MODERN APPLICATIONS OF JEWISH LAW

NAHUM RAKOVER

MODERN APPLICATIONS OF JEWISH LAW

Resolution of
Contemporary Problems According to Jewish Sources
in Israeli Courts

VOLUME ONE

THE LIBRARY OF JEWISH LAW

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of Jewish Law

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FOREWORD

by
The President of Israel
Chaim Herzog

Law lies at the very foundation of the Jewish People. Law was the medium by which the tribes of Israel took their first faltering steps towards nationhood. Even before the Revelation at Sinai, Moses sat to judge the people and accepted the advice of his father-in-law, Jethro, to establish a hierarchical judiciary founded on "officers of thousands, officers of hundreds, officers of fifties, and officers of tens" (Ex. 18:21). These officers were charged with regulating relations among men and between the people and their leaders.

Law reigns supreme in the Jewish Tradition. All are equal before the law, and favoritism is impossible, because "judgment is the Lord's" (Deut. 1:17). On the verse (Deut. 16:20), "Justice, justice shalt thou pursue," Rashi comments that the appointment of honest judges is "sufficient merit to keep Israel alive and settle the nation on its land." From here we see that a just system of law is absolutely necessary to the existence of the Jewish People and to its possession of the Land of Israel.

Little wonder, given the exalted position of law in our national heritage, that all who perceive the modern State of Israel to be the dawning of our Redemption are willing to do everything within their power to see the state conducted in accordance with the principles of Jewish law. For my father, Israel's first chief rabbi, R. Isaac haLevi Herzog, of sainted memory, the yearning to establish Jewish law as the foundation of the Jewish state was like a fire burning within his very bones. Long before Israeli independence, he dedicated himself to preparation of a constitution based upon Jewish law. He wrote: "Even as many remained convinced that a sovereign, independent Jewish state was impossible prior to the advent of the Messiah, I myself aspired to found a great movement to persuade the future legislature to draft a constitution establishing Jewish law as the law of the land...; and while I was yet involved in study and research, the state was proclaimed!"

My father's aspiration to base the law of Israel upon Jewish law, was rooted in his awareness of that system's ability to find legal solutions for the problems of every era. Jewish law has never stagnated, never stopped evolving. In all generations, it has continued to develop as a life-giving and abundant natural spring — testimony to the vitality and spiritual virtuosity of a people dedicated to the ideal of moral excellence. The beauty and uniqueness of Jewish law lay not in its immutability, but rather in its dynamism, its ability to develop and adapt to change. Though based on a written Torah received by the people of Israel thousands of years ago — a Torah not one letter of which may be altered — Jewish law has in every generation proven itself both qualified and capable of confronting every challenge and every problem requiring legal solution. This outstanding characteristic of Jewish law has been responsible for its continued existence and relevance from ancient times to the present.

In spite of my father's efforts and the efforts of many other outstanding individuals, Jewish law was not established as the foundation of the legal system of the Jewish State. Nevertheless, Israeli law and Jewish law are hardly strangers. On the contrary, over the past forty-four years of Israel's existence, her legislature and judiciary have relied heavily upon Jewish law. Judges, interpreting statutes and applying the law, have frequently given careful consideration to the position of Jewish law, and frequently adopted the principles and conceptions of Jewish law in both theory and practice.

We can only be deeply grateful, therefore, to Professor Nahum Rakover for his tireless efforts to re-establish the centrality of Jewish law in the Jewish body politic by strengthening the connection between Israeli law and Jewish sources. The current volume, edited by Professor Rakover, shows the tremendous contribution that Jewish law can make to contemporary law.

It is my conviction that the greater our reliance upon Jewish law, the finer and richer the legal system of Israel will be — the more deeply we shall be rooted in the great Jewish values of justice, morality, and the the supreme value of human dignity.

Jerusalem 1992

PREFACE

Jewish law is an ancient system whose development has never stopped. From biblical times to the present it has been the system to which Jews have turned whenever and wherever they sought to solve contemporary legal problems by the lights of their Tradition.

Jewish law combines legal analysis of unusual rigor, with practical wisdom and a highly developed sense of justice and morality. Concepts, such as the right to privacy and human dignity, only recently recognized by various modern legal systems, have been an integral part of Jewish law since ancient times.

The sources of Jewish law are rich and varied. In addition to the *Talmud*, the fruit of some five hundred years of legal scholarship, they include the great codes of Maimonides and R. Yosef Karo as well as hundreds of thousands of responsa — legal decisions handed down by Jewish jurists of every generation.

What have these sources to offer modern life? To what extent may they be used to solve the kinds of problems that crop up daily in contemporary courts of law? The answer to these questions can be found in *Modern Applications of Jewish Law*, a work which collects hundreds of legal decisions rendered by the Supreme Court and district courts of the modern day State of Israel. The decisions cited here were handed down from 1948 to 1987, and each of them makes recourse to Jewish law — some as the actual basis for ruling, and others for purposes of comparison and perspective. In the vast majority of cases, judges introduced Jewish law into their deliberations not because of some legal requirement to do so, but rather as a consequence of their conviction that legal decisions issued in the State of Israel ought to be based upon the sources of Jewish law.

In 1980, the Israeli legal system reached an important turning point in its development. Prior to this time, whenever local statutes and case law were

found lacking, judges were instructed to turn to the principles of Common Law and Equity of English law. In 1980, however, the Foundation of Law Act abolished this guideline and replaced it with the instruction: "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall be decided in the light of the principles of freedom, justice, equity and peace of Jewish heritage." Many of the post-1980 decisions based upon Jewish law are a direct result of this legislation.

Modern Applications of Jewish Law is organized topically and contains the portions relevant to Jewish law of the decisions selected. The head-note to each decision contains a survey of the facts of the case as narrated in the original decision, or as summarized by the editor. A decision relevant to more than one subject area may appear partly in one section and partly in another. Some decisions appear in only one section but are referenced in others. The decisions that appear here are drawn from decisions of the Israeli Supreme Court, volumes 1-40, and from decisions of Israeli district courts, volumes I-80 and 1974-1987. Decisions in family law, where by law all rulings must be based upon the personal law of the parties, are not cited. The editor has taken the liberty of correcting errors in citation of sources and completing references but has not commented on the decisions (which do not necessarily reflect his views).

Of late, Jewish law has gained increasing recognition outside of Israel. In the academic community, particularly in the United States, a number of special chairs in Jewish law have been established, and as a result, the demand for study materials in English has expanded rapidly. There is also great interest in non-Hebrew speaking countries in what Jewish sources might offer to society at large. It is with such needs in mind that *Modern Applications of Jewish Law*, which originally appeared in 1987, has been translated into English.

The scope of the work is extremely broad, containing decisions from every conceivable area of human endeavor. Covered here are not only such classic legal topics as civil and criminal law, but also discussions of such fundamentals of law as the force of custom and the force of precedent; evasion, and legal fiction; and morality and law. As regards social regulation and administration, we find discussions of immunity, and of appointment and suspension of civil servants; the requirement that administrative decisions be free of personal interest and not arbitrary; confidentiality; the right of citizens to protection of human dignity and protection against defamation; and the community's obligation to educate its members. As regards issues of a penal nature, there are decisions concerning extradition and rehabilitation. In the field of labor law, there

are discussions of employer-employee relations and the right of employees to severance pay.

The unusually broad range of topics discussed is in itself the best indication of the ability of Jewish law to confront the entire range of legal problems, be they classic or modern. *Modern Applications of Jewish Law* can, thus, serve not only legal scholars, but also any intelligent person interested in studying the application of Jewish law in both theory and practice, its solutions to actual problems, the Israeli judiciary's recourse to Jewish sources, and most importantly, that which is unique to Jewish law — its depth, wisdom, and justice, as well as its application to the reality of modern life.

The growing interest in Jewish law has stimulated the publication of a number of volumes designed to aid the members of the legal and legislative communities, as well as scholars and interested laymen. *Modern Applications of Jewish Law* is one of a series of original Hebrew works by the present author, published by The Library of Jewish Law. The Library of Jewish Law has also published the following works in English: *Jewish Law and Current Legal Problems* (Jerusalem, 1984); *Maimonides as Codifier of Jewish Law* (Jerusalem, 1987); *The Multilanguage Bibliography of Jewish Law* (Jerusalem, 1990). *Guide to the Sources of Jewish Law* is currently under preparation.

It is my hope that these works will provide the English-speaking reader some insight into the depth and breadth of Jewish law.

Finally, I would like to express my gratitude to those who aided in the publication of the present work: Peter Elman and Debbie Sinclair assisted in translating the decisions into English; Professor Ben-Tzion Greenberger contributed many helpful suggestions; and David Derovan prepared the indices.

Jerusalem 5752—1992

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Part One

JEWISH LAW
IN THE STATE OF ISRAEL

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Chapter One

THE SOLUTION OF LEGAL PROBLEMS AND THE FILLING OF LACUNAE

1. The Importance of Jewish Law and Its Role as a Source of Jurisprudence

*F.H.*22/73
BEN SHAHAR v. MAHLEV
(1974) 28(2) *P.D.* 89, 98, 100

In a judgment by consent it was decided that if the tenant fell into arrears with his rent he would have to vacate his apartment. Having suffered general paralysis, the tenant could not fulfill his obligations, and proceedings were brought for repossession of the apartment. The court held that it had an inherent power to extend relief to a person who has delayed in doing an act beyond the time fixed for performance by a judgment, based upon considerations of equity.

Cohn J.: When in order to do justice we deem it proper to ignore English or American law, I have accustomed myself to first investigate whether there is anything in the law of the *Torah* upon which to base ourselves. Not that English precedent automatically binds us in the absence of precedent in Jewish law, nor that we are required to decide in accordance with Jewish civil law; but that the justice that we are obliged and endeavour to do will be more certain and more solidly grounded if it finds support in our legal tradition and in the righteous wisdom of our forebears...

C.A. 86/76

AMIDAR...LTD. v. AHARON

(1978) 32(2) *P.D.* 337, 348

The respondent, a new immigrant, applied to the appellant to help him find a workshop where he could carry on his profession as a locksmith. Having been told that there was a suitable store, the respondent hastened to enter into a contract with Amidar to acquire the store. It turned out that local town planning did not permit the place to be used for the intended purpose and proceedings were successfully taken against him to stop using the place for that purpose. The District Court awarded him damages for negligent misrepresentation.

Elon J.: The Law and Administration Ordinance (Amendment No. 14) Law, 1972, provides that "any such provision of a Law as requires such Law or any expressions therein to be interpreted in accordance with English law or with principles of legal interpretation obtaining in England shall no longer be binding." *A fortiori*, if in 1954, before we gained judicial "freedom" from subjection to English legal interpretation, this Court was emboldened to decide as it did in *Boinstein* v. *Kadimah*, contrary to what was then decided law in England, today we are most certainly...obligated to choose the path we consider to be right under law and just in the circumstances when deciding a question before us. When a basic problem such as the present one arises that has no solution in existing law, what better can a judge do than to plunge into the deep waters of the sources of Jewish law and bring up the solution he seeks.

C.A. 546/78

KUPAT AM BANK LTD. v. HENDELES *et al.*

(1980) 34(3) *P.D.* 57, 66-68, 80

This appeal involved the ownership of certain bearer bonds which the first respondent had placed in a safe deposit box with the bank and which the District Court had held belonged to him.

Barak J.: (a) Part of the judgment of the Court of first instance is devoted to the Jewish law concerning the return of lost property. That Court said:

> The present case involves Israeli law, enacted by the Knesset, and the relevant expressions, such as "another person's domain", which appear

in sec. 3 of the Restoration of Lost Property Law, 1973, are expressions known to us from the *halakhah*. Thus, there is good reason to enquire into what the *halakhah* has to say on this subject and learn what we can from it.

According to Jewish law, the bonds found in the safe deposit room are the property of the finder and the owner of the place has no right to them, since the safe deposit room is treated as an unguarded area in the public domain which does not vest anything in its owner. The Court learned about the applicable Jewish law *inter alia* from three opinions of known modern authorities of stature, who gave their opinion on the question posed to us by counsel for the respondent — the facts of which are identical with those in the case before us. I wish to make a number of observations on the judge's recourse to Jewish law.

(b) Recourse to Jewish law...regarding the interpretation of the phrase "in another person's domain" is certainly permissible. It is, however, desirable to fix some bounds. First, such recourse is not obligatory but is only optional. Secondly, we do not refer to Jewish law as a normative system from which a prescript is sought, but rather as a treasury of legal thinking from which we seek inspiration. The recourse is to "law" in its cultural sense and not to "law" in it normative sense. In the present matter we may not address ourselves to Jewish law in order to derive from it the law as to lost property, but merely to obtain inspiration in discovering our own law. Thirdly, when seeking the meaning of a particular phrase in our cultural treasury, we must inquire into whether such meaning — alongside other meanings — reflects the intention of the legislation. I have already dwelt on the fact that determining the meaning of the phrase, "in another person's domain" — and only for this purpose may we resort to Jewish law among others — is not the end of the road but only the beginning. The task of the interpreter is to choose the appropriate alternative from among those before him. This choice is not a technical matter; it is a creative act, effected in accordance with rules prescribed by our law, the most important of which is the one requiring that a statutory provision be construed in accordance with the purpose of the enactment.

(c) The recourse to Jewish law mentioned at the end of the passage cited above is different in nature from that mentioned at the beginning. Whereas the beginning of the passage is concerned with the interpretation of phrases, its end is concerned with comparative law. Frequently, before deciding the content and scope of some legal institution found in his own system, a judge will turn to other legal systems for comparison, in order to obtain inspiration. It is an essential condition for the validity of such guidance that the legal institutions being compared are comparable, that they are based on

common fundamental suppositions and are intended to embody common purposes. In the present case, it is doubtful whether there is any reason for comparison with Jewish law, and hence whether it is possible to obtain any inspiration therefrom. That is because the distinction made by Jewish law between a guarded and unguarded area is based upon the assumption that either the finder or the owner of the place immediately becomes the owner of the lost property, and the only question is which of the two is the owner. As against this, the distinction made by the legislature between property found in another person's domain and property not so found is based upon the assumption that, at the time of the loss, the owner of the lost property remains its owner, and the question is who should preserve it for him and as a reward for so doing become entitled to its ownership. Accordingly, between "in another person's domain" in the Restoration of Lost Property Law and the law relating to guarded areas in Jewish law, there is no common conceptual foundation sufficient for the purpose of any fruitful legal comparison.

(d) In analyzing Jewish law, the Court of first instance referred to three halakhic opinions requested by respondent's counsel. He put to three well-known authorities a series of facts similar to those in the case before us and obtained a reply as to the position taken by Jewish law. These replies were then submitted to the lower court. Counsel for the appellant expressed reservations about the submission of the opinions but the court found no reason not to receive them. The Court stated: "It is a daily occurrence for a court to invoke the assistance of the *Responsa* literature in order to resolve a problem that engages it. If the authorities involved are contemporaries, is that invalid?" With all due respect for the Court at first instance, the *responsa* that constitute part of the Jewish legal system are not comparable to a specific *responsum* on the very matter pending in court. In the present matter Jewish law is not the "law applicable in Israel"; there, the Restoration of Lost Property Law and not Jewish law applies. Neither is the latter a foreign legal system by which to decide the law, the content of which must therefore be proved as a fact by means of an opinion. Here, Jewish law is a legal system that serves for judicial guidance by way of comparative law. We learn about it from the texts that are available to the public for consultation. It does not seem to me right in these circumstances to rely on a question directly touching the subject matter of the present case posed for the purposes of that case, and on the consequent reply.

Elon J.: Lastly and most importantly, I find this manner of interpreting the phrase "in another person's domain", and the object of sec. 3, within the Jewish legal system. The Restoration of Lost Property Law of 1973 is one

of the subjects of independent Israeli legislation in the field of civil law, in which a leading place is assigned to Jewish law for its interpretation. I have dealt with this difficult question in detail in *Roth* v. *Yeshufa* (see *C.A.* 148/77, 632-633), and that judgment may be consulted. The general observations of my learned friend Barak J. on this question do not seem to me to be as sufficiently comprehensive as they might. Of course the interpretation of this independent legislation in accordance with Jewish law is inappropriate when it is clear from the content of the particular law concerned that it is contrary to the approach and purpose of Jewish law on the subject, and one may not therefore confuse disparate things. But where the situation is otherwise and a doubt arises for which no solution is to be found within the law itself, we must turn first to the principles of Jewish law as the foremost source, which, although not binding upon us, may lead us to a solution of the problem presented to us.

Doubt having arisen here over the meaning of the provisions of sec. 3 of the Law and the meaning of the concept, "in another person's domain", and no answer being provided by the law itself, we may properly turn to the Jewish legal system for a solution to the problem. This is certainly the case when we realize that the Restoration of Lost Property Law of the Knesset and the Jewish law relating to the restoration of lost property have a common central object — to restore lost property to its owner. We dwelt on this aspect at the beginning of our opinion and we have observed that the Knesset, during the second and third readings of the Law, saw fit to change its name from the Treatment of Lost Property Law to the Restoration of Lost Property Law, both because that is its objective and because that is the name attached to the series of the pertinent rules in Jewish law. Furthermore, the concern displayed by Jewish law for finding the owner of lost property is so far-reaching that with regard to certain lost articles—those with distinguishing marks, and in respect of which it is not to be assumed that the owner has abandoned all hope of recovery — it prescribes that they never pass into the ownership of the finder, but are left "until Elijah will come" and the owner will be found (*Baba Metzia* 30a; *M.T. Gezelah veAvedah* 13:10; *Hoshen Mishpat* 267:15). And while Jewish law originally held that lost property may be taken by the finder for his own in cases where we may assume that the owner has abandoned hope of recovery, it was decided at the end of the tenth century, both in Babylonia and in Germany, that even as to such lost property the finder is bound to restore it to the owner if and when he claims it (*Resp. Rabbenu Gershom Me'or haGolah*, 67; *Teshuvot haGeonim, Sha'arei Tzedek*, Part 4, 1:20), and this was accepted as the law in practice (see M. Elon, *Jewish Law*, Part 2, pp. 564-66 and note 32).

F.H. 13/80

HENDELES v. KUPAT AM BANK LTD. *et al.*

(1981) 35(2) *P.D.* 785, 788-799

The issue in these proceedings was whether lost property found on the floor of a bank's safe deposit room was found "in another person's domain" within the meaning of sec. 3 of the Restoration of Lost Property Law, 1973. In the course of the hearing, the position of Jewish law in the Israeli legal system was reviewed.

Cohn D.P.: In *Kupat Am Bank Ltd.* v. *Hendeles et al.* (1980) 34(3) *P.D.* 57, this Court held by a majority that lost property found on the floor of a bank's safe deposit room was found "in another person's domain" within the meaning of sec. 3 of the Restoration of Lost Property Law, 1973 (hereinafter referred to as "the Law"). The meaning of the term "domain" is the subject of differences among the halakhic authorities and appears to me sufficiently important, complex and novel to necessitate this further hearing, as distinct from the additional question arising in the present petition: namely, that even if the bank were to be regarded as the owner of the domain, it cannot be deemed the finder since it never took the lost property into its possession (as provided at the end of sec. 3). Regarding this additional question, it seems to me obvious that the petitioner cannot plead that he did not follow the directives of the Law and did not hand over the lost property to the owner of the domain when requested to do so: it is obvious that no plaintiff can establish his case on the basis of his illegal act. The argument of petitioner's counsel that there was no "request" here in the sense of the law, either because the bank clerk asked or suggested but did not "request", or because the request was not uttered by or come directly from those authorised to sign on behalf of the bank, did not merit being heard in the court of first instance, and certainly not in this further hearing.

No one will dispute that the Law is to be construed according to its terms and its purpose; and all agree that the purpose of the Law is the restoration of lost property to its owner (as its title attests). The matter in dispute is what will better advance the restoration: leaving the lost property in the possession of the owner of the domain or in that of the finder. It might be said that the owner of the lost property will return to the owner of the domain, because there is a presumption that the latter will look after anything lost within his domain, and therefore it is preferable to leave it with him; on the other hand, the owner of the lost property may despair of the owner of the domain, as that domain is like a public place and its owner has no control over it, nor does he know those who

pass through it, and in that case it may very possibly be more desirable to prefer the finder to him. In this respect, I accept the approach of Landau D.P. (as he then was) that the main hall of the bank, open to all, is unlike the safe deposit room "over which the bank has full supervision and which is not open to the entire public". The owner of the lost article might regard the hall of the bank, accessible to all, as a kind of public thoroughfare, whereas the safe deposit room, entry to which is restricted to those who have rented safes and those accompanying them, who are observed by the clerk in charge, would be regarded by any reasonable person as an obviously private domain.

I am nevertheless prepared to proceed from the assumption that, as regards reasonable prospects for the restoration of the lost property, there is little difference whether it will be looked after by the owner of the domain, by the finder or by the police (which, under sec. 2(b) of the Law, may require that the article be handed over to it). Even if the owner of the lost article goes first to the owner of the domain, it should not be assumed that, upon not finding it there, he will not go and enquire of the police. Even if the article has not been handed over to the police, there is a possibility that the finder's name and address have been recorded (sec. 2(a) of the Law and reg. 2 of the Restoration of Lost Property Regulations, 1973). The question therefore still remains: Who is the owner of the domain mentioned in sec. 3?

The learned judge of the District Court regarded the term "domain" as one taken by the legislature from Jewish law, and which therefore needs to be interpreted according to its meaning in Jewish law. I do not propose to dispute the basic assumption that, where the legislature chooses an expression or phrase peculiar to Jewish law, it is properly to be construed according to the meaning (or one of the meanings) attached to it in Jewish law; this Court has so proceeded many times. But I do dispute the assumption that the term "domain" was taken by the legislature from Jewish law; the term is in wide use and is invoked in our daily legal terminology, so that there is no occasion or need to seek it in Jewish law and borrow it from there. The late Cheshin J. has already drawn our attention to the fact that the Israeli legislature naturally enough employs many legal terms that find a place in Jewish law, such as promissory note, loan, encumbrance, partnership and others but that does not warrant — or *a fortiori* compel — their interpretation in accordance with Jewish law. The law is to be construed according to the purported intention of the legislature: where it has disclosed its intention to have an enactment interpreted according to Jewish law, by choosing an expression or phrase actually unique to Jewish law and not commonly current among present-day lawyers, the court will try to realize the legislative intent and draw

its modes of interpretation from Jewish law. It is otherwise when the legislature has chosen to employ legal terms in current use: in that event, its presumed intention was that its language be taken literally according to the accepted rules of interpretation long followed by this Court.

This simple approach is not affected by the introduction of the Foundations of Law Act of 1980. The need to refer to the sources of the Jewish heritage does not arise at all so long as an answer can be found to any question requiring decision "in statute law or case law or by analogy". We must first seek a solution to our problems in the law itself, and must interpret the law according to the rules of interpretation that have repeatedly been laid down by case law.

That does not mean that we must rigidly refrain from having recourse to Jewish law so long as we can adduce therefrom concurring or contradictory proof or material for comparison or wisdom and understanding in deducing good attributes, but all this is optional and not obligatory, and if those who do so extensively are praiseworthy, those who do not do so are not to be censured. There are judges who abide by the doctrine of their predecessors and recoil from or shun all *dicta* that are irrelevant to the actual decision; for them and their like, any such dallying with Jewish law is totally invalid. Even if I do not side with them and am not rigid about *dicta*, I nevertheless do not close my eyes to the fact that citations from Jewish law are by way of being *obiter*.

Furthermore, even if a given term or phrase borrowed from Jewish law is to be construed according to its meaning in Jewish law, that does not entail applying the substantive provisions of Jewish law, as if it were the statutory enactment of our legislature. Let us see how my learned friend Elon J., in his abundant and keen erudition, has proceeded in the present appeal. Having come upon the term "domain" adopted by the legislature, which can be variously interpreted, he did not seek in Jewish law or generally any definition or *dictum* concerning "domain" which might assist in its construction, but he adopted the provisions of the *Mishnah* regarding property lost in a money-changer's shop and applied them to property lost in a bank building, as if the provisions of the *Mishnah* had statutory force. It is possible that the money-changer of those times is the bank of today; it is also possible that a money-changer's office is in every way like a bank's safe deposit room; and it is very possible that the statutory solution of the *Mishnah* is preferable, in its degree of justice, to any other possible statutory solution. Yet there is nothing in the doubtful meaning of the term "domain" used by our legislature to justify the absorption of the provisions of the *Mishnah* into the body of lost property law, even if there were justification for adopting the definition in Jewish law of the term "domain" itself. Regarding the

correct interpretation of the term, we can learn nothing at all from the rule that, if a person finds lost property in one part of a money-changer's shop, it belongs to him, but if he finds it in another part, it belongs to the money-changer. Equally, regarding such interpretation, we can learn nothing at all from the distinction, following the mishnaic rule and its explanation, between a guarded area and one that is unguarded. The fact that one of the commentators explains the rule relating to an unguarded area by ascribing to it the nature of a public place does not convert an unguarded area from private to public domain; for the meaning of "domain" this rule is immaterial.

Had it been the intention of the legislature to render the mishnaic or other like rule applicable, he could and should have said so explicitly. For instance, he could have distinguished between a private domain open to all or to many and a private domain not accessible to an uninvited stranger, and he could have made different rules regarding property lost in the different domains. The fact that the legislature knows how to express what it wishes to express is demonstrated — if demonstration is needed — from the wording of sec. 7(a), which states that even a place which the public frequents falls within the definition of private domain, the rule being that the owner of the place or establishment is to be regarded as the finder.

The phrase, "A person who finds lost property in another person's domain", as provided in sec. 3 of the Law, must be taken literally: a person who finds lost property not in his own domain or in the public domain. To support his plea that the bank falls within the definition of public domain in this regard, petitioner's counsel referred us to the definition of "street" or "road" in the Interpretation Ordinance [New Version], according to which these terms include "any...open place used by the public...or to which the public have or are permitted to have access". But the purpose of this definition is to extend the usual meaning of "street" or "road"; wherever these words appear in an enactment, they must be interpreted broadly, "unless...there is something in the subject or context inconsistent with such construction" (sec. 2 of the Ordinance); but this does not involve turning a private into a public domain contrary to the "natural" order, as if by giving the public permission to enter into an area belonging to me I had renounced all control over it.

I harbour no doubt that the bank's building is its "domain" whether or not the bank opens it to the public; and this "domain" cannot change from time to time with the hours of banking so that when the bank is open it is a public domain and when the bank closes it reverts to a private domain. The fact that the public enters and leaves the building derives from the exercise of the ownership by the owner of the domain in

allowing the public to do as they desire but there is nothing to prevent him from withdrawing such permission or to restrict it as he pleases. A person who finds lost property in a bank finds it in the domain of the bank, whether the building is closed or open, and irrespective of how he found it, as, for example, in the hall of the bank when customers and others were still around, or after the bank was closed. The bank's private domain is no different from the private domain of any other person. Had the legislature wished to distinguish between the two, it could and should have done so; just as the *Mishnah* made a special rule regarding money-changers, the legislature could have made a special rule for banks.

It is perhaps incongruous that a provision which the legislature confined to private domain should also apply to a place which the public uses and through which it passes, but that is the concern of the legislature. So long as the Law remains in its given terms, "in another person's domain" includes a private domain which the public uses and passes through. The question whether this is just or not, or whether a more just statutory arrangement might be found, does not arise in any way at all. He who regards the arrangement of Jewish law preferable to that of our statute can suggest its adoption by the legislature, but he cannot make himself the legislator and replace the statutory arrangement with that of Jewish law. For myself, I am not persuaded that the Law needs amendment: every finder may derive rights from "ownerless" property, and I do not know why the right of a finder by his own efforts takes precedence over the rights of a finder by virtue of the Law. On the contrary, where a person takes hold of lost property which to all appearances the owners have not abandoned hope of recovering, and seeks to obtain some entitlement to it, a taint of theft pervades his act, and there is good reason that our master Maimonides conjoins the laws relating to *gezelah* (theft) and lost property.

I therefore concur in the view of the majority of the judges who sat in *C.A.* 546/78 (1980) 34(3) *P.D.* 57, and I propose that the earlier judgment of this Court be upheld.

Elon J.: I have reviewed the submissions of counsel for the respondent and can find nothing to make me change what I wrote in the above-mentioned appeal judgment. I have explained at length my opinion in that judgment and I see no occasion or need to go over it again.

My learned friend Cohn D.P., in the course of dealing with the matter before us, examined the weighty subject of the recourse in the Israeli legal system to the rules of Jewish law. I also shall say something about my approach to this important matter and thereby clarify the remarks I made in the above-mentioned judgment.

My learned friend says that the phrase "A person who finds lost property

in another person's domain" which appears in sec. 3 of the Law must be taken literally to mean a person who finds lost property not in his own domain or in the public domain. And then further on he says, "I harbour no doubt that the bank's building is its 'domain' whether or not the bank opens it to the public." With the greatest of respect, had I also harboured no doubt that that was indeed the meaning of "in another person's domain"...there would be no occasion to resort to any other legal system whatsoever, including Jewish law, in order to construe under its inspiration the meaning of this section, since the Law is to be construed first and foremost by and within its own provisions. That is commonplace among lawyers. And, needless to say, even in such a case a judge will sometimes examine another legal system, if he deems that desirable, in order to broaden his thinking and deepen his analysis for its own sake. It is right and proper that such examination should be made of Jewish law and other legal systems, as the occasion requires, so that the question is settled as clearly as possible. The trouble is that here the concept "in another person's domain" is subject to various interpretations, as my learned friend Barak J. has noted in *C.A.* 546/78 and as I also observed there. What should a judge do in such an instance, what course should he pursue in his interpretation? He must examine the provisions of the entire section concerned, search the other sections of the Law in its entirety, seek assistance by way of analogy from other sections and other matters; perhaps all that will stand him in good stead. That is to say, he must be more comprehensive but no less precise: he must go thoroughly into the nature and object of the Law. At times, he will thereby achieve his aim; but sometimes he will still retain doubt, for it is well-known that just as "a pit cannot be filled by its own digging", so not infrequently an enactment cannot be filled out by its own sections. A judge may often extract from an enactment only suggestions for the solution of a question pending before him; at that stage, he finds sustenance from other legal systems or the studies of legal scholars. All this may at times be done consciously, openly and explicitly, and at other times not consciously, not explicitly but in actual fact.

Reference to another legal system has two aspects. One appears when a court cannot find — either in existing legal sources or by way of analogy — any answer to some legal question, so that a lacuna is created. In this case the legislature has conferred — since the repeal of art. 46 of the Palestine Order in Council — the status of a complementary source of law to "the principles of freedom, justice, equity and peace of Israel's heritage" (Foundations of Law Act, 1980; this is not the place to expand on the meaning and range of these key concepts). The other aspect appears when the legal question that has arisen does not involve a lacuna but

concerns the interpretation of an existing legal provision regulated by statute, but the interpretation of which may vary, and the problem of the court is to determine which is the correct interpretation. An example is the present matter where we are in doubt as to how to interpret sec. 3 with regard to "another person's domain". An important difference exists between these two aspects in point of the status and force of the other legal system to which the court turns; whilst in the event of a lacuna the status of the above-mentioned principles of Jewish law is that of being a complementary source of the legal system and the court is directed to refer to it as a binding source, in the second instance, when there is doubt as to how to interpret an existing provision, reference to another legal system is only a reference to a source of inspiration, to a legal system that is not binding but is only instructive, that does not decide but only influences. Parenthetically I should add that this difference between a lacuna and doubt as to interpretation is not an easy one and no hard and fast rule can be laid down. Many scholars have already expended thought on it. This is not the place to elaborate and I shall note only one example. More than once has it been held by a number of judges of this Court that the concepts of law founded in moral and cultural values — justice, good faith, public policy and the like — that are to be found in the Israeli legal system, should be construed in accordance with the basic conceptions embedded in the cultural and ethical values of Jewish law (*C.A.* 566/77, p. 150 and the decisions cited there; *C.A.* 148/77, p. 631; *Cr.A.* 89/78, p. 155).

In respect of these value concepts, which apart from their names do not refer to any substantive content, it seems to me that to distill their essence is in the nature of supplying a lacuna, particularly in the light of sec. 2 of the Foundations of Law Act which expressly directs us to these values. Accordingly, the mode of interpretation adopted by these judges is really to fill a gap and is not merely interpretation, with all that this involves...

When reference is made to another legal system simply for inspiration, and it is for the court to decide from which sources to derive this inspiration, it must primarily resort to the principles of Jewish law as the foremost source to guide it in resolving the problem confronting it. On this status of Jewish law as a primary inspirational source *inter pares* I have dwelt more than once, and most recently in my opinion in the present appeal. Two grounds exist for this view. The first is that this is required by the fact that both in the Explanatory Notes to various bills and in the debates of the Knesset it was repeatedly emphasised that the Jewish legal system, of all other legal systems, served as the main source for the principles of those laws and that particular attention was paid to

incorporating Jewish law principles into Israeli law (see, e.g., *C.A.* 604/77, p. 97; *C.A.* 148/77, pp. 632-633; *C.A.* 311/78; etc.) An outstanding instance of that process is provided by the Restoration of Lost Property Law which is our present concern. It is well known that Jewish law was in the past, as today, "an inalienable part of the civilisation [of the Jewish people]" (per Agranat P. in *C.A.* 191/51, p. 177). It is obvious therefore that inspiration for the interpretation of the legal system of the Jewish state should come, first and foremost, from the national legal system which forms its legal cultural background, in the same way as this approach to Jewish law served those who proposed and drafted the Law as the principal source upon which to base their labours (see *C.A.* 604/77 and *C.A.* 148/77). These considerations now take on special significance in view of sec. 2 of the Foundations of Law Act dealt with above, which, although concerned with lacunae in legislation, suggests which legal system is favoured by the legislature, even if only as a source of inspiration.

The second ground, too, is of very considerable importance. Israeli legislation, as we know, was preceded by virtually no Israeli legal theory which judges might consult when seeking to establish the nature and meaning of the fundamental legal concepts scattered throughout the legislation, or when it was necessary to reconcile different, contradictory provisions and in like cases. One of the major tasks of the courts in the course of their daily work is the creative development of this legal thinking. To confer paramount status upon the Jewish law system as a source of inspiration for interpreting Israeli law — before referring, in cases of doubt, to one legal system regarding some matter and to another legal system regarding a second matter — is conducive to the establishment of a *uniform* foundation, and the evolution of a rich, homogeneous jurisprudence in the Israeli legal system. I respectfully agree, with all respect, with the remarks of Landau P.:

> Israeli secular law is a law without historic roots of its own....It is made up of many strata, each having its own historical source. But the history is not ours. This is the great problem of modern Israeli law, and many of us — even the most secular — are pained by the fact that no synthesis has so far been achieved between Jewish law as a national cultural asset and the requirements of a modern society such as ours (M. Landau, "Law and Discretion in the Legal Process" (1969) 1 *Mishpatim* 292, 305).

Reference to the Jewish legal system as the supreme source of inspiration in the interpretation of Israeli law, when effected with proper deliberation and the necessary caution, as the occasion and the subject matter of the law involved requires, will give Israeli law historic roots of its own and

allow for the development of a synthesis between the two systems (see also, M. Elon, *Jewish Law*, 2nd ed., Part 1, 116 ff.).

Let us now return to the matter before us. As I insisted in my opinion in the appeal, the course which Barak J. takes in construing sec. 3 of the Restoration of Lost Property Law does not commend itself to me. According to that construction, the provisions of sec. 3 form the main rule of the Law whilst the provisions of sec. 2 are the exception. This conclusion, it seems to me, is not at one with the plain meaning of the Law, nor in my opinion does it conform with the object of the Law. It does not advance the Law's declared object of effecting and assuring the restoration of lost property to the owner, and the conclusion that follows, i.e., that if the owner is not found after four months the property passes into the ownership of the bank and is not handed over to the immediate finder, fails to pass the test of reason and justice, as indeed was stressed also by my learned friends Landau P. and Barak J. in the appeal. And it is also a rule of interpretation, that a law must be interpreted, so long as this is not inconsistent with its express terms, in a manner yielding a result that is just and reasonable. I dwelt on all this in my opinion in the appeal. But all this apart, and apart from the fact that most legal systems of which I am aware disagree with the mode of solving the problem proposed by my colleague (as I also pointed out in my said opinion), since the interpretation of sec. 3 is not resolved by the terms and content of the Law itself and the section may be variously interpreted, it is right and proper to seek inspiration and guidance primarily from the regulation of the matter in the relevant Jewish law, as I explained above. (And) I do not reach this conclusion because the term "domain" is specific to Jewish legal sources and has been taken from them, but because in my opinion, when there is doubt as to how to interpret a law, which cannot be resolved by attending to the terms and content of that law, we must consult the source of inspiration...and turn to the Jewish legal system to find in its provisions a way to solve the problem, provided — as I have emphasised — that the solution is not inconsistent with the provisions of the law and does not entail the mingling of unlike things. In the opinion of my learned friends Barak J. and Landau P., the basic assumptions of Jewish law in the present matter differ from the basic tenor of the Restoration of Lost Property Law, since Jewish law is concerned with the question of who is the owner of the lost property, whilst the Israeli legislature is concerned with the question of who should guard it and become entitled to it. With all due respect, I find it difficult to understand this argument. The difference to which my learned friends point is created as a result of the manner in which they interpret sec. 3, that its underlying consideration is that upon which American legal scholars, cited by Barak

J., have dwelt — i.e., what is the address to which the owner of the lost property may reasonably apply when searching for it. As I said in my above opinion, I do not regard that to be the objective and meaning of sec. 3. That section only provides that when lost property is found in the domain of another person, his claim to the property takes precedence over a claim by the finder, and for that reason the former is entitled to keep the property if the owner is not discovered. Sec. 7(a) of the Law, from which the learned President inferred what he did, does not, in my opinion, enlighten us on the question before us, since it speaks of property knowingly deposited or left behind and not claimed by its owner, where the logic of the situation differs from that here. The conclusion which I reached under inspiration of Jewish law not only does not conflict with the provisions of the Law, but fits in well with its content and purpose...

I have dwelt somewhat at length on this theme for two reasons. First, up till now no better and more fitting example has presented itself to me for explaining the proper manner in which, in my opinion, Israeli legislation is to be interpreted. The second reason is R. Judah's *dictum* (*T. Eduyot* 1:4): "The words of an individual are not mentioned amongst those of the majority except when the occasion requires it for support" (see also *M. Eduyot* 1:5 and Rabad and Rash miShantz *ad loc.*)...

Levin J.: I concur fully in the conclusions reached by my learned friend Barak J. and the reasons he gives in his exemplary opinion with regard to the two questions around which this further hearing revolves: whether the bank is to be treated as the finder, although it did not take over the lost property physically; and what is the meaning of "in another person's domain" in sec. 3 of the Restoration of Lost Property Law, 1973.

I, too, would interpret these words according to the legislative objective, and I have no doubt that the bank's safe deposit room is, for the purpose of sec. 3, in its domain, and it is the place to which the owner would naturally address himself in order to locate the property...

Barak J.: I have considered very carefully my opinion in the appeal and have found no occasion to change the views I expressed there. I could thus end my remarks in this further hearing were it not that my learned friend Elon J. has expanded on the status and place of Jewish law in the judgments of this Court. It appears to me that this question does not require any decision in these proceedings and I therefore do not intend to spend much time on it here. Nevertheless I wish to register here and now two "notes of warning" regarding the points on which I differ from him. First, where Israeli legislation has recourse to such fundamental terms as "justice", "good faith", "public policy" and other like value concepts,

the task of the court is to furnish them with concrete content according to the statutory purpose and having regard to conditions in Israel, existing or desirable. Here the judge is not at all confronted with a lacuna, since the legislature has stipulated the applicable norm. I therefore can see no need to resort to the provisions of the Foundations of Law Act, which are concerned only with completing lacunae. Secondly, where a legislative matter requires interpretation and the task presents difficulties to the judge, it cannot be said that interpretative inspiration must come primarily from the principles of Jewish law which constitute the supreme source. It would be a mistake to replace English law by Jewish law as the source for interpreting legislation. A piece of legislation must be interpreted from within itself in order to realize its objective in the context of existing realities. Where a piece of legislation is influenced by a foreign system we may turn to that system for inspiration, which entails broadening the options of interpretation, but one may never say that a given system, be it the most precious for us, takes precedence over other systems and has a superior right of interpretative inspiration. As Prof. J. Weisman notes in his "Basic Concepts in the Law of Property — a Critical Survey" (1981) 11 *Mishpatim* 41, 61:

> As long as we preserve the rule that the interpreter who delves into the recesses of comparative law does so not in obeisance to the sources he examines but critically and with the freedom to adopt or reject, as he finds proper, no great benefit attaches, in our mind, to prescribing an order of preference among the various systems that may help him.

In my opinion, not only is there no benefit in giving priority to Jewish law but to do so conflicts with the very task of interpretation. I cannot therefore accept the approach of Elon J. in urging that the term "good faith" in sec. 39 of the Contracts (General Part) Law, 1973, is to be construed according to its meaning in Jewish law. "Good faith" in the Contracts Law must be interpreted in the context of that law. And accordingly its meaning in that law may be different from its meaning in the Sale Law, 1968, or in the Bills of Exchange Ordinance (New Version). In this way alone, will we, in our "struggle" for a basic and consistent law, create a legal system, a legal philosophy and fundamental concepts in accord with the modern needs of our State. I am not contending that this labour must be effected *ab origine*, that we are barred from drawing upon the learning of past generations. On the contrary, we must erect our own edifice on the accumulated experience of the past. We cannot begin all things afresh, and understandably, we must draw inspiration from universal learning in general and our own Jewish learning in particular. Far be it from us to close our eyes to the general wealth of culture and law, and even

more to the treasures of our own cultural civilisation. All I intend to say is that it is not right in point of form and not desirable in point of substance to set up Jewish law as the source for interpretation to which the judge must turn when he meets with difficulties in construing a law. To do so without express provision in the statute is not consistent with the nature of interpretation, which is intended to construe words and inform us about the intent and purpose of a statute from within the statute itself by reference to other, similar legislation, but which in no wise fits in with reference to any other outside source, whatever its national or cultural value.

Landau P.: I have considered the argument of counsel for the petitioner in this further hearing and I have not been persuaded that I should depart from my concurrence in the opinion of my learned friend Barak J. in the appeal. I also adhere to the opinion of the learned Deputy President.

In answer to the criticism of Mr. Scherschewski in paragraph 11 of his summation, I would observe that in my description of the facts in my judgment in the appeal I did not overlook the findings of the District Court nor did I intend controverting those facts.

As to the differences that have emerged among my learned friends, on the one side the Deputy President and Barak J. and on the other Elon J. regarding the mode of interpreting the Israeli law dealt with here, I find myself compelled to add some words of my own, although my view remains, as it was in the appeal around which this further hearing revolves, that in the circumstances of the case as I see them the debate is theoretical and not pertinent to the matter at hand. But so that my silence shall not be deemed "consent", I will say about this weighty subject that in my opinion no hard and fast rule can be laid down, nor is a principle of interpretation to be adopted that we must resort primarily to the Jewish law sources in order to dispel the doubt arising over the correct meaning of Israeli legislation. The very idea that the interpreter must refer specifically to this source and not to any other in order to obtain inspiration, I see as self-contradictory, whether this obligation is absolute or whether it is only obligatory in the first instance. In the Foundations of Law Act the legislature expressed its opinion as to the tie to Jewish law: it avoided mentioning that law by name and instead selected the concept, thus far undefined in point of law, of "Israel's heritage" to which we must give real content by interpretation — and that will not be easy. The legislature has also directed that only when no answer is to be found in statute law, case law or analogy, that is, when a lacuna exists in the written law, as Elon J. well explained, are we to proceed as prescribed. That implies that when no lacuna exists — and that is the case before us

— the legislature did not wish to fetter us in the labour of interpretation, not even by resort to Israel's heritage, which here possesses no firm basis in written law.

In my article "Law and Discretion in the Legal Process" I spoke of the desired synthesis, as yet not achieved, between Jewish law as a treasure of our national culture and the requirements of our modern society. I do not think that this synthesis will be achieved by introducing the requirements of our society into the fixed frame of the Jewish legal system, which in its basic approach is a system which claims full and unreserved recognition. Let us enrich our legal thinking from the abundant sources of Jewish law, which embodies the life wisdom of our forbears, in a spirit of awesome respect, but let us retain our freedom of choice in accordance with modern requirements, without laying down any order of priority of the sources of our inspiration and without placing the "burden of proof" upon the interpreter to demonstrate in every case why he is not prepared to have recourse to Jewish law for interpreting one or another matter.

To my mind the present case makes that manifest — though not necessarily along the lines that commend themselves to my learned friend. I have already observed in my judgment in the appeal that we cannot in this case draw inspiration or obtain guidance for the purpose of our interpretation of an original Israeli legislative act, since the basic assumptions of Jewish law are different from the aims of the Israeli legislature. For example, the approach of putting the emphasis on factual presumptions according to the casuist style to evidence the right of ownership of the money changer or of the owner of guarded premises, is one from which our legislation has distanced itself.

F.H. 40/80

KOENIG v. COHEN

(1982) 36(3) *P.D.* 701, 725-726, 742-743

The question here was whether notes written by a person before committing suicide, which did not contain any date or signature, could be treated as her will, or whether such omissions were a "defect" under sec. 25 of the Succession Law, 1965.

Barak J.: My learned friend Elon J. observes that in view of the provisions of the Foundations of Law Act of 1980 we are directed to turn to Jewish law for construing sec. 23 of the Succession Law. In the light of my own basic approach, I wish to avoid any consideration of this

subject. It is sufficient for me to refer to what I said in F.H. 13/80 *Hendeles* v. *Kupat Am Bank Ltd.*, (1981) 35(2) *P.D.* 785 at 787, to the effect that the Foundations of Law enactment is concerned with filling gaps in a law, i.e., to create new law where the existing law is silent and that silence does not involve any negative regulation. Here, however, we are concerned with the interpretation of a legal norm, i.e., the limits of a provision which supplies an answer to a question that has arisen, and therefore the Foundations of Law Act does not apply. As regards the construction of statutory provisions in the light of Jewish law from which it has been taken, it is sufficient for me to repeat that the Israeli legislature gleaned a concept, not a legal rule, from Jewish law. The concept was first turned into law by the Israeli legislature, which did not absorb Jewish law. It is not, therefore, necessary to find a provision in Israeli law that negates or is irreconcilable with Jewish law in order that the latter not apply. Jewish law does not apply because it was not adopted. Nevertheless it is proper and desirable for Jewish law, under the inspiration of which the statutory provision was enacted, to form a source for interpretative guidance, to broaden horizons and extend the field of vision of the commentators and give them perspective and thereby add further depth to creative interpretation. However, the decision between the various possibilities rests with us, without any external legal fetters and without any primacy being given to some other system, as dear to us as it may be.

Elon J.: We take it for granted that one of the basic rules of interpretation is that the legislature does not waste words and that some content must be given to its directions, especially when an entirely novel law is involved, and more so when the law is a basic one occupying a foremost place in the legal system of the State. If even with regard to the present matter, where it is clear that the legislature adopted the idea of the death-bed will from the Jewish legal system — and there is nothing in the terms of the Law that negates the consequences of this idea — there is still nothing in the Foundations of Law Act to accord to the Jewish legal system any status beyond that of being an "inspiration" like any other legal system, if that is the situation, what is the purpose of sec. 2, which is not only central to the Law but contains its "positive" commandment, and what does it add? Even before this Law became part of the Israeli legal system, the court was at liberty to engage in the worthy task of employing Jewish law "to broaden horizons and extend the field of vision of the commentators". What new thing has been generated with the adoption of the Law called the Foundations of Law Act? Should it be said that the day of Jewish law will come in the event of a lacuna, then according

to the interpretation of my learned friend, in *Hendeles* v. *Kupat Am Bank Ltd. et al.*, of the notion of lacuna and of what it does not embrace, I would like to know when and how a lacuna can possibly be found that has no answer "in statutory provision, decided law or by way of analogy". Is it indeed possible to construe a law so that the directions of the legislature are devoid of all legal meaning. How many debates did the Knesset and lawyers generally have, and how many versions did they draft before the enactment of this basic Law? And all that, in order only to contend with the problem of a lacuna that has never existed and that will most likely never come into existence, and still more likely, if and when it does occur, that a majority will decide is not a lacuna at all? I wonder!

S.F. 1554/84

A v. B

(1987) 1 *P.M.* 216, 219-220

The plaintiff sought a declaratory judgment to the effect that his "daughter", born to his wife, was not his child. In his affidavit, the plaintiff declared that when his daughter was born, he noticed that she did not resemble him, and only years later did his wife admit that she had had intercourse with another man. Apart from the plaintiff's request that all parties concerned undergo blood tests and tissue-typing, he had no real evidence to support his claim. The wife admitted to the truth of the plaintiff's assertions.

Matza J.: The substantive reason for dismissing the wife's admission stems from the well-known presumptions of Jewish law, according to which parents may not stigmatise their children with bastardy: these presumptions are that the wife mostly has intercourse with her husband [so that any child is likely to be his], and that the person commonly recognised as the child's father is held to be the father (see B.Z. Schereschewsky, *Family Law* 457-464). These presumptions, it should be noted, constitute part of substantive Jewish law; they draw their force and vitality from worldly wisdom and experience, and aid in the application of good and wise principles of enlightened juridical policy. In practice, these presumptions may not be refuted or contradicted (at least in most cases), and they may therefore be regarded as absolute presumptions, based in law.

Formerly...reliance on these presumptions of Jewish law in this context was not without difficulties, but lately...such reliance has become possible. This development merits a few words.

It was decided at the time that matters of paternity are not included in

matters of personal status within the meaning of art. 51 of the Palestine Order in Council, 1922 (see *H.C.* 283/72 *Boaron* v. *Rabbinical Court* (1972) 26(2) *P.D.* 727; *C.A.* 620/74 *Mor* v. *A* (1976) 30(1) *P.D.* 218 at 220). Inasmuch as these decisions drew criticism...they limited the possibility of resorting to the personal status law of the parties in paternity cases, according to art. 47 of the said Order in Council. An interesting attempt to distinguish these precedents in such a way as to allow for recourse to the presumptions of Jewish law, in a case similar to that before us, was made by Sheinbaum J. in *S.F.* (T.A.) 58/71 *Melamed* v. *Melamed* 1974(1) *P.M.* 251, 256. He expressed the opinion that even if the determination of paternity was not a matter of personal status, nevertheless, a denial of paternity (by the presumed father) which arises in relation to a child born to a married woman, falls within the ambit of matters of personal status because of the question of legitimacy of the child which it involves. Recently, Sheinbaum J. added a new, weighty argument to his said decision, which I, humbly, view as a breakthrough for attempts to rely upon the presumptions of Jewish law. He said as follows:

> Now, after passage of the Foundations of Law Act, 1980, it may be determined that if art. 51 cannot be regarded as including matters of paternity in the context of a married woman, there is a lacuna in Israeli law: no answer can be found (on the assumption that it is not a matter of personal status) to the question of the law that apparently applies to the child of a married woman, neither in legislation, nor in case law, nor by way of analogy. For this reason, recourse must be had to the principles of freedom, justice, equity and peace of the heritage of Israel.

2. The Desirability of Examining Problems in the Light of Jewish Law

See: MAOR-MIZRAHI *v.* ATTORNEY-GENERAL, **Part 6, Penal Law, p. 436.**

3. Reference to Jewish Law for Interpretation of Independent Statutes

See: ZIKIT...LTD. *v.* SERIGEI ELDIT LTD., **Part 8, Obligations, p. 663.**

C.A. 604/77

MUBERMAN v. SEGAL

(1978) 32(3) *P.D.* 85, 97

The appellant, the grandson and administrator of the estate of a deceased person, and the respondent, a beneficiary under the will of the deceased, entered into an agreement whereby the respondent waived her rights under the will in consideration of a fixed monthly payment. The issue between the parties was the validity and interpretation of the agreement.

Elon J.: I find authority for that in the rules relating to estate administration in Jewish law; and it is as well that the Succession Law, whose independence from art. 46 of the Palestine Order in Council is declared in sec. 150 thereof, should be primarily construed in accordance with the Jewish law sources when nothing to the contrary appears in the Law itself. It was attested to by the authors of the Bill that the Law is based *inter alia* "on Jewish law, one of the treasures of our national culture which we must revive and continue....We have regarded Jewish law as a principal source but not a binding or the only source....As for the substance of the rules, we have endeavoured to base our proposal, as far as possible, on Jewish law" (Introduction to the Bill of the Succession Law, Ministry of Justice, July 1952, pp. 6-7).

Chapter Two

INTERPRETATION

1. Basic Concepts and Moral and Cultural Principles

C.A. 337/62
REISENFELD v. JACOBSON *et al.*
(1963) 17 *P.D.* 1009, 1025-1026

The appellant and respondent met each other in 1957, and shortly afterwards decided that as soon as the appellant divorced his wife, they would get married....The two parties were sincere in their intention to marry, and when, in 1958, the appellant decided to buy an apartment and register it in the name of the respondent, they both thought that this apartment would be their common home after the appellant obtained his divorce. The apartment was acquired with the appellant's money, and the leasehold was registered in the respondent's name....The parties lived together as man and wife for about three months, even though the appellant was still married and living in his former apartment. In August, 1958, the respondent locked the appellant out of the apartment, and the appellant subsequently sued for a declaratory judgment to the effect that the apartment belonged to him; he also applied for orders that the apartment be registered in his name, and that the respondent vacate the premises, return the furniture, etc.....The respondent had never thought of the apartment as belonging to her, and viewed its registration in her name as an expression of trust and esteem on the part of the appellant. She even said, both before and after the registration, when the parties realized that they would not get married, that she would return the apartment to the appellant if the marriage did not occur. Her defence was that the appellant's case should fail in that it was based on an agreement which was contrary to public morality and order, as per sec. 64(1) of the Ottoman Civil Procedure Law. The problem lay, as it were, in that the parties had contracted for immediate sexual relations and future marriage when the marriage with the first wife still retained full legal force. The lower court viewed the agreement between the parties as an illegal contract.

Witkon J.: Indeed, the question arises whether the agreement that served as the basis for registering the apartment in the name of the respondent

constituted an immoral contract contrary to public order in that one of the parties was, at the time the agreement was made, a married man. To this question, my colleague, Silberg J., answered in the affirmative, whereas my colleague, Kahan J., answered in the negative, and both...brought sources and evidence from Jewish law. I have no part in this halakhic dispute, not only because I am hesitant to tackle that lofty subject, but because I cannot believe that public opinion is reflected in laws and rulings dealing with conditional marriage, levirate marriage and conversion. Our public will not, for the most part, find inspiration for solving the current problem in these laws. If the man in the street, the reasonable man, or enlightened public opinion, is asked for an opinion about the "morality" of the said contract, answers and opinions will be forthcoming, and I should not be surprised if these are contradictory....Obviously, the world view of the person being questioned, his education, temperament and qualities, are all reflected in these answers and opinions, as well as his whole mental and emotional make-up. And the Jewish law concepts of *kiddushin* (betrothal) or conditional marriage are not the same as the promise to marry, with which we are concerned here. A person who promises to marry a woman, in the modern sense of the word, does not "betroth" her, and the consequences of such a promise and of its breach are different from those attaching to *kiddushin*. Therefore, no matter what the source of inspiration of the average Israeli in creating his view on the question before us, it seems to me that the answer is not to be found in the law cited by my colleague, Kahan J.

C.A. 461/62

ZIM ISRAEL NAVIGATION CO. LTD. *et al.* v. MAZIAR

(1963) 17 *P.D.* 1319, 1333-1334

The respondent fell sick on a voyage from France on one of the appellant's boats, apparently from food poisoning, and suffered from a stomach infection for three months after arriving in Israel. In an action against the company, the District Court applied the rule of res ipsa loquitur *and held the ship's chef directly liable and the company vicariously liable. The appellants in defence relied* inter alia *on an exemption clause in the passenger ticket, relieving them from liability. The District Court, however, held that the exemption clause was void in that it was contrary to public policy.*

Silberg J.: Judaism has always extolled and glorified the great value of human life. The Jewish religion is not a philosophical system of opinions

and beliefs but a living religion, a way of and for life: "...which if a man do he shall live by them" (*Lev.* 18:5), "live by them and not die by them" (*Yoma* 85b). The verses are innumerable which emphasize the causal nexus between the *Torah* and life: "Keep my commandments and live" (*Prov.* 4:4); "He is just, he shall surely live" (*Ezra* 18:9); "Who is the man that desireth life" (*Ps.* 34:13) and so on.

Clearly, Judaism too does not regard life as the supreme value. There are purposes which go beyond it and ideals which are more elevated for the sake of which we should, indeed must, sacrifice life. Myriads of Jews have given their lives in sanctification of the Holy Name in all places and at all times. But in the framework of ordered social life and according to the priorities of the Jewish religion, life is the most sanctified of possessions, the protection of which overrules any other sacred value, including without any doubt the sanctity of contracts. "There is nothing that stands before the saving of life except only idolatry, incest and bloodshed" (*Ketubot* 19a); "for (the Sabbath) is holy unto you — it is committed to your hands, not you to its hands" (*Yoma* 85b).

There is nothing in Jewish ethics which is more abominated than the taking of life. King David was punished for that reason: "But God said unto me 'Thou shalt not build a house for My name, because thou art a man of war and hast shed blood' " (I *Chron.* 28:3). "A Sanhedrin, although properly constituted, that effects an execution once in seventy years is branded a destructive tribunal" (*Makot* 7a). The prophetic visions of Isaiah and Micah of lasting universal peace — "Nation shall not lift up sword against nation, neither shall they learn war any more" (*Is.* 2:4 and *Mic.* 4:3) — recoil with aversion from the shedding of blood.

It is not easy to mint from these lofty concepts the coinage of actual law, but when the decisive question in arriving at some legal conclusion is a question of philosophical outlook — what is "good" and what is "bad", what promotes the public welfare and what impairs it — we may and indeed must draw precisely upon our ancient sources, for these alone truly reflect the basic outlook of the Jewish people.

The voice that calls from the depths of these sources tells us not to trade in human life, not to act lightly in safeguarding it, for life is of the utmost value and is not ours to do with as we please. The sanctity of contracts, or the sanctity of the principle of freedom of contract, has its proper place, but the sanctity of life is far greater. To paraphrase *Isaiah* 54:17, no weapon that is fashioned against it shall succeed and every tongue that shall arise against it in judgment you shall condemn.

The conclusion to be drawn from the foregoing with regard to the present case is that an exemption clause in the passenger ticket bought by the respondent from the appellant company is null and void, as being

contrary to public policy....It is superfluous to stress that injury to life and injury to health are the same in contemplation of the concepts that operate in this context.

I have not overlooked the rule in Jewish law that "if one said 'Put out my eye, cut off my hand, break my leg'...on the understanding that the other would be exempt, the latter is nevertheless liable" (*Baba Kamma* 92a), but I have not invoked it for the purpose of this judgment because, in view of the reason given by Maimonides in *M.T. Hovel uMazik* 5:11 and by *Hoshen Mishpat* 421:12, I have grave doubts whether it reflects the idea of damage to the public good.

C.A. 4/66

PERETZ v. HELMUT

(1966) 20(4) *P.D.* 337, 351-352

The respondent, a married man, represented himself to the appellant, a married woman, as single, and promised to marry her. On the basis of this promise, she left her husband and went to live in an apartment purchased by the respondent. The apartment was registered in both their names in equal shares. A first mortgage was registered on the whole property, and a second mortgage was payable within one month after demand. Shortly after the purchase, the parties argued, and they separated. The respondent tried to realize the mortgage, but the appellant objected, and applied for a stay of execution, based on the fact that she had put in a claim to have the mortgage declared void on various grounds, and in particular, on grounds of illegality, i.e. that cohabitation, and a promise to cohabit when the two parties are married to others, are contrary to morality.

Kister J.: In Israel, there has as yet been no decision laying down clear rules regarding the question of how the courts should decide what is moral and what is immoral. In *C.A.* 337/62 *Reisenfeld* v. *Jacobson* (1963) 17 *P.D.* 1009, at 1026, Witkon J. suggested that the Court must give expression and force to what it deems to "represent public opinion, the intention being to such public opinion which is enlightened and progressive." Unfortunately, I cannot agree with this approach, which deviates from that of the English law which we are apparently bound to follow, and it seems that it is difficult to find a reason why, in the present case, there should be any deviation. Furthermore, it cannot be said that there is unanimity on the question of what is progressive and what is reactionary. The opinion of socialists differs from that of liberals, and secularists sometimes see themselves as progressive for the sole reason that they denigrate the Commandments, and amongst the various "progressives" themselves, opinions differ.

With regard to the value of enlightenment, I do not think that anyone will deny that it contains positive elements and that it has conferred and continues to confer benefits on mankind. At the same time, I do not believe that such great importance should be attached to it to the extent that the court will be bound, in determining moral norms, solely by the views of the enlightened and progressive sectors of the public, without considering the religious and traditional values and the healthy sense of morality held by other sectors.

Is it possible today to insist that it is exclusively a person's education that can protect and immunise him against all negative behaviour and influences? In the past, there were indeed people who believed in the magical properties of enlightenment to prevent all crime and other wrongdoing in the world. In our times, however, during the Holocaust period, when even mass murder was licensed by the leaders of the State considered to be amongst the most enlightened and progressive, many of the intelligentsia of that State and others were caught up by those perverted and despicable notions which need no reminder; and even though one would think that the sense of even a primitive person living in an evil country would oblige him to regard these acts as despicable crimes, in the eyes of the intelligentsia of that period, the "path looked straight, in accordance with human nature, and they dressed up murder and theft so that they would not recognize them" (*Divrei Hayim* of Zanz, in the book of *Moadim*), and they drew the masses along with them.

Indeed, the Holocaust was something the like of which has never before occurred and should not be expected to recur — certainly not to our people and our country. However, a fact which must never be forgotten or ignored is that enlightenment did not succeed in saving masses of people, not merely from a simple mistake, but from the commission of the worst crimes in the history of mankind: if enlightenment was no protection against such deeds, then clearly, it cannot be relied upon to prevent error, or worthless, unfounded or arbitrary opinions. Apparently, the intelligentsia possesses a critical sense with respect to harmful views, but there is no reason for the court to rely solely on the opinion of the "enlightened" ones, amongst whom — as we have said — there is no unanimity.

What emerges from the above is that the court, in its capacity as protector of values, must itself decide, after careful scrutiny and consideration, whether in the matter before it the particular conduct is contrary to morality and public order. In Israel, there are no juries, but even in England, where the institution of juries does exist, the jurors are required to refrain from expressing their superficial impressions on this question; rather, they must consider the question very carefully after they have had the opportunity of hearing the attorneys of the parties and the directions of the judge.

Professional judges are certainly no less capable than juries of considering and deciding whether the conduct in question is in keeping with public morality and order. Here, it should be noted that when the court sets itself a moral norm according to which it assesses conduct in matters in which, from the perspective of the law, it is important to decide whether such conduct is moral or decent, the mere fact that the conduct of many people does not conform to that norm will not move the court to deviate from what it regards as a moral norm to which the whole population should adhere.

See: ROITMAN v. UNITED MIZRAHI BANK LTD.*et al.*, Part 7, Torts, p. 569.

See: YEKUTIEL v. BERGMAN, Part 9, Property — Physical and Intellectual, p. 711.

C.A. 566/77

DICKER v. MOCH *et al.*

(1980) 32(2) *P.D.* 141, 148-151

This appeal concerns the validity of a restrictive trade covenant which was claimed to be contrary to public policy.

Y. Kahan J.: I have read with great interest the observations of my learned colleague Elon J. on the crystallisation of interpretation of the concept of public policy in the Contracts Law by giving primacy of place to the Jewish law tradition, its principles and provisions. The proposal to replace dependence upon English law with dependence on Jewish law has been raised more than once in the past....It seems to me that the observations of Elon J. have great persuasive force and that it is proper to follow the course he suggests in injecting real content into the inchoate and undefinable idea of "public policy", and this without denying the possibility of being assisted when appropriate by the precedents of other legal systems as well...

Asher J.: After I had written my foregoing comment, I received the opinion of my learned colleague, Elon J., which negates giving a generalised theoretical answer to the question of what is public policy for the purpose of sec. 30 of the Contracts (General Part) Law, 1973, preferring instead

a pragmatic determination according to the special circumstances of each case. I agree, with all great respect, with that cautious approach, but I do not, however, think that when sitting in judgment on any particular matter, the court must draw inspiration from one source alone, whatever its national importance and its moral force. What is public policy should be determined in each case with regard to the cultural, economic and ideological development of an enlightened society. The judge must remember that what seemed the pinnacle of development in times past need not necessarily be in keeping with the philosophical outlook of 1978. In my view, a contract is not to be rescinded for reasons of public policy except in a clear instance when the public harm does not lie in any real doubt and the decision is not based on some idiosyncrasy of a number of judges (*per* Lord Atkin in *Fender* v. *St. John Mildmay* [1938] A.C. 1, 12).

