” etc.⁷ From these two sources the general rule is derived that the local organised body is empowered to impose upon local residents the obligation to pay for the appropriate expenditures in respect of all the town’s requirements and forcibly to collect the contributions. In the *Mishnah* the rule is exemplified by reference to the town’s fortification, in the *Tosefta* by reference to the synagogue and the Scriptures.

In a subsequent rule⁸ Maimonides expressly repeats the general rule by citing the *Tosefta* word for word: “Where a person owns premises in another town, the people of that town may charge him for the digging of cisterns, pits and underground cavities and wells If, however, he was resident in the same town *he may be charged with all.*”⁹ That is, he may be required to participate in all the expenditures of the town, even those not specifically mentioned.

That constitutes the general power of inhabitants of a town to impose on all residents dues for covering the town’s expenditure for its requirements, which is a form of taxation.

Powers to Provide for the Convenience of Residents

In addition to the general power of taxation, there was apparently authority to act in providing for the requirements of the residents, not merely such elementary necessities as fortifications or water supply. From Maimonides it may be inferred that the townspeople may

⁵ *M.T. Shekhenim* 6:1.

⁶ *M. Baba Batra* 1:5.

⁷ *T. Baba Metzia* 11:23.

⁸ *M.T. Shekhenim* 6:3.

⁹ In the printed Talmud and the Erfurt Ms. the *beraita* is not complete but is found so in RiF to *Baba Batra* 1:622 and the early authorities (see S. Lieberman, *Tosefet Rishonim*, Part 2 (Jerusalem 1938) at p. 130) as well as in the Vienna Ms. For the variations of reading see *Tosefta* (Zukermandel ed.) 396.

Local Legislation and Independent Local Leadership

appoint certain craftsmen and other like persons to carry out work under supervision of the town. "A person who plants trees for townspeople, which turn out to be a loss, likewise the ritual slaughterer . . . , the cupper . . . and the scribe who makes mistakes in documents and the elementary school teacher who is negligent and does not teach or teaches wrongly, and like craftsmen, where the damage they have done cannot be restored, may be dismissed without [the necessary formal] forewarning since they are warned [of possible dismissal] by presumptively being appointed by the public."¹⁰ Maimonides' source is the Babylonian Talmud¹¹ but this only mentions the elementary school teacher, the gardener, the butcher, the cupper and the town scribe, without Maimonides' addition that these craftsmen are publicly appointed servants and bound to the community. Nor does the talmudic source extend the rule, as does Maimonides, to "all like craftsmen." Maimonides clearly holds that the list set out in the source is not closed: it is left to local discretion as to what craftsmen need to be appointed by the local organised people. He also adds a public reason of his own why they may be removed without warning since the possibility of dismissal is implied in their appointment by the public. Having been so appointed they bear particular responsibility for the quality of their work and they are deemed to have been forewarned from the outset that they might incur dismissal if they caused loss *as public servants*.

It follows from Maimonides' rule that the public is empowered to appoint functionaries of all kinds whose services, in its discretion, are required by residents and whose public appointment will ensure that their work will be responsibly carried out. That is an extension of the authority of the local public, as against what is found in the sources. The addition of "all like craftsmen" in contrast to the limited enumeration in the original source, and the public reason given for their instant dismissal, these additions (perhaps) attach the rule to the authority of the organised community existing at all periods and not only to "the members of the town" of the *Mishnah* and Talmud.

¹⁰ *M.T. Sekhirut* 10:7.

¹¹ *Baba Metzia* 109a-b.

The Power to Vary the Object of Charitable Funds

In addition to taxes, members of a town might collect further sums for a variety of expenditures, and compulsorily when necessary. Thus charitable funds may be collected for division among the needy of the town, as well as separate funds for a soup kitchen (*tamhui*) for all poor persons generally, as is indicated by a *beraita*.¹² For every charitable object separate funds were collected. The question arose whether a fund for one object might be employed for another charitable purpose, and whether a charitable fund might be used to cover other non-charitable town requirements, such as guard duty.

The *beraita* states that “the townspeople may use the *tamhui* fund . . . for whatever purpose they choose.” Maimonides construes the phrase “for whatever purpose they choose” to mean that they may apply the money for any public requirement, even if not charitable. This rule is quite contrary to the view of one of the great early authorities whom Maimonides regarded as his own master, Ibn Migash, who considers doing this as “robbing the poor.”¹⁴

In modern terms this power to transfer one item of the public budget to another is confined to the legislature or its appropriate committee today in Israel.¹⁵ The “halakhic” townspeople may be regarded, therefore, as possessing quasi-legislative powers. It should be noted, however, that this power of the community to vary the purpose to which charitable funds may be devoted applied only to public funds and not to private endowments with defined objects.¹⁶

Maimonides’ ruling as to the management of public moneys is important in respect of public financial management. In medieval times, no general local tax existed, from which the different items of public expenditure might be met. A separate fund was set up for each purpose and requirement, as indicated above. A situation might well arise in which the charity fund would have a surplus but the other funds a deficit. According to Maimonides’ ruling, the townspeople or the com-

¹² *Baba Batra* 8b.

¹³ *M.T. Matenot Aniyim* 9:7.

¹⁴ Ibn Migash, *Novellae* to *Baba Batra* 8b. Maimonides calls ibn Migash his master: *M.T. She’elah uPikadon* 5:6.

¹⁵ See Basic Law: The Budget, 1985, sections 4,11 and 13(c).

¹⁶ See *Resp. HaRambam*, ed. Blau (Jerusalem 1970) 206 and notes thereto.

munity were permitted in such an event to transfer moneys from one fund to another in order to cover shortfalls.¹⁷

The Power to Dispose of a Synagogue

As we have seen, the community might levy dues for the building of a synagogue. Even when the sale of a synagogue became necessary in order, for example, to build a new one, the sale did not deprive it of the sanctity. The purchaser was not allowed to put it to unworthy uses or desecrate it (by turning it into a bath house, for example).¹⁸ If, however, on the sale the seven good men of the town stipulated in the presence of the townspeople in assembly that the synagogue might be desecrated and its use unrestricted, the stipulation was valid since the leaders in association with the assembly of townspeople had the power so to decide. Likewise where the cost of the new synagogue was less than the proceeds of the sale of the old, the balance could be used for any communal requirement, if it had first been so stipulated by the leaders and assembly. Part of the proceeds could be “deconsecrated” and expended on secular purposes. As Maimonides says: “If the seven good men of the town in the presence of the townspeople stipulated at the date of sale that the purchaser might use the premises for profane purposes, it is permitted. . . . So also if they stipulated that any surplus money should become unsanctified . . . they may use it as they please.”¹⁹

In view of the foregoing, the competence of the community to employ freely the surplus of the proceeds of sale of a synagogue for other public requirements when necessary is patently clear.

The Appointment of Leaders and the Majority Rule

How were the leaders appointed? Did they have to number seven persons? According to Maimonides, “If all the townspeople or a majority of them have accepted the appointment of one person all he

¹⁷ For the income of the community in Egypt at that time and the separate funds for different purposes, see A. Ashtor, “Outline of the Image of the Jewish Community in Egypt in the Middle Ages” (1965) 30 *Zion* 73. See also S.D. Goitein, *A Mediterranean Society*, II, *The Community* (1971) 103 ff.

¹⁸ *M.T. Tefillah* 11:17.

¹⁹ *Ibid.* 11:17–18.

does is effective . . . and he may impose conditions as he sees fit.”²⁰ A meeting of the townspeople might also delegate all their powers to one person.

The phrase “all the townspeople or a majority of them” does not appear in the source, in the Jerusalem Talmud,²¹ but seems to have been added by Maimonides himself, thus introducing the idea of majority rule, the power of the majority to make decisions binding upon an opposing minority.

We learn incidentally from this rule of the existence of an organised body of local residents since without it there could be no question of a binding majority decision.

Maimonides’ rule that a majority may make binding decisions seems to be novel.²² We may therefore site an actual occasion when Maimonides followed it. The Jewish communities in Egypt were subject to control at times by the academy of Palestine²³ and at times by the Nagid²⁴ of Egypt’s Jews as a central authority. One public expression of this control was the need to ask for formal permission (*bakashat-reshut*) at the commencement of any public event, such as the preaching of a sermon or the offering up of a prayer. When there was communal strife vis-a-vis the central institutions, the procedure of asking for formal permission was an occasion for controversy.²⁵ The question was put to Maimonides that in a certain place (perhaps Alexandria) a *takkanah* had been promulgated forbidding this procedure, apparently because of the attendant disputes. The *takkanah* had been enacted under oath and any offender had been placed in *herem*

²⁰ *Ibid.* 11:19.

²¹ *Y. Megillah* 3:2.

²² Although in one responsum (Livorno 13) Alfasi writes that the majority of the community should consult with the elders and make a *takkanah* since he does not assign any power to the majority. Maimonides also does not require consultation with the elders. In contrast Rabbenu Tam, a near contemporary of Maimonides, does not recognize the power of the majority. See Mordekhai to *Baba Batra* 480; E.E. Urbach, *Ba’alei haTosefot* (1980) 91. For a discussion on the matter, see M. Elon, *Jewish Law*, 580. See further S. Shilo, “Majority Rule” in *Principles of Jewish Law*, ed. M. Elon, 165; M. Elon, *Takkanat haKahal*, 656.

²³ S.D. Goitein, *The Settlement in Palestine at the Beginning of Islam and in the Period of the Crusades* (Jerusalem 1980) 52 ff.

²⁴ Goitein, *A Mediterranean Society*, II, 33.

²⁵ *Ibid.* 20 ff., 164.

(ostracism). The question was whom did the oath bind.²⁶ Maimonides' reply was that the oath was not binding upon any person who had not actually sworn or accepted it. It was inconceivable that "one should give an oath and another be forbidden." Nevertheless even for those who had not taken the oath the procedure of asking permission was prohibited because of the prohibition against forming contending groups or factions.²⁷ "The Jewish people of every congregation and community must form one band, it must not indulge in discord for one knows what that may entail." All this applies where the oath was taken by the majority; if only a minority had sworn, "their view need not be taken account of בטלו במיעוטן" "and while they were bound not to seek permission, they were in breach at the same time of the prohibition against factions."²⁸

The special ground given by Maimonides for the power of the majority, not to cause controversy, as required by Scripture, is a novelty no less surprising than the rule itself about such power. Thus Maimonides has two rules about the coercive power of the majority.²⁹

We learn incidentally from this responsum that a local body or the majority thereof possesses absolute power of decision in matters pertaining to internal affairs of the community, affairs of Jews as well as to the general kind of constitutional jurisdiction. The question, however, remains what were the limits of this general power.

The Actual Validity of Maimonides' Rules for His Own and Our Days

As we have seen, the rules laid down by Maimonides are in general formulated in the language of the sources.³⁰ Yet, he also introduces variations and makes substantive additions to the original formulations

²⁶ *Resp. haRambam*, ed. Blau, 329 and notes thereto.

²⁷ *Deut.* 14:1.

²⁸ *Yevamot* 14a. See Maimonides, *Sefer haMitzvot*, Negative Commandment 45.

²⁹ Maimonides rules that the majority has the power not to accept a *takkanah* made by the High Court (Sanhedrin). That court must initially inquire whether the community is able to accept the *takkanah* and only then to enact it. If the court errs and the public does not accept the *takkanah*, it is a nullity: *M.T. Mamrim* 2:5–6. The sources are *Avodah Zarah* 36a and *Y. Shabbat* 1:4. For a discussion, see Elon, *Jewish Law*, 441 ff.; idem, "Takkanot" in *The Principles of Jewish Law*, 80–81.

³⁰ See Migdal Oz to *M.T. Shekhenim* 3:7 – "Maimonides wrote only what the Talmud said" and *ibid.* 4:10 – Maimonides "only reproduced in *Mishneh Torah* the terms of the *Gemara*." For a possible reason, see Elon, *Jewish Law*, 1003.

that give expression to his independent opinion or interpretation. On occasion he refers to contemporary matters and also suggests that a particular rule is actually still operative. Prior to dealing with the application of charitable funds to other public requirements, he observes “We have never come across . . . a Jewish community that does not have a charitable fund. . . . It is a plain custom *today* that the trustees of the fund should go around making daily collections.”³¹ In this manner he takes account of the actual situation of his times. Immediately thereafter he lays down the rule that townspeople may set up a *tamhui* fund as well as vary its application, as above. The variation provision therefore relates to a fund existing in every Jewish community, in respect of which the contemporary practice was for trustees to make daily collections.

Maimonides lays down the *Halakhah* for his own and for modern times,³² although in the terms and language of the mishnaic sources. Thus, the *Mishnah* tell us that the surplus of moneys collected for a specific poor person must be given to him and if he dies to his heirs.³³ Maimonides explains that this applies only where the trustees of the charity deem it useful and provided the elders and the townspeople are in agreement.³⁴ Again in respect of the sale of a synagogue he writes that it is permitted if the elders (that is, the good men of the town or the town wardens of the source) and all “the local inhabitants” (that is, the townspeople mentioned in the mishnaic source) concur.³⁵

A Community’s Takkanah Against the Intervention of the Nagid in its Affairs

We have already noted that the Jews in Egypt in Maimonides’ time were subject to the jurisdiction of the Palestinian Gaon or the Nagid.

³¹ *M.T. Matenot Aniyim* 9:3.

³² We saw above with regard to the public appointment of craftsmen and the like that in addition to the talmudic list, Maimonides added “and all like craftsmen.” It was surmised that thereby Maimonides possibly connects the rule with the possibility that in the communities of his time professionals satisfactory to the community were also appointed. The reason which Maimonides gives of his own initiative at the end of the passage – “because the community appointed them” – is equally true of the appointments made in his time. Perhaps it is to this the addition is directed.

³³ *M. Shekalim* 2:5.

³⁴ *Commentary to ibid.* See *Tur, Yoreh De’ah* 253 and *Bet Yosef ad locum; Yoreh De’ah* 253:6–7.

³⁵ *Commentary to M. Megillah* 3:3.

One of the powers of the latter was to control the appointment of a community's office-holders, such as judges. On one occasion, a person named Zuta purchased the office of Nagid and in turn demanded payments from local office-holders on threat of dismissal. One community, fearing that its judge would be dismissed for failing to make payment to the Nagid, addressed itself to Maimonides on the validity of a *takkanah* the community had unanimously adopted to the effect that the entire community, the elders and the residents, had agreed that if at any time the Nagid pressed hard upon the judge and wished to dismiss him, they would not concur and that they had taken an oath to place in *nidui* (under ban) any person who was in breach of the *takkanah*. The *takkanah* had been signed by the elders of the community, its notables and many other persons. The question now was whether the community itself might disregard the *takkanah*. Maimonides' answer was that every detail included in the *takkanah* was binding upon those who had signed it or who, having heard of it, had accepted the *takkanah*. Any one of these in breach was breaking the oath since a person who adopted an oath was forbidden to act contrarily. When an entire community concurs in making a *takkanah*, its elders and residents have done so, especially if they have signed it.³⁶

According to Maimonides in his *Commentary on the Mishnah* with regard to the variation of a charitable purpose and the sale of a synagogue, the competent body is made up of the townspeople acting together with the elders in making the decision. From the above responsum, it emerges that in Maimonides' time the function of the talmudic townspeople and the seven good men was effected by the local organized body. Moreover, the community and its leadership might act contrary to the supreme central authority. In another responsum, the community opposed in advance the possibility of such central authority exercising its power and dismissing a judge, a form of community uprising. Maimonides does not suggest that repeal of the *takkanah*, which is halakhically possible by release of the oath in formal manner,³⁷ and

³⁶ *Resp. haRambam*, ed. Blau 270; see also the supplements of Goitein in (1963) 32 *Tarbitz* 191.

³⁷ In the responsum on the obtaining of permission, Maimonides suggests that an individual upon whom the "ban" was placed and who repented should ask a scholar

that also indicates Maimonides recognition of the powers of the community to make *takkanot* and act accordingly.

It follows that in the time of Maimonides the local community possessed great powers which it was accustomed to exercise independently, not only with regard to everyday matters, such as providing the normal requirements of the community, but also with regard to broader matters of national importance which could involve resisting the acts of the central authority.

to release him from his oath: *Resp. haRambam*, ed. Blau 329 and note 15 thereto which refers us to *M.T. Shevuot* 6:1 – “a person who takes an oath and then has second thoughts . . . should ask a scholar or three laymen where there is no scholar to release him from his oath.”

Criminal Law

MAIMONIDES ON CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS

*Jacob Bazak**

The exemption from criminal responsibility of persons who commit a crime in a state of mental illness is today a well-established rule of criminal law. It is one of the basic legal principles common to both European and Asian systems of law; it is usually followed in both Western and communist countries.

Parenthetically, one should add that in communist regimes, the definition of "insanity" is sometimes arbitrarily stretched to include political dissidents as well as Jewish Refuseniks. That, of course, is a mockery of psychiatry, as of the administration of justice. However, regarding the legal principle of exemption from criminal liability of the mentally ill, there is unanimity of opinion in all legal systems.

The rationale for that principle is obvious: to punish one who committed a crime while mentally ill amounts to punishing one for being mentally ill. Or, to use the words of one of the greatest English jurists of the previous century, James Fitzjames Stephen, it is tantamount to the punishment of a person for not lifting up a heavy burden which is completely beyond his strength. No punishment in the world can have an effect in such cases and is therefore superfluous and immoral. Criminal liability presupposes free will. A person who, during the commission of a crime, is mentally ill does not act out of his own free will and is therefore legally not liable for his conduct. Thus, there is neither

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moral nor legal justification for holding a mentally ill person liable for his actions, and there is no practical reason for doing so.

Yet, the fact is that, in spite of the general unanimity of opinion regarding the principle itself, there is always a sharp controversy in public opinion when it comes to implementing this basic principle in practice. For instance, take the case of John Hinckley who, on 30 March 1981, attempted the assassination of President Ronald Reagan. Hinckley had fallen in love with the image of a young actress, Jody Foster, although he had never met or spoken to her. Acting under a mental disorder, labelled “schizophrenic process,” he decided that the best way to impress his “beloved” and gain her attention was to kill the President of the United States. The jury held correctly that Hinckley was insane and that he should be hospitalized. But public opinion could not accept that verdict and there was an uproar which is typical in such cases.

The same reaction occurred in 1848, following the verdict in the case of Daniel McNaughton. McNaughton was brought to trial for the attempted murder of Mr. Peel, then English Prime Minister who was also head of the Conservative Party, and for the murder of his young secretary, Mr. Drummond. It was proved that McNaughton acted while suffering from paranoia, a mental disease. Overwhelmed by this disease, he felt that he was being persecuted by the Conservative Party. McNaughton was found not guilty by reason of insanity. A general uproar in public opinion followed this acquittal. Something must be wrong in the laws of England – was the claim during the debate in the House of Commons, which followed the uproar – if an acquittal was possible.

The reason for this kind of public reaction to such cases lies in the basic and natural urge to punish whenever a grave crime is committed, regardless of whether or not there is a moral or legal justification for doing so. It is difficult in such cases for lay persons to adhere to the elementary principle, so commonly shared by all systems of law, that a person who committed a crime while mentally ill is exempt from criminal liability.

There is another difficulty in the implementation of this principle which relates to the *definition* of insanity. *Who* is to be considered insane for the purpose? Surely not every person who is irritated or

unstable can be exempted from criminal responsibility. Only those who are so *entirely* deviant from the norm, including even ordinary criminals, should be exempted from criminal liability. Otherwise, punishment itself becomes immoral, illegal and irrational.

The McNaughton Rules based the test of insanity on irrationality, i.e., that when the defendant was mentally confused and did not understand what he was doing or did not know that it was wrong, he will not be held liable for his criminal behavior.

The Rules were sharply criticized as being too narrow a test. In most cases, severely psychotic persons know very well what they are doing, and they also know that what they are doing is contrary to the law. Yet all this has no relevance to them because their mental disorder has completely changed their line of thought and dictated to them a certain way of conduct which they can not resist. Such persons act under an irresistible impulse. Not that they are *unable* to resist this impulse if they would wish to do so, but because of their mental illness they are completely unable and unwilling to weigh such considerations as would lead others to behave differently.

We shall soon see what Jewish Law has to say on this point and what the particular contribution of Maimonides was in this matter. But before we come to that, we would like to add that English Law, in its early stages, gave no exemption from criminal liability to insane persons. In the time of Edward I (1272–1307, about 100 years *after* Maimonides completed his *Mishneh Torah*), in every criminal case when a jury found the defendant had committed a crime due to mental illness, the jury would pass a verdict finding the defendant guilty of the offence but at the same time would recommend that he be pardoned by the King. Only at a later stage did English law develop the principle of legal immunity of criminal responsibility in cases of mental illness.

More than 1,000 years before that, in the *Mishnah* – that early source of Jewish law – we find that the *shoteh* (the insane person) is exempted from all liabilities and sanctions, whether civil or criminal, legal or religious. This exemption from civil as well as from criminal liability was drafted in a somewhat ironic/sarcastic formulation, which is typical to the *Mishnah*:

The deaf-mute, the insane and the minor, their injury is a difficult matter . . . If they injure others – they are exempted from any

liability. If, on the other hand, someone injures them, he is fully liable.¹

Maimonides, in his *Commentary on the Mishnah*, adds that, in spite of this exemption, the courts are entitled (or are bound) to impose sanctions against them in order to defend society.

There is no corresponding statement in Maimonides' Code to these words in the Commentary, and it seems that the source for this very interesting and far-reaching statement is the general rule stated in his Code that the courts are entitled to impose sanctions even in cases where, strictly speaking, there is no criminal liability and that can be done when circumstances necessitate such a deviation from the strict legal rules in order to preserve law and order.²

Courts are thus entitled to impose sanctions against deaf-mutes, the insane and minors, in spite of the fact that legally, halachically, such persons are exempted from criminal liability. The reason for that rule is obvious: the fact that an individual is insane and thus immune from criminal responsibility does not mean that he may harm other people or behave mischievously and that society is not entitled to defend itself against him. True, such an individual cannot be morally or legally blamed for his mischievous conduct, for he does not act out of his own free will but rather as a result of mental illness that has completely overwhelmed him. Society, however, is entitled to use proper methods in order to defend itself against him. In modern society, this will mean the hospitalization of the defendant as long as he is mentally ill and endangers society.

In the 12th century, in the time of Maimonides, when no mental hospitals existed, the ways to protect society from the aggressively insane were, of course, different. What is significant in Maimonides' statement in his *Commentary to the Mishnah* is the fact that he found it important to add to the rule exempting the deaf-mute, minor and insane from criminal responsibility, the fact that this exemption did not preclude the courts from using appropriate sanctions against such individuals in order to protect society. Maimonides does not state that the

¹ *M. Baba Kamma* 8:4.

² *M.T. Sanhedrin* 24:4.

Criminal Responsibility and Mental Illness

court is entitled to *punish* such individuals, for the court is in fact *not* entitled to punish an individual who has no legal capacity. What Maimonides says is that the court may use sanctions *in order to protect society* (*le'hasir hezekam me'bnei adam*) and that is something quite different from punishment.

Rather than elaborating on this interesting point, we shall now address the definition of “mental illness” in Maimonides. Throughout the 14 volumes of his Code, Maimonides refers several times in various contexts to the law relating to the insane. Yet nowhere does he present a definition of insanity, except for the last book of his Code in the section relating to the *Law of Evidence*:

An insane person, according to the Torah, is unfit to give evidence because he has no legal capacity.

Not only the insane who wanders about naked and breaks things and throws stones, but everyone whose mind has become confused and whose mind wanders with regard to a given subject, even though he talks and asks questions adequately on all other subjects, is unfit (to give evidence) and is considered insane. . . . and all this is according to the impression of the judge for it is impossible to define this in writing.³

There is no doubt that Maimonides is speaking here as a doctor thoroughly familiar with the phenomenon of mental illness. The average person tends to think that an insane individual is one who is completely disturbed in his mind and whose conduct is so bizarre that he wanders about naked and throws stones. That was the very reason the McNaghton Rules gave exemption on the ground of insanity only when the defendant did not know what he was doing or did not know that it was wrong. Psychiatrists, however, know very well that one can be seriously mentally ill and, yet, apparently speak logically and behave in quite an orderly manner. Maimonides, in the 12th century, knew this as well and therefore gave a broad definition of insanity so as to include all proper cases. He also stated, something which has only become clear to many systems of law in recent years, that since to define “insanity” in legal terms is almost an impossible task, the law

³ *M.T. Eduv* 9:9.

should leave a certain amount of freedom to the court to decide in each case whether or not the mental state of the specific defendant before it amounts to insanity which absolves criminal liability.

A similar approach was taken in the Model Penal Code of the American Law Institute. The Code proposed a test for the criminal liability of the mentally ill in very broad terms and almost without trying to define the term "mental illness." It is interesting to note that in the 12th century, when English Law was still in its early primitive stages and had not yet developed this basic principle of the immunity of the mentally ill from criminal responsibility, Maimonides had already drafted a test for insanity which is along the lines of most modern legal thought.

TREATMENT OF THE FATALLY ILL PATIENT (*TEREFAH*) IN MAIMONIDES' LAWS OF HOMICIDE*

*Daniel B. Sinclair***

Introduction

The halakhic category with which this paper is concerned is that of the *terefah*, i.e., a person suffering from a fatal organic disease. The definition of human *tarfut* and its legal consequences in Jewish criminal law are stated by Maimonides in his *Laws of Homicide* as follows:

If one kills another who suffers from a fatal organic disease, he is exempt from human law even though the victim ate and drank and walked out on the streets. But every human being is presumed to be healthy, and his murderer must be put to death unless it is known for certain that he had a fatal organic disease and physicians say that his disease is incurable by human agency and that he would have died of it even if he had not been killed in another way.¹

The three aspects of Maimonides' ruling discussed in the present paper are as follows:

* This paper is based on a doctoral thesis carried out under the supervision of Prof. S. Shilo of the Hebrew University.

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¹ *M.T. Roze'ah* 2:8.

- a. The definition of a human *terefah* as someone suffering from a fatal organic disease;
- b. The exemption of the murderer of a *terefah* from “human law”;
- c. The relevance, if any, of the *terefah* category for the treatment of a fatally ill patient in Jewish law.

Maimonides’ Definition of Human *Tarfut*

The term *terefah* is a familiar one in the context of the dietary laws, where it refers to an animal suffering from a fatal organic defect such as a pierced windpipe or gullet. Such an animal may not be eaten, even if it is slaughtered in the prescribed manner. The defects constituting animal *tarfut* are specified in the Talmud and Codes, and scientific evidence as to whether or not they are actually fatal is completely irrelevant.² Animal *tarfut* is therefore a closed category, defined solely by *Halakhah*.³

What is the position regarding human *tarfut*? It has been suggested that there is no difference between animals and humans with respect to the definition of *tarfut*.⁴ Clearly, Maimonides does not adopt this view, since he defines human *tarfut* in terms of medical evidence as to the incurable nature of the disease in question. The primacy of medical evidence in Maimonides’ definition of human *tarfut* was emphasised in a recent *responsum* by R. Moses Feinstein on various bioethical problems. According to R. Feinstein:

Maimonides did not write that a *terefah* person is one afflicted with an injury to the lung or heart etc. as in the case of animal *terefot* . . . since he maintains that the non-administration of capital punishment in the case of the murder of a *terefah* depends upon biological factors which vary from generation to generation. No absolute definition can be supplied.⁵

In the light of Maimonides’ emphasis on the medical aspect of the definition of human *tarfut*, it becomes more feasible to apply the *tere-*

² See *M. Hullin* 3:1; *Hullin* 42a; *M.T. Shehitah* 10:9; *Yoreh De’ah, Terefot*.

³ *Hullin* 54a. This point is expressed most forcefully in *M.T. Shehitah* 10:12–13.

⁴ See Rashi to *Sanhedrin* 78a, s.v. *hakol modim* and A. Steinberg, “Mercy-killing in the Light of the *Halakhah*”, 3 *Sefer Assia*, A. Steinberg (Jerusalem 1983) 435.

⁵ *Resp. Iggrot Moshe to Hoshen Mishpat* II, 73:4.

fah category to a fatally ill patient in contemporary medicine than would be the case if human *tarfut* was defined in the same terms as animal *tarfut*.

It is also possible that the extension by R. Hayyim Grodzinski of the scope of the *terefah* category in the human context from external injuries characteristic of animal *tarfut*, to internal diseases is a result of the medical thrust of Maimonides' definition. According to R. Grodzinski, a person suffering from an internal disease from which, according to his doctors, there is no chance of recovery, is classified as a *terefah*. R. Grodzinski maintains that the feature of externality is characteristic of animal, rather than human, *terefot*, since the former are all visible to the eye of the person inspecting the animal after slaughter.⁶

In the light of R. Grodzinski's approach, it may be suggested that according to Maimonides, any person suffering from a fatal internal disease may be classified as a *terefah*, and his murderer will be exempt from the death penalty, provided that there is sufficient medical evidence of the fatal nature of his victim's condition.

The Exemption of the Murderer of a Terefah from Human Law

According to the Talmud, the reason for the exemption of the murderer of a *terefah* from capital punishment is the non-viability of the victim.⁷ Since he would have died of his disease in any case, he was as good as dead at the time of the murder, and there is no capital punishment for killing a "dead man".⁸ This exemption only applies to the murderer of a *terefah* whose non-viability is an established fact. All other murderers are liable to the death penalty, even if the victim was in his death throes.⁹

⁶ *Resp. Ahiezer to Yoreh Deah* 16:6. Note however the critical comments regarding this decision in *Resp. Iggrot Moshe to Yoreh Deah* III, 36, and the opposing view of E. Jakobowitz, "Concerning the Possibility of Permitting the Precipitation of the Death of a Fatally-Ill Patient in Severe Pain", 31 *Hapardes* 43, according to whom human *tarfut* only extends to external injuries.

⁷ *Sanhedrin* 78a.

⁸ See *Yad Ramah to Sanhedrin* 78a s.v. *amar Raba*; *Shittah Mekkubetzet, Baba Kamma* 26a, s.v. *vekhatav harav Yosef Halevi ibn Migash*; *Minhat Hinukh* no. 34.

⁹ *M.T. Roze'ah* 2:7.

Maimonides' use of the phrase, "exempt from human law" in his formulation of the *Halakhah* implies, however, that the killer is still subject to Divine retribution. Indeed, Maimonides states this point quite explicitly in relation to those guilty of indirect homicide and suicide.¹⁰ Although such killers are exempt from capital punishment, they are nevertheless liable to death at the hand of Heaven:

If, however, one hires an assassin to kill another, or sends his slave to kill him, or ties another up and leaves him in front of a lion or another animal and the animal kills him, and similarly, if one commits suicide, the rule in each of these cases is that he is a shedder of blood, has committed the crime of murder, and is liable to death at the hands of Heaven; but there is no capital punishment at the hands of the court.¹¹

How do we know that this is the rule? Because Scripture says, "Whoever sheds man's blood by man shall his blood be shed" (*Gen. 9:6*) referring to one who commits the murder himself and not through an agent; "And surely your blood of your lives will I require" (*ibid. 9:5*) referring to suicide; "At the hand of every beast will I require it" (*ibid. 9:5*), referring to one who places another before a wild animal for it to devour; "And at the hand of man even at the hand of every man's brother, will I require the life of man" (*ibid. 9:5*) referring to one who hires others to kill someone. In these last three cases, the verb "require" is used expressly to show that their judgment is reserved for Heaven.¹²

The first part of this exegesis, i.e. the influence that indirect murder and suicide are included in the category of bloodshed, is found in *Midrash Rabbah*.¹³ In that context, it refers to the offence of bloodshed in the Noahide laws.¹⁴ Prior to the giving of the Torah, these laws were

¹⁰ Clearly, Divine retribution in the case of suicide consists of the deprivation of eternal life: see *Sem. 2:1* and *Torah Temimah, Gen. 9:8*.