Elon J.: We are required to instill real content into the concept "public policy" that appears in sec. 30 of the Law, which provides that "a contract the making, contents or object of which is or are illegal, immoral or contrary to public policy is void."

Attempts to clarify this term figure not a little in the judgments of this Court. What is novel in the case before us is that since the contract in question was made after the effective date of the Law, the provisions of the Law are applicable. This law, like a number of other fundamental laws adopted by the Knesset in recent years, is endowed with sec. 63, the title of which — "Autonomy of Law" — attests to its import: "Article 46 of the Palestine Order in Council, 1922-47 shall not apply to matters dealt with by this Law." Because of that, as stated in the judgment of my learned friend Kahan J.:

> We no longer graze in foreign fields...and having regard to the "autonomy" of the Contracts Law of 1973, we must prescribe rules in respect of the types of contracts that are in conflict with public policy, bearing in mind the specific conditions existing in Israel, both on the philosophic-ideological level and on the economic level.

Needless to say, and it is in fact well-known, that to prescribe such rules is a very difficult task, not merely because, in the words of an old English saying, the concept is an unruly horse whose rider does not know whither it will lead him, but because every definition, even when it seems clear and balanced, bears within it a grain of doubt and uncertainty. Take for example the remarks of Shamgar J. in *C.A.* 625/76 *A.* v. *B.* (1977) 31(3) *P.D.* 85, cited at length by Y. Kahan J.:

> Moreover, it is obvious that perceptions such as these [that is, perceptions

> of the world and concepts of life singular to a given social or national fabric: M.E.] change over time and always express the beliefs and opinions of the period.

The question then arises, what are the beliefs and opinions of any particular period? It is very, very difficult to provide an objective definition of these beliefs and opinions, and it would seem that the inner life of those who provide the definition exerts a not inconsiderable influence. Further, when the court comes to construe "public policy", it is even more difficult, to decide whether the term is to be taken to mean what the public does or desires to do, or whether the task of the court is to act as a pioneer and, after meticulous study and consideration, to determine on its own initiative the contents of public policy (see for example the remarks of Kister J. in *Peretz* v. *Helmut* (1966) 20(4) *P.D.* 337). It therefore seems that "public policy" will be defined, in view of the "autonomy" of the Law, in piece-meal fashion, from the particular to the general, and from the general to the particular, depending on the individual case and circumstances.

In giving form to the concept of "public policy", which we are commanded by sec. 63 of the Law not to construe by grazing in foreign fields, we must assign a leading role to the Jewish law tradition, its principles and provisions. That by itself is nothing new, since it has already been done by the judges of this Court....Thus for instance Silberg J., in the well-known case of *Zim* v. *Maziar* (see above) regarding the validity of an exemption clause, said:

> Should we then be asked how we can legitimize the forming of our own outlook on a rule which has its source in Turkish legislation [the Ottoman Law of Civil Procedure] the answer is that whilst the rule that a contract can be set aside for being contrary to public policy is derived from sec. 64(1) of [the Ottoman law], what public policy is must be gathered from our own ethical and cultural perceptions since no other source exists for that.

This was also the ruling of Cohn J. in *Yekutiel* v. *Bergman* (1975) 29(2) *P.D.* 757, at 764 regarding the validity of an obligation by the testator whilst still alive to sell and transfer property that was the object of a testamentary provision. The District Court thought that the obligation was contrary to public policy under the Ottoman law but that approach was rejected because "the tradition that has proved itself and creates a healthy fundamental view among the population is for us primarily the Jewish law tradition and according to Jewish law such an obligation is fully valid." Since this ruling is of the utmost importance for our present purpose, let me continue citing from Cohn J.:

> From the viewpoint of "public policy", under Jewish law every statutory provision exempting a party from performance of his obligations is only an edict of the legislature and whoever wishes the world to be properly ordered will abide by his obligations even beyond the strict letter of the law; no breach of promise in civil matters can be in keeping with public policy....Public policy extends the freedom of contract and does not restrict it, safeguards the fulfilment of promises and obligations and does not open the door to their breach. Before a court will set aside a contract on grounds of public policy, a sense of justice and equity and social ethics must revolt against its performance.

Kister J. concurred in his view of Cohn J. as to how the concept of public policy is to be understood (*ibid.* 769; see also *Roitman* v. *Mizrahi Bank* (1975) 29(2) *P.D.* 57, at 79, where Cohn J. reiterates that public policy is to be construed according to the principles and provisions of Jewish law).

If indeed the "public policy" that derives from Ottoman law is so to be construed, *a fortiori* it must be so construed when it is the "offspring" of the Contracts Law enacted by the Israeli Knesset. To construe the concept in accordance with the foundations and principles of Jewish law will substantively give effect to the aim of *autarky* of the Law as stipulated in sec. 63.

C.A. 148/77

ROTH *et al.* v. YESHUFEH (CONSTRUCTION) LTD.

(1979) 33(1) *P.D.* 617, 631, 633

A contract for the sale of an apartment contained an exemption clause whereby occupation of the apartment by the purchaser would be final and conclusive evidence that the vendor had fulfilled all its obligations under the contract. A claim for damages by the appellants (purchasers) for breach of contract was dismissed in limine. *Hence the appeal.*

Elon J.: In construing in Israeli legislation so basic and universal a notion as good faith (which forms an intrinsic part of the moral and judicial thinking of all civilized legal systems), we must first enquire into its meaning in the light of the principles of Jewish law and the Jewish heritage. Although such a universal principle is to be found in the legal systems of our time, its roots are embedded in the fundamental values bequeathed to mankind by the ancient systems of law. Who knows how the spirit of the law is

passed on until it permeates the consciousness of generations of men? If that is true for the legal systems of other people, it is certainly true for the law of the State of Israel, the substructure of whose basic principles we are directed to find primarily in our ancient heritage, the light of which has not been dimmed nor its vigour diminished. As this Court held, *per* Silberg J., with regard to public policy, which is also a universal principle: "It will be construed by us from the fundamental viewpoint very deeply rooted in the Jewish consciousness...from our cultural and moral outlook" (*Zim* v. *Maziar*, (1963) 17 *P.D.* 1319, at 1332). We are directed to use the same yardstick in interpreting the universal principle of good faith. The observations of Cohn J. in relation to another basic concept, the principle of doing justice, are very apposite here:

> When in order to do justice, we deem it proper to ignore English or American law, I have accustomed myself to investigate first whether there is anything in the law of the *Torah* upon which to base ourselves. Not that English precedent automatically binds us, in the absence of precedent in Jewish law, nor that we are required to decide in accordance with Jewish civil law; but that the justice that we are obliged and endeavour to do will be more certain and more solidly grounded if it finds support in our legal tradition and in the righteous wisdom of our forebears...(*Ben Shahar* v. *Mahalev*, (1974) 28(2) *P.D.* 89, at 98).

These observations are even more pertinent in the present matter. The good faith principle of sec. 39 has its source in original Israeli legislation which prescribes the *autonomy* of the Law and the manner of its interpretation and application (i.e. Sec. 63 of the Contracts Law of 1973). The very essence of the expression "good faith" [in Hebrew] is an original Jewish concept, of which more later. Hence, to construe it we must turn in the first place to Jewish law from which it was derived and in which its substance and significance is imbedded.

I should make one further observation at this point. Far be it from me to say that we may not enquire into and learn from the wisdom and decisions of the legal philosophers and judges of other legal systems. Such enquiry serves well to broaden our horizons and render more profound our knowledge. Our Sages, in their broad and open minded attitudes, acted similarly in ancient times. May I quote what I have written elsewhere in this connection:

> The Sages of the *halakhah* knew the law prevailing in the general courts and at times even proposed that a foreign legal practice of which they approved should be adopted. Sometimes they recognised the special social effectiveness of foreign law and did not refrain from praising

a gentile judicial system when it pursued a course better than that of the Jews (*Jewish Law*, Part 1, 49-50).

If that is the position in judicial proceedings conducted almost entirely on the basis of Jewish law, it is certainly so when we venture to construe the laws of the State of Israel of our own days, the force of which derives from the sovereign power of the Knesset to legislate as it deems proper, and when it is clear that an enactment has been passed after study of different legal systems in the context of the social and economic requirements of our time. For this reason it is certain that an enactment of the Knesset — primarily one accompanied by a provision as to its *autonomy* and breaking the link with English law under art. 46 of the Palestine Order in Council — must be interpreted, in the words of Silberg J., (see *Ratner* v. *Plalum Ltd.* (1958) 12(2) *P.D.* 1465, 1471 and *Finkelstein et al.* v. *Finkelstein et al.* (1968) 22(1) *P.D.* 618) "in itself and from its content". If, however, such a course does not yield a satisfactory answer, we must have resort to the principles of Jewish law as a primary source for finding a solution to the problem facing us.

All this is attested by the authors of the 1952 Bill of the Succession Law, the first of a series of laws dealing with an entire branch of civil law....In the Introduction, they emphasize that although the Bill is only "a section of a much wider legislative act, we regard this Law as a plan for the laws that will follow it. The guidelines on which this Law is based are also those on which other civil laws are to be based." What are these guidelines?

Our purpose was to propose a Law that can be interpreted from within itself by studying its provisions and relying on its general objectives...

Our proposal is based on —

(i) the legal and factual situation now existing in this country;

(ii) Jewish law, one of the treasures of our national culture which it is for us to revive and perpetuate;

(iii) the laws of other countries in the West and in the East, whence our people has been gathered to be fused into one community;

With regard to existing law, we felt ourselves free to adopt or reject it...

We have regarded Jewish law as the principal source but not as an obligatory or the sole source...

As for the laws of other nations, we think that both the practical

experience and the scientific foundations they incorporate should serve us as an auxiliary source to enlighten and guide us.

That is exactly what I have said. This is the hierarchy for interpreting independent Israeli legislation in general and its basic principles — justice, public policy, good faith — in particular.

Should it be urged, for prosaic and purely practical reasons, that access to the Jewish law sources is not very easy and convenient, I would say first "it is not in heaven...neither is it beyond the sea....The word is very nigh unto thee, in thy mouth and in thy heart that thou mayest do it" (*Deut.* 30:12-14). It is the *Torah* and requires study. Authors of books and articles, alive to Jewish law and illuminating its paths, are increasing in number. Secondly, is recourse to the decisions of German and other European courts — in which, it is contended, sec. 39 was born — any easier?

See: HENDELES v. KUPAT AM BANK LTD. *et al.*, above, p. 10.

2. Statutory Interpretations

M. 89/51

MITOVA LTD. v. KAZAM

(1952) 6 *P.D.* 4, 6-7, 11-12, 16

Silberg J.: The outcome of the present application for leave to appeal — which by consent of the parties came to be treated as the appeal itself— depends upon and will be decided by the answer to the question of whether a debt due to an absentee person is "property" within the meaning of the Absentees' Property Law, 1950. Doubt arises over the application of the definition in sec. 1(a) of the Law...

It appears to me that the appeal should be accepted. Counsel for the appellant very ably analyzed several sections of the Law, from which it emerges indirectly that the intention of the legislature was to include a debt under "property". In my opinion, however, all this evidence is unnecessary

and the labour was in vain. The answer to the question is to be sought and found in the very definition provided in subsec. (a), and the learned judge erred in thinking that "the words to which attention is to be paid in this instance are 'moneys' and 'a right in property'." The learned judge did not bother to read to the end of the sentence and he overlooked the final words. The whole subsection reads as follows: " 'Property' includes immovable and movable property, monies, a vested and contingent right in property, goodwill and any right in a body of persons or in its management."

The terms "vested" and "contingent" [in Hebrew] in their distinctive senses are not part of common speech. They are legal terms, manifestly borrowed by the legislature from the sources of Jewish law, giving a patent Hebrew form to the legal substance of the parallel terms "choses in possession" and "choses in action", as will be explained later.

The first legal source for the said Hebrew terms is the *Mishnah* in several places, among them the *Mishnah* in *Bekhorot* 51b:

> The firstborn takes a double share of the father's estate but...does not take (a double share of) the improvement (of the estate) nor of what will fall due (to the estate) as he does of what is held in possession.

The reason as the *Gemara* explains at 52a, is because Scripture says "by giving him a double portion of all that he hath" (*Deut.* 21:17), that is, what the father happened to have in his lifetime. Again in *Baba Batra* 125b we read:

> R. Papa said: ...the firstborn does not receive a double portion of a prospective (contingent) (part of the estate) as of that which is in possession (vested) nor does he receive a double portion in a loan (owing to the father) whether (the heirs) levied it in land or in money.

Rashbam *ad loc.* explains that the last rule arises from the fact that "neither the land nor the money was left to them by their father, but was something contingent." Maimonides, *M.T. Nahalot* 3:1, puts it as follows:

> The heir does not take a double portion in property that may prospectively fall in after the death of his father but only in property actually possessed by the father, that had already fallen into his domain...

Cheshin J.: I concur with my learned friend Silberg J. in granting the appeal and for the reasons he has given. His argument is well-ordered and does not require affirmative support. I do not intend to add anything to his observations but rather, with all respect, to restrict them, not on the merits of the case but as regards general principle.

The path Silberg J. followed in seeking a solution to the problem that has arisen here — an immeasurably honourable path — may serve as an opening to an important, lengthy and complex chapter in the law of interpreting original Jewish legislation enacted since the Declaration of Independence and that which may be enacted in the future by the legislative arm of the State. As we know, the genesis of every statute is in the legislature. There it is born, there it receives form and content, and there it obtains the breath of life and it first sees the light of day. But at the point where the legislative labour is completed, the work of interpretation commences. During Mandatory times in this country, that work did not encounter any particular difficulties, even with regard to the Jewish judge who read the law in translation and wrote his judgment in Hebrew. The English language was then predominant and the other two languages, Hebrew and Arabic, were only auxiliary languages and the law provided expressly that in the event of any inconsistency between the English version of an enactment and the Arabic or Hebrew version, the English version should prevail (sec. 34 of the Interpretation Ordinance of 1945). This provision, in conjunction with the basic principle behind art. 46 of the Palestine Order in Council, opened the door wide for the interpreter to the rich English jurisprudence from which he could draw exhaustive legal material regarding the construction of words and phrases which the legislator employed in the original English version of an enactment, and likewise the modes and rules of interpretation.

When the State was established, deliverance came to the Hebrew language as well. The English language was made to yield its dominance and the Jewish judge was freed from the fetters of translation by which he had been restrained during the mandatory period. Hebrew became the original language of all laws, regulations and orders. At this point the legislature was faced with one serious difficulty...on the one hand, it was not released — and in the nature of things could not be released over-night — from the mass of laws left over by the outgoing governmental authority. On the other hand, the need arose to introduce amendments and changes in the body of such laws, as well as to enact new laws for the purposes of the reborn State. The legal thinking of the legislature, of the legal draftsmen and also of those who interpreted the law continued — as it will continue for a long time — to nourish itself from English law, whilst the law itself — whether it was entirely new or an amendment of an existing law — needed an original Hebrew "attire", i.e. it had to be given expression in an organic basic Hebrew, and not make do with a variable literal translation of foreign thought. No wonder, therefore, that in completing the process of renewing our ancient political life, the aspiration grew to revive also the forms of original Hebrew idiom. To this end the legislature has turned

to the treasures of our ancient culture, primarily to the *Mishnah* and *Talmud* and gathered from there the age-old modes of expression in order to inject into them new concepts. It is like filling an old bottle with new wine. In the nature of things, however, the form does not always fit the matter injected. It happens that the legislature, or the legal draftsman, has mingled unlike things; sometimes the exact form has not been found and in an emergency what is thought to be the nearest and most appropriate has been chosen for the task at hand. The interpreters of the law, therefore, bear the duty to exercise great care when embarking on their task. It would be a gross error to construe, for example, every term and expression in our laws according to the context of the *Mishnah* or *Talmud* where it appears, although it is abundantly clear that the term or expression is taken from that particular source. Thus, we may not construe the terms "promissory note", "loan", "encumbrance", "partnership", "abandoned" or "absentee's property" and like legal terms and expressions as they are construed or defined in Jewish law, although there is no dispute that they are culled from the ancient treasury of Jewish thought and law. The vessels have been borrowed from one place, but their contents are original or taken from another place. I have no doubt that the day will come when legal scholars will provide us with a legal lexicon to which the official seal of the legislature will be attached, and this lexicon, or at least an authorized statute of interpretation of wide proportions that will precede it, will render the difficult path of the interpreter easier. For the moment, it seems to me, one must adopt the following rule of construction: whenever the court is required to interpret a legal term found in any enactment since the establishment of the State, and the term is also to be found in our ancient literary sources or is borrowed therefrom, it may address itself to these sources in order to shed light on its meaning and determine the concept it embraces. This applies, however, only if after comparing the two, it is beyond all doubt that the rules emerging from the law and the ancient source are alike within the framework of the subject at hand or that the legal concept embedded in the source is broad enough to include the legal concept to which the legislature has sought to give expression against a new background by the term it has "borrowed".

Schereschewsky J.: It is unnecessary to go deeply into this question for the purpose of the present matter since the Law includes in its definition of "property" in sec. 1(a) both vested and contingent property. I have, however, found it right to make some remarks in consequence of what Cheshin J. has said in order to show how great is the need to be cautious if we wish to use the legal ideas of Jewish law for construing expressions that

appear in the enactments of the Israeli legislature, which although identical in form are not identical in content.

H.C. 163/57

LUBIN v. TEL AVIV-JAFFA MUNICIPALITY

(1958) 12 *P.D.* 1041, 1065

This petition concerned the petitioner's being prevented from selling pork in his butcher shop.

Silberg J.: The time has arrived to weed our own garden. I have in mind the unnatural joinder of Israeli legislation and English interpretation. If the link persists, waves of foreign interpretation may roll in in the future and sweep away the early growths of our youthful legislation, which is intent upon fashioning Israeli patterns of life. In my view, when the Israeli legislature conceives an original idea and does not merely amend or adapt, in the Hebrew language, ideas that its predecessors conceived in the tongue of a foreign people, it is our duty to construe the Israeli enactment from within and by itself and not subject it to interpretations and meanings that have flowered in other fields. Otherwise, we shall never achieve independent thinking but shall continue to create here a hybrid legal plant which possesses a little of everything but nothing at all of its own.

F.H. 13/68

TEL-AVIV MUNICIPALITY v. LUBIN

(1959) 13 *P.D.* 118, 135

Silberg J.: Let no one accuse me of a legal anachronism and let no one cast the aspersion that I interpret modern legislation according to *Tosafot Rid* and *Ritba*. I know very well — to paraphrase the well-known dictum in *Baba Kamma* 2b — that one cannot deduce the meaning of what the Knesset says from scriptural texts. What I have endeavoured to do is to explain in general terms the meaning of words used by the secular legislature. This wonderful word "applicability", so rich in content, has somehow entered fully, in all its aspects into modern Hebrew legal

terminology and the presumption is that the Israeli legislature knew the significance thereof.

Cr.A. 282/61, 297/61

YIHYE *et al.* v. ATTORNEY-GENERAL

(1962) 16 *P.D.* 633, 635

The appellant was convicted of breaking into a cave and stealing sheep, and was sentenced to eighteen months' imprisonment. The appeal concerned the question of whether a cave was a building within the meaning of sec. 297 of the Criminal Code Ordinance (as amended in 1959) under which he had been charged.

Silberg J.: The question facing us is, therefore, what is the meaning of "building"....There is however an anterior question: where are we to look for the meaning of the term, in the stores of the Hebrew language or in English dictionaries? Sec. 297 is an Israeli enactment adopted by the Knesset in 1955. I once raised the question whether it is not in order to construe original Israeli legislation...according to its meaning and sense in Hebrew (cf. (1956) 10 *P.D.* 1213, 1217; (1952) 6 *P.D.* 4; (1959) 12 *P.D.* 1041, 1065). Though the matter may still be doubtful regarding legal expressions, it is, in my opinion, certain regarding common nouns like "building". This simple word, I believe, should be understood according to its sense in Hebrew. For this reason, I am not prepared to be drawn into a consideration of the definition of the term in sec. 2 of the Town Planning Ordinance of 1936 (as amended in 1938) and to infer therefrom — either by way of analogy as respondent's counsel suggests, or otherwise as appellant's counsel requested — the significance of "building" appearing in sec. 297 of the Criminal Code Ordinance.

In Hebrew, "to build" means to combine various substances or parts and make them one complete thing...."And they prepared the timber and the stones to build a house" (*I Kings* 5:32); the body of a person made up of his limbs is called "a building" (*M. Oholot* 2:1).

F.H. 6/62

IHUD HAMADGIRIM...LTD. v. MAYOR OF TEL AVIV-JAFFA

(1962) 16 *P.D.* 2220, 2222, 2223, 2224, 2225-2226

The appellant claimed that as a non-profit agency it was subject to tax at a lower rate than that imposed on a marketing business. The District Court held that the appellant engaged in marketing. In the Supreme Court, opinion was divided and the appellant requested this Further Hearing.

Silberg J.: My answer to the question here is the answer given by R. Nahman to R. Hanan bar R. Katina in *Hullin* 19a: "I know no Reuben, Simon or Levi. I only know a tradition..."

I have reached the above conclusion after going into the meaning of the word "marketing" in Hebrew. I did so because I think that an original Israeli legislator must make his pronouncements in Hebrew and not in "distorted" language. It is not possible that his Hebrew should only be understandable by English speakers, more especially when what is involved is not a patently legal term, the meaning of which is only understood by lawyers, but an every-day term in common usage. Are we to require the Israeli citizen to consult a lawyer about the meaning of "table" or "chair" which the Israeli legislature has employed in one of its original statutes?...

Finally, a short observation on the reasons voiced by my learned friend Witkon J. when touching upon the important problem of pouring new wine into old bottles. The problem is much too serious to be dealt with from the humble perspective of "market" and "marketing". I will say only one thing: let us not over-exercise ourselves with the three root letters of the Hebrew verb and let us not burden them with a mass of tasks and functions. We have not as yet utilised a hundredth part of the vast store of words hidden in our ancient literature fittingly apt for almost all of the new activities of today resulting from the evolution of human society. Were our innovators to proceed in such a manner, they would probably find relief from the inclination of "marketing" that fills their hearts...

Witkon J.: The purpose of this Further Hearing is to elucidate a rule long in dispute amongst members of this Court. Much time has already been spent on how to interpret and remove the difficulties of this complicated by-law, and I doubt whether the economic value of the tax makes up for the cost of all this labour...

Finally, a word about the manner of interpretation adopted by my colleague, Silberg J. He revealed to us...the meaning of the word "market" in the *Gemara*, i.e. a place in which trade was conducted, and because the

word "marketing" comes from the same root, it must — so my colleague holds — also involve "selling". With all due respect, it seems to me that it is possible to assume that the words "market" and "marketing" involve the notion of sale without concluding that every person involved in marketing is necessarily a vendor. Under the conditions of modern commerce, the actions which lead, finally, to the distribution of products amongst consumers are so many and varied that the function of marketing, its organization and resultation, may well be an independent business, separate from the activities concerning sales.

Moreover, the words of a language evolve with the passage of time, and a term which in a primitive society designated something concrete, such as a place or a time at which a certain activity was effected, may, over time, take on an abstract meaning which still embodies the original idea, but which is free of all the trappings of the original idea and of all its manifestations. This is the destiny of a word in a living language which has a role in the development of society, and in its material and spiritual progress. In this way...the word preserves the original notion...but it can be realized in a form which is totally unrelated to the original form. Take the word "market". Undoubtedly, in times of old and up to the present, its original, concrete meaning was and is a place and time intended for commerce in products. But in the modern economy, it denotes what it denoted originally, i.e. a meeting between supply and demand. This was the underlying meaning of the ancient word "market"; it is certainly the meaning of the word "marketing", which is entirely the fruit of modern thinking.

The latter certainly derives from the conceptual content of "market" as we understand it in our modern conceptions, and it would therefore be something of an anachronism to construe it according to the viewpoint of an age in which the way of life was totally different.

In renewing our ancient language we have always sought to revive this hidden treasure and pour new wine into old bottles. He who works towards this goal is unable to adhere to the meaning of a word in all its past external manifestations; he must discover the main idea of the word and derive from it new uses in accordance with the spirit of the time and its requirements. That is customary in every living language, and if the term "marketing" is derived from "market", even though it has drawn away from the original meaning of the latter, are we precluded from following the same course and from deriving the equivalent term in Hebrew, "marketing", from the ancient word "market"? Would it be better to use some linguistic barbarism in case the Hebrew term for "marketing" is too narrow to express the full meaning of the English term? This is not a new problem for us and it has already been dwelt upon here in *Mitova Ltd.* v. *Kazam* (see above)

and in many other precedents (collected by U. Yadin in his essay on the interpretation of the laws of the Knesset in the *Pinhas Rosen Jubilee Volume*, 125). Literary interpretation has its due place, and who more than my learned colleague has the authority to renew and enrich the language, but I prefer to abstain from that since it may, as in the present case, attach to new terms meanings whose time has passed and which will eventually turn out to be an impediment to the development of our renewed language.

H.C. 72/62

RUFEISEN v. MINISTER OF THE INTERIOR

(1962) 16 *P.D.* 2428, 2432-2437

The petitioner was born in Poland in 1922 of Jewish parents. Reared as a Jew, he was active in the Zionist movement and did two years' training in preparation for his migration to Palestine. At the outbreak of the Russo-German War in 1941, he was imprisoned by the Gestapo, but after escaping and managing to obtain a certificate that he was a Christian German, he worked for the German police and actively assisted the local Jewish population of Mir by passing on information and supplying them with arms. He was exposed and again imprisoned but he managed to escape once more and found refuge in a convent, where he underwent conversion in 1942. At the end of the War he entered the Carmelite Order, knowing that it had a chapter in Israel which he could join in due course. After a number of unsuccessful attempts to obtain permission, he was finally allowed to go to Israel in 1958. In his applications for a passport he had been explicit about belonging to the Jewish people although a Catholic. On entry into Israel, his application for a certificate under the Law of Return and registration as a Jew was refused on the basis of a Government decision providing that only one who declares in good faith that he is a Jew and is not a member of any other religion is to be registered as a Jew.

Silberg J.: The question of law before us is very simply the meaning of the expression "Jew" in the Law of Return, 1950. Does it also include a Jew who has changed his religion and been baptised as a Christian but still feels and regards himself a Jew, notwithstanding his conversion?

At this point I do not propose to answer this question in an unequivocal manner. I wish to examine first the various alternatives involved. But I shall say at once that were I to agree with the alternative submission of counsel for the petitioner, that the term "Jew" in the Law of Return bears the identical religious connotation that it bears in the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, I would then propose

to make the order *nisi* absolute and order the Minister of the Interior to grant the petitioner an immigration certificate under sec. 3(a) of the Law of Return. I would do so, however strange and anomalous it may seem that a person who has gone over to another religion should rely on the doctrines of the faith he has left, and in spite of my deep aversion for such a confused argument.

According to the view prevailing in Jewish law, as it appears to me, a converted or apostate Jew is treated as a Jew for all purposes save perhaps certain "marginal" rules of no real importance to the central problem. I shall not rely here on the well-known dictum that "a Jew, even if he has sinned, remains a Jew" (*Sanhedrin* 44a) since (as some writers have already observed) it may well be that this dictum is more in the nature of a homily than a rule of law. Be that as it may, the dictum has nevertheless served for generations as a pivot of the *halakhah* and as an authority, binding or persuasive, in nearly all cases regarding the "Jewishness" of apostates. Jewish law is not only the law of Jews but also for Jews and if the *halakhah*, as will be shown in due course, applies the law to the apostate, then he too is a Jew.

> To what does the rule refer? If [a proselyte] renounced the Jewish faith and betroths a Jewish woman, he is regarded as a non-conforming Jew and his betrothal is valid (*Yevamot* 47b).
>
> ...He is a non-conforming Jew. The difference is that if he betroths [a woman], the betrothal is valid (*Bekhorot* 30b).
>
> If a Jew who has converted marries, though he knowingly practises idolatry, the marriage is absolutely binding and (his wife) will need to obtain a divorce from him (*M.T. Ishut* 4:15).
>
> ...For although he has sinned, he remains a Jew (*Migdal Oz* to Maimonides *ibid.*).
>
> The marriage of an apostate Jew is effective and (his wife) needs to obtain a divorce from him (*Tur, Even haEzer* 44).
>
> Even though he has changed his religion he is nonetheless a Jew as it is written "Israel has sinned"; although he has sinned, he remains a Jew (*Prisha* to *Tur, Even haEzer* 44:22).
>
> It is written in the *responsa* of the *Geonim*: a childless widow whose late husband's only brother was an apostate is exempt from *halitza* (a procedure to release the woman from the levirate obligation) and from the obligation to marry the latter. This opinion was given without citation of any supporting authority. But in one of his *responsa* which

we do not follow, Rashi wrote that although he has sinned, he remains a Jew, and any marriage he enters into is legally binding and he must perform *halitza* but does not marry (his deceased brother's widow) (Mordekhai to *Yevamot* 4:29, but see *Resp. Ribash* 6).

There is some authority for saying that a childless widow is exempt from *halitza* if at the time of her marriage the brother had already converted, but this ruling is not to be relied upon (*Even haEzer* 157:4).

The authority last referred to is R. Yehudai Gaon, who wrote:

If at the time of her marriage to her husband the brother was already converted, she has no need of *halitza* from him (cited by Mordekhai to *Yevamot* 4:28 and by *Tur, Even haEzer* 157).

Tur notes:

We do not know why it should make any difference whether the brother was or was not an apostate at the date of the marriage (*ibid.*).

Yosef Karo in his Commentary *Bet Yosef* to *Tur, ibid.* vehemently attacks the "dispensation" given by R. Yehudai Gaon:

It is astonishing that anyone should think of giving dispensation in such a case. But R. Yehudai Gaon in whose name this was stated was blind and sometimes his students reported things in his name which never entered his mind....But one must wonder at his students and at the author of haItur (R. Yitzhak ben Aba Mari) for reproducing this statement without refuting it utterly. Clearly the statement is without foundation and no one supports it in the least. And woe to anyone who is lenient in this matter (see also *Resp. Eliyahu Mizrahi*, 47).

Some justification for the dispensation of R. Yehudai Gaon is to be found in *Bet haBehirah* by R. Shlomo ben Menahem Meiri (to *Yevamot* 22a):

The early *Geonim* wrote that a childless widow whose brother-in-law is an apostate is dependent upon him and is "deserted" [i.e. cannot remarry] until she obtains *halitza*. A few *Geonim* instituted a new principle, that if at the time of her marriage her husband's brother was already an apostate she did not need *halitza*....This has surprised some commentators, since the marriage of an apostate is effective....But it seems to me that the latter rely on what the *Talmud* says at the end of the first chapter about the ten tribes, who were considered by the contemporary courts to be non-Jewish because of their almost complete assimilation. These *Geonim* held that in their own period assimilation was rife.

Another reason for R. Yehudai Gaon's distinction, though this falls outside the question of the Jewishness of an apostate, is to be found in *Or Zaruah* 1:605 which takes the view that R. Yehudai Gaon utilized in this connection the rabbinical hypothesis that "whoever marries does so under rabbinical sanction" and he therefore annulled retroactively the marriage of the deceased brother. The result of all this is that on precise analysis, the view of R. Yehudai Gaon also does not derogate in any way from the Jewishness of a Jew who undergoes physical baptism and becomes a Christian, as happened in the present case.

Finally two further quotations to manifest the Jewishness of an apostate:

> A childless widow whose brother-in-law is an apostate is not released from the obligation to marry him except by *halitza*. The reason is because of the sanctity of his Jewishness (*Otzar haGeonim* to *Yevamot* 22a).
>
> A Jew who vexatiously becomes an apostate is nonetheless called "your brother" because though he has sinned, he remains a Jew (*Resp. Binyamin Ze'ev* 405).

Mr. Bar Niv, the State Attorney, submitted on behalf of the respondent that even according to religious law an apostate is not fully a Jew but only "partly Jewish". This is evidenced by the fact that he is not treated as a Jew for purposes of inheritance or the law relating to interest or for being counted in a *minyan* (the quorum of ten male adults required for public prayer). I cannot accept this argument.

First, Jewishness is in principle a status and status is indivisible. Who has ever heard of a half-Jew, a third-Jew or a quarter-Jew? Such arithmetical divisions are found only in connection with a slave owned by two masters (*Gittin* 41a). The Jewish religion, like all other religions, is by its very essence total and complete. It cannot ever regard itself as sharing with some other faith. The Second Commandment —. "Thou shalt have no other gods before Me" — expresses this exclusiveness incisively.

Nor, in the second place, is the argument of the State Attorney accurate in itself. As for being joined in a *minyan*, I shall not expend many words. It would be exceedingly strange, not to say absurd, if an apostate who believed in another deity could form part of a *minyan*, the other members of which pray to the God of Israel. I would point out that according to some of the authorities, an apostate is qualified to take part in other ritual ceremonies not involving the presence of a full minyan (cf. *Tosafot* to *Ta'anit* 27a).

With regard to interest, it remains very doubtful whether an apostate may be charged interest, although *Tur* and *Shulhan Arukh Yoreh De'ah* 159 rule that "it is permissible to lend an idolator money at interest" and

an apostate Jew is treated as an idolator. To the same effect *Resp. Rashba* (attributed to Nahmanides) 224: "Nahmanides of blessed memory has stated in one of his *responsa* that it is permitted to lend an apostate money at interest."

But the matter is not free of doubt, for many authorities differ from *Tur*.

> Rashi ruled that it is forbidden to take interest from a converted Jew for he is called "your brother"...as it is written "Israel has sinned" — although he has sinned, he remains a Jew (*Resp. Rashi* 175).
>
> Maharil followed Rashi, R. Eliezer bar Yoel haLevi and *Sefer Mitzvot Gadol* to forbid the charging of interest on loans made to a converted Jew (*Darkhe Moshe* to *Tur*, *loc. cit.* 2; so also *Sefer haTerumot*, Jerusalem ed., Part I, 212a).

It would seem that because of the differences among the authorities it became the practice to take the stricter view in this regard, as Rema (author of *Darkhe Moshe*), in his Glosses to *Yoreh De'ah* 159:2, noted. In any event we are not at liberty to draw extreme conclusions, as we were asked to do by the State Attorney, from the disputed dispensation mentioned above.

There remains the matter of discrimination against converted Jews regarding inheritance, pointed out by the State Attorney. In support of his submission he adduced the *responsum* of Hai Gaon cited in *Resp. Rashba* VII, 7:292:

> As to your question whether according to the Torah a converted Jew can inherit from his father, it has been divinely ordained that he does not because he has removed himself from the sanctity of Judaism he possessed through his father. Hence, a son can only inherit if he does not break continuity with his father, as it is written "And I shall give thee and to thy seed after thee", that is, those descendants who follow after the father, thus excluding an apostate son who does not follow after his Jewish father; again we should compare the story of the Patriarch Abraham etc. No descendant is therefore entitled to inherit unless he follows the tradition and bears the name of his father. An apostate does not do so but has abandoned one people for another.

The State Attorney emphasized the words "abandoned one people for another" and regards them as meaning actually leaving the generality of Jewry. I think he has erred somewhat in so understanding them. The intention here is the ideological denial of his people by the apostate....An apostate does not wish to be known by his family name. The question, however, remains whether the rule that an apostate does not inherit from his father is a scriptural precept.

My answer is twofold.

(a) Here, too, a wide divergence exists among the authorities. As against Hai Gaon, many others hold that although according to the Torah an apostate son does inherit, a religious court or the Sages may deny him his inheritance as a penalty: *M.T. Nahalot* 6:12; *Hoshen Mishpat* 283:2 and *Taz ad loc. Mordekhai* to *Kiddushin* 1:492.

(b) This comment is applicable equally to interest and inheritance. The dispute is over whether an apostate inherits from his father, but all the authorities agree that a Jewish father may inherit from his apostate son (Rema to *Hoshen Mishpat* 283:2; *Be'er haGolah*, *ibid.* 8) and the same applies to interest. Both *Tur* and Karo, who permit the lending of money to an apostate at interest, forbid borrowing from him at interest (*Tur* and *Shulhan Arukh, Yoreh De'ah* 159:2). In other words, even if we follow those authorities who permit the lending of money to an apostate at interest and hold that the latter does not inherit from his father, it does not by itself render the apostate non-Jewish with regard to interest and inheritance. If that were the case, it would operate in both directions. You cannot treat status like a coin that can be changed into a number of smaller units, to deny it to him in respect of certain matters and then only in relation to one of the parties involved, the lender and not the borrower, the heir and not the testator. This very severance shows clearly that what concerns us here is not to derogate from the Jewishness of the apostate but rather to act strictly in one situation and leniently in another for a variety of reasons, depending not on the *rem* of status but on the *personam* of the status-holder.

All these considerations, together with the basic concept expressed above, lead to the conclusion that the Jewishness of an apostate, which finds striking legal expression in the law of marriage and divorce and in the law of the *levir* (person subject to levirate marriage), constitutes a status which is indivisible and absolute.

As I said at the beginning of the last section, were I of the opinion that the term "Jew" in the Law of Return and the Rabbinical Courts Jurisdiction Law meant the same thing, i.e. a Jew according to the rules of Jewish law, I would grant the petitioner's application and make the order absolute.

C.C. (T.A.) 1690/62

REIZMAN *et al.* v. HAYOT *et al.*

(1963) 35 *P.M.* 81, 85

Upon the purchase of certain property, part of the purchase price was left outstanding and payable over a number of years. The sum was linked to the dollar exchange rate. That rate having changed to the detriment of the Israeli lira, the plaintiffs asked for a declaration that part of the payments due constituted in fact exorbitant interest and that the linkage did not take effect.

Tzeltner J.: A term appearing in an Israeli statute is not always to be given the meaning which it should be given according to the sources. Cheshin J. said in *Mitova Ltd.* v. *Kazam* (1952) 6 *P.E.* 382:

> It would be a gross error to construe every term and expression in our laws according to the context of the *Mishnah* or *Talmud* where it appears, although it is abundantly clear that the term or expression is taken from a particular source. Thus, we may not construe the terms "promissory note", "loan", "encumbrance", "partnership", "abandoned" or "absentee's property" and like legal terms and expressions as they are construed or defined in Jewish law, although there is no dispute that they are culled from the ancient treasury of Jewish thought and law. The vessels have been borrowed from one place, but their contents are original or are taken from some other place.

On these grounds the judge arrived at the rule that the court may have recourse to the meaning of the original source—

> ...Only if, after comparison, it is beyond all doubt that the rules emerging from the Law and the ancient source are alike within the framework of the subject at hand, or that the legal concept embodied in the source is broad enough to include the legal concept to which the legislature has sought to give expression, against a new background, by the term it has "borrowed" from that source.

No one can persuade me that such a parallel exists between the Law in question here and the sources. I am convinced that it does not exist at all. Our law is the outcome of an economic situation that could only arise in a modern economy, dynamic, in large part built on financial credit, an economy that has no resemblance to the economy of the period of the sources of Jewish law.

C.A. 227/63

REIZMAN *et al.* v. HAYOT *et al.*

(1963) 17(3) *P.D.* 1625, 1633

Halevi J.: As for the ordinary meaning of the phrase "any credit transaction" [in sec. 1 of the Interest Law, 1957], I would say that it includes a sale on credit. The sources actually point to this meaning of the word "credit" as its main meaning: see *Baba Batra* 22a and Rashi *ad loc.*; likewise *Pesahim* 113a, where the Hebrew word "*ashrai*" is used, translated by Jastrow as "a sale on trust" [and by the Soncino Talmud as "a credit sale"].

H.C. 58/68

SHALIT, *et al.* v. MINISTER OF THE INTERIOR *et al.*

(1969) 23(2) *P.D.* 477, 493, 494, 502, 547-549, 581-586

The petitioner notified the Population Registration Officer that the nationality of his children was "Jewish", but the Officer, acting on instructions issued by the Minister in 1960, refused to register such nationality since the children were born to a non-Jewish mother.

Silberg D.P.: In *Rufeisen*, the "Brother Daniel" case, (see above), we dealt with an extreme and wholly exceptional instance of an unusual Jew who, having converted to Christianity and become a priest, insisted on being registered as a Jew. With regard to such an apostate, strangely enough, two contradictory views exist: the halakhic view which looks upon him in spite of all as a Jew, and the view of the man in the street — even if religious and observant — who regards him in everyday life a complete gentile and also calls him that. Since the law which mentioned the word "Jew" is a secular law, its creator being the Knesset which speaks in the language of the common man, we attached to the pronouncement of the Knesset the popular secular (non-halakhic) meaning of the word and held that an apostate is not a Jew entitled to the privileges of the Law of Return. In the case before us the situation is different. Here it is not a matter of interpreting the term "Jew" in a law. The Population Registry Law of 1965 or 1967 does not mention that word but only the word "nationality", and the question to be clarified here is whether the child of a Jewish father and a non-Jewish mother may be entered as a "Jew"

in the space reserved for "nationality". And if our researches yield the conclusion that there is no effective general definition of the idea of "Jew" other than that of the *halakhah*, we shall be bound to adopt the halakhic test notwithstanding that the Law requiring registration of nationality is a secular law.

At this point I return to the point I reached above. Two different tests have been suggested to us as determinative of our decision. One, which the petitioners defend, is the test of inner affiliation, hereafter called "the subjective test". The other, which the Attorney General defends, is the halakhic test, hereafter called "the objective test". The two must be weighed one against the other, calmly and without any preconceptions. When I say "without any preconceptions", I mean that we may not be seized by any "prejudice" but not that we must entirely exclude the fact that the halakhic test is very ancient in time with a history of millennia. Even the historian who does not believe in the words of our Sages and is not ready to accept the interpretation which the rabbis of the *Talmud* have given to Scripture (as in *Kiddushin* 68b concerning the verse in *Deut.* 7:4: "For he will turn away thy son from following Me"), such an historian will also admit, unless he is a complete ignoramus, that the halakhic rule of a child's affiliation being determined by the mother has prevailed in Jewry since at least the time of Ezra in the middle of the fifth century B.C.E. (N.B. *Ezra* 10:3 and the Septuagint of *Ezra* 10:44) and so venerable an age should most certainly be set to the credit of the halakhic test.

The essential nature of the concept of nation and nationality is a most difficult and complex subject. Much ink has been spilt and many a quill broken on the matter, and a clear and unequivocal definition of this controversial concept has not yet been found. (See the excellent work of B. Akzin, *States and Nations*, New York, 1966.) The problem that remains unsolved is what is the common strand which makes millions of people a single ethnic unit. One would say that the feeling of national affiliation is a basic monolithic emotion inexplicable by other concepts, as much as the colour "green" cannot be "explained" by indicating its wave-length or the number of its oscillations...

Indeed in view of the exclusive status of Jews in the world, and the fact that we are always so different from others, whether for good as our few friends say, or for bad as our many enemies, headed by Haman, declared: "And their religion is different from that of any other peoples" (*Esther* 3:8), it would be extremely difficult to deny Jewry its character as a people or nation. Incidentally, the words "people" and "nation" [in Hebrew] are synonyms having the same meaning, witness the synonymous parallelisms of the Bible, such as "Attend unto Me My people, and give ear unto Me, My Nation" (*Is.* 51:4); "He subdueth peoples under us and nations

under our feet" (*Ps.* 47:4); "Peoples shall curse him, nations shall execrate him" (*Prov.* 24:24).

Thus the way is finally cleared for considering and determining the question at issue here: which test should the Court choose for deciding the Jewish nationality of a person — the accepted objective test of the *halakhah* that treats Jewish motherhood or conversion to Judaism as the exclusive indicator of the Jew, or the subjective test that the petitioners have chosen, which treats attachment to Israeli-Jewish culture and its values as such an indicator?

When the petition was presented, the petitioner's children were Oren, a child of four, and Galia, a child of one year, and, "although not members of the Mosaic religion (or of any other religion), they are of Israeli-Jewish affiliation and were brought up in this spirit" (para. 5 of the petition). Accordingly, in the opinion of the petitioners, they should be registered as members of the Jewish nation.

Had the petitioners not been such fanatical atheists, they could have arranged for the conversion of their children in peaceful tranquility, without denying their non-religious outlook. I assume that the difficulty which they found hard to surmount was not circumcision — Oren was actually circumcised (though not in a religious ceremony but for reasons of convenience). In the main, they feared acceptance of religious precepts which they regarded as giving the lie to their lives, but they, the learned petitioners, overlooked the fact that according to the *halakhah*, "a minor proselyte is ritually immersed on the authority of the *bet din*" [religious court] (*Ketubot* 11a; *M.T. Issurei Bi'ah* 13:7; *Yoreh De'ah* 268:7).

"On the authority of the *bet din*" means on its authority alone. Neither the child nor the parents are asked to declare acceptance of the *Torah* and religious precepts: the *bet din* arranges the immersion and circumcision (Rashba in *Shitah Mekubetzet* to *Ketubot*, Zioni ed., 236). Acceptance of religious precepts is not an obstacle and where not possible it is waived (*ibid.*). If the parents (even the mother alone) bring the child to the *bet din*, he is converted even though they are not converted with him (*ibid.* 235, in the name of Rashi).

But the most interesting thing about the conversion of a child on the authority of the *bet din* is that on growing up he can retract. His being a Jew on reaching majority depends, therefore, on his own free will....Retraction will render the conversion void retroactively. (Consider carefully Rashi to *Ketubot* 11a; *M.T. Melakhim* 10:3; *Yoreh De'ah* 268:7). Had the petitioners converted their children on the authority of the *bet din*, that would not have decided their fate forever. The matter would still have remained within the free will of the children upon growing up, and no one could have "convicted" them of spiritual harm to the children...

Kister J.: The Jewish people is undoubtedly a singular people, at least in having successfully survived for millennia...whilst other great peoples and cultures have flourished and disappeared, and all this in spite of the fact that for the larger part of their existence the Jewish people possessed no state, no territory and no common tongue. No one can contend that the Jewish people is a pure race. Although it traces its ancestry back to the patriarchs, Abraham, Isaac and Jacob, over the centuries converts have attached themselves and become Jews in every respect so that ultimately the Jewish people form an entity (that may even be called a legal entity) comprising the children of Abraham, Isaac and Jacob and of the proselytes who joined it in every generation and all their descendants. Nor can there be any doubt that what has united them in all generations and still unites them is their *Torah*. The statement of Saadiah Gaon sums it up succinctly: "Our people is a people through its *Torah* alone."

I stress the term "Torah" as broader in concept than "religion". The assimilationists have employed the latter term in the sense of religious cult, wishing to turn the Jewish people into a mere religious community. "Torah" comprehends not only matters of belief and opinion and the commandments affecting man and his Maker but also social prescripts, law and legal procedure, customs and usages, including the relations between the Jew and his people, his land and his tongue.

The petitioner submits that today this definition is no longer operative. I shall deal with this submission after considering the question of how, under the laws of the *Torah*, a person becomes affiliated to the Jewish people and how he becomes separated from it. I shall also consider the question of mixed marriages and their issue.

As emerges from the very definition of the Jewish nation, "Jew", according to modern notions, is both a national and a religious concept, and the two aspects are indivisible. Belonging to the Jewish people cannot be separated from belonging to the Jewish religion. Joining the Jewish people is effected by conversion. The detailed laws of conversion are not in question here but rather, our concern is with what is expected of a person who wishes to join the Jewish people as an inseparable part thereof, and the nature and extent of the bond created. On this point it would be better to quote from chap. I of *Ruth* rather than search for definitions. Ruth the Moabite desired to join the family and people of her deceased husband. Her mother-in-law Naomi did not encourage her nor did she promise her any benefits, but Ruth's longing sprang from the depths of her soul:

> Whither thou goest, I shall go, and where thou lodgest, I shall lodge; thy people shall be my people and thy God my God. Where thou diest,

> I shall die and be buried; the Lord do so to me and more also if aught but death part thee and me.

And the account goes on to tell us that Naomi saw "that she was steadfastly minded to go with her and left off speaking with her." To put it briefly in modern terms, this is a powerful and clearly expressed plea to join the Jewish people and the Jewish religion, to join its way of life, to be forever bound by ties of intimate fellowship. There are also external signs of probity of will ("she was steadfastly minded"). All these matters, we may say, are the essentials; the rest merely complete them.

The acceptance of converts on this basis may reasonably be said to have enabled the Jewish people to survive as a people for so long in spite of dispersion over the world for two thousand years without a state and common territory and in spite of its everyday language not being Hebrew. The converts to Judaism did not form a culturally foreign element that might wreck it, as happened with other peoples joined by groups of a different culture, changing the features of the host people and bringing about its complete disappearance.

In practice, it is not always possible to meet such a requirement in full. Even where a person is wholehearted in his wish to join, he naturally does not forget the people he was born into, nor can he always, in a short time absorb the *Torah* of the Jews, its spirit and its minutiae. This eventuality has not been overlooked and it has been well understood, but it has not barred the acceptance of converts. There were times when we were most meticulous and times when we were lenient, depending upon the circumstances. There is no need to cite precedents; it is known to all who have read a little of *Torah* literature. This apart, cases have occurred of conversion not from sincere conviction but for reasons and motives incidental to some special interest, such as a desire to marry. These have rendered the effects of conversion suspect. But cases of insincere converts subsequently proving disloyal to the people have been infrequent. Towards the end of the Hasmonean Kingdom, when the authorities were interested in converting the Edomites in the belief that it would help to strengthen or expand the Jewish people and reinforce the state, these political considerations were deceptive and did not serve the interests of the people nor the welfare of the state. It is superfluous to go into the details of this conversion here, since it was not voluntary, wholehearted or sincere.

From the viewpoint of the persons accepted as converts, it is to be noted that not only is no "race" disqualified, but, as tradition relates, many of our enemies or their descendants became righteous proselytes and occupied important positions in the life of the people. I have mentioned Ruth the

Moabite from whom, we may recall, King David was descended, and since the King Messiah whom we await will, according to tradition, be of Davidic stock, it follows that a Moabite origin is no disqualification even for the most elevated of offices.

Talmudic *aggadot* (legends) are in the same vein. The *Talmud* relates that Nebuzeraddin (Nebuchadnezzar's general) became a righteous proselyte at the end of his days, that grandchildren of Haman the Aggagite and Sisera the Canaanite taught *Torah* in the Land of Israel and that Sennacherib's descendants were Shmaya and Avtalyon. Even R. Meir and R. Akiva were of converted families, and Onkelos was himself a proselyte (see *Gittin* 57b, *Sanhedrin* 96b and elsewhere). These stories suggest an attitude which may, it seems to me, be termed liberal...

Before passing on to the question that concerns us here, i.e. mixed marriages and their issue, I must pause briefly to consider whether a person can leave Judaism. *Prima facie*, a Jew who has apostatized is still regarded as a Jew...even if he has sinned grievously. In most matters, however, he is generally treated as non-Jewish and such of his offspring as have become completely assimilated are not looked upon as Jews at all. Let me quote in this connection from *Resp. Radbaz*, 2:251:

> The marriage of an apostate (to a Jewish woman) does not take effect under scriptural law. Nevertheless because of the serious nature of adultery, it has been held that some regard must be given to his marriage. Although according to the law of the *Torah* he is a gentile for all purposes, we have apprehensions as to whether he had intercourse for the purpose of proper Jewish marriage.

Here the apostate himself is involved, but those of his offspring who have already become fully assimilated with gentiles are certainly regarded as completely non-Jewish. It is pertinent to mention *Responsum* 29 of R. Ya'akov Berab (the teacher of R. Yosef Karo) that deals with Marrano offspring. It is therefore clear that a Jew who has left Judaism is not deemed a Jew except for certain matters, and his assimilated children are non-Jews in the eyes of the *halakhah*. Much has been written on the subject in halakhic literature, but this is not the occasion to go into the details, the distinctions made and the different views expressed...

Agranat P.: If we now turn our attention to the rules of Jewish law that concern the present case, we shall find that they reflect this very consciousness of the Jewish people being a religious national (ethnic) entity, which emerges from the foregoing historical explanation. To understand the matter, it is best to consider the *halakhah* in the light of the following three propositions: (i) all those born of Jewish parents are reckoned among

the Jewish people; (ii) mixed marriages are forbidden and the status of a child born of a mixed marriage is that of the mother — if she is Jewish, so is the child, and if she is not Jewish, neither is the child; (iii) a non-Jew can be absorbed into the Jewish people by virtue of an act of conversion.

The first proposition is grounded in Jewish tradition as set out in the *Torah*, according to which the children of Israel became a single people on the exalted occasion of their sanctification by God by virtue of the covenant He made with them, to perform His commandments, statutes and laws and teach them to their children after them (*Ex.* 19:5-6; *Deut.* 5:1-3 and 6:1-2). So also God's promise to Abraham, the first Patriarch, that he would become "a great nation" in order "that he may command his children and his household after him to keep the way of the Lord and do righteousness and justice" (*Gen.* 18:18-19). The covenant is on the one hand a religious covenant, but it is also, on the other, a patrimonial covenant; hence attachment to the Jewish people attends every "son of Israel" born to Jewish parents. As Y. Kaufmann observes (in his reply of 1958 to the questions addressed by David Ben Gurion, then prime minister, to Jewish scholars) such attachment does not depend on a person's deeds and beliefs when he grows up. Indeed the judgment of the Deputy President in *Rufeisen* (see (1962) 16 *P.D.* 2428, at 2432-2433) informs us that according to the prevailing view in Jewish law, "a Jew who is converted or becomes an apostate is treated as a Jew for all purposes save perhaps certain 'marginal' laws"; and the well-known Talmudic dictum "A Jew, even if he has sinned, remains a Jew" (*Sanhedrin* 44a) has served as a firm basis for this rule in all generations. Nevertheless, I think, this too may be explained by the adhesion of the Jewish people to the tradition of their sanctification by God, so that the religion cannot waive its rights even as regards the apostate, since he may repent and return to fulfill his duty under the *Torah*, a duty from which he has not been released. As Rashi explains the above dictum, "since it does not say that the people sinned, its sanctification still attaches to it." Rav Tza'ir (Hayim Chernovitz, *Toldot haHalakhah*, vol. I, 305) points out that the view that an apostate is considered a Jew is predicated "on the basis of historical Judaism that included the rule 'although he has sinned he remains a Jew', since the primary Jewish outlook derives ultimately from the sanctity of the Jewish race, for the principle of 'thy people is my people, thy God is my God' (*Ruth* 1:16) has never been displaced in Jewish tradition."

It follows that the first proposition of the *halakhah* with which we are concerned — that affiliation to the Jewish people is vested in a person by his very birth to Jewish parents — is not based on racial consciousness alone, but is also nourished by the tradition of Judaism.

It should be added that whilst the last conclusion is based on historical

analysis, it is not to be regarded as inconsistent in principle with the decision of the majority in *Rufeisen*, in regard to the national status of an apostate. As will be recalled, it was held there that contrary to Jewish law, as the Deputy President explained, a Jew who changes his religion leaves the Jewish community. As I understand the reasons given for this decision, the learned judges adopted the criterion of popular Jewish sentiment for defining "Jew" in the Law of Return and registering "nationality" in the Population Register. This sentiment cannot be reconciled with the idea that a Jew who has changed his religion and thereby cut himself off from the very core of Judaism can still return to the congregation of Jewry and be called a Jew. Thus Berinson J. said in his judgment:

> Because of a well-developed sense of self-preservation, however, the people themselves have decided and acted differently throughout the ages. For them, a Jew who has embraced another religion...has no place in the Jewish community. Not for nothing is he called an "apostate" (*meshumad* = destroyed) because from the national viewpoint he is regarded as having destroyed himself and cut himself off from the nation, he and his descendants after him. His family mourn for him by rending their clothes. All ties with him are broken. In the national contemplation, a Jew and Christian cannot reside in the same person and certainly not a Jew and a Catholic priest — that is a contradiction in terms (at 2454. See to the same effect the Deputy President at 2439 and the dicta there cited; Landau J. at 2447).

If we ponder a little over this passage, may we not say that popular Jewish sentiment has been sustained, and not only in a negative manner, by religious motivation? In the extreme case of a person changing his Jewish religion for Christianity, there is no longer room to take into consideration his origins because the feeling of kinship has been emptied of all substance and cannot unite the apostate wholeheartedly with the rest of the Jewish people. It is to this that the words, "In the national contemplation, a Jew and Christian cannot reside in the same person" refer. Hence, in preferring the test of popular sentiment towards the ***halakhah*** the Court was having recourse to a national-religious test.

It will be recalled that the second proposition states that a child of a mixed marriage follows the mother in regard to status. This rule is only to be understood properly in the context of Judaism's prohibition of such marriages. Ezra and Nehemia regarded the commandment, "Neither shalt thou make marriages with them" (*Deut.* 7:3), as an absolute prohibition applying to all contemporary "peoples of the lands" (and not merely the "seven nations") and "forever afterwards" (*Ezra* 9:2 and 12). And they ordered all alien woman and their offspring to be excluded from the

community without the possibility of converting. In later times Jewry did not follow this grave and harsh example; the Talmudic Sages contented themselves in this regard with a rule that prescribed first that mixed marriages are of no effect and secondly that the issue follow the mother (*Kiddushin* 66b, in the *Mishnah*: "Whatever woman cannot contract a marriage with a particular person or with others, the issue is as she and this occurs with a handmaid and a gentile woman." See also *M.T. Issurei Bi'ah* 15:4). The reason for the prohibition of mixed marriages is that mentioned in the Pentateuch: "For he will turn away thy son from following Me and they will serve other gods" (*Deut.* 7:4; *Ex.* 34:16). What is involved here, therefore, is a religious reason, the fear of straying after alien faiths. The Sages, too, relied upon this verse but laid down the rule "the child is as she" by a process of interpretation — "thy son by a Jewish mother is called thy son but thy son of a non-Jewish mother is not" (*Kiddushin* 68b and see Rashi *ad loc.*).

What was the substantive reason, it may be asked, for distinguishing between a child born of a Jewish father and a non-Jewish mother, who is not a Jew, and a child born of a non-Jewish father and Jewish mother? The answer is possibly that behind the Talmudic interpretation of the above verse lay the idea that when a child is still of tender age, it is reared mainly by the mother and, therefore, in the spirit of her religious faith. This explanation is given by Louis Finkelstein in 1958 in answer to the questionnaire of Ben Gurion:

> Our sages recognized that the formative education of a child is that given to it whilst still in the cradle before it has learned to speak. Such education it receives largely and principally from its mother, and she must either be of Jewish parentage or have herself accepted Judaism.

See the like remarks of this scholar in his "The Jewish Religion" in *The Jews etc.* under his editorship, vol. II, 1741: "In the case of a mixed marriage, the status of the children is determined by the faith of the mother, as the greatest influence in their lives."

Another reason for the distinction, which is not inconsistent with the first, is suggested by my learned friend Landau J. in his judgment in the present case: kinship with the mother is clear and certain, something which cannot always be said of the father. (This reason is also mentioned by Prof. Y.L. Talmon in "Who is a Jew?" in *Encounter*, May 1965, p. 30).

It would not be excessive to draw attention to what Rav Tza'ir wrote on the subject (*op. cit.* 233), that whilst in the case of a Jewish father and a non-Jewish mother "none of the Sages had any doubt that the child follows the mother and indeed stood firmly by this rule, in the case of a non-Jewish father and a Jewish mother, they differed as to

whether the child followed the mother or the father and this difference long continued among the *Tanna'im* and *Amora'im*." He adds:

> Formally, the difference appears to revolve on a halakhic point, as if the matter depended on the definition of the noun *mamzer* [bastard]. Since, however, the difference arose in the particular case of a Jewish mother and a non-Jewish father...it may be deduced that behind the halakhic assumption there lurked some historical or social view....After some hesitation, the rule finally prevailed that the child of a gentile...and a Jewish woman is Jewish (*Yevamot* 45b) even to the extent, according to the *Amora'im*, of being qualified to act as a warden of the community. Since his mother was of Jewish descent, he may be regarded as "one from among thy brethren" (*Deut.* 17:15) (*Yevamot loc. cit.*). The Sages also said to King Agrippas, "Thou art our brother" (*Sotah* 41a. According to Rashi, "Because his mother was Jewish"...)

Whatever the explanation of the distinction, the rule that the child follows the mother, so far as it concerns the non-Jewish status of a child born to a Jewish father and a non-Jewish mother, is clearly the inevitable result of the invalidity of mixed marriages by virtue of the prohibition decreed by historical Judaism. The basis of the decision did not lie in a mere desire to separate Jews from other people, but in the quest to prevent the religious assimilation of members of the Jewish people by ensuring their national singularity and their separateness from other peoples with other religions and faiths. I have no doubt that the fact that the prohibition became rooted in Judaism contributed not a little to the Jewish people remaining largely steadfast to "the law of endogamy" and ensuring its separate existence in spite of dispersion among other peoples.

It follows that the racial test which lies at the heart of the second halakhic proposition also has a religious foundation.

The third proposition, about which I do not intend saying very much, states that a non-Jew may attach himself to the Jewish people by an act of conversion (*Yevamot* 46b; *M.T. Issurei Bi'ah* 13:1, 4, 6). According to Rav Tza'ir (*op. cit.*, 296), the institution of conversion embraced both a religious and civic relationship; after Jewry lost its political freedom, the law of conversion, as developed by the *Talmud*, became confined entirely to the religious sphere and became a wholly religious concept. Kaufmann (*The Religion of Israel*, (Hebrew) vol. I, 226ff.) also observes that "conversion in early times was cultural-territorial; later it became conversion to the Covenant." As I suggested above, Ezra and Nehemiah expelled alien women and their offspring from the community without offering them the possibility of conversion, whereas later Judaism did not follow this precedent. The reason is, first of all, that the early authorities did

not know of any usage of converting women in the absence of any mention thereof in the *Pentateuch* (immersion is the invention of later generations, according to Rav Tza'ir, *op. cit.* 301-3), or that the Judaism of the time did not yet know of "any particular and fixed practice of accepting converts", according to Kaufmann, *op. cit.* 226. Secondly, and this is the main reason, in the era of the *Talmud* the view preached by the later prophets took root, that whilst the *Torah* is specific to the Jewish people and without the latter "it cannot be envisaged" (Rav Tza'ir, *op. cit.* 264), it also possesses a general universal character appropriate for every human being as such. "Judaism was universal", says Kaufmann (*op. cit.* 214),

> not merely in the sense that it regarded its God as the God of the whole world, the only God, whose religion alone is true religion, but also in the sense that it thought of itself as the religion to which all mankind must hold fast.

Thus, later Judaism legitimized conversion and opened its doors to all who wished to enter. Again it is important to emphasize that the universality of Judaism is not inconsistent with but rather complements the idea of the uniqueness of the Jewish people as the bearers of the *Torah* and its designated guardians. "The common element of these two aspirations" (the universal and the particular) Rav Tza'ir explains (at 266) "is that neither looks upon Judaism simply as a religious conception that can depart from the bounds of the Jewish race, since that is the very foundation and essence of Jewish prophecy and the concepts of Judaism." Akzin sees it in a similar light (*States and Nations* 55): "Judaism, despite its universalistic theology, has hardly ever departed from the path of a mono-ethnic religion, and this strengthened both the fact of and the desire for ethnic coherence among Jews."

According to Jewish law, it must also be remembered, a non-Jew who converts acquires the status of a Jew for all, or nearly all, purposes (including the right to marry a Jewess) since "a proselyte is like a new-born child" (*Yevamot* 22a, 97b), i.e. he has the status of a person born Jewish. Thus on the one hand, conversion involves adhesion to the Jewish religion, and the very act of conversion is a religious act, and on the other hand the effect of the act is to enable the convert to affiliate to the Jewish people and become merged therewith. Moreover, the latter facet testifies that Judaism had no fears of the intermixture of alien blood, provided that the conditions of conversion were fully observed.

Thus the third proposition of the *halakhah*, too, demonstrates that according to the viewpoint of historical Judaism the elements of nationality and religion are inseparably intertwined.

C.A. 440/75

ZANDBANK *et al.* v. DANZIGER *et al.*

(1976) 30(2) *P.D.* 260, 266

Shamgar J.: The term "resolve" [in sec. 2 of the Contracts (General Part) Law, 1973] is drawn, it is well-known, from Jewish law. The meaning is that both the offer and the acceptance must show the intention of the offeror and the offeree to create, according to the circumstances, a binding legal relationship.

Prof. Z. Tzeltner (*The Law of Contracts in the State of Israel*, (1974), 37 and 55) urges that "resolve" is synonymous with "seriousness" and the lower Court, relying on that view, decided as it did. More acceptable to me is the view that by adopting the word "resolve", the legislator did not mean to indicate seriousness of intention alone, but to adopt the common elements of the European and English legal systems as well, and it sought to deem "the intention of creating legal relationships" as basic to the making of a contract. This aim emerges from the Explanatory Notes to the Bill of the Law. It also matches a view expressed by Prof. Tzeltner elsewhere in his books (at 40-42) and is also supported, incidentally, by the reference to its meaning under Jewish law. It is superfluous to add in this context that there is clearly no duty to interpret a statutory term taken from Jewish law precisely according to its original meaning (per Cheshin J. in *Mitova* v. *Kazam*, (1952) 6 *P.D.* 4, above).

Cr. A. 89/78

AFANGAR v. STATE OF ISRAEL

(1979) 33(3) *P.D.* 141, 150, 155, 160

The issue in this appeal was whether the defence of necessity was available to the appellant on a charge of assault.

Elon J.: Learned counsel for the appellant also drew our attention to the view taken by Jewish law in this matter, and I congratulate him on that since the approach of Jewish law is important for us...

As we have seen the principle of defence of another person involves concepts founded in public policy and the ethical outlook of a society regarding the volunteering of assistance to a person in danger of bodily injury. That course is obligatory according to the logic and nature of orderly

social life. Thus we find that English and American legal scholars consider it a matter of public policy and a peremptory response to injustice that the good man has ingrained in him. More particularly, it also appears in the Jewish law sources, where the rule, "Neither shalt thou stand idly by the blood of thy neighbour" constitutes a fundamental principle in the philosophy of Judaism. It is right, in my opinion, that we should understand those concepts which form the foundation of ethical doctrine and cultural values in the light of Jewish tradition (see *Zim* v. *Maziar*, (1963) 17 *P.D.* 1319, at 1332 above and *Roth* v. *Yeshufeh*, (1979) 33 (3) *P.D.* 617). In view of the Law and Administration Ordinance (Amendment No. 14) Law, 1972, which did away with the subjection in the interpretation of the Criminal Code Ordinance to English law, and in view of the general terms of the Penal Law of 1977, which omits sec. 4 of the Criminal Code Ordinance — which required such subjection — it is certainly for us to give an original and independent interpretation, as the circumstances may require, to such a basic concept as the one before us.

Sussman P.: I join respectfully in the conclusion reached by my learned friend Elon J., but because I have arrived at it in a manner different from his, I feel obliged to set down my reasons. The only problem before us is whether the defence of necessity is available to the appellant under sec. 18 of the Criminal Code Ordinance of 1936. To solve this problem I cannot be assisted by Jewish law. That law is clearly a treasured cultural possession of our people, from which both the legislature and the courts can derive inspiration. We are, however, concerned with a specific provision of the Criminal law that sprang up in another source having nothing to do with Jewish sources. I venture even to doubt whether the application of Jewish criminal law is truly acceptable to the public in Israel. For instance, would the larger part of that public be prepared in 1979 to condemn the adulteress to stoning, or, if she were the daughter of a *Kohen* (member of the priestly tribe), to burning?

See: KUPAT AM BANK LTD. v. HENDELES *et al.*, above, p. 6.

See: HENDELES v. KUPAT AM BANK LTD. *et al.*, above, p. 10.

O.M. (T.A.) 933/79

RUTGER v. STATE OF ISRAEL

(1981) 1 *P.M* 265, 267, 277

The issue in these proceedings was whether a person who found stolen property in some hiding-place could acquire ownership thereof under the Restoration of Lost Property Law. The main argument of the State was that stolen property does not fall within the definition of lost property.

Maltz J.: The third source to which the parties' counsel drew my attention was Jewish law. Respondent's counsel tried to persuade me that the Law is to be construed according to Jewish law, under which the rules relating to lost property do not apply to property that has left the domain of its owner by way of theft.

I would be very happy were that the case. I have never understood why a legal principle imported from Australia or New Zealand is preferable to one of Jewish law, at least one of those applicable today. This Law is an example: the situation had changed, the law had changed. Here was an opportunity to enact a new Law of which the essential principles would be taken from *halakhah*.

But that did not happen. No halakhic principle was placed at the centre of the new Law. Some members of the Knesset protested about this fact in the parliamentary debates. The answer of the Minister of Police was that he could not understand why just in this particular case they were so full of wrath, for as everyone knows, Israeli legislation in general does not adhere to Jewish law.

Respondent's counsel, who submitted to me much interesting material about the definition of lost property and finding under Jewish law — he even enlisted the help of the computer at Bar Ilan University — does not explain in his summation why in his opinion the Law — the foundation of which does not lie in Jewish law principles — should be construed in accordance with Jewish law and not according to the principles of interpretation that apply to the generality of Israeli statutes. That would have been fine, had the principles of Jewish law served as the basis for the Law, but the situation being otherwise, how can a Law, the principles of which are alien to Jewish law, be "dressed" with a Jewish law interpretation?

I do not, therefore, accept the argument that the Law is to be construed according to Jewish law. Counsel for the respondent may perhaps find some consolation in the fact that under Jewish law the interpretation is not as easy and as simple as he wished to infer. I am not at all sure that had I

needed to construe the Law according to Jewish law, I would have come to the conclusion that stolen property is not lost property.

C.A. 341/80

ALI v. SASSON *et al.*

(1982) 36(3) *P.D.* 281, 289

A football pools coupon filled in by the appellant having subsequently been found to be missing, this fact was reported to the football pool organisers and consequently the coupon was not included in the weekly competition. The appellant claimed that his coupon had contained the winning forecast and that he was entitled to the first prize. His action was dismissed in the District Court.

Sheinbaum J: The classification of bailees under the Bailees Law, 1967, follows Jewish law, as explained in the Explanatory Notes to the Bill of the Law. See also Z. Tzeltner, "The Law of Contracts and its Development during the Twenty-Five Years Since the Establishment of the State" (1975) 29 *haPraklit* 56, 71, and N. Rakover, "The Jewish Law Sources of the Bailees Law, 1967" (1968) 24 *haPraklit*, 208, 211. Since Jewish law was considered by the draftsmen of the Law, we may therefore be assisted by Jewish law in understanding the concepts employed by the statute (although not all its provisions follow the rules of Jewish law).

We learn from the *Mishnah*, *Shevuot* 8:1, that—

> There are four bailees, the unpaid bailee, the borrower, the paid bailee and the hirer. The unpaid bailee takes an oath in all cases, the borrower pays in all cases, the paid bailee and the hirer take an oath in the case of injury, capture or death, but pay for loss or theft.

We also learn from *M. Baba Metzia* 3:11:

> If a man deposits money with his neighbour who binds it up and slings it over his shoulders or entrusts it to his minor son or daughter and locks the door before them but not properly, he is liable because he did not look after it in the manner of bailees. If, however, he looked after it in the manner of bailees, he is exempt.

Thus, in Jewish law the gratuitous bailee is liable only for negligence (*peshiah*). As the obligation of this type of bailee is summed up in *Hoshen Mishpat* 291:1: "An unpaid bailee is not liable for theft or loss and only has to pay for negligence." The same article, in paras. 13 and 14, goes

on to explain that looking after a thing in the manner of bailees depends on the nature of the deposit. Where the deposit is kept in a proper place, the bailee is exempt but not otherwise.

It seems that one may discern the common features between the "negligence" (*rashlanut*) of a bailee in the Bailees Law — if we construe it with the help of the Civil Wrongs Ordinance — and between the negligence (*peshiah*) of Jewish law.

Chapter Three

"RELIGIOUS" LAW IN THE COURTS

1. Status of "Religious" Law

Cr. A. 112/50
YOSIPOF v. ATTORNEY-GENERAL
(1951) 5 *P.D.* 481, 484, 501-502

Landau J.: The appellant...was convicted in the Jerusalem District court of the felony of bigamy...in contravention of sec. 181 of the Criminal Code Ordinance, as amended in 1947, and was sentenced to one year's imprisonment. His appeal is directed both against conviction and against sentence. Upon the suggestion of counsel for the appellant...and with the consent of the State Attorney, we decided to hear the appeal in two stages — the first in respect of conviction and the second (should we reject counsel's submission in regard to conviction) in relation to sentence.

The facts are set out in detail and with great clarity in the judgment of the learned President of the District Court and since they are almost undisputed I do not need to repeat them at any length. The appellant, an Israeli Jew belonging to the Caucasian community, married a woman in 1936, who bore him five children. That marriage still subsists. In 1950, with the consent of the Rabbinate in Jerusalem, he married a second woman by religious rite. He obtained the consent by a false declaration, supported by two witnesses, in which he concealed the fact of his existing marriage.

Silberg J.: In order to explain the idea, we must deal briefly with the question of the special legal position of "matters of personal status" and the place they occupy within the framework of the general civil law of the State.

As everyone knows, the Palestine legislature divested itself of the authority to lay down new rules of its own in matters of personal status, and for

reasons that are well-known and understandable left the regulation of such matters — both in point of procedure and in point of substance – generally to the different religious codes of the various communities. Matters affecting the marriage and divorce of a citizen of Palestine, a member of one of the recognised communities, are dealt with even in the civil courts (when, for example, the question arises before them incidentally) in accordance with the religious code of law of the community concerned. The same applies to the duty of maintenance of a husband in a claim against him a civil court and also in other like matters.

Thus far the matter is simple, plain and well-known enough, and there is no apparent reason to discuss it at length. The interesting question, however, which is not so simple, is, what does it mean? Did the legislator leave a vacuum from the legislative viewpoint, and with regard to these topics employ foreign legal norms, that had no place in his own system of law? Or did the legislator in the Land of Israel himself take over these legal norms and make them an integral part of his own general system of civil law? The question is not, as we shall see, merely a theoretical or academic one.

Even had there been some hesitation about the matter up to 1945, the problem was completely resolved with the promulgation of the Interpretation Ordinance of 1945, and since then there is no longer any room for doubt. Sec. 2 of the Ordinance provides explicitly that the term "law" also includes "the religious law (both written and oral)...which is in force or will be in force in the future in Palestine." This is crystal clear, and any interpretation is superfluous. The legislator has expressed his view in unmistakable language that religious law, to the extent that it is in force in Israel, itself forms an integral part of the law of the State. That is to say, if a District Court, for example, deals with the obligation of a Jewish husband who is a citizen of Israel and applies, as it must, Jewish law, that part of the Jewish law dealing with the question is regarded as if it had been enacted as the law of the State. This, moreover, is the only logical and possible approach to the matter. Religious law is not "a foreign bough" grafted on to the trunk of the tree from without but, to the extent that it has been recognised, is itself inextricably interwoven with the tree itself and forms a part of its foliage.

C.A. 191/15

SKORNIK v. SKORNIK

(1954) 8 *P.D.* 141, 180

The issues in this appeal center on the validity of a civil marriage made abroad.

Witkon J.: There is no occasion...to apply religious law under art. 47 [of the Palestine Order in Council] to some matter before ascertaining whether the principles of private international law refer us to a particular foreign law. In the present case, we have found that Polish law applies, in the light of two of these principles, i.e. that relating to deciding incidental questions and that rendering a change in nationality or residence of no effect. That being so, Jewish law does not apply, despite its universal character. Polish law applies, because it is the law which governed the parties at the time and place of their marriage. The provisions of art. 64 of the Palestine Order in Council are in my opinion irrelevant here, and it is only fortuitous that the "national" law of the litigant at the time and place of the marriage is the same law which then applied at the place of its celebration. Had, for example, private international law referred us to some foreign law other than Polish, we would have applied that law without regard to art. 64 and to the previous Polish nationality of the parties. The only source for applying Polish law is, as I have said, private international law that obtains in this country by virtue of art. 46 of the Order in Council.

My colleague, Agranat J., dealt with the question of relief that can be granted to the respondent under Jewish law when her status as wife of the appellant is recognised only by Polish law, and he distinguished between the "right" to claim maintenance and the "amount" to which she is entitled. I do not think it necessary to draw such a distinction and for this reason I express no opinion on it. In my opinion the institution called "marriage" possesses a universal character and under Jewish law it is no different from what is usual in the rest of the civilized world. I have therefore no hesitation in applying the wife's right of maintenance under Jewish law to a woman whose marriage is based upon foreign law but is recognised by the law of this country.

H.C. 143/62

FUNK SCHLESINGER v. THE MINISTER OF INTERIOR

(1963) 17 *P.D.* 225, 231, 238

Silberg J.: The question involved in these proceedings is whether to recognise the petitioner as a married woman whose family name is Schlesinger and so to register her in the Population Registry on the basis of a civil marriage performed between her and Mr. Israel Schlesinger in Cyprus on 21 December 1961. The petitioner is a Christian, a citizen of Belgium, and Mr. Schlesinger is an Israeli Jew permanently resident here. The respondent's refusal stems from the fact that he does not recognise the legal force of the above marriage.

The questions before us are (a) does a marriage between a Jew and a non-Jew take effect according to the laws of the State; and (b) if it is found that it has no legal force, can or must the Registry Officer register the petitioner as married on the basis of a civil marriage performed in Cyprus?

I have stressed the words "according to the laws of the State" because in Jewish law there is not a scintilla of doubt that such a marriage has no legal effect.

Petitioner's counsel submitted on this point, at the very last moment after we had informed him of an English judgment of some weeks ago, the judgment in *Lepre* v. *Lepre* reported in the London "Times" of 6 December 1962, relying on a previous judgment of the English Court of Appeal in *Formosa* v. *Formosa* (1962) 3 *All E.R.* 419, 423, (1962) 3 W.C.R. 1246.

In summary, these two judgments show that the courts in England will not recognise an annulment of marriage ordered by a foreign court because of a difference of religion of the married couple, since such annulment is contrary to the principles of natural justice recognised in England. The situation is the same here, argues petitioner's counsel; we, a civil secular court, must ignore Jewish law to the extent that it invalidates a marriage between a Jew and a non-Jewess, since that impugns the sense of natural justice implanted in the hearts of the Israeli public.

I reject this submission. One court can say that the law of another country impugns its sense of justice and ignore it entirely, but a judge in that country cannot say that one of its laws outrages his own sense of justice and he is therefore not prepared to uphold it. The law of every country, particularly a democratic country with a parliamentary legislature, accords — or is deemed to accord — with the accepted principles of natural justice of that country. Otherwise laws would not be enacted, and if enacted would be set aside under pressure of public opinion. It was in order for Denning

J. to say in *Formosa* (at 423) that if the man in the street in England were asked whether a marriage between a Catholic and an Anglican were valid or not, he would answer valid. It cannot, however, be said that every Israeli, whether the man in the street or a member of the elite, would answer the question of whether the marriage between a Jew and a non-Jewess was valid in the affirmative; I believe that the greater part of the Israeli public would answer it in the negative. Not only is it that we who sit in judgment may not ignore existing law as long as it subsists but also, if the truth be told, that our religious personal law does not conflict with the outlook of the general Israeli public.

H.C. 301/63

SHTREIT v. SEPHARDI CHIEF RABBI *et al.*

(1964) 18(1) *P.D.*, 598, 608, 620-621

After unsuccessful divorce proceedings by her husband, the petitioner asked for an increase in the maintenance awarded to her by a "temporary" judgment of the Rabbinical Court. The husband claimed that their marriage in Rumania in 1925 had been a civil marriage only, a fact which the petitioner admitted, and the said judgment was set aside, a course approved by the Rabbinical Appeals Court. The petitioner then brought proceedings in the District Court for maintenance and was successful, the husband consenting. Subsequently he brought divorce proceedings in the Rabbincal Court, which ordered the petitioner to accept a get *(bill of divorce), and should she refuse, it said that the question of giving the husband permission to marry would be considered. Before the petitioner could appeal, the Rabbinical Court gave such permission, subject to confirmation by the Chief Rabbi. Both the husband and petitioner appealed unsuccessfully.*

Cohn J.: It is decided law and the established practice of this Court that we do not sit in appeal against the religious courts; whatever they decide, it is their religious law, and no civil court may call into doubt their dispositions regarding the character of that religious law. It is easy to imagine the complications and inconsistencies that would be created if, for instance, the High Court of Justice were to deem it *ultra vires* for a rabbinical court to follow in some matter the views of Tashbetz as against Ribash (as Silberg J. puts it in his *Personal Status in Israel*, 174). Already from very early times we have been commanded to observe the rule that we must hearken to "the judges of those days" even when they say right is left and left is right (*Sifre* 154 to *Deut.* 17:11) and we indeed uphold this rule.

Counsel for the petitioner goes on to argue that we must set aside a judgment of the rabbinical courts when contrary to the rule of natural justice and private international law. Counsel regards it as contrary to natural justice as well as private international law for the rabbinical court to close its eyes to the rights and status the petitioner acquired by virtue of a marriage which was lawful and of effect according to the *lex celebrationis*. As for natural justice, I cannot see how and why it is prejudiced when one statute treats a marriage celebrated in a certain form as valid and effective whilst another law treats it as invalid and ineffective. That is a frequent occurrence in law and all the rules of private international law derive from it. It is very true that the law prevailing in Israel does not permit the closing of one's eyes to the rights and status a woman obtains by marrying a man in a marriage that was valid and lawful where it was entered into, as I shall show later, but this has nothing to do with natural justice at all. As for private international law, it is decided law that religious courts are not bound by it (*C.A.* 238/53 *Cohen-Buslik* v. *Attorney-General* (1954) 8*P.D.* 4, 19).

Silberg J.: The second answer to the said submission is that it is refuted by the law itself: put very simply, the religious court is free from the prescriptions of private international law. That was first decided in *C.A.* 158/37 *Neussihin* v. *Neussihin* (1937) 4 *P.L.R.* 373 and that judgment has not yet become extinct; on the contrary, it has been repeated a number of times in this Court as well.

In *Neussihin*, as above, the Rabbinical Court confirmed the validity of a marriage celebrated by religious rite in Germany. It was contended, after the death of the husband, that the confirmation was contrary to a rule of private international law which provides that "validity of form is dealt with according to the *lex celebrationis*", in that case German law, which did not recognise the validity of a religious marriage. The Supreme Court, however, rejected the argument, saying that—

> ...it would not be right for this Court to go into the validity of a decision of the religious courts and consider whether, when dealing with a marriage entered into abroad, the religious courts must introduce into their own law the principles of private international law. The decision was a determination of the status of the parties by the civil courts of Palestine (at 376).

And in *Cohen-Buslik* v. *Attorney General* (1954) 8 *P.D.* 4, 19, it was observed:

> The religious court regards itself as completely free from these

> "constraining" rules [of private international law] and it extends the application of religious law — retrospectively and without restriction — to acts done in the past by foreign nationals outside the frontiers of the State, and it may so do (*C.A.* 158/37 *Neussihin* v. *Neussihin* (1937) 4 *P.L.R.* 373, 376).

Neither of the two judgments cited above explain why that is so, but that deficiency has recently been filled by a judgment of this Court in *Abu Horash* v. *Sharai Court (Acre)* (1964) 18 *P.D.* 589). The reason for the "freedom" of the religious court from the universe of the rules of private international law lies in the fact that these rules, as part of the Common law, only became obligatory for the courts of this country by virtue of art. 46 of the Palestine Order in Council, which opens with the words "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman law in force...and subject thereto...in conformity with the substance of the Common law" etc.

The author of the Order in Council knew very well that Ottoman law is distinguished by its exclusivity and universality, recognising no metes or bounds either of time or place. He therefore freed it (and the religious court), within the confines of its jurisdiction, from the Common law, that embraces within it the rules of private international law.

The first submission of counsel for the petitioner must accordingly be rejected.

As to the second submission of counsel regarding the permission given to marry, as above, one cannot be assisted by the reason for rejection set out above, that prejudice to the principles of natural justice is similar to *ultra vires*. The plea of *ultra vires* does not fall within sec. 7(b)(3) but rather sec. 7(b)(4) of the Courts Law, and it can be raised against the decisions of a religious court.

But another prevailing answer exists, to the second submission of petitioner's counsel, i.e. that it is founded on a mistaken conception, and on this I have already expressed my views in *Levi* v. *District Rabbinical Court* (1959) 13 *P.D.* 1182, 1193:

> I wish and it is my duty to point out that I dissociate myself with the greatest respect from the mistaken conception of "prejudice to the principles of natural justice" which was voiced in the two above judgments....The High Court of Justice failed to distinguish between prejudice to the basic principles of just proceedings, and what it regards as unjust in the decision itself. In this, in my opinion, it was not entitled to intervene, since the material content of religious law, to the extent that it is recognised in principle by the law of the country, does not necessarily have to find grace and favour in the eyes of the

civil judge and *ipso facto* he cannot set aside a decision that in practice upholds that material law.

2. Abrogation of Religious Norms by the Secular Legislator

H.C. 202/57

SIDIS v. SUPREME RABBINICAL COURT *et al.*

(1958) 12 *P.D.* 1528, 1532-1536

The issue in this case was a husband's right of usufruct in nikhsei melog *(wife's estate in which husband has usufruct without responsibility for loss or deterioration) belonging to the wife, in view of the Women's Equal Rights Law, 1951.*

Silberg J.: It follows that we are not released from the burden of considering the question posed above. The question has two aspects.

(a) Does sec. 2 of the Women's Equal Rights Law put an end to the institution of *nikhsei melog* and the latter therefore no longer obtain in local positive law, as was observed, although only incidentally, in (1954) 8 *P.D.* 1020, 1023?

(b) If that is indeed the situation, does the husband retain a right of usufruct in *nikhsei melog* created or acquired before the commencement of the said Law?

It seems to me that the first question must be answered in the affirmative and the second in the negative, as will be explained below.

The answer to the first question follows very simply and most clearly from the terms of the Law, but we must first determine the juridical nature of the institution *"nikhsei melog"* in Jewish law.

It is absolutely clear that the said right of usufruct is not — or is not only — an obligatory right *in personam*, requiring the wife to hand over to her husband the fruits of such property; rather, it is — or is also — a real right *in rem*, which attaches as a lien to the property of the wife, conferring upon the husband an element of ownership in the actual property. One of the obvious indications of the real nature of this right is the fact that after the husband has acquired the right to usufruct, i.e. after the woman is actually married to him and not just betrothed, he can no longer waive this right, because in the case of a married woman the husband's rights have the same force as the wife's, or even superior force...

This is the manner of the laws of Israel: they distinguish, as does every enlightened legal system, between a "right to something" (a right to sue, to demand, a right to a debt) and a "right in something" (ownership, lien, etc.). The former may be renounced or waived or forgiven, but the latter may be conferred or assigned only by means of sale, gift, endowment, etc.

> If a man says to another (Rashi: to his partner), 'I have no claim whatsoever on this field, I have no concern in it and I entirely dissociate myself from it', his statement is of no effect (*Ketubot* 83a; *Baba Batra* 43a, etc.)
>
> His statement is of no effect: For this is not the language of a gift, where he says, 'I shall have no part in this', for it is his, despite himself, until he says to his friend, 'My field is given to you, my field is sold to you, my field is ahandoned to whosoever wishes it' (Rashbam to *Baba Batra* 49a).

The right of usufruct of *nikhsei melog*, too, is not a "right to something" but rather, a "right in something", as expressed concisely by one of the Tosafists: "The fruits are different; for his rights have the same force as hers and he gains a right in the property itself" (*Tosafot* to *Ketubot* 47b).

The right of the hushand is not restricted to the usufruct, but extends...to the wife's ownership of the property itself, such that his "property in the fruits" is almost a "property in the possessions" themselves. This flows from a regulation known as the "regulation of Usha" (Usha was one of the ten places to which the Sanhedrin was exiled: *Rosh haShanah:* 31a-b):

> For R. Jose b. Hanina said: It was enacted at Usha that if a woman disposes of her *melog* possessions during the lifetime of her husband and subsequently dies, the husband will be entitled to recover them from the hands of the purchasers (*Baba Kamma* 88b...and see also *Even haEzer* 90:17, and Rema *ad loc.*).
>
> A regulation was made in Usha: Even though in general, it is not like a real right in the property, the Sages fortified the husband's lien over his wife's property...so that he is like a buyer with the first right (Rashi, *Baba Kamma* 88b).

The juridical construction of the idea is that because of the "fortification" given to the husband's lien, he is considered as if he bought the property, as a huyer with the first right, for the period after her death if she should die during his lifetime. However, the concrete result is that even though

the property belongs to her and she can sell it to whosoever she wants, nevertheless, because of the possibility that the husband will outlive her and claim it back from the buyer by virtue of the Regulation of Usha, she can only sell a "right of usage" of the property...she cannot sell it at its full price, but rather, at a price proportional to the percentage probability that she will outlive her husband. If the price of the property was, for example, 10,000 lirot, and the chance that the husband would predecease her was only thirty percent because she was old or ill, then she would get a maximum of 3,000 lirot for the property. The result is that the right of usufruct conferred upon the husband influences and restricts, from both a purely legal and an economic-practical point of view, her control over the property. Sale of the property by a wife who is still married to her husband is, in fact, not a certain sale but a doubtful sale, the economic value of the doubt being in keeping with the rate of the chance that the husband will die in her lifetime. Thus, after the Regulation of Usha, the right of usufruct is not merely a lien on the property of the wife, but it affects the wife's very ownership of the property.

In view of the above, there is no escaping the conclusion that as a result of sec. 2 of the Women's Equal Rights Law, the husband's right to usufruct of his wife's *nikhsei melog* has, from a secular point of view, been rescinded. The section states:

> A married woman shall be fully competent to own and deal with property as if she were unmarried; her rights in property acquired before her marriage shall not be affected by her marriage.

From the opening phrases alone, it is possible to conclude that the Israeli legislature stipulates and demands that a married woman has capacity to dispose of her property as if she were unmarried, whereas under Jewish law concerning *nikhsei melog*, her control is restricted, from the point of view of the legal effect, *vis-a-vis* her previous situation, even with respect to the capital that belongs to her, by virtue of the Regulation of Usha. Even if we do not view this proof as sufficiently conclusive, due to the fact that the Hebrew term "*kashrut*" has not been defined, so that it is uncertain whether what is meant is legal competence (as I believe), or personal capacity — see Schereschewsky, *Family Law*, 205-6 — the closing phrases of the section definitely lead to the said conclusion:

> ...her rights in property acquired before her marriage shall not be affected by her marriage.

Could this stipulation possibly coexist with the husband's right of usufruct in Jewish law? I believe it could not! Were the husband's right only an obligatory, personal right, effective as against the wife rather than her

property, I would remain silent. Were that so, it could be said that the wife, while married to her husband, controls her property completely, with no restrictions...she has a right both in the property itself and in its fruits, but she owes an obligation to her husband and must assign to him the fruits that belong to her. As we have seen, however, this is not the character of the right under Jewish law. It is — or at least, is also — a real right in the wife's property, which takes the form of a lien which was "fortified" by the Regulation of Usha, and restricts the right of ownership which the woman enjoyed prior to her marriage. When she was unmarried, she had complete, total ownership, and she was entitled to the usufruct, whether for herself, or by way of leasing, etc. Now, after her marriage, this right has been taken away from her and given to her husband, and she retains only an abstract right of ownership...and even this ownership is almost beyond the woman's reach, since she can only sell it as a "right of usage", as we saw above, and she could have sold it as such had it been a "right to something" rather than a "right in something", just as she sells, for example, her *ketubah* (marriage document) (see *M. Makkot* 3a). It is clear, therefore, that because of the right of usufruct granted to the husband under Jewish law, the property of the wife acquired before marriage is adversely affected, and the conclusion is necessarily that in the wake of sec. 2 (the closing phrases), this adverse effect has been abolished, and henceforth "the institution of *nikhsei melog* no longer exists in local positive law", as stated in *Sidis* v. *Chief Execution Officer et al.* (1954) 8 *P.D.* 1020, 1026.

This is not the view of Dr. Schereschewsky (*op. cit.*), upon which counsel for the wife relied. In discussing the closing phrases of sec. 2 [of the Law] he says:

> Neither does the conclusion of sec. 2 of the Law contain anything which might change the said legal position [i.e. the legal position extant before enactment of the Law].
>
> This is also the situation under Jewish law. As we have already seen, the husband has no rights in the actual property, *per se*, of his wife.
>
> The fruits which belong to him by virtue of the marital bond do not fall within the category of property acquired by the woman prior to the marriage, for the husband only gets those fruits which had their inception after the marriage. Whatever belonged to the woman before the marriage, whether it was the capital or whether it was the fruits, is, as far as the husband is concerned, to be considered as capital, and it is only the fruits thereof that will be his. These fruits do not exist prior to the marriage.

Property which she acquired prior to the marriage is not, therefore, adversely affected under Jewish law by virtue of the marital bond (*loc. cit.* 207, 208).

With all great respect to the learned author, I cannot agree with him, for it is difficult for me to understand the logic of this argument. It seems to contain a *non sequitur*. It is perfectly true that the fruits acquired by the woman prior to marriage are, in the legal sense, not fruits but capital, and the husband enjoys only the fruits of this capital...similarly, it is true that the husband's right after marriage is always effective for fruits that have not yet come into being in the ownership of the wife, for this right prevents the fruits from falling into the domain of the woman. But how may it be concluded from this that the marital bond has no adverse effect on the property of the wife? And this adverse effect, as hinted above, relates to something called "property"....In my opinion, therefore, there is not a shadow of doubt that following the enactment of sec. 2, from a secular legal viewpoint the said right of usufruct has been abolished in this country...

C.A. 313/59

BALABAN v. BALABAN

(1960) 14 *P.D.* 285, 287, 291

Here a wife claimed maintenance from her husband, even though the income from her own property was enough for her upkeep. Jewish law generally charges the husband to maintain his wife even when she has adequate means to be self-sufficient.

Silberg J.: In my opinion, counsel for the husband was more correct in his argument than counsel for the wife. A secular legislature cannot set aside a norm of religious law, since it is not the source of religious enactments. All it can do by virtue of the sovereignty of the State is to order the courts, including the rabbinical courts, not to decide according to the norm. This is precisely what the Israeli legislature did in the Women's Equal Rights Law. But what is the subject matter of this secular enactment? The usufruct of *nikhsei melog*, and not maintenance of a wife. The latter has always been and is at present given over to the governance of religious law, religious law *in toto*. It follows that when a husband claims the usufruct in *nikhsei melog*, the claim will be dismissed both by a civil court and by a religious court, as a consequence of the Women's Equal Rights Law (see sec. 7). If, however, a wife who has a large income from her *nikhsei melog* claims

maintenance, her claim will also be dismissed both by a religious court and by a civil court because the husband may say that although his right to usufruct has been abolished under sec. 2 of the Law, the "reflex", the impact which it exerts indirectly on a claim for maintenance, has not been abolished and the same is still dealt with according to the norms of religious law.

From the viewpoint of common sense and simple practical logic, and reason as well, there is something absurd in the result which counsel for the wife attempts to achieve. The wife cannot say, "Grasp Jewish law and also the secular law, do not stay your hand", since "no man is entitled to enjoy two tables" and "man" includes "woman". Sec. 2 of the Law strove to deliver and liberate a "woman" from the "subjection", to the advantage of her husband, that looms over her private possessions, but not further. It did not wish to extend thereby the potential for claims for maintenance, as that is beyond the conception of equal rights for the sexes.

Olshan P.: No one will dispute that a married woman may now do with her *nikhsei melog* what she wishes without any restriction or encumbrance. Assume that the appellant had sold her orchard a day before she commenced proceedings for maintenance, and she now possesses a sum of money, i.e. the proceeds of the sale. Would the respondent be released from his obligation to pay maintenance because she had done something which the Law permits her to do?

As for the question of how a woman who has income of her own can possibly be entitled to compel her husband to provide maintenance, this question does not arise necessarily in connection with *nikhsei melog* but in respect of any woman whose husband is bound to maintain her even when she has sufficient of her own...

It is true that a marriage of Jews in Israel must be carried out in accordance with religious law and that the secular legislature has not required the religious court to take account of private international law. Hence in respect of a marriage celebrated in Israel — to which religious law applies exclusively — the court before which the question posed by Silberg J. arises will be required to answer it as he did. Had, however, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, contained a provision requiring that account be taken also of private international law, the court would then be bound to answer that the marriage takes effect, since the situation would be similar to the one before us, in which the legislature has ordered that the religious obligation regarding *nikhsei melog* be ignored.

I find no authority for saying that a secular legislature cannot set aside a norm of religious law. In the absence of legislation, it is omnipotent. Again,

in the present case, the secular legislature did not set aside a religious norm for those who actually wish to follow it. Sec. 7 says expressly, "...unless all the parties are eighteen years of age or more and have consented before the tribunal, of their own free will, to have their case tried according to the laws of their community." The section only prohibits compelling a person to act in accordance with a particular religious norm.

3. Binding Force of Rabbinical Court Decisions upon Secular Courts.

F.H. 23/69

JOSEPH v. JOSEPH

(1970) 24(1) *P.D.* 792, 805, 809-812

The judgment involved in this Further Hearing held by a majority that, with respect to the duty of maintenance, account is to be taken of the woman's earnings.

Kister J.: It is appropriate to cite here the *responsum* of Maharsham I mentioned above (4:992) and the words of Hazon Ish (*Even haEzer* 70:5 and 6; 68:2 and 3) according to whom a woman who claims maintenance from her husband cannot obtain any profit from her own labours.

Counsel for the applicant, it should be noted, was asked whether he knows of any judgment of the Supreme Rabbinical Court or of a District Rabbinical Court (even if unpublished) which awarded maintenance to a woman when she earns from her own work....He could not point to any such judgment. As a result, the conclusion is that the rabbinical courts in Israel decide without exception as stated above. And that is enough for me to decide likewise.

We must, in my opinion, accept this rule as decided by the rabbinical courts in Israel, as we must accept the rule that, in spite of the change in local usage and in spite of the easing of domestic work, a woman is not bound to go to work in a factory or office in order to assist her husband in providing for the family. The reason why we must act in these matters in accordance with the judgments of the rabbinical courts can be found in the laws of the *Torah* which command us to hearken to the sages of the *Torah* of each generation: "Jepthah in his generation is like Samuel in his" (see *Sefer haHinukh*, Commandments 495 and 496).

The authority of the scholars of the *Torah* and the rabbinical courts is nevertheless restricted to no small degree and much has been written about it in the halakhic literature. I will content myself with mentioning *The Works of Maharatz Hayut*, vol. I, especially the chapter *Mishpat haHora'ah*, 372 ff.

The present case involves regulations touching upon the financial interests of spouses and the construction thereof. The rabbinical courts are empowered to make such regulations, as was done in earlier periods and in other countries. Recently, regulations have been promulgated in Israel regarding the maintenance of children up to the age of 15 and Matrimonial Regulations. It is most certainly clear that they may interpret the regulations of the Sages in binding fashion.

Hazon Ish, too (*Even haEzer* 63:7), in dealing with the Regulations of Worms, Speyer and Mainz, writes that "the regulations by the Sages of each generation are as binding as the regulations made by the Sages of the *Talmud*..."

Cohn J.: My learned friend Kister J. says that the case law I put forward is in conflict with the decisions of the rabbinical courts and that in matters in which it is for us to decide according to religious law we must follow the rabbinical courts, since, according to religious law, we are commanded "to hearken to the Sages of the *Torah* of each generation: 'Jepthah in his generation is like Samuel in his'." I agree, with the greatest of respect, that the fact that people are lesser than of yore does not derogate from the authority and power of the courts of our own days. The rule, however, about "the judge who shall be in those days" (*Deut.* 17:9) applies not only to the rabbinical courts but to every judge in Israel: witness the three questionable characters, Jerubaal, Bedan and Jepthah, who are compared respectively with Moses, Aaron and Samuel, to teach us that the most worthless, once appointed as a leader of the public, is like the mightiest of the mighty (*Rosh haShanah* 25b). The *Torah* is not in heaven so as to require the rabbinical court to raise us unto heaven to receive the *Torah* for us and proclaim it.

Apart, however, from all the considerations intrinsic to the nature of Jewish law, it seems to me that we cannot recognise the case law of the rabbinical courts as binding precedent for another decisive reason. The rabbinical courts indeed adjudicate according to Jewish law with all mental acuteness and proficiency, but they entirely overlook the law of the State. Very infrequently does one find in a rabbinical judgment any mention of a law of the Knesset or an enactment from Mandatory times, when there arises a question about the power of the court to entertain a matter brought before it (see for example, 1 *P.D.R.* 355; 2 *P.D.R.* 38 and

285). I have searched in vain and have not discovered any reliance upon State law in matters pending before the religious courts. The Women's Equal Rights Law, for instance, is readily available to all. How can the decision of a rabbinical court be taken as a guide or as binding regarding the rights or obligations of women when the legislative act of the Knesset on that topic is in its eyes irrelevant? As long as State law is disregarded, the secular courts may not follow the rabbinical courts and accept their decisions as final and unquestionable.

Furthermore, where a decision has to be made "according to local custom" (as here), the rabbinical court has no advantage either in knowledge or in religious authority over the secular court. The latter cannot be bound by the views of the former over what is customary when, on the evidence or the submissions made before it, it reaches a different conclusion.

The situation is different when the Chief Rabbinate, as a legislative body by virtue of Jewish law, makes regulations, provided that these are not in conflict with any statutory enactment, including first and foremost the Women's Equal Rights Law. But sufficient unto the day the goodness and blessing thereof; that day seemingly has not yet arrived.

Y. Kahan J.: I concur with respect in the judgment of my learned friend Kister J. That would be enough but since the judgments of Cohn J. and Berinson J. consider the question of the binding or non-binding force of the judgments of the rabbinical courts in matters of *halakhah* in respect of the civil court, I find it essential to add some remarks on the subject.

The problem has been dealt with recently in a number of articles and notes critical of the position taken by several judges of this Court, permitting a secular court to hold that a rabbinical court has erred on a matter of *halakhah*. (I. Englard, "The Chief Rabbinate Council and the Supreme Court", 22 *haPraklit* (1965/6) 68; M. Shawa, "Jurisdiction of Rabbinical and Civil Courts in Matrimonial Cases" (*C.A.* 359/67) 25 *haPraklit* (1969) 617: I. Englard, "The Integration of Jewish Law in the Civil Legal System", in *Jewish Law in the State of Israel* ed. Y. Bazak, 110).

These articles well explain the substantive difference between a judgment of a secular court and a judgment of a rabbinical court. On this point, Shawa says *inter alia* (at 624):

> It appears to me that the concept of "error in law" is one borrowed from secular law where a separation between the legislative arm and the judicial arm exists, and the task of the judge is merely to interpret the law. For this reason, when an interpretation is not correct, it is possible to speak of "an error in law". As against that, Jewish law vests in the rabbinical court not only jurisdiction but also legislative power, since Scripture

speaks of "the law which they shall teach thee" (*Deut.* 17:11). And these are, in the words of Maimonides (*M.T. Mamrim* 1:2) "the ordinances, decrees and customs which the Supreme Rabbinical Court teach the public in order to strengthen religion and ensure public order." There can be no question that these come under legislation or, if you wish, subordinate legislation.

In *Shtreit* v. *Sephardi Chief Rabbi et al.* (see above (1964) 18(1) *P.D.* 598, at 608). Cohn J. observed as follows in respect of the powers of the Supreme Court regarding the rabbinical courts:

> It is decided law and the established practice of this Court that we do not sit in appeal against the rabbinical courts; whatever they decide, it is their religious law, and no civil court may call into doubt their dispositions regarding the character of that religious law. It is easy to imagine the complications and inconsistencies that would be created if, for instance, the High Court of Justice were to deem it *ultra vires* for a rabbinical court to follow in some matter the views of Tashbetz as against Ribash (as Silberg J. puts it in his *Personal Status in Israel*, p. 174). Already from very early times we have been commanded to observe the rule that we must hearken to "the judges of those days" even when they say right is left and left is right (*Sifre* to *Shoftim* 154).

The foregoing remarks were made in connection with the power of review which the Supreme Court has over the rabbinical courts, but the above reasoning is also pertinent regarding the power of every civil court to hold that a rabbinical court has erred in a matter of law.

Another question arises in the present context. Are the judges of a civil court to be regarded as *dayanim* (the Jewish law term for judges) who "were in those days", irrespective of whether we live in the generation of Samuel or of Jepthah? I cite from Englard's "The Integration of Jewish Law in the Civil Legal System" (*op. cit.* 113-14):

> The fact, however, that halakhic decision is a human act does not involve the secularisation of religious law. The *halakhah* was not given over to the ordinary man but to the Sage who is God-fearing. The sources stress that only those who accept the yoke of the Kingdom of Heaven and enter upon the task of decision out of a feeling of responsibility towards the Divine, only such are treated as the authoritative decisors of the *halakhah*; the suprahuman force of mortal creation is conditioned upon the complete personal subjection of the decisors to the *halakhah*. Thus paradoxically, those who are most closely bound by the *halakhah* hold sway over it.

> In principle, the *halakhah* recognises the circumscribed authority of legislation to vary existing provisions, but this authority, the bounds of which are most carefully defined, is given exclusively to those institutions that accept the binding force of religious law.

Whoever urges that the judges of a civil court, who do not accept the burden of religious law, can assume the mantle of decisors of the *halakhah* must face these objections and find an answer to them. In the civil court, it must be added, there are also judges who are not Jews, and since far be it from us to discriminate between judges, we must ask how the dictum "Jepthah in his generation is like Samuel in his", on which *inter alia* Cohn J. relied, applies to a court having a judge who is not a Jew?

I did not write the foregoing in order to establish a position on the above question but to show that the problem is not simple, its implications are many and complex and it deserves profound and basic deliberation. The criticism levelled by my learned friends against the approach taken by the rabbinical court to the decisions of the civil courts is not relevant at all with regard to the said question, since both Berinson J. and I concur with the view of Kister J. that in the case now before us, the rabbinical court did not "err in law". Obviously all that we two have said about the powers of the civil court on the matter of deciding the *halakhah* is *obiter*. If I have been drawn into such *obiter dicta*, it is only in order to indicate some of the problems that arise in the matter.

F.H. 10/69

BORONOVKSY v. CHIEF RABBIS OF ISRAEL *et al.*

(1971) 25(1) *P.D.* 7, 15

A District Rabbinical Court ordered spouses to divorce on the ground that their married life had completely broken down. The woman refused to receive a get *(Bill of Divorce) after the husband had duly deposited it together with the monetary compensation ordered by the court. The Supreme Rabbinical Court granted the appeal of the husband, against the refusal of the District Rabbinical Court to grant him a* heter nisu'in, *i.e. permission to marry a second wife while still married to the first, emphasising that the woman's refusal to accept the divorce was inspired by feelings of revenge. The civil Supreme Court held, contrary to the decision in* Shtreit *(see (1964) 18(1)* P.D. *598 above), that the Chief Rabbinate had the power to authorise the giving of a* heter nisu'in *for the purpose of sec. 5 of the Penal Law Amendment (Bigamy) Law, 1959.*

Cohn J.: It is decided law that when a rabbinical court disregards a statutory provision it acts *ultra vires*, if the statute concerns the matter dealt with by the rabbinical court, and this whatever the religious law thereon. As my learned friend Berinson J. said:

> My friend [the late Goitein J.] asks what is the outcome of a judgment given by a rabbinical court when it is clear that the latter disregarded certain applicable statutory provisions — in the present case, the Women's Equal Rights Law, 1951 — and his answer is that where the judgment shows on the face of it that the judges (*dayanim*) paid no heed to the law of the State, execution of the judgment may perhaps be avoided on the argument that the rabbinical court decided as it did in a manner beyond its powers. Whilst I concur in that, it does not, with all respect, seem to me that the answer is exhaustive of the matter. In addition to the argument of lack of jurisdiction to effect execution, there are other means of attacking an invalid judgment given without authority....In my opinion the way to invalidate a judgment as above does not differ and is not inferior to the normal ways that an interested party can pursue in order to invalidate a decision given *ultra vires* by a lower tribunal....To sum up, I think that an *ultra vires* decision of a rabbinical court, for being contrary to the provisions of a secular law applying to that court, can be voided like every other like decision of an inferior tribunal that is *ultra vires.*

Part Two

GENERAL PRINCIPLES

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Chapter One

LEGISLATION

1. Primary and Secondary Legislation

See: KATLAN v. PRISONS SERVICE *et al.*, Part 3, Social and Administrative Regulation, p. 199.

2. Local Regulation — *Takkanot haKahal*

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3. "Forewarning" — Retroactive Penal Legislation

See: SYLVESTER v. ATTORNEY-GENERAL, Part 6, Penal Law, p. 429.

4. Status of Deceased Person

H.C. 98/53

ZIGELMAN v. CHAIRMAN AND MEMBERS OF THE TEL AVIV RABBINICAL COURT *et al.*

(1953) 7 *P.D.* 606, 612-613

Silberg J.: And so...to the main question in dispute between the parties, which is this: whether the deceased was, at the time of his demise in January

1952, an Israeli citizen or not. The grey area is...whether the retroactivity of sec. 2(b)(2) of the Citizenship Law extends to people who died before the enactment of that Law.

It is my opinion that the retroactive applicability of Israeli citizenship does not extend to deceased persons. Such a conclusion could apparently have been drawn quite simply from the language of the Law, sec. 2(c)(1), which states:

> (c) This section does not apply —
>
> (1) To whoever ceased to be a resident prior to the commencement of this Law.

A dead person is most certainly no longer a resident in the State of Israel. But I am prepared to assume...that the legislature did not intend to subsume deceased persons in this general — too general — term, and that the intention here was to a person who had ceased *voluntarily* to reside in Israel. Nevertheless, my conclusion is the same, for two principal reasons:

(a) The Citizenship Law is not only retroactive: it looks forward and backward at the same time. The Law was passed in the Knesset on April 1, 1952, was published in the official Gazette on April 8, 1952, and stipulated that it "would come into force on 14.7.52". This means that this is not an authentic legislative declaration to the effect that certain persons were already considered Israeli citizens. Rather, it constitutes the conferral of the status of citizen at a certain point in time in the future, after which, when this future becomes the present, it will extend backwards, retroactively, to the past, reaching the date of the Establishment of the State, or the date of the person's immigration, or some other date, in accordance with secs. 2(b)(1), (2), (3) and (4) of the Law. And that being so, because we are dealing with the award of citizenship, how can a new status be awarded to someone who is no longer alive? Citizenship, by its very nature, is linked to personhood; moreover, "Amongst the dead I am free — once a man is dead he is free from religious duties" (*Shabbat* 151b). And of course, he is free from the laws as well, and no law can confer any status whatsoever upon him.

Chapter Two

CUSTOM

1. Custom as a Source of Law — *Situmta*

See: KHALATI v. UZAN, Part 8, Obligations, p.

C.A. 2/77

AZUGI v. AZUGI

(1979) 33(3) *P.D.* 1, 4, 16-17

Elon J.: Two questions arise in the present appeal. (a) Do the rules regarding joint property, as these have evolved in the decisions of this Court, attach in principle to financial relations between the spouses, the parties to these proceedings? (b) If they do, are these rules to be applied to their affairs in view of the facts and the relationship between them, and to what extent? I shall deal with these questions in the order they have been posed, since that is the logical course...

Financial relations between spouses, like all monetary matters, are characterised by the principle of freedom of contract and treated as *jus dispositivum* or, as this idea is expressed in Jewish law, "in financial matters a person may contract out of the provisions of the *Torah*" (see *T. Kiddushin* 3:7-8). In fact, a considerable portion of the laws relating to freedom of stipulation in Jewish law are originally found in sources dealing with the financial relations between spouses (see, e.g., *Ketubot* 56a; *M.T. Ishut* 6:9-10; 12:6), and extensive use was made of the principle of freedom of contractual stipulation in these relations down through the ages, in the wake of the social and economic changes that had occurred (see M. Elon, *Jewish Law*, Part I, 159 ff. and note 102).

In financial relations between spouses, as with all financial matters, the force of custom is great, since it may supplement existing *halakhah* when reality poses questions and problems that have no solution in the existing *halakhah*, and new norms may be laid down that are contrary thereto by

virtue of the principle that "custom displaces the *halakhah* in financial matters" (*Y. Baba Metzia* 7:1; Elon, *op. cit.*, Part 2, 726 ff., 732 ff.). Extensive use was also made of custom in the regulation of the financial relations between spouses (*ibid.*, 739 ff. and note 61). As Maimonides (*op. cit.* 23:12) puts it:

> In all these and like matters, national custom is a major principle of decision, provided that the custom is common and widespread throughout the country (see also *Even haEzer* 66:11; for the conditions necessary to prove a custom, see Elon, *op. cit.*, 752 ff.).

Another decisive element for the regulation of financial relations is the assessment of public opinion on the question. As Kister J. has said:

> There are many rules in Jewish law in connection with transactions between spouses, some of which are based on an appraisal of public opinion in such cases. There are also rules in Jewish law that allow the court to decide a variety of matters according to assessment of public opinion, and in such matters local and contemporary usage are also to be taken into account (see *Judgments of the Rabbinical Courts* Vol. I, 113, 117). Regarding assessment for the purpose of testing the nature of a contract between husband and wife, no general custom is actually necessary: even a local practice and usage among people of the same type as the spouses may be important in determining what the spouses had in mind.

In this regard, "one must also bear in mind that in this country various institutions have greatly encouraged the tendency to a regime of joint property between spouses" (*ibid.* at 615).

To proceed, I would observe that Jewish law has also created and developed much in this area of the law, in the wake of social and economic changes that occurred in the different places where Jews at various times were dispersed, by means of the legal source of *takkanot* promulgated by the halakhic authorities and community leaders. The number of these regulations is great, and some of them are known in halakhic literature by the name of the place where they were first instituted. For instance, the regulations that originated mainly in early thirteenth century Germany are called the Regulations of Shum, the Hebrew acronym for the communities of Speyer, Worms and Mainz, the heads of which participated in the meetings at which these Regulations were made. At about the same time, a variety of regulations were enacted in the great Jewish centre of Spain, called the Regulations of Toledo and Molina. Later we hear of the Regulations of Algier and of Fez in Morocco (see Elon, *op. cit.* 632 ff., 677 ff.; S. Assaf, *The Various Regulations and Customs Relating to the Husband Succeeding*

His Wife, Vol. 1, 79 ff.; Z. Warhaftig, "Joint Property of Husband and Wife," in *Proceedings of the Fourth World Congress on the Science of Judaism* (1967) 189 ff.). Likewise, many of the elements and concepts lying behind the rules on joint property, as crystallized in the decisions of this Court on which we shall dwell later, have also been the basis for the creation of new rules in this field in the case law of the rabbinical courts in Israel, beginning in the early nineteen-forties. (The first indications of the process may be dated further back but this is not the place to expand on the matter.) I am referring to the "compensation" to which a woman is entitled in the event of divorce, in addition to her rights under her *ketubah* (marriage contract), as a result of which she will receive part of the possessions acquired during marriage. In a judgment of the Supreme Rabbinical Court in 1945 (*Collection of Rabbinical Court Appellate Judgments,* ed. Z. Warhaftig (1950) 83) it was held that the award of such compensation was the practice in the rabbinical courts, and a request was voiced indirectly that the woman's share in the property acquired by the husband during marriage, for the purpose of division upon divorce, should also be regulated by means of a *takkanah* of the Chief Rabbinate (*ibid.*, 85), but no action was taken on the request (see M. Elon, *Religious Legislation*, 165 ff.).

See: KATAN *et al.* v. MUNICIPALITY OF HOLON, below.

See: VILOZNI v. SUPREME RABBINICAL COURT, JERUSALEM, *et al.*, p. 103.

2. Custom Determinative in Cases of Doubt

H.C. 442/77

KATAN v. MUNICIPALITY OF HOLON *et al.*

(1978) 32(1) *P.D.* 494, 495, 498

This petition involved the question of whether those participating in a public tender must attach a bank guarantee to their offer.

Elon J.: On the day on which we heard the submissions of counsel, we

notified them of our decision to dismiss the order *nisi* and the interlocutory order, as well as of our decision as to costs....Following are the reasons for our decision.

The petition will be decided in accordance with our answer to the question of whether it was incumbent upon those participating in the tender to attach to their offers a bank guarantee...

According to the respondents, the practice of attaching a guarantee when tendering an offer exists only when the tender is public and not of a minor nature. The petitioners do not contest the existence of this practice, but argue that in the present instance of a minor tender the deposit of a guarantee was also necessary. We accept the fact that a practice may be decisive where there is doubt or uncertainty. That is also basic to the idea embodied in one of the principles of Jewish law relating to custom and usage: "Any rule about which the court is in doubt and the nature of which is not certain, is to be determined by observing and following what the public usually does in the matter" (*Y. Pe'ah* 7:5, 34a; *Y. Ma'aser Sheni* 5:2, 30a; M. Elon, *Jewish Law*, Part 2, 714 and 732). Thus, too, did R. Shlomo ben Shimon Duran decide regarding the interpretation of documents: "Wherever the language of a deed is uncertain, we follow local custom as to how the matter is dealt with" (*Resp. Rashbash* 354).

3. Conditions Determinative of Custom

C.A. 100/49

ESTATE OF MILLER v. MILLER

(1951) 5 *P.D.* 1301, 1305, 1307, 1312-1313

Assaf J.: This is an appeal against a decision of the Tel Aviv District Court charging the appellant, the estate of Meir Joel Miller, to pay the respondent, Mrs. Rivka Miller, a monthly sum of IL. 50 for the duration of her widowhood. The District Court held that in this matter it must decide in accordance with the law customary in the place where the deceased was resident, which in this case is Jewish law. Although the deceased was a British national, and as a result of her marriage to him (on 27 February 1941) the respondent also acquired British nationality, the deceased came to this country in 1934, after having wound up his affairs in England, and

from the day of his arrival until his death (on 12 November 1947) he had not left the country. Whilst still in England he had bought a burial plot for himself and his first wife on the Mount of Olives. In this country he engaged in trade and acquired much wealth. All these facts show, in the opinion of the learned judge who presided, that the deceased was determined to make his permanent home in Israel. Notwithstanding that in his will he directed that his wife should be paid her *ketubah* [i.e. the settlement stipulated in her marriage document] plus an additional IL. 100, the judge charged the estate of the deceased with the widow's maintenance, in accordance with the decided law in *Yoreh De'ah* 93:3:

> The widow is maintained out of the assets of the heirs during widowhood even if it is not so provided in her *ketubah*; and even when (the husband) directed that upon death his widow should not be maintained out of his property, he is not heeded.

Since the deceased was a wealthy man who did not deprive himself or his wife in their domestic life, the learned judge awarded the widow maintenance of IL. 50 a month and also directed that this sum not be reduced by the rent she received from letting part of her apartment.

The principal question facing us is, therefore, whether the widow is to be maintained out of the property of her deceased husband as long as she remains a widow, against the wishes of the heirs, or whether the heirs, or the executor of the husband's estate, can deny her maintenance by payment of her *ketubah*. This question is an old one, dating back to the period of the Second Temple. It is right and proper to trace its course briefly from its origins down to the present time and draw practical conclusions.

From the time of the Crusades, until those expelled from Spain came to this country, there are almost no forms of *ketubot* or *responsa* or other authoritative pronouncements whose provenance is the Land of Israel. The Jewish settlement in this period was very meagre in every respect. In the sixteenth century, however, a number of great scholars in Jerusalem and Safed left behind collections of important *responsa* from which we may gather that even then the custom existed that a widow be maintained out of her husband's property. See for example *Resp. Mabit* 1:295, 312; 2:124; 3:40, 185; and the *responsa* of R. Moshe Galanti 121, who thinks that this was not simply a local usage but a universal practice; this usage persisted amongst Sephardi Jews who until the nineteenth century constituted the vast majority of the Jewish settlement here: see Y.Y. Burla, *Mekor Yisra'el* (Jerusalem 1882); *Resp. Yissah Berakhah* by R. Elyashar, *Even haEzer* 14; and the opinion of Chief Rabbi Ya'akov Me'ir in *Alpert* v. *Alpert*. In Egypt as well — where most practices followed those of this country — it was the custom for the widow to be maintained

out of the heirs' property so long as she did not claim her *ketubah* (see *Resp. Radbaz* III, 455 and the new *Resp. Radbaz* 92 and 501; *Maharikash, Erekh Lehem* to *Even haEzer* 93; *Resp. Ginat Veradim* 4:21; *Nahar Mitzrayim*, 196a, attesting that the custom still obtains).

We may now consider the present situation and the question before us. We live in a period of ingathering of the exiles, and it would be impossible for immigrants from different lands to follow, in this and future generations, the customs of their countries of origin. In these cases of varying customs and decisions, the custom that has always been practiced in Israel must be determined and followed. We must as far as possible harmonize modalities and not allow each to make his own law. Since we have shown (a) that the leading authorities, Alfasi, Maimonides, Rosh, *Tur* and *Shulhan Arukh*, have decided in accordance with the views of Shmu'el and the Galileans [see *M. Ketubot* 4:10] and (b) that down the ages the custom in Israel was also for the widow to be maintained out of the heir's property — we should so order at the present time. For the following reasons, this is not a matter of requiring a minority to accept the practice followed by the majority: (i) the custom of the Sephardi minority is founded in the *halakhah*; (ii) such was the usage in Palestine before the Jewish settlement came to be divided into communities — Sephardi, Ashkenazi, Yemenite and so on; (iii) when Ashkenazim came to settle here in earlier centuries, and during the eighteenth and early nineteenth centuries they were a very small minority as against the Sephardim, and if they were not apprehensive about the majority practice, then we too should have no such apprehension today; (iv) we face tremendous changes in the composition of the population of the country. The Sephardim and the eastern communities who a few years ago comprised only about twenty percent of the population now constitute more than forty per cent and most probably will soon reach fifty per cent or more. Chief Rabbi Uziel is to be commended for his effort to standardise the terms of marriage throughout the country and to ensure that this rule "should become the practice all over the country for all communities, Sephardi and Ashkenazi." In pursuit of this standardisation, he agrees that the Sephardim accept the practice of the Ashkenazim in this matter, but for the reasons set out above, it seems to me that, on the contrary, the Sephardi custom is determinative on this question.

It is still not certain whether it is at all justified to speak of a clear Ashkenazi practice known to all in this matter. A number of conditions exist for establishing a custom and one must examine carefully whether these conditions are met.

In the view of many scholars a custom is only considered settled with respect to something recurring frequently and to which daily recourse is had (see also Rema to *Hoshen Mishpat* 331). In the case before us, one

cannot adduce evidence of arrangements made privately between a widow and heirs for the very reason suggested by Maharam miRotenberg...: "It is no evidence that sometimes orphans give the widow her *ketubah* and pay her off, since she may have acted willingly." Furthermore, do all women know the law that they are not to be paid out against their wishes, and might not their lack of objection be because they thought that such is the law. Evidence may therefore only be brought from the practice of the courts, but here also there are difficulties, since few such cases come to court. In the *Collection of Chief Rabbinate Decisions* published in 1950, not one instance is to be found, whereas cases regarding certain other family matters repeat themselves with some frequency. Moreover, R. Me'ir Posner has written in his *Bet Me'ir* to *Hoshen Mishpat*:

> I have noticed several times in the rabbinical courts that where minor orphans are concerned the widow's *ketubah* has been paid out to be rid of her, and I do not know whether this is a firm practice of long standing or just a chance occurrence.

In any event it is not a daily happening. It may be possible to speak of legal precedents, but not of a firmly established custom. I have heard Chief Rabbi Herzog say that no firm practice on this question exists among Ashkenazim in this country.

In the present matter, the deceased was an exceptionally wealthy man and left behind him a large estate. His sons are grown up and are people of substance. When he married the widow he made no stipulations. It was only in his will that he directed that she should receive her *ketubah* and an additional IL. 100. Even if it be said that he thereby expressed his intention that she should only get this sum and no more, the law as decided by Maimonides and *Shulhan Arukh* is that "even if he directed at his death that his widow should not be maintained out of his property, he is not heeded." Accordingly we concur in the judgment of the District court on this point and order the appellant to pay maintenance to the respondent for the duration of her widowhood.

4. Conflict of Customs as Between Communities

See: ESTATE OF MILLER v. MILLER, p. 98.

5. Custom in Labour Law

See: WOLFSON v. SPINNEYS LTD., Part 11, Labour Law, p. 819.

See: STATE OF ISRAEL v. ESTATE OF A IN BANKRUPTCY *et al.*, Part 11, Labour Law, p. 841.

See: BEN MOSHE v. BEN MOSHE, Part 11, Labour Law, p. 835.

Chapter Three

FOREIGN LAW

1. The Law of the State is the Law

See: ROSENBAUM v. ZEGER *et al.*, Part 10, Commercial Law, p. 794.

H.C. 323/81

VILOZNI v. SUPREME RABBINICAL COURT, JERUSALEM *et al.*

(1982) 36(2) *P.D.* 733, 740-743

In divorce proceedings between the petitioner and the second respondent, the first respondent directed inter alia *that the apartment owned jointly by the spouses should be sold as vacant. The petitioner, who had continued to live in the apartment after his wife had left it because of his violence, submitted that it should be sold as occupied property by virtue of sec. 33(a) of the Tenant's Protection Law (Consolidated Version), 1972.*

Elon J.: In this connection, an interesting and important phenomenon in the judgment of the Supreme Rabbinical Court is noteworthy, one that in part is already to be found in the case law of rabbinical courts and in part makes its first appearance in the matter before us. As emerges from the decision of the Supreme Rabbinical Court, the parties presented to it the legal position arising out of the Tenant's Protection Law (Consolidated Version), and the Court, incorporating the provisions of that Law, held that its decision that the apartment must be treated as vacant was not inconsistent with tenant protection legislation that has been given halakhic force on the basis of usage, because "townspeople may impose penalties for breach of their regulations" (*Baba Batra* 9a).

The problem of the relationship between Jewish law and another legal system within which it operates is a long standing one, and this is not the occasion to discuss it at length (see M. Elon, *Jewish Law* (2nd ed.) 48 ff.), but a few brief words are appropriate in order to shed a little light on

the subject of the case law of the rabbinical courts and its relation to the general legal system...

The well-known principle regarding this broad subject is that "the law of the state is the law," a rule formulated by the *Amora* Samuel in the third century in Babylon (*Nedarim* 28a; *Gittin* 10b; *Baba Kamma* 113a-b; *Baba Batra* 54b-55a). Opinion has from the very outset been divided over the scope of application of the principle and what matters it embraces, but again, here is not the place to deal with that (see S. Shilo, *Dina deMalkhuta Dina*, (1974); Elon, *op. cit.* 51 ff.). The rabbinical courts have also from time to time, when delivering judgment, had recourse to this principle so as to give effect to different kinds of legal transactions which would not be valid under Jewish law (matters dealt with include bank guarantees which are flawed as *asmakhta* — an invalid penal clause — the legal capacity of an artificial legal person, the recognition of which is doubtful in original Jewish law, and land registration). There are some who would even deny the validity of a legal transaction, although it complies with the provisions of Jewish law, as long as it does not abide by the requirements of the general law (for example, in the matter of land registration where under Jewish law an agreement alone is sufficient). When the principle of *dina demalkhuta dina* operates, a rule of the general legal system is given binding force although the latter does not become part of Jewish law.

There are, however, occasions when Jewish law not only recognizes the binding effect of a rule of some other legal system, but incorporates it into its own system. That is done by means of the legal source of custom. When the public acts in accordance with some legal norm, that norm is in certain circumstances recognised as part of the Jewish legal system, and it may be valid even if it is contrary to a particular regulation of Jewish civil law. Just as two individuals may, in civil matters, contract out of Biblical law, the public may all the more so stipulate — by way of custom — contrary to a rule prevailing in monetary law (see for example *Resp. Rashdam*, *Hoshen Mishpat* 280). This principle finds expression in the dictum "custom sets *halakhah* aside" (*Y. Baba Metzia* 7:1, 11b). I have dealt with this in detail elsewhere with regard to the acceptance of the law relating to joint property (see *Azugi* v. *Azugi*, p. 15-17; Elon, *op. cit.* 732 ff.). In Jewish law this legal source of custom (Elon, *op. cit.* 211 ff.) is given the technical name of *situmta* ("seal") because of the precedent in the *Talmud* regarding the purchase of wine by placing a seal on the container: it was in this connection that the creative force of custom was developed and explained (*Baba Metzia* 74a). By means of custom, different areas of Jewish law underwent considerable development, particularly the laws of acquisition and of obligation (see *Novellae Rashba* to *Baba Metzia* 74a; *Hoshen Mishpat* 201:1-2; Elon, *op. cit.* 713 ff., 739 ff.). The rabbinical

courts make extensive use of this legal source of custom, generally called *din situmta*, in order to absorb a variety of principles and legal rules from the general legal system...