¹¹ See *Kiddushin 43a*; *Sanhedrin 77a* and *Baba Kamma 91b* for the Talmudic sources of this ruling.

¹² *M.T. Roze'ah 2:2-3*.

¹³ *Genesis Rabbah 34:14*.

¹⁴ See *T. Avodah Zarah 8:4*; *Sanhedrin 57a*; *M.T. Melakhim 9:1*; S. Berman, "Noahide Laws", in *The Principles of Jewish Law*, ed. M. Elon (Jerusalem 1975) 708. There is a considerable body of scholarly opinion to the effect that these laws

binding upon all mankind. After the giving of the Torah, however, only non-Jews were directly bound by the Noahide laws.¹⁵ These laws, which are all derived from the pre-Sinaitic portion of the Bible, are generally wider in scope than their parallels in the Torah. Hence, the Noahide offence of bloodshed embraces many more forms of homicide than the halakhic crime of murder, including killing through an agent and indirect killing.¹⁶ The question which then arises is Maimonides' justification for condemning those acts in a halakhic code on the basis of an offence which *prima facie* applies only to non-Jews.

The answer to this question is that bloodshed constitutes a pre-halakhic offence in Jewish law, i.e. it is an offence based upon human reason and as such, requires no formal justification in order to ground a prohibition within the *Halakhah*. This contention is supported by Maimonides' reference to the scriptural basis of the prohibition on homicide in the Noahide laws, since the latter are often viewed as the Natural law dimension of the *Halakhah*.¹⁷ The rational basis of the Noahide laws is referred to by Maimonides in the following passages in which he cites the Rabbinic tradition which traces six of the seven Noahide laws to Adam: "Adam was commanded with regard to six matters . . . even though . . . reason inclines to them . . ."¹⁸ Maimonides also observes that the basis for the practice of the Noahide

constitute a Natural law dimension in the *Halakhah*, i.e., they are binding by virtue of reason rather than revelation: see S. Atlas, *Netivim Bemishpat Ivri* (N.Y. 1978) ch. 1, and D. Novak, *The Image of the Non-Jew in Judaism* (N.Y. 1983) 290. The precise nature of the Noahide laws is, however, a separate study and clearly beyond the scope of this paper.

¹⁵ The nature of the relationship between Jewish and Noahide law is a complex one and there are certain areas in which Jewish law is clearly informed by the Noahide provisions. Indeed, the role of the Noahide offence of bloodshed in the context of Jewish criminal law is one of the most significant aspects of the present paper. On the issue of the role of Noahide law in general, see *Resp. Rashbash* no. 543; *Torat Neviim*, ch. 11 in *Kol Kitvei Meharats Hayyes* 1 (Jerusalem 1968); M. Potolsky, "The Rabbinic Rule 'No Laws are Derived from Before Sinai'", 6 *Dine Israel* (1976) 195.

¹⁶ *Genesis Rabbah* 34:14; *M.T. Melakhim* 9:4.

¹⁷ See note 14 above. An opposing view is adopted by M. Fox, "Maimonides and Aquinas on Natural Law", 5 *Dine Israel* (1972) 1. Also see: S. Schwarzchild, "Do Noachites Have to Believe in Revelation?" 57 *Jewish Quarterly Review* (1962) 305.

¹⁸ *M.T. Melakhim* 9:1; Atlas *op. cit.* 17.

laws is the need to “prevent the world becoming corrupt.”¹⁹ Although he also writes that a non-Jew who observes the Noahide laws “because of the determination of reason is not of the pious of the nations nor of their wise men”,²⁰ it is widely accepted that the correct reading should be, “but of their wise men.”²¹ This reading supports the view that according to Maimonides, reason alone is capable of serving as a basis for the Noahide system.²² It is also possible to resolve this apparent contradiction by distinguishing between the concept of a Natural law doctrine and the right reasons for obeying such a code. In respect to the latter, only acceptance on the basis of Divine fiat is sufficient to constitute grounds for obedience.

It is also noteworthy that the rationale offered in the Talmud for the rule that murder may not be committed even in order to save one’s own life, is justified in terms of pure reason, whereas in the case of idolatry and forbidden sexual relations, a suitable Biblical exegesis is formulated in order to establish that martyrdom is also required in these cases. In the case of homicide, the principle is: “How do you know that your blood is redder!”²³ Homicide, therefore, is a rational offence requiring no scriptural support for its interdiction.

The rational principle underlying the prohibition of bloodshed in general is articulated by Maimonides in a passage dealing with those guilty of bloodshed but legally exempt from the death penalty. In providing for the imposition of extra-legal penalties upon such killers, Maimonides writes as follows:

¹⁹ *M.T. Melakhim* 10:11.

²⁰ *Ibid.* 8:11.

²¹ See J. Katz, *Exclusiveness and Tolerance* (N.Y. 1962) 175; N. Lamm and A. Kirschenbaum, “Freedom and Constraint in the Jewish Judicial Process”, 1 *Cardozo Law Review* (1979) 117; Schwarzschild, *op. cit.* 301; Fox, *op. cit.* 14.

²² According to Lamm and Kirschenbaum *op. cit.* 117:

It is reasonable to assume, if this reading is correct, that this indicates a Natural law theory by Maimonides. The single letter in Maimonides’ Code is thus of the greatest moment in deciding the question of whether Jewry’s greatest jurist and most eminent philosopher advocated or rejected Natural law.

In the present paper, it is the more modest claim that the Noahide offence of bloodshed constitutes an independent rational norm which is being advanced.

²³ *Sanhedrin* 74a.

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For although there are worse [i.e. in the theological sense] crimes than bloodshed, none causes such destruction to civilized society as bloodshed. Not even idolatry, nor immorality, nor the desecration of the Sabbath is the equal of bloodshed.²⁴

According to Maimonides, therefore, the rational principle of the need to preserve “civilized society” is sufficiently strong to justify imposing extra-legal sanctions upon such killers without any further justification.

Likewise, Maimonides’ provisions regarding those killers legally exempt from capital punishment are derived from the general principle of the evil of all forms of unjustified homicide, and the threat posed by such acts to “civilized society”. Maimonides refers to the Noahide offence of bloodshed in the extract referring to indirect homicide and suicide in order to emphasise that exemption from capital punishment does not make indirect killings any less heinous a deed in the eyes of the *Halakhah*. The perpetrators of such acts are still considered “shedders of blood”, and are spared the death penalty on technical grounds only. Maimonides’ point is that the crime of murder in Jewish law cannot be disassociated from its rational dimension as articulated in the Noahide code.

In the second part of the above exegesis, Maimonides infers that both the above-mentioned offences are subject to Divine retribution. This inference, however, is not to be found in any talmudic or mid-rashic source. The question which now arises is that of the basis for Maimonides’ provision that the judgment of indirect killers and suicides is “reserved for Heaven.”

The answer to this question, too, would appear to lie in the role of the Noahide offence of bloodshed as the rational dimension of Jewish law. Divine sanctions are a standard solution in cases in which the act in question deserves condemnation but there is no legal punishment.²⁵ Various forms of the offence of bloodshed would appear to be prime candidates for such sanctions since they constitute infringements of the Noahide offence of bloodshed and are at the same time specifically excluded from the category of culpable crimes in Jewish criminal law.

²⁴ *M. T. Roze’ah* 4:9.

²⁵ See *Genesis Rabbah* 34:13, ed. J. Theodor and H. Albeck, 324 note 8.

In fact, the nexus between the Noahide offence of bloodshed and Divine punishment is specifically established in *Midrash Halakhah*. According to *Mekhilta*, an Israelite who kills a heathen is exempt from capital punishment, since the victim is not "his neighbour."²⁶ This rule is then subjected to the following critique:

Issi b. Akabiyah says: Before the giving of the Torah, we had been warned against shedding blood. After the giving of the Torah whereby laws were made stricter, shall they be considered lighter? In truth, the Sages said: He is free from judgment by the human court but his judgment is left to Heaven."²⁷

Here the approach is an historical one, with the emphasis on the new situation created by the giving of the Torah. Prior to that event, there was obviously no distinction between Jews and heathens with respect to the offence of bloodshed. After the giving of the Torah, however, Jews were exempt from capital punishment for killing a non-Jew, whereas the latter continued to be liable for the death penalty, irrespective of the creed of the victim. Jewish law is thus more lenient than Noahide law on this issue, a state of affairs which is entirely unacceptable in the light of the assumed aim of the Torah as a means of raising, not lowering, the moral standards of the Jewish people. Issi b. Akabiyah's objection is, in fact, a classical formulation of the role of the Noahide laws as a controlling standard for the *Halakhah*. The latter can only add to the former: it cannot possibly detract from it.

The Sages' answer to the objection of Issi b. Akabiyah is to invoke the notion of Divine retribution. As already observed, Divine punishment is a standard solution in such cases. Since capital punishment is specifically excluded in relation to the murder of a non-Jew, and since the murder of a non-Jew constitutes the offence of bloodshed, Heavenly sanctions are clearly applicable.²⁸

In the light of the relationship between bloodshed and Divine punishment, Maimonides' intimation that the killer of a *terefah* is sub-

²⁶ *Mekhilta Derabbi Yishmael, Masekhta Denezikin*, ed. H. Horowitz and I. Rabin, 263.

²⁷ *Ibid.*

²⁸ See *Kesef Mishneh to M.T. Roze'ah* 2:11; *Raavan to Baba Kamma* 113a.

ject to Divine retribution is perfectly clear. According to Maimonides, killing a *terefah* is a capital offence in Noahide law.²⁹ As such, it automatically carries a Divine sanction. In his use of the incisive phrase, “exempt from human law,” Maimonides indicates that the killing of a *terefah* is in the same category as indirect killing and suicide, both of which carry the penalty of “death at the hand of Heaven.” Other forms of bloodshed which are exempt from capital punishment but are included in the Noahide laws are qualified by Maimonides in a similar fashion, i.e. their perpetrators are exempt only from human sanctions.³⁰

It is noteworthy here that according to R. Meir Cohen, a standard middle-eighteenth and early-nineteenth century commentator on Maimonides’ *Mishneh Torah*, death at the hands of Heaven also applies to foeticide in Jewish law.³¹ The lack of any definitive sanction on foeticide in the sources of Jewish law has given rise to an extensive body of rabbinic literature aimed at establishing a definitive legal category for this offence.³² In contrast, foeticide is specifically classified as a capital offence in Noahide law.³³ The solution provided by R. Cohen is elegant in its simplicity. Since foeticide is included in the Noahide law, Issi b. Akabiah’s argument applies, and the offence is

²⁹ *M.T. Melakhim* 9:4. An interesting point is raised here, since there is no mention of the killing of a *terefah* in the context of Noahide law in midrashic or talmudic sources. Various commentators on the *Mishneh Torah* attempt to locate a source for this ruling, but to no avail: see *Mekorei Harambam Lerashash* to *M.T. Melakhim* 9:4; *Mirkevet Hamishneh* to *M.T. Melakhim* 9:4; *Or Sameah* to *M.T. Roze’ah* 4:3; *Maaseh Rokeah* to *M.T. Melakhim* 9:4. One possible solution is that Maimonides regards the Noahide system as the concretisation of Natural law and not merely its source. Hence, in relation to the offence of bloodshed, any act which rationally falls within its scope, e.g. killing a *terefah*, is automatically subsumed under that category in the Noahide laws. This view would seem to be supported by Maimonides’ strong condemnation of bloodshed on rational grounds mentioned above.

³⁰ See *M.T. Roze’ah* 1:13; 2:7; 2:11; 3:10–11.

³¹ *Or Sameah* to *M.T. Issurei Biah* 3:2; *Meshekh Hokhmah, Vayakel* s.v. “shabbat shabbaton.”

³² For a collection of the relevant rabbinic material on this issue see: M. Stern, *Hare-fuah Leor Hahalakhah* 1 (Jerusalem 1980) sec. 1. Also see J.D. Bleich, *Contemporary Halakhic Problems*, vol. 1 (N.Y. 1977) 325.

³³ *Sanhedrin* 57b. Also see V. Aptowitz, “The Status of the Embryo in Jewish Law”, 15 *Jewish Quarterly Review* (1924) 113; G. Alon, *Mehkarim Betoldot Yis-*

immediately classified as a form of bloodshed and hence, subject to Divine retribution.

It is clear, therefore, that killing a *terefah* is a serious offence in the *Halakhah*. The question which arises, however, is whether or not this seriousness manifests itself in any concrete form.

Once again, Maimonides provides the solution to this problem. Immediately subsequent to the provisions regarding indirect killing and suicide cited above, Maimonides states:

Regarding any of these or similar murderers who are not subject to being condemned to die by verdict of the court, if a king of Israel wishes to put them to death by Royal Decree and for the sake of improving society he has a right to do so. Similarly, if the court deems it proper to put him to death as an emergency measure, it has the authority to do so as it deems fit, provided that the circumstances warrant such action.³⁴

Moreover, even if circumstances are such that the needs of the time do not demand the deaths of the killers concerned, it is nevertheless the duty of the court to take the following action against them:

to flog them almost to the point of death, to imprison them in a fortress or a prison for many years, and to inflict severe punishment on them in order to frighten and terrify other wicked persons, lest such a case become a pitfall and a snare, enticing one to say, "I will arrange to kill my enemy in a roundabout way as did so-and-so, and then I will be acquitted."³⁵

Maimonides' specification of these extra-legal penalties is undoubtedly a reflection of his above-mentioned view that bloodshed is the ultimate threat to civilized society, and cannot, therefore, be allowed to go unpunished. In this respect, it is noteworthy that the extra-legal jurisdiction of the king and court extends to all those killers guilty of bloodshed in relation to whom there is no capital punishment, and not only to indirect killers and suicides. The wide scope of this provision is

rael (Tel Aviv 1966) 280 for historical aspects of this ruling.

³⁴ *M. T. Roze'ah* 2:4.

³⁵ *Ibid.* 2:5.

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implicit in Maimonides' use of the phrase, "or similar murderers" in the first of the above citations. The killer of a *terefah*, therefore, is included in this category. In addition to Divine sanctions, Maimonides maintains that those guilty of bloodshed but exempt from the death penalty are liable to execution at the hands of either the king or the court.

The authority of the court to administer extra-legal penalties in order to protect religion is well-established in Jewish law, and is restricted to cases involving a specific and substantive threat to the religious standards of society at large, i.e., "emergency measures" and "safeguarding a cause."³⁶ The authority of the king, although well-established with respect to rebels,³⁷ is not so clear in the case of criminals who are exempt from capital punishment. However, it is noteworthy that Maimonides mentions the monarch's jurisdiction to punish murderers exempt from capital punishment in another context in his *Laws of Homicide*. In the following passage, Maimonides refers to those killers exempt from capital punishment as a result of insufficient or technically defective evidence, or lack of a formal warning:

If a person kills another and there is no clear evidence, or if no warning has been given him, or there is only one witness, or if one kills accidentally a person whom he hated, the king may, if the exigency of the hour demands it, put him to death in order to ensure the stability of the social order. He may put them to death by hanging for a long time so as to put fear in the hearts of others and break the power of the wicked.³⁸

The salient feature of all the cases mentioned in this provision is that they constitute culpable forms of bloodshed in the Noahide laws. Under these laws, the murderer does not require a warning and may be executed on the testimony of one witness alone.³⁹ Similarly, a Noahide

³⁶ See *Yevamot* 90b; *M.T. Mamrim* 2:4; M. Elon, *Hamishpat Haivri* 2 (Jerusalem 1975) 421; J. Ginzburg, *Mishpatim le Yisrael* (Jerusalem 1956) ch. 4; E. Quint and N. Hecht, *Jewish Jurisprudence* (N.Y. 1980) ch. 2.

³⁷ *Sanhedrin* 49a; *M.T. Melakhim* 3:8.

³⁸ *M.T. Sanhedrin* 2:4.

³⁹ *Sanhedrin* 57a; *M.T. Melakhim* 9:14.

who kills by accident may be put to death by the blood-avenger.⁴⁰ Clearly, there is a link between the king's role in punishing criminals and the preservation of society manifested in the form of the Noahide laws. The king, in his general capacity to maintain public order,⁴¹ is empowered to enforce the Noahide laws, at least in the case of the offence of bloodshed. This is because of the universal rational nature of this offence, the prevention of which is, as already observed, a necessary prerequisite for the preservation of civilized society. The king's jurisdiction to execute criminals, therefore, is confined to those whose offences are punishable under Noahide law, since their deaths are necessary in order to safeguard society.

This approach is, in fact, hinted at by R. Cohen, whose view regarding the Divine sanction for unjustified foeticide in Jewish law was cited above. According to R. Cohen:

an Israelite king is authorised by virtue of his role as the preserver of the social order to act according to the general Noahide code, and this is a rational principle.⁴²

R. Cohen identifies the king's general role in preserving society with the enforcement of the Noahide laws. He also emphasises the rational nature of this link. Maimonides is thus merely extending the two concepts of the Noahide laws and the general role of the king to their rational conclusions by empowering the monarch to execute criminals from capital punishment. Since bloodshed constitutes a threat to the very basis of society, the king must take all the necessary steps to ensure its prevention.

One question which presents itself in this context is the relationship between the extra-legal jurisdiction of the king and that of the court. Both institutions enjoy extra-legal jurisdiction with respect to killers exempt from capital punishment. The king's jurisdiction would, however, appear to be somewhat wider than that of the court. It has already been observed that the court may only mete out extra-legal

⁴⁰ *M.T. Melakhim* 10:1; cf. *Guide for the Perplexed* III, 40.

⁴¹ See G. Blidstein's recent book, *Ekkronot Mediniim Bemishnat Harambam* (Jerusalem 1983) 123.

⁴² *Or Sameah* to *M.T. Melakhim* 3:10.

penalties as an “emergency measure,” and in order to “safeguard a cause.”⁴³ Moreover, with regard to killing those against whom there is insufficient evidence of lack of a formal warning, Maimonides specifies the king rather than the court as the relevant punitive agency.⁴⁴ Clearly, extra-legal procedures on the part of the court must be restricted to the minimum, for otherwise the whole structure of the legal system will be threatened. Any departure from the rules of evidence by a court is bound to detract from the authority of the system as a whole. Consequently, the king, rather than the court, ought to be empowered to remedy the breach in public morality by executing those against whom the evidence is inconclusive or defective. The king’s jurisdiction may, therefore, be of a more general nature than that of the court, which is still subject, albeit in a somewhat flexible fashion, to the strictly legal forms of the *Halakhah*.

The Relevance of the *Terefah* Category for the Treatment of the Fatally Ill Patient

The killer of a critically ill patient in Jewish law is exempt from capital punishment, provided that the patient falls into the category of *terefah* as specified above. He is, however, subject to a range of extra-legal penalties of both a Divine and a human nature. The human penalties are administered in accordance with prevalent social conditions and, as such, involve a significant amount of discretion on the part of those entrusted with the maintenance of public order. In this light, it is clear that killing a *terefah* would not be treated by a Jewish court in the same way as a regular murder charge. In fact, the court might very well not hear the case at all. Instead, it may be transferred to the king or any institution, the nature of which parallels that of the king in Jewish law.⁴⁵ Clearly, this approach is very different to the one adopted in

⁴³ See note 36 above, and *Resp. Ri Migash* no. 191; J. Gershuni, “The Law of the Sanhedrin and the Monarchy and the Difference Between Them”, 2 *Hatorah Vehamedinah* (1950) 72.

⁴⁴ *M.T. Melakhim* 3:10; Gershuni, *loc. cit.*

⁴⁵ The concept of the king as an institution rather than a person is a well-established one in Jewish law. It has become especially popular in recent years with the establishment of the State of Israel. One way of legitimating the laws of the Knesset according to *Halakhah* is, in fact, to regard them as an extension of the powers of the king: see Meiri and *Yad Ramah* to *Sanhedrin* 49b; *Derashot haRan* no. 11;

most developed legal systems in which prosecutions for euthanasia are not differentiated, in theory at any rate, from a regular charge of murder. An approach based on Jewish law may very well favour the appointment of a special quasi-judicial body designed to deal specifically with situations of this nature, and empowered to mete out sanctions in accordance with current social mores. Regular courts would not deal with issues of this nature.

Clearly, this approach is closely bound up with the special institutional framework of Jewish law, i.e. Divine retribution and the extra-legal jurisdiction of the court and king. In general terms, however, it indicates that a more flexible attitude to this type of case is necessary than one which assimilates euthanasia with regular murder. The difference between Jewish and non-Jewish law was observed as early as the fifteenth century by R. Solomon Duran, who pointed out that Jewish law makes an inherent distinction between killing a *terefah* and murder, whereas non-Jewish law makes no such distinction, preferring instead to mitigate the sentence of the murderer after the verdict.⁴⁶ If anything of a general nature can be derived from Jewish law on the role of the judiciary with respect to the termination of the lives of critically ill patients, therefore, it is that such a role ought to be as narrow as possible. The regular courts ought not to be the bodies responsible for deciding on these matters: special tribunals concerned with the moral welfare of society as a whole are the appropriate institutions to which such questions should be directed.

Responsa Mishpat Cohen no. 144; R. Saul Yisraeli, "The Authority of the President and Selected Governmental Institutions in the State of Israel," 1 *Hatorah Vehamedinah* (1949) 76, and see Elon, *op. cit.* 1, 42, cf. R. Benjamin Teumim-Rabinowitz, "Capital Offences under the Law of the Sanhedrin and of the King Respectively", 4 *Hatorah Vehamedinah* (1952) 79, and R. Yisraeli's response on p. 82.

⁴⁶ *Milkhemet Mitzvah* 32b s.v. "od heshiv."

THE RIGHT OF SELF-DEFENSE AND ABORTION*

*Dov. I. Frimer***

The Sanctity of Human Life and Necessity

The sanctity and preservation of human life are unquestionably important values in Jewish law. “Thou shalt not murder,” the Decalogue¹ proclaims; “Thou shalt not stand idly by the blood of thy fellow,” *Leviticus*² admonishes. The Torah forbids us to bring about the death of a human being – whether through commission or omission.

The superior value of human life finds expression in the law which permits, if not requires,³ one to transgress practically any commandment of the Torah in order to sustain life. The classical legal formulation of this principle is to be found in the *Tosefta* which reads:

The commandments of the Torah were not given to Israel save that they should live by them, as it states: “(My statutes and my ordinances) which if a man do, he shall live by them.”⁴ He shall

* Some of the ideas found in this paper have already been expressed in our article, prepared in collaboration with Arnold N. Enker, entitled “The Line Dividing Necessity from Self-Defense in Jewish Law”, in Enker, *Duress and Necessity in the Criminal Law* (Bar-Ilan University 1977), 212–234.

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¹ *Ex.* 20:13; *Deut.* 5:17.

² *Lev.* 19:16. See *Torat Kohanim, Kedoshim*, Chap. 4; *Sanhedrin* 73a.

³ See Immanuel Jakobovits, *Jewish Medical Ethics* (New York 1959) 52–53 and sources there cited.

⁴ *Lev.* 18:5.

live by them and not die by them. Nothing stands in the face of preserving life except for idolatry, illicit sexual relations and murder.⁵

A similar ruling is found in the Talmud which records:

Rabbi Johanan reports in the name (of his teacher) Rabbi Simeon b. Jehozadok: It was decided by vote in the upper chamber of the house of Nitsa in Lydda that in respect of any law of the Torah, if a man is ordered “Transgress and be not slain,” let him transgress rather than be slain, except in the case of idolatry, illicit sexual relations, and murder.⁶

The Talmud⁷ proceeds to carefully examine the three exceptions of idolatry, illicit sexual relations and murder, searching out the biblical texts which support the claim that these crimes are not to be violated even in the face of certain death. In the case of idolatry and illicit sexual relations, the Talmud is, indeed, successful in finding such textual support. In the case of murder, however, the Talmud fails to invoke any biblical source. Instead, the Rabbis argue from logic and legal precedent:

A certain man came to Rava and said to him: “The governor of my town has ordered me to kill someone and has warned that if I refuse to do so he will have me killed. (What am I to do?)” Rava replied: “Let yourself be killed but do not kill him. How do you know that your blood is redder? Perhaps the blood of that man is redder.”⁸

⁵ *T. Shabbat* 15:17 (ed. S. Lieberman, 75). For parallel citations see S. Lieberman, *Tosefta Ki-fshutah*, *ad loc.* Note especially *Yoma* 85a–85b; *Sanhedrin* 74a. See also Rashash to *Yoma* 85b.

⁶ *Sanhedrin* 74a; *Y. Sheviit* 4:2 (35a); *Y. Sanhedrin* 3:6 (21b). See also *Pesahim* 25a–25b: “When Rabin came (from Israel to Babylonia) he reported in the name of Rabbi Johanan: One can cure oneself (from a deathly illness) by any means except idolatry, illicit sexual relations and murder.” A similar ruling is found in the *Y. Avodah Zarah* 2:2 (40d), in the name of Rabbi Haninah.

⁷ *Yoma* 82a–82b; *Sanhedrin* 74a. See also *Pesahim* 25b.

⁸ As to the authority of logic and precedent as legal sources in Jewish Law, see Elon, *Jewish Law: History, Sources, Principles* (Jerusalem 1978) Vol. 1, part 2, 768–828. Note, especially, 808–809.

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The only grounds upon which it may have been permitted for the questioner in the above case to kill is the necessity principle: “He shall live by them and not die by them.” The purpose of this rule, though, is obviously to save life. Yet, in the circumstances as described, someone will definitely die – regardless of the decision taken. The law is not prepared to favor one life over another. Consequently, the principle “He shall live by them and not die by them” is inapplicable. There is, therefore, no basis upon which to obviate the commandment of “Thou shalt not murder.”⁹

It is the sanctity and value of human life in Judaism which dictates that in cases of necessity, one may transgress the commandments of the Torah in order to sustain life. In the balance of interests, it is the Torah’s interest in life which outweighs its interest in the observance of the *mitsvot*. By the same token, however, it is the sanctity and value of human life in Judaism which prevents one from violating the Law when the prohibition to be transgressed is “Thou shalt not murder.” In the eyes of the Torah, the blood of one person is as red as the blood of another person. The balance of interests are equal – a life versus a life. We may not trade off one life even to save another life.¹⁰

The Right of Self-Defense

While Jewish law forbids one under duress to kill another, even to save his own life, it does, nonetheless, permit one to kill in self-defense. In the famous dictum of Rava:

He who comes to kill you, kill him first.¹¹

It should be noted that this is the same teacher Rava who rendered the ruling that one under duress may not murder.

Jewish law does not only permit the pursued victim to defend himself by killing the pursuer. It *requires*, as well, any third party capable

⁹ Rashi, *ad loc.*

¹⁰ Consequently, a person who under duress kills another in order to save his own life has committed a wrongful act of murder. Whether, however, he will be punished for this act of murder is the subject of great debate. The dominant view among rabbinic scholars is that he will be excused from punishment. See at length D. Frimer, “The Line Dividing Necessity from Self-Defense in Jewish Law,” as above, at 224–226.

¹¹ *Sanhedrin* 72a.

of saving the victim, without any real threat to his own life,¹² to do so. If in fact the only way to rescue the victim is to take the aggressor's life, then even the third-party may act accordingly. "These are to be rescued," states the *Mishnah*, "at the cost of their life: He who pursues another in order to kill him . . ."¹³

How do we square these two rulings? In the former case – the man under duress – the law prohibits one from saving his life by killing another; while in the latter situation – the pursued victim – the law permits and even encourages one to save his life by killing another.

Latter-day rabbinic scholars¹⁴ have debated at length the analytic underpinning of the right of self-defense. One possibility is to view the right of self-defense as a form of pre-emptive punishment. The aggressor is attempting to commit an act which, if completed, is punishable by death. In a situation of aggression the law prefers to advance the punishment, and, thereby, prevent the crime altogether. The other approach posits that the protection of an innocent victim's life is what grants the right of self-defense. The law recognizes that one has a right to protect his life against aggression. The mere saving of life is what makes the right of self-defense operative.

Each position can refer to talmudic sources which seemingly support its claim. We have outlined these proof-texts elsewhere¹⁵ and will not do so here. However, simply on an analytic level, each of the two approaches is difficult. First, the mere fact that each side can cite convincing proof-texts for its position demonstrates that neither explana-

¹² See *Nedarim* 80b; *B.M.* 62a. Cf. *Y. Terumah* 8:10 (46b). For a summary of this fascinating topic, to what extent one is obligated to place oneself in danger in order to save one's fellow, see at length Rabbi Ovadia Yosef, "The Entebbe Operation in Jewish Law", 19 *Torah She'be'al Peh* (1977) 9, 15–28 = "A Responsum Permitting Kidney Transplants," (1976)7 *Diné Israel*, 25–41, with minor additions. See also: A. Kirschenbaum, "The 'Good Samaritan' and Jewish Law," (1976)7 *Diné Israel*, 7, 19–59.

¹³ *M. Sanhedrin* 8:7. See also *Sanhedrin* 72b, 73a; *Sifre, Ki Teitsei*, 292–293 (ed. Finkelstein, 311–312); *M.T. Rotsei'ah U'shemirat Nefesh* 1:6, 13.

¹⁴ *Resp. Nodah B'yehudah, Mahadurah Tinyanah, Hoshen Mishpat* 59–60; *Tsafnat Pa'ane'ah* to *M.T. Hilkhhot Issurei Bi'ah* 1:3; *Resp. Kuntrus Y'dei Moshe, Simhat Hahag*, 17; *Afekei Yam*, 40; *Tosefet Hayim on Sanhedrin*, 40.

¹⁵ Frimer, note 10 above, 213–217. See also Itamar Warhaftig, "Self-Defense in Crimes of Murder and Battery," 81 *Sinai* 48, 50–56.

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tion exhausts the various alternatives or successfully defines the basis of the right to slay an aggressor.

There are, however, more fundamental and substantive objections to the two schools. The former approach, which sees self-defense as pre-emptive punishment, fails to explain why one is not permitted to kill another who is about to perform some non-violent act which is punishable by death in Jewish law – e.g. desecration of the Sabbath or idolatry. It is interesting to note that the great *tanna*, Rabbi Simeon b. Yohai, an outspoken critic of Rome's pagan ways,¹⁶ did in fact maintain that it was permissible to kill a person about to worship an idol.¹⁷ Furthermore, Rabbi Simeon's son, Rabbi Elazar, held the view that it was proper to slay even one who was about to desecrate the Sabbath.¹⁸ Yet, both these rulings were expressly rejected by the authoritative Mishnah where we find:

However, he who pursues an animal (for purposes of sodomy) and the Sabbath desecrator and the idolator are not rescued at the cost of their lives.¹⁹

Should we accept the explanation that self-defense is a form of pre-emptive punishment, it is difficult to comprehend the distinction between murder and idolatry or desecration of the Sabbath.²⁰

However, equally problematical is the opinion which understands self-defense purely as a mechanism to protect the life of the victim. In the absence of any notion of transgression or guilt on the part of the aggressor, what basis is there to prefer the life of the pursued over the life of the pursuer. In the case of the man under duress who came before Rava, that man's life was, indeed, in danger. Yet, Rava refused to allow the questioner to kill the innocent third-party precisely because of the third-party's lack of transgression or guilt. Rava teaches us

¹⁶ See *Shabbat* 33b.

¹⁷ *Sanhedrin* 74a. In *T. Sanhedrin* 11:11 (ed. Zuckerman, 432), however, this opinion is ascribed to R. Elazar b. R. Zadok.