Jewish law possesses a special means, in addition to the creative activity of the courts, and that is legislation enacted directly by the Jewish community enjoying a minimum of internal autonomy, or by its representatives (in the *Talmud* and subsequently, these representatives are called *shivah tovei ha'ir* (literally: the seven good citizens) or by various other names in the different centres of the Diaspora). The first signs of such legislation are found in the *Tosefta* and the *Talmud* in diverse areas of social and commercial interest. "The townspeople may make regulations governing the price of wheat and wine, measures and wages" (*T. Baba Metzia* 11:23). In the *Talmud* (*Baba Batra* 8b- 9a) the formula is that "townspeople may impose penalties for breach of their regulations" — *masi'in al kitzatan*... In the course of time the scope of communal legislative activity was extended to a number of different areas of civil, criminal and public law, in particular from the tenth century, when the power of the communities in various parts of the world began to increase. This legislation has since been called *takkanot hakahal* (communal regulations). In the long history of Jewish law, various rules and restrictions were formulated governing the enactment of these *takkanot*, the areas in which they were enacted, (thus for example none were made in the rules relating to religion and ritual observance), their mode of interpretation and the like. These *takkanot* (regulations) greatly enriched the legal system and became a substantial part thereof (see further Elon, *op. cit.* 558 ff.).

A special, fundamental character attaches to the manner of establishing the relationship between the Jewish legal system and the general legal system of Israel according to the principle of *masi'in al kitzatan*. Under this principle, various laws in the area of civil, criminal and public law of the general legal system may actually become part and parcel of the Jewish legal system — in the broad sense of this concept — and not merely recognized by it, as was the case under *dina demalkhuta dina*, nor simply absorbed by it as was the case with custom. As mentioned above, the rabbinical courts frequently employ the principle of *dina demalkhuta dina* or *situmta* (custom) in order to render valid or to incorporate some law of the general legal system. The present judgment constitutes one of the few cases — perhaps the only one, although this requires further examination — in which the provisions of tenant protection legislation are recognized as part of the case law of the rabbinical courts not merely by virtue of custom but also under *masi'in al kitzatan*, and its employment by the Supreme Rabbinical Court is of far-reaching and major importance. In this way, it seems, the three honourable judges of the Supreme Rabbinical

Court have continued along the path cleared by their predecessor, R. Ovadyah Hadayah, who in a detailed *responsum* (*Resp. Yaskil Avdi* 6, *Hoshen Mishpat* 8) in 1954 dealt with the tenant protection laws from the viewpoint of Jewish law:

> Here it is not a question of foreign law but law which the Government enacts for the benefit of the country's inhabitants, as in every other state. There is a systematic discussion in *Baba Batra* (8b): the townspeople may impose penalties for breach of their regulations....This is a matter of providing regulation, since the majority or the leading citizens (*tovei ha'ir*) can then certainly enact regulations and interdictions which are enforceable against the minority....And it is obvious that the Members of Knesset in Israel, elected from amongst the entire population, are not inferior to "the seven leading citizens" who could promulgate important *takkanot*, even when that entailed an advantage to some and a disadvantage to others, all for the sake of regulating the situation. The law relating to apartments is not any the less in this regard, intended as it is for the benefit of people in want of dwellings, particularly at a time of increased immigration, when large numbers are in that situation. Failing regulation of general benefit, very many would have to remain in the streets for lack of apartments and because of high rents which not all are able to pay. Hence it was found proper to make such regulations for the general benefit.

We may now return to the case before us. The apartment of the spouses is their joint property, and but for the Tenant's Protection Law (Consolidated Version) would certainly have to be treated as being vacant, even if only one of them in fact lived there. That is the rule under Jewish law as stated in the judgment of the Supreme Rabbinical Court: joint property which is not severable is dealt with according to the rule *gud o agud,* i.e. one joint owner may offer his co-owner one of the following alternatives — "either you buy the property and pay me half its value or I will buy it and pay you half its value" (*Baba Batra* 13a; *M.T. Shekhenim* 1:2; *Hoshen Mishpat* 171:6; on valuation of the property, see *Magid Mishneh* to *M.T., loc. cit.* and *Rema* on *Hoshen Mishpat, loc. cit.*). However, as stated in the above judgment, the rabbinical courts recognise the binding force of the tenant protection legislation by virtue of the Jewish legal system itself, and for that reason the value of the apartment is determined not only in accordance with the joint ownership attaching to it but also having regard to the accommodation it provides and its occupancy. In the view of the Rabbinical Court, the apartment is to be deemed unoccupied by the spouse who does not reside there only if he or she has left of his or her own free will; but where one spouse has been compelled to leave

involuntarily because of the violent behavior of the other, the former is deemed to be still in constructive occupation, and the value of the apartment is therefore to be divided between the spouses as if it were vacant. The decision on the nature of the abandonment of the apartment by one of the spouses — whether it was voluntary or involuntary — rests with the court as it deems right and proper in the circumstances of the case. In practice, therefore, the Rabbinical Court has dealt with the matter according to the Tenant's Protection Law (Consolidated Version) as well, because it considered itself bound to do so under the Jewish legal system — except that it construed the provisions of that Law such that it was right and proper to value the apartment as vacant and not occupied by the husband alone.

T.A. 342/81

NAGAR v. ATTORNEY GENERAL *et al.*

(1973) 1 *P.M.* 232, 253

These proceedings involved a dispute between divorced parents over the proper educational framework for their two minor children — whether it should be a secular school, as the mother desired, or a religious school, as the father desired. The parties had been divorced in a rabbinical court under an agreement which provided that "all disputes that might occur between the parties regarding their children after divorce shall fall within the jurisdiction of the rabbinical court," but the agreement itself was not approved by the court and did not acquire the force of a judgment. Although under the agreement the children remained in the custody of the mother, the father petitioned the Rabbinical Court to require their removal from the secular school that they were attending and their transfer to a religious school. His action succeeded, and judgment was confirmed by the Supreme Rabbinical Court. The children themselves refused to transfer to a religious school and as a result, remained for a lengthy period without schooling. The Attorney-General and the mother applied to the District Court for an order that the children be sent to a secular school. The order was made in the absence of the father. He now asks for the decision to be set aside on the ground that the District Court had no authority to intervene in the matter, the Rabbinical Court having already given a decision thereon with all the parties consenting to jurisdiction.

Porat J.: I am ready, with respect, to understand the position of the judges of the Rabbinical court who take the view that they have been appointed to adjudicate according to religious law, to which and to which alone they owe fidelity. I am prepared to believe that such a judge will do everything

possible to adhere to religious law since any other law will be contrary to his conscience and perhaps his faith (particularly in a case such as this where the mother asks that her children be sent to and remain in a "secular" school).

The above is not mere supposition, for it has support and halakhic foundation in the decision of Hazon Ish in his *Hoshen Mishpat, Sanhedrin*, 15:4 at the end (folio 184b):

> It makes no difference whether he came before non-Jews or Jews who adjudicate according to fabricated law; and the matter is still more disgraceful when the law of the *Torah* has been exchanged for a law of vanity. If people agree to that, their agreement is meaningless, and if they enforce it their law is predatory and oppressive and they rebel against the Law of Moses.

These observations were cited with approval by R. S. Miron in his article, "The Status of the Rabbinical Courts in Israel according to the *Halakhah*" in *Proceedings of the 22nd National Conference on the Oral Law* (1981) 94-95.

Having regard to what Hazon Ish has written and the article by R. Miron, it is more than clear and explicit to me that the outstanding force of the rabbinical court, as compared to any other tribunal, is *inter alia* its adhesion to the *halakhah* and to that alone. The moment a rabbinical court decides other than in accordance with the *halakhah* it loses its authority even under the *halakhah* — any "secular" limitation to halakhic authority and religious law is null and void from the viewpoint of the *halakhah* (see Miron, *op. cit.* 98).

Chapter Four

PRECEDENT

1. The Principle of Binding Precedent

C.A. 245/60

AMERICAN CYANAMID COMPANY v. S.P.A. *et al.*

(1962) 16 *P.D.* 788, 799

The appellant company, which manufactures pharmaceutical goods, brought an action against the respondent companies for breach of a patent registered in Israel. The defence was that the claim in the patent was ambiguous and did not disclose any invention; the patent was therefore null and void. The appellant then made application under the Patents Ordinance for amendment of the particulars of the patent, but the District Court dismissed the application.

Cohn J.: I am not prepared to dispute the presumption that the English courts know how to interpret English law. This presumption obligates the courts in Israel to relate seriously and respectfully to the case law of the English courts in all that concerns the English Common law that obtains in Israel, and the interpretation of laws taken or copied from English sources. English precedents, however, have no binding force — at least not those decided after the Establishment of the State. The question facing an Israeli court with regard to such a precedent is not whether there appears to be "strong reason" for departing from it, since otherwise we would follow it as if it were a mountain towering over us; rather, the Israeli court must ask itself in each case whether the English precedent is "just in its own eyes" (in the words of Rosh to *Sanhedrin* 4:6), that is, whether it would have decided likewise had the matter originally come before it. From the positive rule that every court, apart from the Supreme Court itself, is bound by the precedents of the Supreme Court, one may infer the negative rule that a court is not bound by the precedent of any other court; and no court fulfills its duty to judge by depending on a precedent

by which it is not bound and which on its merits it does not consider right.

F.H. 39/75, 41/75

ISRAEL PORTS AUTHORITY v. ARARAT INS. CO. LTD. *et al.*

(1977) 31(1) *P.D.* 533, 536-537, 545

The subject of this Further Hearing is the date on which damages in tort are to be calculated.

Cohn J.: Sec. 33(b) of the Courts Law provides that the Supreme Court is not bound by its own judgments, although they bind every other court. Clearly the Supreme Court may diverge from its own precedents, even set them aside — and to that end no legislative act is needed. However, the practice of this Court not to exercise this authority lightly has implanted in the minds of observers and pleaders the (mistaken) impression, as it were, that the Supreme Court generally regards itself bound by its own precedents. This impression has been strengthened not a little by the *dicta* of judges who have desired to deviate from, or set aside precedents but have been restrained from doing so...

I, too, have had occasion to express the view that there are matters in respect of which, notwithstanding the authority we possess under the law, we will not deviate from decided law even when it does not seem correct to us. Among these matters are those precedents which determine the jurisdiction of tribunals or procedure: in such and like cases decisive importance attaches to stability and certainty, without which delay of justice is unavoidable. In other words, where some mishap is likely to be caused by departing from a precedent and the only benefit of doing so is academic, it is preferable to follow the ploughed furrow of the precedent and avoid the mishap, even if the purity of the law is thereby affected.

This is not the case where a wrong is likely to be caused by not diverging from a precedent or by not setting it aside. When the Supreme Court sees that a previously decided rule may lead to injustice, either because circumstances have changed or because the rule seems to the judges mistaken from the outset, not only may it disregard it but, in my opinion, it is obliged to do so. The Supreme Court is charged with judging justly in accordance with the law, and it will not be fulfilling its duty if it does not exercise the powers conferred upon it by the law to decide with justice regardless of any precedent of its own.

These observations are not addressed to formal-technical matters such as procedure and questions of jurisdiction, but to substantive matters, where the question is not how we arrive at the remedy to be given but what remedy is due. When the question involves the determination of the substantive rights and duties of the litigants appearing before the Supreme Court, the legislature has revealed its intention as expressed by the first President of this Court: as between truth and stability, truth is to be preferred.

Were I required to set for myself a yardstick when or when not to diverge from a decided rule in substantive matters, I would be happy to adopt the directives of Rosh, according to which the person deciding a case must immerse himself in the judgments of his predecessors and search out whether they are equitable in his eyes; and if —

> They are not equitable in his eyes and he brings evidence for his own views which are acceptable to his contemporaries — Jepthah in his generation is like Samuel in his; there is only the judge who lives at the time, and he may depart from the views of his predecessors since anything that is not expounded in the *Talmud* redacted by Ravina and Rav Ashi (read: legislation) may be departed from, even to the extent of differing from the *Ge'onim* (*Piskei haRosh*, *Sanhedrin*, *IV*, 6, 118a).

Some things may be "equitable" for one generation and not for another, and the task is to determine whether they are "equitable" for one's own generation. Since Jepthah in his generation is like Samuel in his (*Rosh Hashanah* 25b), one should not refrain from setting aside the decisions of one's predecessors simply because they were greater and wiser and one is "the most worthless" (*ibid.*). Litigants have only the judges of their own time. Hence the question facing the judge (the Supreme Court) is not only what is the decided law; the question is mainly whether the decided law is "equitable," just and apposite to contemporary requirements. Only when this principal question is answered affirmatively can decided law be binding.

It is simply our good fortune that the vast majority of the precedents of this Court have been and will remain "equitable" in our eyes and we follow them with good will...

Kahan J.: My learned friend Cohn J. has cited Rosh....As Prof. M. Elon has explained in his treatise on *Jewish Law*, 232-36, the *halakhah* has adopted the principle of *hilkhata kebatrai*, which means that where a difference of opinion exists between the earlier sages of the post-Talmudic period and later sages, the law is according to the latter. After citing from Rosh, the learned author writes:

> Thus was the leading principle of decision-making in Jewish law founded and adopted — *halakhah kebatrai*. This principle is not to be understood as any diminution whatsoever of the reverence which the later paid to the earlier generations; this reverence also moved the later authority to contemplate his own decisions with gravity, awe and humility since he knew that he was dealing with a problem already dealt with by the early authorities; but having reached his own conclusions, the law would be decided according to his own views and not according to those of the early authorities.

It should be pointed out that this power of the Sages of the *halakhah* is strongly related to the belief that the *halakhah* was given over to decision by the Sages and that the Giver of the *Torah* agreed, as it were, to their judgment, as illustrated in the deeply significant story of Aknai and his oven (*Baba Metzia* 59a-b; see also M. Silberg, *Principia Talmudica*, 68-70). The powers of the Sages of the *halakhah* may be said to be both judicial and legislative, subject to the rules laid down until the completion of the *Talmud* (see Elon, *op. cit.* 225-30). It is impossible to compare this extensive authority with the powers of secular judges who work alongside the legislative branch, in a constitutional system based on the separation of powers.

C.A. 682/81

FREED v. FREED

(1982) 36(2) *P.D.* 695, 697

The District Court dismissed in limine *the claim of the appellant wife for maintenance from the respondent husband in view of a decision of the District Rabbinical Court that she was a "rebellious" wife, a decision which was contrary to a previous decision of the Supreme Rabbinical Court of Appeals.*

Landau J.: The rule *hilkhata kebatrai* upon which the judge relied is not involved here because that rule deals with the right and power of each generation of authorities of the *halakhah* to diverge from the judgments given in previous generations (see M. Elon, *Jewish Law*, (2nd ed.) 232 ff.). This has nothing to do with the differences of opinion that may arise in the various courts that have given judgment on an issue. Indeed, Jewish law tells us that every court may and in fact must decide "as it views the matter" and if not convinced of the correctness of the judgments of other judges, is not bound by their decisions (Elon, *op. cit.* 802-4).

2. Care Required When Relying on Precedent

C.A. 4/67

BRITISH AND COLONIAL ESTATES LTD. v. TRABLUS

(1967) 21(1) *P.D.* 463, 470-471

The District Court approved the decision of a Rent Tribunal holding that a roof is part of rented premises and that the Tribunal therefore had jurisdiction to permit the erection of a television antenna thereon.

Kister J.: As to the question of what is or is not included in a sale or rental, many explanations are found in halakhic literature and these are apt in the present case. The method of Maimonides and *Shulhan Arukh*, as we know, is casuistic. Yet Maimonides, after dealing in chapters 5 and 6 of *M.T. Mekhira* with the question of what is or is not included in a sale of immovable property, when the matter is not made explicit by the parties, writes (*ibid.* 16:7 and 8):

> 7. These matters arise only where there is no general practice...
>
> 8. It is a leading rule in all negotiations that one has regard to the terms used locally and to general local practice, but where no practice is known and no special terminology employed, some using one term and some another, we proceed in the manner explained by the Sages.

Thus also it is decided in *Hoshen Mishpat* 215 and elsewhere.

Apart from general practice, terminology and circumstances, there are other basic rules for appraising the intention of the parties, including the amount due to be paid, but there is no need for me to enlarge on that.

As for the use of precedents and the decisions contained in the *Responsa* and halakhic literature with respect to a particular case (as distinct from explanations of the bases of law cited in the *Responsa*), I will confine myself to citing the incisive observations of R. Yishayahu Bassan in a *responsum* published in *Resp. Pahad Yitzhak*, 1:328: "Not every one is privileged to learn from the leading *Responsa*...and it is well known that the law changes with the slightest variations in the transaction in question."

Chapter Five

CIRCUMVENTION AND FICTION

1. Avoidance of Statutory Law and Legal Fiction

C.A. 34/61

VADIYAH v. DIRECTOR OF LAND APPRECIATION TAX

(1961) *P.D.* 2255, 2257-2258

This is an appeal against a decision of the Haifa Appeals Committee for Land Appreciation Tax which by a majority dismissed the appeal of the appellant to an order imposing land appreciation tax on a sale of real estate effected by means of a long lease for 999 years.

Silberg J.: In this judgment I wish to change the usual order and deal first in the abstract with the main question that is before us.

In legal literature it is common to distinguish between evasion of tax and avoidance of tax. The first is always prohibited whilst the second is sometimes allowed. However, after delving into the subject we shall see that conceptually and substantively there is no difference between them. Both evasion and avoidance — as long as they do not involve the deception of the authorities with respect to the facts — exploit one legal norm as a shield and defence against another norm...and the question is, how do they differ...?

Jewish law as well contains much material on the question of when evasion of the law will be effective and when it will not (cf. R. Tarfon's betrothal of hundreds of women: *Y. Yevamot* 4:12; the evasion of the second tithe: *Ma'aser Sheni* 4:5; *Baba Metzia* 45b-46a; the Bet Horon gift: *Nedarim* 48a; *Y. Nedarim* 39b; the evasion of interest *Baba Metzia* 62b; *M.T. Malveh veLoveh* 5:15, etc.).

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C.A. 265/67

MEFI LTD. v. ASSESSMENT OFFICER FOR LARGE ENTERPRISES

MAIN T.A. 72/60

The appellant company was set up by ten individuals who were partners in a certain business. Subsequently the company acquired the shares of nine of the partners in the partnership, giving it an eighty-eight percent stake therein, whilst the share of the tenth partner was transferred to another company which had been acquired by the appellant a few months before. This other company had ceased trading for some time and was left with a trading loss exceeding a quarter of a million lira. The appellant company tried to set off this loss against the profit it had derived from its participation in the partnership. The assessment officer rejected the claim, viewing the whole transaction as fictitious.

Silberg P.: The present appeal involves an important legal problem — evasion of the law in the classic Jewish sense, i.e. the creation of a special situation which enables the provisions of one law to be bypassed by means of another law. When and in what circumstances is such evasion to be regarded as "fictitious" in the sense of sec. 86 of the Income Tax Ordinance?

Formulation of the question in this manner incorporates the proposition that, but for sec. 86, the transaction could not, on general grounds, be disqualified for its fictitious nature. A transaction protected by statutory provision cannot simply be illegal. On the other hand, if indeed the transaction is fictitious, it fails not because of its fictitiousness but because of its illegality, since the fact that it is fictitious removes from it the garb of legality and uncovers its illegal core...

The position taken by Jewish law on the circumvention of a law by means of the law itself is very liberal. There were many historical reasons for that, the main one being the desire to preserve the flexibility and vitality of the ancient law and render it a receptacle for absorbing changing ways of life. For example, we can cite the various forms of evasion of the prohibition against taking interest by transforming a loan transaction into one of double sale (*M. Baba Metzia* 5), or by transforming the interest into profits by means of a *heter iska* ("transaction permit" allowing a lender to take interest by regarding him as a partner of the borrower); or the circumvention of the remission of debts in the sabbatical year by means of the well-known *takkanah* of *prozbul*, as a result of which the collection of debts is effected, as it were, not by the creditor (who is under the obligation to remit the debt) but by the court (*Gittin* 36a-b; cf. Rashi in *Makkot* 3b, s.v. *moser shtarotav* — "he hands over his promissory notes"; and see *M.T. Shemittah ve Yovel* 9:15); or the evasive effect of the abundant beneficence

of the priestly *Tannah*, R. Tarfon, who betrothed three hundred women in Ashkelon so that they could partake of *terumah* (priestly tithe on produce) in a period of famine (*Y. Yevamot* 4:12); or the evasion of the obligation of the additional fifth payable on redeeming the second tithe by giving the money or produce to another so that the redeemer is a "stranger" and not the owner of the produce (*M. Ma'aser Sheni* 4:4-5).

Indeed on examining the laws relating to the tithe we find, to our amazement, two evasions of two different laws, one permitted and the other not. The first of these laws is that a person who redeems his own second tithe in order to go up to Jerusalem and consume it there must add a fifth of its value (*Lev.* 27:31) but if it is not the owner of the produce but someone else who redeems the second tithe, he redeems it at its value without any addition. This rule served as a basis for the "good advice" regarding evasion which the *Mishnah* proffers to the owner of the produce:

> One may contrive (to redeem without adding a fifth) the second tithe. How? One may say to one's son or daughter, one's Hebrew servant or maid servant, "Take this money and redeem this second tithe for yourself" (*M. Ma'aser Sheni* 4:4).

> A man who has no money, standing on his threshing floor, may say to his neighbour [one for whom he has affection and who knows that it is only being done to be freed from the fifth — Rashi to *Baba Metzia* 45b s.v. *omer*]: "I give this produce to you as a gift" and then "It is to be exchanged for money which I have at home" (*M. Ma'aser Sheni* 4:5).

Here we have a fictitious transfer of ownership of money or produce, with the object of the redeemer being a "stranger", exempting the true owner from the fifth. This evasion is "recommended" as it were by the *Mishnah* and no fraud or other defect attaches to it.

The second form of evasion which it is possible but forbidden to employ to by-pass the actual duty of separating out the tithe is treated differently. The law is that *tevel* (produce potentially liable to the priestly and levitical dues but not yet separated) is not liable to tithe until it is taken into the house (through the front door), for it is written, "I have brought away the hallowed things out of my house" (*Deut.* 26:13) (*Baba Metzia* 87b-88a). According to Rashi (*ad loc.*), "into the house" means through the front door, and not by way of the roof or the backyard. Thus a person is given the very simple option of freeing himself from the obligation of separating the tithe by bringing it into his house, not through the front door but through the backyard or over the roof. May one employ this evasion? The answer is decisively no, for this method of evasion is not looked upon kindly by the rabbis. The *Gemara* tells us:

> Observe how the earlier generations differed from the later! The earlier generations would bring in their produce by way of the *traksamon* [a paved path giving entrance — Rashi *ad loc.*] in order to make it liable to the tithe; the later generations bring in their produce by way of the roofs and through enclosures in order to release it from the tithe. R. Yanai stated that *tevel* is not liable to the tithe until it is taken into the house [through the front door] (*Gittin* 81a).

What is the difference between the two cases? Why may certain evasive action be taken to be released from the duty of the fifth on redemption of the second tithe, but it is forbidden to take similar evasive action to release oneself from the duty itself of separating tithes? Does the matter depend on the quantity of the "circumvented" tithe?

There is only one answer. In the case of redemption of the second tithe the *purpose* of the evasion is indeed to be released from the fifth, but the *action* taken and its *effect* is much wider and more profound, since it involves the actual transfer of ownership, in every respect, of the money or produce itself to the other person. If anything should be lacking in the content or scope of the transfer, the redeemer would not be a "stranger" and the evasion would not achieve its purpose. With regard to bringing in the produce over the roof or through the enclosures, the actual evasive act is an act devoid of content which, beyond the release from the tithe alone, has no other implications. It is therefore effective in releasing from tithe as stated in the *Torah* but it is forbidden, precisely because of its effectiveness, since were it not for this effectiveness there would be no harm in it and no reason to forbid it.

This is exactly the distinction made above, except that the modern secular legislator, preferring to deny validity instead of imposing a prohibition, stipulates that a fictitious transaction should be treated as if it never existed and it should not merit recognition by the tax authorities. This is "the thin line" to which I alluded above.

It is not superfluous to note here the words of Maharit Tzahalon in his *Responsa* 147, which manifest the negative approach of Jewish law to acts of evasion, the sole purpose of which is to reduce the amount of tax due to the community.

2. Fiction Limited to Particular Cases

H.C. 382/67

ROSENBLIT v. LAND REGISTRAR...TEL AVIV *et al.*

(1968) 22(1) *P.D.* 589, 596-597

The petitioner paid additional tax under sec. 9(a) of the Land Appreciation Tax Law, 1963, prior to the time specified in sec. 65 of the Collective Housing Law, calculated on the value of the land concerned. He claimed that he was thus exempt from transfer fees in accordance with sec. 56 of the Law. The Registrar denied the claim.

Kister J.: In *C.A.* 139/65, at 288-289, Witkon J. had the following to say regarding the passage "if the real estate right had been sold in a manner requiring registration in the Land Registry" at the end of sec. 9a(1):

> The phrase "if that...had been" creates a fiction. In actual fact the real estate right is not sold in a manner requiring registration and the fiction is only intended to provide a yard-stick for determining the additional tax.

I agree with Witkon J, but when the term "fiction" is used, the only meaning it can have is that when a contract is made, tax is to be levied at the same rate as if it were a transfer, but to the extent that a real transfer is legally necessary, the contract of sale is not to be regarded as a substitute for an actual transfer. In Jewish law as well, we find fictions restricted to particular matters. "Two things are not in a man's ownership and yet Scripture treated them as though they were in his ownership. These are a pit [dug] in a public place and leaven from midday onwards" (*Pesahim* 6b). Rashi explains *ad loc.* that "in his ownership" signifies that a man becomes liable therefore.

The consequence of the phrase "if that...had been" is that when an agreement is made within the terms of sec. 51 of the Land Appreciation Tax Law, the person acquiring the land is liable to additional tax under sec. 9, even if no transfer was effected, at the rate levied on an actual transfer of property.

Chapter Six

LEGAL COMPLEXITY

1. "Half Slave and Half Freeman"

C.A. 279/79
TZEDAKAH v. MUSKAT *et al.*
(1981) 35(4) *P.D.* 374, 377

The District Court empowered the respondents as executors of a deceased's estate to sell an apartment subject to its approval. When the Court refused to approve a sale to the appellant, he appealed to the Supreme Court without obtaining leave to do so.

Tirkel J.: Counsel for the appellant...further argued that sec. 152 of the Succession Law does not apply here since only one half of the ownership of the apartment belonged to the estate, the other half belonging to the widow, but this argument cannot avail him either. The fact that half of the apartment did not belong to the deceased's estate can at most serve as grounds for the argument that the District Court was not competent to give any directions regarding that half in the proceedings before it, and therefore its decision in respect of that half is null and void. That, however, does not exclude its decision — insofar as the one half belonging to the estate is concerned — from the aegis of sec. 152 of the Succession Law. A complex legal situation of the kind of "half slave and half free" (*Gittin* 41a ff.) indeed gives rise to difficulties and problems but the complexity itself is not sufficient to exclude each part from the application of the relevant law.

Chapter Seven

MORALITY

1. Immoral Contracts

See: Part 7, Torts, p. 515, and Part 8, Obligations, p. 633.

2. Moral Considerations in Medical Experiments

H.C. 30/82

MA'YAN *et al.* v. DIRECTOR-GENERAL OF MINISTRY OF HEALTH

(1982) 36(3) *P.D.* 477, 482

The first petitioner suffers from lung cancer and no longer responds to conventional treatment. As the doctors treating him were not able to suggest any effective treatment, he approached another doctor engaged in cancer research who had developed a new medical preparation with which he was prepared to treat the petitioner. The hospital doctors were not, however, ready to have recourse to this preparation, and the respondent refused to approve its use. Hence this petition.

Netanyahu J.: Consequent to the Foundations of Law Act, 1980, counsel for the petitioners referred us to Jewish law and the ***halakhah***. Since binding law exists on the subject, there is no occasion to refer us to Jewish law, and if I do indeed make reference to that law, it is because we are aware not only of the legal aspect of the problem but also its human, moral and ethical aspects, and we show respect for the views of our Sages who have already considered this fundamental problem of the loss of life when there is a chance, though no certainty, that by applying some dangerous treatment a sick person will be restored to health and be kept alive.

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regard: "The law here is really a matter of life and death and one must be very cautious in the application of the legal sources...and make thorough inquiry." He goes on to say: "If some drug may possibly cure the patient completely, we need have no fear about risking what little life he has left...since he will certainly die, we put that certainty aside and seize upon the possibility of cure" but "in any event, the doctor may not act facilely, he must be very cautious and consult with the local specialists, and act upon their majority opinion, that is a substantial...majority."

Elon J. has also written ("*Halakhah* and Modern Medicine" 4 *Molad* (1971-72) 231, 235) that "the *halakhah* affirms the principle itself but demands great caution and serious thought, and certainly also knowledge and thorough, punctilious preparatory work. Account must equally be taken of the success rate when making this difficult and fateful decision."

Thus, under the *halakhah* as well this fateful decision is not left to the exclusive discretion of the doctor who is treating the sick person; he must not only be very careful but must also consult with the leading contemporary specialists. In our days, who, if not the respondent himself, fills the role of specialist and has the task of examining and weighing the prospects of success as against the danger, after consultation with the experts? The result would be the same, even were we to decide in accordance with the *halakhah*.

3. The Duty to Rescue and Self-Jeopardy

See: ATTORNEY-GENERAL v. GREENWALD, Part 6, Penal Law, p. 443.

S.F. 26/82

ATTORNEY GENERAL *et al.* v. TZIVIDALI *et al.*

(1983) 1 *P.M.* 225, 230-231

The second petitioner has a three-year old daughter suffering from an incurable disease. The child is likely to die very soon and perhaps the only cure for her is to transplant bone marrow from her nine-year old sister. The transplant process is almost harmless to the donor but may hasten the death of the donee in the event of it not being successful. The petition asks that the Court order the doctors who had recommended a transplant to carry it out.

Tal J.: I have also given thought to the position of the *halakhah* in a case such as this. We are commanded by the *Torah* to save a person in a perilous situation. "Whence do we know that a person who sees another drowning in a river, or attacked by wild animals or beset by brigands, must save him? It is written: 'Thou shalt not stand idly by the blood of thy neighbour' (*Lev.* 19:16)" (*Torat Kohanim*, *Kedoshim* 4:8; *Sanhedrin* 73b). Apart from the negative command not to stand idly by, there is also a positive command to rescue one who is in danger, derived from the duty to restore something that another has lost: "And thou shalt restore it to him" (*Deut.* 22:2), which the rabbis construed as meaning that even his life you must restore to him (*Sifre ad loc.* cited in *Sanhedrin loc. cit.* and *Baba Kamma* 81b). Thus also is the law stated by Maimonides, *M.T. Rotze'ah* 1:14; and *Hoshen Mishpat* 426). The same applies to rescue from a possible peril (Novellae of R. Nissim to *Sanhedrin loc. cit.*) even if that involves discomfort to the rescuer (*Magen Avraham* 156:2). Since the obligation to rescue is a positive commandment, it is clear that according to the *halakhah* the rescuer may be compelled to act on pain of death — "until his soul departs" (*Ketubot* 96a-b) and not to follow the manner of Sodom (*Baba Batra* 12b), for this is the case with all positive commandments.

The authorities are, however, divided over whether the rescuer must place himself in danger or potential danger in order to save his neighbour even from certain peril (*Hagahot Maimuni* to *M.T. loc. cit.*, citing the affirmative view of the *Jerusalem Talmud*). As against this, there is the view that to go so far is an act of piety but is not obligatory (*Resp. Radbaz* 3:2052, and see more extensively the *Talmudic Encyclopedia*, s.v. *Hatzalat Nefashot*; *Shulhan Arukh Ba'al haTanya*, *Hilkhot Nizkei Guf*, 7).

In the present case, there is no occasion, even under the *halakhah*, to compel the young sister to donate bone marrow. First of all, since she has not reached majority she is not bound at all by the commandments. Secondly, since the bone marrow will be taken under general anaesthetic, she faces potential danger, even though it is remote, and those who think that no obligation to rescue arises where there is potential danger do not differentiate between immediate and remote danger. (One of the reasons given by Radbaz citing an actual case that he knew of is that potential remote risk may become a real risk.)

4. The Duty to Rescue Despite Protest

Cr.C. (Haifa) 361/84
STATE OF ISRAEL v. KORTAM *et al.*
(1986) 1 *P.M.* 45, 54

This case turned on an alleged invasion of privacy by means of an operation, in order indeed to save his life, to extract two plastic bags of heroin that the defendant had swallowed.

Zehavi J.: Since there is nothing in our legislation or case law or in anything else that deals directly with the situation where a rational adult opposes an operation on his body that will save his life, counsel for prosecution proposed that use be made of sec. 1 of the Foundations of Law Act of 1980 and that the matter be decided in the light of "the principles of...Israel's heritage." To this end he cited a leading authority of his age, Ya'akov Emden (1697-1776), from his *Mor uKetziah* on *Orah Hayim*:

> Where a person is obviously sick and the physician has clear and certain knowledge of the sickness and employs proven medicines, one may always compel the sick person to undergo treatment when he refuses, if the danger is apparent, and permit the physician to proceed, e.g. to operate...and even to amputate a limb (in order to save him from death)....One may do all such things against his wishes in order to save his life...and he is not heeded if he does not wish to undergo the pain and chooses to die. A complete limb may be amputated if necessary to save him from death. Everything needed is to be done to preserve the life of a sick person even against his will. All are to be enjoined to act thus, because no one may stand by and allow a person to die. The matter does not depend on the wishes of the sick person and he is not at liberty to abandon his life.

This principle that a person may save another's life although the latter is opposed and desires to commit suicide is to be found indirectly in sec. 5(c) of the Unjust Enrichment Law, 1979, which, although it provides that a beneficiary need not indemnify or compensate any one who preserves his property, nevertheless creates an exception where "life, physical integrity or health" is involved and that in spite of any objection of the beneficiary to the act of "rescue."

Cr.A. 480/85, 527/85

KORTAM v. STATE OF ISRAEL

(1986) 40(3) *P.D.* 673, 685, 696, 697

The appellant was convicted in the District Court of illegal posession of narcotics, in violation of sec. 7 of the Dangerous Drugs Ordinance [New Version], 1973. The appeal turned mainly on the question of whether an object which was discovered in the course of an operation conducted by a doctor without the patient's consent and against his will but with the aim of saving his life, might constitute admissible evidence in court in the absence of the consent of that person.

Bach J.: In this context, the judge also mentions Jewish law, which views the need to protect life as a supreme value, and which has given this value expression in the rules relating to *pikuah nefesh* — the obligation to save life.

The words of Silberg J. in *Zim v. Maziar* (1963) 17 *P.D.* 1319, at 1333, should be mentioned in this context:

> Judaism has always glorified and exalted the immense value of human life. The *Torah* of Israel is not a philosophical system of beliefs and opinions, but a way of life—for life, and for the sake of life. "That man shall do and live by them" (*Lev.* 18:5); "And live by them and not die by them" (*Yoma* 85b); there are countless passages in which the causal connection between the Torah and life is stressed.

The judge also relied on the provisions of sec. 5(c) of the Unjust Enrichment Law, 1979. By virtue of this section, the legislature has recognised that a person is not required to make restitution or pay damages to another person who was acting to protect his property, when he himself objected to the acts of protection; nevertheless, he is required to make restitution and pay compensation when the act was done to preserve his "life, bodily integrity or health", even if he objected to the acts of salvation. From this we learn that an act which is directed at saving the life of another merits encouragement, support and, where necessary, protection as well, even if these are contrary to the wishes of the person being saved.

Here, however, we must take note of the difference between performing a regular act which is intended to save the life of another, and an act which affects the bodily integrity and the privacy of a person whose life the injurer intends to save.

Beiski J.: For my part, I do not think that in such a difficult and complex matter, we must necessarily adopt the principles that were shaped in the

United States and in England — neither the general principle which forbids physical treatment by a doctor without the patient's consent, nor the few exceptions to the rule. I am not denigrating the references cited by my colleague in this context, but I am not convinced that this approach is compatible with the Jewish philosophy of the sanctity of life as a supreme value and with the Jewish tradition of saving life when it is possible to do so. In this context, the judge in the lower court cited in his decision the words of R. Jacob Emden in his book, *Mor Ukeziah* on *Shulkhan Arukh, Orah Hayyim*...

We find this approach reflected in the decision in *Ashira (a minor), by her Parents, V. A. Gerti* v. *State of Israel* (1964) 18 *P.D.* 449, at 454, the circumstances of which and quotes from which have already been mentioned by my learned colleague...

Further on, a passage from J.G. Fleming, *On the Law of Torts* (Sydney, 2nd ed., 1961) 89-90, is cited, which demonstrates a similar approach.

Also similar are the words of Silberg J. in *Zim v. Maziar* cited in the opinion of my colleague.

5. Acting Beyond the Strict Letter of the Law

See: CUSTODIAN FOR ABSENTEE PROPERTY v. UBEID *et al.*, Part 9, Property — Physical and Intellectual, p. 740.

See: KITAN LTD. v. WEISS *et al.*, Part 7, Torts, p. 581.

See: NESS *et al.* v. GOLDA *et al.*, Part 7, Obligations, p. 583.

H.C. 702/81

MINTZER v. CENTRAL BOARD OF ISRAEL BAR ASSOCIATION *et al.*

(1982) 36(2) *P.D.* 1, 9, 17-19

Elon J.: What has happened here is that a law student has pursued his studies and fully absorbed the cases and statutes and also clerked with two instructors. Now that he comes to receive his qualifying certificate he is told that he is premature in applying to join the community of lawyers. The postponement is not the result of pursuing some elevated standard (consider carefully *Shabbat* 31a) but rather, is due to a formality

of law. To be very brief, this is the problem facing us: under strict law as formulated in rule 3 of the Chamber of Advocates (Registration of Clerks and Supervision of Clerkship) Rules, the petitioner's clerkship with his second instructor does not count in calculating the required period of clerkship since the Chamber was not notified about it in good time and obviously did not duly approve it. Yet, by any true measure of justice, how can the petitioner be deprived of an entire year of clerkship when it is clear beyond all doubt that he duly served — even if not in strict adherence to the law — throughout that entire period, as he declared and as the second instructor attested. Nor has any one suggested that there was any deceitful practice...

The approach of Jewish law to the subject of "measures and quantities" and of law and justice is very illuminating. I shall say something about that, even if only allusively and briefly. The principle of measurements and quantities as a substantive element of every matter of law certainly has its place in Jewish law. In that system, it is given clear, unequivocal and emphatic expression in the learning of the Sages, as highlighted in the well-known story of R. Yirmiyah (*Baba Batra* 23b):

> A young pigeon found within fifty cubits of a cote belongs to the owner of the cote; beyond fifty cubits it belongs to the finder....R. Yirmiyah asked "If one foot is within and one foot beyond fifty cubits, what is the rule?" For that, R. Yirmiyah was turned out of the *Bet Hamidrash* because "he annoyed them" (Rashi *Baba Batra ad loc.*).

Why was that so? Because—

> All the measures set by the Sages are such. In [a bath of] forty *se'ah* one may immerse ritually; in one of forty *se'ah* less a *kartob* one may not (*Ketubot* 104a).

Nevertheless, this basic approach of Jewish law with respect to the need for firmly prescribed standards generally did not prevent that system from requiring a judge to try and find a suitable solution in the exceptional case if justice and good reason called for such a solution. The requirement is pointedly and briefly illustrated in defining the duties of the judge to give "true judgment according to its truth" (*Shabbat* 10a; *Sanhedrin* 7a). What is *truthful* truth? Is there a truth that is not true? To that question, R. Yehoshua Falk Katz replied:

> What they meant by saying "true judgment according to its truth" was that a judge decides according to time and place and not always according to the actual letter of the *Torah*, for sometimes he needs to decide beyond the strict letter of the law in the light of the occasion and

> the matter involved. When he does not do so, although his judgment is true it is not "truthful". As the Sages have said [*Baba Metzia* 30b] "Jerusalem was destroyed only because judgment was given strictly in accordance with the letter of the *Torah* and not beyond that" [i.e. equitably] (*Derishah* to *Tur, Hoshen Mishpat* 1:2).

The Vilna Gaon adds:

> Judges must be adept in worldly affairs so that their judgments are not spurious. Otherwise, even if they are proficient in the law of the *Torah*, truth will not emerge in its truthfulness — even though they decide the truth it will not be according to its truthfulness... A judge must be proficient in both...learned in the *Torah* and understanding of worldly matters (*Perush haGra* to *Prov.* 6:4).

The Sages coined the expression that "a judge is concerned only with what his eyes behold" (*Sanhedrin* 6b) which means that "he should have in mind to decide the law justly and according to its truth" (Rashi on *Sanhedrin* 6b, s.v. *ela*)...

Let it not be feared that this moderation of the standard of law in particular appropriate cases may undermine the stability of legal norm regarding measures and quantities. In Jewish law, the equitable exercise of discretion is also a matter of judicial decision with its own rules and limits, and a judge is free to exercise his discretion only in accordance with these rules and limits. This subject is many-faceted and now is not the occasion to enlarge thereon, the question having been partly discussed elsewhere (M. Silberg, *Principia Talmudica* (1964) 97 ff.; M. Elon, *Jewish Law*, (1978) 171 ff.).

This mode of judicial decision has its foundation in the philosophy of Jewish law on the relation between law and ethics, between insisting on the strict letter of the law and going beyond it, between the character of the law and the nature of the world in which it operates, which are intertwined in judicial decision when circumstances and occasion so require. To repeat what C.K. Allen has said, the layman may be loud in his condemnation of "flagrant injustice" because he is not trained to look beyond the particular to the general, but the force of this condemnation is "quietly" upheld by all who maintain the law and *a fortiori* by judges sitting in judgment; the patent injustice that befalls a litigant confuses his comprehension of the nature and character of doing just law. And the consoling view that obvious injustice "is a source of genuine regret to every lawyer who respects his profession" cannot minimise the wrong done to the individual. It is small comfort to lawyer and judge even when they have learned "to look beyond the particular to the general". If any comparison can be drawn between the

practice of surgery and the legal profession, the opposite conclusion would seem to present itself. The surgeon does not, heaven forbid, "lose" a certain number of patients, to serve some purpose beyond the patient on whom he operates and for whom he is commanded by law and medical ethics to do all he possibly can. It would appear that the mode of decision making under Jewish law may lead to a happier prospect: it may also save a litigant from the possibility of suffering an obvious and imminent wrong, from becoming "lost" in the operation of the law and judgment.

T.A. 537/79

STATE OF ISRAEL v. LAUFER

(1981) 2 *P.M.* 309, 313

The defendant was convicted of "stealing by an employee" under sec. 391 of the Penal Law, 1977, on his admission of having taken tools and other articles belonging to his employer. The items were shown to be of little value and meant to be sold as scrap. The defendant had no previous convictions and in fact was considered a good and devoted worker. In view of these mitigating circumstances the prosecution did not ask for actual imprisonment, but it did request a suspended sentence, in order to impress upon the public that the court regarded stealing by an employee a serious offence. The defence contended that this was a case where a fine would have been sufficient.

Strusman J.: The prosecution argues that the law — as decided by the Supreme Court — is that any employee who steals from his employer property valued at more than IL. 500 is liable to imprisonment. If that is indeed the law, we should amend it. "Jerusalem was only destroyed because (the judges) insisted on the strict law and did not act equitably" (*Baba Metzia* 30b). That is not the law, however: the rule is that the defendant is to be judged according to his personal character and the circumstances of the offence.

C.A.(T.A.) 862/79

LEVI *et al.* v. KLUDI ARMATUREN PAUL SCHFFER

(1982) 1 *P.M.* 368, 373-374

As a result of a monetary claim made by the respondent, a temporary attachment was imposed on shares held by the appellants in two companies, one of them engaged in building a hotel in Jerusalem. The appellants sought to have the attachment changed

into an attachment of various parcels of land that they proposed, but this request was rejected by the Registrar, largely because they had not specified in their affidavits the damages they might suffer from a continuation of the attachment of the shares. Hence this appeal.

Harish J.: In the current absence of settled law and guidelines in the matter before us, it is proper to seek guidance from our own sources. Maimonides states in *M.T. Malveh veLoveh* 19:1-2 (on the basis of *Gittin* 48a):

> When the court proceeds to distrain the property of a borrower, it should only seize land of medium quality....The strict law is that the creditor levies on the poorest quality of land, since it is written, "Thou shalt stand without and the man to whom thou dost lend shall bring the pledge out to thee" (*Deut.* 24:11). What will a person normally bring out? The least valuable of his property. The Rabbis, however, stipulated medium quality so that "the door should not be bolted against would-be borrowers" [i.e., if lenders see that the debt is collected from the least valuable property only, they will hold back from lending].

Again—

> ...payment is not made out of property that has been charged when unencumbered property exists, even if the latter is of the poorest quality and the encumbered property is of medium or best quality. If the free property was flooded, the encumbered property may be seized since unusable property is treated as non-existent.

The *halakhah* thus teaches us, as a guiding rule of practice, that where a choice exists of satisfying a debt by taking the best property of the debtor or by taking his worst or medium property and leaving the good property in his possession, we decide in favour of the debtor since the creditor has no vested right both to obtain full satisfaction of his debt and at the same time make things difficult for the debtor, and certainly not to harm him. To bear heavily upon a debtor and injure him cannot be reconciled with the ethical rule of doing what is good and equitable which every Jew is commanded to observe (*Deut.* 6:18). If Scripture has so decided, *a fortiori* in the case of temporary attachment of property on a mere claim, the determination of which in favour of the plaintiff is at least doubtful.

C.A. 216/80

BAUER v. SHIKUN OVDIM LTD. *et al.*

(1984) 38(2) *P.D.* 561, 569

This appeal involved a statute-barred claim with regard to payment made in 1943 entitling the appellant to certain residential property if and when built.

Elon J.: We must dismiss the appellant's claims in every respect. He is not entitled to any property from the respondents, nor are we able, from the point of view of the law, to restore the real value of the money he paid to the respondents. Learned counsel for the Jewish National Fund [one of the respondents] admitted that a sum of 60 lira still stands to the credit of the appellant on the books of the JNF, and that it was prepared to return this sum to the appellant, duly linked, as a matter of grace. At the date of the hearings, the sum so linked amounted to 3,000 shekel. On comparing the real worth of 30 lirot in 1943 (and on that point we were advised by counsel of the daily wage of 17 1/2 agorot which the appellant earned in those distant days as a building labourer) with that of 3,000 shekel, the offer of counsel is derisory. The appellant's money did not lie idle but was used by the respondent. In such a case, the Sages have said: "How did one have the usufruct of the other's property?" (*Baba Metzia* 35b). This is a classic case in which it is right and proper to act equitably, beyond the strict law (*ibid.* 30b and 83a) and repay the appellant his money according to its real worth at that time. This Court has already said, per Shamgar P., in a case in which both claim and appeal were dismissed in point of law:

> Accordingly I would recommend that in spite of the lapse of time, and acting beyond the strict letter of the law, the insurance company should reconsider the matter so that the owners of the insured property are not left with nothing (*C.A.* 130/80, 712).

It is surely right that such an esteemed public body as the appellant should so act "since the public, like the individual, and perhaps *even more so*, must proceed in a manner that is good and equitable and not insist on the letter of the law" (my emphasis *M.E.*) (5637/21 *A.* v. *B.*, 5 *P.D.R.* 151).

In a very similar case, it was held that "although in law the community may be exempt, it is right and proper that it should act beyond the strict law where the party is a poor person with dependent children" (*Resp. Mayim Hayim, Hoshen Mishpat* 6, cited in *Pithei Teshuvah, Hoshen Mishpat* 333:3).

6. Moral Basis for Duty of Care in Torts

See: PINKAS v. STATE OF ISRAEL, Part 7, Torts, p. 542.

7. Moral Duty of Employer to Pay Compensation

See: WOLFSON v. SPINNEYS LTD., Part 10, Commercial Law, p. 819.

See: BUKHABZA v. BUKHABZA *et al.*, Part 11, Labour Law, p. 833.

See: LAPIDOT LTD. *et al.* v. SCHLISSER *et al.*, Part 11, Labour Law, p. 840.

See: BEN-MOSHE v. BEN-MOSHE, Part 11, Labour Law, p. 835.

8. Moral Duty to Chastize Sinners

C.C. 113/56

BEN-GURION v. APPLEBAUM *et al.*

(1960) 14 *P.M.* 307, 364-365

Tzeltner J.: The task of this court in the present claim for damages for defamation is to examine the material published by the defendants in a pamphlet issued in December 1955 and in an open letter printed in "Davar" on 16 January 1956, and see whether these are defamatory of the plaintiff within the meaning of the Civil Wrongs Ordinance. In the event of the answer being in the affirmative, we must determine whether the plaintiff is entitled to damages from the defendants and if damages are due, the amount thereof...

When sec. 20(a) of the Civil Wrongs Ordinance speaks of "a legal, moral or social duty" it is clear to all that a "legal" duty signifies a duty imposed by Israeli law. But what is a moral or social duty? Here as well there can only be one answer: a duty which Israeli morality and the norms of conduct among people in this country require us to perform. Our principles of morality differ, to a greater or lesser degree, from those of other peoples,

since morality is a national heritage that varies at least in its manner from nation to nation. For us there exist rich ethical treasures in our early and later heritage. We do not intend to elaborate upon them here but it may be useful to draw the attention of public-spirited individuals, for whom moral and ethical integrity occupies a commanding position, to the words of our forebears as these were penned by Maimonides (*M.T. De'ot* 6:7 ff.):

> A person who has seen another committing a sin or pursuing a course that is not good is commanded to bring him back to what is good, to tell him that he sins against himself with his evil acts....A person who reproves another whether in regard to matters of a social nature or of a divine nature must do so personally; he must speak to him gently and in moderate language and tell him that he is only speaking to him for his own good so that he is ensured life in the world to come.

Again,

> ...a person who reproves another shall not begin by speaking harshly to him to shame him....Thus the Sages said "Upon reproving him, his countenance may fall....You shall not sin because of him." Hence it is forbidden to put a fellow Jew to shame, especially in public. Although a person who shames another is not liable to flagellation, it is a grievous sin, and so the Sages said, "A person who embarrasses another in public has no part in the world to come." One must therefore be careful not to shame another in public whether he is an important or a lowly person, and not to address him by an offensive name.

9. "Clean Hands and Pure Heart" as a Condition for Application to the High Court of Justice

H.C. 29/52

ST. VINCENT DE PAUL MONASTERY v. TEL AVIV-JAFFA MUNICIPAL COUNCIL

(1952) 6 *P.D.* 670-674

Smoira P.: This is an appropriate case for dwelling on the rule that a person may turn to the High Court of Justice only when his hands are clean.

Let me start with a linguistic point....The source of the expression, "with clean hands", lies in *Ps.* 24:3-4: "Who may ascend the mountain of the Lord? And who may stand in His holy place? He that hath clean hands and a pure heart; who hath not set his desire upon vanity, and hath not sworn deceitfully." This is the source of the above expression in Equity, and when we talk of "clean hands", we are merely returning to the source. Possibly, the whole term, "with clean hands and a pure heart" should be used.

The above equitable principle applies with even greater force to applications for an order *nisi* precisely because the hearing is held *ex parte*, thus laying on the petitioner an even greater obligation to give the court a complete picture and not to mislead it.

See: MARCIANO v. ELECTIONS COMMITTEE FOR OFAKIM LOCAL COUNCIL, Part 3, Social and Administrative Regulation, p. 175.

10. *Middat S'dom*

See: IN RE PARTNERSHIP OF THE BROTHERS LITWINSKY, Part 10, Commercial Law, p. 776.

Chapter Eight

WEIGHTS AND MEASURES

1. Weights and Measures in Law and the Doing of Justice

H.C. 201/68

KAMINETZKI v. DIRECTOR-GENERAL, MINISTRY OF HEALTH

(1968) 32(2) *P.D.* 1013, 1015-1016

The respondent refused to grant the petitioner a permit to open a pharmacy on the grounds that the proposed pharmacy was only about two hundred metres away from an existing pharmacy.

Cohn J.: Had the shop which the petitioner bought for her pharmacy been five hundred and one metres away from the existing pharmacy, she would not have required permission from the respondent to open her pharmacy and no question would have arisen as to whether or not an additional pharmacy was necessary for the regular supply of medicines. Even if all agree that there are more than enough pharmacies in a particular area to ensure an abundant supply of medicines, no authority in the world could prevent a young pharmacist from establishing another pharmacy provided the spot intended for it is beyond the five hundred metre limit. Were it to be asked how can this chance and arbitrary distance of five hundred metres be determinative of what is or is not required for supplying medicines in "regular" fashion, one would only be repeating the eternal question asked by R. Yirmiyah (*Baba Batra* 23b) and constantly raised by those who love justice each time they encounter standards fixed by the law. It is in the nature of such standards to entail arbitrariness in the execution of justice, with the result that those who come within the four corners of these standards are suitably rewarded whilst those whose fortune it is to fall outside them, even by the smallest margin, are penalised despite their innocence.

See: MINTZER v. CENTRAL BOARD OF ISRAEL BAR ASSOCIATION, p. 125.

Chapter Nine

CONDUCT IN TIMES OF WAR

1. Prohibition Against Waste

H.C. 202/81

TABIB *et al.* v. MINISTER OF DEFENCE *et al.*

(1982) 36(2) *P.D.* 622, 636

This petition concerned a decision of the respondents to acquire land belonging to the petitioners for the purpose of building a road. It appeared that the petition contained incorrect data about the ownership of the land and that two of the petitioners had died before the petition was presented.

Shilo J.: Counsel for the petitioners also expressed concern about the fact that as a result of siting the road as planned, it would become necessary to uproot a number of citrus trees. In the course of the hearing we tried to establish with counsel and the group of experts accompanying them whether it was possible to choose an alternative line which would avoid that need, but we understood that in the circumstances it was not practical. That is a pity. Perhaps inadvertently, learned counsel for the petitioners advanced an argument from the sphere of early Jewish international law. There, indeed, a principle exists forbidding the destruction of fruit trees in the course of besieging a town in time of war (and all the more so in peacetime). The source is *Deut.* 20:19:

> When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by wielding an axe against them; for thou mayest eat of them but thou shalt not cut them down, for man is the tree of the field.

The reason for this commandment is that "we should avoid cutting down trees when besieging a city in order to subdue the inhabitants and bear heavily on them" (*Sefer haHinukh*, ed. H.D. Chavel, Commandment 530). And Maimonides in *M.T. Melakhim* 6:7-8, notes that "when besieging

a city...trees bearing fruit are not to be cut down...nor water channels blocked so that they dry up."

According to Maimonides, however, the *Torah* only forbade destruction for its own sake, but the trees may be chopped down if that course is more beneficial than leaving them standing, as when they are harmful to other trees and the like.

In the present case, serious military considerations outweigh civilian needs, and necessity should not be condemned. Immediately upon expropriation, all who would thereby suffer injury were offered full monetary compensation for their loss. There was no misrepresentation in the notice given to the interested parties, and in fact every one of them knew in good time of the petitioners' intention to acquire the land compulsorily so as to be able to take lawful steps to oppose the acquisition. The acquisition itself is not contrary to international law.

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Chapter One

HOLDERS OF PUBLIC OFFICE

A. Status and Obligations

1. Immunity of President

H.C. 65/51

JABOTINSKY *et al.* v. PRESIDENT OF THE STATE OF ISRAEL

(1951) 5 *P.D.* 801, 807

Smoira P.: This is an application for an order *nisi* against the President of the State, requiring him to appear and show cause why he should not call upon one of the one hundred and twenty members of the First Knesset to form a new government and, if he fails to do so, why members should not be called upon in turn until one of them succeeds in forming a new government that will enjoy the confidence of the Knesset. The petition is consequent upon a vote of the Knesset of no-confidence in the Government led by Mr. Ben-Gurion, on 14 February 1951, and the submission to the President of the Government's resignation on the same day...

Objection to the appearance of the Attorney-General at this stage having been dismissed by us, he submitted the arguments that: (a) this Court will not entertain an application against the President of the State; and (b) this Court is not competent to hear this application.

The first argument was, in fact, that the President of the State enjoys general immunity. The second argument was that in accordance with existing law in this country, this Court lacks jurisdiction to deal with this application.

Although in the course of his submissions the Attorney-General shifted his main argument from immunity to want of jurisdiction, he initially spoke at length on the first argument and evoked broad-ranging contrary arguments from counsel for the petitioners. In my opinion, both sets of arguments suffer from false analogies. We will not decide any constitutional problem of the State of Israel in 1951 regarding immunity of the President of the State by relying upon the statement of the *Mishnah* in *Sanhedrin* that "the king may neither judge nor be judged", nor upon the incident relating to the servant of King Jannai, cited in the *Gemara* to the *Mishnah*. Incidentally, were we to try to resolve the problem according to these sources, we would first have to decide whether the law concerning the President of the State of Israel is the same as the law in regard to the kings of the House of David who might judge and be judged, or to the kings of Israel who might not judge nor be judged (*Sanhedrin* 19a) since they did not submit to the *Torah* and therefore some misfortune might ensue (Maimonides). Nor, on the other hand, will we decide the matter by basing ourselves on verses in the Bible which speak of the princes of Israel and the tribes (*Num.* 7:6-13) or the verse in *Ezekiel* (46:10): "And the prince, when they go in, shall go in the midst of them, and when they go forth, they shall go forth together."

2. Judicial Character of Public Representatives

See: MARCIANO v. ELECTIONS COMMITTEE FOR OFAKIM LOCAL COUNCIL, p. 175.

H.C. 24/66

MALKA v. LEVI *et al.*

(1966) 20(1) *P.D.* 651, 657

The petitioner was elected to the local council of Bet-Shemesh as a member of a particular party but subsequently transferred his allegiance to another party. The next day he relented, but subsequently he again joined the opposition coalition. Some time afterwards he wrote to the chairman of the council informing him of his resignation, and the person next on the list of candidates was invited to take his place. The petitioner argued that he had never signed a letter of resignation, but rather, had signed a blank sheet, for some other purpose, at the request of a colleague, and the latter had completed the sheet with his resignation and passed it on to the chairman.

Kister J.: The question facing us is whether the petitioner comes to us with clean hands. As to that, my opinion is as follows: A person elected to serve as a council member, and who has accepted this appointment, must fill this public office in a trustworthy manner and act in accordance with his conscience, fearlessly and for the benefit of local affairs. A person of conscience, elected by some party on a list bearing its name and on the basis of pre-election declarations, who finds after a time that his party is acting or requires him to act in a manner that does not seem right to him, is certainly not bound to act against his conscience. Nevertheless, he should consider whether he still represents all or some of the people who elected him as their representative in reliance on his declarations, and he should certainly give serious thought to whether he ought to continue to serve or resign. He may possibly find that he need not resign but may continue to act in line with his ideas, especially when it is manifest that some members of the party that chose him have split the party-line and have adopted his approach.

The course this petitioner pursued is far from being that of a public representative with a conscience. Not only did he waver between the parties in a manner that cannot be satisfactorily explained as befitting a person occupying a responsible public office, but the explanation he gave of his shifts of position as being, according to him, the result of threats made by members of the party by which he was chosen shows that he himself admits that any threat is sufficient to influence his behavior: he did not even try to protect himself by going to the police or to a lawyer. As for his other shifts, their frequency and the way they were effected do not indicate that they were the consequence of weighty consideration of how he should act in public office. Although the true motives of his frequent political wanderings were not disclosed, we were given during the hearings some hints that speak for themselves.

I should repeat also what I have mentioned on another occasion when dealing with the duties of a person who holds public office, that Jewish tradition has already laid down the rule that those appointed to engage in public purposes are like judges (see *Hoshen Mishpat* 37 (Rema); *Terumat haDeshen* 214; *Noda biYehudah, Mahadura Kamma*, *Hoshen Mishpat* 20, etc.).

H.C. 312/66

SALEM v. MINISTER OF THE INTERIOR *et al.*

(1967) 21(1) *P.D.* 59, 64

In February 1965, most of the settlements in the Emek Lod Region elected representatives to the local council. In one settlement no elections were held, and the respondent appointed the petitioner as the representative for that settlement. A few months later, following a resolution of the new council, the Minister revoked the appointment of the petitioner and replaced him by one of the respondents.

Kister J.: The rule in respect of elected legislative and governmental bodies is that voters have no right to require their representatives to consult with them before taking action or to proceed according to their instructions. If that were the practice, the stability of governmental authority would be shaken. The law does not require an elected person to have regard to every change in the mood of the electorate: that is a matter for his conscience alone since he was elected for that purpose.

The approach of Jewish law to the question of publicly elected persons is noteworthy. I have mentioned more than once—most recently in *Malkha* v. *Levi* (see above)—that those appointed to engage in public affairs are like judges (see *Hoshen Mishpat* 37). Following Rashi to *Sanhedrin* 23a (s.v. *yatza din emet le'amito*) who says that with regard to arbitration, the parties will abide by the decision of the arbitrators because "the losing party thinks: 'I myself chose one of them and had he been able to find in my favour, he would have done so'; and the arbitrators themselves may well find in favour of both parties since they chose them", *Terumat haDeshen* (344) explains that representatives of a minority of the public are like arbitrators, and since they were elected, those who voted for them rely on them to act honestly and fairly even when they decide in favour of the other side. The criterion is that arbitrators should be men of truth and not deceitful, as stated by *Hazon Ish* (*Baba Batra* 5:1):

> The main aim of those choosing representatives is that the latter should be of honest character and knowledgeable....But that is not really like arbitration where each side chooses its own arbitrator, since elected individuals cannot go thoroughly into the law and act with precision even though they possess the powers of a court.

It follows that in the case of publicly elected persons, Jewish law requires the electorate to rely upon them to carry out their functions faithfully and honestly. Hence there is no reason to dismiss them before expiry of the term for which they were elected if their only fault is that they did not heed the state of mind of that part of the public that elected them.

See: KATABI *et al.* v. CHAIRMAN OF THE LOCAL COUNCIL OF KIRYAT EKRON, Part 4, Regulation of the Courts, p. 253.

3. Public Consultation Before Appointment

F.H. 21/60

ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1960) 14 *P.D.* 2045, 2084-2085

The High Court of Justice, sitting as a bench of three judges, held that the removal of one member and the resignation of three other members of the Election Committee of the Chief Rabbinical Council were of no legal effect and did not affect the competence of the Committee.

Silberg J.: Let us finally examine the problem of the Committee from the viewpoint of Jewish law. Indeed, the State of Israel is said to be a state of law and not a state of the *Torah*, but it is difficult to divorce the law entirely from the *Torah* when the appointment of rabbis is involved. I have no doubt at all that Jewish law requires the Chief Rabbinical Council to have an influential voice in the Election Committee, a fact which obliges both sides to arrive at some compromise and do their utmost as a united body to hold the elections in due and proper manner. The *Talmud* tells us:

> A leader is not appointed over a community without its first being consulted, since it is written: "See, the Lord hath called Bezalel by name" (*Ex.* 35:30). The Holy One Blessed be He said to Moses, "Do you consider Bezalel worthy?" He replied: "If he is worthy in Your eyes, he is surely worthy in my eyes." God then said to him: "Nevertheless, go and speak to them [the people]." He went and asked Israel: "Do you think Bezalel is worthy?" They replied: "If he is worthy in the eyes of the Holy One Blessed be He and in your eyes, surely he is worthy in our eyes" (*Berakhot* 55a).

See to what pains the Holy One Blessed be He went to ascertain the wishes of the people of Israel.

This wonderful passage from the *Talmud* is quoted many times in the *Responsa* literature in connection with the appointment of rabbis and

communal leaders. There is the story of one rabbi who dominated the community on the basis of an order of a most exalted authority and held the office of rabbi by force and against the community's wishes. Hatam Sofer wrote:

> This rabbi, be he so lofty as the cedar and mighty as the oak, has not acted rightly with the people by using his exalted position to dominate them. Where is his Talmudic wisdom? Has it not been said, "A leader is not appointed over a community without first consulting it"....How is a person appointed unnominated, without asking the majority of the community what are their wishes?....And if that is the case with a leader of prayer who possesses no governing authority over the people, neither to judge them nor to give them orders,...the more so with a rabbi appointed to lead the public without consultation, with the result that the public is forced to accept him against its will. Obviously that is not well done (*Resp. Hatam Sofer*, *Hoshen Mishpat* 19).

Additional commentary is superfluous for it would only detract from the value of what the Jewish Sages have said, and *a fortiori* regarding the "installation of judges" who are to serve as Chief Rabbis in Israel.

The Chief Rabbinate of Israel — if it and our generation are worthy — can serve as an educational force of the highest value in the consolidation and renaissance of national life. Let all those involved in the matter be told: Beware of debasing the institution, for those who oppose on each side will have occasion to rejoice at the calamity that will follow.

4. The Duty to Act Above Suspicion

Cr. A. 884/80

STATE OF ISRAEL v. GROSSMAN

(1982) 36(1) *P.D.* 405, 412-413

The respondent, a senior official in the Bank of Israel responsible for the issue of linked State bonds, was charged with fraud and breach of trust under sec. 284 of the Penal Law, 1977 for acquiring certain bonds for members of his family. It was the Bank's policy to sell this series of bonds to various public savings and pension funds, although nothing in the pertinent regulations so restricted the issue, and the public could not therefore be prevented from buying these bonds if they so wished.

The lower court acquitted the respondent on the grounds that he was not in breach of trust. Hence this appeal.

Tirkel J.: The question which the State has repeatedly posed for our decision in this appeal...is whether the respondent's actions, described below, amount to a misdeed...

There are offences which have no parameters in statutory provision but only in the observations of the judiciary, which from time to time prescribes them according to the act committed and the person committing it. The danger confronting the court when dealing with such offences is whether by its intention to set bounds to distance a public servant from an offence, it finds itself including conduct which may be faulty in point of proper administrative procedure, but which does not amount to an offence. We must be very careful, as we have learned, "not to make the fence more embracing than the principle" (*Bereshit Rabbah* 19:3).

The respondent instructed the United Mizrahi Bank to buy in the name of members of his family for whom he held a power of attorney, bonds from a series which any member of the public might purchase and the sale of which was free. Does the fact that he did so when he was a senior official in the Bank of Israel, administering State loans, give it the taint of an offence?

I will not conceal that I am among those who propound the view that rules rooted in ethics and morality should gradually become a part of public and private law; neither is it illegitimate in my eyes to employ statutory and case law for the enforcement of ethical and moral norms. Nevertheless, it seems to me that the act of the respondent does not lie within an area to be forbidden by criminal sanctions. No doubt the respondent should properly have refrained from these purchases, just as every public servant is bidden to desist from any private involvement in matters that are in or connected with the area of his office and employment even indirectly, if only to avoid slanderous gossip. There might also be room to say that his action went beyond an "aesthetic imperfection" and perhaps he was guilty of an ethical lapse, but no more than that.

Those who stood guard over the sacred vessels in the Temple abstained from any act — even the most legitimate — that might give rise to an iota of suspicion that they had betrayed the confidence of the public, in order to abide by the dictum, "You shall be clean before the Lord and before Israel" (*Num.* 32:22), from which the Sages inferred that "a person should satisfy all mankind as he should satisfy the All Present" (*Y. Shekalim* 3:2: *Yoma* 38a). I fear that the respondent has not satisfied mankind, but he has satisfied the All Present and should not, therefore, be treated as a sinner.

5. Minor Appointees and Setting an Example

H.C. 178/81
JAFER v. ODEH *et al.*
(1982) 36(1) *P.D.* 40, 48

The petitioner, a member of a local council, was convicted of discourteous conduct towards a passenger he was carrying in his taxi and taking him beyond his destination, contrary to the Traffic Regulations, 1961. He was also convicted of false imprisonment of the passenger. The first respondent, chairman of the Council, informed the petitioner that his seat on the Council had become vacant because of these convictions, involving as they did ignominious conduct. The appeal concerns the question of whether these offences indeed involve ignominy.

Shilo J.: It is doubtful whether the public regards every person elected to a relatively minor executive office as an example to them of elevated moral behavior.

Our Sages distinguished between scholars who should serve as a model to the public, and persons engaged in public affairs; they said that a scholar whose "garment becomes stained" is liable to the death penalty (*Shabbat* 114a), whilst persons occupied in public affairs should not be appointed to administer the community unless they carry "a basket of reptiles" on their backs so that if they become arrogant they can be told to look behind them (*Yoma* 22b).

In dealing with the petitioner's offence here, we find that although he was rightly condemned for what he did, his behaviour was essentially a thoughtless act committed when he was momentarily excited by a dispute on the merits of which he probably thought he was justified. It therefore does not seem that the offences of which he was convicted are ignominious in the sense of the relevant law.

6. Appointment of Rabbi

See: ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*, p. 145.

7. Duty of Rabbi With Regard to Political Queries

H.C. 291/17
BILET *et al.* v. GOREN *et al.*
(1975) 29(1) *P.D.* 98, 103-106

The petitioners sought to prevent the respondents (the Chief Rabbis) from changing a previous decision of theirs, of which the National Religious Party had been informed, making the participation of that party in the Government conditional upon a change in the definition of "Who is a Jew".

Kister J.: Is there anything wrong in a party consulting the rabbis? It seems to me that there is nothing faulty in that. Every Jew of some competence may ask himself whether some act is or is not contrary to the *halakhah*. If he cannot rely on his own judgment, he should ask a scholar of authority, even if not a publicly-appointed rabbi. Where the rabbi who is being asked has been accepted by the public (as a neighborhood or municipal rabbi or as a Chief Rabbi), he is obliged to deal with the question addressed to him. In fact the meaning of "rabbi" is "teacher", a teacher of the law in religious matters (*moreh hora'ah*). Every religion, it should be remembered, has its spiritual leaders, its priests, whose task it is to teach the members of their community the principles and rules of the faith. If a person is denied the possibility of asking his leaders and mentors to reply and to teach, freedom of speech as well as freedom of religion are in fact destroyed.

From the distinction between law and religion, it follows that the answers of the teacher (here, the rabbi) have no legal force or effect unless legal power has been conferred upon him in a particular area. Without such power, the consequence of the rabbi's teachings is a matter of conscience, of morals, and the decision to submit to them or not rests with the questioner.

The fact that the question affects not simply matters of prayer forms, dietary laws or mourning customs, is of no consequence. The Jewish religion, or as some call it the *Torah*, extends to every aspect of life, including the political arena. It is not at all extraordinary for a Jew to inquire of the rabbi whether he may, from the viewpoint of religion and conscience, accept some office. The rabbi will ponder the actualities of the situation, consider the pros and cons, before telling him how to act. I emphasize again that such instruction has no legal force and if it is not followed, no legal sanction exists.

Regarding the rabbi's obligation to reply, even when publicly appointed, we should remember that the rabbi may himself have doubts, in which event he will put the question to another rabbi in whom he places confidence. There is no legal directive laying down to whom he may turn. The rule is that "it is not the position that honours the man but the man who honours the position." Thus, some seventy years ago, a leading rabbi of Jerusalem, R. E.D. Rabinovitz-Teomim, addressed questions to the rabbi of a small town in Galicia, R. S.M. Hacohen (see *Resp. Maharsham*, 2:210).

During the period of the Sanhedrin, the situation was indeed different, and Maimonides writes (*M.T. Mamrim* 1:4) that at that time there was no dispute over the rule that the Supreme Court sitting in the Chamber of Hewn Stones in Jerusalem decided all doubts.

In later generations, attempts were made to resurrect central rabbinical institutions. In the Ottoman Empire there was the *Haham Bashi* (Chief Rabbi), with a Rabbinical Council having exclusive jurisdiction in religious matters. Alongside it, a lay council existed. This form of organisation of the Jewish community was confirmed by the Sultan in 1865. In Palestine there presided a *Haham Bashi* who was subject to the Chief Rabbi of Constantinople (see I. Englard in 22 *haPraklit* (1965) 68, 71).

I cannot say what the standing of the Rabbinical Council of Constantinople was in the rabbinical world, and whether the rabbis of Palestine addressed their doubts to it or vice versa. From the halakhic viewpoint its reputation depended on the personalities who constituted it, i.e. whether all its members were superior in their learning and other qualities to the other rabbis of their time: its royal warrant was in itself not a decisive factor. Nevertheless, as regards the agencies of the state, recognition of the Council was important since all religious matters were subject to its exclusive control.

At the end of the First World War, R. Kook and other religious leaders conceived the idea of an institution defined as —

> A Supreme Court, a commission of great rabbis, in our holy capital of Jerusalem, having a prescribed number of members of renown, among them a group of persons of authority and dignity in world Jewry, including outstanding *Torah* scholars, wise and righteous and experienced in the ways of the world (see *Hazon haGe'ulah* 297).

R. Uziel uses similar terms in a *responsum* he wrote in 1920 whilst serving as Rabbi of Jaffa (*Resp. Mishpetei Uziel, Hoshen Mishpat* 1) which concludes as follows:

> I hereby call upon all our Rabbis in Palestine and in the Diaspora: "Let great and honoured Rabbis, the shepherds of the people and its

> well-wishers, join forces in the work of building our spiritual Temple, of restoring to Jerusalem its former glory and making it the spiritual and political centre of the Jewish people, whence the *Torah* will go forth and answers be given to all questions that confront the Jewish Settlement and call for a religious solution."

All this demonstrates the aspirations of those who conceived the idea of the Chief Rabbinate, its composition and its tasks.

At the beginning of 1921, the Chief Rabbinate was set up and its establishment was publicised by the Secretary of State in a public notice dated 18 March 1921 (see N. Bentwich, *Legislation of Palestine*, Vol. 2, 392-93); the Chief Rabbis, the Rabbinical Council and a body of Lay Councillors were chosen thereunder, the Palestine Government according recognition to the Council and every rabbinical court approved by it as "the sole authorities of Jewish law." This was followed by enactments dealing with the Chief Rabbinate.

> In fact, the Chief Rabbinical Council acted *inter alia* as a High Court of Appeal against judgments of the rabbinical courts until the establishment of the Rabbinical Court of Appeal under the Dayanim Law, 1955, composed of independent judges, with the Chief Rabbis continuing to act as its Presidents.

There is no need here to review the statutory history regarding the Jewish community and the rabbinate. I shall note only that no enactment details the functions of the different kinds of rabbis — municipal, neighborhood and congregational rabbis, members of the Rabbinical Council and the Chief Rabbis. From time to time their powers in particular matters were prescribed, among them powers of a legal nature (under the Dayanim Law). This apart, mention may be made of the powers of supervising *shehitah* (ritual slaughter), laid down by regulation under the Jewish Community Rules. (It is doubtful whether these Rules are still in force in view of an earlier judgment of this Court.) Mention may also be made of the power to appoint judges under the Dayanim Law, 1955, candidates for the rabbinate under the Election of Municipal Rabbis Regulations, 1966, made by the Minister of Religious Affairs, and various other powers, that may be defined as administrative, in the election of the Chief Rabbinical Council.

As I said at the outset, however, the powers conferred upon the Chief Rabbinical Council or the Chief Rabbis are not intended to affect their status or moral authority as rabbis, teachers of the law and spiritual leaders, since all are rabbis.

We return once more to the question of what are the conventional

functions of a rabbi in Israel. No enactment deals with the subject and apparently there is no need for any, since religion and religious law are not the creation of the secular legislature and therefore one does not expect it to intervene in the question of what the functions of religious leaders should be in the field of religion. In fact, the area in which the rabbis operate is widely known. They are the religious judges of the community, they deliver sermons, answer questions addressed to them, and some on their own initiative address themselves to matters concerning their members. They take part in religious ceremonies and also busy themselves with the material and spiritual needs of the community and give religious guidance by giving classes in *Torah* and other subjects. They try to restore peaceful relations and settle disputes amongst people and between spouses.

The first part of art. 83 of the Palestine Order in Council establishes the principle of freedom of religion and conscience and the second part, the autonomy of the religious communities, subject to the law. In the wake of this section, the Religious Communities (Organization) Ordinance was enacted, empowering the Palestine Government to promulgate regulations. Among these were the Jewish Community Rules, the purpose of which was to determine the organisation of the Yishuv (Jewish Community) as a "religious community": legal power was given to the rabbis and the Chief Rabbinical Council in various matters, and in those areas where no such powers were granted the rabbis act only under their religious and moral authority.

The Chief Rabbis also engage in these tasks and may certainly respond to all those who address questions to them and will surely do so when the question is of national, not merely local, dimension. Just as the individual rabbi may be questioned, so may the group of rabbis who together constitute the Chief Rabbinical Council, especially when the Chief Rabbis wish to consult with it. There is no need to deal with the other functions of the Chief Rabbinical Council or its status in point of religious authority, since that does not arise here.

In conclusion, this Court has no reason to intervene when a person enquires of a rabbi whether he may, from the religious-halakhic viewpoint, accept some office, and there is nothing wrong if he chooses to ask not a rabbinical scholar who holds no rabbinical post but a rabbi appointed under state law. Nor is there anything wrong in the question having a political aspect; more than that, rabbis may address themselves to the community without any question having being asked.

Accordingly there is no justification for granting this petition.

H.C. 732/84

SABAN M.K. v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1986) 40(4) *P.D.* 141, 153

The second respondent, R. Ovadiah Yosef, is a judge in the Supreme Rabbinical Court, and he also serves as a member of the body known as the Council of Sages. The petitioner argued that R. Yosef engages in widespread political activity in the framework of his membership of this Council, and inter alia, *he determines the political line of the Shas Party. Such activity, according to the petitioner, is not in keeping with his position as a judge. In his reply to the order* nisi, *R. Yosef remarks that his activity follows naturally from his position as a religious and spiritual leader, who advises the many people who turn to him. He also believes that the position of a judge in a religious court (i.e. a* dayan*) differs from that of a secular judge, for a* dayan *is also a rabbi, and the role of the rabbi, by its very nature, is to be involved in communal life, to advise and help with advice and spiritual support all those who turn to him.*

Goldberg J.: When a *dayan* is appointed by virtue of the Dayanim Law, he wears two crowns: that of the Rabbinate, and that of the judiciary of the religious courts. A teacher of the Law and pastor with the one crown, in the sense, "And I made known the statutes of the Lord and his Laws" (*Ex.*. 18:16), and a judge "between man and his neighbour" (*loc. cit.*) with the other crown. However, I do not intend to dwell on the definitions of the tasks, but rather, on a substantive distinction. The greatest power of the Rabbinate lies in its moral authority, and extends to those who come to "seek the Lord", whereas the authority of the judges who hear a case is not dependent upon the wishes of the parties, but is coerced, in the framework of the judicial system set in place by the legislature. In this area, the *dayanim* fulfill the prescript, "and they shall judge the people" with all their views and opinions.

It is this distinction between the two roles that places a limit on the political involvement of a *dayan*. A *dayan* — and a regular judge as well — who involves himself in political life is not only damaging the image of the judiciary as an independent body in the eyes of the public, but such involvement is also contrary to the fundamental principle of the separation of powers between the judiciary and other state authorities.

8. "Important Personage" and Trading Agreements

See: DICKER v. MOCH *et al.*, Part 8, Obligations, p. 646.

9. *Moreh Hora'ah*

H.C. 29/55

DAYAN v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1955) 9 *P.D.* 997, 1002-1004

Silberg J.: In these proceedings, an order *nisi* issued by this Court on 4 April 1955 is being contested. The question here involved, to put it briefly, is the validity of the election of members of the Rabbinical Council, and more particularly of the esteemed R. Nissim, one of the two Chief Rabbis of Israel. Because of the great public importance of the question, the Attorney-General exercised his statutory powers and appeared in court to argue on behalf of the Government that the order be dismissed...

Likewise we reject outright and without hesitation the other submission of counsel for the petitioner that R. Nissim was not a "Rabbi" within the meaning of the Regulations, neither for ten years nor for a lesser period, and he is therefore ineligible for election as Chief Rabbi. Counsel has overlooked the broad meaning of the term *hora'ah* (instruction) in the compound noun *moreh hora'ah* (qualified rabbi). The term is certainly not confined to those who decide the law regarding religious prohibitions and permissions or to those holding an official position such as neighborhood rabbi. R. Ishmael (ben Elisha), a leading *Tannah*, was "an authority in Israel" (*Gittin* 58a) not only with respect to the decisions he gave in the cases brought before him but largely in connection with his interpretations of the *halakhah*, the special methods (the thirteen hermeneutical principles and others) he developed for the study and understanding of the *Torah*. It was also said of another *Tannah*, R. Hannina, that he became "a religious authority" (*moreh hora'ah*) (*Nazir* 29b), as is demonstrated in the *Jerusalem Talmud* (*Y. Nazir* 4:6 *ad fin.* 196): "R. Elazar bar Tzadok said 'I saw him sitting and expounding [the *Torah*] in Yavneh.' " Of the Sages of the *Talmud*, Samuel is the only one whose title as *moreh hora'ah* refers to his appointment as a judge (*Ketubot* 79a and Rashi *ad*

loc.). Nor is the meaning attached to *horeh* and *hora'ah* (ruling) in the Tractate *Horayot* the exclusive meaning of the term. It is said of R. Ashi and Rabina who edited and completed the *Talmud* that "they conclude (authentic) teaching" (*sof hora'ah*) (*Baba Metzia* 86a). Alfasi, Maimonides and Rosh are known as "the three pillars of *hora'ah*", obviously not because of their activities as judges nor because those who came after them followed their decisions, but because of their great legal writings (*Hilkhot haRif*, *Yad haHazakah* and so on—which are both *hora'ah par excellence* and the "pillars of *hora'ah*" at the same time). Shmuel haNagid in his *Introduction to the Talmud* writes that "*hora'ah* is the tradition regenerated by the scholars in the communities and schools regarding the commandments—it is this that is called *hora'ah*."

On the other hand, the same term and its various inflections are found in some sources in a more limited and technical sense, such as "this is the *halakhah* but not the practical ruling of law (*en morin ken*)" (*Baba Kama* 30b; cf. Rashi *ad loc.* and following him *Hoshen Mishpat* 414:1 and Rema *ad loc.* who refer to a still more limited meaning of the term). Another example is, "he may decide (*horeh*) ritual law, he may decide (*yadin*) civil law" (*Sanhedrin* 5a; see also *Kritot* 13b).

We can see how extensive is the meaning of the term, and how it embraces many connotations. R. Nissim is, on any view, one of Israel's great scholars of the *Torah*, very much at home in the *Talmud* and the Codes, a scholar who for decades has responded to his many inquirers, among them famous rabbis to whom he has speedily sent *responsa* and opinions both on ritual law and on civil law. He is thus *moreh hora'ah* not only in the State of Israel, but throughout the Jewish world, and it is beyond all doubt that he meets the rabbinical criteria set by the regulation-making authority.

10. Authority of Rabbi to Disqualify Ritual Slaughterer

H.C. 371/67

FOGEL v. LEVINGER *et al.*

(1968) 22(1) *P.D.* 344, 346-348, 350-351

The first respondent, the rabbi of Nehalim, declared the slaughtering of animals by the petitioner, the settlement's shohet *(ritual slaughterer), to be ritually unfit. On application by the petitioner, the District Rabbinical Court decided that no other* shohet *should*

be engaged by the settlement. The first respondent persisted in declaring the animals slaughtered by the petitioner ritually unfit. On his refusal to have the matter heard in the rabbinical court, a "warrant of refusal" was issued against the respondent, under which the petitioner was at liberty to embark upon proceedings in a secular court.

Kister J.: This is indeed an unusual case. A *shohet* may often sue his employer in a monetary claim, but here the dispute is not between the *shohet* and the settlement which at one point gave him notice of dismissal but between the *shohet* as such and the local rabbi over the fitness of the slaughtering...

For a person to act as a *shohet*, he must possess, in addition to knowledge of the laws of *shehitah* (ritual slaughter) and suitable physical qualities (such as good eyesight, and a steady and quick hand), the character of a God-fearing Jew. This requirement precedes all others, since the community relies upon him for proper slaughtering and examination of the carcass; those who are believers are very meticulous in matters of the dietary laws, much having been written about forbidden food, apart from the prohibition itself. Thus Luzatto observes in his *Mesilat Yesharim*, ch. 11:

> He who is lenient (about forbidden food) simply destroys himself....Forbidden foods introduce real impurity into the mind and soul....Thus every thinking Jew will regard forbidden food as poisonous or as containing an element of poison, for if he so regards it, could he lightly partake of it...

Accordingly, the acceptance of a *shohet* and his disqualification is left exclusively to the decision of the rabbis and God-fearing inspectors, who have authority to supervise his activities and to declare his slaughtering unfit when they decide that he lacks any of the necessary qualities and that no confidence is to be reposed in him.

Since the present case involves disqualification, it should be noted that a *shohet* is dealt with very strictly indeed, and even insubordination or insolence to the local supervising rabbi is a cause for disqualification, at least temporarily, until the *shohet* is penitent and acts more circumspectly in his social relations as befits a learned man, or is subjected to stricter supervision.

As for insolence to the local rabbi, Natziv writes in *Resp. Meshiv Davar*, 2:8:

> More than any other Jew, a *shohet* is warned not to make light of the respect due to the rabbi but to stand in awe of him, thus ensuring that he will not act improperly in slaughtering, which requires great caution.

And he returns to the same point in his very next *responsum*.

In the same vein I could cite other authorities and many *responsa* on the functions of the *shohet*, his disqualification and the like, but I shall content myself with referring to a handful of the sources concerning the matters that have arisen here, without going into the reasoning.

Disqualification of a *shohet*, especially when permanent, is deemed to be a matter of criminal law (see e.g. *Resp. Sho'el uMeshiv*, 2:87), particularly when he has young children dependent on him (*Hullin* 18a), and his slaughtering is not to be declared unfit lightly. That is in fact the situation in the present case.

The authorities approach the question on the basis of the following Talmudic passage (*Hullin* 18a):

> There was a *shohet* who did not present his knife for examination by Raba ben Hinena. The latter put him under ban, removed him from his post and declared his meat *trefah* (ritually unfit). Mar Zutra and R. Ashi happened to visit Raba ben Hinena and he said to them, "Would you look into this matter, for small children are dependent on him?" R. Ashi inspected the knife and found it satisfactory and declared it fit. Thereupon Mar Zutra said to him, "Are you not apprehensive about overruling the Sage?" R. Ashi replied, "We acted as his agents."

This incident illustrates the strictness with which the acts and conduct of a *shohet* are treated: nevertheless, there is a readiness to consider each case carefully and find some exoneration by bringing it before other rabbinical scholars for them to consider, out of a wish not to harm him at all, or to harm him as little as possible.

Thus we have found a long series of *responsa* by the earlier and later authorities addressed to rabbis, communities and ritual slaughterers, which did not disqualify the *shohet*, and in particular not permanently, except after very close enquiry (see e.g. the *responsum* in *Resp. Sho'el uMeshiv* mentioned above). Where the *shohet* erred innocently and there was reason to believe that he desired and was able to repair his ways, he was only removed temporarily and required to do whatever might be necessary, for instance to study anew the laws of *shehitah* or amend the particular fault, or improve his behaviour generally and solemnly undertake to act in a given manner, or to be properly supervised by another *shohet*...

It may be noted that the real significance of "a warrant of refusal" is that it constitutes a declaration that the person involved has refused to appear in court and is regarded from the viewpoint of religious law to be in contempt of court. Various consequences ensue. According to *Resp. Bet Ya'akov* (1696 ed.) 33, the effect of a judge refusing to appear is that he may no longer sit in judgment because "he that is not judged cannot judge others" (see *Sanhedrin* 18b). I will not go into the question

of when a rabbinical court will order a local rabbi to appear before it and on his refusal issue a warrant of refusal against him. At all events, a warrant of refusal was issued here and although an appeal is available and there is also the Rabbinical Council with appropriate powers and functions, the first respondent did nothing to have the warrant set aside nor to remove the case to another rabbinical court, if that is what he really wished, nor to have the warrant cancelled in the accepted manner. All this apart, it should be emphasised that in spite of the Rabbinical Court deciding that no other *shohet* should replace him in the settlement, which means that the petitioner was presumed to be still fit to act, the first respondent found it right, on his own initiative, to disqualify the petitioner's slaughtering without obtaining a decision from this Court or any other court or the Chief Rabbinate.

As we saw in the passage from *Hullin*, cited above, the rabbi who had disqualified a *shohet* turned to other scholars on his own initiative for them to consider carefully whether they could find in favour of the *shohet*. On examining the many *responsa*, we also found cases where a rabbi believed it right to disqualify a *shohet*, but he nevertheless applied to other rabbis of acknowledged repute, asking how the *shohet* concerned should be dealt with and whether he ought to be disqualified.

The first respondent, in his affidavit of reply, stated that upon consideration, he had reached the conclusion that in accordance with religious law, the petitioner's slaughtering was not ritually fit and, therefore, consumption of the meat of the animals slaughtered by him was forbidden to all those who came under his jurisdiction. He added that this ruling would only be varied "if so directed by his rabbis" by virtue of the command, "according to the law they teach you".

Although the first respondent withdrew his affidavit on being requested by the petitioner to be cross-examined and to deliver particulars, I nevertheless quote from it to indicate the attitude of the first respondent. It emerges from that affidavit that although he admitted he was not the final authority and would rely upon his rabbis, he did not say whether he had in fact asked for their opinion or obtained from them prior approval for what he did, either as regards his refusal or, after they had considered the matter, as regards support of the *shohet*'s disqualification. Apparently this was not the case.

The first respondent claims in his affidavit — a claim that was repeated by counsel in court — that he had only ruled on the disqualification of the *shohet*'s slaughtering for the people of the settlement; however, the disqualification taints the *shohet*, especially as he was dismissed, and he will surely find it difficult to get an appointment elsewhere....In general when one scholar prohibits something, others will find it difficult to permit it.

The authorities have advised caution in dismissing a person from a post in case people suspect that the dismissal was due to some fault.

Here the local rabbi held explicitly that the petitioner was unfit to act as a *shohet* so that as regards the injury done to the petitioner, the disqualification extends beyond the sphere of the relationship of a rabbi and a member of his community.

I am prepared to assume that the first respondent, as a community rabbi, is concerned about local *kashrut* (observance of the dietary laws) and he probably does not rely on the petitioner's slaughtering, but the *Torah* also bids us to take into account the honour and livelihood of the *shohet*. Obviously that is not to be at the expense of *kashrut*, but it seems to me that there is good reason to presume that the judges of the District Rabbinical Court...are also solicitous about *kashrut* and would take great care to prevent a Jew from stumbling in matters of *trefah* (ritually unfit food).

It is indeed possible to dismiss a *shohet* without declaring his slaughtering unfit, but to declare that a *shohet*'s slaughtering is unfit requires a very wide discretion.

11. The Right to Resign

H.C. 205/60, 210/60

ABUDI v. MINISTER OF RELIGIOUS AFFAIRS

(1960) 14 *P.D.* 2020, 2021, 2023-2033

Under discussion was the validity of the dismissal of one member and the resignation of three members of the Elections Committee for the Chief Rabbinical Council, who were appointed to their posts by the outgoing Chief Rabbinate, and the effect of such dismissal and resignations on its ability to operate and to exist.

Silberg J.: A person appointed to a once-off public post can resign with the consent of those who appointed him — with the resignation of three of the members of the Elections Committee, the other members have not become the majority of a committee, but only of a deficient, truncated committee, which cannot fulfill the task set for the full committee until those who appointed the resigning members appoint replacements for them.

On the other hand, I do not accept the Attorney General's argument,

according to which the three resignations are invalid despite the fact that they were accepted by the Chief Rabbinical Council. We have found no basis for such a radical assumption, neither in Jewish law nor in the Common law nor in Israeli case law.

(a) Jewish Law: The Attorney General found support for his argument in the *halakhah*, from a source in *Tosefta Baba Batra*, to the effect that a guardian who held the property of orphans, or who had begun to deal with their affairs, cannot withdraw from the task (see *Hoshen Mishpat*, and Rema 290:23; *Maggid Mishneh* to *M.T. Nahalot* 10:5 in the name of Ramban and Rashba), but that in no way constitutes evidence. It is not necessary to dwell on the point that a member of the committee is not a "guardian", and the affairs of the committee do not constitute "orphans' property". Even if we stretch the point and equate these two unlike things, the three members who resigned never even began to deal with the affairs of the committee, and they received no "property" into their hands. Moreover, even the above laws applying to the guardian are not absolute: there is still room for the resignation of the guardian when it is justified, e.g. "if he leaves the city" (see Rema *ad loc.* and *Bet Yosef* to Tur *ad loc.* in the name of Rashbatz), so that even a real guardian can, in certain circumstances, be released from his task.

B. Dismissal of Public Servant

1. Compulsory Dismissal

H.C. 218/65

GABBAI v. MAYOR OF JERUSALEM

(1966) 20(1) *P.D.* 41, 48

The petitioner had agreed to leave his job with the Municipality on certain terms, but subsequently argued that the provisions of the law relating to municipal employees had not been observed.

Kister J.: In a case which dealt with the dismissal of an employee by the Ramat Gan Municipality, I expressed the view that even without the

labour law applicable in the present case, a permanent employee could not be dismissed for a criminal act as long as he had not been informed of the charge against him and as long as he had not been given an opportunity to be heard on the charge. That was also the view of the Court that tried the matter. I also expressed the view that permanent public servants of the petitioner's kind are to be deemed "lawfully appointed as long as they exert themselves at their work, since the public appointed them" (*M.T. Sekhirut* 6:7)...

In the same case I cited Hazon Ish in dealing with the present matter, and expressing the approach of Jewish law. I shall quote further from the works of this outstanding scholar (*Baba Kama* 23:2):

> When they act badly they lose their rights since the employer does not engage them to that end. It may also be said that public administrators are commanded to remove them for the benefit of the public and to choose those who are worthy and upright....An individual too can force the public to remove them.

Although these remarks do not constitute a legal precedent, they may be adopted with respect to public servants because of their persuasive force. Whilst an individual cannot apply to court to compel a town council to dismiss an employee who has "acted badly", it is nevertheless the duty of the council to ensure that the public services for which it is responsible are entrusted to persons who carry out their tasks faithfully.

See: A. v. ATTORNEY GENERAL, p. 167.

2. Grounds for Dismissal and Restrictions

H.C. 290/65

ALTAGAR v. MAYOR OF RAMAT GAN *et al.*

(1966) 20(1) *P.D.* 29, 35-37, 39-40

The Municipality dismissed the petitioner from his permanent post as editor of its magazine because of adverse conduct. The petitioner submitted that the respondents had acted contrary to the rules of natural justice since they had not asked him to

state his case against his "arbitrary dismissal". The respondents, on the other hand, submitted that giving an employee the opportunity to be heard was not one of the pre-conditions to dismissal, as set out in the Municipalities Ordinance.

Kister J.: In the long tradition of the Jewish people it has been the practice, in accordance with Jewish law sources — the *Talmud* and later authorities — not to dismiss lightly a person appointed to public office or a post in a public institution.

Maimonides in *M.T. Klei haMikdash* 4:21, writes: "A person is never removed from a position of authority among Jews unless he is corrupt." Obviously this rule will not apply to one who has been chosen only for a specific period and leaves when it expires. In his *Responsa* (*Mekitzei Nirdamim* ed., 110), Maimonides starts out with the following: "What every intelligent and learned person must know is that it is not proper to remove a person from the office he holds on mere hearsay."

Although there are employees of public institutions who are not treated as having a post of authority, in respect of these also, where they have not been engaged for a particular task or a defined period or where they may be dismissed under the terms of their employment after prior notice, the rule or custom has taken root to dismiss them only for cause. It should be emphasized that the petitioner is a permanent employee of the respondent.

All Jewish communities acted in accordance with the above rule. The *responsa* literature is replete with cases relating mainly to communal employees — rabbis, ritual slaughterers, cantors and beadles, and although it is difficult to define beadles as people possessing authority, the custom has applied to them as well.

The halakhic sources, the *Talmud* and later authorities, deal with craftsmen and other office holders appointed or engaged by the public, such as tree planters, ritual slaughterers, scribes and elementary school teachers: see *Baba Metzia* 109a and *M.T. Sekhirut* 10:7. Of this type of employee, it has been said that "the community should not act inequitably in removing without cause those it appoints" (R. I.Z. Meltzer, *Even haEzel*, in the chapter dealing with Maimonides' rule as above).

For the same reason the dismissal of persons appointed for life is questionable.

A *responsum* of 1913 (*Resp. Tzur Ya'akov* 195, by R. A.Y.H. Hurwitz) dealt with the case of a beadle who was appointed by the wardens of a community for one year only, but continued to serve for three more years. Another person then tried to get the post. It was held that although this was not a case in which the employee may not lawfully be replaced, it is nevertheless improper to replace him. The author found fault in

the other person who sought to oust the incumbent beadle (a form of trespass) as well as in the community: "It is not fitting to dismiss the first one and deprive him during his lifetime of his livelihood...without good and sound reason."

Resp. Tzur Ya'akov was written by a Polish rabbi and the *responsum* cited is one of very many. In almost every collection of *responsa* that appeared in Eastern Europe, where this kind of literature was widespread, such cases abound. But it is not only in the *responsa* literature of European rabbis, but also in that of Sephardi and Oriental rabbis that many similar *responsa* are to be found. For example, *Resp. Rav Pa'alim, Hoshen Mishpat* 6 by R. Hayim, rabbi of Baghdad (first printed in Jerusalem in 1905), was given in reply to a question addressed to him from Persia. See also *Resp. Bakesh Shlomoh* 20, by R. S. ibn Danan, published in Casablanca in 1931.

In the United States as well, *responsa* dealing with the dismissal of employees of Jewish institutions may be found: for example, *Resp. Iggrot Moshe, Hoshen Mishpat* 76, 77, by R. Feinstein, published in 1964, which concerns teachers.

Finally, the judgments of the rabbinical courts in Israel contain cases on the same subject.

One of these that is of interest to us is a judgment of the Haifa Rabbinical Court dealing with the dismissal of the cleaner of a school (*Rabbinical Court Judgments*, Vol. 3, 91). A comprehensive survey of the *halakhah* in this field is presented in the decision.

It is said of the type of employees referred to in *Baba Metzia* 109 and *M.T. Sekhirut* 10:7 and also in *Hoshen Mishpat* 306:8, that if they have acted badly or wrongly in their work (provided it was not a single occurrence) they may be dismissed without any forewarning....Yet the evidence must be put to them and they may not be dismissed if they work properly. If, however, they were taken on for a defined period or it is local usage not to give notice of dismissal or forewarning, that will not apply.

One of the reasons for prohibiting dismissal without grounds — as prescribed in the halakhic literature — is to avoid the likely suspicion that the dismissed person was at fault: see *Mishnah Berurah* to *Orah Hayim* 53:25:73 s.v. "a *hazan* is not dismissed from his post..." The same applies wherever it is not customary to make the appointment for a fixed period, and the reason is that no one should suspect that the employee has been found at fault.

Nevertheless, according to Jewish law, when a public servant has evidently acted badly the community leaders are commanded to dismiss him in order to prevent harm to the public: see Hazon Ish, *Baba Kama* 23:2 as cited above. Similar observations are frequent in the halakhic literature...

As regards the taking of evidence, questions arise in Jewish law as to the

effectiveness of hearing evidence when not in the presence of the person concerned. In *Resp. Sho'el uMeshiv* (*Tanina* ed., 2:77), R. Nathansohn observes, with respect to a *shohet* being declared unfit, that to disqualify a person permanently so that he loses his vocation — as distinct from suspension for a few months — is like a matter of criminal law, and there is no value generally in hearing witnesses in the absence of the party against whom the evidence is proffered.

Here the petitioner has a single argument, i.e. that the town council should have heard him, and in my opinion that indeed is the least that was required. The duty to hear the party concerned is basic not only in Jewish law but also in English law. Rema has explained the point well in his *Responsa* (108):

> It is therefore obvious that one cannot deal with a matter without hearing the submissions of the defendant, for the *Torah* has said: 'listen to your fellow men.' Although it is obvious, we may learn from God who trod the path of justice and whose ways are ways of pleasantness and whose paths are paths of peace. He began by asking Adam, 'Who told you that you are naked?' And also of Cain He asked, 'Where is Abel your brother?' And all this in order to hear what they had to say. How much more so is it for the ordinary mortal. Likewise our Sages understood, 'Let Me go down and see' as teaching judges not to decide a case until they have heard and understood, and thence that even where it is clear to them that the defendant is guilty, they must at least first hear his arguments.

H.C. 192/68

BASHKIN v. MAYOR OF TEL AVIV-YAFFO *et al.*

(1968) 22(2) *P.D.* 744, 748

The petitioner was the widow of a man who for a long time had been licensed to provide deck-chairs along the beach. She now complained of the refusal of the Municipality to renew the licence.

Kister J.: I would not conclude from these remarks that the Municipality may cease granting the licence or permit without reason and give it to another. The rule is that a local authority may not act arbitrarily. In the Jewish tradition, there is a rule regarding employed persons which I cited in *Altagar* v. *Mayor of Ramat Gan* [see above] that—

The community should not act inequitably in removing without cause those it appoints (R. I.E. Meltzer, *Even haEzel* to *M. T. Sekhirut* 10:7)....It is not befitting to dismiss the first one and deprive him during his lifetime of his livelihood...without a good and sound reason (*Resp. Tzur Ya'akov*).

M. 2859/59, 2134/59

KABALA *et al.* v. BASYOK *et al.*

(1959-60) 21 *P.M.* 75, 77, 79-80

Kister J.: The applicants are members of a workers' settlement organised as a co-operative society.

As became clear during the hearing of the application, two groups exist among the members of the settlement, with conflicting views about its management. It was not clarified — and the question is not important — whether the differences arise out of party political considerations. Apart from differences of opinion, there appear to be mutual recriminations and suspicion.

It was shown that in February 1959, the administrative bodies of the settlement, i.e. the management and supervisory committees, each comprising five members, were constituted by agreement between the two groups. The settlement was affiliated under a control agreement to the Labour Farmers' Cooperative.

On 17 June 1959, four of the members of the supervisory committee of the society and two of the society's members on the said control agreement gave notice of their resignation and also submitted an application signed by eighty-three members of the settlement calling for elections to the administrative and supervisory committees. I would point out that the total number of members of the settlement is one hundred and fifty-two, and eighty-three is therefore an absolute majority. Although I did not establish that all the eighty-three members in fact signed, for the purposes of these proceedings I shall assume they did so...

I think I may define the relationship that can be expected to prevail between the majority and minority in a cooperative society...as our Sages defined the relationship between Bet Hillel and Bet Shammai (*Yevamot* 14b), that in spite of their differences of opinion, "they showed love and friendship to each other in order to observe 'Love ye truth and peace' " (*Zech.* 8:19).

It follows from the basic principles of cooperation that the majority should not treat the minority contemptuously and, relying on their number,

do as they wish with regard to the latter. Rather, the majority should aim at fair relation with the minority.

In view of the above, let us see whether, according to principles of cooperation, it may be established that when a majority of the members are dissatisfied with a committee member they can remove him from the committee even in the middle of his term.

A member may very well feel that he is not generally accepted, and may himself desire to resign. On the other hand, if a member is normally elected for a complete fiscal year, it is unfair to remove him in the middle of the year unless he has acted in a manner that renders him unfit to continue to serve, or unless he falls ill or the like and cannot act. If a group proceeds otherwise and members are dismissed in the middle of their term without weighty reason, it may lead to instability and to daily attempts at proposing elections, and persons of good will may well hold back from accepting office.

In addition, the removal of a member before the expiry of his term gives rise to suspicion about him, and that is the reason why Jewish law has stipulated that the public may not recall a person appointed for a particular period before its expiry unless some very important ground exists to do so (see *Yoreh De'ah* 257:2, glosses of Rema and Shakh *ad loc.*; *Orah Hayim* 53:26 and commentators).

C.S.A. 3/71

A. v. ATTORNEY-GENERAL

(1971) 25(2) *P.D.* 365, 368-369

After being convicted in court of taking a bribe, the petitioner came before the Civil Service Disciplinary Committee and was sentenced to dismissal with pension. The representative of the Department where he had worked appeared before the committee and recommended that he should not be dismissed, but should be transferred to a different post at a lower grade, one that did not involve contact with the public.

Kister J.: I do not...overlook the gravity of bribery and the danger of an employee taking bribes, even if he believes that he will not stray in the slightest from his duty.

Our Sages emphasized (in explanation of the Scriptural statement that bribery blinds) the fact that bribery renders the receiver and giver of one mind...and therefore the receiver cannot contend that although he took a bribe, he did not pervert the law (see *Mekhilta* to *Parshat Mishpatim*, 20, and *Ketubot* 105b).

The danger is particularly great where the matter involves the discretion of the employee. Here the appellant had a certain discretion. I therefore agree that the offence must be treated with the utmost severity.

See: A. v. STATE OF ISRAEL, p. 178.

C. Reinstatement of Public Servants

1. Conditions of Reinstatement

Ch.A.A. 1/68

A. v. ATTORNEY-GENERAL

(1968) 22(1) *P.D.* 673, 676-679

The appellant, a lawyer, was convicted of forging legal documents and circulating them and he was sentenced to imprisonment. The District Disciplinary Tribunal suspended him for five years from membership in the Chamber of Advocates, but the National Disciplinary Tribunal, upon appeal, ordered his total disbarment.

Kister J.: In dealing with the question of whether the Tribunal ought to have decided to disbar the appellant, I think it is fitting to have recourse to the approach taken by Jewish law and the tradition of the Jewish people regarding wrongdoers, their disqualification from public office and the conditions for reinstating them.

Mention should also be made of the new winds blowing throughout the world regarding the rehabilitation of people who have stumbled into transgression, as well as the tendency to wipe the slate clean after a prescribed period if no further offences have meanwhile been committed.

Briefly, the attitude of Jewish law is as follows:

On the one hand, every instance of falsehood or suspicion of falsehood is treated with seriousness: the *Talmud* and the *Shulkhan Arukh* contain

many examples where the use of a stratagem, including one for gaining a procedural advantage, is deemed an infraction of the directive, "From a false matter distance yourself" (*Ex.* 23:7) (see *Shevu'ot* 30b- 31a).

On the other hand, a person who commits an offence and pays the penalty imposed on him or the damages he is ordered to pay and thereby does his penance in full, or otherwise behaves in a manner that satisfies the court that he has mended his ways for the future — such a person is to be forgiven and not reminded of his earlier misdeeds; in general he becomes fit once more to fill the office in which he served when he erred. The rule is, " 'Lest thy brother shall be dishonoured before thine eyes' (*Deut.* 25:3) — on having received flogging he is like your brother" (*Makkot* 23a). As regards the penitent, it is forbidden even to remind him of his former deeds (*Baba Metzia* 58b).

Furthermore, we must mention the rule that craftsmen and those holding various public posts (the sources mention *inter alia* scribes who draw up deeds) who fail even innocently in carrying out their duties "are dismissed without warning, for they may only continue as long as they exert themselves in their work, because they are appointed by the community" (*M.T. Sekhirut* 10:7, based on *Baba Metzia* 109; see also *Hoshen Mishpat* 306).

As for reappointing them, if they were dismissed because of an offence, their penitence is scrutinized very carefully to establish whether they have really repented and are not deceiving the court in their wish to return to their previous post, and whether they can be trusted for the future (*Hoshen Mishpat* 34:33-34 (Rema); see also *Bet Yosef* to *Tur, Hoshen Mishpat* 34, the main source of which is *Sanhedrin* 25a).

Instances may occur in which punishment and penance will not suffice to enable a person to be restored to his position, but the examples that I will cite from the sources demonstrate that that is so only in the most extreme instances, either because of the nature of the evidence or because of the post the offender held.

(a) A person who killed inadvertently and was exiled to a city of refuge will never go back to his post "because this monstrous mishap occurred through him" (see *M.T. Sanhedrin* 17:8; *M.T. Roze'ah* 7:14). There is the case, reported in *Resp. Ribash* 251, of the judge whose son struck a person with fatal effect with the encouragement of his father; Ribash directed that the judge be removed and never again appointed to public office.

(b) A High Priest who sins is flogged and then is restored to his office (*M.T. Klei haMikdash* 4:22). In contrast, the head of a Talmudic Academy (in the sense of President of the Sanhedrin) is not restored, not even as an ordinary member of the Sanhedrin (*M.T. Sanhedrin* 17:9). The reasons for the latter ruling are: (1) that it is for his own benefit not to be restored

in case his colleagues despise him (*Kesef Mishneh ad loc.*); (2) the fear that he may seek revenge on those who condemned him (*Pnei Moshe* to *Y. Sanhedrin* 2:1); (3) *Resp. Radbaz*, 6: 2078, gives two further reasons, i.e. the profanation involved when a person in such a prestigious position sins, and the function of the President to guide the people in the right way, as it is written, " 'Gather yourselves together, yea gather together' (*Zeph.* 2:1)...first adorn yourself and then adorn others" (*Baba Metzia* 107b — a play on the Hebrew for "gather" and "adorn" ["be just to yourselves before requiring it of others")...

(c) The priests of the High Places and of the Temple of Onias, and *a fortiori* priests who served idols, were forever barred from serving in the Temple (*Menahot* 109a; *M.T. Bi'at haMikdash* 9:13-14).

These instances are exceptional but they emphasize the rule that the door is not to be bolted in the face of those who repent sincerely and honestly. Indeed in the absence of any weighty reason to the contrary, restoration to their previous way of life, their occupation and post should be facilitated for the penitent.

I should observe that disqualification for five years, like the suspension of the appellant here by the District Disciplinary Tribunal, is also to be found in Jewish law, as in the case brought before Rosh (*Resp. Rosh* 58:4) concerning a cantor/slaughterer who had committed perjury and was suspended for such a period.

See: A. v. ATTORNEY GENERAL, p. 167.

Chapter Two

PUBLIC AUTHORITIES

A. Principles of Action

1. The Right to be Heard

See: BERMAN *et al.* v. MINISTER OF THE INTERIOR, Part 4, Regulation of the Courts, p. 307.

See: ALTAGAR v. MAYOR OF RAMAT GAN *et al.*, p. 161.

C.A. 413/80

A. v. B.

(1981) 35(3) *P.D.* 57, 88-89

The question arising in this appeal was whether a husband has any standing in law in an application brought by his wife to terminate a pregnancy.

Elon J.: The firm rule, rooted in the decisions of this Court, is that —

> ...an administrative body — and even a purely administrative body (not quasi-judicial) — will not be permitted to inflict upon the citizen any injury to his person, property, occupation, status or the like unless he is given a fair opportunity to be heard regarding the prospective injury. The scope of this obligation and the mode of the opportunity will obviously depend on the actual circumstances of the matter at hand (*per* Silberg J. in *H.C.* 3/58 *Berman* v. *Minister of the Interior* (1958) 14 *P.D.* 1508).

The right of a person to be heard before any decision is taken that might injure him is already to be found in Scripture: "Hear the causes between your brethren and judge them righteously" (*Deut.* 1:16) and its roots go back to the dawn of humanity:

Chapter One

HOLDERS OF PUBLIC OFFICE

A. Status and Obligations

1. Immunity of President

H.C. 65/51

JABOTINSKY *et al.* v. PRESIDENT OF THE STATE OF ISRAEL

(1951) 5 *P.D.* 801, 807

Smoira P.: This is an application for an order *nisi* against the President of the State, requiring him to appear and show cause why he should not call upon one of the one hundred and twenty members of the First Knesset to form a new government and, if he fails to do so, why members should not be called upon in turn until one of them succeeds in forming a new government that will enjoy the confidence of the Knesset. The petition is consequent upon a vote of the Knesset of no-confidence in the Government led by Mr. Ben-Gurion, on 14 February 1951, and the submission to the President of the Government's resignation on the same day...

Objection to the appearance of the Attorney-General at this stage having been dismissed by us, he submitted the arguments that: (a) this Court will not entertain an application against the President of the State; and (b) this Court is not competent to hear this application.

The first argument was, in fact, that the President of the State enjoys general immunity. The second argument was that in accordance with existing law in this country, this Court lacks jurisdiction to deal with this application.

Although in the course of his submissions the Attorney-General shifted his main argument from immunity to want of jurisdiction, he initially spoke at length on the first argument and evoked broad-ranging contrary arguments from counsel for the petitioners. In my opinion, both sets of arguments suffer from false analogies. We will not decide any constitutional problem of the State of Israel in 1951 regarding immunity of the President of the State by relying upon the statement of the *Mishnah* in *Sanhedrin* that "the king may neither judge nor be judged", nor upon the incident relating to the servant of King Jannai, cited in the *Gemara* to the *Mishnah*. Incidentally, were we to try to resolve the problem according to these sources, we would first have to decide whether the law concerning the President of the State of Israel is the same as the law in regard to the kings of the House of David who might judge and be judged, or to the kings of Israel who might not judge nor be judged (*Sanhedrin* 19a) since they did not submit to the *Torah* and therefore some misfortune might ensue (Maimonides). Nor, on the other hand, will we decide the matter by basing ourselves on verses in the Bible which speak of the princes of Israel and the tribes (*Num.* 7:6-13) or the verse in *Ezekiel* (46:10): "And the prince, when they go in, shall go in the midst of them, and when they go forth, they shall go forth together."

2. Judicial Character of Public Representatives

See: MARCIANO v. ELECTIONS COMMITTEE FOR OFAKIM LOCAL COUNCIL, p. 175.

H.C. 24/66

MALKA v. LEVI *et al.*

(1966) 20(1) *P.D.* 651, 657

The petitioner was elected to the local council of Bet-Shemesh as a member of a particular party but subsequently transferred his allegiance to another party. The next day he relented, but subsequently he again joined the opposition coalition. Some time afterwards he wrote to the chairman of the council informing him of his resignation, and the person next on the list of candidates was invited to take his place. The petitioner argued that he had never signed a letter of resignation, but rather, had signed a blank sheet, for some other purpose, at the request of a colleague, and the latter had completed the sheet with his resignation and passed it on to the chairman.

Kister J.: The question facing us is whether the petitioner comes to us with clean hands. As to that, my opinion is as follows: A person elected to serve as a council member, and who has accepted this appointment, must fill this public office in a trustworthy manner and act in accordance with his conscience, fearlessly and for the benefit of local affairs. A person of conscience, elected by some party on a list bearing its name and on the basis of pre-election declarations, who finds after a time that his party is acting or requires him to act in a manner that does not seem right to him, is certainly not bound to act against his conscience. Nevertheless, he should consider whether he still represents all or some of the people who elected him as their representative in reliance on his declarations, and he should certainly give serious thought to whether he ought to continue to serve or resign. He may possibly find that he need not resign but may continue to act in line with his ideas, especially when it is manifest that some members of the party that chose him have split the party-line and have adopted his approach.

The course this petitioner pursued is far from being that of a public representative with a conscience. Not only did he waver between the parties in a manner that cannot be satisfactorily explained as befitting a person occupying a responsible public office, but the explanation he gave of his shifts of position as being, according to him, the result of threats made by members of the party by which he was chosen shows that he himself admits that any threat is sufficient to influence his behavior: he did not even try to protect himself by going to the police or to a lawyer. As for his other shifts, their frequency and the way they were effected do not indicate that they were the consequence of weighty consideration of how he should act in public office. Although the true motives of his frequent political wanderings were not disclosed, we were given during the hearings some hints that speak for themselves.

I should repeat also what I have mentioned on another occasion when dealing with the duties of a person who holds public office, that Jewish tradition has already laid down the rule that those appointed to engage in public purposes are like judges (see *Hoshen Mishpat* 37 (Rema); *Terumat haDeshen* 214; *Noda biYehudah, Mahadura Kamma*, *Hoshen Mishpat* 20, etc.).

H.C. 312/66

SALEM v. MINISTER OF THE INTERIOR *et al.*

(1967) 21(1) *P.D.* 59, 64

In February 1965, most of the settlements in the Emek Lod Region elected representatives to the local council. In one settlement no elections were held, and the respondent appointed the petitioner as the representative for that settlement. A few months later, following a resolution of the new council, the Minister revoked the appointment of the petitioner and replaced him by one of the respondents.

Kister J.: The rule in respect of elected legislative and governmental bodies is that voters have no right to require their representatives to consult with them before taking action or to proceed according to their instructions. If that were the practice, the stability of governmental authority would be shaken. The law does not require an elected person to have regard to every change in the mood of the electorate: that is a matter for his conscience alone since he was elected for that purpose.

The approach of Jewish law to the question of publicly elected persons is noteworthy. I have mentioned more than once—most recently in *Malkha* v. *Levi* (see above)—that those appointed to engage in public affairs are like judges (see *Hoshen Mishpat* 37). Following Rashi to *Sanhedrin* 23a (s.v. *yatza din emet le'amito*) who says that with regard to arbitration, the parties will abide by the decision of the arbitrators because "the losing party thinks: 'I myself chose one of them and had he been able to find in my favour, he would have done so'; and the arbitrators themselves may well find in favour of both parties since they chose them", *Terumat haDeshen* (344) explains that representatives of a minority of the public are like arbitrators, and since they were elected, those who voted for them rely on them to act honestly and fairly even when they decide in favour of the other side. The criterion is that arbitrators should be men of truth and not deceitful, as stated by *Hazon Ish* (*Baba Batra* 5:1):

> The main aim of those choosing representatives is that the latter should be of honest character and knowledgeable....But that is not really like arbitration where each side chooses its own arbitrator, since elected individuals cannot go thoroughly into the law and act with precision even though they possess the powers of a court.

It follows that in the case of publicly elected persons, Jewish law requires the electorate to rely upon them to carry out their functions faithfully and honestly. Hence there is no reason to dismiss them before expiry of the term for which they were elected if their only fault is that they did not heed the state of mind of that part of the public that elected them.

See: KATABI *et al.* v. CHAIRMAN OF THE LOCAL COUNCIL OF KIRYAT EKRON, Part 4, Regulation of the Courts, p. 253.

3. Public Consultation Before Appointment

F.H. 21/60

ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1960) 14 *P.D.* 2045, 2084-2085

The High Court of Justice, sitting as a bench of three judges, held that the removal of one member and the resignation of three other members of the Election Committee of the Chief Rabbinical Council were of no legal effect and did not affect the competence of the Committee.

Silberg J.: Let us finally examine the problem of the Committee from the viewpoint of Jewish law. Indeed, the State of Israel is said to be a state of law and not a state of the *Torah*, but it is difficult to divorce the law entirely from the *Torah* when the appointment of rabbis is involved. I have no doubt at all that Jewish law requires the Chief Rabbinical Council to have an influential voice in the Election Committee, a fact which obliges both sides to arrive at some compromise and do their utmost as a united body to hold the elections in due and proper manner. The *Talmud* tells us:

> A leader is not appointed over a community without its first being consulted, since it is written: "See, the Lord hath called Bezalel by name" (*Ex.* 35:30). The Holy One Blessed be He said to Moses, "Do you consider Bezalel worthy?" He replied: "If he is worthy in Your eyes, he is surely worthy in my eyes." God then said to him: "Nevertheless, go and speak to them [the people]." He went and asked Israel: "Do you think Bezalel is worthy?" They replied: "If he is worthy in the eyes of the Holy One Blessed be He and in your eyes, surely he is worthy in our eyes" (*Berakhot* 55a).

See to what pains the Holy One Blessed be He went to ascertain the wishes of the people of Israel.

This wonderful passage from the *Talmud* is quoted many times in the *Responsa* literature in connection with the appointment of rabbis and

communal leaders. There is the story of one rabbi who dominated the community on the basis of an order of a most exalted authority and held the office of rabbi by force and against the community's wishes. Hatam Sofer wrote:

> This rabbi, be he so lofty as the cedar and mighty as the oak, has not acted rightly with the people by using his exalted position to dominate them. Where is his Talmudic wisdom? Has it not been said, "A leader is not appointed over a community without first consulting it"....How is a person appointed unnominated, without asking the majority of the community what are their wishes?....And if that is the case with a leader of prayer who possesses no governing authority over the people, neither to judge them nor to give them orders,...the more so with a rabbi appointed to lead the public without consultation, with the result that the public is forced to accept him against its will. Obviously that is not well done (*Resp. Hatam Sofer*, *Hoshen Mishpat* 19).

Additional commentary is superfluous for it would only detract from the value of what the Jewish Sages have said, and *a fortiori* regarding the "installation of judges" who are to serve as Chief Rabbis in Israel.

The Chief Rabbinate of Israel — if it and our generation are worthy — can serve as an educational force of the highest value in the consolidation and renaissance of national life. Let all those involved in the matter be told: Beware of debasing the institution, for those who oppose on each side will have occasion to rejoice at the calamity that will follow.

4. The Duty to Act Above Suspicion

Cr. A. 884/80

STATE OF ISRAEL v. GROSSMAN

(1982) 36(1) *P.D.* 405, 412-413

The respondent, a senior official in the Bank of Israel responsible for the issue of linked State bonds, was charged with fraud and breach of trust under sec. 284 of the Penal Law, 1977 for acquiring certain bonds for members of his family. It was the Bank's policy to sell this series of bonds to various public savings and pension funds, although nothing in the pertinent regulations so restricted the issue, and the public could not therefore be prevented from buying these bonds if they so wished.

The lower court acquitted the respondent on the grounds that he was not in breach of trust. Hence this appeal.

Tirkel J.: The question which the State has repeatedly posed for our decision in this appeal...is whether the respondent's actions, described below, amount to a misdeed...

There are offences which have no parameters in statutory provision but only in the observations of the judiciary, which from time to time prescribes them according to the act committed and the person committing it. The danger confronting the court when dealing with such offences is whether by its intention to set bounds to distance a public servant from an offence, it finds itself including conduct which may be faulty in point of proper administrative procedure, but which does not amount to an offence. We must be very careful, as we have learned, "not to make the fence more embracing than the principle" (*Bereshit Rabbah* 19:3).

The respondent instructed the United Mizrahi Bank to buy in the name of members of his family for whom he held a power of attorney, bonds from a series which any member of the public might purchase and the sale of which was free. Does the fact that he did so when he was a senior official in the Bank of Israel, administering State loans, give it the taint of an offence?

I will not conceal that I am among those who propound the view that rules rooted in ethics and morality should gradually become a part of public and private law; neither is it illegitimate in my eyes to employ statutory and case law for the enforcement of ethical and moral norms. Nevertheless, it seems to me that the act of the respondent does not lie within an area to be forbidden by criminal sanctions. No doubt the respondent should properly have refrained from these purchases, just as every public servant is bidden to desist from any private involvement in matters that are in or connected with the area of his office and employment even indirectly, if only to avoid slanderous gossip. There might also be room to say that his action went beyond an "aesthetic imperfection" and perhaps he was guilty of an ethical lapse, but no more than that.

Those who stood guard over the sacred vessels in the Temple abstained from any act — even the most legitimate — that might give rise to an iota of suspicion that they had betrayed the confidence of the public, in order to abide by the dictum, "You shall be clean before the Lord and before Israel" (*Num.* 32:22), from which the Sages inferred that "a person should satisfy all mankind as he should satisfy the All Present" (*Y. Shekalim* 3:2: *Yoma* 38a). I fear that the respondent has not satisfied mankind, but he has satisfied the All Present and should not, therefore, be treated as a sinner.

5. Minor Appointees and Setting an Example

H.C. 178/81
JAFER v. ODEH *et al.*
(1982) 36(1) *P.D.* 40, 48

The petitioner, a member of a local council, was convicted of discourteous conduct towards a passenger he was carrying in his taxi and taking him beyond his destination, contrary to the Traffic Regulations, 1961. He was also convicted of false imprisonment of the passenger. The first respondent, chairman of the Council, informed the petitioner that his seat on the Council had become vacant because of these convictions, involving as they did ignominious conduct. The appeal concerns the question of whether these offences indeed involve ignominy.

Shilo J.: It is doubtful whether the public regards every person elected to a relatively minor executive office as an example to them of elevated moral behavior.

Our Sages distinguished between scholars who should serve as a model to the public, and persons engaged in public affairs; they said that a scholar whose "garment becomes stained" is liable to the death penalty (*Shabbat* 114a), whilst persons occupied in public affairs should not be appointed to administer the community unless they carry "a basket of reptiles" on their backs so that if they become arrogant they can be told to look behind them (*Yoma* 22b).

In dealing with the petitioner's offence here, we find that although he was rightly condemned for what he did, his behaviour was essentially a thoughtless act committed when he was momentarily excited by a dispute on the merits of which he probably thought he was justified. It therefore does not seem that the offences of which he was convicted are ignominious in the sense of the relevant law.

6. Appointment of Rabbi

See: ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*, p. 145.

7. Duty of Rabbi With Regard to Political Queries

H.C. 291/17
BILET *et al.* v. GOREN *et al.*
(1975) 29(1) *P.D.* 98, 103-106

The petitioners sought to prevent the respondents (the Chief Rabbis) from changing a previous decision of theirs, of which the National Religious Party had been informed, making the participation of that party in the Government conditional upon a change in the definition of "Who is a Jew".

Kister J.: Is there anything wrong in a party consulting the rabbis? It seems to me that there is nothing faulty in that. Every Jew of some competence may ask himself whether some act is or is not contrary to the *halakhah*. If he cannot rely on his own judgment, he should ask a scholar of authority, even if not a publicly-appointed rabbi. Where the rabbi who is being asked has been accepted by the public (as a neighborhood or municipal rabbi or as a Chief Rabbi), he is obliged to deal with the question addressed to him. In fact the meaning of "rabbi" is "teacher", a teacher of the law in religious matters (*moreh hora'ah*). Every religion, it should be remembered, has its spiritual leaders, its priests, whose task it is to teach the members of their community the principles and rules of the faith. If a person is denied the possibility of asking his leaders and mentors to reply and to teach, freedom of speech as well as freedom of religion are in fact destroyed.

From the distinction between law and religion, it follows that the answers of the teacher (here, the rabbi) have no legal force or effect unless legal power has been conferred upon him in a particular area. Without such power, the consequence of the rabbi's teachings is a matter of conscience, of morals, and the decision to submit to them or not rests with the questioner.

The fact that the question affects not simply matters of prayer forms, dietary laws or mourning customs, is of no consequence. The Jewish religion, or as some call it the *Torah*, extends to every aspect of life, including the political arena. It is not at all extraordinary for a Jew to inquire of the rabbi whether he may, from the viewpoint of religion and conscience, accept some office. The rabbi will ponder the actualities of the situation, consider the pros and cons, before telling him how to act. I emphasize again that such instruction has no legal force and if it is not followed, no legal sanction exists.

Regarding the rabbi's obligation to reply, even when publicly appointed, we should remember that the rabbi may himself have doubts, in which event he will put the question to another rabbi in whom he places confidence. There is no legal directive laying down to whom he may turn. The rule is that "it is not the position that honours the man but the man who honours the position." Thus, some seventy years ago, a leading rabbi of Jerusalem, R. E.D. Rabinovitz-Teomim, addressed questions to the rabbi of a small town in Galicia, R. S.M. Hacohen (see *Resp. Maharsham*, 2:210).

During the period of the Sanhedrin, the situation was indeed different, and Maimonides writes (*M.T. Mamrim* 1:4) that at that time there was no dispute over the rule that the Supreme Court sitting in the Chamber of Hewn Stones in Jerusalem decided all doubts.

In later generations, attempts were made to resurrect central rabbinical institutions. In the Ottoman Empire there was the *Haham Bashi* (Chief Rabbi), with a Rabbinical Council having exclusive jurisdiction in religious matters. Alongside it, a lay council existed. This form of organisation of the Jewish community was confirmed by the Sultan in 1865. In Palestine there presided a *Haham Bashi* who was subject to the Chief Rabbi of Constantinople (see I. Englard in 22 *haPraklit* (1965) 68, 71).

I cannot say what the standing of the Rabbinical Council of Constantinople was in the rabbinical world, and whether the rabbis of Palestine addressed their doubts to it or vice versa. From the halakhic viewpoint its reputation depended on the personalities who constituted it, i.e. whether all its members were superior in their learning and other qualities to the other rabbis of their time: its royal warrant was in itself not a decisive factor. Nevertheless, as regards the agencies of the state, recognition of the Council was important since all religious matters were subject to its exclusive control.

At the end of the First World War, R. Kook and other religious leaders conceived the idea of an institution defined as —

> A Supreme Court, a commission of great rabbis, in our holy capital of Jerusalem, having a prescribed number of members of renown, among them a group of persons of authority and dignity in world Jewry, including outstanding *Torah* scholars, wise and righteous and experienced in the ways of the world (see *Hazon haGe'ulah* 297).