¹⁸ *Sanhedrin* *ibid.*; *Y. Sanhedrin* 8:9 (26c).

¹⁹ Note 13 above. See also Maimonides, *Commentary to the Mishnah, ad loc.* (ed. Kafah, 190–191).

²⁰ This argument has been put forth in the writings of Rabbi Moses Feinstein, *Resp. Iggrot Moshe, Even ha-Ezer*, Vol. 1, 39.

that mere self-preservation does *not* allow the taking of innocent life, for who says “that your blood is redder? Perhaps the blood of that man is redder!”²¹

Professor Baruch Brody has dealt with this last issue in his intriguing work, *Abortion and the Sanctity of Human Life: A Philosophical View*.²² Professor Brody suggests that the Rava-type duress situation is distinguishable from the aggression case, based on what he calls “the Condition of Action.”²³ The Condition of Action, as defined by Professor Brody, exists when:

B is doing some action that will lead to A’s death, and that action is such that if B were a responsible person who did it voluntarily knowing that this result would come about, B would be responsible for the loss of A’s life.²⁴

In the duress situation, although the questioner’s life was in peril, the third-party had not fulfilled the Condition of Action. Thus the third-party may not be killed. In the aggression case, however, not only is the pursued’s life in jeopardy, but the aggressor has certainly fulfilled the Condition of Action. As a result, the pursuer may be slain in order to save the victim’s life.

This analysis appears to us untenable. Firstly, the very concept of “Action” is unclear. Take for example a fetus which during the birth process causes so much internal damage to the mother that her life is in danger. Has this fetus fulfilled the Condition of Action? Brody says no.²⁵ Rabbi Shalom Carmy, in his outstanding review essay of Brody’s work, clearly maintains yes.²⁶ We must heartily concur with Carmy when he declares:

²¹ This argument has been advanced by Rabbi Gershon Hanokh Fischman in his work *Simhat Hahag*, sec. 17. See also: *Hidushei Rabbi Hayyim Halevi to M.T. Rotsei’ah U’shemirat Nefesh* 1:9; *Resp. Tiferet Tsvi, O.H.*, 14.

²² (Cambridge – London 1976). See also Sh. Carmy, “Review Essay: Halakha and Philosophical Approaches to Abortion”, 16 *Tradition* (1977) 126–157.

²³ *Op. cit.* 6–10.

²⁴ *Ibid.* 10.

²⁵ *Ibid.* 11.

²⁶ Carmy, note 22 above, 149–150.

Self-Defense and Abortion

The aforementioned disceptations indicate that what constitutes an action is a complicated question.²⁷

Secondly, Brody's analysis overlooks the importance of the distinction between the pursued and a third-party intervenor.²⁸ Even assuming the validity of the Condition of Action and that it would grant a right of self-defense to the pursued himself, one would be hard pressed to explain why action alone would justify the intervention of a third party. On what basis is a third party to prefer the life of the pursued over that of the pursuer? Obviously, action alone is an unsuccessful criterion for determining that one's blood is redder than another.^{28a}

Finally, the Condition of Action will render unacceptable conclusions. Let us examine the case where A(Aggressor) is pursuing V(Victim) in order to kill V. H(Hero) in turn, pursues A in order to save V's life. Can A kill H in "self-defense"? The Condition of Action would dictate a yes response. H is doing some action that will lead to A's death. According to Brody's principles, this action should evoke a right of self-defense. Our instincts, however, recoil at such a conclusion. After all, A is attempting to do an illegal act, killing V. H, on the other hand, is performing a noble action, one both sanctioned and encouraged by law and society. It makes little sense for the law and society to encourage H to intervene and save V's life even by slaying A, while at the same time protecting A should A kill H. In other words, we cannot accept a system which would punish A should he kill innocent V, but acquit A should he kill noble H. We might conclude this point by noting that "our instincts" correspond to the dominant view in Jewish law.²⁹

²⁷ *Ibid.*, 150. See also G.P. Fletcher, *Rethinking Criminal Law* (Boston – Toronto 1978) 863.

²⁸ Not that Professor Brody is totally oblivious to the distinction. Indeed he is not. However, in his own words: ". . . that difference seems to be irrelevant," Note 22 above, 6.

^{28a} See G.P. Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory." 8 *Is. L. R.* (1974) 367 at 378: "One can understand diminishing an aggressor's interests if he is to blame for the encounter, but it is hard to see why he should be worth less merely because his body is the locus of dangerous propensities."

²⁹ See *Hidushei Rabbi David Bonfils to Sanhedrin* 82a; *Beit Habehira to Sanhedrin* 82a; *Dina D'hayai*, Positive Commandments, 77; *Hamrah V'hayai to Sanhedrin*

Due to all these reasons we believe that Professor Brody's approach is simply unacceptable.³⁰

We should like to suggest that the right of self-defense in Jewish law is grounded in a theory which combines both punishment and rescue elements. It would be permissible to kill a person in self-defense or in defense of others if (1) The person to be killed is engaged in wrongful conduct, punishable by death at its highest state,^{30a} for which the person is legally culpable: and (2) Killing the person will save (and is the only available way to save³¹) the victim from serious and irreparable harm³² resulting from the wrongful conduct.

At the heart of the right of self-defense is, of course, the rescue factor. By slaying the aggressor we save the life of the victim. However, as we noted before, that element alone simply is insufficient. In order for us to make the determination that the blood of the victim is indeed redder than the blood of the aggressor, so that in turn we are willing to trade off the life of the aggressor for that of the victim, we must demand that the conduct of the pursuer be wrongful and illegal. It is the wrongfulness quality which tips the scale in favor of the pursued. In the balance of interests between the illegal aggressor and the innocent victim, Torah law unhesitatingly opts for protecting the life of the latter. Both elements – the rescue and the wrongfulness quality – are, consequently, essential. In the absence of either aspect, the right of self-defense fails to become operative.

The approach we have just outlined finds expression in the writings

82a; *Mishneh Lamelekh to M.T. Rotsei'ah U'shemirat Nefesh* 1:15; *Resp. Igrot Moshe, Even ha-Ezer*, 1, 39 (end). See also *Resp. Mishpat Cohen*, 139 (end).

³⁰ For an additional approach see Sanford Kadish, "Respect for Life and Regard for Rights in the Criminal Law," 64 *Cal.L.R.* (1976) 871. This approach has been successfully refuted, however, by A. Enker, *Duress and Necessity in the Criminal Law* 235–239.

^{30a} Blackstone, *Commentaries*, Vol. 4, 182, writes in regard to the Common Law tradition that no act "may be prevented by death unless the same, if committed, would also be punished by death."

³¹ *Sanhedrin* 57a, 74a. See also Warhaftig, note 15 above, 60 and sources there cited.

³² Jewish law recognizes the right of self-defense against harm other than death such as incestuous assault and homosexual attack. See *M. Sanhedrin* 8:7. For grievous bodily harm, see I. Schepansky, "Studies in the Laws of an Aggressor," 20 *Or Hamizrach* (1970) 15, 23–27.

of Maimonides. In his philosophical work, *The Guide for the Perplexed*, he elucidates the right of self-defense as follows:

The law – I mean the prescription to kill him who wishes to accomplish an act of disobedience before he performs it – is only applicable to two kinds of acts: If one pursues his fellow man in order to kill him, and if one pursues someone in order to expose the latter's nakedness. For these are acts of wrongdoing that cannot be repaired once they have been accomplished. As for other transgressions that are punished with death by order of a court of law, such as idolatry and the profanation of the Sabbath, they do not constitute an act of wrongdoing with regard to someone else, but concern only thoughts; and, therefore, the transgressor is not killed because of his wish but only if he commits the transgression.³³

Maimonides clearly underscores the two elements we mentioned above. On the one hand the aggressor is one who “wishes to accomplish an act of disobedience . . . acts of wrongdoing.” On the other hand, however, the aggressor's wrongful conduct is such that if allowed to continue will cause harm “that cannot be repaired once they have been accomplished.”

In the modern period this analysis was clearly articulated by Rabbi Gershon Hanokh Fischman in his important volume, *Simhat Hahag*. He writes:

It appears to me that even should we maintain that the slaying of an aggressor results from the rescuing of the pursued, we must, nonetheless, acknowledge that there is an element of punishment as well. For without any aspect of punishing the pursuer, on what basis are we prepared to sacrifice the blood of the pursuer for the blood of the pursued by actively killing the aggressor to save the victim? Who says that the blood of the pursued is redder than the blood of the pursuer? We must, therefore, conclude that due to the wrongfulness of the aggressor we punish the aggressor in that his blood is worth less than the blood of the victim. . . . Therefore, when we have before us the blood of the pursuer and the blood of

³³ *The Guide for the Perplexed*, Part 3, chap. 40 (ed. Pines, 556).

the pursued, the blood of the pursued is preferred and we slay the aggressor to save the victim. This slaying is the result of punishment as well, and not solely the consequence of rescue.³⁴

Wrongfulness as an Essential Ingredient

In all candor we must admit that there is a group of important contemporary halakhic authorities who maintain that wrongfulness is not an essential ingredient to the right of self-defense.³⁵ Yet, these scholars in no way represent the traditional or dominant position in Jewish law.^{36,37} Three short but poignant examples from the writings of the early post-talmudic rabbis will demonstrate convincingly, we believe, that the quality of wrongfulness in the aggression was a requisite factor in their formulation of the right of self-defense.

1. The preamble to the seminal *Mishnah* which codifies the right of

³⁴ *Simhat Hahag*, 17. Cf. *Beit Zevul*, Vol. 2, 1, no. 10.

³⁵ *Resp. Bekurei Shlomo*. "Omissions to *Yore De'ah*," 10; Rabbi I.Y. Unterman, "Regarding the Preservation of the Life of a Fetus," 6 *Noam* (1963) 1, 6 and *Shevet Yehudah*, 28; *Amud Hayemini*, 16, chap. 4; *Resp. Lev Aryeh*, Vol. 2, 32, part 1, chap. 3, no. 2 (beginning); Rabbi Moshe Feinstein, "On the Law of Abortion," *Memorial Volume for Rabbi Yehezkel Abramsky* (Jerusalem 1978) 463. See also Rabbi Feinstein's *Resp. Igrot Moshe Yore De'ah*, Vol. 2, 60. This also appears to be the opinion of the following: *Yefei Toar Hashalem to Genesis Rabbah*, 76:2; *Resp. Pri Hasadeh*, Vol. 4, 50; *Resp. Mishpetei Uziel, H.M.*, 46 no. 2; Rabbi Shmuel Elimelekh Turk. "Abortion by Jewish Noahides," 22 *Or Hamizrach* (1973) 13,17,18.

³⁶ See *inter alia Resp. Havot Ya'ir*, 31; *Resp. Geonim Batrai*, sec. 45; *Resp. Torat Hesed*, 2, *Even ha-Ezer*, 42, no. 16-17; *Hidushei Rabbenu Hayyim Halevi* on Maimonides, note 21 above; *Even Ha'azel*, to *M.T. Rotsei'ah U'shemirat Nefesh* 1:9 (in the name of Rabbi Hayyim Soloveitchik); *Simhat Hahag*, 17; *Resp. Tsits Eliezer*, Vol. 9, 51, gate 3, chap. 1, no. 11; Rabbi Haim Isaac Korb, "Regarding the Saving of Life and Self-Defense" 18 *Hapardes* (1945) 23-25; Schepansky, note 32 above, 16-17; Rabbi Zvi Magence, "The Law of a Pursuer" 50 *Hadorom (Ashirah Lashem Behayai)* 206, 211, 214. This also appears to be the view of *Minhat Hinukh*, Commandment 296. Cf. *Resp. Lev Aryeh*, vol. 2, 32, part 1, chap. 3, who failed to take note of the *Minhat Hinukh's* remarks on this matter.

³⁷ This fact was unfortunately overlooked in the Note, "Justification and Excuse in the Judaic and Common Law: The Exculpation of a Defendant Charged with Homicide," 52 *N.Y.U.L.R.* 599. In general this piece is fraught with omissions, inaccuracies and misrepresentations as to the Jewish law position. The author(s) apparently had little or no access to primary Hebrew language source material and responsa.

self-defense and the defense of others reads: “These are to be rescued at the cost of their lives.”³⁸

Many of the important commentators – including Rashi³⁹ and the Tosafists⁴⁰ – interpret the *Mishnah* to mean: “These are to be rescued from their transgression at the cost of their own lives.”⁴¹

2. Maimonides understands the *Mishnah* slightly differently.⁴² He explains it to mean: “These are the victims who are to be rescued at the cost of the aggressors’ lives.” Nonetheless, Maimonides clearly requires criminal intent to be present for a fight of self-defense to exist. After citing the Biblical verse: “And you shall cut off her hands, you shall have no mercy,”⁴³ which, according to the *Sifrei*⁴⁴ and Maimonides,⁴⁵ serves as the Biblical source for the right of self-defense, Maimonides, in his *Mishneh Torah* comments:

The meaning of the verse is that should one intend to hit his fellow a deadly blow, we are to rescue the victim at the cost of the aggressor’s hands or, if that is impossible, his life.⁴⁶

It is evident that Maimonides considers the presence of *mens rea* a condition *sine qua non* for the slaying of an aggressor. The pursuer must at least intend to inflict upon the victim a deadly blow if not death itself.⁴⁷ This formulation of Maimonides goes hand in hand with his

³⁸ Note 13 above.

³⁹ *Sanhedrin* 73a.

⁴⁰ *Ibid.*

⁴¹ Emphasis added. See also *ibid.*, *Yad Ramah*; Rabbi Jonathan (b. David) Hakohen of Lunel; Author of the *Hidushei Haran*; Rabbi Judah (Hakohen b. Eleazar Hehasid) Al-Madari; *Peirush Talmid Haramban*; and Bertinoro to *Sanhedrin* 8:7.

⁴² *Commentary on the Mishnah, ad loc.*; *M.T. Rotsei’ah U’shemirat Nefesh* 1:6. See also *Semag*, Positive Commandments 76; *Dina D’hayai*, note 29 above.

⁴³ *Deut.* 25:12.

⁴⁴ Note 13 above. Cf. *Sanhedrin* 73a.

⁴⁵ *M.T. Rotsei’ah U’shemirat Nefesh* 1:7.

⁴⁶ *Ibid.* 1:8. This formulation is also to be found, in Hameiri’s *Beit Habehira* to *Sanhedrin* 73a (ed. Sofer, 272). See E.J. Schochet, *A Responsum of Surrender* (Los Angeles 1973) 50, who attributes this view exclusively to Hameiri, not being aware of the fact that Hameiri was merely following, as he so often does, in the footsteps of Maimonides.

⁴⁷ See *Resp. Hegeonim Batra’ee* 45.

presentation of the right of self-defense in *The Guide for the Perplexed* noted above.⁴⁸

3. The Babylonian Talmud⁴⁹ relates a case of one who placed his donkey onto an already loaded boat thereby endangering the lives of the human passengers. In order to save the boat from sinking one of the passengers quickly threw the animal overboard. The owner subsequently sued the passenger for damages caused by the loss of his donkey. The *amora*, Rabbah, ruled that the passenger was free from any payment, “For he” – namely the owner – “was from the outset an aggressor.” The owner realized that the carrier was overloaded but nonetheless disregarded the danger to the passengers. In doing so the owner became an aggressor whom we may stop “be it by killing him, be it by destroying his property.”⁵⁰ In his *Responsa Maimoniot*, Rabbi Meir haCohen affirms Rabbah’s holding:

. . . in a case where initially there was a danger in bringing the donkey aboard ship. However, if this act (of bringing the animal aboard) was usual, and only afterwards was the danger of sinking brought about by the donkey’s leaping, then should someone throw the animal into the river he would be obligated to pay, for the owner was not an aggressor and the fact that his donkey began to leap about was without fault.⁵¹

From these words it is indeed plain that the sole reason the donkey owner was considered an aggressor was due to his wrongfully endangering the passengers. Had there been no fault in his behavior, he would not be deemed a pursuer.

Rabbi Meir HaCohen’s ruling has been confirmed by many other important halakhic authorities.⁵² Interestingly though, Maimonides⁵³

⁴⁸ Note 33 above. See also Maimonides, *Sefer Hamitzvot*, Negative Commandment 293, where he states: “However, when he desires and is on his way to perform (the act), then he is considered a pursuer and we are obligated to stop him and prevent him from committing the transgression which he desires to do.”

⁴⁹ *B.K.* 117b.

⁵⁰ *Migdal Oz to M.T. Hovel U'mazik* 8:15.

⁵¹ *Resp. Maimoniot, Sefer Nezikin* sec. 20.

⁵² Mordekhai, *Baba Kama*, chap. 10, sec. 193; *Darkei Moshe to Tur, Hoshen Mishpat* 380:3; *Mappah, ibid.*, 380:4; *Resp. Harema*, 95; *Bah to Tur, Hoshen Mishpat*, 380. This is also the opinion of Ra’abad as understood by haGrah:

differs from this decision. Yet, in light of his other writings, his disagreement is certainly not based on a rejection of the wrongfulness requirement. Rather, it is predicated on a perspective which we shall soon have the opportunity to discuss.

In any case, these three examples, we maintain, should eliminate any doubt as to the essential role wrongfulness plays in the Jewish legal definition of the right of self-defense.⁵⁴

The Minor Aggressor

If we grant that guilt and fault are indispensable elements to the right of self-defense, what then would be the position of Jewish law if the aggressor were a minor. A minor in Jewish law – until the age of twelve for a female, and thirteen for a male⁵⁵ – is not punishable for her or his actions.⁵⁶ That would seem to indicate, in light of our above analysis, that a minor could never be by law an aggressor. Yet, our instincts tell us that one has a right of self-defense against a pursuer even if that pursuer is a minor.

The problem of a minor aggressor is in fact raised by Rabbi Hisda in the Jerusalem Talmud⁵⁷ and left unresolved. In the Babylonian Talmud,⁵⁸ however, Rabbi Huna rules unequivocally that a minor aggressor may be slain.

Bei'urei Hagrah, Hoshen Mishpat 380:4 no. 10 (end). See also Ra'abad to *M.T. Hovel U'mazik* 8:15, *Baba Kama* 117b.

⁵³ *M.T. Hovel U'mazik* 8:15. See also *Hoshen Mishpat* 380:4.

⁵⁴ See also *Gur Aryeh* to *Gen.* 32:8; *Yefei Toar*, note 35 above; *Matteh Aharon*, Vol. 2, no. 122; *Resp. Megei Haharigah*, 1, 29. In this last source, note that the author, Rabbi Simeon Efrati, entertains the notion of a guiltless aggressor *only* if the balance of interests is already tilted as in the case where the "aggressor" will die under any circumstances. If, however, the interests are equal, then Efrati clearly maintains that there is no guiltless aggression. This point was thoroughly misunderstood in note 37 above, 624. See also discussion below, section E.

Some authorities hold that while in the absence of a wrongdoing a third party may not intervene on behalf of either side, nonetheless, the victim himself may protect his own life even at the expense of the guiltless aggressor's life. See at length Frimer, note 10 above, 227–234.

⁵⁵ *M.T. Ishut* 2:1, 10.

⁵⁶ *Sanhedrin* 52b. See *Resp. Harosh*, 16, no. 1.

⁵⁷ *Y. Shabbat* 14:4 (14d); *Y. Avodah Zara* 2:2 (40d). See also *Y. Sanhedrin* 8:9 (26c) where the question is brought without any name.

⁵⁸ *Sanhedrin* 72b.

Rabbi Huna's ruling in no way contradicts our thesis, the need for wrongdoing in self-defense. We must, though, carefully distinguish between wrongfulness and punishment. While a minor may not be punished for his actions, nonetheless, a wrongdoing has been committed for which the child may be legally responsible. In the language of the Babylonian Talmud: "Since the action was done wilfully a wrongdoing has been committed. However, it is the Merciful One who has mercy on him."⁵⁹

Applying this principle to the laws of illicit relationships, Maimonides writes: The act of intercourse of anyone less than nine years old and one day is not deemed intercourse and, with regard to punishment, it is as if he has done nothing. However, with regard to the prohibition the act is prohibited.⁶⁰

The famed Rabbi Solomon haCohen of Vilna drew a similar conclusion from this talmudic text:

From the above cited text we must conclude a very novel thing. That minors are not punishable by law is not due to the fact that they are guiltless, inasmuch as they have no intent or will; nor is it due to the fact that such actions by them are not considered sins, since only adults were commanded the *mitsvot* and warned while they were not. Certainly minors were also commanded not to transgress the admonition of the Torah just as were adults, and their will is considered full will. Rather, the punishments for the Torah's prohibitions – such as flogging, fines, Divine death, and court enforced capital punishment – were imposed solely on adults and not on minors for the Merciful One had mercy on the children not to punish them by any means of punishment found in the Torah.⁶¹

⁵⁹ *Sanhedrin* 55b.

⁶⁰ *Commentary to the Mishnah, Sanhedrin* 7:4.

⁶¹ *Kuntress Y'dei Moshe*, note 14 above, part 2. See also *Resp. Havalim Bene'imim*, vol. 1, 41, s.v. "U'lekh'orah" (end); *Mekor Hessed* (by Rabbi Reuben Margolis) to *Sefer Hahasidim*, 692, no. 1, and the sources cited there; *Resp. Tsafnat Pa'ane'ah* 1, 39–134; *Mibet Midrasho shel Harav*, Rabbi Joseph B. Soloveichik, citing his grandfather Rabbi Haim Halevi Soloveichik, 162; *Mo'adim U'zemanim*, Vol. 8, Assorted Comments, Vol. 2, sec. 177; *Resp. Mishneh Halakhot*, Vol. 8, 61 and sources there cited; *Resp. Divrei Menahem*, Vol. 1, Resp., sec. 10. Or Same'ah to

Rabbi Solomon haCohen then proceeds to link his conclusion with the topic of self-defense.

With this we can understand why a minor who is pursuing another person to kill him or for illicit sexual relations can be slain. Since the minor is acting wilfully, we are clearly dutybound to rescue him from his transgression, for anything which he does wilfully is considered his sin just as if an adult had done it, except that he is not punishable.^{61a}

This analysis would force us to distinguish between two types of minors. The first is a minor capable of wilful killing. Such a minor could be an aggressor. The second type of minor is an infant, incapable of wilful killing, who would not be deemed an aggressor. This distinction is indeed correct and is to be found in the Babylonian Talmud.⁶² Rabbi Huna, upon rendering his decision that even a minor can be an aggressor, was challenged by his colleague Rabbi Hisda, who, as mentioned before,⁶³ had left the problem of the minor aggressor unresolved. The latter questioned the ruling from the following *Mishnah* in the tractate of *Oholot*:

If a woman was in hard travail, we cut up the child whilst it is in the womb and bring it forth member by member, since the life of the mother has precedence over the life of the child; but if the greater part of it has already come forth, it may not be touched, since we may not set aside one being for the sake of another.⁶⁴

M.T. Issurei Bi'ah 3:3, restricts this principle to a minor who performs one of the seven universal Noahide Laws which are incumbent upon Jews and Gentiles alike, e.g. homicide, illicit sexual relations, etc. (see S. Berman "Noahide Laws," *The Principles of Jewish Law*, ed. M. Elon (Jerusalem 1975) 708–710 = *Encyclopedia Judaica*, Vol. 12, 1189–1191). This approach has been followed by *Nahal Yitshak*, 7; Rabbi A.M. Hebroni, "Regarding an Aggressor," *V'zot L'yehudah* (Jerusalem 1977) 541, 544. This position, of course, would make no difference in regard to the laws of a minor aggressor. Cf., however, *Resp. Iggrot Moshe, Yore De'ah* Vol. 1, 3, 6, Vol. 2, 8, 10, who appears to maintain that a minor has no legal culpability whatsoever. See, however, *Resp. Iggrot Moshe, Even ha-Ezer*, Vol. 1, sec. 39, s.v. "ulifi zeh".

^{61a} See also *Resp. Ahiezer*, Vol. 1, 19, no. 1 (end); *She'erit Yosef* (Wahrman), Vol. 1, no. 4, 338–339; Rabbi Haim Osaiah Weiss, "The Conviction of an Aggressor," *Kovets Nehora* (Lakewood 1980) Vol. 1, 299, 302.

⁶² *Sanhedrin* 72b.

⁶³ Text at note 57 above.

⁶⁴ *M. Oholot* 7:6.

Rabbi Hisda's argument is from the second part of the *Mishnah* which rules that once the greater part of the child has been born, it may not be touched even though the mother's very existence is at stake. If, indeed, the law is according to Rabbi Huna that even a minor can be an aggressor, why then, queries Rabbi Hisda, can we not kill the infant – is he not a pursuer? Rabbi Huna's response is simple and straightforward: "It is heaven which is pursuing her."⁶⁵

The infant cannot be slain, even to save the mother's life, for the infant is not at fault for the threat to the mother's continued survival. The infant possesses no criminal mental state; his action is not wilful.⁶⁶ The danger results from a natural process whose origin is in heaven.⁶⁷ In other words, the child is not a wrongful aggressor. Under such conditions the law remains firm – "we may not set aside one being for another."

A child who has the mental and physical capacity to commit a wrongdoing can justifiably be killed as an aggressor. An infant, however, who lacks such attributes is not to be touched. This is Rabbi Huna's approach.⁶⁸

Abortion and the Right of Self-Defense

While Rabbi Hisda's attack on Rabbi Huna's ruling came from the latter half of the *Mishnah* in *Ohalot*, we should like to continue with an investigation of the former section of that *Mishnah*. There, the *Mishnah* rules that it is permitted to abort a fetus whose birth threatens the mother's life, "since the life of the mother has precedence over the life of the child." We do not intend to deal at length with the various aspects of abortion in Jewish law.⁶⁹ Rather, we

⁶⁵ See Rashi, *ad loc.*; Frimer, note 30 above, 219.

⁶⁶ *Resp. Torat Hesed*, note 36 above, no. 17; *Resp. Tsits Eliezer*, note 36 above; Schepansky, note 32 above, 16–17. See also *Tiferet Yisrael, Oholot* 7:6; *Boaz*, no. 10; Magence, note 36 above, 211–212.

⁶⁷ *M.T. Rotsei'ah U'shemirat Nefesh* 1:9; *Kesef Mishnah, ad loc.*

⁶⁸ Cf. sources cited in note 57 above. See Frimer, note 10 above 219–220, note 35, and at greater length in Frimer, "The Guiltless Aggressor," 24, *Or Hamizrach* (1985) 94 at 96–100.

⁶⁹ For excellent English language summary articles on abortion in Jewish Law see: J. Bleich, *Contemporary Halakhic Problems* (New York 1977) 325–371; D.B. Sinclair, "The Legal Basis for the Prohibition of Abortion in Jewish Law," 15 *Is. L. R.* (1980) 109–130.

would like to focus on that aspect of the subject which directly relates to our topic at hand, the right of self-defense.

There are two major schools of thought as to why abortion is allowed in order to save the mother's life. One school, headed by Rashi, maintains that while abortion is generally prohibited⁷⁰ the fetus is, nonetheless, not legally a "being."⁷¹ Consequently, the prohibition of abortion must be set aside in order to save the mother's life. The other school, led by Maimonides, contends that the justification of rescuing the mother by aborting the fetus is the principle of self-defense.⁷²

The view of Maimonides and his followers⁷³ has come under serious question. One of the major objections lies in the obvious lack of any fault on the part of the fetus. Without such fault, how can the fetus be deemed a wrongful aggressor worthy of death?⁷⁴ This challenge is especially troublesome in light of the fact that Maimonides himself, as we have seen,⁷⁵ readily accepts the element of wrongdoing as essential for the right of self-defense to become operative.

Various explanations and answers have been advanced.⁷⁶ Yet, we believe that the correct approach is that offered by Rabbi Shneur Zalman of Lublin,⁷⁷ Rabbi Gerson Henekh of Radzin⁷⁸ and Rabbi Hayyim Soloveitchik.⁷⁹ These scholars contend – with minor modifications among themselves – that a fetus is deemed a pursuer precisely because he is not a total "being." A re-examination of our self-defense analysis will reveal that this right becomes operative

⁷⁰ For the source of the prohibition see Rabbi A. Lichtenstein, "A Halakhic Opinion" 27, *Bri'ut Hatsibur* (1974) 495–501; Sinclair, *op. cit.*

⁷¹ Rashi to *Sanhedrin* 72b, s.v. "yatsah rosho."

⁷² Note 67 above.

⁷³ See for example Bahyai to *Deut.* 22:26; *Hoshen Mishpat* 425:2.

⁷⁴ See *inter alia* *Resp. Hogeonim Batra'ee*, 45; *Tosafot Rabbi Akiva Eiger, Oholot* 7:6, note 15; *Hidushei Rabbenu Hayyim Halevi*, note 36 above.

⁷⁵ See text and notes 43–48 above.

⁷⁶ See M. Stern, ed., *Medicine in the Light of Halakha* (Jerusalem 1980) Vol. 1, part 1, 24–51.

⁷⁷ *Resp. Torat Hesed*, note 36 above.

⁷⁸ *Sidrei Taharot, Oholot* 123a–123b, s.v. "mehtakhin."

⁷⁹ *Hidushei Rabbenu Hayyim Halevi*, note 36 above. See also *inter alia* *Kuntress Y'dei Moshe*, note 14 above; *Simhat Hahag*, note 14 above; *Resp. Yabia Omer*, Vol. 4, *Even ha-Ezer*, 1, no. 1; *Resp. Tsits Eliezer*, note 36 above.

when a lower social interest threatens a higher social interest. We thus rescue the higher interest at the expense of the lower interest. The question is, though, how to determine which life is the higher interest and which the lower. Under normal circumstances – when we are dealing with two human beings – we utilize the element of wrongdoing to help us weigh the interests; the person who is at fault for the wrongdoing is to be sacrificed in order to protect the innocent party.

However, there are instances where the tilt in the balance of interests is so obvious that we do not need wrongdoing to tell us which is the more preferred value. Take, for example, the case of the donkey on the boat.⁸⁰ Maimonides⁸¹ is of the opinion that even if there were no fault on the part of the owner in placing his donkey aboard, nonetheless, the passenger who threw the donkey overboard and thereby saved the ship is free from all payment. When we weigh the value of the donkey as against the value of the passengers, the proper balance is clear. Consequently, should the lower interest – the donkey – threaten the life of the higher interest – the passengers – the former is deemed an aggressor. Under such circumstances we require no fault whatsoever. In the words of Maimonides: “This cargo is like one who is pursuing to kill. And he who threw it overboard and thereby saved them did a very meritorious deed.”⁸²

A similar analysis, these scholars maintain, is applicable to the case of abortion. In Jewish law a fetus, while considered human life, is not a total human being.⁸³ The mother, however, is very much a human being. This status of “being” clearly augments the legal standing of the mother’s life itself. As such, between the mother and the fetus, there is no doubt which life is the higher interest. In the language of the *Mishnah*: “Her life has precedence over the life of the child.”⁸⁴ If so, should the lower interest fetus threaten the life of the higher interest mother we have once again entered the ambit of the right of self-defense. No fault is necessary, for the relative status of the two competing life interests is eminently understood. Once, however, the

⁸⁰ Text at notes 49–53 above.

⁸¹ Note 53 above.

⁸² *Ibid.* See *Resp. Torat Hesed*, note 36 above, 16; *Simhat Hahag*, note 14 above.

⁸³ *S’ma to Hoshen Mishpat* 452:2, no. 8.

⁸⁴ Note 64 above.

child has been born, he too becomes a “being.” At that point, even should the continued birth process cause the mother’s death, we may not touch the baby. He is not at fault and “we may not set aside one being for the sake of another”⁸⁵ in the absence of wrongdoing.