R. Uziel uses similar terms in a *responsum* he wrote in 1920 whilst serving as Rabbi of Jaffa (*Resp. Mishpetei Uziel, Hoshen Mishpat* 1) which concludes as follows:

> I hereby call upon all our Rabbis in Palestine and in the Diaspora: "Let great and honoured Rabbis, the shepherds of the people and its

> well-wishers, join forces in the work of building our spiritual Temple, of restoring to Jerusalem its former glory and making it the spiritual and political centre of the Jewish people, whence the *Torah* will go forth and answers be given to all questions that confront the Jewish Settlement and call for a religious solution."

All this demonstrates the aspirations of those who conceived the idea of the Chief Rabbinate, its composition and its tasks.

At the beginning of 1921, the Chief Rabbinate was set up and its establishment was publicised by the Secretary of State in a public notice dated 18 March 1921 (see N. Bentwich, *Legislation of Palestine*, Vol. 2, 392-93); the Chief Rabbis, the Rabbinical Council and a body of Lay Councillors were chosen thereunder, the Palestine Government according recognition to the Council and every rabbinical court approved by it as "the sole authorities of Jewish law." This was followed by enactments dealing with the Chief Rabbinate.

> In fact, the Chief Rabbinical Council acted *inter alia* as a High Court of Appeal against judgments of the rabbinical courts until the establishment of the Rabbinical Court of Appeal under the Dayanim Law, 1955, composed of independent judges, with the Chief Rabbis continuing to act as its Presidents.

There is no need here to review the statutory history regarding the Jewish community and the rabbinate. I shall note only that no enactment details the functions of the different kinds of rabbis — municipal, neighborhood and congregational rabbis, members of the Rabbinical Council and the Chief Rabbis. From time to time their powers in particular matters were prescribed, among them powers of a legal nature (under the Dayanim Law). This apart, mention may be made of the powers of supervising *shehitah* (ritual slaughter), laid down by regulation under the Jewish Community Rules. (It is doubtful whether these Rules are still in force in view of an earlier judgment of this Court.) Mention may also be made of the power to appoint judges under the Dayanim Law, 1955, candidates for the rabbinate under the Election of Municipal Rabbis Regulations, 1966, made by the Minister of Religious Affairs, and various other powers, that may be defined as administrative, in the election of the Chief Rabbinical Council.

As I said at the outset, however, the powers conferred upon the Chief Rabbinical Council or the Chief Rabbis are not intended to affect their status or moral authority as rabbis, teachers of the law and spiritual leaders, since all are rabbis.

We return once more to the question of what are the conventional

functions of a rabbi in Israel. No enactment deals with the subject and apparently there is no need for any, since religion and religious law are not the creation of the secular legislature and therefore one does not expect it to intervene in the question of what the functions of religious leaders should be in the field of religion. In fact, the area in which the rabbis operate is widely known. They are the religious judges of the community, they deliver sermons, answer questions addressed to them, and some on their own initiative address themselves to matters concerning their members. They take part in religious ceremonies and also busy themselves with the material and spiritual needs of the community and give religious guidance by giving classes in *Torah* and other subjects. They try to restore peaceful relations and settle disputes amongst people and between spouses.

The first part of art. 83 of the Palestine Order in Council establishes the principle of freedom of religion and conscience and the second part, the autonomy of the religious communities, subject to the law. In the wake of this section, the Religious Communities (Organization) Ordinance was enacted, empowering the Palestine Government to promulgate regulations. Among these were the Jewish Community Rules, the purpose of which was to determine the organisation of the Yishuv (Jewish Community) as a "religious community": legal power was given to the rabbis and the Chief Rabbinical Council in various matters, and in those areas where no such powers were granted the rabbis act only under their religious and moral authority.

The Chief Rabbis also engage in these tasks and may certainly respond to all those who address questions to them and will surely do so when the question is of national, not merely local, dimension. Just as the individual rabbi may be questioned, so may the group of rabbis who together constitute the Chief Rabbinical Council, especially when the Chief Rabbis wish to consult with it. There is no need to deal with the other functions of the Chief Rabbinical Council or its status in point of religious authority, since that does not arise here.

In conclusion, this Court has no reason to intervene when a person enquires of a rabbi whether he may, from the religious-halakhic viewpoint, accept some office, and there is nothing wrong if he chooses to ask not a rabbinical scholar who holds no rabbinical post but a rabbi appointed under state law. Nor is there anything wrong in the question having a political aspect; more than that, rabbis may address themselves to the community without any question having being asked.

Accordingly there is no justification for granting this petition.

H.C. 732/84

SABAN M.K. v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1986) 40(4) *P.D.* 141, 153

The second respondent, R. Ovadiah Yosef, is a judge in the Supreme Rabbinical Court, and he also serves as a member of the body known as the Council of Sages. The petitioner argued that R. Yosef engages in widespread political activity in the framework of his membership of this Council, and inter alia, *he determines the political line of the Shas Party. Such activity, according to the petitioner, is not in keeping with his position as a judge. In his reply to the order* nisi, *R. Yosef remarks that his activity follows naturally from his position as a religious and spiritual leader, who advises the many people who turn to him. He also believes that the position of a judge in a religious court (i.e. a* dayan*) differs from that of a secular judge, for a* dayan *is also a rabbi, and the role of the rabbi, by its very nature, is to be involved in communal life, to advise and help with advice and spiritual support all those who turn to him.*

Goldberg J.: When a *dayan* is appointed by virtue of the Dayanim Law, he wears two crowns: that of the Rabbinate, and that of the judiciary of the religious courts. A teacher of the Law and pastor with the one crown, in the sense, "And I made known the statutes of the Lord and his Laws" (*Ex.*. 18:16), and a judge "between man and his neighbour" (*loc. cit.*) with the other crown. However, I do not intend to dwell on the definitions of the tasks, but rather, on a substantive distinction. The greatest power of the Rabbinate lies in its moral authority, and extends to those who come to "seek the Lord", whereas the authority of the judges who hear a case is not dependent upon the wishes of the parties, but is coerced, in the framework of the judicial system set in place by the legislature. In this area, the *dayanim* fulfill the prescript, "and they shall judge the people" with all their views and opinions.

It is this distinction between the two roles that places a limit on the political involvement of a *dayan*. A *dayan* — and a regular judge as well — who involves himself in political life is not only damaging the image of the judiciary as an independent body in the eyes of the public, but such involvement is also contrary to the fundamental principle of the separation of powers between the judiciary and other state authorities.

8. "Important Personage" and Trading Agreements

See: DICKER v. MOCH *et al.*, Part 8, Obligations, p. 646.

9. *Moreh Hora'ah*

H.C. 29/55

DAYAN v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1955) 9 *P.D.* 997, 1002-1004

Silberg J.: In these proceedings, an order *nisi* issued by this Court on 4 April 1955 is being contested. The question here involved, to put it briefly, is the validity of the election of members of the Rabbinical Council, and more particularly of the esteemed R. Nissim, one of the two Chief Rabbis of Israel. Because of the great public importance of the question, the Attorney-General exercised his statutory powers and appeared in court to argue on behalf of the Government that the order be dismissed...

Likewise we reject outright and without hesitation the other submission of counsel for the petitioner that R. Nissim was not a "Rabbi" within the meaning of the Regulations, neither for ten years nor for a lesser period, and he is therefore ineligible for election as Chief Rabbi. Counsel has overlooked the broad meaning of the term *hora'ah* (instruction) in the compound noun *moreh hora'ah* (qualified rabbi). The term is certainly not confined to those who decide the law regarding religious prohibitions and permissions or to those holding an official position such as neighborhood rabbi. R. Ishmael (ben Elisha), a leading *Tannah*, was "an authority in Israel" (*Gittin* 58a) not only with respect to the decisions he gave in the cases brought before him but largely in connection with his interpretations of the *halakhah*, the special methods (the thirteen hermeneutical principles and others) he developed for the study and understanding of the *Torah*. It was also said of another *Tannah*, R. Hannina, that he became "a religious authority" (*moreh hora'ah*) (*Nazir* 29b), as is demonstrated in the *Jerusalem Talmud* (*Y. Nazir* 4:6 *ad fin.* 196): "R. Elazar bar Tzadok said 'I saw him sitting and expounding [the *Torah*] in Yavneh.' " Of the Sages of the *Talmud*, Samuel is the only one whose title as *moreh hora'ah* refers to his appointment as a judge (*Ketubot* 79a and Rashi *ad*

loc.). Nor is the meaning attached to *horeh* and *hora'ah* (ruling) in the Tractate *Horayot* the exclusive meaning of the term. It is said of R. Ashi and Rabina who edited and completed the *Talmud* that "they conclude (authentic) teaching" (*sof hora'ah*) (*Baba Metzia* 86a). Alfasi, Maimonides and Rosh are known as "the three pillars of *hora'ah*", obviously not because of their activities as judges nor because those who came after them followed their decisions, but because of their great legal writings (*Hilkhot haRif*, *Yad haHazakah* and so on—which are both *hora'ah par excellence* and the "pillars of *hora'ah*" at the same time). Shmuel haNagid in his *Introduction to the Talmud* writes that "*hora'ah* is the tradition regenerated by the scholars in the communities and schools regarding the commandments—it is this that is called *hora'ah*."

On the other hand, the same term and its various inflections are found in some sources in a more limited and technical sense, such as "this is the *halakhah* but not the practical ruling of law (*en morin ken*)" (*Baba Kama* 30b; cf. Rashi *ad loc.* and following him *Hoshen Mishpat* 414:1 and Rema *ad loc.* who refer to a still more limited meaning of the term). Another example is, "he may decide (*horeh*) ritual law, he may decide (*yadin*) civil law" (*Sanhedrin* 5a; see also *Kritot* 13b).

We can see how extensive is the meaning of the term, and how it embraces many connotations. R. Nissim is, on any view, one of Israel's great scholars of the *Torah*, very much at home in the *Talmud* and the Codes, a scholar who for decades has responded to his many inquirers, among them famous rabbis to whom he has speedily sent *responsa* and opinions both on ritual law and on civil law. He is thus *moreh hora'ah* not only in the State of Israel, but throughout the Jewish world, and it is beyond all doubt that he meets the rabbinical criteria set by the regulation-making authority.

10. Authority of Rabbi to Disqualify Ritual Slaughterer

H.C. 371/67

FOGEL v. LEVINGER *et al.*

(1968) 22(1) *P.D.* 344, 346-348, 350-351

The first respondent, the rabbi of Nehalim, declared the slaughtering of animals by the petitioner, the settlement's shohet *(ritual slaughterer), to be ritually unfit. On application by the petitioner, the District Rabbinical Court decided that no other* shohet *should*

be engaged by the settlement. The first respondent persisted in declaring the animals slaughtered by the petitioner ritually unfit. On his refusal to have the matter heard in the rabbinical court, a "warrant of refusal" was issued against the respondent, under which the petitioner was at liberty to embark upon proceedings in a secular court.

Kister J.: This is indeed an unusual case. A *shohet* may often sue his employer in a monetary claim, but here the dispute is not between the *shohet* and the settlement which at one point gave him notice of dismissal but between the *shohet* as such and the local rabbi over the fitness of the slaughtering...

For a person to act as a *shohet*, he must possess, in addition to knowledge of the laws of *shehitah* (ritual slaughter) and suitable physical qualities (such as good eyesight, and a steady and quick hand), the character of a God-fearing Jew. This requirement precedes all others, since the community relies upon him for proper slaughtering and examination of the carcass; those who are believers are very meticulous in matters of the dietary laws, much having been written about forbidden food, apart from the prohibition itself. Thus Luzatto observes in his *Mesilat Yesharim*, ch. 11:

> He who is lenient (about forbidden food) simply destroys himself....Forbidden foods introduce real impurity into the mind and soul....Thus every thinking Jew will regard forbidden food as poisonous or as containing an element of poison, for if he so regards it, could he lightly partake of it...

Accordingly, the acceptance of a *shohet* and his disqualification is left exclusively to the decision of the rabbis and God-fearing inspectors, who have authority to supervise his activities and to declare his slaughtering unfit when they decide that he lacks any of the necessary qualities and that no confidence is to be reposed in him.

Since the present case involves disqualification, it should be noted that a *shohet* is dealt with very strictly indeed, and even insubordination or insolence to the local supervising rabbi is a cause for disqualification, at least temporarily, until the *shohet* is penitent and acts more circumspectly in his social relations as befits a learned man, or is subjected to stricter supervision.

As for insolence to the local rabbi, Natziv writes in *Resp. Meshiv Davar*, 2:8:

> More than any other Jew, a *shohet* is warned not to make light of the respect due to the rabbi but to stand in awe of him, thus ensuring that he will not act improperly in slaughtering, which requires great caution.

And he returns to the same point in his very next *responsum*.

In the same vein I could cite other authorities and many *responsa* on the functions of the *shohet*, his disqualification and the like, but I shall content myself with referring to a handful of the sources concerning the matters that have arisen here, without going into the reasoning.

Disqualification of a *shohet*, especially when permanent, is deemed to be a matter of criminal law (see e.g. *Resp. Sho'el uMeshiv*, 2:87), particularly when he has young children dependent on him (*Hullin* 18a), and his slaughtering is not to be declared unfit lightly. That is in fact the situation in the present case.

The authorities approach the question on the basis of the following Talmudic passage (*Hullin* 18a):

> There was a *shohet* who did not present his knife for examination by Raba ben Hinena. The latter put him under ban, removed him from his post and declared his meat *trefah* (ritually unfit). Mar Zutra and R. Ashi happened to visit Raba ben Hinena and he said to them, "Would you look into this matter, for small children are dependent on him?" R. Ashi inspected the knife and found it satisfactory and declared it fit. Thereupon Mar Zutra said to him, "Are you not apprehensive about overruling the Sage?" R. Ashi replied, "We acted as his agents."

This incident illustrates the strictness with which the acts and conduct of a *shohet* are treated: nevertheless, there is a readiness to consider each case carefully and find some exoneration by bringing it before other rabbinical scholars for them to consider, out of a wish not to harm him at all, or to harm him as little as possible.

Thus we have found a long series of *responsa* by the earlier and later authorities addressed to rabbis, communities and ritual slaughterers, which did not disqualify the *shohet*, and in particular not permanently, except after very close enquiry (see e.g. the *responsum* in *Resp. Sho'el uMeshiv* mentioned above). Where the *shohet* erred innocently and there was reason to believe that he desired and was able to repair his ways, he was only removed temporarily and required to do whatever might be necessary, for instance to study anew the laws of *shehitah* or amend the particular fault, or improve his behaviour generally and solemnly undertake to act in a given manner, or to be properly supervised by another *shohet*...

It may be noted that the real significance of "a warrant of refusal" is that it constitutes a declaration that the person involved has refused to appear in court and is regarded from the viewpoint of religious law to be in contempt of court. Various consequences ensue. According to *Resp. Bet Ya'akov* (1696 ed.) 33, the effect of a judge refusing to appear is that he may no longer sit in judgment because "he that is not judged cannot judge others" (see *Sanhedrin* 18b). I will not go into the question

of when a rabbinical court will order a local rabbi to appear before it and on his refusal issue a warrant of refusal against him. At all events, a warrant of refusal was issued here and although an appeal is available and there is also the Rabbinical Council with appropriate powers and functions, the first respondent did nothing to have the warrant set aside nor to remove the case to another rabbinical court, if that is what he really wished, nor to have the warrant cancelled in the accepted manner. All this apart, it should be emphasised that in spite of the Rabbinical Court deciding that no other *shohet* should replace him in the settlement, which means that the petitioner was presumed to be still fit to act, the first respondent found it right, on his own initiative, to disqualify the petitioner's slaughtering without obtaining a decision from this Court or any other court or the Chief Rabbinate.

As we saw in the passage from *Hullin*, cited above, the rabbi who had disqualified a *shohet* turned to other scholars on his own initiative for them to consider carefully whether they could find in favour of the *shohet*. On examining the many *responsa*, we also found cases where a rabbi believed it right to disqualify a *shohet*, but he nevertheless applied to other rabbis of acknowledged repute, asking how the *shohet* concerned should be dealt with and whether he ought to be disqualified.

The first respondent, in his affidavit of reply, stated that upon consideration, he had reached the conclusion that in accordance with religious law, the petitioner's slaughtering was not ritually fit and, therefore, consumption of the meat of the animals slaughtered by him was forbidden to all those who came under his jurisdiction. He added that this ruling would only be varied "if so directed by his rabbis" by virtue of the command, "according to the law they teach you".

Although the first respondent withdrew his affidavit on being requested by the petitioner to be cross-examined and to deliver particulars, I nevertheless quote from it to indicate the attitude of the first respondent. It emerges from that affidavit that although he admitted he was not the final authority and would rely upon his rabbis, he did not say whether he had in fact asked for their opinion or obtained from them prior approval for what he did, either as regards his refusal or, after they had considered the matter, as regards support of the *shohet*'s disqualification. Apparently this was not the case.

The first respondent claims in his affidavit — a claim that was repeated by counsel in court — that he had only ruled on the disqualification of the *shohet*'s slaughtering for the people of the settlement; however, the disqualification taints the *shohet*, especially as he was dismissed, and he will surely find it difficult to get an appointment elsewhere....In general when one scholar prohibits something, others will find it difficult to permit it.

The authorities have advised caution in dismissing a person from a post in case people suspect that the dismissal was due to some fault.

Here the local rabbi held explicitly that the petitioner was unfit to act as a *shohet* so that as regards the injury done to the petitioner, the disqualification extends beyond the sphere of the relationship of a rabbi and a member of his community.

I am prepared to assume that the first respondent, as a community rabbi, is concerned about local *kashrut* (observance of the dietary laws) and he probably does not rely on the petitioner's slaughtering, but the *Torah* also bids us to take into account the honour and livelihood of the *shohet*. Obviously that is not to be at the expense of *kashrut*, but it seems to me that there is good reason to presume that the judges of the District Rabbinical Court...are also solicitous about *kashrut* and would take great care to prevent a Jew from stumbling in matters of *trefah* (ritually unfit food).

It is indeed possible to dismiss a *shohet* without declaring his slaughtering unfit, but to declare that a *shohet*'s slaughtering is unfit requires a very wide discretion.

11. The Right to Resign

H.C. 205/60, 210/60

ABUDI v. MINISTER OF RELIGIOUS AFFAIRS

(1960) 14 *P.D.* 2020, 2021, 2023-2033

Under discussion was the validity of the dismissal of one member and the resignation of three members of the Elections Committee for the Chief Rabbinical Council, who were appointed to their posts by the outgoing Chief Rabbinate, and the effect of such dismissal and resignations on its ability to operate and to exist.

Silberg J.: A person appointed to a once-off public post can resign with the consent of those who appointed him — with the resignation of three of the members of the Elections Committee, the other members have not become the majority of a committee, but only of a deficient, truncated committee, which cannot fulfill the task set for the full committee until those who appointed the resigning members appoint replacements for them.

On the other hand, I do not accept the Attorney General's argument,

according to which the three resignations are invalid despite the fact that they were accepted by the Chief Rabbinical Council. We have found no basis for such a radical assumption, neither in Jewish law nor in the Common law nor in Israeli case law.

(a) Jewish Law: The Attorney General found support for his argument in the *halakhah*, from a source in *Tosefta Baba Batra*, to the effect that a guardian who held the property of orphans, or who had begun to deal with their affairs, cannot withdraw from the task (see *Hoshen Mishpat*, and Rema 290:23; *Maggid Mishneh* to *M.T. Nahalot* 10:5 in the name of Ramban and Rashba), but that in no way constitutes evidence. It is not necessary to dwell on the point that a member of the committee is not a "guardian", and the affairs of the committee do not constitute "orphans' property". Even if we stretch the point and equate these two unlike things, the three members who resigned never even began to deal with the affairs of the committee, and they received no "property" into their hands. Moreover, even the above laws applying to the guardian are not absolute: there is still room for the resignation of the guardian when it is justified, e.g. "if he leaves the city" (see Rema *ad loc.* and *Bet Yosef* to Tur *ad loc.* in the name of Rashbatz), so that even a real guardian can, in certain circumstances, be released from his task.

B. Dismissal of Public Servant

1. Compulsory Dismissal

H.C. 218/65

GABBAI v. MAYOR OF JERUSALEM

(1966) 20(1) *P.D.* 41, 48

The petitioner had agreed to leave his job with the Municipality on certain terms, but subsequently argued that the provisions of the law relating to municipal employees had not been observed.

Kister J.: In a case which dealt with the dismissal of an employee by the Ramat Gan Municipality, I expressed the view that even without the

labour law applicable in the present case, a permanent employee could not be dismissed for a criminal act as long as he had not been informed of the charge against him and as long as he had not been given an opportunity to be heard on the charge. That was also the view of the Court that tried the matter. I also expressed the view that permanent public servants of the petitioner's kind are to be deemed "lawfully appointed as long as they exert themselves at their work, since the public appointed them" (*M.T. Sekhirut* 6:7)...

In the same case I cited Hazon Ish in dealing with the present matter, and expressing the approach of Jewish law. I shall quote further from the works of this outstanding scholar (*Baba Kama* 23:2):

> When they act badly they lose their rights since the employer does not engage them to that end. It may also be said that public administrators are commanded to remove them for the benefit of the public and to choose those who are worthy and upright....An individual too can force the public to remove them.

Although these remarks do not constitute a legal precedent, they may be adopted with respect to public servants because of their persuasive force. Whilst an individual cannot apply to court to compel a town council to dismiss an employee who has "acted badly", it is nevertheless the duty of the council to ensure that the public services for which it is responsible are entrusted to persons who carry out their tasks faithfully.

See: A. v. ATTORNEY GENERAL, p. 167.

2. Grounds for Dismissal and Restrictions

H.C. 290/65

ALTAGAR v. MAYOR OF RAMAT GAN *et al.*

(1966) 20(1) *P.D.* 29, 35-37, 39-40

The Municipality dismissed the petitioner from his permanent post as editor of its magazine because of adverse conduct. The petitioner submitted that the respondents had acted contrary to the rules of natural justice since they had not asked him to

state his case against his "arbitrary dismissal". The respondents, on the other hand, submitted that giving an employee the opportunity to be heard was not one of the pre-conditions to dismissal, as set out in the Municipalities Ordinance.

Kister J.: In the long tradition of the Jewish people it has been the practice, in accordance with Jewish law sources — the *Talmud* and later authorities — not to dismiss lightly a person appointed to public office or a post in a public institution.

Maimonides in *M.T. Klei haMikdash* 4:21, writes: "A person is never removed from a position of authority among Jews unless he is corrupt." Obviously this rule will not apply to one who has been chosen only for a specific period and leaves when it expires. In his *Responsa* (*Mekitzei Nirdamim* ed., 110), Maimonides starts out with the following: "What every intelligent and learned person must know is that it is not proper to remove a person from the office he holds on mere hearsay."

Although there are employees of public institutions who are not treated as having a post of authority, in respect of these also, where they have not been engaged for a particular task or a defined period or where they may be dismissed under the terms of their employment after prior notice, the rule or custom has taken root to dismiss them only for cause. It should be emphasized that the petitioner is a permanent employee of the respondent.

All Jewish communities acted in accordance with the above rule. The *responsa* literature is replete with cases relating mainly to communal employees — rabbis, ritual slaughterers, cantors and beadles, and although it is difficult to define beadles as people possessing authority, the custom has applied to them as well.

The halakhic sources, the *Talmud* and later authorities, deal with craftsmen and other office holders appointed or engaged by the public, such as tree planters, ritual slaughterers, scribes and elementary school teachers: see *Baba Metzia* 109a and *M.T. Sekhirut* 10:7. Of this type of employee, it has been said that "the community should not act inequitably in removing without cause those it appoints" (R. I.Z. Meltzer, *Even haEzel*, in the chapter dealing with Maimonides' rule as above).

For the same reason the dismissal of persons appointed for life is questionable.

A *responsum* of 1913 (*Resp. Tzur Ya'akov* 195, by R. A.Y.H. Hurwitz) dealt with the case of a beadle who was appointed by the wardens of a community for one year only, but continued to serve for three more years. Another person then tried to get the post. It was held that although this was not a case in which the employee may not lawfully be replaced, it is nevertheless improper to replace him. The author found fault in

the other person who sought to oust the incumbent beadle (a form of trespass) as well as in the community: "It is not fitting to dismiss the first one and deprive him during his lifetime of his livelihood...without good and sound reason."

Resp. Tzur Ya'akov was written by a Polish rabbi and the *responsum* cited is one of very many. In almost every collection of *responsa* that appeared in Eastern Europe, where this kind of literature was widespread, such cases abound. But it is not only in the *responsa* literature of European rabbis, but also in that of Sephardi and Oriental rabbis that many similar *responsa* are to be found. For example, *Resp. Rav Pa'alim, Hoshen Mishpat* 6 by R. Hayim, rabbi of Baghdad (first printed in Jerusalem in 1905), was given in reply to a question addressed to him from Persia. See also *Resp. Bakesh Shlomoh* 20, by R. S. ibn Danan, published in Casablanca in 1931.

In the United States as well, *responsa* dealing with the dismissal of employees of Jewish institutions may be found: for example, *Resp. Iggrot Moshe, Hoshen Mishpat* 76, 77, by R. Feinstein, published in 1964, which concerns teachers.

Finally, the judgments of the rabbinical courts in Israel contain cases on the same subject.

One of these that is of interest to us is a judgment of the Haifa Rabbinical Court dealing with the dismissal of the cleaner of a school (*Rabbinical Court Judgments*, Vol. 3, 91). A comprehensive survey of the *halakhah* in this field is presented in the decision.

It is said of the type of employees referred to in *Baba Metzia* 109 and *M.T. Sekhirut* 10:7 and also in *Hoshen Mishpat* 306:8, that if they have acted badly or wrongly in their work (provided it was not a single occurrence) they may be dismissed without any forewarning....Yet the evidence must be put to them and they may not be dismissed if they work properly. If, however, they were taken on for a defined period or it is local usage not to give notice of dismissal or forewarning, that will not apply.

One of the reasons for prohibiting dismissal without grounds — as prescribed in the halakhic literature — is to avoid the likely suspicion that the dismissed person was at fault: see *Mishnah Berurah* to *Orah Hayim* 53:25:73 s.v. "a *hazan* is not dismissed from his post..." The same applies wherever it is not customary to make the appointment for a fixed period, and the reason is that no one should suspect that the employee has been found at fault.

Nevertheless, according to Jewish law, when a public servant has evidently acted badly the community leaders are commanded to dismiss him in order to prevent harm to the public: see Hazon Ish, *Baba Kama* 23:2 as cited above. Similar observations are frequent in the halakhic literature...

As regards the taking of evidence, questions arise in Jewish law as to the

effectiveness of hearing evidence when not in the presence of the person concerned. In *Resp. Sho'el uMeshiv* (*Tanina* ed., 2:77), R. Nathansohn observes, with respect to a *shohet* being declared unfit, that to disqualify a person permanently so that he loses his vocation — as distinct from suspension for a few months — is like a matter of criminal law, and there is no value generally in hearing witnesses in the absence of the party against whom the evidence is proffered.

Here the petitioner has a single argument, i.e. that the town council should have heard him, and in my opinion that indeed is the least that was required. The duty to hear the party concerned is basic not only in Jewish law but also in English law. Rema has explained the point well in his *Responsa* (108):

> It is therefore obvious that one cannot deal with a matter without hearing the submissions of the defendant, for the *Torah* has said: 'listen to your fellow men.' Although it is obvious, we may learn from God who trod the path of justice and whose ways are ways of pleasantness and whose paths are paths of peace. He began by asking Adam, 'Who told you that you are naked?' And also of Cain He asked, 'Where is Abel your brother?' And all this in order to hear what they had to say. How much more so is it for the ordinary mortal. Likewise our Sages understood, 'Let Me go down and see' as teaching judges not to decide a case until they have heard and understood, and thence that even where it is clear to them that the defendant is guilty, they must at least first hear his arguments.

H.C. 192/68

BASHKIN v. MAYOR OF TEL AVIV-YAFFO *et al.*

(1968) 22(2) *P.D.* 744, 748

The petitioner was the widow of a man who for a long time had been licensed to provide deck-chairs along the beach. She now complained of the refusal of the Municipality to renew the licence.

Kister J.: I would not conclude from these remarks that the Municipality may cease granting the licence or permit without reason and give it to another. The rule is that a local authority may not act arbitrarily. In the Jewish tradition, there is a rule regarding employed persons which I cited in *Altagar* v. *Mayor of Ramat Gan* [see above] that—

The community should not act inequitably in removing without cause those it appoints (R. I.E. Meltzer, *Even haEzel* to *M. T. Sekhirut* 10:7)....It is not befitting to dismiss the first one and deprive him during his lifetime of his livelihood...without a good and sound reason (*Resp. Tzur Ya'akov*).

M. 2859/59, 2134/59

KABALA *et al.* v. BASYOK *et al.*

(1959-60) 21 *P.M.* 75, 77, 79-80

Kister J.: The applicants are members of a workers' settlement organised as a co-operative society.

As became clear during the hearing of the application, two groups exist among the members of the settlement, with conflicting views about its management. It was not clarified — and the question is not important — whether the differences arise out of party political considerations. Apart from differences of opinion, there appear to be mutual recriminations and suspicion.

It was shown that in February 1959, the administrative bodies of the settlement, i.e. the management and supervisory committees, each comprising five members, were constituted by agreement between the two groups. The settlement was affiliated under a control agreement to the Labour Farmers' Cooperative.

On 17 June 1959, four of the members of the supervisory committee of the society and two of the society's members on the said control agreement gave notice of their resignation and also submitted an application signed by eighty-three members of the settlement calling for elections to the administrative and supervisory committees. I would point out that the total number of members of the settlement is one hundred and fifty-two, and eighty-three is therefore an absolute majority. Although I did not establish that all the eighty-three members in fact signed, for the purposes of these proceedings I shall assume they did so...

I think I may define the relationship that can be expected to prevail between the majority and minority in a cooperative society...as our Sages defined the relationship between Bet Hillel and Bet Shammai (*Yevamot* 14b), that in spite of their differences of opinion, "they showed love and friendship to each other in order to observe 'Love ye truth and peace' " (*Zech.* 8:19).

It follows from the basic principles of cooperation that the majority should not treat the minority contemptuously and, relying on their number,

do as they wish with regard to the latter. Rather, the majority should aim at fair relation with the minority.

In view of the above, let us see whether, according to principles of cooperation, it may be established that when a majority of the members are dissatisfied with a committee member they can remove him from the committee even in the middle of his term.

A member may very well feel that he is not generally accepted, and may himself desire to resign. On the other hand, if a member is normally elected for a complete fiscal year, it is unfair to remove him in the middle of the year unless he has acted in a manner that renders him unfit to continue to serve, or unless he falls ill or the like and cannot act. If a group proceeds otherwise and members are dismissed in the middle of their term without weighty reason, it may lead to instability and to daily attempts at proposing elections, and persons of good will may well hold back from accepting office.

In addition, the removal of a member before the expiry of his term gives rise to suspicion about him, and that is the reason why Jewish law has stipulated that the public may not recall a person appointed for a particular period before its expiry unless some very important ground exists to do so (see *Yoreh De'ah* 257:2, glosses of Rema and Shakh *ad loc.*; *Orah Hayim* 53:26 and commentators).

C.S.A. 3/71

A. v. ATTORNEY-GENERAL

(1971) 25(2) *P.D.* 365, 368-369

After being convicted in court of taking a bribe, the petitioner came before the Civil Service Disciplinary Committee and was sentenced to dismissal with pension. The representative of the Department where he had worked appeared before the committee and recommended that he should not be dismissed, but should be transferred to a different post at a lower grade, one that did not involve contact with the public.

Kister J.: I do not...overlook the gravity of bribery and the danger of an employee taking bribes, even if he believes that he will not stray in the slightest from his duty.

Our Sages emphasized (in explanation of the Scriptural statement that bribery blinds) the fact that bribery renders the receiver and giver of one mind...and therefore the receiver cannot contend that although he took a bribe, he did not pervert the law (see *Mekhilta* to *Parshat Mishpatim*, 20, and *Ketubot* 105b).

The danger is particularly great where the matter involves the discretion of the employee. Here the appellant had a certain discretion. I therefore agree that the offence must be treated with the utmost severity.

See: A. v. STATE OF ISRAEL, p. 178.

C. Reinstatement of Public Servants

1. Conditions of Reinstatement

Ch.A.A. 1/68

A. v. ATTORNEY-GENERAL

(1968) 22(1) *P.D.* 673, 676-679

The appellant, a lawyer, was convicted of forging legal documents and circulating them and he was sentenced to imprisonment. The District Disciplinary Tribunal suspended him for five years from membership in the Chamber of Advocates, but the National Disciplinary Tribunal, upon appeal, ordered his total disbarment.

Kister J.: In dealing with the question of whether the Tribunal ought to have decided to disbar the appellant, I think it is fitting to have recourse to the approach taken by Jewish law and the tradition of the Jewish people regarding wrongdoers, their disqualification from public office and the conditions for reinstating them.

Mention should also be made of the new winds blowing throughout the world regarding the rehabilitation of people who have stumbled into transgression, as well as the tendency to wipe the slate clean after a prescribed period if no further offences have meanwhile been committed.

Briefly, the attitude of Jewish law is as follows:

On the one hand, every instance of falsehood or suspicion of falsehood is treated with seriousness: the *Talmud* and the *Shulkhan Arukh* contain

many examples where the use of a stratagem, including one for gaining a procedural advantage, is deemed an infraction of the directive, "From a false matter distance yourself" (*Ex.* 23:7) (see *Shevu'ot* 30b- 31a).

On the other hand, a person who commits an offence and pays the penalty imposed on him or the damages he is ordered to pay and thereby does his penance in full, or otherwise behaves in a manner that satisfies the court that he has mended his ways for the future — such a person is to be forgiven and not reminded of his earlier misdeeds; in general he becomes fit once more to fill the office in which he served when he erred. The rule is, " 'Lest thy brother shall be dishonoured before thine eyes' (*Deut.* 25:3) — on having received flogging he is like your brother" (*Makkot* 23a). As regards the penitent, it is forbidden even to remind him of his former deeds (*Baba Metzia* 58b).

Furthermore, we must mention the rule that craftsmen and those holding various public posts (the sources mention *inter alia* scribes who draw up deeds) who fail even innocently in carrying out their duties "are dismissed without warning, for they may only continue as long as they exert themselves in their work, because they are appointed by the community" (*M.T. Sekhirut* 10:7, based on *Baba Metzia* 109; see also *Hoshen Mishpat* 306).

As for reappointing them, if they were dismissed because of an offence, their penitence is scrutinized very carefully to establish whether they have really repented and are not deceiving the court in their wish to return to their previous post, and whether they can be trusted for the future (*Hoshen Mishpat* 34:33-34 (Rema); see also *Bet Yosef* to *Tur, Hoshen Mishpat* 34, the main source of which is *Sanhedrin* 25a).

Instances may occur in which punishment and penance will not suffice to enable a person to be restored to his position, but the examples that I will cite from the sources demonstrate that that is so only in the most extreme instances, either because of the nature of the evidence or because of the post the offender held.

(a) A person who killed inadvertently and was exiled to a city of refuge will never go back to his post "because this monstrous mishap occurred through him" (see *M.T. Sanhedrin* 17:8; *M.T. Roze'ah* 7:14). There is the case, reported in *Resp. Ribash* 251, of the judge whose son struck a person with fatal effect with the encouragement of his father; Ribash directed that the judge be removed and never again appointed to public office.

(b) A High Priest who sins is flogged and then is restored to his office (*M.T. Klei haMikdash* 4:22). In contrast, the head of a Talmudic Academy (in the sense of President of the Sanhedrin) is not restored, not even as an ordinary member of the Sanhedrin (*M.T. Sanhedrin* 17:9). The reasons for the latter ruling are: (1) that it is for his own benefit not to be restored

in case his colleagues despise him (*Kesef Mishneh ad loc.*); (2) the fear that he may seek revenge on those who condemned him (*Pnei Moshe* to *Y. Sanhedrin* 2:1); (3) *Resp. Radbaz*, 6: 2078, gives two further reasons, i.e. the profanation involved when a person in such a prestigious position sins, and the function of the President to guide the people in the right way, as it is written, " 'Gather yourselves together, yea gather together' (*Zeph.* 2:1)...first adorn yourself and then adorn others" (*Baba Metzia* 107b — a play on the Hebrew for "gather" and "adorn" ["be just to yourselves before requiring it of others")...

(c) The priests of the High Places and of the Temple of Onias, and *a fortiori* priests who served idols, were forever barred from serving in the Temple (*Menahot* 109a; *M.T. Bi'at haMikdash* 9:13-14).

These instances are exceptional but they emphasize the rule that the door is not to be bolted in the face of those who repent sincerely and honestly. Indeed in the absence of any weighty reason to the contrary, restoration to their previous way of life, their occupation and post should be facilitated for the penitent.

I should observe that disqualification for five years, like the suspension of the appellant here by the District Disciplinary Tribunal, is also to be found in Jewish law, as in the case brought before Rosh (*Resp. Rosh* 58:4) concerning a cantor/slaughterer who had committed perjury and was suspended for such a period.

See: A. v. ATTORNEY GENERAL, p. 167.

Chapter Two

PUBLIC AUTHORITIES

A. Principles of Action

1. The Right to be Heard

See: BERMAN *et al.* v. MINISTER OF THE INTERIOR, Part 4, Regulation of the Courts, p. 307.

See: ALTAGAR v. MAYOR OF RAMAT GAN *et al.*, p. 161.

C.A. 413/80

A. v. B.

(1981) 35(3) *P.D.* 57, 88-89

The question arising in this appeal was whether a husband has any standing in law in an application brought by his wife to terminate a pregnancy.

Elon J.: The firm rule, rooted in the decisions of this Court, is that —

> ...an administrative body — and even a purely administrative body (not quasi-judicial) — will not be permitted to inflict upon the citizen any injury to his person, property, occupation, status or the like unless he is given a fair opportunity to be heard regarding the prospective injury. The scope of this obligation and the mode of the opportunity will obviously depend on the actual circumstances of the matter at hand (*per* Silberg J. in *H.C.* 3/58 *Berman* v. *Minister of the Interior* (1958) 14 *P.D.* 1508).

The right of a person to be heard before any decision is taken that might injure him is already to be found in Scripture: "Hear the causes between your brethren and judge them righteously" (*Deut.* 1:16) and its roots go back to the dawn of humanity:

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> He began with Adam, asking him "Who told you that you were naked?" and continued with Cain, "Where is Abel your brother?", in order to hear what they had to say. How much more is that so for the ordinary human. And that is how the Sages explained, "I shall go down and see," to teach judges not to give judgment until they have heard the facts and arguments and understood them (*Resp. Rema* 108).

This Court has also held that while the right of a litigant to be heard in judicial proceedings is absolute, the obligation of an administrative agency to give any person liable to be harmed by what it does an opportunity to be heard, its scope and its form, depend upon the circumstances of the case. Such scope and form are determined by finding the proper balance between the right to be heard and the effective functioning of the administrative body so as not to frustrate its labours.

These rules and principles are commonly accepted by us when we are faced with the possibility of affecting the material rights of property, occupation or other financial benefit of a person, and *a fortiori* when a decision may affect the lot of an embryo, to whom the parents are profoundly and inherently attached. Every human being feels this attachment and no more apt or incisive expression of it is to be found than in the words of the rabbis: "There are three partners in man, the Holy One Blessed be He, the father and the mother" (*Kiddushin* 30b and *Niddah* 31a). It is well-known that in Jewish law, parents have never been vested with any "material" right, even as regards their born children, and the relationship between parents and children is "a natural bond in which the usual concepts of legal ownership are on the one hand pale and scanty and on the other hand touch our sensibilities in practice" (*C.A.* 488/77 *A.* v. *Attorney General* (1978) 32(3) *P.D.* 421, 429-430). Thus the partnership is one of attachment — the profound, natural bond of parents with the fate of the embryo they have created. It exists even when the parents are unmarried and *a fortiori* when they are wed and are building a home for their family. When the question arises of terminating a pregnancy, each of the parents possesses the fundamental right, grounded in natural elementary justice, to have his or her views heard and heart-felt wishes listened to before any decision is taken on termination of pregnancy and abortion of the child. As I have said, the existence of the right to be heard depends on the circumstances. Where, for example, the husband is an alcoholic and incapable of considered and understanding consultation or where, because of the urgency of the case, it is impossible to summon the husband and the like, the committee may in general come to a decision regarding termination of pregnancy without first hearing him. But these are exceptional cases which circumstances may render necessary. They

do not derogate from the rule that a duty exists to hear the husband before taking so fateful and far-reaching a decision.

2. Arbitrary Action

See: BASHKIN v. MAYOR OF TEL AVIV-YAFFO, p. 164.

3. Tolerance and Discrimination

H.C. 175/71

ABU GOSH MUSIC FESTIVAL v. MINISTER OF EDUCATION *et al.*

(1971) 25(2) *P.D.* 821, 827, 830-831

An application by the petitioner to the Ministry of Education for a grant was refused on the grounds that it was not the Ministry's function to assist an institution the purpose of which was to perform church music.

Cohn J.: For my part I would note, parenthetically, only one thing: that discrimination regarding the allocation of financial assistance from the state treasury between the culture and religious art of a majority and that of a minority not only arouses the most mournful of associations and memories of the times and the places where the Jewish religion was and still is subject to discrimination, but it is also wholly contrary to the principles of Judaism befitting the State of Israel. "What is hateful to you, do not to your neighbour. That is the whole *Torah*, for the rest...go and learn it" (*Shabbat* 31a). And Ben Azai said, "This is the chronicle of mankind —a leading principle follows" (*Sifra, Kedoshim* 40).

Kister J.: The basis for the prohibition against religious discrimination lies in two principles — religious tolerance and religious equality. Although the term "tolerance" is more embracing than the term "patience" [*sovlanut* and *savlanut* in Hebrew], it possesses also metes and bounds. The principle of

toleration demands that the citizen and society should not only tolerate the existence of every faith even though they do not believe in its tenets, but they must treat that faith with courtesy and respect, without contempt and without hurting the feelings of its members. Those who belong to a given religion may not be discriminated against in comparison with other religions, and no person may be prevented from abiding by the dictates of his religion, either directly or indirectly, by rendering it impossible for members to engage in religious services. The very expressions, "Honour your fellow man" or "love mankind" are devoid of all meaning if they are not manifested in a practical way. I would conclude my remarks by referring to the leading principle known to us from the earliest of times: "What is hateful to you, do not unto your neighbour." What would be hateful to you, if it harmed you by way of your religion or your opinions, do not do to those of another religion or opinion.

This principle is couched in negative terms, i.e. to abstain from doing harm, and it is not always fully achieved. Nevertheless, in modern society where the means and capacity without which the citizen cannot obtain all his religious requirements nor give his children a religious education are concentrated in the hands of the State, a positive duty lies with the State to meet these needs.

If, therefore, it is impossible to observe religious precepts or to obtain religious education for the children of one's community without active assistance from the State, one may expect of the State to do all it can for the citizen in this regard.

The principle of equality demands that if the State spends money out of its budget, i.e. from the pockets of taxpayers, to assist in the maintenance of one religion, its ritual and the education of its children, then every other religion is entitled to expect similar assistance when necessary and when within the capacity of the State.

Accordingly, where it is a matter of music necessary for maintaining the ritual of one religion, and the State allots money for this purpose for some other religion, it must not withhold similar assistance from the institutions of the former...when their own means are insufficient.

H.C. 392/72

BERGER v. HAIFA DISTRICT PLANNING COMMISSION *et al.*

(1973) 27(2) *P.D.* 764, 770-771

This was a petition asking that a change in municipal building plans entailing compulsory acquisition of property belonging to the petitioner be declared null and void.

Berenson J.: Finally, I think that it is not superfluous on this occasion to speak my mind about the attitude which we should necessarily expect of each of us towards strangers who live in our midst....From earliest times, when the Jewish nation dwelt in its own land and on its own soil, it knew the soul of the sojourner and acted towards him with justice and in equity. The *Torah* commanded us, "One law shall be to him that is homeborn and unto the stranger that sojourneth among you" (*Ex.* 12:49); "Ye shall have one manner of law, as well as for the stranger as for the homeborn" (*Lev.* 24:22). "Judge righteously between a man and his brother and the stranger that is with him" (*Deut.* 1:16). In a number of places the *Torah* enjoins us not to cheat the stranger, not to put pressure on him, not to oppress him and not to pervert justice in his regard: in all these matters he is compared to the orphan and widow, the poor person who is in need of understanding and compassion from his neighbour. "Ye know the heart of a stranger for ye were strangers in the land of Egypt" (*Ex.* 23:9). Not without cause did S.D. Luzatto write in his *Mehkerei haYahadut* (Vol. I, Part 1 *Yesodei haTorah*, p. 32): "Whilst Israel is a chosen people and even though it has been kept apart from idolatrous peoples, the *Torah* has never distinguished between Jew and non-Jew in any matter in which true justice and equity are required of each man to his neighbour." And Maimonides has said:

> Let no man say one thing and mean another but be undissembling and sincere. It is forbidden to deceive one's fellow man, even a non-Jew...and even one word of deception...is forbidden, but (one should) speak truthfully and honestly and with a mind free of all evil and mischief (*M.T. De'ot* 2:6).

When we were exiled and removed from our land, we became the victims of the nations of the world among whom we dwelt. In all generations we tasted the bitter taste of persecution, oppression and discrimination simply because we were Jews whose religion was different from that of any other nation. Having learned from this wretched and bitter experience, that has penetrated deep into our awareness and our national and human consciousness, it is to be expected that we should not follow the aberrant

ways of the gentiles. With the renewal of our independence in the State of Israel we must carefully preserve ourselves from any suspicion of discrimination or dubious practices towards any law-abiding non-Jew found among us, who wishes to live with us in his own way, according to his own religion and faith. The hatred of the stranger is a double curse: it destroys the divine image of the one who hates and causes evil to the one who is hated without any wrong on his part. We must display a tolerant and humane attitude towards all those created in God's image, and observe the great principle of equality of the rights and duties of all mankind.

4. Minority Representation

H.C. 311/65

MARCIANO v. ELECTIONS COMMITTEE OF OFAKIM

(1965) 19(3) *P.D.* 393, 396-397

The Minister of the Interior, by virtue of his authority in that capacity, appointed a nine-member Election Committee for the local council of Ofakim. The petitioner, who was one of the members, claimed that four of them belonged to Mapai, four to Mafdal and one to Herut. He complained that when the committee appointed a chairman for each of six polling station committees, it overlooked the Alignment party and appointed four Mafdal party members and two Herut members. According to the petitioner, this was contrary to the principle of "suitable representation" which the law requires to be observed when appointing chairmen of polling station committees as well.

Kister J.: I agree with my learned friend Sussman J. and would only add the following to what he has said:

It is true that the law enables the Election Committee to appoint chairmen of polling station committees by a majority resolution, and does not prescribe any test for such appointments. This does not, however, mean that the Committee may act arbitrarily. The rule has already been laid down in the tradition of Jewish law that those appointed to occupy themselves with public requirements are like judges (see *Hoshen Mishpat* 37:22; *Terumat haDeshen* 214; *Noda biYehudah, Hoshen Mishpat* 20). One of the consequences is that such appointees, when they come to appoint the

chairmen of the polling station committees, would be required to treat each citizen equally and are forbidden to deprive any citizen or group of citizens of his or its rights in reliance on the power of a majority. Although there are public posts which are given only to those who enjoy the confidence of the majority to carry out its policy when what is involved is the execution of policy, here the task is to supervise that the elections are conducted in a fair manner, and for that a candidate need not be of the party in the majority; indeed, it is very possible that it would be better for him to be of the minority.

In the absence of any statutory provision the Elections Committee may choose the chairman of the polling station committees according to any objective test from among the polling committees, and may itself lay down the test.

Generally, the right test is to choose the most fitting person but I understand that regarding the post in question there are, even in a small settlement, many capable of filling it, whilst on the other hand any attempt at deciding who is most fitting is likely to lead to disputes, a course that is undesirable.

The halakhic literature gives thought to this aspect of the problem as well. R. Menahem Me'iri's *Bet haBehirah* to *Sanhedrin* 17a states that "a person should always be take care not to create envy among members. Even a communal leader or prophet who guides the people at the will of the Blessed One needs to act with care in appointing administrators so as not to create envy among the different families."

I cannot say which test should be adopted — that of seniority of age from among the members of the polling station committees or party representation, roughly in accordance with local membership, or perhaps some other test found to be appropriate, provided it does not negate without just cause the right of appointment of a minority, which in the present case is a minority constituting a considerable percentage of the population.

The very banding together of several parties to deny appointments to the minority is contrary to a fundamental rule of the *Torah*, "And thou shalt love thy neighbour as thyself" which, put in a negative and prohibitive form is, "What is hateful to you, do not to your neighbour", regarding which Hillel said: "That is the entire *Torah* — the rest is commentary, go and learn it" (*Shabbat* 31a). Certainly no party among the majority would find such a banding together fair and valid had it been directed against itself and denied its members the right to fill some post as in the present case.

This principle enunciated by Hillel...entered into the Common law of England according to Lord Atkin in his judgment in *Donoghue* v.

Stevenson [1932] *A.C.* 562, 579, as a basic principle in a certain area of tort law. We may surely use it also in other areas.

In the relationship between those who hold different views on the *halakhah*, the *Talmud* (*Yevamot* 14b) says regarding Bet Shammai and Bet Hillel that "they showed love and friendship to one another, thus observing Scripture, 'Love ye truth and peace' " (*Zech.* 8:19). Ritba explains this statement and concludes "...neither did anything hateful to the other".

5. Interested Parties

See: KATABI *et al.* v. CHAIRMAN OF THE LOCAL COUNCIL OF KIRYAT EKRON *et al.*, Part 4, Regulation of the Courts, p. 253.

H.C. 291/72

RUBINSTEIN *et al.* v. CHIEF RABBINATE COUNCIL ELECTION COMMITTEE

(1972) 26(2) *P.D.* 273, 279-280

The petitioners, who were members of the Haifa Religious Council, pleaded that the Election Committee set up under sec. 4(a) of the Chief Rabbinical Council (Elections) Law, 1972, had not included in the list of local rabbis a number who should have been included, and contained rabbis not suitable for inclusion.

Cohn J.: With regard to the composition of the Appeals Committee, I find it difficult to understand the intention of the legislature. The Minister of Religious Affairs knows better than anyone that the Chief Rabbis can be candidates for re-election to that exalted office. How did he come to appoint them to hear appeals as a result of which their voters are determined or varied? I will not spend time on the great principle amongst the rules of natural justice that no man may be a judge of his own case. I am, however, astonished that the enactor of the Regulations, prescribing the procedure for elections to the Chief Rabbinical Council, has overlooked the rule of Jewish law that no judge may hear any matter in respect of which he possesses some benefit (*Hoshen Mishpat* 7:12). The Sages of the *Talmud* went so far as to disqualify a judge who had some interest in a matter simply as a citizen or inhabitant: where a *Torah* scroll is stolen in some town, the local judges may not hear the matter; similarly where one person tells another to distribute some money to the inhabitants

of a town and the money was found to have been stolen, the local judges may not try the culprit (*Baba Batra* 43a). Rosh holds that where a person has evaded paying tax, those of the local judges who themselves are tax-payers may not try him: "Obviously he should not appear before them for how can they try him, having a part in the claim" (*Resp. Rosh* 58:7). The interest that every citizen has in the payment of tax by another or in the integrity of public property is only a distant and indirect interest, and presumably a judge will know how to differentiate entirely between his own personal interest and the public interest in which he has a part. Here, however, what is involved is not such a distant and indirect matter. An objection presented to the Appeals Committee may directly affect the success or failure of an immediate personal interest of members of the committee themselves. The fact that Chief Rabbis are concerned in the matter and they are, Heaven forbid, not to be suspected of perversion of the law, whatever the matter, is not relevant: they are disqualified by law, which prohibits any favour being shown.

C.S.A. 2/73

A. v. STATE OF ISRAEL

(1974) 28(1) *P.D.* 365, 370

The appellant was found guilty by a Civil Service Disciplinary Tribunal of disciplinary offences of a sexual nature, and was immediately dismissed. His submission was that there was no evidence to corroborate that of the complainant.

Kister J.: A properly ordered civil service in a democratic state requires that a senior official concerned with the acceptance and dismissal of other officials should exclude from his considerations and activities every personal or private motivation and not exploit others for his own needs and concerns. In general, caution is required in a person's relationship with those who may be dependent or think themselves dependent on him. In the present matter, it is apposite to quote the observations of R. Yonah Girondi, a contemporary of Nahmanides, in his *Sha'arei Teshuvah* (3:60):

> One person should not subjugate another. If fear of him or embarrassment prevent the other from withstanding what he says, he should not order the other to do anything, small or large, unless he concurs and it is for his benefit, even if to heat a kettle of water or go on some trivial errand.

A senior official may, and even must, demand that the staff carry out their duties, but no more.

6. The Obligation to Give Reasoned Decisions

H.C. 142/70

SHAPIRA v. JERUSALEM DISTRICT COMMITTEE OF THE ISRAEL BAR ASSOCIATION

(1971) 25(1) *P.D.* 325, 333-335

The Jerusalem District Committee of the Israel Bar Association — the respondent — heard the petitioner's complaint against a particular lawyer and decided to dismiss it. In reply to the petitioner's demand that he be sent the reasons for its decision, the respondent's secretary wrote that "every member of the committee voted as he did for reasons and considerations which he believed to be correct" and that "in the opinion of the committee, it does not need to give reasoned decisions."

Kister J.: As to the obligation to give reasoned decisions....This obligation is well-known in Jewish law with respect to the religious courts (which, in general, are collegiate bodies).

The laws relating to reasoning are based mainly on *Sanhedrin* 31b, dealing with two litigants, one of whom wished to be heard before the Supreme Rabbinical Court, and one who opted for the local court: according to the *Talmud*, [a litigant] is obligated to appear locally, "and if the litigant says: Write down the grounds on which you made your decision and give them to me, they must write them down and give him the document." We also find in *Baba Metzia* 69a a story of two people at a hearing before R. Papa, who said that "in such a case it is certainly necessary to inform him [of the grounds of my verdicts]."

The obligation to give a reasoned judgment and the conditions of such an obligation are set down by Maimonides, *M.T. Sanhedrin* 6:6, and in *Tur* and *Shulhan Arukh*, *Hoshen Mishpat* 14:4 and glosses.

This is not the place to detail all that the *halakhah* has to say on the obligation to give reasoned decisions, and it is sufficient if I mention the reasons for this obligation and how it should be fulfilled:

The reasons for the existence of the obligation are as follows:

(a) To ensure the possibility of review by a higher court or even by another body which will then be able to decide whether or not there has been an error in the decision;

(b) The principle guiding all men, and in particular, a person fulfilling a public role, "and you shall be clear before the Lord and before Israel" (*Num.* 32:22).

In view of these considerations and the language of the *Talmud*, the Sages instructed that where the parties have agreed to the jurisdiction of a particular body, then in general, there is no obligation to give reasons unless there is some basis for suspecting that there has been a mistake. Similarly, the decisors distinguish between the obligation to give reasons orally, so that the parties should know, and the obligation to write a reasoned judgment: the former obligation is the wider.

Regarding written reasons which are not necessarily intended to explain to the litigants the grounds for the decision, but rather, to allow for review, we find in *Nimukei Yosef* to *Baba Metzia* (40a in *Dappei haRif*):

One does not write: For these reasons, and from this evidence [from the halakhic literature], but one writes that A argued thus and B replied thus and from their arguments [it emerges that] A was right, and in the Court of the Assembly they will know the reasons.

Rema, too, ruled thus in *Hoshen Mishpat* 14:4, and Sema *ad loc.* in subsec. 26 explains: "For every competent court which hears the arguments will know how to rule on them, for there is one Torah for all."

R. Yair Bachrach, in *Resp. Havot Yair* (addenda), expressed surprise at the words of Rema and said that a description of the arguments, or in modern legal terms, the facts as presented, are insufficient...proper reasoning is necessary, i.e. judicial grounds for the decision.

It seems to me that all of these considerations are applicable today. Today, too, the authorities (and not only the courts) who deal with a citizen's rights are required to "be clear...": it is not enough that justice is done, but justice must also be seen to be done. The consideration that, from a practical point of view, it is difficult to subject any decision to review if the grounds for it are not known is also valid. Since the same considerations apply today, if the dispute between the Sages on the extent of the obligation to give reasoned judgments is translated into modern terms, we may say that in order to subject any decision to review, it is sufficient that the decision-making body gives the applicant a recital of the facts on which the decision is based, so that the body before which the matter is brought for review can determine whether or not the first body was mistaken. This is the minimum demand with respect to reasoning, and it is to be expected

that the body will note down, if only briefly, its juridical reasons as well. Indeed, Chap. 11:104 of the Rabbinical Courts Procedure Regulations, 1959, states:

> Every decision must contain, apart from the ruling on the subject of the case:
>
> (a) a brief summary of the litigants' arguments;
>
> (b) a determination of the material facts; and
>
> (c) the reasons for the decision.

Counsel for the respondent argued that the petitioner did not prove that an obligation exists on the part of the respondent to provide him with a copy of the minutes. This approach is wrong. When the argument forms the basis of the decision, then...the petitioner is entitled to see it or receive a copy, on the basis of the dictum, "and you shall be clear...". Likewise, refusal to show the minutes is like refusal to provide the reasoning to which the petitioner is entitled, and if the respondent argues that there is cause to conceal the minutes, he must prove it.

7. Public Tenders

H.C. 632/81, 19/82

MIGDAH LTD. v. MINISTER OF HEALTH *et al.*

(1982) 36(2) *P.D.* 673, 688

The petitioning company participated in a tender published by the third respondent, which set out dates of delivery of items ordered. In the course of dealing with the tender, the appropriate committee changed these dates. The company asked that consideration of the tender be cancelled because of its defective nature or alternatively that its own bid be accepted in full.

Elon J.: It is rather impertinent of the petitioner to ask us to cancel the tender with regard to all who responded to it — as it were, "if I do not succeed, neither may you" — because of a misdeed committed in the negotiations conducted with it. Of such a case, the *Talmud* says, "First adorn yourself and then adorn others" (*Baba Metzia* 107b), and as the old adage has it, when one says to another, "take the splinter from between your teeth" the other may reply "take the beam from between

your eyes" (*Baba Batra* 15b and Rashi *ad loc.*). As regards the question before us, it has long been settled that "anyone who seeks to set aside the offer made by a competitor in a tender because of defects he has found therein or omissions which he claims it shows, must first of all demonstrate that he himself was meticulous with regard to the terms of the tender and abided by them zealously. Otherwise his own offer is disqualified and he has no standing to claim that the other offer be set aside."

8. Public Contracts

H.C. 376/81

LUGASI *et al.* v. MINISTER OF COMMUNICATIONS *et al.*

(1982) 36(2) *P.D.* 449, 465-470

The petitioners attacked the policy of the respondents regarding the implementation of a plan for developing the telephone system where they resided, with respect to its ramifications upon priorities for installing telephones.

Elon J.: According to the plain meaning of sec. 61(b) of the Contracts (General Part) Law, 1972, the provisions of secs. 12 and 39 regarding negotiation and performance in good faith are equally applicable to obligations in the area of administrative law, even where these do not arise from a contract....Indeed, as my learned friend Shamgar J. pointed out, the duty of a public agency to act in good faith preceded the provisions of the said Law: the genesis of that duty lay in judicial law-making. With the enactment of the Contracts (General Part) Law, however, it was reborn as an act of the legislature, which has ever since been its source. To some degree we witness a similar development as regards good faith in contract law, since prior to the coming into effect of the Contracts (General Part) Law, judgments of this Court spoke of "one of the rules accepted as a universal principle of the law of contracts,...that the parties must act in good faith in performing a contract. According to the Sages the first question asked of a party who appears in court is 'Did you negotiate *bona fide*?' " (*C.A.* 242/70 *Misheol haKrach Ltd.* v. *Grovner* (1970) 24(2) *P.D.* 692, 702). Moreover, the principle of acting in good faith, both for the individual and the public, is based on the ancient precept, "And thou shalt do what is right and

good" (*Deut.* 6:18), by virtue of which the principle of good faith became crystallized in the Israeli legal system in the provisions of the above Law. In *C.A.* 148/88 *Roth* v. *Yeshufeh* (1979) 33(1) *P.D* 617, it was said that the term "good faith," according to its Jewish sources and in modern phraseology, is synonymous with "honesty of purpose" (*yosher lev*) which "constitutes a substantive part of the supreme principle in the *halakhah*, which found expression in the phrase 'and thou shalt do what is right and good'. This supreme principle served the Sages as a guide, a 'royal directive' throughout the *halakhah*." That is the significance of acting in good faith both in contract law and in administrative law. The meaning of this general and universal guiding concept cannot be defined in advance — as is also the case with similar general terms like "justice", "public welfare" and the like — and it gains content in the course of judgment in one matter or another. "The manner of employing the principle of good faith should be determined with the utmost caution, not by laying down generalised rules in advance, but from case to case, until in due course perhaps a number of directives and rules as to its use are precipitated. If that does not occur, the stability of the law is threatened and no one — not even the pure of heart — will know honestly what it involves and how far it reaches" (*ibid.*). Some assistance in understanding the concept may be derived from the incisive language used by Nahmanides in the thirteenth century in defining the nature of conduct which does not reflect the right and good. Whoever behaves according to the formal and technical sense of the laws of the *Torah*, who is particular about what is expressly stated but not about what is not mentioned but implied by the general spirit of the particular passage, such a person, in the words of Nahmanides, is "a scoundrel within the limits of the *Torah*" (Commentary to *Lev.* 19:2). Thus a person displaying a lack of good faith in performing his contractual obligations is a "scoundrel within the limits of the contract", and similarly, lack of good faith on the part of a public authority renders it a "scoundrel within the limits of public service."

Whereas the requirement of *bona fide* conduct is the same — as provided in sec. 61(b) of the Contracts (General Part) Law — both in the area of contract law and in the area of administrative law, its content and ambit is not necessarily identical in these two different legal spheres. Everything depends upon the subject matter and the circumstances. There are also two modes of carrying out an obligation that derives from contract. "In some cases lack of good faith amounts only to conduct not in accordance with the quality of piety, having no legal repercussions and not being a matter for the court. In other cases lack of good faith goes so far that it is necessary to seize upon the perpetrator and oppose him, to frustrate his counsel and nullify his evil thought, as the circumstances of

the case may require by analogy" (*Roth* v. *Yeshufeh*, see above). The same applies in *mala fide* conduct in the area of administrative law. Furthermore, sec. 61(b), which applies the requirement of good faith to all legal acts and obligations, incorporates an important basic limitation: "as far as appropriate and *mutatis mutandis*." The underlying reason for this derives from the nature and range of administrative law in contrast to private law, a difference that emanates from the varying character of these two bodies of law.

We may therefore dwell upon a number of rules of Jewish public-administrative law. Administrative law underwent considerable creative development in Jewish law with the rise in power and status of Jewish communities since the tenth century. These communities in various parts of the Diaspora enjoyed wide internal judicial autonomy, and by virtue of the extensive activity of the leadership in various public and administrative matters evolved a long series of administrative law principles. This internal autonomy was granted not only to individual communities but to groups of communities that were to be found in many areas...(M. Elon, *Jewish Law*, 2nd ed. 131, 547 ff., 558 ff.; *M. Elon*, "Authority and Power in the Jewish Community" in *In Memoriam of Yitzhak Ber*, 241 ff.: *M. Elon*, "Public Authority and Administrative Law" in *Principles of Jewish Law* (1975) 646).

Jewish law in general requires a formal act of acquisition (*kinyan*) to render a legal transaction valid (see Elon, *Jewish Law*, 476). From the thirteenth century onward we find the legal principle that every legal transaction effected by the community is valid even without such formal act (*Resp. Maharam miRotenburg* cited in *Mordehai* to *Baba Metzia*, 457-458). This new rule was applicable to different types of legal transactions, such as master-servant relations, surety, gift and others to which the community was a party (see e.g. *Resp. Maharam Ben Barukh*, Prague ed., 38; *Resp. Ribash* 476; *Hoshen Mishpat* 163: 6 (Rema), 204:9; *Resp. Mayim Amukim*, part containing *Resp. haRa'anah*, 63). The rule prescribed and adopted was that "it is a common usage that what community leaders agree to do is fully valid without *kinyan*" (*Resp. Rosh*, 6:19 and 21). With regard to some other fundamental requirements of property law, too, the rules prescribed by Jewish law in respect of public agencies were different. Thus, full effect was given to their act which involved a sale or purchase of something that was not yet in existence, and as opposed to private law under which a conditional clause (*asmakhta*) constituted an impediment to acquisition, in matters in which the public was involved it did not (*Resp. Mayim Amukim loc. cit.*; *Resp. Mabit*, Part 3, 228; see also Elon, "Law of Obligations" and "Contract", *Principles of Jewish Law*, 241-56).

Moreover, a greater measure of seriousness, rectitude and fairness was

required of a public agency in carrying out its obligations than was required of the individual acting in some area of private law. For this reason, when a representative of a public agency admitted that a particular citizen was exempt from some tax, the admission was binding and of full legal validity. In the case of an individual, an admission has no force unless it is made before two witnesses specifically asked to act as such. This is because of the presumption that an admission made only between the two persons involved lacks the firm resolve that is necessary; hence the person making the admission may say to the other that he was only jesting (*Sanhedrin* 29a). An admission by a public agency, on the other hand, is treated differently, "since it is not the manner of the public to 'jest' " (*Resp. Ribash*, 476 and following him Rema to *Hoshen Mishpat* 81:1).

In the two following matters, clear expression is given to this principle. In the first, Rashbash was asked whether a community whose practice it was to sell certain rights for one year but in the given case sold it for four years could rescind the transaction before the time had expired because the consideration was thought to be inadequate for what they had in mind to finance out of the proceeds. In Talmudic law, a sale at less than the normal price is called *ona'ah* or *hona'ah* (overreaching), and where the price is one sixth less than the normal price, the vendor may rescind (*Baba Metzia* 49b). It was also argued that the sale of the rights had been effected without an act of acquisition and was therefore invalid because the subject matter was non-existent. Rashbash rejected the argument of the community and denied them rescission:

> A sale by a community even without *kinyan* of a non-existent thing is fully valid....And if it was the practice to sell for one year but it was sold for four years, the sale is not to be cancelled....This is no ground for setting the transaction aside unless the treasurers alone sold, and not in public, for only then can the public rescind the transaction since it was not effected in the customary manner. If, however, the transaction was effected publicly, it is not to be set aside and it stands; nor is there any over-reaching here. Observe how all holy communities act in such matters. They never rescind because a non-existent thing is involved nor by reason of over- reaching....It is a disgrace for a community to say that it erred... (*Resp. Rashbash*, 566).

Secondly, there are the illuminating observations of Ra'anah, in a *responsum* we have already mentioned (*Resp. Mayim Amukim* as above). The leaders of a certain community came to an agreement with a person regarding the amount of tax payable by him on the estate he had inherited from his father. The community wanted to abrogate the agreement and argued *inter alia* that a mistake had occurred in the valuation of the

estate and that it should be re-valued. The person involved opposed this and claimed that he had already been released from payment under the agreed compromise. Ra'anah dealt first with the duty of the court to take the utmost care not to deprive the public of funds: "Where the case involves the right of the public, the trial judge must examine the matter as thoroughly as he can to find, if possible, some argument which tends to be in favour of the community."

Nevertheless Ra'anah rejected the plea of the public authority in the instance before him:

> Since they so valued it, even if it turns out that he had inherited more, he pays only on the valued amount, for they made the valuation. And although community leaders appear to be only agents of the community, and where an agent makes a mistake his agency ceases — since he may be told, 'I sent you to improve my position, not to impair it' (*Ketubot* 99b)...in any event Maharam has already written in a *responsum* that whatever the leaders of a community do...cannot be set aside, even though an error sufficient for that has occurred. We may thus infer for the case before us, that anything done by the heads of a community in the affairs that have been delegated to them endures, and the community cannot go back on it, even when it is apparent that the leader made a mistake.

A public authority that has assumed an obligation is thus bound to abide by it with greater rectitude and fairness, beyond the strict law binding on an individual in the same circumstances under private law. On the other hand, there are instances where an individual must display greater rectitude and fairness in his legal relations with another individual than is demanded of a public authority. For instance, when no obligation was undertaken by the public authority, and the question involves some public right, such as public property or funds, this right must be zealously safeguarded from any adverse influence, even more than in the instance of the right of an individual under private law. And that is also a leading rule in Jewish law as we learn from the remarks of Ra'anah on the subject.

We may illustrate this additional rule from the subject of the present petition. In Jewish law, a duty exists in special circumstances to act beyond the strict letter of the law in order to fulfill a religious duty, even when exempt in point of law (see e.g. *Baba Metzia* 83a; *Baba Kama* 55b- 56a). This duty obtains in the relations between individuals but not in respect of a public authority, the reason being that the individual is commanded in certain circumstances to observe the general directive, "Be liberal with what is yours and give it to him" (*Hullin* 134a). It is otherwise with a public authority: when exempt in point of law, it may not make any

equitable payment to an individual out of public funds. To do so would be to prefer the individual at the expense of the rights of the many, for a public authority is a trustee of the moneys and rights of the general public and it may not act in this manner. The rule is, "Be liberal with what is yours and give it to him", i.e. with what is "yours" but not out of the funds of the public.

9. Confidentiality

H.C. 264/70

MIZRAHI v. APPOINTMENTS COMMITTEE TO THE SUPREME RABBINICAL COURT *et al.*

(1970) 24(2) *P.D.* 335, 339

The petitioner sought an order to the Appointments Committee to accept a proposal that he be appointed as a member of the Supreme Rabbinical Court and to annul a proposal for the appointment of a certain other rabbi.

Kister J.: One may expect from or require members not to "leak information" or, in simple language, not to "bear tales and reveal secrets" (*Prov.* 13:11). This applies particularly to a committee for the appointment of judges. It should be pointed out that in the case of deliberations *in camera* of public committees, Hafetz Hayim said in *Hilkhot Lashon Hara* (2:11) that it is absolutely forbidden for a member of a committee to disclose what view he or any other member took.

10. Judicial Review

H.C. 302/72, 306/72

ABU HILU *et al.* v. STATE OF ISRAEL *et al.*

(1973) 27(2) *P.D.* 169, 184

The petitioners sought an order prohibiting the respondents to prevent the petitioners from returning and resettling in the Gaza Strip from which they had been removed by the Army.

Kister J.: How far may this Court interfere in the acts, including the legislative acts, effected by the Army Commander in Administered Territories?

There is no need to embark upon an exhaustive inquiry, and I shall content myself with dealing with the points that actually arise in these proceedings. In the nature of things, there are matters in which our intervention is very limited or even impossible. Thus, for example, the Court will not interfere with the foreign policy of the State and will not give directions regarding the manner of conducting war. Jewish law, it may be noted, contains a provision that the king may only engage in an "optional" war with the concurrence of the Sanhedrin (Great Court), but need not obtain such approval for a "compulsory" war, one instance of which is "to save Israel from an enemy" (see *M.T. Melakhim* 5:1-2; for the sources and interpretation of these rules, see S. Aricli, *The Law of War* 96, 170; E. Waldenberg, *The Law of the State*, Vol. 2, parts 4 and 5).

For similar reasons the Court will not hasten to intervene in the acts of a military commander, or his agents, which are intended for the defence of territory under his control. The facts, as well as the affidavits of the parties, are set out in the judgment of my learned friend Landau J., and he concludes that there is no reason to interfere with the discretion of the Military Commander. I concur in that.

11. Majority Decision

H.C. 205/60, 210/60

ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1960) 14 *P.D.* 2020, 2042-2044

H. Cohn J.: There is no dispute amongst the Sages that in the act of judging, the [decision of] the majority of judges or arbitrators is not followed unless they were all present at the hearing; even if one out of ten, or one out of one hundred was missing, the "whole package has come apart", for "the majority is not followed unless those in favour outweighed those against, or those against outnumbered those in favour, when they have all discussed (negotiated), but when a minority was not present, it is not so. It is said that if that one missing person had been present, he might have raised a point contrary to the decision of the majority, and the majority may

have conceded...and this applies both to a ruling and to a compromise, and there is no majority unless it is a majority of the whole that has engaged in negotiation, but a majority which is set apart from the whole and which judges or assesses or executes for itself without negotiations with the whole or not in the presence of the whole has not done anything" (*Resp. Ritba* 85; and *Resp. Rashba*, cited in *Bet Yosef, Tur, Hoshen Mishpat* 13:9). The learned Attorney-General argued that the Election Committee fulfills quasi-judicial functions, and its members may not, therefore, resign. I do not accept that argument, for if I were to hold that this is a quasi-judicial body, I too would rule that there can be a majority decision only when all members are present and participate in the discussion. But the characteristic of a judicial or quasi-judicial act is judgment between litigants and not, as the Attorney-General would have it, independent use of discretion. The use of discretion is common to both judicial and administrative acts, and the discretion required for an act of electing is not greater — neither in extent, nor independence, nor in nature — than that required in an administrative act in which the rights of others are involved.

There is another reason for the said rule applying to judicial acts. The right of the person being judged is to be judged by each and everyone of the members of the competent body, and not just by the majority: "By the implications of the text, 'Thou shalt not follow a majority for evil', I infer that I may follow them for good; if so, why is it said to 'incline after the majority'? To teach that the majority to 'incline after' for good [i.e., for a favourable decision] is not the one to 'incline after' for evil [i.e., for an unfavourable decision] since for good, a majority of one suffices..." (*M. Sanhedrin* 2:1).

In our sources, too, this applies not only to judicial acts, but also to quasi-judicial acts and acts which benefit one person and cause loss to another, such as the imposition of taxes and other compulsory payments (*Resp. Maharik*, Root 1) in which a majority has no significance unless all members were present. Regulations which had been made by the majority of the community other than in the presence of the whole were only ratified in places where such a custom had taken hold (*Resp. Mabit* 1:264).

Even though I know of no precedent for selecting the Chief Rabbi by a majority of electors when not all are present, the question in fact arose, and caused a great debate, with respect to renewal of the traditional "authorization" (*smikha*) of *dayanim* (religious court judges) in the first half of the sixteenth century. The Rabbis of Safed acted according to what Rambam had written in his Commentary to *M. Sanhedrin*, to the effect that the Sages of Israel may "authorize" *dayanim*, even though they themselves had not been "authorized". The Rabbis of Safed "authorized" the greatest

man amongst them, R. Jacob Berav. When the deed of authorization was sent to the Rabbis of Jerusalem for their endorsement, and so that they, too, could be "authorized" by the newly "authorized" *dayan*, the messengers were chased away by the greatest of the Jerusalem Rabbis, R. Levi b. Haviv, who argued that not only were there no grounds for revival of the traditional authorization, but also that the decision of the Rabbis of Safed was invalid, for even though they constituted the majority of Rabbis in Israel, that majority decided as it did when not in the presence of all the Rabbis: even though a majority decision is equivalent to a unanimous decision, that is only so when it is a majority of the whole. In the words of R. Levi b. Haviv:

> It is a positive scriptural commandment to incline after the majority, as long as the majority decides after discussions amongst the whole...but when the majority agrees without such discussion, there is no agreement, because it is possible that had the majority heard the arguments of the minority, they might have conceded, and changed their opinion...and in the present matter, in order for a majority decision to have been taken, we ought to have all sat together, discussing the law face-to-face, or at least, in writing...and because neither the one nor the other was done, their "authorization" cannot be called "authorization" by the majority.

Those words, and many many more, were published by R. Levi b. Haviv in a monograph, and in response, R. Ya'akov Berav wrote his own monograph. Thus, monographs from each side were exchanged three times, and as their number increased, so did their tone and the mutual recriminations contained therein....R. Levi b. Haviv wrote that the Rabbis of Jerusalem were few in number, but great in quality, and what value was there in a majority of Rabbis if the good Rabbis were not amongst them?! R. Levi also accused the Sages of Safed of impugning the honour of the Sages of Jerusalem, and of lack of good manners, for if they had been polite, how could it have occurred to them to confront the Jerusalem Rabbis with a *fait accompli*? I mention these accusations only to show that for this, too, there is a precedent, and this should not detract from the greatness of either of the Rabbis. On the matter at hand, it is noteworthy that in his critical scholia on R. Levi b. Haviv, R. Ya'akov Berav ruled that a matter such as the "authorization" of Rabbis does not require discussion or an inquiry, but only agreement as to the person to be "authorized", and to this end, a majority of the whole is not necessary; even a majority which does not constitute the whole is competent to act. Added weight attaches to this ruling in view of the fact that R. Ya'akov Berav's pupil, R. Yosef Karo, received "authorization" from his master when the latter was forced to flee from the authorities to Damascus.

It was later ruled that in non-judicial matters, when it was necessary "to make a fence in spiritual matters, where the generation is lax in the observance of the Torah, and it is vital to erect protective barriers... there is unanimous agreement that the majority which is not part of the whole has the power to do and amend whatever they deem necessary for public order (*Resp. Maharik* 180) and I dare to think that from the point of view of the litigants before us, this definition holds good for the purpose of electing the Chief Rabbinical Council: This is a spiritual matter, and this is a generation lax in observance of the Torah, and if such a majority decision is not valid, nothing will be done and nothing will be enacted.

It is also settled law that when there is a regulation which the majority follows, as in the case with respect to the regulations concerning the Elections Committee, "Whatever the majority decides, even though it be not from the whole, will be valid and hold good" (*Resp. Rashdam, Yoreh De'ah* 151). And in another *responsum*, support can be found for the view that when something has been agreed, and later some of those who made the decision resign or leave, the decision remains valid, and whatever is done later is valid, even though some are missing (*Resp. Mabit, Yoreh De'ah* 151). And in fact, there is no other possibility, for were this not so, the community would never decide anything if individuals had the power to rescind the agreement (*Resp. Rosh.* 6:5)

12. Delegation of Authority

H.C. 380/74

SALAMAN v. NATIONAL LABOUR COURT *et al.*

(1976) 30(1) *P.D.* 495, 496, 501

The issue in this petition was whether the dismissal of the petitioner was politically motivated and therefore unlawful.

Berinson J.: Counsel for the petitioner sought to invalidate an arbitration award on several grounds: the arbitration was held not before the pertinent committee but before only two of its members; neither the committee nor the arbitrators were disposed to listen to the submissions of the petitioner; the matter had not been brought before the central review committee; the

award had not been signed by all members; all that existed was a letter from the secretariat of the committee concerned with dismissals; and a copy of that letter had been sent to the petitioner but the award was not properly signed.

The petitioner brought no evidence concerning the division of functions amongst the various subordinate bodies of the central review committee, the rules of procedure or the form of award. It is reasonable to assume that not everything needs to be brought to the attention of the plenary committee for consideration and decision. The committee is a large body, comprising a large number of members. The secretariat is also a large body and sufficiently representative. Accordingly, only matters of fundamental importance or of a very general nature are brought before the committee for decision in the sense of Jethro's advice to Moses that "every great matter they shall bring unto thee, but every small matter they shall judge themselves" (*Ex.* 18:22).

H.C. 702/79

GOLDBERG v. MAYOR OF RAMAT HASHARON *et al.*

(1980) 34(4) *P.D.* 85, 88, 89-90

The petitioner challenged the delegation of certain powers by the Mayor of Ramat Hasharon and sought inter alia *to have such delegation annulled.*

Elon J.: An important rule is that discretionary powers must be exercised by the person vested with the discretion and may not be delegated to another person unless he is expressly authorised to do so...

It should be pointed out that this rule can already be found in ancient Jewish administrative law. Such law underwent great creative development with the rise of the Jewish community, beginning in the tenth century. The Jewish community in the different centers of the Diaspora enjoyed extensive internal and judicial autonomy, and because of the widespread activity of the communal leaders in a variety of public and administrative areas, a long series of administrative law principles was developed (see M. Elon, *Jewish Law*, Part 1, 547; vol. 2, 558; Elon, "Public Authority and Administrative Law" in *The Principles of Jewish Law* (1975) 645).

In one of his *responsa*, Ribash dealt with the delegation of powers of municipal administration, similar to the present case (*Resp. Ribash* 228). A particular community in Catalonia had enacted a regulation empowering three of its leaders (called "trustees") together with the local *bet din* (Jewish court) to choose a group of thirty persons for supervising different

communal matters, concerned largely with the distribution of the burden of tax and its collection. "The trustees and the *bet din* deliberated on the choice of the thirty persons and since they could not agree upon the selection, they left it to two individuals to decide." A section of the community opposed this delegation of powers, arguing that "the trustees and the *bet din* have no power to appoint any one to make the selection since they themselves were the ones empowered and authorised to do so and therefore, even if they did appoint the two, the selection was of no effect."

In a lengthy and detailed answer dealing with agency law and the delegation of powers, Ribash accepted the view of the opposition and concluded:

> Although in general an agent may appoint another as his agent where it may be assumed that the principal will not mind, in the present case it appears that the trustees and the *bet din*, who are the agents of the community for selecting the thirty appointees, cannot appoint others in their place to make the selection, since that was not expressly provided in the regulation.
>
> In such a matter people are particular. The affairs of the community depend upon the selection of the thirty appointees and those who are fit to choose them must exercise great caution and give much thought in choosing persons who are wise and discerning and acquainted with the affairs of the community, its laws, customs and regulations, persons who love righteousness and pursue peace and towards whom the majority of the community are well disposed. There is no doubt that people are very concerned as to who will make the choice....Since the community is concerned that the persons making the choice should be persons of importance and prominence, it is not the community's intention that they should be able to appoint others in their place, even if those others are as wise and discerning as they themselves.
>
> Furthermore, even if the community did not insist on this point, they could nevertheless not appoint others in their place since they were not given express power to do so. The authority of the trustees and *bet din* to choose the thirty appointees is given orally, and oral matters are not passed on to an agent....This is not a case of handing over an article but rather, a matter of words, and in the very carrying out of his agency the agent acts as agent but cannot leave it to another agent.
>
> For these reasons, the first selectors cannot appoint others in their place unless expressly authorised to do so, for only then, as it were, will

the community itself have chosen the two (see also *Arukh haShulhan, Hoshen Mishpat* 182:8; Elon, "Public Authority," etc. *ubi supra*, 648-49).

The functions and authority which a person chosen by the community receives under law, and which involve deliberation and thought, must be exercised by him personally unless he is expressly authorised to delegate such functions and authority.

13. Exercise of Official Powers

See: A. v. STATE OF ISRAEL, p. 178.

B. The Citizen and the Authorities

1. Presumption of Innocence

H.C. 94/62

GOLD v. MINISTER OF THE INTERIOR

(1962) 16 *P.D.* 1846, 1851-1852

On arrival in Israel the petitioner expressed his desire to settle here, and also made it known that he had received a passport in the U.S.A. on a false declaration that he had lost his old passport. The respondent refused to give him a new immigrant's certificate, believing honestly — on the basis of material that included an indictment, a summons to trial and a sworn affidavit from the American police — that the petitioner had a criminal past that might endanger the public welfare.

Cohn J.: A person has the basic right to be presumed innocent not only so that he will not be punished without trial, but also so that his honour and good name and all his other personal and material rights will not be prejudiced by reason of any criminal act so long as he has not stood

trial. Moreover, this basic right, like most basic rights of the individual, is given and stands not merely so that he may defend himself in court but rather, for his protection against the administrative authorities...

So that no suspicion arises in the mind of any person (particularly the respondent) that we are bound only to the English legal tradition and the ethics of modern nations in order to prescribe such fundamental concepts, let me say that it is a positive commandment to judge our neighbours in righteousness (*Lev.* 19:15). This was understood and explained by Rashi thus: "Scripture is not speaking of litigation between individuals, but of an instance where you observe your neighbour doing something which may be either sinful or right, in which event consider it right and do not suspect that he is committing a wrong" (Rashi to *Shevu'ot* 30a). The just manner in which an administrative authority is commanded to act raises the presumption that the person is innocent; only when no reasonable doubt exists of his guilt, because he has been found guilty after a properly conducted trial, will this presumption no longer be available to him (see *Shabbat* 127b and *Berakhot* 31b; Hafetz Hayim, Positive Precepts, 3).

2. Acquisition of Land for Public Purposes

H.C. 326/65

SARVI *et al.* v. ISRAEL LANDS AUTHORITY

(1966) 20(2) *P.D.* 490, 499

Kister J.: The principle that the state must pay compensation for confiscating private property has crystallized and is recognized in many legal systems, as may be seen from the recent English decision in *Burmah Oil Co. Ltd.* v. *Lord Advocate* [1965], *A.C.* 75, 152. This principle, I may point out, has long been recognized in Jewish law. Maimonides puts it in the following manner:

> (The King) takes fields, olive trees and orchards for his vassals when they go to war and they are spread out over such places, and can only sustain themselves therefrom, and he makes payment (*M.T. Melakhim* 4:6).

In view of this fundamental principle, the State must ensure that the petitioners, whom it placed in the Jamosin quarter after having been

evacuated from Yaffo during the war, are compensated. In its...notice [to them, the Lands Authority] even prescribed the manner for compensating the petitioners so that they would receive alternative housing should it desire to make other use of the area in which they now dwell. The evacuees were assured that the matter would be arranged by mutual agreement, but since no such arrangement has been agreed upon, a decision on the matter must inevitably be left to a suitable judicial body.

The State thought that it would discharge its duty by means of an agreement with a particular housing company to which it had transferred its rights in the land on which the petitioners dwelt, to the effect that the company would provide alternative housing to all those who desired it in the buildings that it was to erect in that area.

C.A. 216/66

TEL AVIV-YAFFO MUNICIPALITY v. ABU DAYAH

(1966) 20(4) *P.D.* 522, 525, 546

Agranat P.: On 25 January 1966, the respondent applied to the Tel Aviv District Court asking for an assessment of the compensation due to him in respect of his rights in Block 6638, Plot 43, on its expropriation by the appellant, in accordance with the Land (Acquisition for Public Purposes) Ordinance, 1943...

And finally, Jewish law also recognizes that there is no expropriation without payment. In *Sarvi* v. *Israel Lands Authority* (see *H.C.* 326/65 above) my learned friend Kister J. cited Maimonides regarding the rights of the king to make expropriations for army requirements during wartime. He has also drawn my attention — as regards the expropriation of land for public purposes such as roads, by public authorities — to the rule summed up by Hazon Ish to *Baba Batra* 4:16, which states *inter alia*:

> In any event the individual should not suffer any financial loss, but the public must make good his loss since the individual is not required to provide for public purposes out of what is his...but only needs to give his share with the public.

3. Collection of Tax

C.A. 65/76

HEVRAT HAGIVAH HA'ADUMAH 5000 LTD. v. MUNICIPALITY OF RISHON LEZION

(1976) 30(3) *P.D.* 818, 819, 823

Cohn J.: The respondent Municipality demanded from the appellant company the payment of IL54,555 as its share of the costs of the highway which the Municipality intends to construct. Having received no response, the respondent commenced summary proceedings in the District Court. The appellant asked for leave to defend, pleading not only that summary proceedings were not the proper form of trial but also that the Municipality is not entitled to claim either at all or at the present stage. The learned Registrar dismissed both pleas and awarded the respondent the amount it claimed with interest and costs. The appellant then appealed to this Court...

The by-law that empowers a Municipality to levy participation money for expenses that have not been made and for works that have not been executed but merely because a resolution was once adopted to carry out the works in question, is invalid not only because it has no basis in the law and lacks authority but also because it contains an element of robbery and is unreasonable. The element of robbery arises from the fact that where a person borrows something without the knowledge of the owner, he is called a robber (*Baba Batra* 28a) and the same applies where one forcibly takes "a deposit" for nothing tangible, even when restitution is provided for. Maimonides permits a king to hew down trees and destroy houses and *a fortiori* to levy taxation for building roads or bridges. But all this will obtain where "the fame of a king has spread"; "where it has not, he is like a violent robber, acting like a lawless band of armed highwaymen: such a king and his vassals are in all respects robbers" (*M.T. Gezelah* 5:18). A king's fame spreads when he acts and issues decrees "with the consent of the local population." Likewise one may say that the fame of a municipality spreads when it imposes taxation and raises money either with consent of the legislature or with the consent of those who pay the taxes. In the absence of express and unambiguous consent, a demand for payment by way of a deposit amounts to "state robbery" by virtue of which money may not be extracted from its owners.

Chapter Three

CIVIL RIGHTS

A. Protection of Human Dignity

1. Reputation and Respect

F.H. 9/77

ISRAEL ELECTRICITY CO. LTD. *et al.* v. HA'ARETZ NEWSPAPER LTD. *et al.*

(1978) 32(3) *P.D.* 337, 343, 344

This hearing concerned the dismissal of the claim of the Israel Electricity Company for damages for libel.

Landau D.P.: The Basic Law: Civil Rights Bill of 1973 states in sec. 3 that "every person is entitled to legal protection of his life, his person, his soul, his honour and his reputation" and this right may not, so it seems, be limited by any law. This formulation, which gives reputation equal standing with the right to life, recalls the words of our ancestors; "Whosoever shames his friend in public, it is as if he spills blood." Today, this is called "character assassination". (On the rules in Jewish law which stress the important position of a person's honour in the system of juridical values meriting protection, see Rakover, "Protection of a Person's Honour", *Research and Surveys in Jewish Law* no. 54, published by the Ministry of Justice.)

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H.C. 355/79, 370/79, 373/79, 391/79

KATLAN *et al.* v. THE PRISON SERVICE *et al.*

(1980) 34(3) *P.D.* 294, 305-307

These proceedings turned on the question of whether the Prison Service and the Governor of Ramlah Prison may order the administration of an enema without the consent of the prisoners concerned in order to discover drugs which prisoners had swallowed. The drugs had been smuggled into the prison for personal use and as a means of acquiring influence and status.

Cohn D.P.: The reasonableness of a regulation — and even more so of an administrative directive — is determined by the good standards accepted by the majority of people in a democratic society and state of law, and there is none better and more accepted than basic respect for humans. A free and civilised society is distinguished from a barbaric and oppressive society by the degree to which it treats a human being as a human being. Lofty classic expression was given to this by the *Mishnah*:

> Therefore Adam was created alone, to teach you that whosoever destroys a single soul — Scripture ascribes to him as though he had destroyed an entire world, and whosoever preserves a single soul — Scripture ascribes to him as though he had preserved an entire world; and for the sake of peace among mankind let no man say to his fellow man "My father is greater than your father"....Therefore every single person must say, "The world was created for my sake" (*M. Sanhedrin* 4:5).

Just as a person must (note, not "may") say, "The world was created for my sake", so must every other person say that the world was no less created for his sake. This is what Hillel meant when he said that the whole *Torah* is exhausted in the great rule that every one is entitled to be treated according to your own honour, as you would wish to be treated (*Shabbat* 31a). However, it is not only because we have been commanded from ancient times to respect man (or in modern terms, because respect for man is an outstanding element of the Jewish heritage) but also because zealous respect for a person is a precondition for ensuring his rights and other freedoms, that this is a good standard by which to measure reasonableness as aforesaid.

My learned friend Barak J. in his wisdom cited many impressive passages from English and American legal literature to show that in the view of the leading judges and legal philosophers of the gentile world as well, the safeguarding of a man's honour is preferable to the satisfaction of the legitimate requirements of the rule of law and order. I have said to myself

that we do not live by these authorities alone. Let me try to quarry from our own deep sources the sayings of our Sages to illuminate the matter and gladden hearts.

The duty to abide not merely by the commandments of the Written law but also by those of the Oral law derives from the verse: "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 what they tell thee to the right or to the left" (*Deut.* 17:11). On the basis of this verse, it was decided that whoever transgresses what the Sages have declared and does not follow their directives transgresses a negative commandment, since it says, "Thou shall not turn aside" (*M.T. Mamrim* 1:2). The Sages also prescribed the eminent principle, "Great is human dignity since it overrides a negative commandment of the *Torah*" (*Berakhot* 19b). Rab bar Sheva explained this principle to R. Kahana as referring to the negative commandment not to turn aside, i.e. that human dignity over-rides all rabbinical prescripts and interdicts which we are required to observe by virtue of the negative commandment not to turn aside, as opposed to the prescripts and interdicts of the *Torah* which do not yield to human dignity. This rule at once met with criticism in the light of the verse "There is no wisdom or understanding or counsel against the Lord" (*Prov.* 21:30). If it is a Divine commandment that imposes upon us the duty to obey the prescripts of the rabbis, how can the rabbis release us from this duty for the sake of human dignity, or at all? The problem is resolved in the language of the *Gemara*: "All the ordinances of the rabbis are based on the prohibition of 'thou shalt not turn aside' but for the sake of human dignity the rabbis allow the act" (*ibid.*). In other words, the rabbis who imposed the prohibition may remove it later for the sake of human dignity.

The distinction between the Written law which does not yield to human dignity and the Oral law which does so yield directly affects the matter before us. If we "translate" the Written law into legal terms as meaning primary legislation, and the decrees of the scribes as being secondary legislation, we may say that even human dignity cannot prevail over primary legislation, whereas secondary legislation must yield to human dignity. That is what we have said: If it is possible to contemplate an infraction of human dignity by forcible penetration of the individual's inner parts, that could only be permissible under primary legislation; so long as it is not so permissible, or so long as no genuine implementation of any such legislation demands an act that violates human dignity, such dignity is immune from any licence to violate. If the analogy is untenable, this is only because the Written law is presumed to be eternal and immutable whereas primary legislation is, after all, a human act, variable and repealable at the wish of

the legislature; and in this respect the Oral law of the rabbis is similar to the primary legislation of our own times. That may also suggest to the primary legislature that just as the rabbis were bold enough to waive all prohibitions instituted by them where necessary to preserve human dignity, it should be cautious in sacrificing human dignity on the altar of any other requirement whatsoever.

The concept of "human dignity" is not expressly defined, but one may infer from all the cases in which the sources speak of it that violation of such dignity consists of any act that brings scorn, shame or embarrassment to a person. Thus, to strip the clothes off someone in a public place was deemed an infraction of human dignity (*Menahot* 37b), as was preventing a person from attending to his bodily needs (*Eruvin* 41b). A corpse that has begun to smell offensively may be removed on the Sabbath from the place where it is lying on account of human dignity (*M.T. Shabbat* 26:23 based on *Shabbat* 94b). And although it is forbidden on the Sabbath to move the lightest of stones, especially from one domain to another, it is permissible to carry them up to the roof (for cleaning one's private parts) on grounds of human dignity (*Shabbat* 81a-b). (Let no one wonder that small stones were used for this purpose, since they were only as large as a nut, according to R. Meir, or an egg, according to R. Yehudah, and R. Yohanan forbade the use of chipped stones (shards) for cleansing oneself because of the danger of cuts)...

On the other hand, the *halakhah* is that one must do everything to prevent another from committing a prohibited act, even if his honour is affected: if one sees a person dressed in a garment of a mixture of wool and linen, which is an offence under the *Torah* (*Deut.* 22:11), one must tear it from his body even in public and "even if he was his teacher who taught him wisdom, since human dignity does not displace the prohibition of an express negative commandment of the *Torah*" (*M.T. Kilaim* 10:29). This will only apply to a transgression manifest to all and where there is no doubt as to the commission of the offence and the identity of the offender...since it is equally forbidden to touch a person merely suspected of a wrong (*Menahot* 37b). That is the situation in the case before us: even were it permitted to prevent the commission of a wrongful act by removing drugs from the body of a person, when it is clearly and demonstrably known that the drugs are in his body, there is no authority to penetrate his body merely to search, to establish whether an offence has been committed or not. The act of preventing the commission of an offence is intended to prevent the continuance of an ongoing offence the commission of which has already begun, and not to prevent an offence the commission of which is only suspected.

To conclude, human dignity is supreme since it prevails over the

prohibition of introducing drugs into prison, if that can only be enforced by a violation of the body of a person and his dignity.

2. Oppression of the Convert

H.C. 230/86
MILLER v. MINISTER OF THE INTERIOR *et al.*
(1986) 40(4) *P.D.* 436, 447-448

The petition turned on the decision of the first respondent to insert the word "converted" next to the word "Jew" in the nationality rubric of the petitioner's identity card. The petitioner underwent conversion in the United States, and received a conversion certificate from the United States Reform Movement. Because those registering marriage and divorce in Israel attribute great significance to the item of nationality in the identity card, the respondents believed that they had the authority not to register a sensitive item such as religion and nationality in a way that may mislead another authority and thus cause grave harm to the public.

Elon J.: My colleague, Shamgar P., explained clearly that under the Population Registry Law, 1965, a registration clerk is not empowered to add the word "convert" in parentheses after the word "Jewish". I am of the same view, and would just like to add, that this parenthetical addition, which "complements" or "describes" every case of conversion, played no part in the *halakhah*. I quote from what I have said previously: "The Jewish people does not 'make souls' in order to bring members of other nations within its ranks" (*Micah* 4:5; *M.T. Melakhim* 8:10). And later, at p. 300:

> A Gentile who joins the Jewish people becomes one of the members of that people, with all the rights and obligations: "Ye shall have one statute, both for the stranger and for him that is born in the land" (*Num.* 9:4); "Let not the foreigner who has joined himself to the Lord say: The Lord will surely separate me from his people...for My House shall be called a House of Prayer for all peoples" (*Is.* 56:3-7). That applies not only to the future, but also to the past. Thus Rambam replied to R. Ovadiah the Righteous Proselyte:
>
> Therefore, every one, to the end of all generations, who becomes

> a proselyte, and whoever declares the name of God as One, as it is written in the *Torah*, is a disciple of Abraham, our father...and they are all children of his household...and there is no difference at all between us and you....Let not your genealogy be deprecated in your own sight...if we are descended from Abraham, Isaac and Jacob, you are descended from The One by whose word the world was created (*Resp. Rambam*, Freiman ed., 369).

Apparently, there is no person with respect to whom the *Torah* cautioned more — in thirty-six places (*Baba Kamma* 59b; *Resp. Rambam* (Blau) 448) — than it did against oppression of the convert, whether by word, by deed, or by way of halakhic-legal registrations and determinations. Two factors were at work here: the first — the nation's historical memory: "And you shall love the stranger, for you were strangers in the Land of Egypt" (*Deut.* 10:9), and also, in the said *responsum* of Rambam to R. Ovadiah, we find:

> For the *Torah* was given both to us and to the proselytes, as it is said: As for the congregation, one statute there is for you and for the proselyte, an eternal law for your generations, for you and for the proselyte before the Lord; one law and judgment shall be for you and for the proselyte. Know thou that our fathers who came out of Egypt were, the majority of them, idolators. In Egypt they intermingled with the Gentiles and learned their ways, until the Holy One, Blessed be He, sent Moses, peace be upon him, the teacher of all prophets, and set us apart from the other peoples and brought us under the wings of the *Shekhina* [Divine Presence] for us and for all the proselytes, and gave us all one Law (*Resp. Rambam* 293).

The second factor is the special sensitivity of a person who has left his social and spiritual world, the world in which he was born and raised, in which he was educated and worked, and has gone over to become part of a different and special spiritual world and social milieu, and has assumed their laws and way of life: "And a stranger thou shalt not oppress; for ye know the heart of a stranger" (*Ex.* 23:9). One does not remind a convert of his former status and deeds, and his honour should not be held lightly (*Mekhilta Mishpatim* 18; *Baba Metzia* 59b; *M.T. De'ot* 6:4; *Sefer haHinnukh*, Commandment 431, etc.). And we have also learnt: "The proselyte is dear, for in every place he is described as an Israelite" ...and "he will be called by the name of Jacob — these are the righteous proselytes" (*Mekhilta loc. cit.*). And so ruled one of the later halakhic authorities: "Every person who treats the proselyte in a manner different from his treatment of an Israelite — transgresses this positive

commandment, as it is written: He shall be as a citizen amongst you, and you shall love him as yourself" (Commentary of R. Jeruham Fischel Perla to *Sefer haMitzvot* of R. Sa'adia Gaon, Positive Commandment no. 82). And there is no doubt that in adding the word "converted" in parentheses — an addition which is not found beside the "ordinary" Jew — we are acting in a way that is different from the way in which we act towards any other Jew, and we are therefore warned not to act thus and not to add [this word].

3. Imprisonment as a Means of Punishment

See: STATE OF ISRAEL v. SEGAL *et al.*, Part 6, Penal Law, p. 491.

B. Freedom of Religion and Conscience

1. Exemption from Military Service

H.C. 734/83

SHINE *et al.* v. MINISTER OF DEFENCE *et al.*

(1984) 38(3) *P.D.* 393, 403-405

The appellant served a sentence for non-compliance with a call-up to reserve duty on grounds of conscience. During his imprisonment he received another call-up that was due to commence a few days after his release from prison, with which he again refused to comply for reasons of conscience. He argued that the relevant army regulations were invalid since they were discriminatory; that his second call-up did not serve a military purpose but was intended to penalise him for his previous refusal; that the required forty-two days' prior notice had not been given to him, and that his imprisonment was illegal and should have been counted as part of his reserve duty.

Elon J.: It is right that we should examine the position of Jewish law on this matter, if only briefly. The grounds afforded by one legal system are naturally not identical with those of another system, especially on this matter in which philosophy and law come together, and most especially in the case of a system such as Jewish law with its outlook, in which law and morals are intricately combined. In principle, Jewish law, even in earliest times, treated the present subject as part of a group of matters relating to the release from the duty of army service. These matters are dealt with in *Deut.* 20:1-9 and in particular in verses 5-8:

> 5. And the officers shall speak unto the people, saying: What man is there that hath built a new house and hath not dedicated it? Let him go and return to his house, lest he die in battle and another man dedicate it. And what man is there that hath planted a vineyard and hath not used the fruit thereof?
>
> 6. Let him go and return unto his house, lest he die in battle and another man use the fruit thereof.

These two verses establish that in certain circumstances economic considerations afford exemption from army service. The next verse refers to the family aspect:

> 7. And what man is there that hath betrothed a wife and hath not taken her? Let him go and return unto his house, lest he die in battle and another man take her.

The verse that follows approaches the present case:

> 8. And the officers shall speak further unto the people and they shall say: What man is there that is fearful and fainthearted? Let him go and return unto his house, lest his brethren's heart melt as his heart.

We learn from other sources of how these exemptive grounds were applied in practice. Thus God says to Gideon (*J.* 7:3):

> Now therefore make proclamation in the ears of the people, saying "Whosoever is fearful and trembling, let him return and depart early Mount Gilead." And there returned of the people twenty and two thousand and there remained ten thousand.

The substance of these verses is repeated in I *Macc.* 3:55:

> As the law commands, he ordered back to their homes those who were building their houses or were newly wed or who were planting vineyards or who were fainthearted.

The Sages add various details and other grounds for exemption from army service but this is not the place to enlarge on these (see *M. Sotah* 8:2-7; *T. Sotah* 7:18-24; *Sifre, Deut.* 192-197; *M.T. Melakhim* 7; *Sefer haHinnukh* 502; S. Arielli, *The Law of War* (1972) 35-36, 52-90; S. Goren, *The Law of the Sabbath and the Festivals* (1982) 369-379). For release on medical grounds, see *Sifre loc. cit.*, 190.) Let us look at certain observations on release from army service of those who are "fearful and fainthearted":

> R. Akiva says "fearful and fainthearted" is to be understood literally: he who is unable to stand in the ranks of battle and see a drawn sword (*M. Sotah* 8:5).

A similar definition is to be found in a *Beraita* (*Sotah* 44b):

> The Rabbis taught: If he heard the sound of trumpets and was terror-stricken, or the crash of shields and was terror-stricken, or beheld the brandishing of swords and urine discharged itself upon his knees, he returns home.

According to these definitions, the "fearful and fainthearted" are those who fear the panic of battle. A further definition is given by R. Akiva in *T. Sotah* 7:24:

> R. Akiva said: Why does the *Torah* add "fainthearted" to "fearful"? Even the bravest of men and the strongest of them who feels merciful is to return home.

According to this interesting definition, "the fearful" is one whose fear overcomes him, while "the fainthearted" is one who, while not fearful of battle, is filled with feelings of mercy, even for the enemy, so that he becomes incapable of waging battle and there is a risk that others will be similarly affected.

Another explanation is cited in the *Mishnah* in the name of R. Jose the Galilean: "Fearful and fainthearted" alludes to one who is afraid of the transgressions he has committed, and for this reason his conscience troubles him and he may become indecisive and affect others with lack of resolve. The *Mishnah* concludes with the following:

> To what does all the foregoing apply? To an optional war, but in war commanded by the *Torah* [such as in the conquest of the Land of Israel (Rashi *ad loc.*), or in defence against an invading enemy, according to *M.T. Melakhim* 5:1] all go forth, even a bridegroom from his chamber and a bride from her canopy.

Such are the main views of Jewish law on the matter, which in essence

is similar to release from army service on grounds of conscience. These grounds are general and universal, based on the nature of man and his attitude to violence and war. They are not selective and particular to circumstances of time and place, or based on social-ideological perceptions. Those general, universal grounds are only applicable, however, in the case of optional wars; they do not apply in times of emergency, when the war is a war commanded by the *Torah*.

For all these reasons we decided, on the date of the hearing, to dismiss the petition.

2. Recruitment of Women

H.C. 456/71

BARAZHANI v. MINISTER OF JUSTICE *et al.*

(1972) 26(2) *P.D.* 543, 549

The Exemptions Committee operating by virtue of the Defence Service (Exemption) Regulations 1952 discussed the case of the petitioner, who asked for an exemption from military service for reasons of religious conscience, and it decided that "there is nothing to prevent her from serving in the Army."

Kister J.: Indeed, the trend or tendency in a democratic state is to recognize the citizen's freedom of religion and conscience, and not to force a citizen to violate a prohibition applying to him by virtue of his religion, or to act contrary to his conscience. Not in every single case, however, will the citizen be able to rely on the principle of freedom of religion and conscience. With respect to military service, a male resident of Israel who belongs to a religious grouping that prohibits military service will not be able to request an exemption from such service, and this is also the case with respect to a person who claims that military service violates his conscience.

With respect to women, on the other hand, the law does recognize such an exemption, and it is the task of the Exemptions Committee to determine whether, on the evidence, the person requesting the exemption is religiously observant, and whether, according to the laws of her religion, she is prohibited from serving in the Army.

What is at issue here are civil rights which are recognized the world over, and the Committee must therefore act only after careful thought and refrain from laying down criteria or means of proof that will render the law devoid of all meaning.

Indeed, in view of the above, it might have been sufficient to mention the prohibition issued by the Chief Rabbinate, but I felt it necessary to discuss the nature of the prohibition and the degree of gravity attached to it in order to understand that for a person who believes and who feels himself to be bound by the edicts of the Rabbis, the prohibition is no light matter. Noteworthy here is one of the sources for the prohibition on real military service for women. *Nazir* 59a states:

> R. Eliezer b. Jacob says: How do we know that a woman should not go to war bearing arms? Scripture says, "A woman shall not wear that which pertaineth unto a man" (*Deut.* 22:5).

Similar statements are to be found in *Sifre Ki Tetze*, 226.

In the wake of these statements, the rule was laid down in *M.T. Avodah Zarah* 12:10:

> A woman shall not array herself in men's raiment, such as putting on a hat or headdress or wearing armour and so forth...

We find words to the same effect in *Yoreh De'ah* 182:5.

C. Freedom of Expression

1. Freedom of Opinion and Expression

See: NEIMAN v. CHAIRMAN OF CENTRAL ELECTIONS COMMITTEE, p. 209.

D. Rights of Aliens

1. Rights of the Gentile in Israel

H.C. 200/83

WATA'AD *et al.* v. MINISTER OF FINANCE *et al.*

(1984) 38(3) *P.D.* 113, 119

This petition challenged the validity of certain regulations governing financial grants to students in theological seminaries, on the ground that they discriminated against non-Jews, there being no such institutions in the country for Moslems or Christians.

Tirkel J.: In considering the question of whether these regulations are discriminatory, we would do well to go back to first principles.

The principle of equality and the prohibition against discrimination, embodied in the commandment, "Ye shall have one manner of law, as well for the stranger as for the home-born" (*Lev.* 24:22), which the Sages took to mean "a law that is equal for you all" (*Ketubot* 33a; *Baba Kama* 83b), have been enshrined in Jewish law ever since the Jews became a nation. When we returned to our land and declared the independence of our State, after thousands of years of exile during which our people were the victims of hostile discrimination amongst the nations, our Declaration of Independence explicitly ensured complete equality of social and political rights to all inhabitants, irrespective of religion, race or sex. Accordingly we, more than any other people, are commanded to examine meticulously the least manifestation, open or disguised, of wrongful discrimination, in case we are guilty of that from which we ourselves suffered.

El.A. 2/84, 3/84

NEIMAN *et al.* v. CHAIRMAN OF CENTRAL ELECTIONS COMMITTEE OF THE ELEVENTH KNESSET

(1985) 39(2) *P.D.* 225, 293-302, 318

This appeal concerned the decision of the Central Elections Committee to reject applications by two party lists to take part in elections to the Eleventh Knesset

Elon J.: My colleagues have expounded at length the views of lawyers and legal thinkers in other legal systems and in other countries regarding freedom of expression and freedom of thought. The different views are not always consistent and often they are contradictory. Enquiry into this subject is very important because it can broaden one's horizons and deepen the study of this matter which is common to all enlightened and progressive legal systems. In this context I would note that in a study of this kind one must always bear in mind the political background and the legal framework in which the views are expressed, for they may differ from those in Israel. Since, however, the various approaches to the subject...have been considered well by my colleagues, I am released from the duty of going over them again. Here, too, it is fitting that we find sustenance in the principles of the Jewish tradition...

Before I proceed along this course, one preliminary observation. It is well-known that Jewish thought over the ages — including the halakhic system, as we shall see — is full of varying perceptions and conflicting approaches. No litigant finds it difficult to extract from the recesses of the sources some support for his own arguments and views....This applies to each and every issue, including that of freedom of expression. Certainly it goes without saying that these approaches and perceptions taken together have contributed to the deepening and enriching of Jewish thought. Those, however, who seek understanding must distinguish between that which was of temporary significance and that which is of continuing importance, between the expression of a generally accepted opinion as against something exceptional....From this vast and abundant storehouse, the inquirer must draw liberally that which his time and place require....This reality and the need so to distinguish are of substantive importance in Jewish thought and in the world of *halakhah* itself — as they are by their nature in every system of thought....There are many facets to the matter but the present is not the occasion to expand (and see R. Kook, *Eder haYakar* (1967) 13-28; M.R. Konvitz, ed., *Judaism and Human Rights* (1972) 11)...

The prophets of Israel and their prophecies have served and still serve as archetypes of indignant and uncompromising critics of governmental authority that wrongfully exploits its might and force and acts corruptly towards the public or the individual. They protest against the exploitation of the poor and the oppression of the widow, against the violation of public and private rights, against deviations from the essential spirit of the *Torah* and the *halakhah*. The struggle of Israel's prophets, their watchfulness, even when they encountered violent and virulent opposition, have served as an unfailing inspiration for the struggle for freedom of thought and expression....Anyone familiar with political science and democratic thinking is well-acquainted with all this.

There is, I think, no more striking and thorough-going expression of freedom of thought and the importance of every point of view, even that of the individual, than the principle laid down by the Sages regarding the dispute between the schools of Hillel and Shammai: "The utterances of both are the words of the living God" (*Eruvin* 13b; *Y. Berakhot* 1:4; *Y. Yevamot* 1:6). For practical purposes, the binding norm of the *halakhah* lies with the school of Hillel, "because they were felicitous and patient" (Rashi to *Eruvin* 13b), but the views of their rivals remain legitimate and substantive in the world of the *halakhah*. This kind of approach is characteristic. Even after the *Sanhedrin*, the highest national court, had decided against him, the "rebellious elder" could continue to adhere to his views and teach them as before so long as he did not give any practical decision accordingly (*M. Sanhedrin* 11:2; *Sanhedrin* 86b). Furthermore, there is always the possibility that a minority view might in time prevail and become accepted in practice. "R. Yehudah said, the words of the individual among the many were recorded in case their time would come and they would be relied on" (*T. Eduyot* 1:4; *M. Eduyot* 1:5); "Even though the view of the individual may not have been accepted at first and the majority may have disagreed, if later on the majority comes around to that view, it would become the *halakhah*. The whole *Torah* was thus given to Moses, affording the possibility of various rulings, and when asked how could a matter be determined, his reply was that the majority is to be followed, since all utterances are the words of the living God" (Commentary of R. Shimshon miShantz *ad. loc.*). The words of Akavia b. Mehalalel, who differed from his contemporaries, still reverberate. He testified to four matters. The rabbis said to him, "Akavia, withdraw these four things and we will make you President of the *Sanhedrin*." His answer was: "It is better for me to be called a fool all my days than become for one hour a wicked man and have people say that I withdrew my opinions in order to obtain office" (*M. Eduyot* 5:6; see also M. Elon, *Jewish Law*, 870-78).

Pluralism is not a negative phenomenon or a defect: it is of the essence of the *halakhah*. "It is not a question of inconstancy or deficiency to say, Heaven forbid, that the *Torah* was thereby made into two *Torot*. On the contrary, that is the way of the *Torah*, the utterances of both are the words of the living God" (Hayim b. Betzalel, *Mayim Hayim*, Introduction). A multiplicity of views and approaches tends, moreover, to create harmony and uniformity through diversity. In the fine words of the latest of the codifiers, R. Y.M. Epstein (*Arukh haShulhan, Hoshen Mishpat*, Introduction) at the beginning of this century:

Every dispute among the *Tannaim*, the *Amoraim*, the *Geonim* and the

> *Poskim* in pursuit of true understanding constitutes the word of the living God and each has a place in the *halakhah*. That is indeed the glory of our holy and immaculate *Torah*. The whole *Torah* is called a song and it is the glory of song that its different sounds are various but harmonious.

This fundamental conception that "the utterances of both are the words of the living God" has had a decisive influence on the manner and substance of the codification of the *halakhah* in all ages and on the manner of giving judgment and decision (see Elon, *op. cit.* 870).

Pluralism is a substantive and welcome element in the life of every civilized society. The Sages even drew up a special benediction for this wonderful creative power of pluralism. "One who sees a very large crowd of people makes the benediction, 'Blessed be He who discerneth secret things, for their features are dissimilar and their views unlike.' " (*T. Berakhot* 7:5 and *Berakhot* 58a). A similar benediction is found for creative wisdom. "Just as creative nature still renders the appearance of men different, so it is to be believed that wisdom is shared by all men, each different from the other" (*Mayim Hayim*, Introduction). Diversity of opinion is to be honoured properly by the dominant authority. A wonderful expression of this idea appears in *Num. Rabbah Pinhas* 21:2 and *Tanhuma Pinhas* 10:

> Just as the features of men are not alike, so also their views are not alike....Moses at the moment of his death asked of the Holy One blessed be He: "Lord of the Universe, the opinion of each one [of the people] is very manifest to You and one view is unlike another. On my departing this life I ask of you to appoint for them a leader who will bear patiently with each one of them according to the view he holds."

That is the theory of leadership and government in Jewish tradition...that is the great force of the right of each to express his opinion since not only is that essential to orderly and enlightened government, but it is also vital to its creative power. In the real world, "two principles that oppose each other come together and yield fruit; all the more so in the spiritual world" (R. Kook, *Hanir* (1909), 47 and *Eder haYakar* 13 ff.).

When out of the various opinions...one view emerges that may damage the social, spiritual and cultural foundations of society, that society must stand steadfast in its spirit and outlook. This end is primarily to be achieved by persuasion and education. Education does not mean mere preaching to those who have strayed from the proper path but also self-examination and questioning of the spiritual and cultural image of the society in which the thistles and thorns have grown. Civilized society will employ, when

necessary, the legislative powers available to it to punish those who incite and encourage an evil cultural perception that threatens it. Those who merit punishment, those in respect of whom all the requirements of the law regarding proof of their offences have been fulfilled, will be legitimately punished. Needless to say, the legislature is entitled to take radical measures to silence such opinion by denying the right of those who voice it to be elected to the legislature, and this also means, as Shamgar P. indicated, denial of the right of those who share such opinion to vote for those whom they desire to have elected. This is the lawful right of the Knesset that represents the will of the people...

As I maintained at the outset of my opinion, denial of so basic a right, in our democratic form of government, is not left to the judiciary without it first having been expressly empowered in that regard by the legislature...from which it derives its powers and authority. For a court to take such power into its own hands without legislative affirmation is in itself injurious to an enlightened democracy, the very basis of which is the rule of law and not the rule of the law-maker, the rule of justice and not the rule of the judge....For the court to assume such power of disqualification without express legislative authorization...involves another serious danger. The democratic character of the State of Israel was proclaimed in the Declaration of Independence in the affirmation that the State will be a Jewish state and not merely a state of Jews, a state open for Jewish immigration and the ingathering of the exiles (realised later in the Law of Return, 1950), and ensuring complete equality of social and political rights irrespective of religion, race or sex and guaranteeing freedom of religion, conscience, language, education and culture. These principles also serve us as a guide. They form part of the special character of the Jewish state. The best of all shades of Zionist thinkers, Jews with differing outlooks, citizens of Israel and members of other nations and religions have dealt and continue to deal with the meaning and practical application in a Jewish state of the complex of principles set out in the Declaration of Independence. How and by what yardstick should the court judge the contents of the election programme of a party list that cannot be reconciled with each of these principles?

Moreover, my colleague Barak J. observes that invalidation of a party list because its election programme is inconsistent with the democratic principles on which the State of Israel is founded will only occur if a *reasonable possibility* exists that the will of those on the list will be realised. When the court comes to deal with this reasonable possibility, "it must have in mind the entire social picture in all its different aspects. It must analyse social processes...not merely past events but also the probability of events concealed in the future." This task rests entirely on

social and sociological considerations and has nothing to do with judicial decision. Is the court fully prepared for it? According to what directives and rules is the court to decide what to do? According to Barak J., "in this regard there is something like 'prophecy in the garb of judicial decision'" ...I would suggest that as judges we refrain from acting as prophets. I would adopt the words of the great Maimonides:

> The Holy One Blessed be He did not permit us to learn from the prophets but from the Sages, men of logic and thought. It is not said that "thou shalt come unto...the prophet that shall be in those days" but "unto the priests and the Levites and unto the judge" (*Deut.* 17:9), (Introduction to the *Commentary on the Mishnah*; see Elon, *op. cit.*, 224-25).

If that is the case with Jewish law, where the Sages recognised and believed in its superhuman source, it applies all the more so to a legal system based entirely upon wise men, men of logic and reason, and which is applied by them. Furthermore, as I have said, the power to disqualify a party list for social and ideological reasons rests primarily with the Central Elections Committee which, apart from its chairman, is clearly a political body, the views of the members of which...in their factional variety are oft-repeated and accepted. We may well fear that these members do not easily lend themselves to a considered non-partisan examination of this clearly social and political matter.

What I have said may indicate the abundance of problems and difficulties that are foremost in considering the disqualification of a party list because of its political programme. In this respect, the "Kach" list is not a good example of the actuality of these difficulties, since its programme, the aim of its leaders and initiators and their seriousness from the viewpoint of the image of Israeli democracy and culture, is so blatant that, were we empowered to disqualify lists, we might conclude that its inclusion among the lists seeking election to the Knesset is not to be allowed. For myself, the most serious difficulty in the content of the "Kach" programme — even more than the perverseness of its general outlook regarding the preservation of the democratic foundations of Israel society — is that the list and its spokesmen base themselves upon the *Torah* and the *halakhah*.

A basic element of Judaism is the idea that man was created in the image of God (*Gen.* 1:27). It is thus that the *Torah* commences, and from it the *halakhah* derives fundamental principles regarding the worth of every human being as such, his equality and the love of him. R. Akiva used to say, "Beloved is man for he was created in the image of God: a special love, because it was made known to him that he was so created"

(*M. Avot* 3:18). This verse is the basis of the prohibition on the children of Noah against shedding blood, long before the *Torah* was given. Most instructive is the difference of views between two of the greatest of the *Tannaim* regarding moral priorities in interhuman relations. " 'And thou shalt love thy neighbour as thyself' (*Lev.* 19:18). R. Akiva said, 'This is a leading rule of the *Torah*.' Ben Azai said, 'This is the book of the generations of Adam. In the day that God created man, in the likeness of God made He him' (*Gen.* 5:1) — this is a greater rule" (*Sifra* to *Kedoshim* 4:10). According to Akiva the supreme virtue in human relations is the love of man. According to Ben Azai it is the equality of man....Both virtues together — equality and love of mankind — became one with the Jewish people, both together lie at the very foundations of Judaism at all times and in all ages. This basic viewpoint is further explained. "Ben Azai says, 'This is the book of the generations of Adam' — that is a leading principle of the *Torah*. R. Akiva says, 'Thou shalt love thy neighbour as thyself' — this is a greater principle: 'you may not say that because I have been shamed, let my neighbour also be shamed along with me.'....R. Tanhuma said, 'If you do so, remember whom you are shaming — in the image of God He created him' " (*Gen. Rabbah* 24:7). The rule of loving thy neighbour as thyself is not merely an inward abstract matter that entails no obligations; it is a way of life requiring action. In Hillel's formulation the rule is that you may not do to another that which is hateful to yourself. Many commentators have pointed out that this negative formulation adds significance to the rule, suiting it to human nature. "A person cannot really love another as he loves himself, for as R. Akiva taught, thy own life takes precedence over the life of another" (Nahmanides to *Lev.* 19:18; see *Baba Metzia* 62a).

The Jewish people are commanded to fight for their existence and to pursue those who seek to conspire against them and deprive them of their sovereignty and of their land. But the enemy, too, possesses human worth and dignity. When Jehosaphat prevailed over the Ammonites and Moabites, the people sang, "Give thanks unto the Lord for His mercy endureth forever" (II *Chron.* 20:21). On that the *Talmud* notes:

> R. Yohanan said, Why are the words "for He is good" [as in *Ps.* 107:1] omitted from this thanksgiving? Because the Holy One, blessed be He, does not rejoice in the downfall of the wicked. And R. Yohanan said further, Why is it written "And one came not near the other all the night?" (*Ex.* 14:20) The ministering angels wanted to chant their hymns but the Holy One, blessed be He, said, "The work of My hands is being drowned in the sea and you chant hymns?" (*Megillah* 10b).

Barak J. referred to R. Kook on the love of man and creation. R. Kook adds:

> The love of man should be alive in the heart and the soul — the love of every person in particular and the love of every nation in general. One should desire their elevation and their material and spiritual progress....Inner love from the depths of one's heart and soul, to do good to all peoples, to improve their situation, to make their lives happy (*Middot haRe'iyah, Ahavah*, 5).

Still more instructive is R. Kook's thinking on the relationship between the "natural, conventional morality" of every civilized person and the moral demands of Judaism.

> The love of man requires much nurturing to reach its proper dimensions as against the superficiality that appears at first sight by its insufficient exercise, from the side of the *Torah* and from the side of conventional morality, as though contradictions and equanimity exist in this love, which needs ever to be provided from the recesses of the soul (*Ibid.*, 10; see also *Orot haKodesh*, Vol. 3, 318).

This tending and education of a Jew by the *Torah* and conventional morality are complementary and closely interrelated and depend upon each other...(*Orot haKodesh*, Vol. 3, Introduction 11 and 16). To ignore societal morality derogates from religious morality...

These cardinal concepts have also determined relations with minority groups under Jewish rule. The *Torah* justifies a series of fundamental commandments in Judaism by the historical memory of the Jewish people and its sufferings as a minority under alien rule. "For ye were strangers in the land of Egypt" (*Ex.* 23:9; *Lev.* 19:30; *ibid.* 22:20 and 23: and elsewhere). And beyond that, "Thou shalt not abhor an Egyptian, because thou wast a stranger in his land" (*Deut.* 23:8). Racism, which has greatly blighted human history to this very day, has no place in Judaism; it has been rejected outright. A member of another nation who attaches himself to the Jewish people is accepted and acquires all the same rights and duties. "Ye shall have one statute both for the stranger and for him that is born in the land" (*Num.* 9:14). "Neither let the alien that hath joined himself to the Lord speak, saying: the Lord will surely separate me from His people....For My house shall be called a house of prayer for all peoples" (*Is.* 56:3-7)....Thus Maimonides wrote to R. Ovadyah Ger Tzedek:

> Every one who is converted for all time and every one who professes the unity of the Holy One blessed be He...is a disciple of Abraham our Patriarch and a member of his family...there is no difference between us and them in any respect. Let not his lineage be lightly treated. If we are related to Abraham, Isaac and Jacob, you are related to Him who said "Let the world be created" (*Resp. haRambam* [Freimann ed.] 369).

The Jewish people does not "save souls" in order to enlist other peoples to its ranks (*Mic.* 4:5; *M.T. Melakhim* 8:10). This fact is intended, among other things, to give expression to the protection which Judaism confers upon minorities to live according to their own heritage and culture. It was customary in the ancient — and less ancient — world for the dominant majority to assimilate minorities, on the principle that *cujus regio ejus religio*, under which minorities were compelled to adopt the religion of the dominant majority. According to the *halakhah*, this is absolutely forbidden. Accordingly, in those periods when Jews had the upper hand, "no *bet din* received converts throughout the time of David and Solomon; in the time of David, lest they convert out of fear, and in the time of Solomon, lest they convert because of the goodness and greatness of the kingdom" (*M.T. Issurei Bi'ah* 3:15).

The *halakhah* defined members of national minorities as "resident aliens" (*ger toshav*), subject only to observance of the seven Noahide laws, the elementary obligations of maintaining law and order which all civilised peoples are bidden to observe and which the Sages regarded as universal natural law (*M.T. Issurei Bi'ah* 14:7; *Sanhedrin* 56a; *Nahmanides to Gen.* 34:13; see further Elon, *op. cit.* 183 ff.). A national minority is entitled to all the civil and political rights that all other residents enjoy. "As a stranger and a settler shall he live with thee" (*Lev.* 25:35); "Resident aliens are treated with the courtesy and kindness extended to a Jew, since we are ordered to sustain them" (*M.T. Melakhim* 10:12; *M.T. Avodah Zarah* 10:2). The Sages also stated that—

> ...resident aliens are not settled in border areas or in unsightly surroundings but in a well-favoured environment in the middle of the country...for it is said "he shall dwell with thee, in the midst of thee, in the place which he shall choose within one of thy gates, where it liketh him best; thou shall not wrong him"(*Gerim* 3:4).

The basic guiding principles that inform the Jewish State in its relationship to all its inhabitants are the basic principles of the *halakhah*. As Maimonides said in this context, "It is written 'God is good to all and His mercies extend to all His deeds' and 'its ways are ways of pleasantness and all its paths are peace' " (*M.T. Melakhim* 10:12).

What I have said represents only part of the law of the state in Jewish law on this important theme of minority rights...

Let me conclude with the incisive observations of Maimonides on the age-long yearning for the Messiah, whose times differ from the present in respect only of "subjugation to the state" (*M.T. Melakhim* 12:24-5). Relying on a statement by Samuel in the *Talmud* (*Sanhedrin* 91b, 99a and elsewhere) he states:

> The Sages and the Prophets did not long for the days of the Messiah in order to rule over the entire world nor to cast down the gentiles nor hold themselves superior to other peoples nor to eat and drink and make merry, but in order to have time for *Torah* and wisdom without let or hindrance so that they might merit the world to come....At that time famine and war will no longer prevail, nor envy and rivalry: the good will be abundant and delightful things as thick as the sand. The only concern of the world will be to know the Lord. And therefore Jewry will be greatly wise, knowing the secret things, and it will attain understanding of the Creator, "for the earth will be full of the knowledge of the Lord, as the waters cover the sea" (*Is.* 11:9).

Barak J. I have no doubt that the ideas of "Kach" are racist and its principles offend against the basic principles upon which the democracy of the State rests. I am also convinced that they are opposed to the spirit and essence of Judaism in all its variety and form. As Maimonides says (*M.T. Sanhedrin* 12:3):

> For this reason man was created alone in the world to teach us that any one who does away with one soul is as if he did away with the whole world, whilst one who sustains one soul is as if he sustained the whole world. All mortals are created in the form of Adam, yet none is like another in appearance. Hence each can say that the world was created for him.

The same outlook found expression in the words of R. Avraham Yitzhak Kook (cited from Z. Yaron, *The Philosophy of Rav Kook* (1974) 306):

> The loftiest place in the love of creation must be taken by love of man, which should also permeate the entire person. Notwithstanding differences of opinion, religion and belief, and notwithstanding the divisions of races and environment, it is right and proper to penetrate into the very depths of the minds of different peoples and groups so as to learn as far as possible their character and qualities, to know how to base love of mankind on foundations that bring us close to deeds. Only a soul rich in the love of mankind can raise the love of the nation to pride in its nobility, its spiritual and practical greatness. Narrowness of vision that causes us to regard everything beyond the border of a particular nation, even if outside the frontiers of Jewry, as thick undergrowth and unclean, is one of the more terrible black spots that cause the general destruction of all spiritual goodness to which each refined soul aspires.