The differentiation between “human life” and “human being” is not without firm biblical foundation.⁸⁶ According to *Exodus*,⁸⁷ a man who strikes a pregnant woman and causes her to lose her fetus is required to compensate her husband, provided that the woman does not die.⁸⁸ While feticide does not carry the death penalty but only monetary payment, the demise of the mother entails “a being in place of a being” (“*nefesh tahat nefesh*”).⁸⁹ The contrast in punishment for the loss of the fetus as compared with that for the death of the mother, as well as the Torah’s careful usage of the phrase “a being in place of a being” only in connection with the mother, already point to a distinction between the relative values of the two lives.

This distinction is brought into clearer focus when, upon closer examination of the biblical verse, we realize that monetary compensation is the appropriate remedy even had the abortion been caused intentionally.⁹⁰ Yet, despite the intentional nature of the blow, the Torah refrains from equating this *actus reus* with that covered by the verse: “He who smites a man (*ish*) so that he should die, shall surely be put to death.”⁹¹ Obviously, the Torah does not consider the fetus

⁸⁵ *Ibid.*

⁸⁶ *S’ma*, note 83 above.

⁸⁷ *Ex. 21:22–23*, See B.S. Jackson, *Essays in Jewish and Comparative Legal History* (Leiden 1975) 75–107, for a comprehensive textual and legal treatment of this most difficult passage.

⁸⁸ This is the proper understanding of the verses according to most commentaries, both ancient and modern. See Sinclair, note 69 above, 110 and sources cited at note 3.

⁸⁹ There exists a debate among the Rabbis whether the phrase “a being in place of a being” is to be taken literally, i.e. the death penalty, or rather to be interpreted as requiring a just monetary compensation for the loss of a life. See *Mekhilta Mishpatim*, 8 (ed. Horowitz-Rabin, 276); *Sanhedrin* 79a–79b. Even should we accept the latter view, the biblical expression “a being in place of a being” indicates a payment far greater than that for the loss of the fetus. See Ibn Ezra to *Ex. 21:23*. Cf. the judgment of the German Supreme Court, March 11, 1927, 61 RGSt. 242 at 255.

⁹⁰ *Ha’amek Davar* to *Ex. 21:22*; D. Daube, *Studies in Biblical Law* (Cambridge 1947) 148; Sinclair, note 69 (above), 110–111.

⁹¹ *Ex. 21:12*.

“a man.”⁹² Even more striking is that feticide is not seen by the Torah as within the scope of the *Leviticus* treatment: “And a man who smites any human being (*kol nefesh adam*) shall surely die.”⁹³ One can only conclude that a fetus is neither “a man” nor a “human being.”⁹⁴

It may be worthwhile to note that the non-capital nature of feticide in the Torah corresponds to the position adopted by most ancient Near Eastern codes where the penalty incurred for feticide was generally pecuniary and on occasion even flagellation, but not death.⁹⁵ In addition, there is a close textual similarity between the feticide verses in *Exodus* and the relevant sections in the Code of Hammurabi, where the penalty is unequivocally monetary (“ten shekels of silver”).⁹⁶

It is not until the Septuagint that we find introduced into the biblical text a view other than the tort approach to feticide enunciated above.⁹⁷ However, as Daniel B. Sinclair argues: “Presumably the Septuagint here, as in other cases, followed the Greek concepts rather than the Hebrew etymology.”⁹⁸

Professor Victor Aptowitz concludes as follows:

Thus the rabbinic conception of the passage proves to be the only correct one and in agreement with the primitive tradition which reaches as far as the Pentateuch and beyond it to Abraham – in fact to the origin of Israel and to primitive Semitic tradition, while the view expressed in the Septuagint must be designated as a later tendency, which in addition is not genuinely Jewish but must have originated in Alexandria under Egyptian-Greek influence.⁹⁹

⁹² See *Mekhilta* to *Ex.* 21:12 (ed. Epstein-Melamed, 169).

⁹³ *Lev.* 24:17.

⁹⁴ Cf. *M. Niddah* 5:2. See also *Sanhedrin* 84b.

⁹⁵ Sinclair, note 69 above, 111–112.

⁹⁶ Hammurabi’s Code, sec. 209–210, cited in G.R. Driver and C. Miles, *The Babylonian Laws* (Oxford 1955) Vol. 2, 29.

⁹⁷ According to the Septuagint, only if the “child be born imperfectly formed” would a monetary payment suffice. If, however, the child “be perfectly formed, he shall give life for life.”

⁹⁸ Sinclair, note 69 above, 116.

⁹⁹ Aptowitz, “The Status of the Embryo in Jewish Criminal Law” 15 *Jewish*

Nonetheless, the early Christian theologians were heavily influenced by Greek thought and the Septuagint understanding of the Bible. Consequently, it is in their writings that abortion is treated as homicide and feticide condemned as the killing of a man.¹⁰⁰ It is at this point that, for the first time, the life of a fetus is given equal value to that of a born person.

Let us now return to the right of self-defense and the defense of others. While our perspective has been that of Jewish law, we must acknowledge that much of our thesis did not escape the analysis of Canon law scholars. Pope Pius XI's understanding of the right of self-defense is quite similar to that presented here.¹⁰¹ As a result, the Pope proceeds to reject the right of self-defense as a justification for abortion, on the grounds that a fetus is a guiltless aggressor.¹⁰² As we have demonstrated, however, Jewish law also views the fetus as a guiltless aggressor. Nonetheless, the lack of guilt alone is not sufficient to remove abortion – where needed to save the mother's life – from the scope of self-defense.

What is truly at the heart of the abortion–self-defense issue is the status of the fetus. In Canon law the life of the fetus is on par with the life of a born person. Hence, one may not abort even to save the mother's life. It is a life-versus-life situation and in the absence of guilt we may not trade off one life to save another. In Jewish law on the other hand, the life of the fetus and the life of the mother are inherently not of equal weight. While the fetus may be a “life,” the mother is a “being.” As such, “her life has precedence over the life

Quarterly Review (N.S.) (1924) 85, 88. Aptowitz goes even further and maintains “that the translation of the passage in question found in our Septuagint is not original but represents one of the numerous later transformations of the original Palestinian text of the Septuagint – though, it must be admitted, one of the oldest transformations, since it existed already at the time of Philo” (at 88–89).

¹⁰⁰ Sinclair, note 69 above, 109, 118, 128–130.

¹⁰¹ This theory of self-defense as predicated upon a balancing of interests is also the dominant theory of defensive force in Anglo-American Common law and French law. It has, moreover, found some support in Germany. The weight of authority in German law, however, as well as in Soviet law, subscribes to a somewhat different analysis of the right of self-defense. See at length Fletcher, note 27 above, 857–864; note 28 above, 377–380.

¹⁰² *Casti Connubii*, sec. 64, reprinted in William J. Gibbons ed., *Seven Great Encyclicals* (New Jersey 1939) 95.

of the child” within the parameters of self-defense, even without fault.¹⁰³ In the final analysis, it is not the legal construct over which these two religious systems differ, but, rather, in their fundamental understanding and definition of the quality of fetal life.

Judaism appreciates the sanctity of all human life. Yet, that full measure of sanctity – which we dare not violate – is endowed exclusively on a human being.

¹⁰³ Within the Anglo-American tradition, see Fletcher, note 27 above, 782, who writes: “There are many sensitive moralists who maintain that abortion is a case of directly taking innocent life and therefore should not be subject to justification by countervailing interests. The only way to avoid this conclusion is to argue that the fetus is a lesser interest than a person already born or at least less significant than the mother whose life or health might be endangered.” See also Enker, note 30 above, 110, and the sources there cited in note 34.

TERRORISM AND EXTORTION

*Nahum Rakover**

I should like to deal here with significant issues of current concern regarding terror and the extortion that accompanies it. The modern State of Israel is confronted most acutely with these dilemmas. The problem of how we are to best respond in the future and the repercussions of how we have reacted in the case of the Entebbe Raid and the recent interchange of terrorists for three of our prisoners of war, serve as pertinent examples. Our response on such occasions is not merely a matter of policy and political tactics but closely involves legal and moral problems of the highest order in the field of criminal law that affect both the individual and the public.

Maimonides deals with the subject in scattered *halakhot* in his *Mishneh Torah* but, surprisingly, not in those sections that touch upon public law such as *Hilkhot Sanhedrin* or *Hilkhot Melakhim*. Instead, the subject is considered in parts of his work that have little connection with matters of strict law.

One source is *Hilkhot Yesodei haTorah* (Foundations of Jewish Law), and another *Hilkhot Matnot Aniyim* (Charity).

In *Hilkhot Yesodei haTorah* Maimonides deals with *Kiddush haShem* (sanctification of the Holy Name – martyrdom) and with *Hilul haShem* (profanation of the Holy Name). In the course of his

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treatment of these subjects, he touches *inter alia* upon the obligation of a person to give up his own life in order to save another.

In *Hilkhot Matnot Aniyim*, which are really concerned with the giving of charity, he discusses the precept of the ransom of captives, which also falls under the category of charity.

It emerges from a study of the rules laid down by Maimonides that in certain circumstances the ransom of captives, which in general involves a positive act, may turn out to be a transgression. That will happen where blackmail or extortion is present. Where the captors demand a large sum of money beyond that which is “normal”, then not only is there no obligation to ransom but it is actually forbidden to comply with the ransom demand.

The prohibition rests on a *Mishnah* in *Gittin* where in the course of mentioning various regulations that were instituted because of *tikkun ha'olam* (good public order – to prevent abuses), the *Mishnah* states: “Captives should not be redeemed for more than their value because of *tikkun ha'olam*.”¹

This *takkanah* (enactment) is the basis of the law in this area. It demonstrates how dynamic Jewish law is in confronting various novel situations and in finding a solution appropriate to the circumstances.

What does this regulation signify? What interest is it intended to protect? Opinion in the Talmud *ad locum* is divided. “Does,” it is asked, “this (*tikkun ha'olam*) relate to the burden placed on the public (*duhka detzibura*) or perhaps to the possibility of encouraging the activities (of terrorists) (*delo ligrevu veletu tefeï*)?”²

In other words, was the *takkanah* made in order not to impose heavy financial obligations on the public in having to pay excessive ransom or not to embolden the taking of more and more captives for the purpose of extortion?

The two grounds differ from one another, as Rashi explains: if the object of the rule is to avoid heavy financial burden on the public, then if an individual, a relative of the captive, wishes to ransom him at the set price, there is nothing to prevent this being done. If the object is not to encourage the taking of captives, then such individual or relative

¹ *M. Gittin* 4:6 (45a).

² *Gittin* 45a.

is forbidden to ransom the captive. The individual may not yield to extortion even at his own expense because he has a social interest in opposing it.

To answer this question, the Talmud relates the story of one Levi b. Darga who ransomed his daughter for the very large sum of thirteen thousand gold dinars.³ It may apparently be gathered from this incident, that a relative willing to pay a large sum is permitted to do so. And, as a consequence, the reason for the rule is not the heavy financial burden on the public, but the fear of prompting the taking of captives.

The Talmud rejects the evidence provided by this incident. "Are you sure" asks Abaye, "that (Levi b. Darga) acted with the consent of the Rabbis? Perhaps he acted against their wishes."

The doubts in the Talmud over the basis of the *takkanah* are not resolved there. Maimonides holds that "captives are not to be ransomed for more than their value because of *tikkun ha'olam*, so that the captors do not pursue people to take them captive,"⁴ that is, Maimonides adopts the second of the above-mentioned grounds suggested by the Talmud. According to this approach, even if there is someone willing to pay more, he may not do so.

What is the scope of the *takkanah*? In what circumstances does it apply? What is the situation if the captive is in danger of his life? Is it better, then, to yield to extortion? To answer these questions, we must refer to a further discussion in the Talmud. R. Yehoshua b. Hananiah happened to be in Rome and was told that a young Jewish boy of comely appearance was in prison. He went and examined the boy by quoting a verse from *Is. 42:24*. On hearing the verse which the boy cited in reply, R. Yehoshua said, "I feel sure that this boy will one day be a noted teacher in Israel. I swear I will not depart before I ransom him, whatever price is demanded." The young boy later became R. Yishmael b. Elisha.⁵

All this appears to be wholly inconsistent with the rule of the *Mishnah*. *Tosafot ad locum*, discusses the question and comes to the

³ *Ibid.*

⁴ *M.T. Matnot Aniyim* 8:12.

⁵ *Gittin* 58a.

conclusion that when life is in danger ransom of greater value may be paid, thus importing a limitation on the mishnaic rule.

Is the view of *Tosafot* acceptable to Maimonides? According to the passage from Maimonides cited above, it seems that he did not place any limitation on the rule. However, is it indeed possible to infer that Maimonides placed no limitation on the rule of the *Mishnah* in view of his silence in this regard? It is a well-known principle that Maimonides does not mention matters that are not expressly stated in the Talmud and thus it is possible that because the limitation is not mentioned in the Talmud Maimonides does not refer to it.

Yet, if we look closely at the observation of Maimonides at the beginning of his treatment of the subject, it will become evident that in his opinion the *takkanah* applied also when danger to life exists. In describing the great importance of the *mitzvah* of ransoming captives, he writes that “the ransom of captives takes precedence to the feeding and clothing of the poor. There is no greater *mitzvah* than the ransoming of a captive since he comes within those who are famished, parched with thirst and without clothing and *they are in danger of their lives*.” And he adds that a person who closes his eyes to ransoming, transgresses several prohibitions, among them, “Thou shalt not stand idly by the blood of thy neighbor” (*Lev. 19:16*), and sets at naught several commandments, including “Deliver them that are drawn unto death” (*Prov. 24:11*).⁶

Since according to Maimonides, a captive is defined as a person in danger of his life, the mishnaic *takkanah* must also apply when danger to life obtains.

This view is more compelling from the treatment of the subject in *Shulhan Arukh*.⁷ Several limitations are mentioned there – an individual may ransom himself at any price he wishes; the same applies in the case of a scholar and even a very bright student who may become a great man – but not in respect of danger to life. Accordingly the view expressed by *Tosafot* is not accepted either by Maimonides or *Shulhan Arukh*.

Moreover, the opinion of *Tosafot* possibly rested on the view that the *takkanah* was promulgated in order not to bear too heavily on the

⁶ *M.T. Matnot Aniyim* 8:10.

⁷ *Yor'eh De'ah* 252:4.

public, but if it rests upon the alternative view, not to encourage the taking of captives, then even if a captive is in danger of his life he may not be ransomed for more than his value since to do so would encourage the taking of captives and putting them in danger of their lives. If the law is decided according to this alternative view, as Maimonides does, then the *Halakhah* is undisputedly that captives are not to be ransomed for more than their value even when they stand in danger of their lives.

How does one define the value of a captive? It may mean “the usual price” of a captive either in terms of money or in terms of some other *quid pro quo*, e.g., the release of one captive for another. In this sense, “more than their value” may mean more than is usual under international practice. And if international practice is not to release many terrorists for a few captives, then any departure from such practice will also be contrary to the *takkanah*.

Further questions arise in view of the rule that nothing takes precedence to the saving of life. How can we not do the utmost to save the life of a captive? Here, however, in opposition to this rule, the danger is present that other potential captives may be brought into danger of their lives. May we endanger one life by saving another?

This question is not specifically considered in the Talmud. Nor does Maimonides mention this aspect when deciding that a person must save his neighbour, on the basis of “Thou shalt not stand idly by the blood of thy neighbour.” In his laws relating to killing Maimonides writes:

any person who can save another and does not do so transgresses “Thou shalt not stand idly by the blood of thy neighbour.” Thus a person who sees his neighbour drowning or being attacked by bandits or wild animals should save him . . . and if he does not do so transgresses.⁸

So also he writes in his *Sefer haMitzvot*: “The warning is against refraining from saving life when one is able to do so, as when he is drowning and one is able to swim.”⁹ The ability to swim is emphasised by Maimonides in this case.

⁸ *M.T. Rotze'ah* 1:14.

⁹ Maimonides, *Sefer haMitzvot*, Neg. Precept 93.

Shulhan Arukh also does not mention any duty to put oneself in danger in order to save another.¹⁰

From the Jerusalem Talmud, however, it would seem, according to some authorities, that a person should place himself in danger in order to save another, and the reason given for this is that the other lies in full danger whilst the risk to oneself is doubtful.¹¹ The leading authorities, Alfasi and Maimonides and Tur, do not cite the Jerusalem Talmud, nor does *Shulhan Arukh*.

But even if there is no such duty, may one take the risk? May one undertake voluntarily a course that may entail loss of one's life?

To answer this question we must proceed to examine another topic with which Maimonides deals, self-incrimination. In rejecting this course, Maimonides gives an interesting reason: the admission of a defendent is not to be accepted since it may not be true and he is merely admitting something he did not do in order to be sentenced to death.

In commenting on this, Radbaz, one of the glossators of Maimonides, asks why the admission of a party is accepted as evidence in civil law but not in criminal law? The answer he gives is that whilst the subject matter of a civil case belongs to the party, his life does not, and a criminal defendent cannot "confess" a thing that does not belong to him, just as he cannot "admit" that another owes him money.¹² It follows that no possibility exists for a person to do what he likes with his own body. His body is protected under the law even against himself!

This, however, is not a complete answer for our present purposes since the party here has not lost "his mind" like an "insane person", in the terms of Maimonides, but rather has volunteered, and it is possible that in a case when one "volunteers" to do a *mitzvah* such as rescuing another life it is permissible.

As we know, when a person is faced with the option of transgressing or being killed, the rule in the Torah is that he should transgress and not be killed, except in the three severe cases of idolatry, incest and "the spilling of blood".¹³ What happens when a person faced with a

¹⁰ *Hoshen Mishpat* 426.

¹¹ *Y. Gittin* 5:7.

¹² Radbaz, to *M.T. Sanhedrin* 18:6.

¹³ *Sanhedrin* 74a.

choice wishes to be killed rather than transgress? Some hold that he may do so, viewing the rule “transgress and not be killed” as permissive. Maimonides, however, thinks otherwise, and in his view a person who chooses to be killed rather than commit a transgression commits a sin against himself.¹⁴

In fact, Maimonides’ view has not been accepted in practice. There are in Jewish history many cases of people sacrificing themselves in order not to transgress a religious precept. About this Rabbi Soloveitchik once told me that the Jewish people do not follow Maimonides.

Is the situation the same with risking one’s life for another? May a person put his life at peril, if by so doing another will be saved? There is no source that permits a person to “volunteer” himself, and that shows apparently that all acknowledge that it is forbidden.

Nevertheless, the release of terrorists which may involve endangering people in order to rescue others is something that should not be done, according to Maimonides. And this for two reasons: in order not to put at risk the life of one person to save another and because of the special *takkanah* that forbids giving way to extortion by the captors and not to encourage them further.

I do not want to end without raising another question that requires consideration. Is there any difference between extortion for a criminal purpose, financial extortion, and extortion for a political purpose?

Prima facie, political extortion is far more serious and its effects more far-reaching. What has been said about the “classic” form of extortion, that captives may not be ransomed for more than their value, has greater force. Yet, account must be taken of the fact that in war rules other than the usual obtain. In wartime soldiers endanger themselves in saving others. Various explanations have been given for this apparent inconsistency.

There is another aspect: tactical military considerations out of the ordinary may have far-reaching results which are pertinent here. But these considerations must always have as their point of departure a knowledge of the basic position regarding the saving of life and the usual limitations thereon. The latter may be ignored only when a decisive reason exists for disregarding them – the better conduct of war.

¹⁴ *M.T. Yesodei haTorah* 5:4.

Family Law

SOCIAL REALITIES IN EGYPT AND MAIMONIDES' RULINGS ON FAMILY LAW

*Mordechai A. Friedman**

The present period, associated with the 850th anniversary of Maimonides' birth (he was born in 1136/7 or 1137/8—not 1135),¹ has been the occasion for renewed interest in the master's works. Jewish Maimonidean studies traditionally have centered on his legal writings, especially *Mishneh Torah*.² The relationship between the rulings in his Code and the Talmud has always been at the heart of this activity. Relatively few studies have compared his work with Islamic law.

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¹ In a postscript to his Commentary to *Mishnah Tahorot*, Maimonides wrote that he completed the work in Egypt, at the age of 30, in the year 1479 Sel. A late colophon to a commentary to *Rosh ha-Shanah*, which is attributed to Maimonides, lists his birthdate as 14 Nisan 1446 Sel. (1135 C.E.). In a recent study, S.Z. Havlin (15 *Daat* [1985] 67–69) examines the relevant literature and convincingly demonstrates that, of the two testimonies, the *Mishnah* postscript is clearly more reliable. Many modern scholars (cited by Havlin) have in fact accepted this and accordingly list Maimonides' birthyear as 1449 Sel. or 1138 C.E. The intention, of course, is the year beginning Sept. 18, 1137 and ending Sept. 9, 1138. I assume that when Maimonides wrote that he was 30 years old, he meant that it was his 31st year. But he did not indicate when in 1479 Sel. he was writing or when his 30th birthday occurred. He could have become 30 sometime during the preceding year, in 1478 Sel. (Sept. 29, 1136 – Sept. 17, 1137). Consequently, Maimonides' birth may have been any time after the beginning of 1448 Sel. (1136/7) or in 1449 Sel. (1137/8). (Were we to accept the day and month of the second testimony, viz. 14 Nisan – but not the year, this could still be either 1137 or 1138).

² See I. Twersky, *Introduction to the Code of Maimonides* (New Haven and London 1980).

Another, even more promising area of inquiry has been particularly neglected, namely: the Egyptian Jewish community in which Maimonides was active.

How did the social realities of Egypt affect Maimonides; what responses did they elicit from him? To what extent did his activity influence every-day life in Egypt? Pertinent information on these questions can be gleaned from Maimonides' responsa, especially after the appearance of Joshua Blau's critical edition, with the Arabic originals.³ An additional abundant source of relevant data is found in the Cairo Geniza documents, most of them written in Judeo-Arabic. This material was not studied systematically for the first half century or so after its discovery. The revolutionary researches of the late lamented S.D. Goitein have reversed this situation, both through his comprehensive book *A Mediterranean Society* and numerous other works, including several papers devoted to Maimonides and his family.⁴

Although I am not a Maimonidean scholar, through my Geniza studies I have identified some of his unedited responsa as well as other relevant documents.⁵ Parenthetically, the Geniza may yet yield a few new fragments containing Maimonides' responsa; more than a few is, however, unlikely. There are numerous unedited responsa from his son Abraham Maimonides; I have identified many of these and hope to be able soon to collect and publish them. The Geniza documents which deal with marriage and the family have interested me for some years, and the following observations are based on these sources.

Goitein notes that Maimonides never served as a judge, and that no

³ R. Moses b. Maimon, *Responsa*, ed. J. Blau, I-IV (Jerusalem 1957-1986).

⁴ S.D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*, I-IV (Berkeley, Los-Angeles and London 1967-1983) (henceforth: Goitein, *Med. Soc.*). Goitein's most recent study on the Maimonidean family with references to his earlier publications is "The Twilight of the House of Maimonides: Joshua ha-Nagid (1310-1355)" 54 *Tarbiz* (1984) 67-104.

⁵ M.A. Friedman, "Three New Fragments from the Responsa of Maimonides", 46 *Tarbiz* (1976) 145-149; "New Fragments from the Responsa of Maimonides", in *Studies in Geniza and Sephardi Heritage Presented to Shelomo Dov Goitein* (Jerusalem 1981) 109-129.

Geniza documents signed by him in this capacity have been found.⁶ In 1964 a small fragment of a legal document that contained the signature of Moshe ben Maymun was published, and the editor suggested that this was in fact Maimonides who signed in the capacity of a witness or a judge.⁷ There was doubt as to the identification of the handwriting, however. Only a few words from the text of the document above the signature were intact in the fragment. From an analysis of them, I suggested, in my book *Jewish Marriage in Palestine – A Cairo Geniza Study*, that the document was a Palestinian-style marriage contract written in late tenth century Damascus. I have now identified another fragment of this document which confirms that suggestion. The witness Moshe ben Maymun, has, of course, nothing to do with Maimonides. In fact, he was probably a banker.⁸

The main source of Maimonides' authority was his scholarship. He was designated in queries sent him and in other documents as *haRav haGadol beYisrael* (the Great Rabbi of Israel), or, as Goitein has paraphrased this, the Grand Mufti, that is, the expert whose legal ruling (i.e., *fatwa*) was considered most decisive.⁹ But it is not entirely clear why judges sometimes added their consenting opinions to Maimonides' responsa.¹⁰

The Great Rabbi did serve two terms as the official Head of the Jews of Egypt, *Ra'is al-Yahūd*. He is cited as such in documents after the

⁶ S.D. Goitein, "Moses Maimonides, Man of Action: A Revision of the Master's Biography in Light of the Geniza Documents", in *Hommage à Georges Vajda* (Louvain 1980) 166–167. [Maimonides attests the validity of a power-of-attorney and the signatures of its witnesses in a document kept in the Marshall Case of the Jewish Theological Seminary of America Library; I hope to publish this elsewhere.]

⁷ J. Goldin, "Fragment of a Legal Deed Containing Maimonides' Signature?" 34 *Tarbiz* (1964) 65–71 (Cambridge University Library, Taylor-Schechter Collection [TS] 8.285). I would like to thank the Syndics of Cambridge University Library and Dr. S.C. Reif, Director of the Taylor-Schechter Genizah Research Unit for their assistance.

⁸ M.A. Friedman, *Jewish Marriage in Palestine – A Cairo Geniza Study* (Tel-Aviv and New York 1980–1981) Vol. II, 368–374. TS NS 69.46.

⁹ S.D. Goitein, "Maimonides' Biography in Light of New Discoveries from the Cairo Geniza", 4 *Peraqim* (1966) 34 (The marriage contract TS 12.572 cited there also refers to Maimonides as *haRav haGadol beYisrael*, and the citation is to be corrected accordingly); "Maimonides, Man of Action", 161.

¹⁰ See Friedman, "New Fragments" (See note 5 above) 110–111.

summer of 1171 and later some time after 1196.¹¹ As we shall presently see, he is called *Ra'īs* in a document from the end of 1198 or 1199. During these periods, Maimonides personally took charge of various community affairs, including some rather mundane matters.¹² As an example I would like to cite a new piece of information from the last of four documents dealing with a certain Sitt al-Gharb "Mistress of the Occident." Although the first three documents have nothing to do with Maimonides, I briefly summarize them as well, since they exemplify social realities of the time and place and show the fortuitous nature in which the Geniza papers themselves were preserved and researched. The first document is Sitt al-Gharb's marriage contract, of which I have identified two pieces, one, now in the Taylor-Schechter Collection in Cambridge, the largest Geniza Collection, and the other in the Bodleian Library of Oxford.¹³ The *ketubba* is still very incomplete. The two pieces are difficult to read, but they show that the marriage took place at Qūṣ, an out-of-the-way town on the upper Nile, some 45–50 days journey from the Egyptian capital. According to one letter no one came to Qūṣ unless he was running away from a ban of excommunication.¹⁴ (Incidentally, Goitein discovered a letter from

¹¹ Goitein, "Maimonides, Man of Action", 160 ff., 165–166 (in note 43, the shelf mark should read TS 12.822; it is correct in 4 *Peraqim* (1966) 33, note 11). To the documents from the summer of 1171 under Maimonides' authority add Papyrus Erherzog Rainer, Vienna (PER) H 20 from Marheshvan of that year. I would like to thank the Director of the Papyrussammlung, Österreichische Nationalbibliothek, for his cooperation. Also see M.A. Friedman, "Geniza Sources for the Crusader Period and for Maimonides and his Descendants" [Hebrew] 40 *Cathedra* (1986) 63–82 (an English version is to appear in the Gratz College Festschrift).

¹² Cf. Goitein, 4 *Peraqim* (1966) 33; idem, "Maimonides, Man of Action", 166: "The Geniza contains a number of autographs of Maimonides and other documents related to his activities as official head of the community. All seem to refer to his first tenure of office, although there cannot be absolute certainty in this matter, and all show that he dealt with the technical aspects of the issues concerned." Accordingly, the document discussed here, referring to Maimonides' second tenure of office, is somewhat of a novelty.

¹³ TS 8.239 + Bodl. MS Heb. a. 3, fol. 36. I would like to thank the Keeper and staff of the Department of Oriental Books and Manuscripts, the Bodleian Library, for their cooperation.

¹⁴ TS 13 J 26.6, partially edited in M.A. Friedman, *Jewish Polygyny in the Middle Ages – New Documents from the Cairo Geniza* (Hebrew, Jerusalem & Tel-Aviv 1986) 267–269.

Maimonides' brother David, in which he described to him his journey from Qūṣ to the Sudanese port 'Aydhāb, his point of departure to India; he perished on the way.)¹⁵ Item No. 2 in our file was issued in Aleppo, in Northern Syria, in 1189. Several years had passed. Mistress of the Occident had some small children and now lived in Alexandria, Egypt, her husband Eleazar in Aleppo. Eleazar agreed to give his wife's representative Abraham the Talmid, that is the Scholar, a bill of divorce for her, to be effective if he did not return to her within 13 months. This document is now in the New Series of the Taylor-Schechter Collection.¹⁶ The bill of divorce itself is found in the Mosseri Collection now in Paris.¹⁷ The fourth document is in the Adler Collection of the Jewish Theological Seminary of America in New York. It was written in Alexandria (so it seems) on Friday the 26th of the month (which month is missing) 4959 A.M., which could be either Kislev, corresponding to Dec. 25, 1198 or Av, Sept. 18, 1199. Sitt al-Gharb had remarried, and her new husband sold half of a house belonging to her. The community leaders insisted that nothing be done with it until explicit instructions came from the *Ra'īs* "our master and lord Moses, the Great Rabbi of Israel", however long that might take.¹⁸ Perhaps Maimonides' instructions will still turn up among the Geniza fragments.

Egypt was never known as a center of Jewish learning, and Maimonides found some serious discrepancies with standard Jewish legal practice as well as other irregularities which, in his opinion, had to be remedied by decisive action. The three enactments (*takkanot*) whose texts are cited in Blau's edition of his Responsa, all deal with family matters. (A fourth, forbidding one from bringing suit against a Jew in a Muslim court is referred to in a query. Others may be alluded to in the Geniza as well).¹⁹ Interesting background material for each can be found in the Geniza.

¹⁵ S.D. Goitein, *Letters of Medieval Jewish Traders* (Princeton 1973) 207-212.

¹⁶ TS NS J 455. Cf. Goitein, *Med. Soc.*, III, 262, 485 note 77.

¹⁷ Mosseri A (VII) 75. Cf. Goitein, *ibid.*

¹⁸ While any doctor could be called *Ra'īs*, the context indicates that *Ra'īs al-Yahūd* was intended here. The document is now kept in the Marchall Case of the Jewish Theological Seminary of America Library. I would like to thank the Librarian Dr. Menahem H. Schmelzer and his staff for their assistance.

¹⁹ *Resp. Moses b. Maimon* I, 39-40 (no. 27). Cf. S.D. Goitein, 32 *Tarbiz* (1963), 191 ff.

The enactment from 1176 intended to remedy a most serious violation of religious tradition. It deals with the ritual bath in the *mikve* after menstruation. The overwhelming majority of Egyptian women are said to have had a peculiar purification rite called *sakb*, which was something like a shower. The statute ruled that any woman who did not count seven clean days after menstruation and immerse in a *mikve* (or continued with the *sakb*) would forfeit her *ketubba*, that is her divorce settlement. The regulation was to be brought to the attention of the community by public announcements in the synagogue.²⁰ From the Geniza we learn of an additional method for publishing the enactment. Within a few years, a stipulation containing its main provisions was written in all Egyptian *ketubbot*.²¹ It thereby assumed the status of a binding monetary stipulation (*tenai mamon*), and the bride or groom could not claim ignorance of its measures. The stipulation appears with three variants. In one, the responsibility and financial consequences are borne by the wife. A second holds the groom responsible. If he had intercourse with his wife before she counted the seven clean days and immersed in a *mikve*, he must divorce her with full *ketubba* payments, even if she sued for divorce and he did not want to divorce her. The assumption in this case is that her husband forced her to have sex before going to the ritual bath. In the third type of contract both groom and bride are warned. If they did not obey the regulation, they would have to be divorced and the guilty party would make the *ketubba* payment or lose it, depending on the circumstances.²² Maimonides received a query concerning a divorce case

²⁰ *Resp.*, II, 434–444 (no. 242). The Geniza manuscript from the Taylor-Schechter Collection used by I. Friedlaender in his edition (cited by Blau *op. cit.*) now bears the shelf mark TS K 15.1. Friedlaender's edition has some minor errors. For example, for *ketubbat anashim* (men) in his edition (see Blau, 442, n. 145) the manuscript reads *ketubbat nashim* (women). For the date, see II, 443, n. 17. As noted there, I. Abrahams cited a Geniza document TS K 13 (later cited by L.M. Epstein; see note 24 below) where the enactment was dated 1176 (see Blau, III, 129). I suspect that this may actually refer to the same manuscript TS 10 K 15.1 published by Friedlaender.

²¹ The earliest example which I have noted is TS 20.13, written when Sar Shalom was Head of the Jews.

²² Examples of each type can be found in the following documents: Bodl. MS. Heb. b. 12, fol. 11 (wife responsible); TS 8 J 6.11 (husband responsible); Bodl. MS. Heb. d. 65, fol. 20 (both responsible).

in Alexandria which describes the conflicting accusations that resulted from the new rule. The wife's *ketubba* did not contain this stipulation. The husband claimed that his wife had refused to go to the ritual bath and subsequently should not collect the *ketubba* settlement. She countered that she had told her husband that she had not yet gone to the *mikve*, and he had raped her.²³ By the way, many of the Geniza marriage contracts that contain this clause are badly mutilated. L.M. Epstein in his book, *The Jewish Marriage Contract*, cites a fragmentary Geniza *ketubba* which supposedly contains the unusual stipulation that the bride would forfeit her *ketubba* payment, if she did not light the Sabbath candles. The text which he cites contains no such stipulation. Epstein unfortunately read *nerot*, "candles", instead of *nidut* "menstrual impurity", and restored the clause with some liberality.²⁴ A document concerning a divorced couple who were remarrying in 1229 has a strange notation on the margin *wakānat bilā tevīla* literally "she was without a ritual bath," and I am not sure exactly what was intended.²⁵

One should not conclude that the rules concerning purification after menstruation were ignored in Egypt before Maimonides. Some documents point to the strict separation of menstruant women. An agreement drawn up in early eleventh century Fayyūm between simple folk, with the conditions for reconciliation between a husband and wife, includes a clause that "whenever she is pure she will not refrain from doing all the household chores."²⁶ The implied prohibition to engage in household chores during menstrual impurity is a continuation of the ancient Palestinian practice which was more stringent than the Babylonian one.²⁷ In Maimonides' time, the original Palestinian custom was no longer followed in Eretz Israel. He assumed that Egyptian Jewry had been influenced by sectarian practices: "Whoever thinks that food

²³ *Resp. Moses b. Maimon* II, 426–428 (no. 234).

²⁴ TS 16.85. L.M. Epstein, *The Jewish Marriage Contract* (New York 1927), p. 279.

²⁵ Cambridge University Library 1081 J 40. An unpublished query addressed to Abraham Maimonides proves that the problems associated with this matter were still quite serious when he served as Nagid.

²⁶ PER *1, ed. S. Assaf, "Pitom and Damsis" (Hebrew), in *Sefer haYovel...Marx* (New York, 1943), 75. Cf. Friedman, *Jewish Marriage in Palestine*, I, 188.

²⁷ See, for example, M. Margulies (Margaliot), *The Differences between Babylonian and Palestinian Jewry* (Jerusalem, 1938) 114–118.

which has been touched by a menstruant woman is forbidden has left the Rabbanite community and denies the Oral Law.”²⁸ The ancient Palestinian custom may be the basis for the obscure accusation against the “Rav”, Judah b. Joseph ha-Kohen, an eminent scholar in the mid-eleventh century, that he had said to Abraham the Son of the Scholar: “If your mother will not take ritual baths, I will visit you; I will not eat a meal in your house.”²⁹ Goitein cites an engagement agreement between members of scholarly families from the first half of the twelfth century with the singular stipulation that the groom “undertook to observe the ritual bath.” A rather fragmentary query addressed to Mazliah Cohen, Gaon of the Palestinian Academy relocated in Cairo, concerns a woman unable to perform the ritual bath.³⁰ Furthermore, Maimonides does note that some individuals in Egypt practiced the rules of ritual purity as required.³¹ It is not clear from these sources how the immersion was performed. Goitein has noted that no *mikve* is mentioned in eleventh and twelfth century documents from Fustat; but for the time being, I believe it advisable to refrain from concluding that there was none.³²

The second enactment is dated 1187 and pronounces a ban on whoever performs a wedding or arranges a divorce in the Egyptian towns of Damanhūr, Bilbais and Maḥalla other than the respective local judges, Ḥalfon, Judah Cohen, and Perahya.³³ The Jews of Alexandria addressed a query to Abraham Maimonides containing the text of a statute promulgated in 1235 which proclaimed a similar ban against anyone who performed a marriage there other than the local *muqaddam*. The statute cites the enactment of Maimonides and his court that

²⁸ *Resp. Moses b. Maimon II*, 588–589 (no. 320).

²⁹ TS K 25.244, ed. S.D. Goitein, 2 *Shalem*, (1976), 56–63; idem, *Palestinian Jewry in Early Islamic and Crusader Times* (Jerusalem, 1980), 144–149. Cf. Friedman, *Jewish Marriage in Palestine*, I, 188.

³⁰ The engagement agreement: Goitein, *Med. Soc.*, III, 154. The query: Mosseri IV 15.2. Also note a letter written by a man whose wife had not been able to perform the ritual bath in 20 years and who sought permission to marry a second wife (edited by M.A. Friedman, *Jewish Polygyny in the Middle Ages*, pp. 188–193).

³¹ *Resp. Moses b. Maimon II*, 436.

³² Goitein, *Med. Soc.*, II, 154–155. Cf. M. Gil, *Documents of the Jewish Pious Foundations from the Cairo Geniza* (Leiden, 1976), 173, note 5.

³³ *Resp. Moses b. Maimon II*, 624–625 (no. 348). (On the date, see S.D. Goitein, 32 *Tarbiz* 184, n. 2.)

“placed under the ban all inhabitants of the land who performed a marriage without permission of the muqaddams appointed for this by the contemporary *Ra'īs*,” and R. Abraham refers to this in his responsum.³⁴ The Geniza contains much information concerning irregularities perpetuated by ignorant people in matters of marriage and divorce and the long history of the authorities' attempts to bring this under control. The muqaddam was the head of a local community, appointed by the central Jewish leaders to supervise all religious matters.³⁵ I believe that Maimonides made only one enactment, which referred to any town in the country that had a muqaddam, and the aforementioned judges served as muqaddams in their communities. The enactment may have been promulgated in separate copies to different areas where the local muqaddams were named.

The restriction of marriage ceremonies to the muqaddam is referred to in a number of subsequent Geniza texts. Abraham Maimonides writes to the muqaddam of Minyat Zifta and Minyat Ghamr that in any town with a muqaddam, he alone could perform weddings and divorces.³⁶ A woman appeared before Abraham Maimonides and complained that her husband had not paid her divorce settlement but intended to marry another wife. The Nagid assured her that none of the muqaddams would marry her husband unless he paid her. A circular was sent to the muqaddams giving them explicit instructions concerning the affair, but someone seems to have allowed the husband to marry anyway.³⁷

A Muslim *fatwa*, or legal opinion, from Cordova written sometime between the 10 and 12th centuries speaks of *al-muqaddam lil-manākih*, the muqaddam for women or marital affairs. Maimonides' enactment may have been a response to local conditions in Egypt and can be related to Talmudic precedent, but the parallel to the Islamic institution of Cordova merits further investigation.³⁸

³⁴ *Resp. Abraham Maimuni* (Hebrew), ed. A.H. Frieimann and S.D. Goitein (Jerusalem, 1937) 182–183, 189 (no. 106).

³⁵ See the literature on the *muqaddam* cited in Friedman, *Polygyny*, ch. 10, no. 6, n. 4.

³⁶ TS 12.597. See Friedman, 43 *Tarbiz* (1974), 184.

³⁷ *Ibid.*, at 182–196 (re-edited in Friedman, *Polygyny*).

³⁸ See H.R. Idris, “Le mariage en Occident musulman”, 25 *Revue de l'Occident de musulman et de la Méditerranée* (1978) 130. Talmudic precedent: *Gittin* 5b end, R. Ahi was appointed over bills of divorce.

The last enactment, which is undated, is of particular interest.

Enacted for the benefit of the daughters of Israel. We shall not allow any foreigner to marry in the land of Egypt until he brings proof that he is single or takes an oath to this effect on a Pentateuch. If he has a wife, he must write her a bill of divorce and only then will we let him marry here. Any foreigner who marries a wife here and wants to go abroad will not be allowed to do so, even if his wife gives her consent, unless he writes her a bill of divorce, delivers it to her and stipulates (that it will be effective at) a time they agree upon, whether one, two or three years, but no more.³⁹

The enactment is not an anti-polygyny measure as such. Both in his Code and responsa, Maimonides clearly ruled, according to Rava, that a man may marry as many women as he could support, despite his wife's protest.⁴⁰ Recent research has identified numerous Geniza texts that deal with the polygyny syndrome. I have prepared a study on the question which includes some 70 documents relevant to monogamy, polygyny and concubinage with slave girls.⁴¹ Before Maimonides' arrival, Egyptian Jewry followed the Palestinian ruling (of R. Ammi) that a wife could refuse her husband permission for a second marriage.⁴² If he persisted, she could demand a divorce with full *ketubba* payments. On the other hand, if one had a wife in another country, he could deposit her *ketubba* payment in court and immediately marry a second wife in Egypt. The prevailing practice is succinctly defined in a document drawn up by the rabbinic court of Fustāt in 1139. A Jew from Sicily, who already had a wife whom he had left in Damascus, applied to the court for a license to marry a local Egyptian woman, because the government – “may God increase its glory” – would not engage him in civil service unless he had a wife in Egypt.

But the custom in Miṣr [Fustāt or Egypt] is not to let anyone get married if he already has a wife, unless she consents. If she is

³⁹ *Resp. Moses b. Maimon II*, 624 (no. 347).

⁴⁰ See *M. T. Nashim* 14:3.

⁴¹ See note 14 above.

⁴² *Yevamot* 65a.

abroad, he must bring her *mu'akhkhar* (the delayed marriage settlement) and deposit it, until his situation with the first wife is clarified, however it might be.

The deposit insured the first wife's rights, were she to demand a divorce, yet enabled the husband to marry another woman without delay. The Sicilian Jew did just this, and after four months, word had still not arrived from his Damascene wife.⁴³

Maimonides reversed this practice. A local man could marry a second wife irrespective of his first wife's wishes. And whoever had a wife abroad would have to divorce her before marrying an Egyptian woman. Similarly, before leaving Egypt, one (the word "foreigner" may be superfluous here)⁴⁴ would have to give his wife a conditional bill of divorce. A priori these provisions appear to be based on R. Eliezer b. Jacob's dictum (*Yebamot* 37b and parallel): "One should not marry a woman in this city (or: country) and go and take another wife in another city, lest a match is made between the children, and a brother marry his sister." But as the heading "for the benefit of the daughters of Israel" suggests, Maimonides' enactment was not concerned primarily with incest but with women being deserted by their husbands or separated from them for an extended period. Some of the problems associated with the high mobility of the society have already been demonstrated by the Mistress of the Occident's file. Men who engaged in the India trade sometimes were abroad for as many as ten or twenty years. The practice to give conditional bills of divorce before leaving the country had been in vogue for some time. In fact a fragmentary document written in Fustāt during the first four decades of the twelfth century (1100–1138) seems to speak of a statute (*tikkun*) requiring a conditional divorce by husbands absenting themselves for four years.⁴⁵ Maimonides strengthened this measure and shortened the period to three years.

My original intention was to discuss several additional areas of family law dealt with by Maimonides which are given a special dimension

⁴³ TS 13 J 2.25, ed. Friedman, 40 *Tarbiz* (1971) 335–340 (re-edited in *Polygyny*).

⁴⁴ On the other hand, a local man might have been expected to return to Egypt, while a foreigner could be assumed to stay abroad.

⁴⁵ See Goitein, *Med. Soc.*, III, 190, 466, n. 143.

by the Egyptian background and the Geniza documents, such as the levirate, the wife whose bad luck was believed to be the cause of her husbands' deaths,⁴⁶ the *ketubba* text and its provisions,⁴⁷ the *moredet* or recalcitrant wife, the *iftidā* or ransom-divorce procedure,⁴⁸ wife beating, the wife's freedom of movement outdoors⁴⁹ and Maimonides' ruling that one who was suspected of having an affair with his slave girl should emancipate and marry her.⁵⁰ But time does not permit me to discuss these matters now. In any event, my purpose in this paper was to indicate that even random Geniza studies could contribute to a better understanding of Maimonides' work in Egypt and its influence on society. I hope that the examples discussed above have achieved this to some degree. A systematic search of the Geniza documents for material relevant to Maimonides' rulings on family law as well as other areas should yield some interesting results.

⁴⁶ See M.A. Friedman, "Tamar, A Symbol of Life: The 'Killer Wife' Superstition in the Bible and Jewish Tradition" (to appear in the Spertus College of Judaica Jubilee Volume).

⁴⁷ See Friedman, *Jewish Marriage in Palestine*, I, 305 *et passim*.

⁴⁸ See M.A. Friedman, "The Ransom-Divorce: Divorce Proceedings Initiated by the Wife in Mediaeval Jewish Practice", 6 *Israel Oriental Studies* (1976) 288–307.

⁴⁹ See Friedman, "The Ethics of Medieval Jewish Marriage", in *Religion in a Religious Age*, ed. S.D. Goitein (Cambridge 1974), pp. 87 ff.

⁵⁰ *Resp. Moses b. Maimon II*, 373–375 (no. 211); see Friedman, *Polygyny*, ch. 10.

COMPELLING THE HUSBAND TO DIVORCE

The Device of the “Sages of Spain”

*J. David Bleich**

In recent years numerous attempts have been made to alleviate the plight of the modern-day *agunah*, i.e., the woman whose husband declines to cooperate in the execution of a religious divorce despite the irreversible breakdown of the marital relationship as evidenced by the issuance of a divorce decree by a civil court. The simplest remedy by far would lie in the drafting of an antenuptial agreement between the bride and groom which would bind the husband to the payment of an extravagant sum of money upon failure to execute a religious divorce within a specified period of time subsequent to entry of a judgment of divorce by a court of competent jurisdiction. There are, however, a number of considerations which effectively serve to bar consideration of such a remedy.

Lack of Enforceability in Secular Courts

Realistically, in order to be effective, any remedy for the problem posed by the recalcitrant husband must be enforceable in secular courts. The husband who, for whatever reason, refuses to alleviate the plight of his estranged wife is unlikely to abide by the conditions of any agreement or voluntary undertaking unless he recognizes that judicial proceedings may be initiated in order to compel fulfillment of the terms of such an undertaking. Hence an agreement providing a penalty

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for non-performance of an undertaking to deliver a *get* will be of little avail since penalty agreements are, in most cases, unenforceable in a court of law. In common law, penalty agreements are regarded as being in violation of public policy and hence are not actionable.

There is some disagreement with regard to the precise nature of the public policy which renders penalty agreements odious. Many scholars accept the proposition that it is “obviously against conscience that a person should recover a sum of money wholly in excess of any loss incurred”¹ but disagree with regard to the nature of this violation of conscience. It has been contended that enforcement of such stipulations would lead to taking unconscionable advantage of an accident,² would constitute unfair recovery in excess of justifiable reliance,³ or that contracting parties, overly optimistic about capacity to perform obligations, would be subject to severe hardship.⁴ It may also be the case that the legal prejudice against enforcement of penalty clauses is rooted in the concept that imposition of punitive sanctions is the exclusive prerogative of the State and cannot be made the subject of an agreement between private parties. Individual citizens cannot stipulate the punishment to be imposed for a crime committed by one party against another; nor are private persons competent to criminalize actions which are not so categorized by the State. Other authorities maintain that the public policy offended is the concern to limit recovery for breach of contract to damages actually suffered in order to discourage performance of contractual undertakings in situations in which adherence to the provisions of an agreement would be uneconomic. Legal theory assumes that uneconomic performance is wasteful and hence not in the public interest.⁵

¹ W.S. Holdsworth, *A History of English Law*, vol. V (Boston 1927) 293.

² *Loc. cit.* Holdsworth also suggests that a person seeking to enforce such an agreement “might, in some circumstances, come perilously close to committing a fraud.”

³ See Ian Macneil, “Power of Contract and Agreed Remedies”, 47 *Cornell Law Quarterly* (1982) 495, 499–501.

⁴ See Charles T. McCormick, *Handbook on the Law of Damages* (St. Paul 1935) 601.

⁵ See, for example, Charles J. Goetz and Robert E. Scott, “Liquidated Damages, Penalties and the Just Compensation Principle”, 77 *Columbia Law Review* (1977) 554–594.

Unenforceability of Penalty Clauses in Jewish Law (*asmakhta*)

Penalty clauses, in many if not most instances, are similarly unenforceable in Jewish law, albeit for other reasons. In Jewish law such agreements constitute an unenforceable *asmakhta*. The essence of a contract is the “meeting of the minds.” In Jewish law this is reflected in the need for *gemirat da’at* on the part of the person bound by the contract, i.e., finality of intent and determination to be truly bound thereby, and of *semikhat da’at* on the part of the beneficiary, i.e., satisfaction with regard to the other party’s determination to perform and mental reliance thereon. Absent these reciprocal psychological phenomena no binding contract exists.

Inclusion of a penalty clause in a contractual agreement is designed to spur performance of the primary obligation. Characteristically, a person obligating himself to payment of a penalty for non-performance agrees to such a stipulation only because he is confident of his ability to perform and does not seriously anticipate that he will be called upon to fulfill the secondary undertaking. Accordingly, since at the time of assumption of the obligation there is no seriousness of intent with regard to payment of the penalty, the requisite element of *gemirat da’at* is lacking and hence the penalty is unenforceable. Thus, for example, a contractor who enters into an agreement to construct a building and binds himself to complete the project by a certain date upon penalty of payment of a stipulated sum should he fail to complete construction by that date will not be compelled to pay the contractually stipulated penalty for non-performance. No prudent contractor enters into such an agreement unless he firmly intends to perform on the contract. He agrees to insertion of a penalty provision solely because he is confident of his ability to perform and does not seriously anticipate that he will be called upon to fulfill the contingent obligation, viz., payment of the penalty.

Since a penalty agreement is unenforceable in Jewish law any attempt to compel payment by means of recourse to secular courts or otherwise is, from the vantage point of *Halakhah*, indistinguishable from extortion. Any attempt to secure a *get* upon threat of illicit enforcement of such an undertaking is tantamount to coercion of the *get*

itself and hence a religious divorce granted under such circumstances would be invalid by reason of duress.⁶

Discouragement of Divorce Executed Under Self-Imposed Duress

Even if the defect of *asmakhta* were to be obviated and the penalty rendered actionable, the validity of a religious divorce executed pursuant to such an agreement would remain under a cloud. The validity of a *get* executed under circumstances of self-imposed duress (*onsa de-nafshe*) is the subject of considerable dispute among early authorities. Bet Yosef to *Even ha-Ezer* cites *Teshuvot haRashba* as maintaining that a *get* executed pursuant to an actionable undertaking to indemnify the wife's family for failure to deliver the *get* is invalid by reason of not being executed voluntarily.⁷ Similarly, *Shulhan Arukh Even ha-Ezer* rules that if the husband swore an oath to grant a *get* the oath must be annulled prior to execution of the *get* since the oath, although voluntarily assumed, constitutes a form of duress.⁸ Rema there rules that a *get* should not be executed in a situation in which delivery of the *get* serves to avoid a voluntarily assumed financial obligation but that *post factum* a *get* executed under such circumstances is valid.⁹

Possible Solutions

The first step in crafting an acceptable device for assuring the cooperation of the husband is to find a means of curing the defect of *asmakhta*. Given the extreme and well-founded reluctance on the part of rabbinic authorities to sanction any procedure which would render the *get* invalid even according to a minority view,¹⁰ the remedy must avoid the taint of *asmakhta* in a manner accepted by all authorities. Such a device was fashioned by earlier authorities in an entirely different context.

⁶ See *Resp. Tashbatz*, I, no. 1; *Resp. Mabit*, I, no. 22 and II, no. 138. Cf., however, *Resp. Ribash*, no. 126.

⁷ Beit Yosef to *Even ha-Ezer* 134.

⁸ *Even ha-Ezer* 134:4.

⁹ *Loc. cit.*

¹⁰ See *Resp. R. Betzalel Ashkenazi* no. 15; *Beit Me'ir*, *Even haEzer* 134:4; and *Mishkenot Ya'akov*, *Even haEzer*, nos. 38–41, who maintain that all authorities are in agreement with Rashba in maintaining that the *get* is invalid in situations in which the husband regrets his prior financial undertaking in the event that he fails to grant a *get*. Cf., however, *Hazon Ish*, *Even ha-Ezer* 99:3 and 99:5.

Compelling the Husband to Divorce

Engagement contracts have from time immemorial provided for a penalty to be imposed for breach of promise. Ostensibly, such penalties are not enforceable by reason of *asmakhta*. *Tosafot*, propounds the theory that the penalty is actually compensation for the shame and humiliation caused to the rejected party.¹¹ As such, the stipulated penalty is actionable in a manner closely resembling the concept of liquidated damages which figures prominently in other systems of law. In common law, penalties are enforceable to the extent that they are designed to compensate for damages suffered provided that the precise extent of the damages are difficult to ascertain and there is a reasonable relationship between the stipulated payment and the extent of actual or consequential damages.¹² Rambam, apparently rejecting this theory, advises that the contract be drafted in a particular and innovative manner in order to avoid the *asmakhta* defect:

When the sages of Spain wish to convey by means of *asmakhta* thus did they do: They entered into a *kinyan* with this [party] that he owes his friend a hundred dinarii. After he obligated himself they entered into a *kinyan* with his creditor that “whatever thus and so shall transpire or [whenever] he shall do thus and so the debt is forgiven retroactively, but if it shall not transpire or he shall not perform I will claim the money to which he has obligated himself.” We acted in this manner in all engagement contracts between a man and his wife and in all similar matters.¹³

The device crafted by the “sages of Spain” and reported by Rambam provides for two separate and ostensibly unrelated undertakings. The first consists of a unilateral and unconditional obligation undertaken *ex gratia* to pay a specified party a certain sum of money. The second consists of a conditional forgiveness of that obligation by the beneficiary of the undertaking. Forgiveness of the already assumed unconditional obligation is made contingent upon fulfillment of a stipulated condition. Thus, for example, a prospective groom enters into an

¹¹ *Tosafot to Baba Metzia* 66a.

¹² See 5 Corbin, *Contracts*, ch. 58 (1964 and Supp. 1980); 5 Williston, *Contracts* §§ 776–89 (3rd ed. 1961); and *Restatement (Second) of Contracts* §356(1).

¹³ *M.T. Mekhirah* 11:18.

obligation in favor of his fiancée for the payment of one hundred dinarii. She, in turn, predicates her forgiveness of that debt upon solemnization of a marriage between the groom and herself.

That the groom's undertaking is free of any taint of *asmakhta* is quite evident. His obligation is unconditional and unequivocal. The binding nature of the bride's release is however deemed somewhat more problematic. Her forgiveness is predicated upon the groom's performance. To be sure, her release is in the form of an inducement to perform rather than in the nature of a penalty for non-performance. Nevertheless, according to some authorities, conditional obligations of such nature are still categorized as *asmakhta*. Thus, Rambam rules that a person who stipulates "If you will go with me to Jerusalem on a certain day, or if you will bring me a certain object, I will give you this house, or I will sell it to you for so much and so much" is not bound by his undertaking unless the beneficiary takes possession of the house immediately, thus rendering the condition a condition subsequent rather than a condition precedent.¹⁴ However, Rabbenu Nissim maintains that forgiveness is never rendered nugatory by reason of *asmakhta*.¹⁵ The distinction between a promissory undertaking and a release in this regard is essentially psychological. A person undertaking an obligation in the nature of an *asmakhta* lacks seriousness of intent with regard to performance whereas forgiveness, by its very nature, pertains to situations in which the beneficiary is already in possession of the funds or property to be conveyed. Hence the person accepting such a stipulation is quick to realize that fulfillment of the stipulated condition will simply cause possession to ripen into title and that,

¹⁴ *M.T. Mekhirah* 11:3. According to some authorities, in order for such an agreement to be actionable the recipient must take physical possession of the property being conditionally conveyed; according to other authorities transfer by deed or payment of the purchase price is sufficient. See *Bet Yosef to Hoshen Mishpat* 207. *Perishah to Hoshen Mishpat* 207:14 and *Sema to Hoshen Mishpat* 207:6, maintain that the crucial distinction is whether the primary desire is fulfillment of the condition or validation of the conveyance. If the primary concern is the transfer of property and the condition is stipulated as a material aspect of the conveyance the transaction is not void by reason of *asmakhta*; but if the primary concern is the fulfillment of the condition, and the transfer of property is effected merely as an inducement designed to secure performance of the condition, the transaction is void by reason of *asmakhta*.

¹⁵ Ran to *Nedarim* 27b.

since possession has been confirmed, repayment of funds or return of property will not be forthcoming.

Nevertheless, *Maggid Mishneh*, in his commentary on Rambam's ruling, remarks that the device of the "sages of Spain" conforms to the view of only "the majority of opinions." The minority view not satisfied by such a procedure is presumably that of Rashi, as elucidated by Rabbenu Nissim to *Nedarim* who maintains that forgiveness is also governed by principles of *asmakhta* coupled with the position that *asmakhta* applies not only to penalties but to inducements as well.¹⁶

The expedient devised by the "sages of Spain" can readily be adapted to assure that a recalcitrant husband would find refusal to grant his estranged wife a *get* to be inimical to his financial interests. The groom might be required to enter into an antenuptial undertaking obligating himself to the payment of a specified sum to the bride. The monetary obligation, undertaken in consideration of marriage, would be unilateral and would be entirely unconditional. The undertaking would provide that the specified sum might be claimed by the wife at her discretion at any time. The bride would deliver a release forgiving the groom's obligation subject to the execution of a religious divorce. Assuming that a husband would prefer to divorce his wife rather than pay the stipulated sum, the wife would, in effect, be able to secure a *get* upon demand. It is of course obvious that, since the husband can readily avoid performance of his undertaking by executing a *get*, no woman desirous of continued marital bliss would attempt to compel performance of the husband's undertaking by presenting a claim for satisfaction of the stated obligation.

A similar expedient can be utilized to avoid situations in which the husband desires a religious divorce but the wife refuses her cooperation in its acceptance. Since, by virtue of rabbinic edict, a woman cannot be divorced against her will, the husband is barred from entering into a new marital relationship unless he is able to establish grounds for a *heter me'ah rabbanim* which serves as dispensation from the ban of Rabbenu Gershom prohibiting polygamous marriage. It is only because of the specter of the husband's ability to establish grounds for a *heter me'ah rabbanim* that many such situations are avoided with the

¹⁶ Rashi to *Baba Metzia* 47b; Ran to *Nedarim* 27b.

result that the incidence of recalcitrant wives is much less frequent than that of recalcitrant husbands. Nevertheless, such situations do arise on occasion and might be entirely avoided by means of this expedient.

In order to avoid such situations the bride would similarly enter into a unilateral and unconditional undertaking to pay a specified amount to the groom. Thereupon the husband would enter into a separate undertaking to forgive that obligation upon acquiescence of the wife to the execution of a religious divorce. In order to assure the cooperation of both parties, the bride and the groom would each be required to enter into an undertaking of this nature and to execute a conditional release of the opposite party's obligation. The net result would be that when both parties agree to a *get* both undertakings become extinguished. So long as neither party desires a *get* the reciprocal obligations, provided they are for an identical sum of money, have the effect of cancelling one another and remain dormant. If one party desires a *get* and the other does not, the monetary obligation of the party willing to execute a *get* is *ipso facto* forgiven while the obligation assumed by the recalcitrant party remains in full force.

The expedient devised by the "sages of Spain" is endorsed by Rabbam and is codified by *Shulhan Arukh Hoshen Mishpat* and *Even haEzer*, and hence must be regarded as normative.¹⁷ Even an understandable desire on the part of rabbinic scholars not to sanction execution of a *get* when its validity is subject to challenge even on the basis of a minority opinion should not serve as a barrier to utilization of such a device. To be sure, as indicated by *Maggid Mishneh*, some authorities would regard the conditional release of the undertaking herein outlined as invalid by reason of *asmakhta*. However, since the undertaking and the release are entirely separate and discreet, the onus of *asmakhta* does not at all taint the primary undertaking. Thus the unconditional undertaking to pay the specified sum is enforceable according to *all* authorities. Accordingly, there can be no question that an action to enforce that undertaking does not constitute extortion. Similarly, since the assumed obligation is not at all linked to failure to execute a *get* there arises no question of self-imposed duress. According to the minority view, the obligation with regard to payment of the

¹⁷ *Hoshen Mishpat* 207:16 and *Even ha-Ezer* 50:6.

specified sum is simply not extinguished by the actual execution of a religious divorce because the release is defective by reason of *asmakhta* and hence the original survives despite the cooperation of the party. Yet no person need hesitate to enter into such an agreement for fear that he will be called upon to satisfy the financial undertaking despite his cooperation in the execution of a religious divorce. Since a Bet Din cannot act to compel payment in accordance with the minority view, no Bet Din will be in a position to compel performance of the undertaking once a *get* has been executed.¹⁸

A proposal for an antenuptial undertaking along these general lines, but which incorporates significant modifications, has been outlined by Rabbi Judah Dick in an article published in *Tradition*.¹⁹ A Hebrew version of the same proposal appeared in *Sefer haYovel in Honor of Rav Soloveitchik*.²⁰ The latter publication contains an addendum by Rabbi Saul Israeli expressing a number of objections to the proposal focussing upon the validity of the device of the “sages of Spain” when applied to a situation involving execution of a *get* in order to avoid satisfaction of a financial undertaking.

¹⁸ Moreover, if both bride and groom enter into identical undertakings such reciprocal undertakings have the effect of cancelling one another. However, this does not mean that the recalcitrant party may rely upon the minority opinion in claiming that his or her release of the other party's obligation is void for reason of *asmakhta* and hence that the respective obligations are always extinguished. Such a pleading (*kim li*) is, in this case, perforce predicated upon a minority view rejected by *Shulhan Arukh* and Rema and for that reason does not serve as a defense against a legitimate claim. See R. Yonatan Eibenschutz, *Te'umin, Kitzur Tokpo Kohen*, sec. 124. Nor can such a pleading be advanced on the basis of a minority view as a counterclaim when the validity of the original claim is incontestable. See *Resp. Ra'anah*, II, no. 1; *Pri Tevu'ah*, no. 47; and *Divrei Ge'onim*, rule 91, sec. 11. Since, in this case, the validity of the monetary undertaking is not subject to dispute, the defending party can advance his or her own claim for an identical sum only as a counterclaim. However, since this pleading can be sustained only on the basis of a minority view (which regards the reciprocal undertaking as unextinguished because the release is void by reason of *asmakhta*) it cannot be interposed as a counterclaim in order to secure exoneration from satisfaction of an obligation the validity of which is incontrovertible.

¹⁹ J. Dick, 21 *Tradition* (1983) 91–106.

²⁰ *Sefer haYovel leKhvod haGaon Soloveitchik* (Jerusalem 1974) Vol. I, 226–236.

Does a Pre-Nuptial Undertaking Involve Self-Imposed Duress

The expedient devised by the “sages of Spain” was carefully crafted to avoid the defect of *asmakhta*. There remains, however, the further question of whether an undertaking of this nature constitutes a form of self-imposed duress such that a *get* executed pursuant to its provisions by a person unwilling to grant a divorce other than because he is faced by the prospect of financial loss would be invalid according to the opinion of Rashba.²¹

In essence, Rashba’s position is that a *get* is invalid when executed under duress even if such duress is indirect. Hence duress compelling a person to fulfill a perfectly binding undertaking to pay compensation for failure to execute a religious divorce invalidates the *get* since it is simply an indirect means of securing compliance in executing a *get*. Those who disagree with Rashba maintain either that self-imposed duress does not constitute duress²² or that, since the enforceable demand is for financial compensation rather than for a *get*, a religious divorce executed under such circumstances is not to be regarded as executed under duress; i.e., so long as satisfaction of a lawful claim remains a viable option in order to avoid execution of the *get*, execution of the *get* in order to avoid payment of a just debt is regarded as a voluntary act motivated by the self-interest of the husband.²³ Essentially, the controversy between Rashba and other authorities is with regard to situations in which the husband is subject to duress of some nature: He is compelled either to execute a *get* or to pay a certain sum of money upon failure to do so. Since the husband is under no independent obligation to make payment and can avoid the *get* only by means of such payment, a *get* executed under such circumstances is regarded by Rashba as having been obtained by duress – indirect duress, but duress none the less.

However, this is not to say that, according to Rashba, all conceivable forms of indirect duress invalidate a *get*. This can be demon-

²¹ *Resp. Rashba* IV, no. 40.

²² See the responsum of Ritva cited in *Bet Yosef to Even ha-Ezer* 154; *Resp. Maharik*, no. 63; *Resp. Tashbatz*, II, no. 68; and Rema to *Even ha-Ezer* 134:5.

²³ See the responsum of R. Maimon Nagor cited in *Bet Yosef to Even ha-Ezer* 134 and Rema to *Even ha-Ezer* 134:5.

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strated on the basis of a *reductio ad absurdum*. Were it the case that in every instance in which the husband executes a *get* in order to relieve himself of a financial obligation the *get* is thereby rendered invalid, virtually no divorce would be valid. It is quite true that in our day the primary motive in many, if not most, instances prompting a husband to execute a *get* is a desire to be free to enter into a new marital relationship. Nevertheless, it must be remembered that under biblical law the husband need not execute a *get* in order to achieve that end. Since biblical law sanctions polygamy the husband does not lack capacity to enter into a second marriage without terminating the first. The husband's sole motivation, then, is a desire to free himself of the financial obligation and conjugal obligations which flow from the marital bonds. The existence of those financial obligations and the desire to be free of them do not constitute duress; rather, considerations of such nature lie at the essence of a determination to dissolve the marital relationship. A husband may choose either to continue a marital relationship and both to enjoy its privileges and bear its burdens or he may terminate the relationship by means of a *get* and thereby deny himself the advantages of marriage and avoid its concomitant burdens. Similarly, a person in need of cash who sells property in order to realize the purchase price cannot void the sale for reason of duress. No one would ever sell property unless he has determined that, given the attendant circumstances, he prefers the money to continued ownership of the property. It is for precisely the same reason that a *get* executed in return for a freely accepted financial inducement is regarded by all authorities as voluntary in nature. The fact that, absent such inducement, the husband would refuse to grant the *get* does not render his act involuntary. The husband enjoys complete freedom of choice with regard to continuing of the marital relationship or receiving the benefit of the proffered sum. Accordingly, a *get* executed in return for financial inducement is regarded as valid by all authorities. T. Shimon b. Zemah Duran, Tashbatz, rules that a *get* executed pursuant to an agreement to forgive an outstanding debt is similarly valid.²⁴ In effect, Tashbatz rules that forgiveness of a debt is no different from delivery of cash. To be sure, failure on the part of the husband to acquiesce to the arrangement may result in application of various sanctions designed to compel

²⁴ *Resp. Tashbatz*, II, no. 68.

payment of the debt. Those sanctions are, however, not designed to enforce execution of a religious divorce but rather to compel payment of a lawful debt entirely unrelated to the *get*.

The sole difference between the situation described by Tashbatz and that addressed by Rashba is that, in Rashba's case, assumption of the debt is coupled with, and made contingent upon, failure to grant a *get*. Rashba's objection is based upon the fact that a financial obligation of such nature is generated solely as a means of enforcing the *get*. Since there is a direct linkage between the financial undertaking and the *get*, enforcement of the financial undertaking, although it is self-imposed, is regarded as duress with regard to the *get* itself. The compulsion is, to be sure, indirect but is regarded by Rashba as compulsion with regard to the *get* nonetheless.

A unilateral and unconditional obligation by the groom in favor of the bride coupled with an agreement to cancel the debt in return for a *get* would appear to be identical in nature to the situation described by Tashbatz. Since the groom's undertaking is not linked to non-execution of a *get* Rashba's objection would not appear to be pertinent. However, further analysis of this matter must be undertaken in light of the comments of a 16th-century scholar, R. Moses di Trani. In commenting upon the ruling of Tashbatz, this authority writes:

. . . for also that which Tashbatz, of blessed memory, wrote that if they coerced him with regard to other matters and in order to preserve himself from that coercion he agrees to divorce it is not a coerced *get*. . . . It appears to me that this is when they coerce him with regard to another matter not with intent of divorce, and he, of his own accord, in order to avoid that punishment, divorces of his own accord, as R. Shimon, of blessed memory, twice wrote in his phraseology "of his own accord (*me-atzmo*)". . . . However, when they wish to compel him with regard to the divorce, and they would not have been concerned to compel him and to insist upon some other matter with regard to which they would have been able to compel him, but in order to compel him with regard to the *get* they compel him with regard to some other matter which they know that he cannot fulfill and [therefore] he will divorce, then it appears that the coercion is precisely with regard to the *get*.²⁵

²⁵ *Resp. Mabit*, II, no. 138.

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Although the terminology of Mabit is not entirely unequivocal he may be understood as regarding a *get* to be invalid in one of two circumstances: (1) either when the husband is financially incapable of meeting the demand made upon him; or (2) when the financial claim is not pressed for its own sake but solely for the purpose of securing a *get*.

The qualms expressed by Mabit in circumstances in which the husband is financially incapable of meeting the demand made upon him are readily understandable. An attempt to press an illegitimate claim is tantamount to extortion. The husband's acquiescence to a *get* in order to avoid extortion constitutes execution of the *get* under duress. Jewish law prohibits pressing a debtor for payment of even a just debt when it is known that the debtor is insolvent. This prohibition is derived from the biblical verse "If you lend money to any of my people . . . you shall not be to him as an exactor" (*Ex. 22:24*). Mabit regards an attempt to exact payment under such circumstances as the equivalent of extortion since the claim is, practically speaking, not actionable, i.e., although the debt is not extinguished, a claim may not legitimately be pressed when it is known that satisfaction is not possible.

Nevertheless, the concern expressed by Mabit does not serve to bar utilization of the agreement which is the subject of this discussion. In light of Mabit's position care must simply be taken to limit any actual claim for recovery to an amount within the financial capability of the husband. Any remaining balance will continue to be due and owing to be paid when the husband is financially capable of doing so.

Rabbi Israeli, however, is concerned that a *get* granted pursuant to such an agreement would be defective by virtue of the second consideration raised by Mabit, viz., that the primary interest in enforcing the agreement is compliance in the delivery of the *get* rather than enforcement of the financial undertaking. Indeed, if the groom's undertaking and the bride's release subject to execution of a *get* are merged in a single instrument this concern may well be cogent. Under such circumstances there may be strong reason to construe the undertaking regarded in its entirety as designed primarily to assure the execution of a *get*. In order to obviate this objection the groom's undertaking and the bride's release should be drafted as entirely separate instruments. Under such circumstances the wife may institute a cause of action on the basis of a document that declares only the husband's unconditional

undertaking. Since under such circumstances the sole relief demanded by the wife is financial and that financial claim is the sole subject of the instrument upon which her claim is predicated there is no prima facie reason to assume that the wife's expressed desire to press a financial claim is merely instrumental to obtaining a *get*. In pressing the claim and in any pleadings drafted by the wife or drafted on her behalf scrupulous care should be taken not to refer to the husband's ability to exonerate himself from his financial obligation by executing a *get*. Any offer to execute a *get* should originate with the husband – in the words of Tashbatz “of his own accord.” The existence of a conditional release already signed by the wife should be of no significance provided that, in pressing her claim, she makes no attempt to secure a *get* but institutes a bona fide claim for fulfillment of the husband's financial undertaking – an undertaking which, were the husband desirous of renewed marital bliss, he would be compelled to honor and to recognize as being entirely compatible with continued domestic harmony.

A more serious obstacle is presented by the position expressed by R. Ya'akov of Lissa in *Torat Gittin*.²⁶ He addresses himself to the oft-occurring situation in which, following negotiations between the parties, the husband agrees to execute a *get* and thereupon the wife seeks some form of assurance that the husband will not renege on his agreement. The expedient devised by the “sages of Spain,” i.e., an unconditional monetary undertaking on the part of the husband coupled with a conditional release executed by the wife, is rejected for utilization in such situations. He argues that, although the husband is ostensibly unconditional in nature, he nevertheless retains the option of legitimately withdrawing from his commitment should the wife subsequently fail to execute a conditional release. *Shulhan Arukh* rules that any agreement entered into by means of a *sudar* (seizing of a “kerchief”) may be rescinded until such time as “the parties rise,” i.e., so long as the matter remains the subject of unadjoined conversation between the parties.²⁷ It is clear, he argues, that, under the circumstances, were the wife not to execute a conditional release, the husband would retract his own undertaking as he is legally empowered to do. Hence, concludes

²⁶ *Torat Gittin* 134:4.

²⁷ *Hoshen Mishpat* 195:6.

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Torat Gittin, a linkage does in fact exist between the husband's undertaking and the wife's conditional forgiveness with the result that the husband's undertaking assumes the guise of a self-imposed penalty for non-execution of a religious divorce.

It is important to clarify the precise nature of this objection. *Torat Gittin* does not challenge the validity of the procedure adopted by the "sages of Spain" insofar as commercial or engagement contracts are concerned. In those contexts such undertakings are entirely valid since the sole impediment to actionability of a penalty agreement is the defect of *asmakhta* which is entirely cured by the remedy crafted by the "sages of Spain." Although, as *Torat Gittin* points out, the husband's undertaking is, in reality, contingent upon the wife's conditional forgiveness the undertaking itself, once assumed, is unconditional. The wife's release is a condition precedent for the husband's assumption of his stipulated obligation but, once assumed, the husband's obligation is undertaken in the form of an unconditional obligation. Insofar as *asmakhta* is concerned the form of the undertaking is crucial. An absolute undertaking is free from the defect of *asmakhta*. Although the person entering into the undertaking may freely withdraw if a conditional release is not forthcoming, nevertheless, once the undertaking becomes effective, it is unconditional in nature. The objection is that although the undertaking is not defective by reason of *asmakhta*, when employed in the context of an agreement to grant a divorce, the linkage between the husband's undertaking and the wife's conditional forgiveness is such that *de facto* it constitutes a penalty for non-execution of a *get* and hence, according to Rashba, a *get* executed pursuant to such an agreement is void for reason of duress. *Torat Gittin's* contention is that duress exists wherever there is linkage of any nature between the undertaking and the granting of a *get*.

The position advanced by Rabbi Ya'akov of Lissa does indeed serve as a formidable barrier to adoption of the proposal as heretofore outlined.²⁸ However, a modification may be made in the proposal which will render it entirely compatible with the position taken by him.

²⁸ Rabbi Dick endeavors to accommodate the view of *Torat Gittin* by conditioning the wife's release upon execution of a *get* within a specified period of time. *Torat Gittin* declares that the husband's obligation is enforceable under such circumstances provided that a timely *get* is not executed because the two instruments are

As will be shown, the modification earlier advocated to render the agreement compatible with the view expressed by Tashbatz will overcome the concerns expressed. R. Ya'akov of Lissa speaks of a situation in which the husband's undertaking and the wife's conditional release are both executed at a single sitting. Were the respective instruments to be executed on two separate occasions his objections would not obtain. Having risen from the deliberations subsequent to the assumption of an unconditional undertaking, the husband no longer enjoys the option of renouncing his undertaking even if the wife fails to execute a conditional release as anticipated by the husband. Indeed, it is precisely for that reason that a husband who has agreed to grant a divorce (which is the situation discussed) will not allow the parties to rise with his undertaking in force unless the wife executes a release at the same sitting. The husband cogently fears that the wife will accept a *get* and then insist upon fulfillment of the financial undertaking or, if a conditional release is subsequently demanded prior to execution of the *get*, she may refuse to accept a *get* in lieu of payment of the financial obligation assumed by the husband.

An antenuptial undertaking on the part of the groom is another matter entirely. The groom should be advised to execute his undertaking at the time of the couple's engagement or during the course of a prenuptial conference in the rabbi's study. On the same occasion the bride should execute a similar obligation in a like amount in favor of the groom.²⁹ Immediately prior to the wedding ceremony, the bride

no longer interdependent after the expiration of this specified period of time. See Dick, *op. cit.* p. 100, note 29. Rabbi Israeli correctly observes that such an arrangement renders it impossible for the husband to execute a *get* within the time period unless the obligation is forgiven, but if the obligation is indeed forgiven there is nothing to prevent the husband from refusing to grant a *get*. Moreover, according to *Torat Gittin*, the husband can totally avoid both the *get* and the monetary obligation by offering to execute the divorce within the stipulated time period. According to Rashba such a divorce would be invalid since it is executed in order to avoid a penalty for non-execution. However, since the husband is not permitted to execute the *get* despite his willingness to do so within the stipulated time period, he cannot be required to pay the stipulated penalty after the stipulated period has elapsed. See *Sefer haYovel*, I, 239–240.

²⁹ A single, unconditional undertaking to be entered into by the groom is not advised because such an undertaking would remain binding even if the engagement is later broken. An undertaking of that nature could, of course, be made contingent upon subsequent solemnization of the marriage by rendering it actionable only after mar-

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should be advised to execute a release of the groom's obligation contingent upon the granting of a religious divorce by the groom. At the same time, the groom would be required to execute a similar release contingent upon the wife's agreement to accept a *get*. Since, in accordance with this procedure, the instruments and the releases are executed at different times no linkage whatsoever exists between the husband's financial undertaking and an agreement with regard to a *get*. Thus, *Torat Gittin's* objection does not pertain to an arrangement of this nature. Insofar as financial consequences are concerned, neither party need fear that he or she will be burdened with an onerous debt as a result of the other party's subsequent refusal to execute a conditional release since failure to execute mutual releases would leave the parties with reciprocal obligations which effectively nullify one another. Moreover, the aggrieved party would retain the option of refusing to proceed with the marriage unless the requisite instruments are exchanged.³⁰

riage has occurred. Such a procedure is not advised because it may possibly be argued that *Torat Gittin's* position renders such an expedient defective. To wit: The groom certainly has the option of rendering the agreement nugatory by refusing to enter into the marriage. Indeed, it may be presumed that he would refuse to do so were the bride to refuse to execute the anticipated conditional release. Hence, it might be argued, a linkage is created between actualization of the actionability of the undertaking at the time of marriage and the bride's conditional release. In the opinion of this writer, since it is the prior undertaking rather than the marriage that binds the groom and the agreement itself cannot be rescinded unilaterally, no linkage is created between the actual undertaking and the contingent release. Be that as it may, a procedure involving reciprocal undertakings by the bride and groom is certainly not subject to such objection and, additionally, affords protection against a recalcitrant wife as well.

³⁰ For a remedy based upon an entirely different expedient requiring but a single document rather than four separate instruments and which makes no reference whatsoever to the contingency of divorce see J. David Bleich, "Modern-Day *Agunut*: A Proposed Remedy", IV *Jewish Law Annual* (1981) 139-154.

INDIVIDUAL, SOCIAL AND NATIONAL ASPECTS OF INHERITANCE

*Benjamin Greenberger**

I

When we speak of theories of inheritance, we are actually addressing two distinct issues. The first is the basic question – why allow inheritance at all. There is, after all, nothing inherent in the notion of private property which requires that ownership thereof automatically pass to others upon death. Instead, one could assume a system where property passes to the state, or escheats, upon death. American case law long ago decided, for example, in accordance with Blackstone,¹ that the entire institution of inheritance, intestate as well as testate, is a privilege granted by the state; a typical example is the 1896 United States Supreme Court opinion of *U.S. v. Perkins*.²

Another alternative is that property becomes ownerless upon death, and anyone would then have the right to acquire it by taking possession. In Jewish law, for example, a convert to Judaism is deemed to

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¹ 2 Bl. Comm., C.1, 14: “All rules of succession to estates are creatures of the civil polity and *juris positivi* merely.”

² 163 U.S. 625, 627 (1896): “the right to dispose of . . . property by will has always been considered purely a creature of statute.” See also, *Irving Trust v. Day*, 314 U.S. 556, 562. But see, *Nunnemacher v. State*, 129 Wis. 190, 108 N.W. 627 (1906). See, generally, McMurray, “Liberty of Testation and Some Modern Limitations Thereon”, 14 *Illinois L. Rev.* 96(1919); Connor, “The Nature of Succession”, 8 *Fordham L. Rev.* 151 (1939).

have no heirs unless he has children after his conversion, and his property indeed *does* become ownerless upon his death.³

The Talmud apparently sides with those classical theorists who consider inheritance to be fundamental, and even in the absence of legislation, that is, even if the Torah were silent on the issue, some form of inheritance would be applicable. This can be illustrated from the talmudic discussion⁴ of the biblical passage: “If a man die and have no son, then ye shall cause his inheritance to pass to his daughter” (*Numbers 27:8*). Rabbi Pappa suggests as a possible interpretation that a son inherits when there is no daughter, and a daughter inherits when there is no son, but if the decedent leaves both a son and a daughter, then neither one inherits. The Talmud considers this preposterous. Its response to Rabbi Pappa’s suggestion is: “Who than shall inherit if not the children who survive the decedent – should the town official inherit instead?”⁵ Thus, irrespective of the biblical rules, there is apparently a self-understood logic, in the talmud’s view, for granting priority to inheritance by next-of-kin as opposed to the alternative represented by “the town official” – escheat to the state or a disorderly grab by anyone and everyone present at death.⁶

The second issue we face when discussing theories of inheritance is the *order* of succession – that is, who among the various potential heirs should be given priority, what should be the relative shares they receive, and to what extent should the decedent be given the power to determine the answers to these questions by execution of a will.

Secular legal philosophers have offered two fundamental theories in this regard, which address themselves to both issues raised – namely, why inheritance, and to whom.

The utilitarian school, represented primarily by Jeremy Bentham,⁷ views inheritance as the expression of society’s desire that those customarily dependent upon the property owner during his lifetime for

³ *M.T. Zehiya U’Mattana 2:1; M.T. Nahalot 6:10.*

⁴ *Baba Batra 110a-b.*

⁵ *Ibid.*

⁶ See, E. Rackman, “A Jewish Philosophy of Property: Rabbinic Insights on Intestate Succession”, 67 *J.Q.R.* 65.

⁷ Jeremy Bentham, “Utilitarian Basis of Succession”, in *Rational Basis of Legal Institutions* (Macmillan 1923) 413–423; See, also, 6 Powell, *Real Property*, at 611.

their economic well-being, must be given priority in sharing his wealth after his death, and the intestacy statutes represent society's judgment as to who those dependents are. The utilitarians recognize that general presumptions may not always reflect reality in any given situation, and the power is therefore given to execute a will in order that the property owner be able to correct any imperfections in the statutory presumptions.

On this view, the fundamental role of inheritance is intestate succession, or succession without a will, by statutory rules which represent society's judgment as to what is objectively best in the average case. The will is only a back-up designed to fine-tune the specific case when necessary.

The individualists, such as Pufendorf,⁸ on the other hand, take the very opposite approach, and most modern legislators and textwriters do as well. For them, it is the will which is the principal method of inheritance, since the will represents a natural extension of one's property rights while living. It is intestacy which is the back-up, designed to function only in the absence of a will. The rules of intestate succession thus should not be designed primarily to achieve objective, social utilitarian purposes, but rather should reflect, as closely as possible, the presumed intent of the typical decedent.

Turning now to Maimonides' views on the subject, we find the following passage in his *Guide for the Perplexed*:

The statutes concerning property also comprise inheritance. Herein is involved an excellent moral quality, that a man should not withhold a good thing from one deserving it. Accordingly when he is going to die he should not begrudge his heirs and squander his property. On the contrary, he should leave it to him who among all the people deserves it most, namely, to his next of kin . . . This most just Law safeguards and fortifies this moral quality – I refer to taking care of relatives and protecting them. You know what the prophet says: But he that is cruel afflicts his own kinsman.

The Torah has taught us that one must go exceedingly far indeed in the exercise of this moral quality. Namely, man ought to take

⁸ See Parry, *The Law of Succession* (2d ed. 1947) 158.

care of his relative and grant very strong preference to the bond of the womb. Even if his relative should do him an injustice and a wrong and should be extremely corrupt, he must nevertheless regard his kinsman with a protective eye.⁹

While this view is more closely aligned to the utilitarian theory of inheritance than to the individualist theory, it is actually a “hybrid”: the intestacy rules reflect what is *objectively* right, although on moral rather than purely economic grounds, but they also reflect how the decedent *should* wish that his property be distributed.

Now the power to leave a last will and testament clearly would run counter to the objectives of the law, since the property owner could thereby cause his estate to pass outside of his family or discriminate among heirs *within* the family. The Torah therefore makes no provision for a will, and Maimonides confirms in *Mishneh Torah*¹⁰ that leaving a will has no effect whatsoever (except in the case of a *matnat shechiv me'rah*, a deathbed gift *causa mortis*, which is beyond the scope of this paper). We must therefore conclude that Maimonides' statements in the Guide, that “a man should not withhold a good thing from one deserving it . . . ,”¹¹ cannot be an admonition to the decedent against leaving a will which deviates from the Torah pattern, for this is in any event legally ineffective. Instead, he must be referring to *inter vivos*, lifetime gifts, which could be used effectively to circumvent the intestacy rules. The Talmud is in fact replete with examples of *inter vivos* transactions, such as creation of life estates and remainders, which are recognized as legally effective¹² and which often serve as will substitutes. It is in such a case that it becomes necessary to impress upon the donor the moral considerations inherent in the Torah system, in order to persuade him against carrying out such a plan.

Inherent in Maimonides' formulation, therefore, we find three elements: first, that the Torah rules of succession reflect the only morally correct result, i.e., that the next-of-kin deserve to be the heirs and they

⁹ Maimonides, *The Guide for the Perplexed* ed. S. Pines (Chicago 1963) III, 42 at 569.

¹⁰ *M.T. Nahalot* 6:1-5.

¹¹ *Guide loc. cit.*

¹² See e.g. *Baba Batra* 135b; *M.T. Zehiya U'Mattana* 12:14-16.

are therefore designated as such by the Torah. Second, the law not only reflects what is morally preferable, but is uniformly binding on *all* decedents, so that wills cannot be used to deviate therefrom; as Maimonides puts it, “This most just Law safeguards and fortifies this moral quality.”¹³ Third, since the vehicle of lifetime gifts could be exploited in order to circumvent the purposes of the succession rules, the decedent is admonished not to do so, by appealing to his moral sensibilities.

This construct of Maimonides’ views accurately reflects the talmudic approach to this question. The *Mishnah* in chapter 8 of tractate Baba Batra begins with a description of the Torah’s rules of intestate succession; it then declares, first, that testamentary attempts to deviate from the intestacy rules are legally ineffective; second, that inter vivos conveyances, on the other hand, are effective; but third, that while such lifetime gifts are valid, nevertheless: *ein ruah hahamim nohah heimenu*,¹⁴ “the Sages find no pleasure in him,” for, by circumventing the Torah rules, he has defeated the moral objective inherent in the system. Similarly, Maimonides codifies these points in the same sequence, in chapters I through VI of his Laws of Inheritance in *Mishneh Torah*.

II

Upon closer analysis, however, certain aspects of Maimonides’ codification of the succession laws simply are not explainable on the basis of his theory of inheritance outlined above.

First, there is the problem of the remote heir. Most legal systems provide that relatives beyond a certain degree of kinship cannot qualify as heirs, even in the absence of closer relatives.¹⁵ Thus, for example, descendants of common great-grandparents, or second cousins, would not be treated as heirs by most intestacy statutes, and the decedent’s property would then escheat to the state.

Jewish law, on the other hand, does not recognize the concept of escheat; instead, it allows relatives to inherit, no matter how remote. If there are no relatives of a closer ancestor, the inheritance moves up to

¹³ *Guide loc. cit.*

¹⁴ *M. Baba Batra* 8:5; *M.T. Nahalot* 6:11.

¹⁵ See, e.g., N.Y.E.P.T.L. Sec. 4-4.1; U.P.C. Sec. 2-103.

the next distant ancestor, *ad rosh hadorot*,¹⁶ even up to the beginning of all generations, or in the words of the Talmud, *nahalah memash-meshet v'holekhet ad Reuven*,¹⁷ the estate ascends up to Reuven, son of Patriarch Jacob. Maimonides therefore concludes: “*ein lekha adam mi'Yisrael she'ein lo yorshim*,”¹⁸ that because of this rule, no man in Israel is without heirs.

It is apparent that this phenomenon cannot be justified on the basis of any utilitarian theory of inheritance. It can hardly be argued that a very distant heir, who in all likelihood never knew the decedent, and who surely was in no way economically dependent upon him, is in any way “deserving” that the estate pass to him.

A second problem arises with respect to the rule which Maimonides sets forth in paragraph 9 of chapter 6: “A non-Jew inherits his father by Torah Law, but in all other cases of inheritance, he is allowed to follow his own customs.” *Maggid Mishneh*, one of the glossators to Maimonides’ *Code*, observes that non-Jews are allowed to follow their own customs, “because we do not find any specifically mandated Torah order of succession, for anyone other than the Jewish people.”¹⁹ Thus, while the Noahide laws, which are of universal applicability, require that *all* nations adopt a just system of laws by which they are to govern themselves,²⁰ it is nevertheless permissible for other nations to adopt different inheritance systems.

Rabbi Moshe Feinstein makes two important observations on this passage.²¹ First, Maimonides thereby confirms that there is apparently an obligation that all nations have *some* system of inheritance, rather than mandating state confiscation or allowing the decedent’s property to become ownerless, in accordance with the talmudic discussion mentioned previously. Second, Rabbi Feinstein refers to this passage in Maimonides in connection with the dispute between Rashi²² and *Tosafot*²³ as to whether sons and daughters of non-Jews inherit equally

¹⁶ *M.T. Nahalot* 1:3.

¹⁷ *Baba Batra* 115b; *M.T. loc. cit.*

¹⁸ *Ibid.*

¹⁹ *Maggid Mishneh* to *M.T. op. cit.* 6:9. Cf. *Minhat Hinuch*, Mitzvah 400.

²⁰ Feinstein, *Dibrot Moshe*, *Baba Batra* III, 339.

²¹ *Ibid.* 379–380.

²² *Yevomot* 62a, s.v. *be'nahriyutan*.

²³ *Baba Batra* 115b, s.v. *melamed*.

under Torah Law. He concludes that Maimonides agrees with Rashi that non-Jews are not bound by the Torah law that sons inherit to the exclusion of daughters, but instead, when Maimonides says that a non-Jew inherits his father by Torah law, he means that sons and daughters should inherit equally, since the distinction between sons and daughters in Torah law finds no rational justification in terms of degree of kinship, and must therefore be a rule unique to the *sefer nahalot*, the Torah order of succession, as it applies specifically to Jews.

Again, this presents difficulties when reference is made to the theory of inheritance presented above: first, if the Torah system of inheritance is based on morality and justice, why should this system not be equally applicable, in all its details, to *all* nations, pursuant to the Noahide requirement that all peoples adopt just laws? And second, if as Rabbi Feinstein points out, there is no rational justification for distinguishing between sons and daughters on the basis of their respective degrees of kinship, what indeed is the unique rationale of *sefer nahalot*?

III

A fuller understanding of Jewish inheritance law may be derived by a closer reading of the context of the Torah's intestacy provisions, which appear in *Num.* chapter 27:8–11.

Beginning in the previous chapter of *Num.* 26, we find that Moses is being instructed concerning the division among the tribes of the land of Israel, which the people were about to enter. The Torah relates that Zelafchad, of the tribe of Menassah, had died in the desert, leaving five daughters surviving him. The daughters feared that only sons would be allowed to inherit the land; they therefore petitioned Moses that their father's share not be lost because he left no sons.

The Torah relates that the daughters of Zelafchad were indeed correct in their request; that if there are no sons, then daughters do inherit. It is in this context that *Num.* 27:8 states: "When a man shall die, leaving no son, his inheritance shall be passed to his daughter."

The Torah does not declare the more basic rule that if a father dies, his inheritance shall pass to his son; the reason for this is that the entire chapter is a response to the daughters' petition which was precipitated by there being no sons.

Taken in the context of this episode, it is clear that the entire biblical chapter on intestate succession was addressed initially to a time in Jewish history when the people of Israel would be inheriting the land of Israel, and inheritance of the land by each tribe, and preservation within each tribe of its allotted *portion* of the land, are therefore the primary purposes for which the rules are designed.

This is reflected not only in chapter 27 but in various other phenomena as well; first, the Jubilee Year laws,²⁴ which dictate that if land is conveyed in fee simple it nevertheless reverts to its original owner or his estate in the Jubilee Year, which occurred every fifty years. As a result of this rule, one's property could not be alienated even during one's lifetime, whether by sale or by gift, for more than a relatively short period, after which the original family (and thus, by extension, the original tribe) to which the land had belonged reacquired possession. The intestacy statutes are therefore a natural extension of the Jubilee rules, since both are designed to preserve the ancestral ties to the land as originally determined. It therefore makes eminent sense that testation not be allowed; if the land is to remain in the family and tribe for all time, what difference is there whether alienation is attempted during lifetime or upon death?

Second, this concept is again reflected in *Numbers* 36, which tells us that women were prohibited from marrying outside their own tribe, for, without this restriction, daughters who inherit land might cause the land to be removed permanently from their tribe of origin, if in the event of their death, their sons or husband belonging to a different tribe were to inherit from them. The Talmud relates that this prohibition applied only to the generation which originally entered Israel,²⁵ but for our purposes, we should note that the mere fact that concern was raised about the effects of inter-tribal marriages on the preservation of the ancestral land, and that a prohibition did indeed exist initially against such marriages, indicates again that the Torah's inheritance system was directed toward the specific problem of succession to land, the land of Israel, and its transmission through the generations.

It is for this reason, therefore, that no family member is ever con-

²⁴ *M.T. Shemitta Ve'Yovel*, 11:1, 19.

²⁵ *Baba Batra* 121a; *Taanit* 30b.

sidered too remote to inherit; the goal upon which this rule is based is the perpetuation of the tribe's possession of the land, which is accomplished so long as the land is inherited by any member of the tribe, no matter how remote.

This goal must therefore be seen as existing side by side with the moral objectives, on the personal or family level, described by Maimonides, and this injects a uniquely Jewish element into the succession laws of the Torah. The late Rabbi David Hacoen, the *Nazir*, emphasizes the centrality of this aspect of Jewish inheritance law in a letter to the late Chief Rabbi Uziel: "The fundamental essence of inheritance is national, the transmission of the land to the tribes of Israel."²⁶

IV

We find in the Talmud,²⁷ that the point in time came when the Jubilee Year Laws became inoperative; the consensus in the sources is that this occurred when the tribes residing on the East Bank of the Jordan, the tribes of Reuben, Gad and half the tribe of Menasheh, were exiled, before the destruction of the First Temple.²⁸ As a result, those still living on the land after this first, partial exile, were no longer subject to restrictions on alienation; they could thenceforth permanently alienate the land during their lifetimes, and the land no longer reverted to its original owners after fifty years.

Indeed, it was this change in the law which made possible for the first time the use of various *inter vivos* will substitutes, such as life estates plus remainders, mentioned earlier. The preservation of the ancestral tribal title to the land thereafter became impossible, since the land could now be freely and permanently conveyed; instead, it is the people of Israel as a whole, rather than the individual tribes, who thereafter hold title to the land. It can in fact be demonstrated that Maimonides considers title to the land of Israel to be vested in the Jewish nation in a concrete, legal sense, based on the general principle of property law, *karka einah nigzelet* – land cannot be stolen – and title

²⁶ Reprinted in *Nezir E'hav*, II, 197.

²⁷ *Arakhin* 32b.

²⁸ *Ibid.*; *M.T. op. cit.* 10:8.

therefore remains in the people of Israel despite foreign conquests of the land.²⁹

Now, if the connection between the people and the land is thus deemed to be eternal in a concrete legal sense, then we have here again a uniquely Jewish element in the realm of inheritance law – every time property passes to one's next of kin upon death in accordance with the Torah laws, one's share in the land of Israel passes on as well.³⁰ Application of these laws, regardless of the specific property any individual leaves behind, may thus be viewed as a reaffirmation of the never-ending continuity of the people and their everlasting relationship to their land. Circumvention of these laws, on the other hand, such as by *inter vivos* conveyances outside the family, therefore constitutes a denial of this relationship, and it is for this reason that the Sages find no pleasure in one who chooses to act in this fashion. The Jerusalem Talmud³¹ goes so far as to characterize one who circumvents the Torah inheritance laws as having committed an eternal transgression, invoking the biblical verse: “And their sin shall remain on their bones forever.” (Ez. 32:27). Interestingly, the only additional instance when the Talmud cites this verse is in describing the sin of one who consumes meat or wine on the eve of Tisha B'Av, the fast day commemorating the destruction of the Temple.³² He, too, by failing to express grief for this national tragedy, thereby denies his link with eternal Israel, and his transgression is therefore eternal as well.

Maimonides expresses this eternal aspect of Jewish inheritance law

²⁹ *M. T. Sheluhin Ve'shutafin*, 3:7 and *Kesef Mishneh ad loc.* explaining that Maimonides' rejection of the Geonic position that every man is deemed to own four cubits in the land of Israel is based only on the fact that, as to any *specific* person, there exists doubt whether any of his ancestors were converts or freed slaves, which would break the “chain of title”; in principle, however, Maimonides does not take issue with the notion that the land is still legally possessed by the Jewish people. See also *Otzar HaGeonim, Kiddushin*, no. 147.

³⁰ Thus, when the technique of the *Shtar hazi zahar* was developed to provide an inheritance for daughters, it traditionally excluded “*sefarim ve'karkaot*” so that only sons would share in these items, which embodied most directly the notion of inherited property that remained in the family throughout the generations. See *Nahalat Shiv'ah*, XXI, 6. See, also *Resp. Shevut Ya'akov*, II, 121.

³¹ *Y. Baba Batra* 8:6. See *Pnei Moshe ad loc.*: “*Sheha'avon kayam al azmotav bekever leolam*”.

³² *Ta'anit* 30b.

in his formulation of the rule disallowing testamentary dispositions.³³ The Talmud explains that a will is ineffective because the testator is “stipulating against that which is written in the Torah.”³⁴ And while such stipulations are generally valid in monetary matters, the Talmud explains that this is only because we can assume that the party adversely affected by such stipulation waives whatever benefit the Torah grants. A potential heir, on the other hand, cannot be assumed to have waived his expectancy under Torah law, and testamentary deviations from the Torah system are therefore invalid.

Maimonides chooses to explain the invalidity of the will on totally different grounds. He states that any stipulation contrary to Torah law is invalid, even though this is a monetary matter, where such stipulations are generally valid, not because of the talmud’s waiver theory, but: “because in the division of Scripture treating of inheritances it is said: And it shall be unto the children of Israel a statute of judgment (*Num. 27:11*), that is to say, this Law is not subject to change and a condition qualifying it is not valid.”³⁵ Maimonides chooses to rely on this Midrashic reading of the phrase *hukat mishpat*, as does Nahmanides in his Commentary on the Torah on this verse,³⁶ rather than on the relatively technical talmudic discussion of waiver, in order to emphasize this central aspect of Torah inheritance law.

What we have, then, in Maimonides’ references to Torah inheritance laws in the *Guide* and in his Code, are two distinct elements: first, inheritance based on kinship, which fulfills moral objectives on the familial level; and second, inheritance based on tribal or national continuity, where the heir may be considered as successor to the decedent, standing in his place in an eternal chain of succession.³⁷

V

Two additional points deserve brief mention. First, we find ample evidence in the Talmud that the Sages were acutely aware of the economic needs of wives and daughters of decedents, who are not heirs

³³ *M.T. Nahalot* 6:1.

³⁴ *M. Baba Batra* 8:5 and Gemora 126b.

³⁵ *M.T. op. cit.*

³⁶ *Num. 27:11*.

³⁷ Cf. *Zafnat Pa'ane'ach, Kuntres Hashlama*, IV, 13a.

under Torah law. Property owners are in fact encouraged to provide ample dowries for their daughters,³⁸ and similarly, wives are protected by the Ketubah and by being granted the right to support out of the estate.³⁹ Now, such diversion of a portion of one's wealth to persons who are not heirs does not trigger any criticism – to the contrary, it is itself recognized and incorporated into Jewish family law. The Talmud implies,⁴⁰ and later authorities confirm,⁴¹ that so long as such diversions are limited to wife and daughters and even if only a single dinar is left to be divided in accordance with Torah inheritance law, the decedent will not be characterized as having circumvented the Torah's inheritance rules.

This is entirely consistent with our previous analysis. On the one hand, the decedent's family members, that is all his family, women as well as men, are morally deserving that the decedent's wealth be devoted to their economic well-being. And to the extent that the *seder nahalot* does not fully provide for this, that is because the *seder nahalot* was and is addressed to the succession of the land of Israel, not to the general issue of providing for the welfare of the family. Other laws and enactments therefore are provided, in the family law context, to fill out the system.

Compliance with the *seder nahalot* is still of critical importance, nevertheless, for it represents the eternal link of Israel to its land. But if a property owner chooses to divest himself of his property during his lifetime, he can still provide symbolic compliance, by leaving a "dinar" to be divided among the Torah heirs, and the sages consider this sufficient, since it is the symbol which is here important – the *demonstration* of the ever-continuing chain down through the generations. For this purpose, even a single dinar can suffice, so long as the decedent takes no steps which *contradict* what the system represents, such as by conveying *outside* the family unit.

We therefore see the fine balance which Torah law has achieved in providing for the utilitarian goals Maimonides expresses in the *Guide*,

³⁸ See e.g. *Ketubot* 52b.

³⁹ *Even ha-Ezer* 93-94.

⁴⁰ *Ketubot loc. cit.*

⁴¹ See *Ketzot Hahoshen* 282,2; *Resp. Sho'el U'Meishiv*, II, 1; *Resp. Minhat Yitzhak*, III, 135; *Resp. Igrot Moshe, Even ha-Ezer* 110,3.

on the one hand, and on the other, the national expression of identity with the land, that uniquely Jewish element of inheritance law which underlies the various formulations in Maimonides' Code discussed above.

VI

Finally, reference should be made to the talmudic rule "*mitzvah le'kayem divre ha'met*" – it is obligatory to fulfil the words or instructions of the decedent, perhaps the most intriguing and yet least understood aspect of Jewish inheritance law. Maimonides cites this principle in various isolated rules in his Code⁴² (none of them in *Hilhot Naha-lot*), and the import of this rule is that there is apparently an enforceable obligation on the decedent's heirs to comply with the decedent's final wishes, at least with respect to disposition of property. Most authorities agree that this rule constitutes an *in personam* obligation on the heirs.⁴³ That is, first the estate passes to the heirs according to the Torah order of succession. And if the decedent attempted to modify this succession, such an attempted will, if stated *in rem*, that is, "My property shall pass to X," for example, would be ineffective, as discussed earlier. However, if the decedent states, "I instruct my heirs to give my property to X," thereby imposing a *personal* obligation on the heirs who have in fact succeeded to the property according to the Torah rules, such an obligation will under certain circumstances be enforceable. There is no consensus among the few rabbinic authorities who have discussed this rule, as to its underlying sources and rationale. Tashbetz considers this power to create an "in personam" will to be part of the biblical *parshat nahalot*, that is, that the Torah indeed recognizes some form of testation as inherent in the notion of inheritance.⁴⁴

There is support for this view of Tashbetz, although he himself fails to cite it, in *Tosafot to Gittin*,⁴⁵ where Rabbenu Tam explains that the

⁴² *M.T. Zehiya U'Mattana* 4:5; *M.T. Avadim* 6:4.

⁴³ See Rama to *Hoshen Mishpat* 252:2; *Mishpitey Uziel* III, 39; *Sha'arey Uziel* I, 21; *Resp. Ahiezer* 34.

⁴⁴ *Resp. Tashbetz* II, 53.

⁴⁵ *Gittin* 13b, s.v. "Ve'ha lo Mashah"; cf. *Tosafot to Baba Batra* 149a–b, s.v. *de'ka migmar*.

principle *mitzva lekayem divre ha'met* is inapplicable to a convert, "because the mitzvah to heed the instructions of a decedent applies only where the decedent's property will be inherited, since his dominion over his assets continues, by virtue of the fact that inheritance derives from his ownership; but a convert, who has no heirs, and whose dominion over his assets has therefore ceased – there is then no obligation to heed his words."

We have here a profound identity between inheritance and testation, in Rabbenu Tam's view. The decedent's dominion over his estate continues even after death, and it is therefore eminently logical that there be an obligation to heed his requests.

Maimonides would appear to have considered this power to be outside the realm of *nahalot*, since he fails to mention it in *Hilkhot Nahalot* at all. And this is understandable – for Maimonides, the *sefer nahalot* is exclusively an *in rem* process of automatic succession upon death, which has inherent purpose and which is unalterable by the property owners. *Inter vivos* gifts are of course possible, and there may well be some form of power of testation represented by the principle *mitzva lekayem divre ha'met*, but whether the *inter vivos* gift or this *in personam* testament is used, these do not apply at the *moment* of death – gifts will have divested the property *before* death, and compliance with *divre ha'met* will divest the heirs *after* death – these results are undesirable deviations to the extent that property is thereby diverted outside the family, and Maimonides in his *Guide*⁴⁶ explains to the property owner the moral objectives of the Torah which he can fulfill if he but refrain from causing his property to pass in such manner to persons other than the Torah heirs.

But at the very moment of death, only the Torah rules, the *hukat mishpat*, can apply – at that moment, the decedent is powerless to interfere with the eternal process of succession which in fact continues to this very day.

⁴⁶ *Ibid.*

Comparative Analysis

MAIMONIDES AND AMERICAN CASE LAW

*Bernard J. Meislin**

There are very few legal luminaries of the twelfth century whose names appear in support of legal propositions in twentieth century American judicial opinions. Among those few who are cited we would expect to find historical figures and legal giants bound up in the misty origins of the common law to which the United States is heir. The twelfth century marked the emergence of the common law from the shadows of varied local customs and an aggrandizing clerical establishment. In the late thirteenth century, September 3, 1189 was fixed by statute as the limit of legal memory, that date beyond which "the memory of man runneth not to the contrary."¹

Taking such common law chronological guidance into account, Maimonides finished his *Mishneh Torah* some ten years before legal memory officially expired, and he was born an additional forty-five years earlier than that. His studies and environment not only antedated the common law's memory, they were completely foreign to the common law. Yet, a computerized search of recent American legal decisions retrieves citations of Maimonides as authority for American legal propositions in the fields of criminal law, matrimonial law, bailments, arbitration, real estate, evidence and even corporate litigation.

While Maimonides worked in an Islamic milieu and the common law took form in thirteenth century England, some similar concerns

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¹ The date of limitation was officially set in 1275 by Westminster I, c. 39.

attracted the serious attention of both Rambam and early common law figures. Of primary common interest was the relationship between the state and religion. To Maimonides the issue of the applicable scope of the King's law is an aspect of his treatment of the principle *dina demalkhuta dina*, "the law of the state is law." To King Henry II of England and one of his judges, Henry de Bracton, the issue appeared as a practical problem of containing growing Church power manifested through ever-widening ecclesiastical court jurisdiction with its concomitant ever-growing mass of canon law.² To Bracton and Rambam, the problem was not quite as easy as it was to the King since they saw the King as subject to God and the law, while Henry was not so subservient. Fortunately, both Maimonides and Henry II aimed at a compromise. Their solutions, incorporated in *Mishneh Torah* and the Constitutions of Clarendon, respectively, broadly stated, allowed for ecclesiastical free rein in matters of ritual observance but conceded to the state dominance in matters of money.³

Treatment of debt, to take a specific example, affords an interesting parallel between *Halakhah* and canon law. Each found a way to accommodate the demands of the crown, yet still assert religion's role. The Church coupled debt with an oath or pledge of faith, for breach of which it could impose spiritual censure. Spiritual censure as a sanction did not oust civil jurisdiction over debt. *Halakhah*, while split over whether debt repayment is a legal duty alone or also carries with it a religious obligation, clearly characterizes a borrower who fails to repay as *rasha*, "wicked".⁴ But Maimonides, like the Constitutions of Clarendon, is clear on the point that the law of the state controls debt enforceability because "in all monetary matters we abide by the law of the state".⁵

Despite divergent legal systems, despite passing epochs and distant place, despite a sea change in culture and a different language, *Halakhah* as ordered by Maimonides, speaks to American judges of the late twentieth century with a persuasive voice as they address those

² T. Plucknett, *A Concise History of the Common Law* (4th ed., London 1948) 16-17.

³ *Ibid.* 17 and *M.T. Zekhiah* 1:15.

⁴ *Ps.* 37:21.

⁵ *M.T. Zekhiah* 1:15.

issues which have persisted before the courts in Islamic, Jewish and common law societies since the twelfth century.

Among those persistent issues, in addition to the relationship of religion and government, are secular concerns: laws of homicide, bailment and incorporeal rights in real estate; procedural and evidentiary rights of an accused; and overriding all, the administration of justice between rich and poor in their various conflicts.

All these issues confronted Maimonides. That American judges still entertain his authority is, in part, implicit recognition that the same issues persist; but is, in greater part, a tribute to his enduring insights into *Halakhah* and into the nature of justice.

Criminal law – Self-Incrimination

The most publicized American allusion to Maimonides undoubtedly is the reference to his views on self-incrimination as they appear in the opinion of Chief Justice Earl Warren in the 1966 landmark *Miranda* case⁶ – a landmark downgraded in subsequent cases from stop sign to caution signal.⁷ In Chief Justice Warren's words, "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times."⁸ His citation for these statements is "Maimonides, *Mishneh Torah, Book of Judges, Laws of the Sanhedrin, 18*", from which he quotes, "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree."

Several months later the same United States Supreme Court bench which decided the *Miranda* case had occasion to revisit Maimonides' treatment of self-incrimination and to compare it with the *Miranda* rule it had just enunciated. *Garrity v. New Jersey*⁹ addressed the issue of whether testimony given by an accused was coerced when he was offered but two alternatives: (1) that his statements might be used

⁶ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 694, 10 A.L.R. 3d. 974, note 27.

⁷ *Berkemer v. McCarty*, 468 U.S. —, 104 S. Ct. —, 82 L.Ed. 2d. 317 (1984); *New York v. Quarles*, 467 U.S. —, 104 S. Ct. —, 84 L.Ed. 2d. — (1984).

⁸ *Miranda v. Arizona*, 384 U.S. 436 at 458–459.

⁹ *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed. 562 (1967).

against him in criminal proceedings; (2) his failure to respond would subject him to job removal. In concentrating on the coercive aspect of that choice, Justice William O. Douglas explains the constitutionally imposed necessity for such focus. As stated in *Miranda*, practices are condemned which are “likely to exert such pressure upon an individual as to disable him from making a free and rational choice.” Then, as though wistfully contemplating a legal system which renders such analysis moot, Justice Douglas compares the *halakhic* view of the role of compulsion in self-incrimination. He cites Professor Norman Lamm’s article, “The Fifth Amendment and Its Equivalent in Jewish Law”, 17 Decalogue Journal (Jan.–Feb. 1967) 1 at some length:

It should be pointed out . . . that the *Halakhah* does not distinguish between voluntary and forced confessions. . . And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, 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-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession.

The *Halakhah*, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts . . . While certainly not all, or even most criminal confessions are directly attributable, in whole or in part, to the Death Instinct, the *Halakhah* is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides’ interpretation of the *Halakhah*’s equivalent of the Fifth Amendment.

In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted

character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations. *Id.* at 10, 12.

The irony of Justice Douglas' longing for a flat prohibition against self-incrimination (which would free him from a case by case evaluation of coercive factors in the confessional setting) and finding such flat prohibition in Jewish jurisprudence, is that, according to Professor Arnold Enker, who cites the responsum of Ribash,¹⁰ *Halakhah* only applies such an absolute rule forbidding self-incrimination when the court acts in the very limited sphere of "enforcing the Divine law." However, as in most cases, "when the court functions in the discretionary mode as a court acting for social protection . . . there is no rule forbidding self-incrimination." According to Professor Enker, Maimonides' interpretation is part and parcel of that bundle of strict evidentiary and procedural rules the court follows when "acting as the enforcer of the Divine law – punishing someone for rebellion against the Divine Will, for knowing, wilful rebellion against the Divine Will."¹¹ This is what accounts for Maimonides' reference to the self-incrimination prohibition as a "divine decree." It is, no doubt, one of legal history's gentler ironies that Justice Douglas, admirer of Thomas Jefferson, and like him a champion of church-state separation, holds up a feature of "Divine law" as an ideal for secular reflection.¹²

Three other post-*Miranda* criminal law decisions refer to Maimonides' view of self-incrimination. In a 1974 opinion the Court of Appeals of Maryland¹³ cited *Mishneh Torah* and Professor Lamm's article, "The Fifth Amendment and Its Equivalent in the Halakhah", 5 *Judaism* 53 (1956). Maryland's highest court found error in "the State's employment during the trial of those portions of [the defendant's] statement which reflect his silence in response to certain of the

¹⁰ A. Enker, "Self-Incrimination", *Jewish Law and Current Legal Problems*, ed. N. Rakover (Jerusalem 1984) 169 at 173 citing *Resp. Ribash* 234-239. See A. Kirschenbaum, "Self-Incrimination in Jewish Law" (New York 1970) 83-90.

¹¹ Enker, *op. cit.*

¹² See W.O. Douglas, *An Almanac of Liberty* (N.Y. 1954) vi.

¹³ *Younie v. Maryland*, 272 Md. 233, 322 A.2d. 211 (1974) at 215.

interrogator's questions . . ." In 1982, New Jersey's highest court¹⁴ found error in the admission of the defendant's self-incriminatory testimony and cited that alliterative duo, Maimonides and *Miranda*. A 1975 New York Supreme Court decision¹⁵ dealt with the privilege against self-incrimination asserted by a confessed killer who urged suppression of her own statements on the ground that "internal subjective pressures" made her confess and those pressures constituted the compulsion that made her statements inadmissible. In the course of rejecting that contention, the court reviewed "the origins of the right against self-incrimination in talmudic law" and stated, "In talmudic law, self-incriminatory testimony, whether voluntary or compulsory, was forbidden."

There is no doubt Chief Justice Warren's 1966 invocation of Maimonides started a flow of Maimonidean self-incrimination references still cascading today.

Oath Taking by a Witness

What beliefs are necessary to render a witness competent to testify? If the veracity of adults is suspect, positive disbelief attends the word of children. As Shakespeare wrote:

Briefly die their joys,
That place them on the truth of girls and boys.
(*Cymbeline*, Act V, Scene 5)

A 1962 New Jersey County Court assault and battery prosecution dealt with the competency of a ten-year-old girl to testify as a witness.¹⁶ On *voir dire* her answers to interrogation reflected the conflicts of our time and the cynicism of a hardened adult; in other words, she was a truthful child. Susan acknowledged that she was Jewish. She confessed to reading the Bible. She denied attending Synagogue. She admitted belief "in some parts of the Bible" and even "that the Bible represents God." But, when asked if she believed in God, her answer was "no." What was the judge to make of all this? As a starting point, a benchmark, Judge Schwartz ponderously declared, "A votary of the

¹⁴ *New Jersey v. McCloskey*, 90 N.J. 18 at 31.

¹⁵ *New York v. Jo-Anne Brown*, 86 M.2d. 339.

¹⁶ *State of New Jersey v. Walton*, 72 N.J. Super. 527 (1962).

Jewish religion believes in God in a form laid down as a cardinal principle (one of 13) by Maimonides and universally accepted by those of the Jewish faith conversant therewith.¹⁷

He then engages in two lines of argument to sustain Susan's right to testify. First, "the presumption being that she believes, an apparent contradiction was not sufficient to overcome the presumption."¹⁸ Second, while New Jersey required a witness to believe in God, such faith is not required of a party. As a complaining witness in a criminal case, while the State is technically the party, "for reasons of public policy, the complaining witness would appear to take on the characteristic of a party. To hold otherwise (in most cases of this nature) would deprive the State of the ability to prosecute where the complaining witness or victim did not believe in God."¹⁹

Family Law

A 1972 New York case²⁰ presented the presiding judge with an opportunity to summon the leading lights among our sages to rebut the

¹⁷ *State of New Jersey v. Walton, supra*, at 537. Issue may be taken with Judge Schwartz's formulation of a Jew's creed. Insofar as he avers only one of Maimonides' 13 Articles of Faith concerns God's form, he underestimates the number. The first five enumerated Articles dealing with God and His attributes. Insofar as the judge asserts Maimonides' creed is "universally accepted by those of the Jewish faith conversant therewith, (Daily Prayer Book (rev. ed. 1960), by Dr. Joseph H. Hertz, late Chief Rabbi of the British Empire)," the very authority he cites, Dr. Hertz, in his commentary to Maimonides' Thirteen Articles of Faith, at page 248 of the Daily Prayer Book (rev. ed. 1948), states with respect to spiritual doctrines, "No formulation of these exists which enjoys universal recognition by the House of Israel." According to the Jewish Encyclopedia (New York and London 1903) Volume II at 150, "This creed Maimonides wrote while still a very young man; it forms a part of his Mishneh Commentary, but he never referred to it in his later works (see S. Adler, "Tenets of Faith and Their Authority in the Talmud," in his "Kobez 'al Yad," p. 92, where *M.T. Issure Biah* 14:2, is referred to as proof that Maimonides in his advanced age regarded as fundamentals of the faith only the unity of God and the prohibition of idolatry). It did not meet universal acceptance . . ." In fact, in Maimonides' own time and afterwards a variety of enumerated Articles of Faith proceeded from Jewish scholars and philosophers. Nahmanides, Abba Mari ben Moses, Simon ben Zemah Duran, Albo, Isaac Arama and Joseph Jaabez reduced the cardinal principles to three. Crescas and David ben Samuel Estella spoke of seven, including free will. David ben Yom Tob ibn Billa chose 26. Jedaiah Penini enumerated 35 fundamentals.

¹⁸ *State of New Jersey v. Walton, supra*, at 537.

¹⁹ *State of New Jersey v. Walton, supra*, at 539.

²⁰ *Kaplan v. Kaplan*, 69 M.2d. 198; 329 N.Y.S. 2d. 750.

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defendant husband's contention that his life of "Hebrew studies" relieved him of the obligation to support his wife and children. The husband relied on Jewish legal citations for his claim that "it would be tantamount to blasphemy to compel him to exceed his annual trust and annuity income in providing for the support of his wife and three daughters." Judge Louis B. Heller first called on Nahmanides:

Defendant's references to the "*Kethubah*", the Jewish contract of marriage, to the "*Yoreh Dayoh Hilchoth Talmud Torah*" Chapter 246, paragraphs 21, 25, "*Hagah*" are distortions of the law to suit himself, and defendant is best described by a famous quote of Nachmanides, "a scoundrel within the limits of the Torah."²¹

Judge Heller then proceeds to invoke the life of Rabbi Akiba as an object lesson:

. . . the example (now established Hebraic law) set by one of the greatest scholars in rabbinic history, Rabbi Akiba, who would not devote his life to study without his wife's express consent, forbids defendant from pursuing his newly chosen "life's work".²²

The irate judge concludes his rebuttal with a direction that the defendant direct his studies to specified law sources, including Maimonides, dealing with a husband's family obligations:

The court commends to defendant a reading of Ex. 21:10; Maimonides, "*Nashim*", section "*Ishuth*", Chapter XII, paragraphs 1, 2 and 5; and the *Shulhan Arukh* (Code of Jewish Law), *Even ha-Ezer*, Chapters LXIX and LXX, which make it mandatory for a husband to support his wife in accordance with his economic status.²³

Another American family law doctrine influenced by Maimonides' view of the subject is the defense of recrimination. Recrimination is the right of a party charged with cruelty in a divorce action to justify his or her conduct by showing that the accuser is equally to blame.²⁴ This

²¹ *Kaplan v. Kaplan, supra*, at 755.

²² *Kaplan v. Kaplan, supra*, at 755.

²³ *Kaplan v. Kaplan, supra*, at 755.

²⁴ *Duberstein v. Duberstein*, 171 Ill. 133 (1897) at 144, quoting from 5 Am. & Eng. Ency. of Law 796.

doctrine was re-examined by the courts of Illinois in 1972 and the conclusion was reached, at least for the State of Illinois, that it had lost much of its force: "Courts no longer need slavishly or automatically apply the historic doctrine of recrimination in cases where such application would, in the exercise of sound discretion, be unwarranted."²⁵ The authority of Maimonides, through his silence on that point, was adduced by the Illinois appellate court as evidentiary, much in the way Sherlock Holmes in one of his adventures found a significant clue in the incident of the dog which had *not* barked in the night.²⁶ In support of the doctrine the Illinois court cites the work of several "Illinois commentators"²⁷ who speculated that the origin of the defense of recrimination might be biblical, i.e., *Deut. 22:12-19*. But the court then points out that recrimination is *not* mentioned by Maimonides. Specifically, it is nowhere to be found in his *Guide for the Perplexed*. Such omission is taken as evidence that undermines the alleged biblical foundation for recrimination, and helps sweep the path to its modification or abolition.

Law of Bailment

In contrast to the Illinois "recrimination" decision with its reliance on Maimonides for what he did *not* say, stands a Maryland appellate court decision²⁸ which notes the remarkable correspondence between halakhic and common law on the subject of bailment and singles out Maimonides for what he did say on that topic.

The uncontested facts were that industrial equipment was stored on bailee's truck and when the bailor came to retrieve the equipment it was in damaged condition. This put the onus of coming forward with

²⁵ *Mogged v. Mogged*, 5 Ill. App. 3d. 581.

²⁶ See A. Conan Doyle, "Silver Blaze" in *The Complete Sherlock Holmes* (N.Y. 1975) 347:

Inspector Gregory: "Is there any point to which you would wish to draw my attention?"

Sherlock Holmes: "To the curious incident of the dog in the night-time."

Inspector Gregory: "The dog did nothing in the night-time."

Sherlock Holmes: "That is the curious incident."

²⁷ Neumark and Levinson, "Marital Law in a Changing Society", 57 Ill. Bar Journal (1969) 902 at 905.

²⁸ *Miller v. McClung-Logan Equipment Company*, 40 Md. App. 585; 392 A.2d. 1153 (1978).

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an explanation on the bailee. The bailee's explanation being unconvincing, the trier of fact found for the bailor and the bailee appealed.

The court was struck by the resemblance between the facts as presented and those set forth in *Ex. 22:9–11*. Carriers have changed from beasts of burden to tractor trailers and goods bailed have become industrial equipment, but these are distinctions without a difference. The law of bailment has remained remarkably unchanged. In the court's words, "The law of bailments is ancient – extending back to Biblical times and before." For a recital of that law the court refers to Maimonides:

The Code of Maimonides, Book Two, The Book of Civil Laws speaks of the laws concerning bailment. It refers to *Ex. 22:6–7*, which says that a bailee from whose possession the object bailed was stolen or lost was required to swear that he kept the object after the manner of bailees. *Ex. 22:9–10* and *Ex. 22:11* provide: "If a man deliver unto his neighbor an ass, ox, or a sheep or any beast, to keep, and it die or be hurt, or driven away, no man seeing it; the oath of the Lord shall be between them both to see whether he have not put his hand into his neighbor's goods; and the owner thereof shall accept it, and he shall not make restitution." The implication was that if the bailee was not responsible for the loss by reason of his conduct, then he was not liable to the bailor.²⁹

The court expresses its wonder over modern adherence to law so old, and then parallels Maimonides' exposition of the biblical law of bailment with that of the late 20th century Maryland:

It is amazing how little change has occurred in the law of bailments over the intervening centuries since the time of Moses . . . When the bailed chattel is either not returned or returned in a damaged condition without legal excuse, a prima facie case of lack of due care or negligence is made out. It is then the duty of the bailee to go forward with proof that the loss or injury was occasioned by a cause which excuses the bailee, thereby providing a complete defense as the bailee is not an insurer. The bailor is

²⁹ *Miller v. McClung-Logan Equipment Company, supra*, at 1155.

then, by reason of his burden of proof, required to overcome this defense by establishing a preponderance of the evidence that the bailee failed to use ordinary care and diligence to safeguard the bailor's property and that failure to perform his duty caused the loss to the bailor.³⁰

Applying that ancient law to the facts, the Maryland court affirmed the judgment below. The trial judge was justified in disbelieving the bailee's sworn "explanation that the damage was occasioned by the actions of an alleged phantom vehicle," especially since the bailee "had failed to mention the alleged phantom vehicle to the investigating officer." The precipitating cause, according to bailee's testimony, in the words of *Ex.*, had "driven away, no man seeing it." Although stated under "the oath of the Lord," the trial court remained skeptical: "Bailor's prima facie case of negligence survived the effort of the defendant [bailee] to overcome it." The bailee in this case had to "make restitution."

Arbitration

In light of Maimonides' encouragement of arbitration, and the support in our time for what is called "alternative means of dispute resolution" by the present Chief Justice of the United States Supreme Court,³¹ *bet dins*, or in Hebrew "battai din", acting as arbitration tribunals, and calling on Maimonides to support positions taken by them, have not fared well before civil courts reviewing their decisions in two relatively recent New York cases.

In the Matter of the Estate of Jacob J. Jacobovitz, Deceased,³² the Surrogate's Court of Nassau County squelched a challenge to its probate jurisdiction mounted on the basis that the interested parties had agreed to submit the entire matter to a *bet din* and had thereby ousted the civil court of jurisdiction. This clearly angered the Surrogate:

A purported probate of a will and a directive for the distribution of the estate, made by a purported ecclesiastical or rabbinic court pursuant to a purported agreement among some distributees for

³⁰ *Miller v. McClung-Logan Equipment Company, supra*, at 1155.

³¹ Chief Justice Warren Burger in 43 New York State Bar Journal (Oct. 1971) 384.

³² 58 M.2d. 330 (1968).

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arbitration and award by such a court, is contrary to the New York State Constitution and statutes and public policy and is void.

Before coming to that conclusion, Surrogate John D. Bennett consulted Jewish law sources. He found that an agreement to arbitrate was not necessarily binding. It may be rescinded unless the parties formally commit to its enforcement. The court quotes Maimonides:³³

Even if both litigants have consented to arbitration by the court, they have the right to change their minds and demand a decision at law unless both have pledged themselves by *Kinyan* to abide by the outcome of the arbitration.

With this opinion, the Surrogate could have explored the various modes of *Kinyan* and found the necessary requirement lacking.³⁴ But rejection of the notion that a rabbinical court might have any claim whatever to probate jurisdiction was total: “whatever position the Jewish law may take today regarding the probating of wills and settling of estates, the civil law of the State of New York must be applied and is the only law this court can consider.”³⁵ The vehemence of rabbinical court rejection recalls the peculiar sensitivity of common law courts, historically, to ecclesiastical inroads where marriage and inheritance are concerned.³⁶

The second New York arbitration appeal to quote Maimonides and to overturn a *bet din*'s decision was decided in 1980 by a King's County Supreme Court judge familiar with Jewish law.³⁷ In addition to finding that the *bet din* had violated two principles of civil law (it had ignored the legal concept of limited stockholder liability for corporate acts and had decided the merits of the dispute when the respondents had agreed to appear before the *bet din* only to argue its jurisdiction), the Supreme Court also concluded the *bet din* had violated Judaic law. Finally, to complete the range of *bet din* misapplications of law, it had violated both rabbinic and civil law on the issue of denial of counsel.

³³ 58 M.2d. at 331.

³⁴ See *The Principles of Jewish Law*, ed. M. Elon (Jerusalem 1975) 206.

³⁵ 58 M.2d. at 331.

³⁶ See B. Meislin, *Jewish Law in American Tribunals* (New York 1976) 105, 144.

³⁷ *Mikel v. Scharf*, 105 M.2d. at 548 Opinion by Judge Arthur S. Hirsch.

The error last mentioned is traced by the court to a failure by the *bet din* to have kept up with rabbinic law developments. Maimonides is cited for the early view, proceeding from *Deuteronomy* 19:17, “that parties appear before a magistrate in person and not by proxy.” His *Mishneh Torah*, *Sanhedrin* 21:8 is authority for later adherence to the biblical rule: “For many years,” the court states, “this supported a Jewish judicial prejudice against proxies, including attorneys and even interpreters, it being determined essential that argument be heard directly from the mouths of litigants or witnesses.” But the *Mishneh Torah* statement by Maimonides did not enter the matter. According to Judge Arthur S. Hirsch, a post-Maimonides trend, having its origin in a talmudic exception to the general rule, led to a change in the anti-attorney bias of rabbinical courts. The Talmud’s exception, set forth in Talmud Yerushalmi *Sanhedrin*, 2:1, 19d, allowed a high priest to appoint an attorney to represent him. This exception evolved into the rule that “where the parties were present to give testimony, thus permitting judges to perceive their demeanor and evaluate their credibility, legal counsel was no longer considered to be anathema.” The court then makes a leap from “no longer anathema” to the conclusion that “the rabbinical court in the instant matter obviously did not abide by this accepted legal concept.” The court finds its construction of “right to counsel” under rabbinic law in accord with United States and New York law: “The right of counsel, which is a constitutional right, is further enunciated in CPLR article 75, and is an unwaivable right (CPLR 7506, subd [d]).” There is no doubt that right to counsel is an American constitutional right; that rabbinic law has departed from Maimonides’ statement of the rule is not as certain. Reference to *The Principles of Jewish Law*, cited by the court, reveals Judge Haim H. Cohn’s conclusion on the subject of right to counsel: “apart from custom (and equity) the purely legal position has never been resolved (see *Shittah Mekubbezet* to *Baba Kamma* 70).”³⁸

³⁸ *The Principles of Jewish Law* ed. M. Elon (Jerusalem 1975) 574. See also to the same effect, D. Frimer, “The Role of the Lawyer in Jewish Law”, 1 *The Journal of Law and Religion* (1983) 297.

Real Estate – Easements

Maimonides' view of incorporeal easements against the will of the record owner is asserted as the origin of a similar common law doctrine, oddly enough, in a family law visitation right opinion.³⁹ This is an unusual setting for an easement discussion and may be ascribable to the halakhic enthusiasm of a Family Court judge. With unrestrained exuberance the court cites four examples of "Talmudic concepts found in the common law" to support its contention that the principle of *kal v'chomer* (the major category includes the lesser) is an applicable common law principle. It deems that principle to have been absorbed from *Halakhah* sometime before the expulsion of all Jews from England in 1290. To prove the legitimacy of Jewish law reception, Judge Stanley Gartenstein catalogues other instances of "Hebraic and Aramaic Talmudic concepts found in the common law." They include the jury system, construing a nominal deed as a mortgage, and the origin of the Recording Act. He concludes with "the concept of incorporeal easements against the will of the record owner of real or personal property in furtherance of the public good."

The source of the last mentioned legal principle is given as *Tur, Hoshen Mishpat 292; 20 Darkhe Moshe*, "The ten conditions of Joshua in dividing land," *Baba Kamma 80b*. As stated by Maimonides in *M. T. Nizkei Mammon 5:2-4*, "In the season when the public roads were muddy or overflowing with rivulets of water, wayfarers might take to the side of the road and walk there even though they be trespassing on private property." This rule is stated by Maimonides to be one of the ten conditions which Joshua imposed when he divided the land. But this attribution is simply a repetition of the Talmud, *Baba Kamma 80b*, and cannot be proved. In any event it is an early instance of authorizing an easement over private land. That it is the source of a common law rule to the same effect also remains conjectural despite Judge Gartenstein's good faith enthusiasm for such provenance.

In any event, by convincing himself of Jewish law influence on the common law, Judge Gartenstein feels justified in applying the principle of *kal v'chomer* "for which no exact counterpart can be found in the common law" to permit him to adjudicate visitation rights where the

³⁹ *In the Matter of Juan R. v. Necta V.*, 84 M.2d. 580 (1975).

right to adjudicate and award custody was uncontroverted. The “principle which would permit litigation for the weightier relief of custody” could not logically “deny it for the lesser remedy of visitation.”

Corporate Law – Shareholder Suits

A derivative stockholders action to upset a corporate merger⁴⁰ does not readily invite twelfth century legal authority as dispositive of a major issue in such complex modern litigation. But at this point in our survey the summoning of Maimonides as authority on the most unlikely points of twentieth century law should no longer be surprising.

One ground urged by the defendants for the dismissal of the complaint was that the plaintiff owned but a paltry few shares in the defendant Julius Kayser & Co. To Judge Jerome Frank, writing for the Second Circuit United States Court of Appeals, this was irrelevant. He quotes The Code of Maimonides, Bk. IV, *The Book of the Judges* (Transl. 1949) Ch. XX, Clause 10: “Think not that the foregoing rules apply only to a case involving a large sum of money to be taken from one litigant and given to the other. At all times and in all respects, regard a suit entailing one thousand maneh and one entailing a perutah as of equal importance.”⁴¹

I cannot help but believe Maimonides would have been particularly pleased by the court’s resort to his authority for this legal and ethical 800-year-old reminder.

⁴⁰ *Subin v. Goldsmith et al.*, 224 F.2d. 753 (1955).

⁴¹ *Subin v. Goldsmith et al.*, *supra*, at 761.

COMPARATIVE STUDY OF GRATIAN AND MAIMONIDES*

*Isaac H. Jacob***

Introduction

Any comparative study of Gratian and Maimonides must take into account that they were contemporaries. Gratian begins the ten year production of the *Decretum* in 1140; Maimonides writes his *Letter to the Jews in Yemen* in 1172. The evident point of comparison, given their contemporaneity, is that they both produced codes of religious law.

A study of Gratian really means the study of the so-called Decree of Gratian (*Decretum Gratiani*) in which the Benedictine monk who lived near the University of Bologna gathered, selected, organized the *ius antiquum*, the ancient law of the Church up until that time.¹ It was a massive task which the term “Decree” itself does not convey. The Decree of Gratian is a code term for the true and full title of his work: “Concordantia Discordantium Canonum,” “Harmony out of

* This paper is dedicated to Professor Stephan Kuttner, Director of the Medieval Canon Law at the University of Southern California at Berkeley. It is only through his lectures and writing that it has been possible for me to approach the subject of this lecture. My grasp of the sources of Canon Law I owe to him; the comparison of the work of Gratian and Maimonides is my responsibility.

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¹ Gratian put the sources of the *ius antiquum* into one organized whole of which the *Corpus Iuris Canonici* is the First Part (Pars Prima) which will be discussed shortly.

Conflicting Religious Law,” or, as Gratian would probably add, if he could, “Harmony out of *Apparently* Conflicting Religious Law.”²

Gratian in Canon Law, as Maimonides in *Halakhah*, spent a good part of his time showing how laws often seem to conflict but can be explained in a non-conflictive way, harmoniously, through analysis of the words themselves. In the twelfth century it was an analysis stimulated by the study of both Greek philosophy and classical Roman law, crucial factors in the intellectual *Zeitgeist*. A point of comparison meriting study, then, lies in the intellectual mood of the twelfth century and highlights how the simple fact of contemporaneity can be important.

Religious Law

Of far greater importance for our purposes, however, is the nature of the writings of Gratian and Maimonides: religious law. Thus in our comparative study it is *Mishneh Torah* of Maimonides which is the term of reference for *The Decree*. Focusing only on *Halakhah* in our study may seem to be too obvious to mention. It is not. The real point upon which we hope to begin our comparison of Gratian and Maimonides is that of *legal intelligence*; whether there exists a *juristic intelligence* that is discernible in the legal activity of the twelfth century, and this precisely in the area of religious law.

This discernment of a juristic intelligence is the crucial objective for our study. With its existence and identification we can discern what codification can mean, and what does it mean to quantitatively reduce the existing law, if there is not an intelligence at work shaping, eliminating, adding, and even “apparently” changing. In the evaluation of Gratian and Maimonides on this point, there is a controversy that continues among their co-religionists to this day as to their achievement. Is Gratian merely a hired man of the Papacy, an agent of the Gregorian reform, simply eliminating what does not conform to the policy of Rome? If that is the central sense of *The Decree*, though it is not doubted that alignment with papal policy is an important factor, then

² For a very pertinent discussion of the full title of *The Decree*, cf. S. Kuttner, *Harmony from Dissonance* (Wimmer Lecture X, The Archabbey Press, Latrobe, PA 1960) 10–18.

we do not have a distinctive juristic intelligence that merits our interest and study. Alternatively, if the core of the codification process that is found in *Mishneh Torah* is basically an exercise in Aristotelian logic and ordering, we do not have a distinctive juristic intelligence. For intelligence that is juristic, it is necessary that there is a grasp of essential communal self-identity which emerges from the mass of religious law. If this intelligence exists in Gratian and Maimonides, then religious law of the Judeo-Christian tradition yields a rich vein for research in the task of identifying sources for contemporary law.

At stake in the question of a specific juristic intelligence arising from halakhic and canonistic study is whether one can expect a proper and important contribution from a comparative study of Jewish and Canon Law, and whether there should be an institute for such comparative legal study. There is a discernable juristic intelligence within the legal stream of the Judeo-Christian tradition and such an institute ought to be established.

The Juristic Intelligence of Gratian: Harmony

The true title of the work of Gratian, called *The Decree of Gratian*, *Decretum Gratiani*, is *The Harmony out of Discordant Canons*. This title itself is rich and evocative of the Church in the West, the Latin Church. It evokes music and, as applied to life in the Church, circumstances where many discordant voices can be heard, and the hope that, eventually, a beautiful harmony will emerge. Saint Augustine (354–430) refers to the realization of this hope when speaking of the resurrection of the flesh. Saint Augustine envisions that the Saints of God will have their differences fused as in one sound (*consonantes*), not in dissonance; that is, in consent, not dissent; even as a sweet harmony (*concentus*) is made from sounds that are diverse but not adverse (*concentus ex diversis non adversis*).³

³ Augustine, *Enarrationes in Psalmos*, 150. 4 par. 7: “. . . ut diversitate concordissima consonent, sicut ordinantur in organo. Habebunt etiam tunc sancti differentias suas consonantes, non dissonantes, idest consentientes, non dissentientes; sicut fit suavissimus concentus ex diversis quidem, sed non inter se adversis sonis.” (Migne, *Patrologia Latina* 42.889); quoted by L. Spitzer, “Classical and Christian Ideas of World Harmony,” 2 *Traditio* (1944) 443.

The theme of harmony for Augustine is rooted in God who created nature, and found, through Christ, in the order of grace and redemption. This thinking was common enough to become an ideal of the Middle Ages, the idea of attaining a universal order. But it is Ivo of Chartres in his *Panormia* – that appeared in 1096 – who was more directly influential on Gratian, who produced his work on Canonical Harmony around 1140. In the *Panormia* there appears a separate treatise under the title, “Of the Harmony of the Canons,” *De consonantia canonum*.⁴ It is a milestone in the history of interpretation, transferring certain principles of biblical and rhetorical hermeneutics to the field of the sacred canons, enriching commonplaces with new ideas which have consequence both to scholastic theology and the nascent canonical writings. Hermeneutics, the art of reconciliation of the sacred authorities, was the tool of harmony, whose principles were interchangeable in biblical interpretation, the art of rhetoric, and the canonical science. Thus Gratian learned from the *Panormia* the hermeneutical principles by which contradictions could be resolved into harmony.

The elements making up the harmony of *The Decree* are 4000 *capitula* which are divided into three parts; part one is 101 *distinctiones*, with the first twenty serving to define the sources of the *distinctiones* which provide place for a wide range of material: excerpts from Mosaic law, words drawn from the Gospels, decrees from the Councils of the fourth and fifth century, *epistolae decretales* of the popes deriving from the latter part of the fourth century, enactments of later councils, and synods that are national, provincial, regional; Roman imperial statutes, ordinances of the Frankish kings; rules from private handbooks of penance. And more. This list conveys something of the task *The Decree* sets out to accomplish, leaving room for modern day criticism, certainly, but providing a basis for the development of canon law to this very day, as will be seen.

The Decree was the casting of all these *auctoritates*, all these authorities, into a jurisprudential system, whereby these authorities were

⁴ Cf. the chapter “Yves de Chartres,” in P. Fournier and G. Le Bras, *Histoire des collections canoniques en Occident depuis les Fausses Decretales jusqu’au Decret de Gratien* (Paris 1931–32) II, 55–114.

seen to maintain a continuity with the preceding generations, from the very beginning of the Church. From *The Decree* textual arguments were drawn, point for point, the textual arguments for the canonical doctrines Gratian proposed. It became accepted for this organized thought to find its own place as a distinctive discipline, somewhere between theology and the other legal science which was developing in the wake of the restoring of the full *Corpus iuris civilis*, the body of civil law which had just been reborn at the University of Bologna where nearby stood the monastery of Gratian.

To probe the juristic intelligence underlying the work of Gratian is to touch the juristic intelligence in the whole system of canon law. *The Decree* of Gratian is the First Part of the three part *Corpus iuris canonici*; the Second and Third Sections of the *Corpus iuris canonici* are made up of papal decrees, which are later law and are based substantially on the studies of the Masters on *The Decree* of Gratian in the Schools. That is, *The Decree* of Gratian functions as the foundational source of the *Corpus iuris canonici*, which was only formally abrogated with the appearance of the Code of 1917. And even after the latest revision of the Code in 1983, the *Corpus iuris canonici*, with its anchor, *The Decree* of Gratian, still stands as the written embodiment of the *ius antiquum*, the ancient law. Accordingly, it is still part of the present-day system of canon law. As paragraph 2 of Canon 6 of the recently revised Code of 1983 states: "The canons of this Code, insofar as they refer to the old law, are to be assessed in accord with canonical tradition."⁵ And it is the *Corpus iuris canonici* which is the chief written embodiment of that tradition.

In a Gloss, written sometime after 1169, there is encapsulated a perception of the juristic intelligence of canon law. The Gloss explains there is "a proper intelligence for living in the Church," *ratio recte vivendi*. This sense, this *ratio* has two parts: one *magistralis*, magisterial, the other *autentica*, authentic or genuine; that is, one which is proposed by the Masters of the Schools, the *Magistri*; and the other is

⁵ Canon 6 par. 2 of the newly revised Code of Canon Law, *Codex Iuris Canonici*, Auctoritate Ioannis Pauli Pp II Promulgatus, MDCCCCLXXXIII. "Canones huius Codicis, quatenus ius vetus referunt, estimandi sunt ratione etiam canonicae traditionis habita." Cf. *Corpus Iuris Canonici* ed. A. Friedberg (2 vols., Leipzig 1879–81).

autentica, which is ordained by the Roman Pontiff. The two make a consistent whole.⁶

The way these two dimensions were seen as constituting the juristic intelligence, the *ratio* for living in Church society, is illustrated by the manner popes issued their official collections. They, characteristically, addressed them to these schools and their masters, and not to the hierarchy as such, which has become a later practice.

This interplay between the *magisterial* and the *authentic* is that which constitutes the heart of the juristic intelligence proper to the Latin Catholic Church, as understood historically.

Reshaping, Renewing Religious Law

Our particular focus has been *The Decree* of Gratian, and it was suggested that this work is comparable to *Mishneh Torah* of Maimonides in that they are both foundational pieces for systems of religious law. With great clarity and honor the work and influence of Maimonides have been held throughout the world, as this Seminar testifies. It is significant, I think, that this is not true to the same extent within the Catholic community, never mind the Christian community, in regard to Gratian. That fact, I believe, reflects the pervasive Christian ambiguity toward the dimension of law in the Church, the absence of Christian consensus as to the role of law in the Church.

There are certain points of similarities which one can accept to consider as significant for pointing to the role of jurists, of those who reshape, renew the mass of law to a shorter and more viable form. In the case of Gratian and Maimonides their work still has unparalleled impact on the legal traditions and development of their communities. It is fair to ask the question, then, does not this fact point to a special significance of law for Judaism and the Church? What is there in common between Catholicism and Judaism whereby one person of legal

⁶ Gloss of the *Summa Elegantius in iure divino* (School of Cologne, after 1169): "Moralis sapientia in libris utriusque iuris: hec diuiditur in ratiocinatium et amministratium; hec in amministrazione officiorum et in economicam politicam (et ethicam) subdiuiditur. . . . Ratiocinatio moralis est que metu penarum et exhortatione premiorum mores componit, duobus his modis ad rationem recte uiuendi promouens. Hec in magistralem et autenticam distinguitur, altera in traditionibus et scriptis magistrorum, altera in constitutionibus imperatorum et romanorum pontificum continetur" (Vienna MS. lat. 2125, fol 11').

genius exercises such influence? Another fact that stimulates questions is that neither *The Decree* nor *Mishneh Torah* has ever received formal endorsement as an official code. Does this suggest the fate of jurists like Gratian and Maimonides? Does not this denial signal the felt need for further contributions precisely in the field of *Halakhah* and canon law? Is there a proof more potent of the unique importance of *Halakhah* and canon law to their respective communities?

Call for Research in Israel

Both the fields of *Halakhah* and canonical law can and should stimulate research that can make a contribution to contemporary law. The existence of the State of Israel and its Foundations of Law Act (1980), allowing for the contemporary growth of Jewish law, is a great stimulant for modern-day *Halakhah*, surely, and at the same time an abiding tap root of juristic intelligence. Here in Israel, with all the new problems associated with the establishment and functioning of a modern state, a wonderful opportunity exists for testing the principles of Jewish law, *Mishpat Ivri*.

Canon law is problematic in the Christian church and a point of great historical discord. It is possible that the study of the Hebrew word of Scripture which draws Christians from round the world can be endowed also with an authentic juristic resonance that can heal alienation and lead to a harmony. For many Christians, even the co-religionists of the monk Gratian, do not always see a connection between the Word and Canon Law. As is can be phrased within Catholic circles, the quest for an adequate theology of Canon Law is most urgent. I believe it is *the* most urgent question facing Catholicism today.

And, as is abundantly evident, it is the Church that struggles to address the questions which arise from many Third World Nations throughout the world. That canonical juristic intelligence needs nurtured to attain that flexible precision to build bridges between faith and the modern secular state in the search for economic and social justice.

Moreover, the area of religion and the modern state is not without significance in the whole Mideast region, and throughout much of the world where Islam and the modern state face the challenge of developing new legal realities. In this regard, I wish to allude to the Seminar in Religion and the State held in 1979, sponsored by Tel Gamaliel in

COMPARITIVE ANALYSIS

conjunction with the Law Faculty of the Hebrew University of Jerusalem and the Ecumenical Theological Research Fraternity in Israel.

A final word on juristic intelligence and modern day bridge building – and this word is an observation on Maimonides and *Mishneh Torah*. With *Mishneh Torah*, Maimonides had as an objective that a Jew will have no further need to have recourse to another work to solve his problems with *Halakhah*, with religious law; it is an admirable objective for encouraging responsible autonomy. But was there also another objective? To meet the Isolation of Exile?

Of all his major works, it was only *Mishneh Torah* that Maimonides wrote in Hebrew. Why did he write his halakhic masterpiece in Hebrew? Was that a hint as to the meaning and historical purpose of the *Halakhah* lived in Exile? By giving the *ta'am* (the taste) of Hebrew, was that giving the savor of return to the Land which is achieved only by keeping the *mitzvot*?

And this return to the pursuit of righteousness, now in a world of religious and secular realities, is not this a moment in history for an actualization of the words of the prophet, in a new way and for the whole human community?

We must not be silent and inactive
but work for the day that the Torah-Law
Will break forth from Zion
like a Flaming Torch.⁷

⁷ *Isaiah* 61:1.

APPENDICES

SEMINAR PROGRAM

CHAIRMAN

Professor Nahum Rakover
Deputy Attorney General
Israel

Monday August 12, 1985

Reception hosted by

Professor Nahum Rakover
Deputy Attorney General, Israel

Opening Ceremony, Greetings

H.E. Mr. Chaim Herzog
President of the State of Israel

Rabbi Shalom Mashash
Chief Rabbi, Jerusalem

Mr. Menachem Berger
President, Israel Bar Association, Israel

Prof. Haim H. Cohn
Deputy President Emeritus, Supreme Court of Israel
President, International Association of Jewish Lawyers and Jurists

Seminar Program

Mr. Mayer Gabay
Director General, Ministry of Justice, Israel

Prof. André Bertels
UNESCO

Keynote Address

Prof. Marvin Fox (U.S.A.)
Brandeis University

Seminar Program

Tuesday August 13, 1985

Session 1

CODIFICATION AND SOURCES

CHAIRMAN

Bernardo Baruch, Esq. (Costa Rica)

LECTURERS

Prof. Haim H. Cohn (Israel)

Deputy President Emeritus, Supreme Court of Israel

CODIFICATORY METHOD AND JEWISH LEGAL THEORY

Prof. A. Sàenz-Badillos (Spain)

University of Granada

BIBLICAL FOUNDATIONS OF JEWISH LAW

Prof. Meyer S. Feldblum (U.S.A.)

Yeshiva University, New York

CRITERIA FOR DESIGNATING LAWS

Seminar Program

Session 2

**POLITICAL THEORY
AND PUBLIC LAW**

CHAIRMAN

Sheridan Albert, Esq. (U.S.A.)
President, Brooklyn Bar Association

LECTURERS

Rabbi Shear-Yashuv Cohen (Israel)
Chief Rabbi, Haifa
WAR AND PEACE

Prof. Emanuel Rackman (Israel)
Chancellor, Bar-Ilan University
POLITICAL THEORY

Prof. Eliezer Goldman (Israel)
Bar Ilan University
POLITICAL AND LEGAL PHILOSOPHY
IN THE GUIDE FOR THE PERPLEXED

Prof. Nahum Rakover (Israel)
Deputy Attorney General
TERRORISM AND EXTORTION

Luncheon with *The Hon. Minister Moshe Arens*

Seminar Program

Session 3

FAMILY LAW AND SUCCESSION

CHAIRMAN

Dr. Ben-Zion Schereschewsky (Israel)
Judge Emeritus, Supreme Court of Israel

LECTURERS

Prof. Mordechai Friedman (Israel)
Tel-Aviv University
SOCIAL REALITIES IN EGYPT AND MAIMONIDES,
RULING IN FAMILY LAW

Rabbi Prof. J. David Bleich (U.S.A.)
Cardozo Law School, New York
SOLUTION TO THE PROBLEM OF COMPELLING THE HUSBAND
TO DIVORCE

Prof. Benjamin Greenberger (U.S.A.)
Touro College School of Law, New York
INDIVIDUAL, SOCIAL AND NATURAL ASPECTS OF INHERITANCE

Tour of the Israel Museum

Reception hosted by the Municipality of Jerusalem

Seminar Program

Wednesday August 14, 1985

Session 4

**MAIMONIDES' METHODS OF
DETERMINING THE LAW**

CHAIRMAN

Dr. Josef Burg (Israel)
Minister of Religious Affairs

LECTURERS

Rabbi Mordechai Eliyahu (Israel)
Rishon Letzion, Chief Rabbi of Israel

MAIMONIDES' METHODS OF DECIDING THE HALAKHAH

Rabbi Prof. Binyamin Ze'ev Benedict (Israel)
Haifa

SOLUTIONS TO DIFFICULTIES IN MAIMONIDES' WORKS
BY REFERENCE TO HIS OWN WRITINGS

Dr. Aaron Greenbaum (Israel)
Jerusalem

SURETY FOR THE PERSON OF THE DEBTOR:
MAIMONIDES' GEONIC SOURCES

Rabbi Ratzon Arusi (Israel)
Tel-Aviv University

MAIMONIDES AS MARA DE'ATRA

Seminar Program

Session 5

MORALS AND LAW

CHAIRMAN

Prof. Yitzhak Englard (Israel)
Dean of the Faculty of Law,
Hebrew University of Jerusalem

LECTURERS

Prof. Andre Neher (Israel)
META-ETHICS IN THE THEORY OF MORALS
OF MAIMONIDES

Prof. Aaron Kirschenbaum (Israel)
Tel-Aviv University
MAIMONIDES AND EQUITY

Dr. Jonah Ben Sasson (Israel)
LAW AND JUSTICE IN THE THOUGHT OF MAIMONIDES

Seminar Program

Session 6

CRIMINAL LAW

CHAIRMAN

Prof. Niyazi Oktem (Turkey)
Istanbul University

LECTURERS

Prof. Yaakov Bazak, Judge (Israel)
District Court Jerusalem

CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS

Rabbi Daniel Sinclair (Scotland)
Chief Rabbi, Edinburgh

TREATMENT OF FATALLY ILL PATIENT (TEREFAH)
IN MAIMONIDES' LAW OF HOMICIDE

Prof. Dov Frimer (Israel)

SELF-DEFENSE AND ABORTION

Seminar Program

Thursday August 15, 1985

Session 7

MAIMONIDES AS CODIFIER AND RESPONDENT

CHAIRMAN

Prof. Haim Dimitrovsky (Israel)
Hebrew University of Jerusalem

LECTURERS

Prof. Mordechai Rabello (Israel)
Chairman, Institute for Research in Jewish Law,
Hebrew University of Jerusalem

OBSERVATION ON MAIMONIDES AS CODIFIER

Prof. Meir Benayahu (Israel)
Tel-Aviv University

RESPONSA OF MAIMONIDES

Rabbi Dr. A. Hilewitz (Israel)

MAIMONIDES' CODIFICATION

Tour to Massada (for overseas participants)

Seminar Program

Session 8

PUBLIC LAW

CHAIRMAN

Prof. Hans Klinghoffer (Israel)
Professor Emeritus,
Hebrew University of Jerusalem

LECTURERS

Rabbi Avigdor Nebenzahl (Israel)
AUTHORITY FOR GOVERNMENT IN JUDAISM

Aharon Nahalon, Esq. (Israel)
Hebrew University of Jerusalem
MAIMONIDES ON COMMUNITY SELF-GOVERNMENT

Seminar Program

Session 9

**APPROACHES TO THE STUDY
OF MAIMONIDES**

CHAIRMAN

Yitzchak Tunik (Israel)
State Comptroller, State of Israel

LECTURERS

Dr. Zerach Warhaftig (Israel)
Former Minister of Religious Affairs

THE "YESHIVA" APPROACH

Rabbi Herschel Schachter (Israel)
Yeshiva University, New York

THE METHOD OF "BRISK"

Judge Elishah Schoenbaum (Israel)
District Court, Tel-Aviv

COMPELLING THE GRANT OF DIVORCE

Dr. Sh. Z. Havlin (Israel)
Bar-Ilan University

LOGIC VERSUS TEXTUAL CRITICISM

Seminar Program

Friday August 16, 1985

Session 10

COMPARATIVE ANALYSIS

CHAIRMAN

Prof. Daniella Piatelli (Israel)
University of Rome, Italy

LECTURERS

Bernard J. Meislin, Esq. (U.S.A.)

MAIMONIDES AND AMERICAN CASE LAW

Dr. William Elefant (Israel)

Bar-Ilan University

EDUCATION . . .

Dr. Isaac Jacob (Israel)

COMPARATIVE STUDY OF GRATIAN AND MAIMONIDES

Seminar Program

Session 11

CIVIL LAW

CHAIRMAN

Prof. Leona Beane (U.S.A.)
Baruch College,
City University of New York

LECTURERS

Emanuel B. Quint, Esq. (Israel)
SELF-HELP IN "MISHNEH TORAH"

Dr. Yaakov Meron (Israel)
Tel-Aviv University
PRIVATE INTERNATIONAL LAW IN TORTS

Seminar Program

Sunday August 18, 1985

Session 12

JURISPRUDENCE, LAW AND MORALS

Session held at the Knesset

Greetings

Mr. Shlomo Hillel (Israel)
Speaker of the Knesset

CHAIRMAN

M. Jules Braunschvig (France)
Honorary President,
Alliance Israelite Universelle, Paris

LECTURERS

Prof. Ze'ev Falk (Israel)
Hebrew University of Jerusalem
MAIMONIDES AND JURISPRUDENCE

Prof. Martin P. Golding (U.S.A.)
Duke University, North Carolina
THEORY OF JURISTIC REASONING

Prof. Ruth Link-Salinger (Israel)
Touro College, New York
MAIMONIDES: BETWEEN WISDOM AND ETHICS

Gala Farewell Dinner

Hosted by *H.E. Mr. Moshe Nissim*
Minister of Justice

A SELECTED BIBLIOGRAPHY ON MAIMONIDES AND LAW*

*I.I. Dienstag***

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* This bibliography is part of a comprehensive bibliography prepared by the author on Maimonides and his writings on the Halakhah, Philosophy and Medicine. The present bibliography relates only to those topics that specially relate to law. No general references are given to Maimonides and his *Mishneh Torah*, such as the outstanding study of Prof. I. Twersky – *Introduction to the Code of Maimonides* (New Haven, 1980).

In 1985 a bibliography was published of works in Hebrew on Jewish law in general (Nahum Rakover, *Otzar Hamishpat*). There is now in preparation a complementary volume covering works in other languages, which will contain a selection on Maimonides.

** Prof. Emeritus, Yeshiva University, N.Y.

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