If we decided to enable [the list] to participate in the elections, it was not out of agreement with any part whatsoever of its programme. On the

contrary, we repeat that its approach is contrary to our basic perceptions and the general Jewish values on which we build our national structure. So long, however, as it has not been proved to the satisfaction of the Elections Committee and of ourselves that the list creates a reasonable possibility of harm to the existence of the State or its democratic character, we cannot do other than permit it to participate in the elections.

See: BERGER v. HAIFA DISTRICT PLANNING COMMITTEE *et al.*, p. 174.

Chapter Four

EDUCATION AND WELFARE

1. Duty of Father to Educate His Children

Sp.C. 1/81

NAGAR v. NAGAR

(1984) 38(1) *P.D.* 365, 390-394, 396-397, 402-407

The question here was whether the education of the young children of the parties came within the jurisdiction of the Rabbinical Court or the District Court. The parties had agreed in the divorce agreement to the jurisdiction of the former in all matters concerning the children, and that was not challenged until the wife changed counsel. It was then submitted that the question lay within the exclusive jurisdiction of the District Court.

Elon J.: At this point, let us look into the second ground that served the learned judge as a foundation for concluding that the judgment of the Rabbinical Court was a nullity and that the District Court had jurisdiction....The starting point was that a suit concerning the education of children is not among those matters left to the concurrent or exclusive jurisdiction of the Rabbinical Court but rather falls outside matters of personal status. How did the judge arrive at such an extreme result? The judge said that according to the Rabbinical Court's judgment —

> The Rabbinical Court did not deal at all with guardianship within the meaning of the Capacity and Guardianship Law, 1962, but rather with "the rights of parents" to determine the mode of education, the learning of *Torah* or the observance of religious commandments, and these are not matters of personal status under article 51 of the Order in Council; and in any case the Rabbinical Court was *ab initio* without jurisdiction on the question now before me, and again, neither the parties nor this court is bound by what occurred in the Rabbinical Court....In fact, guardianship of children, as defined in the above law, does not exist in

contrary, we repeat that its approach is contrary to our basic perceptions and the general Jewish values on which we build our national structure. So long, however, as it has not been proved to the satisfaction of the Elections Committee and of ourselves that the list creates a reasonable possibility of harm to the existence of the State or its democratic character, we cannot do other than permit it to participate in the elections.

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> the *halakhah*. In Jewish law, guardianship can only arise in connection with property or in regard to fatherless orphans or in the exceptional case where the father is still alive but has wasted the property of a minor, i.e. in connection with property but not a person (A. Gulak, *Foundations of Jewish Law*, Book III, 146)....Here we shall confine ourselves to a limited aspect of guardianship — education and schooling — that is mentioned separately in sec. 15 of the law and is dealt with in the case of *Florsheim* (1968) 22(2) *P.D.* 723....Ultimately, in my opinion, it will become apparent that we must conclude that the Rabbinical Court did not deal with this matter as an aspect of guardianship but as one of parental rights — the father's right under the *halakhah* to observe the commandment of teaching *Torah*. In this regard, the presumption is that the Rabbinical Court will reflect the halakhic position. The Rabbinical Court did not deal with or give judgment on a guardianship matter and *ipso facto* dealt with a matter over which it had been given no jurisdiction by the (secular) legislature. Its judgment lacks legal consequence and the consent given by the parents to its jurisdiction is meaningless, even if in its operative part it would appear to cover guardianship.

I cannot accept these observations of the learned judge. With all respect, he has erred in the essential definition of guardianship of children under Jewish law and as a result, his conclusion about the difference between guardianship in the Jewish legal system and its definition in the above law is mistaken. Nor do I quite understand the distinction the learned judge drew between guardianship and parental rights. And it is difficult for me to reconcile his observation that since the study of *Torah* is a commandment — indeed a very important commandment that takes precedence over all others — its observance does not merit inclusion among the matters of guardianship enumerated in sec. 15 of the Law.

The learned judge bases his contention, that the guardianship of parents in Jewish law pertains only to the property of a minor and not to his person, education and schooling, unlike the definition in sec. 15 which covers both person and property, upon Gulak as cited above and upon dicta in *Florsheim* where it is stated that guardianship covers a minor's property alone. This, however, is not quite accurate. Both of these sources...deal with the appointment of a person as guardian of a minor who is not his own child....Sec. 15 of the Law under discussion deals with the tasks of parents as the *natural* guardians of their minor children (see sec. 14). No one will dispute that under Jewish law the natural guardianship of parents includes the responsibility for both person and property of such children, as specified in sec. 15. The duty and right of parents to attend to the

education and schooling of their children, in the broad sense of those terms, are clear; provisions in this regard are to be found in both Scripture and talmudic and later halakhic literature....I shall mention a few of these.

In *Kiddushin* 29a we read:

> The Rabbis taught: a father is bound to circumcise his son, to redeem him [if a firstborn], to teach him *Torah*, to take a wife for him and to teach him a craft. Some say, also to teach him to swim. R. Yehudah said, a person who does not teach his son a craft teaches him brigandage. Do you really think 'brigandage'? Rather, it is *as though* he teaches him brigandage (*ibid, 30b*). [Since he has no occupation to support him, the son will take to robbery; Rashi *ad loc.*]

According to R. Yehudah the duty is to teach a craft, an occupation, and not some other source of livelihood such as business which is precarious (*Kiddushin* 30b and Rashi *ad loc.*). The *Tosefta* (*Kiddushin* 1:1)...and the *Mekhilta*, Bo, 8:73...make further observations in praise of teaching a craft.

In talmudic literature these obligations are deduced from different verses of Scripture, either directly or interpretatively (see *Y. Kiddushin* 1:7 and *Kiddushin* 29b ff.).

These obligations and duties, including care of a child's property and his custody, are based on the parents' standing as the guardians of their children. It is settled law that parents do not possess any rights in their children and that if differences arise between them regarding any of their obligations, it is not a matter of a dispute between litigants with vested rights (see, e.g., *Resp. Rashdam, Orah Hayim* 123; *Resp. Mishpetei Uziel, Even haEzer* 91). In the parent-child relationship, the idea of "belonging" means a belonging by nature, conception and birth and this natural belonging creates a natural guardianship comprising duties and rights for the guardian *vis-a-vis* those under his wardship. Although a father is commanded to educate his child and teach him a craft, that has nothing to do with any parental right, in the sense of a property right in law... The right of a parent in respect of education and other matters of guardianship is a right to carry out one's duty as a guardian. This court has already said that "it is illuminating that originally in Jewish law the idea of 'possessing' a child, as one usually speaks of possessing some property, was not common, but the usual phrase... was that the child 'was found' with his parents or 'was brought' up by his parents and the like" (C.A. 488/77 *A.* v. *Attorney-General* (1978) 32(3) *P.D.* 421).

Hence, the exercise of these parental "rights" is subject to the child's welfare, which is the dominant principle that informs the entire subject of the parent-child relationship in Jewish law. This principle already appears in a *responsum* of Sherira Gaon in the tenth century (see *Otzar haGeonim,*

Ketubot 434, 173; and also E. Schochetman in 5 *Jewish Law Annual* (1978) 285, 292), and it is a constant feature in the *responsa* literature and codes (see, e.g. *Resp. Rashba* attributed to Nahmanides 38; *Resp. Radbaz* 1:123; *Resp. Mabit* 2:62; *Even haEzer* 82:7; *Pithei Teshuvah Even haEzer* 82:7). The terminology of guardianship in describing the powers and obligations of parents *vis-a-vis* their children is found in decisions of the Rabbinical Court and the halakhic authorities (see *Sha'arei Uziel*, Part I, 126). The matter is summed up by R. E. Goldschmidt, a member of the Supreme Rabbinical Court, as follows:

> There is no doubt that according to law the child himself is always the litigant and the parents are only guardians who represent him in court and speak on his behalf. Not only are they not parties, but I doubt whether they have the status of "interested persons", since an "interested person" in a trial means that his "interest" affects the hearing and the judgment. In the maintenance of children, however, not only is their welfare the main consideration (see Everley, *Law of Domestic Relations*, 334): according to Jewish law, it is the sole and exclusive consideration, and every other consideration which concerns the parents or one of them will not be taken into account and will have no effect as against the child's welfare...The reason is that the law regarding the maintenance of children is not for the benefit of the parents but for the benefit of the child. A son or daughter is not an "object" of the rights of either parent. Neither parent possesses any rights, but only duties binding them to raise and educate the child. When the court comes to decide the position of the child in a matter of access, one consideration alone is in its mind — for the well-being of the child, with whom should it be, and in what manner: as regards parental rights, these do not exist.

Thus we see that in Jewish law, the powers and functions of parents towards their children are those of guardians. The provisions of sec. 15 of the Law in all its details cannot be said to be non-existent in the *halakhah*; on the contrary, they are in total conformity with and embedded in Jewish law...

As I have said, the powers and functions of natural guardians under sec. 15 are at one with the powers and functions of parents over their children under Jewish law. We may add that the same applies to any one appointed as guardian over a child not his own. According to Jewish law, he has to look after the child's property as well as educate and school him....The matter is expressly covered in Talmudic literature (*T. Terumot* 1:10; *T. Baba Batra* 8:14; *Gittin* 52a). The settled law is that a guardian "makes a *lulav* (palm branch) and *sukah* (tabernacle) and fringes, a *shofar* (ram's horn), a scroll of the *Torah*, *tefillin* (phylacteries), *mezuzot* (scrolls attached

to doorposts, and a *megila* (Scroll of Esther) for minors in order to educate them" (*M.T. Nahalot* 11:9; *Hoshen Mishpat* 290:15).

The central idea of Jewish law in regard to guardianship of children is based upon the rule that "the court is the parent of orphans" (*Gittin* 37a; *Baba Kamma* 37a). This rule applies to all children, not necessarily orphans (*Resp. Radbaz* Part I, 263; *Sha'arei Uziel* Part I, 126). The parents and every person who is appointed guardian are, as it were, the court's representatives, acting in accordance with its directions as regards both the personal welfare of the minor and his property and possessions, according to the over-riding principle of the child's well-being. The matter is summarised in *Sha'arei Uziel* Part I in the following manner:

> This is the essential foundation of guardianship among Jews, that it rests with the judges and the courts. The guardianship of the court continues the guardianship of the parents...they have the duty to care for the spiritual and physical well-being of their children, their learning and education, their induction into the commandments, good behaviour and fear of Heaven (Preface, 8).
>
> Hence in the event of divorce or upon a child losing a parent, the court will deem that the best place for rearing the child and ensuring his religious and moral upbringing is with one of the parents, or sometimes with another person. More than being under obligation to take care of his material possessions, the court must look after his body and soul so that he does not weaken and pursue evil ways, but remains healthy and grows up in a good and upright manner in the eyes of God and man, faithful to the *Torah* of God and his people (p. 4).
>
> The guardians of orphans, whether they are appointed by their father or by the Court, are commanded to teach the young orphans *Torah* in public schools, or to hire special teachers for this purpose from the estate of their father or grandfather, for this obligation falls on the parents and guardians, or a Court-appointed guardian after them, to fulfil with their life and their money. Therefore we tax their property in their lifetimes and obligate the guardian to recover from the testator's property as much as he can for all that is needed... it is obligatory to ensure that the orphans under their guardianship shall also learn the rudiments of arithmetic and other basic practical skills so that when they grow up they should be respected amongst their friends and they should know to conduct negotiations wisely and intelligently (p.173-174; and see: B. Schereschewsky, *Family Law* (Published by the Faculty of Law of the Hebrew University, 2nd ed., 1970) 413).

This, in brief, is the doctrine of guardianship of minors in Jewish law, both with respect to natural guardians and to appointed guardians...

...The unequivocal holding of the Rabbinical Court that the father has the duty to educate his children and hence that he alone is entitled to determine the form of education, would not, in my humble opinion, hold on appeal to the Supreme Rabbinical Court....Not only is it contrary to the statutory provisions of the Women's Equal Rights Law regarding the equality of mother and father in guardianship, which means that they have an equal right to their opinion as to the manner of educating their children, but it also seems to be out of line with the general trend in this area in modern *halakhah*.

According to several early authorities, R. Yohanan and Resh Lakish disputed whether teaching a child the commandments was the duty of the father alone or also that of the mother (*Nazir* 28b; Me'iri, *Bet haBehira Nazir* 28b; Rashi to *Hagiga* 2a; Tosefot to *Eruvin* 82a). The matter was also in dispute among the later authorities (see A. Danzig, *Hayei Adam* 66:2; Y. Etlinger, *Arukh laNer, Succah* 2:2; Y. Girondi, *Iggeret Teshuvah* 72; Y. Horovitz, *Shnei Luhot haBrit, Derekh Eretz*; and cf. *Prov.* 1:8).

The right and duty to educate children is central to the question of the maintenance of children. According to the *halakhah*, in addition to study of the *Torah*, education in relation to custody includes the learning of a craft...and primarily the fashioning of the child's character. The Sages thus explained the assumption that a girl is best with the mother and a boy, after the age of six, with the father: "Just as the mother will teach the daughter a girl's way, so the father will teach the son what he ought to know" (Rabbenu Yeruham, *Toldot Adam veHavah, Sefer Havah* 23:3; *Resp. Rashba* attributed to Nahmanides 38; *Resp. Radbaz* Part I, 429). The Supreme Rabbinical Court has accordingly held that the distinction regarding custody of a boy over the age of six pertains even when the parents are not observant Jews....Moreover, with respect to the son's education, "the father can teach the son what he is obligated to teach him, even if the child is not with him, e.g. he can hire a tutor or can put the child into apprenticeship" (see R. Yitzhak di Molina, 16th century ms. printed by A. David 44 *Kiryat Sefer* (1969) 557 and cited by Schochetman, *op. cit.*, 301-2). This has special significance at present, when the education of children, in all its forms and branches, is undertaken by a wide network of educational institutions. The Supreme Rabbinical Court thus held as follows in the context of the said distinction:

> But as for a son who studies *Torah*, Maimonides wrote that...the *melamed* [tutor] teaches him all day long and part of the night, in order to educate him to study both during the day and at night...and if so, the

> father is left with no time to teach him, but he will only be with him in order to eat and sleep, and in this it must be said that the father is not preferable to the mother (as per R. Shapira; and see *Resp. Yaskil Avdi*, Part II, *Even haEzer* 2; *Resp. Mishpetei Uziel*, *Even haEzer* 91).

Although the above was said in the context of the right of custody, it has important ramifications for the question of preferring the father in determining the form of education; because the father does not teach the son personally, but rather, he is taught by the school-teachers and his rabbis, it is reasonable to assume that these act as the agents of both parents and with their consent.

This conclusion is dictated by the logic of the situation today and the law as laid down by the later authorities on the basis of the teaching of the Talmudic rabbis, mentioned above, that the father is obliged to inculcate *Torah* whilst the mother is exempt from this obligation (*Kiddushin* 29a-b):

> How do we know that the father must teach the child *Torah*? Because it is said: "And ye shall teach them to your sons" (*Deut.* 11:19)....How do we know that the mother has no such duty? Because it is written "velimaddetem" ["and ye shall teach"] which may also be read "ulemadetem" ["ye shall study"]. Whoever is commanded to study is commanded to teach. But how do we know that the mother is not bound to study herself? Because it is written: ...the one whom others are commanded to teach is commanded to teach himself, and the one whom others are not commanded to teach is not commanded to teach himself. But how do we know that others are not commanded to teach the mother? Because it is written "And ye shall teach them to your sons" but not to your daughters.

Maimonides sums up the law as follows:

> Women are exempt from the study of the *Torah*. A father is obliged to teach his minor son the *Torah*...not the mother, because he who must learn must teach (*M.T. Talmud Torah* 1:1).

On this threefold exemption — the mother from teaching her son and from learning herself, and the father from teaching his daughter — various opinions were voiced even in tannaitic times. Ben Azai declared that a man is obliged to teach his daughter *Torah*, whereas R. Eliezer said that "whoever teaches his daughter *Torah* teaches her licentiousness" (*M. Sotah* 3:4). The reasons for this difference of opinion and the extreme remark of R. Eliezer have been variously explained, but this is not the occasion to go into the matter (see the commentaries *ad loc.* and *Sotah* 21b; *M.T. Talmud Torah* 1:13; *Yoreh De'ah* 246:6; *Torah Temimah* (48) to

Deut. 11; see also *Y. Sotah* 3:4). Various Talmudic and post-Talmudic sources do indeed speak in praise of wise women, preachers and scholars (see e.g. *T. Kelim, Baba Kamma* 4:17; *T. Kelim, Baba Metzia* 1:6; *Baba Batra* 119b; *Sivuv haRav Petahia miRegensburg* 3:2; *Tashbetz* 3:76; *Resp. Maharshal* 29). The final rule was decided in accordance with the views of R. Eliezer (see *M.T. Talmud Torah* 1:13; *Yoreh De'ah* 246:6). In the course of time the prohibition against a man teaching his daughter underwent restrictive amendment as regards both the nature and scope of the subject matter — as well as the depth of study (see A. Elinson, *The Woman and the Commandments*, 147, 153-57; Y.Y. Neuwirt, *The Education of Children to Observe the Commandments*, 308-10).

A substantive halakhic and practical change in this area has occurred in recent times, commensurate with the profound social and ideological modifications that have taken place. Various reasons have been given for this by halakhic scholars....Thus Hafetz Hayim, referring to R. Eliezer's prohibition of teaching girls *Torah*, has written (*Likutei Halakhot shel haHafetz Hayim, Sotah* 21; see also *Resp. Hafetz Haim* dated 8 Shevat 5693, cited in Y. Greenbaum, "The Religious Education of Girls in Israel," in *Shevilei haHinnukh*, 24, 35):

> It seems that all this actually obtained in past times....The tradition of our forbears was very strong to induce people to follow in its path....Today, however, when that tradition has become very much weaker...and especially among those who have grown to study foreign writings, it has certainly become an important *mitzvah* [religious obligation] to teach (girls) the Pentateuch, the Prophets and the Writings and halakhic ethics.

The decisions on this matter took various directions in this country both before and after the foundation of the State. R. Zalman Sorotzkin, a leading figure in the world of the Yeshivah (Talmudic Academy), has held (*Moznayim leMishpat*, 42; and see Elinson, *op. cit.* 158 ff.; Kapah, *Woman and Her Education*, 31):

> The prohibition not to teach girls *Torah* applied only to the Oral Law, its close study and dialectics....The final conclusions, without its argumentations, might, however, be studied by women....Today the situation is different from what it was in earlier times. Then Jewish homes were conducted according to the *Shulhan Arukh* and it was possible to learn the entire *Torah* from experience....Today, however...not only may girls be taught *Torah* and piety but it is obligatory, and...it is a great mitzvah [religious obligation] to set up schools for girls to inculcate in them purity of faith and knowledge of the *Torah* and the Commandments.

Rabbinical decision — like all judicial decision — is characterized by not cutting itself off from existing *halakhah* but rather, qualifying it. The prohibition against teaching girls has been limited to the close study and dialectics of the *halakhah*. Among a considerable number of halakhic scholars of today we no longer find this limitation. One scholar has pronounced unequivocally that present times are marked by an intense desire of men and women to eat of the Tree of Knowledge, and no one can stem the tide. To prevent girls from learning *Torah* and Judaism in all its aspects can hardly be contemplated (B. Firrer in *Noam III*, 134).

To sum up: as we have seen, according to the *halakhah* the father must teach his son *Torah*, whilst the mother is exempt, just as a man must himself learn and a woman is under no such obligation, according to the principle that whoever is bound to learn is also bound to teach. In view of the substantial changes that have occurred, not only is a woman not forbidden at present to learn *Torah*: she is obliged to do so; not only does she herself learn but she teaches the children of others. It would seem to follow necessarily that the duty to teach a son *Torah* should fall equally upon the father and the mother....That is all the more applicable when what is involved is expressing a view about which school a son should be sent to in order to be educated. I would suggest that had the Supreme Rabbinical Court been asked to deal with the duty of educating children, both boys and girls, and bringing them up, it would have concluded that the rights and duties of the parents are joint, subject of course to the special rearing that a father can give to a son and a mother to a daughter by reason of their understanding of and identification with children of their own sex.

2. Communal Responsibility for Education

H.C. 1/67

MASHI'EL *et al.* v. MINISTER OF EDUCATION AND CULTURE *et al.*

(1967) 21(1) *P.D.* 384, 387

The respondents denied the application of the petitioners to vary a directive given by the headmaster of a state school regarding the transfer of their children from a mixed school to another [single sex school]. The reason for the directive was a decision of the Ministry of Education to terminate the mixed education of boys and

girls, because parents of minority groups were dissatisfied with such mixed education, particularly in the higher classes. They had therefore removed their daughters from school before finishing their studies, with the result that there was a considerable drop in the number of children at the school in question. The petitioners, who were in favour of mixed classes, pleaded that any transfer of their daughters would be contrary to their feelings on the matter; and that the school to which the girls had been transferred was very far from their homes and involved crossing a main road with all the consequent dangers. Furthermore, they argued that the respondents had no authority to transfer the children, the right to do so resting with the local authority. The respondents maintained that the petitioners had no right to demand that their daughters attend any particular school.

Kister J.: The rights of the citizen to require of the State that his child should receive education in a public school and to express his view as to which school his child is to be educated at, or at least against any transfer from the school he was attending, depend on an assortment of laws that deal with the duty of the public and the rights of the citizen with respect to educational matters.

The Jewish people recognized the duty of parents to educate their children, and particularly of the father to teach his son *Torah* as well as the duty of the public to set up schools for children from the age of 6 or 7. Regarding the duty of the public, the *Gemara* tells us that it was originally decreed that teachers of young children should be appointed in Jerusalem and then in each region, but one of the shortcomings of this arrangement was that children who incurred the displeasure of their teachers would rebel and leave. Finally Yehoshua ben Gamla, who lived during the reign of King Janai, instituted schools in each town and improved their internal regulation. The same Talmudic passage deals *inter alia* with the conditions under which children may be moved from one town or even neighbourhood to another, especially where a river ran between them (*Baba Batra* 21a; *M.T. Talmud Torah* 2:1, 2, 5, 6; *Yoreh De'ah* 245).

It follows that among Jews a parent had the right to demand proper education for his young children and the public authorities were under an obligation to make suitable arrangements.

C.A. 343/68

ASSESSMENT OFFICER — TEL AVIV v. BAT YAM MUNICIPALITY

(1969) 23(1) *P.D.* 186, 191

According to the appellant, a reduction given by the municipality to its employees in respect of school fees at the local secondary schools was of the nature of "any other allowance" within the meaning of sec. 2(2) of the Income Tax Ordinance and was therefore taxable.

Kister J.: The common element of the three instances noted in sec. 2(2) of the Ordinance — quarters, board and residence — is that they constitute a benefit for the employee involving expenses to the employer. The municipality set up a network of secondary schools for the general population and not especially for the children of its employees. Since "a lamp for one is a lamp for a hundred" (*Shabbat* 122a), the benefit enjoyed by the municipal employees does not entail any diminution of the municipality's funds, since an increase in the number of pupils will not necessarily involve additional expense for maintenance, especially as these children are not educated *gratis* but pay school fees at a lower rate than the local inhabitants who do not enjoy any reduction.

This principle is doubly correct if we take notice of the fact that this is not a matter of providing the inhabitants with some product or commodity at a lower price, but rather giving a service which the municipality is empowered to give to its inhabitants by virtue of sec. 249(29) of the Mandatory Municipal Ordinance (New Version). It is true that the Ordinance does not impose on the municipality a duty to supply this service to the local inhabitants but Jewish tradition has regarded it as an obligation falling upon the general population from time immemorial, or at least from the time of the Second Temple, as R. Yehoshua ben Gamla, a high priest of those days, ordained that "teachers of young children should be appointed to every province and in every town" (*Baba Batra* 21a). It is this ordinance that forms the basis for the rule of law laid down by Maimonides, *M.T. Talmud Torah* 2:1, and in *Yoreh De'ah* 245:7. The duty to finance education, it was also prescribed, was to be borne by the general inhabitants of the town and not only by the parents of the pupils: see the observations of Rabbenu Yeruham, cited in *Darkhe Mosheh* to *Tur*, Hoshen Mishpat 163:1, and the glosses of Rema to *Hoshen Mishpat* 3.

3. Parental Discipline

H.C. 425/68

MASKIL L'EITAN, A MINOR v. MASKIL L'EITAN

(1969) 23(1) *P.D.* 309, 321

The Rabbinical Court was convinced that the atmosphere prevailing in the house of the child's mother, who was divorced from his father, had a bad effect on the child's relationship with his father, and it therefore ordered that the child be placed in an institution. The ruling was not carried out. The appellant's claim for maintenance against his father was dismissed.

Kister J.: When, according to the applicable regulation, the father is exempt from maintaining his child in circumstances such as these, it does not mean that the child is fated to starve because he does not submit to his father's wish that he live with him; rather, whoever has custody of the child maintains him, and the father is not obliged — neither *vis-a-vis* the child nor *vis-a-vis* whoever has custody — to reimburse the expenses, and he is certainly not obliged to accept this state of affairs and pay the expenses in advance. Indeed, as long as the appellant remains with his mother, and she is able to support him, there is no problem from the appellant's point of view, for it is immaterial to him from whom he receives his maintenance. A problem will arise only if the appellant's mother is not able to support him and he suffers from want when he is with her.

However, even should the child be suffering from want, we would come back to the question of whether the father could argue that even under the laws of charity, he is not obliged to make up the shortfall in the child's maintenance, when he is prepared to support the child in his own home or in an institution designated by the Rabbinical Court; in the case before us, taking into consideration the child's age and the other circumstances that are known to us...it would not be just, from the point of view of the laws of the *Torah*, if the father were to deny responsibility for the child when the child does not submit to him. The father is not entitled to say, "If my son behaves in the way he does, he will starve, and it is not my business if he does starve."

It is true that if a child of the appellant's age behaves improperly or refuses to study, his father is entitled to punish him in order to force him to study and behave properly, but parents have been warned against adopting overly harsh disciplinary measures. One of the rules is that discipline should

always be tempered with affection, and a child should never be totally rejected. The respondent himself discovered that undue force cannot be used to place the child in an institution. Is it easier to influence him by allowing him to suffer from want?

R. Schneuer Zalman of Ladi, in his *Shulhan Arukh, Hilkhot Talmud Torah* 1:6, warned the father "not to be too heavy-handed with punishment and censure." Moreover, the question of disciplining a child by depriving him of food was discussed by the commentators of the *Talmud* with respect to a child who refuses to study *Torah.* In *Ketubot* 50a, we find: "In Usha it was ordained that a man must bear with his son until he is twelve years [of age]. From that age onwards he may threaten his life."

4. Physical Injury to Children by Parents and Teachers

See: RASSI v. ATTORNEY GENERAL, Part 6, Penal Law, p. 462.

5. Raising of Public Funds for Charity

P. 354/64

ADMINISTRATOR GENERAL RE THE ESTATE OF NEHAMA HOFMAN dcd.

(1965) 46 *P.M.* 308, 311-312, 313-314

On the death of Nehama Hofman, no heir applied to court and the Administrator General was appointed administrator of her estate. Subsequently the Tel Aviv Municipality applied for payment of a sum of money for the assistance the deceased had unlawfully received during her lifetime for hospitalisation in various hospitals, medical treatment and convalescence. The deceased left a sum slightly larger than that demanded. The Administrator General applied to the Court for directions.

Kister J.: With regard to Jewish law, the following remarks from *Resp. Rosh* 85:2 are equally applicable to every legal system:

> It is a well-known custom that when a person falls ill and cannot fend for himself his relatives try to provide medical treatment. In the case of a sick person who is, as you have written, sometimes lucid and sometimes demented, his relatives must all the more look after his affairs. Indeed no person who busies himself with the medical care of another even without being asked by the latter should lose out, because it is a matter of saving life and all who are zealous about that are worthy of praise.

As long as the State or other public authority has not undertaken to provide free medical assistance to every citizen, be he poor or rich, or in respect of certain illnesses, this principle must be followed in every public hospital as it is in a private hospital or other private institution, regarding those illnesses in respect of which the State has not undertaken to provide free medical treatment to the entire population. Thus every institution which supplies such treatment is entitled to proper payment or payment according to the usual tariff in that institution...

The question is, what are sufficient means so as to render a person ineligible for assistance?

In Jewish law it is the duty of an individual to give charity to the needy, and it is the duty of the public to maintain institutions (soup kitchens, charity funds and the like) for collecting money from the local citizens and giving charity to those requiring help. In the *Mishnah* and later codes, tests were prescribed according to property owned and a person's financial means, for deciding when one is entitled to charity and benefits from these public institutions or to receive the special biblical allocations to the poor (gleanings, the forgotten sheaf and the poor man's tithe) or charitable contributions from relatives. The rates prescribed applied to those times, having regard to the organisation of public charity then existing and the purchasing power of money; today the matter is governed by present day conditions (see the commentators on *Yoreh De'ah*, 253).

Because in the course of time changes have occurred in the organisation of public charity, the purchasing power of money, the standard of living and so on, modern authorities do not follow the detailed provisions of the *Mishnah*, Maimonides or *Shulkhan Arukh*; likewise they do not seek to convert the amount of the prescribed fifty or two hundred *zuzim* into modern currency, but impose tests in the light of the foundations and principles laid down in the *Talmud* and the other authorities.

The *Mishnah*, in *Pe'ah* 8, Maimonides, *M.T. Matanot Aniyim* 9, and *Tur* and *Shulhan Arukh, Yoreh De'ah*, 253 and 256 describe the organisation of charity and, in the light of that, the means tests for persons in need. According to the halakhic sources, in every area there was a *tamhui* which made daily distributions of food to the poor, a charity fund which distributed

weekly what the poor required, a permanent office of charity wardens who collected funds from the public compulsorily and distributed these funds for charity, and there were also institutions which provided in secret for those who were ashamed to ask for assistance, or which obtained money privately from friends and relatives for this purpose.

With regard to the *tamhui* and the normal charity funds, rates of distribution were prescribed and any one who had enough to sustain himself for the week would not receive anything. So that the poor should not suffer deprivation, the persons generally entitled to receive charity, even in private, were determined, and to this end a sum of two hundred *zuzim* was fixed for those who were not in business. The commentators of the *Mishnah* and of the early authorities reached the conclusion that this sum was sufficient for keeping oneself for a year, and anyone who had the sum in cash or in land which he could sell for not less and which was free of debt or incumbrance was not to receive charity; obviously no one was required to sell his dwelling and the tools of his trade which were not deemed luxuries. In *Resp. Hatam Sofer, Yoreh De'ah* 239 rules are laid down as to who is entitled to receive support from the money collected from philanthropists for the resettlement of those whose village had been burnt...: in view of the considerations found in the *Talmud* and the authorities, Hatam Sofer prescribed the minimum that workers or those who cannot work should possess in order to determine whether they were to receive anything from the funds set aside for resettling persons whose homes or part of their possessions had gone up in flames.

6. Entitlement of Property Owners to Charity

MAIN (T.A.) 72/60

COHEN v. COHEN *et al.*

(1961) 28 *P.M.* 106, 107, 110-11

In an action for maintenance brought by a father against his three sons, the father claimed that he was sick and aged and unable to work and that he had no source of income apart from the IL. 40 a month he received from National Insurance. The defendants argued that the father supported himself by collecting alms, and owned a share in two plots of land worth about IL. 700 in addition to the place where

he lived. The Court ordered the sons to support the father and permitted them to attach his share in the two plots of land in order to secure repayment of their contribution to his support to be determined here.

Kister J.: I can, it seems, be assisted by the sources of Jewish law where the problem is one of Family law (personal status), for where the law is not explicit, the laws governing a person's personal status are to be followed. In addition...the law is largely based on Jewish law and inquiry into that law can certainly be of much help in solving the problems. According to the sources of Jewish law, a distinction must be made between the place where the plaintiff dwells and his share in the plots.

The rule is that where a person owns property which he cannot sell immediately he must be regarded as in need of charity and he may claim support. Moreover, Rabbenu Yeruham bar Meshulam of Provence writes in his *Toldot Adam veHavah*, Part 1, 19:

> A person who was poor and took charity is not required to repay when he becomes rich....This is so not only when he obtained assistance from a charity fund but also when a generous person gave him enough to keep him. However, if he had assets or land, even under the control of another, he must repay upon being sued, except in the case of an orphan.

This rule is given as the *halakhah* by *Be'er Hetev* to *Yoreh De'ah* 253:6.

It may be noted that there is room for doubt, in view of the small value of the share in the plots, that possibly he might be deemed not to be in need, but since plaintiff's counsel informed us that he was prepared to transfer the plots to the defendants, no problem arises in this respect. Nevertheless I do not think it right to render the maintenance conditional upon the transfer of the plots to the defendants, for I am apprehensive that they will not provide the support granted by the judgment and they would then be undeservedly reimbursed. I prefer to order that as soon as they begin to pay maintenance they may ask for an attachment to be placed on the plaintiff's share in the said plots to reimburse themselves for the payments they will make under the judgment. It is possible that they will sell them at some future date, possibly at a higher price.

The situation is different with regard to the place where the father lives. In the Jewish laws of charity, the rule is that when a person is needful of charity his dwelling place is generally not sold.

See: ADMINISTRATOR GENERAL RE THE ESTATE OF NEHAMA HOFMAN dcd., p. 232.

7. Obligation of Charity Towards One Who is Not Careful With Funds

Cr.A. 480/70

DESSLER v. STATE OF ISRAEL

(1971) 25(1) *P.D.* 732, 741

The District Court convicted the appellant on forty-three counts of fraud in aggravated circumstances under sec. 2 of the Penal Law Amendment (Deceit, Blackmail and Extortion) Law, 1963. The appellant received various amounts of money from the forty-three complainants as deposits on various work contracts. The appeal turned on the conviction itself and on the severity of sentence.

Kister J.: Those who suffered most were those workers who started work and gave deposits close to the time that the appellant's business collapsed....At such a time, a reasonable person would have had to understand that he could not continue the business, and at least, not in the way in which the appellant continued. Indeed, there seems to be a disease amongst many people whose businesses run into difficulty, that instead of putting an end to speculation and seeking a settlement with their creditors or asking to be declared bankrupt, they continue as before and still think to be saved by means of deception and other unlawful acts, and they sink deeper into the morass of ever-increasing debt to the point where their economic situation is irredeemable. It is surely dishonest to go into debt when one sees that his business is on the verge of collapse, without notifying the lender of his situation.

Under the laws of charity, one is commanded to lend to such a person, as it is written, "And if thy brother be waxen poor, and his means fall with thee, then thou shalt uphold him; as a stranger and a settler he shall live with thee" (*Lev.* 25:35); but to what does this refer? It refers to a case in which the person in need does not conceal his true situation, and he has a plan for recovery by means of the loan: then we are commanded to support him and not to allow him to go under. However, there is no such moral obligation in a case in which the borrower is not careful with the money of others. Neither is there any justification for a person to use deception, to say that he is looking for workers, and to require loans of the candidates at a time when there are at least grave doubts as to whether with their help, he can redeem his business and embark on "the King's Way" (see Hafetz Hayim in the name of *Ahavat Hesed*, pt. 1, 1:9, and pt. 2, 21 and 24).

Chapter Five

TAXES

1. Poll Tax — Uniformity

H.C. 34/50
ASNIN *et al.* v. AFULA LOCAL COUNCIL *et al.*
(1950) 4 *P.D.* 898, 901, 906

This petition involved the opposition of the petitioners to a graduated poll tax imposed by the local council.

Cheshin J.: I have already suggested above that the very idea of a "poll tax", taken literally, suggests a tax determined not on the basis of a person's annual income or his property in general, but one imposed *per capita*, uniformly on all persons in the sense of "the rich shall not give more and the poor shall not give less" (*Ex.* 30:15). Examples may be found in the early history of the Jews, i.e. the half shekel which was imposed in the desert on every male aged 20 years or more and the third of a shekel which those who returned from Babylon in the days of Nehemiah undertook to pay yearly (*Nehemiah* 10:33-34). This tax is called a poll tax, and it is also known as a capitation tax or head money.

2. Assessment

H.C. 14/66

ULAMEI HANESI'IM LTD. v. MUNICIPALITY OF TEL AVIV *et al.*

(1966) 20(1) *P.D.* 658, 666-667

The petitioner sought a declaration that it was not an "institution" within the meaning of the Local Authorities (Welfare and Recreation Charge) Law, 1959 and a local by-law made thereunder, and that a certain notice from the Mayor was ultra vires *and a nullity.*

Kister J.; I should note here that the problem of what is to be preferred as a basis for levying taxes — an assessment or a detailed return which the taxpayer is bound to make or at least a sworn statement as to income — is not at all a new one, as may be gathered from Dr. Y. Bazak's *Tax Law in the Jewish Sources* (1964). Thus we find that Isserlein in his *Resp. Terumet haDeshen*, 343, is critical of the assessment method:

> All such assessments are based on a surmise of how most people generally act. Although we are able to discern and establish how most people habitually proceed, estimations of poverty and wealth do not rest on that; some are enriched without any one else knowing and some are greatly impoverished, all depending on how people look at the matter. There are people who conceal their property in order not to have to declare it under oath. Accordingly it is impossible to arrive at an accurate assessment at all.

At the same time, we find that the system of "declarations" and the obligation to make detailed returns cannot always prevail, since part of the public claim that it causes them harm. See *Resp. Ribash*, 461. Although *Noda biYehudah* (ed. *Tanina, Hoshen Mishpat* 40) is aware of the deficiencies of the assessment method and says that if the assessee himself knows that he owns more than he has been assessed he must make up the difference, he does not favour the method of a sworn statement or social ostracization since experience shows that these are frequently unsuccessful...

Throughout the ages, the leaders of the community and the halakhic authorities battled by means of criticism and moral persuasion against those who evaded tax. An example is found in *Resp. Rashdam, Hoshen Mishpat* 442, where it is stated that a person who relieves himself from

paying his taxes and thus increases the tax burden of others is guilty of robbery and is disqualified from acting as a witness; but no proven way was found to obviate such evasion. Hence where the public had decided upon an assessment method, the method was followed; where tax was determined by means of the "declaration" system, returns were made to the public authorities with due measures being taken to ensure secrecy.

The same complexities persist today and we can only decide according to what the legislature has prescribed in respect of each form of taxation.

3. Double Taxation

See: BANK LEUMI TRUST COMPANY LTD. v. DIRECTOR ESTATE DUTY, Part 12, Interpretation, p. 851.

4. Evasion of Tax

See: VADIYAH v. DIRECTOR, LAND APPRECIATION TAX, Part 2, General Principles, p. 114.

See: MEFI LTD. v. ASSESSMENT OFFICER, Part 2, General Principles, p. 115.

Part Four

REGULATION OF THE COURTS

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Chapter One

THE JUDICIAL SYSTEM

A. Appointment of Judges

1. Criteria for Appointment

F.H. 21/60

ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*

(1960) 14 *P.D.* 2045, 2073, 2076-2077, 2084-2085

Silberg J.: We again have the burden—this time in a panel of five judges —of dealing with the problems of elections to the Chief Rabbinical Council and we must once more air the different aspects of this unhappy case. My heart goes out to the highly respected institution of the Chief Rabbinate of Israel. May it not be submerged in the treacherous waters of competitive hate and envy, let the elections not be sunk or wrecked on the reefs because of the rift between the quarrelling captains. These differences must not be allowed to shift the balance to one side or the other. In the course of the hearings I thought that only co-operation between the two camps in the Committee could save the Council from disaster and collapse and that the complete domination of one "block" over the other would put both victor and vanquished to shame...

We all know — witness the bitter differences before us — that the importance of appointment to the Electoral Committee is not membership as such but the influence it indirectly furnishes regarding the final selection of a candidate for the office of Chief Rabbi or membership on the Council.

The ultimate and most incisive question is whether any distinction exists

between the rabbinic and secular approaches to the qualities required of the person designated to be a Chief Rabbi or Council member. If the answer is affirmative, the obvious conclusion is that the Electoral Committee is heterogenous, and the rule in "*Nahlat Yitzhak*" applies.

My answer to the above question is that a difference does exist or is likely to exist. I shall not attempt to define the secular outlook, since the range of variation is very wide indeed, but I can define the rabbinic outlook which is identical with that of Jewish law regarding "the installation of *dayanim* (judges)".

The sources tell us that:

> "Thou shalt not respect persons" refers to the person appointed to install *dayanim*. In case he says "This man is pleasant, I shall install him as a *dayan*; this man is brave, I shall install him as a *dayan*; this man is well-versed in languages, I shall install him as a *dayan*," the outcome will be that the guilty are rendered innocent and the innocent rendered guilty (*Sifre* to *Deut.* 17).

> Every Sanhedrin or king or *Rosh haGolah* [Exilarch] that sets up a *dayan* for Jews who is not worthy and wise in the *Torah* and is not fit to be a *dayan*, although all may want him and he possesses other good qualities, has transgressed a negative commandment, for it is written "Thou shall not respect persons" (*M.T. Sanhedrin* 3:8).

The expression "not worthy" does not mean morally unworthy, since of such a person Maimonides would not have said that all may want him. It means rather that he is not suitable for the office of *dayan* "because he is not erudite" in the *Torah* (*Lehem Mishneh loc. cit.*; cf., for example, "and although I am not fit and worthy therefor" in the prayer of the cantor preliminary to the *Mussaf* (Additional) Service on the New Year and the Day of Atonement). Maimonides continues in the same passage:

> We know from tradition that (the above verse from *Deut.*) speaks against the person appointed to install *dayanim* [and, reproducing almost entirely the passage from *Sifre*, ends] not because he is a wicked man but because he is not knowledgeable.

The ideal is, of course, that the person installed as *dayan* should be endowed with the qualities of being outstanding in his knowledge of the *Torah*, of imposing appearance and comely, a person of strength and force, with a broad general education. Were we today to search as much as we can, we might—without belittling the others—find such lofty persons for high rabbinical office. Since, however, it is not easy to find such perfection, we must necessarily set an order of priorities—who yields to whom, and

Jewish law tells us that the choice must fall on one who exceeds his fellows in knowledge of the *Torah*...

Finally, let us examine the problem of the present Council from the viewpoint of Jewish law. Although it is said that Israel is a state of law and not a state of *Torah*, it is difficult to sever entirely the law from the *Torah* when the appointment of rabbis is involved. I harbour no doubt at all that Jewish law requires the Chief Rabbinical Council to play an active part in the Electoral Committee. That requires the two sides to reach a compromise and work together in order to duly and properly elect the Council. The *Talmud* says:

> A leader is not to be appointed over the community without first consulting it, as it says [*Ex.* 35:30], "See, the Lord hath called by name Bezalel." The Holy One blessed he He said to Moses, "Do you think Bezalel suitable" and (Moses) replied, "If Thou thinkest him suitable, surely I must also do so." (The Holy One blessed be He) then said "Nevertheless, go and speak to them." (Moses) went and asked Israel "Do you think Bezalel suitable?" and they answered "If the Holy One blessed be He and you think him suitable, surely we do" (*Berakhot* 55a).

To what lengths did the Holy One blessed be He go in order to find out the wishes of Israel!

This wonderful Talmudic story is often mentioned in the *responsa* in connection with the appointment of rabbis and communal leaders. In the case of one rabbi who "dominated a community in reliance on an order from the highest authorities and occupied rabbinical office against the wishes of the community," Hatam Sofer (*Hoshen Mishpat* 19) wrote:

> This rabbi, be he as lofty as a cedar and mighty as the oak, has not acted properly in ascending the Capitol by force. Where is his knowledge of the *Talmud*, which teaches us that 'a leader is not appointed over the community without first consulting it'... And if a cantor who has no sway over the people either to judge them or instruct them (is appointed only in this manner)... how much more so is it with a rabbi appointed to lead the community and the community is not consulted, with the result that the community is forced to accept him against their will. Very obviously he has not acted properly.

Explanation and comment would be superfluous and would only derogate from the force of the Sages' observations; *a fortiori* as regards the installation of *dayanim* who may in the future serve as chief rabbis in Israel.

The Israeli Chief Rabbinate, if it and this generation are worthy, can serve as a most valuable educational influence in the consolidation and

renewal of the life of the people. Let it be said to all those involved in the matter that they must refrain from demeaning the institution since those who oppose both camps together will be overjoyed at the calamity.

2. Qualifications of a *Dayan* (Religious Court Judge)

H.C. 264/70

MIZRAHI v. APPOINTMENTS COMMITTEE TO THE SUPREME RABBINICAL COURT *et al.*

(1970) 24(2) *P.D.* 335, 339-340

This petition was for an order that the Committee appoint the petitioner as a member of the High Rabbinical Court instead of another person.

Kister J.: Members may be expected or requested not to "leak" information, not "to go about as talebearers revealing secrets", particularly members of a committee for the appointment of *dayanim* (religious court judges). It should be remarked that Hafetz Hayim in his *Laws of Defamation* (2:11) writes concerning closed hearings of public committees, that it is a serious offence for a member to reveal what he or others thought. It may be added that the secrecy of a ballot in such restricted committees is most doubtful, but after Advocate Shahor proposed that the ballot for the candidates should be secret and his proposal was accepted, this manner of proceeding cannot be said to be invalid, and if only two candidates had received the required majority no reason for invalidating the result would have existed. However, as I have said, all three candidates received a majority and the Committee therefore had to find the proper means of establishing which of the three was to be preferred, and it was not bound to adhere to any mechanical rule. Ultimately, if we examine the Law and its purposes, that seems to be the task of the Committee, since even had two candidates been proposed for two offices, it appears to me that according to the meaning and object of the Law the Committee could not say that because there were two candidates for the two offices, they are to be deemed elected, as is customary with other bodies, but it had to establish whether the candidates were suitable for the task, and if it did not decide by a majority as provided in the Law, the candidates would not be elected.

A further difference exists between the appointment of judges and *dayanim* and between elections and appointments to other offices: the common manner of appointment and election is that a candidate requests to be nominated or agrees to be a candidate. The legislature adopted a different method in the case of judges and *dayanim*, which may be said to conform to the early tradition of the Jewish people.

Basing himself on Talmudic statements, Maimonides (*M.T. Sanhedrin* 2:8) sums up the matter as follows:

> The Sages said that messengers were sent by the Sanhedrin throughout the country to examine all whom they found wise and God-fearing, open-minded and stable, of suitable age and congenial to people—and they would make him a *dayan* of his town and then promote him to 'the gate of the Temple Mount' and thereafter to the 'gate of the Temple enclosure' and (finally) to the Great Court.

The qualities required of *dayanim* according to their rank are detailed by Maimonides in Chapter 2 but I shall not dwell on these and merely quote from Chapter 3:10.

> Thus was the way of the Sages: first they would avoid being appointed and refrain from acting as judges unless they knew there was no other fit person and if they so refrained, justice would not be served. Yet they never sat in judgment until they were compelled or entreated by the people and the elders.

Today also, it may be said, there are those who are not prepared to seek appointment to the office of judge or *dayan*, although they would be ready to accept the task. The legislature was interested that the fittest person should be appointed rather than those who sought appointment. The legislature went very far: not only is it unnecessary for a person to propose his own candidacy, but all overtures to the committee to be appointed are prohibited. It is possible, however, to approach those who under the Law may propose candidates, and they, in turn, may do so, it they so decide.

3. Worldliness

See: ADV. ROITMAN v. UNITED MIZRAHI BANK LTD. *et al.*, Part 7, Tort Law, p. 569.

See: MINTZER v. CENTRAL COMMITTEE OF THE ISRAEL BAR ASSOCIATION *et al.*, Part 2, General Principles, p. 125.

4. Judicial Qualifications

C.A. 27/49

LEVANON v. ALMALIAH

(1950) 3 *P.D.* 68, 81

A petition for an order declaring the invalidity of a charity which was established in the Sharia Court and confirmed by the religious court of the Sephardi Community was dimissed.

Silberg J.: Counsel for the appellant submits that assuming even that the Sephardi *bet din* (religious court) was competent to give legal approval to the charity...R. Papo, in any event, did not have authority to act in view of the well-known halakhic rule that a *bet din* is not constituted with less than three judges.

I do not accept this argument. The rule is restricted and does not apply where a *dayan* is an acknowledged expert, widely accepted by the public as a scholar (see *Hoshen Mishpat* 3:2). In the present case, R. Yaakov Barukh attested that R. Papo had been deputy senior rabbi in Baghdad and a notable rabbi. Since counsel brought no evidence to controvert this evidence, I am not prepared to set aside the judgment on this submission of his. Apellant's counsel—who sought to have the registration cancelled —called no witness at all either in chief testimony or in rebuttal. Hence all the details demonstrated *prima facie* by the respondent must be treated as correct.

Counsel for the appellant advanced another argument. Registration in the land register—so he contended—was effected on the basis of a Shariate *wakf* (trust) and not on the basis of a Jewish religious charity, and since registration, in his opinion, is constitutive and the *wakf* is invalid on all accounts, the charity has no force.

This submission too is not acceptable. In the first place, no precedent was adduced to show that the registration of a charity (of immovables) is in fact constitutive and indeed creates the charity itself. Secondly, and this is the main point, the trust submitted to the land registry also embraced, as was held by the learned District Court judge, R. Papo's judgment, a copy of judgment being appended to the copy of the trust, with the result that the failure to refer to it in the registration is neither here nor there and incapable of voiding the registration as such. The rule that we should adopt is that documents produced at the land registry are

not determinative of the validity of a transaction but only the original document wherever it may be, and if that document as such can serve as the basis of a transaction that was registered, no importance attaches to its description in the register.

B. Disqualification of Judges

1. Self-Interest

H.C. 21/66

KATABI *et al.* v. CHAIRMAN OF THE LOCAL COUNCIL OF KIRYAT EKRON *et al.*

(1966) 20(2) *P.D.* 102, 108-109

The Local Council approved an additional budget for the local religious council, in part to cover payments of wage differentials due to a reclassification of jobs. The validity of the approval was challenged on the ground that the second respondent, an employee of the religious council, had voted as a member of the Local Council on the resolution granting approval.

Kister J.: The principle that a person is disqualified from considering and deciding in matters that affect him personally is one which has taken root over the generations in civilised society.

In Roman law the principle is expressed by the maxim: *nemo debet esse iudex in propria causa.*

Jewish law is even more stringent. In *Hoshen Mishpat* 7:12, the halakhic rule is prescribed in the following terms:

> No *dayan* [religious court judge] having a beneficial interest in a matter may take part in the consideration thereof... Tax matters are therefore not dealt with by the *dayanim* of the same city since they or their relatives have a part therein... If, however, a regulation is made or a custom exists that a city's judges may also deal with taxation, their judgment stands.

Thus, the rule is that a city judge may not deal with that city's tax matters because of his own involvement, even if that is absolutely minimal, unless custom or regulation permit it. The reason for such custom or regulation is the public interest, but even then the judge may only deal with city taxation in so far as his involvement is merely general; if it is personal, he may not (*ibid.*).

I should note that here we are dealing not with the obligations of a judge but with the duties of an elected representative. I have, however, not infrequently cited the law as decided in *Hoshen Mishpat* 37:22 (Rema), that the "good men" of a community appointed to transact public affairs are treated as judges, and therefore a duty as aforesaid applies also to the present respondents.

Sometimes, a particular statute may in fact enable a member of a public body to deal with and decide upon a matter in which he has a direct interest. If such legislation exists, it was clearly only passed for the reason indicated above, i.e. the public interest, because no other effective procedure was available. Where, however, there is no such express enactment, we may only proceed in accordance with the accepted principle that a person with an interest in the matter is disqualified from participating in the discussion and voting.

See: RUBINSTEIN *et al.* v. CHIEF RABBINATE COUNCIL ELECTORATE COMMITTEE, **Part 3, Social and Administrative Regulation, p. 177.**

M. 258/65

MIKOLINSKI v. A.B.C. HOUSE LTD.

(1965) 19(2) *P.D.* 645-647

The Chief Magistrate, to whom a Rent Tribunal had referred the respondent's application that a given matter be heard before a different bench, came to no decision, returning the file to the chairman of the Tribunal. The latter decided to grant the application. No objection was made to this decision, but at the opening of the actual proceedings, respondent's counsel argued that the file was illegally transferred since the hearings had already commenced in the original Tribunal.

Kister J.: I am indeed unhappy with the decision of the Tribunal... When it found that the argument of respondent's counsel was baseless, it should

have continued hearing the matter. It is not enough that a party wishes to disqualify a judge in order that the latter disqualify himself. The judge's duty is to finish hearing the matter he has begun unless he finds reason for disqualifying himself, since to refrain from doing so may interfere with the proper conduct of the trial and cause injury to the other party and the public as a whole... This rule is of long standing. If a person is permitted to be strict with himself and so pious as not to deal with a matter in which it is claimed that he has some sympathy for one of the parties, nevertheless, the position is different with a *dayan* (religious court judge) appointed by the public. The following appears in *Resp. Maharik* 21:

> After having been shown to be qualified to try the case... a *dayan* who is strict with himself cannot be asked to debar himself; rather he should rightly endeavour not to persecute the deceitful... It is a measure of piety to be strict with oneself... but where strictness entails loss to others, there is very obviously no occasion for it. On the contrary, every person is bound to save his fellow-man from loss and injury and from being oppressed by others.

2. Judicial Animosity

H.C. 20/59

KINSLEY v. REGISTRAR OF COOPERATIVE SOCIETIES *et al.*

(1960) 14 *P.D.* 2297, 2303

Cohn J.: Another argument against the Registrar was that when the petitioner and other creditors made other various charges against him and expressed a lack of confidence in him, he became an interested party in the judicial proceedings assigned to him alone....This plea is, in my view, vexatious. Were a party able to disqualify a judge or arbitrator or other authority for the sole reason that he himself had made imputations against the latter — imputations that have not yet been proved and are only credible to the person making them — qualified people would cease to exist. In truth, it is a leading principle of justice that a person is by nature self-interested and therefore is not fit to hear a matter in

which he is personally involved (cf. *Shabbat* 119a and *Ketubot* 105b). This applies not only to material things, such as being given or promised a bribe or some other benefit, but also to personal things, such as a liking for or dislike of one of the parties and wishing apparently to further that person's advancement or detriment (*M.T. Sanhedrin* 23:6). However, to make insinuations and arouse suspicions in general terms is insufficient. There is not a scrap of evidence before us to create even the slightest doubt that the Registrar here was so affected.

See: KALO v. ATTORNEY-GENERAL, p. 272.

3. Greeting a Litigant

H.C. 327/63

MIZRAHI *et al.* v. MINISTER OF LABOUR *et al.*

(1964) 18(1) *P.D.* 434, 435-436

Silberg J.: This petition is directed against the decision of the Chief Inspector of Labour, acting under sec. 30(b) of the Hours of Work and Rest Law, 1951, that the employment of the petitioner in the hotel of the second respondent comes within the definition of "administrative duties" under sec. 3(a)(5) of that Law, which renders the employer unable to control their hours of work and rest, and as a consequence the Law does not apply to them.

There are no grounds for this petition. The complaint voiced by counsel for the petitioner against the Chief Inspector is that he acted very favourably towards the second respondent, "welcomed him most warmly" and "treated him with great esteem", and therefore "came to a readily-prepared decision against the applicants", whereas "he should have disqualified himself in view of his acquaintance with the employer and not the employee."

We are not prepared to set aside the decision of the Inspector on the basis of these general accusations. I have never heard that acquaintance alone with a litigant will disqualify a judge from trying a case. Were we to say so, what would happen to a judge in a small town who knows all the residents? Even in Jewish law which is very zealous in these matters (see

the sources mentioned in *H.C.* 10/59 *Levi* v. *Tel Aviv District Rabbinical Court et al.* (1959) 13 *P.D.* 1182, 1188), the fact that a judge greets a litigant does not disqualify him — it might disqualify him if the reverse were the case (cf. *Ketubot* 105b; *Be'er Hetev* to *Hoshen Mishpat* 9:3).

C. Judicial Functions and Obligations

1. Judicial Law-Making

Misc. 22/83

KRAUS v. STATE OF ISRAEL

(1983) 37(1) *P.D.* 365, 369

This was an objection to a decision of the District Court to detain the applicant until the close of proceedings against him, in which he was charged with thirteen counts involving bribery, blackmail, fraud, breach of confidence, theft and forgery, committed in the course of a single year when he was chairman of the Students Union of Tel Aviv University. The issue in this case is whether the severity of the crimes, in and of themselves, warranted detention.

Elon J.: As the learned judge observed in his decision, we have it indeed from our Sages that "a *bet din* (religious court) may administer flogging and other penalties not under prescript of the *Torah*, not to transgress the *Torah*, but to make a fence around it... not because the penalty is deserved but because exigencies require it" (*Yevamot* 90b; *Sanhedrin* 46a) and this, according to Rashi (*Sanhedrin, loc. cit.*), because people were acting lawlessly and the circumstances called for it. Under the *halakhah* this task was placed upon the *bet din*, which acted both as a legislature and as a judge. This principle brought about a great development in Jewish criminal law and procedure, having regard to the social and ethical changes that occurred at certain places and times. The situation is otherwise in a system that separates the legislature from the judiciary, in which a major innovation such as the detention of a person because of the exigencies of the time needs to be introduced by legislative enactment.

2. Duty to Give Judgment

C.A. 238/53

COHEN-BUSLIK v. ATTORNEY-GENERAL

(1954) 8 *P.D.* 4, 10, 21, 34-35

Silberg J.: The subject of the present appeal is the determination of the legal significance of an unusual act, the solemnization of the marriage of a Jew and a Jewess not in the office of the Rabbinate but in a lawyer's office, by a lawyer, after the office of the Rabbinate had refused to solemnize it on the grounds that it was contrary to Jewish law...

This brings us to the final and most difficult part of this appeal, the question of whether the learned judge was right in deciding that the validity of the marriage of the appellants could not be recognised under Jewish law. A special difficulty arises from the fact that the learned judge... did not definitely rule that the marriage was a nullity, but only that it was a doubtful marriage... so that in effect he left the question open and refrained from deciding the legal problem facing him.

With all due respect to the learned judge, it seems to me that this is not the correct approach. "Teach your tongue to say 'I know not' " (*Berakhot* 4a) is not an injunction directed to a judge; he must generally arrive at a definite view on every legal question arising before him. Here the judge was faced, as he saw the matter, with a disagreement among the halakhic authorities as to the disqualification of witnesses by reason of ban (*herem*) and despite his understandable reluctance to engage in the debate of these high authorities, it was his duty to reach a decision on the matter for the purpose of the concrete case before him. A precedent for this duty, if it be required, may be found in the following observations of the Supreme Court in *Palestine Mercantile Bank Ltd. v. Fryman* (1938) 5*P.L.R.* 159: "If the Ottoman law is not clear, it is the duty of the judges to expound it, however difficult that may be."

From a purely legal point of view, as distinguished from a religous point of view which is "prohibitive" and tends in cases of doubt to be strict, in Jewish law there is no special status of a doubtful marriage (see *Kiddushin* 5b — "where there is doubt, we suspect the marriage [to be valid] as a rabbinical measure" — Ran to Alfasi on the same topic; cf. *Resp. Maharit* 138). Doubt can only arise as to the precise legal status of the people concerned, and where doubt arises from juridical differences of opinion among the great authorities, the judge is bound, as with any other

legal question, to reach a decision which is certain and clear, however humble he may feel.

We must therefore fill in that which, to our regret, the learned judge omitted and try to take a stand one way or the other on the question he left open.

3. Duty to Argue for a Litigant Unable to Do So Himself

C.A. 634/76

ESTATE OF M. GERLITZ dcd. *et al.* V. AHARON

(1979) 33(1) *P.D.* 253, 255-256

After dissolution of a partnership, the appellants, who were the heirs of one of the partners, applied for a proper rent to be paid for the use of their portion of certain land.

Cohn J.: The second matter is that the learned judge found that the result he had reached was unjust. He said:

> It is only with great regret that I have reached the conclusion that the plaintiffs failed to rest their claim on any legal foundation. My feelings are like those of plaintiffs' counsel, that they had been done a wrong and the defendant had benefited from the lawlessness. Perhaps for this reason I have expressed my grievance over the fact that plaintiff's counsel did not carefully examine the situation created and the possibilities available to the plaintiffs. As the matter was presented before me, I have no choice but to dismiss the action.

It is, however, a leading rule of very long standing that where there is a right, there is a remedy — *ubi ius ibi remedium* — and the court will not reconcile itself to a wrong that has been done and left unrepaired. There are judges who are not prepared to decide except according to what counsel have succeeded in submitting to them and are not ready to turn themselves into counsel. But I follow my own theory that the sins of counsel are not to be visited upon their clients. In order to do justice to a party appearing before it, the court will apply against counsel who does not know how to plead, the commandment of "opening its mouth for the dumb". (Thus have *batei din* (religious courts) proceeded from ancient

times: when a party did not know how to plead himself, they pleaded for him: *Ketubot* 36a; *Gittin* 37b; *Piskei Rosh* to *Baba Kamma* 1:3.) Regarding the claims of orphans and widows to succession rights, the Sages said, One who claims by way of succession does not need any pleadings (*M. Baba Batra* 3:3), and Rosh wrote that everything the deceased could plead, the court will plead, since a minor knows nothing about the affairs of his father and in such a case the court opens its mouth for the dumb (*Resp. Rosh* 86:1). In the present case as well, I have no difficulty in finding a way of helping the appellants, and I shall follow the path I have paved for myself, despite the fact that the pleadings here on behalf of the appellants were far from being exhaustive, precise or comprehensive.

4. Warning Witnesses to Tell the Truth

See: BECKER v. EILAT *et al.*, Part 5, Evidence, p. 354.

5. Duty Not to Hear One Litigant in the Absence of the Other

C.A. 344/78

MA'ARAVI v. BENSHAR *et al.*

(1979) 33(1) *P.D.* 550, 552-553

Cohn J.: The learned judge wrote what he wrote in his judgment about the impression made on him by the appellant and it goes without saying that the respondent's counsel followed suit and added a personal touch to reinforce his submissions. I shall say nothing at all about the matter but this opportunity reminds me of the *halakhah* and I propose saying something generally.

King Solomon — who, as we know, was not only the wisest of people but also the most merciful of judges — was apparently the first who perceived the importance of cross-examination for discovering the truth: "He that pleadeth his cause first seemeth just; but his neighbour cometh and searcheth him out" (*Prov.* 18:17). R. Levi b. Gershon in the fourteenth century explained:

> There is another advantage in appearing before judges before one's opponent does, for it is the way of people to believe the story first related to them. Thus the man who first appears before the judge is 'just' for what he says is believed and when the other party turns up the situation is different and he will not be believed except after full examination. And that is the reason why the *Torah* precluded the judge from hearing the story of one litigant before his opponent appears so that his mind should not be more disposed to him who first presented his case...

As the number of judges increased and their bitter experience of litigants who tried to "snatch" judgments in the absence of their opponents grew, their response to this phenomenon intensified. Among those who "destroy the world" R. Yehoshua counted the "cunning rogue" (*M. Sotah* 3:4) whom R. Yohanan identified with he "who explains his case to the judge before the other party appears" (*Sotah* 21b). His wickedness lies in his transgression of "Thou shalt not utter a false report" (*Ex.* 23:1) and in his cunning in trying to establish in the mind of the judge a view about his rights, which it is difficult to remove afterwards (Rashi *Sotah* 21b).

Moreover, they said that "as those engaged in whispering in judgment increased, the fierce anger (of God) grew against Israel and the *Shekhinah* [Divine Presence] departed" (*Sotah* 47b). Who are those who whisper in judgment, if not those advocates who "whisper" to the judges in the absence of their opponents and begin to argue the innocence of one and the guilt of the other (Rashi *Sotah* 47b)? The obvious danger is that a judge who listens to one party alone cannot know whether the latter is not dressing up falsehoods as truths, since there is no one to controvert him (Rashi to *Sanhedrin* 7b).

In Jewish law also, the rule is that evidence is not received in the absence of the opposing party, but Jewish law also excepts the case where a party who has been summoned does not appear (*Baba Kamma* 112b). Such a party, as it were, empowers the judge to hear the case in his absence; and no one can complain if a judge exercises such power. But consider what injustice might have ensued here had not the respondent and his counsel appeared at the very last moment, and how great would the expense and trouble have been to right the injustice.

See: ALTAGAR v. MAYOR OF RAMAT GAN *et al.*, Part 3, Social and Administrative Regulation, p. 161.

6. Duty to Propose Compromise

See: BALIN v. EXECUTORS OF THE WILL OF LITWINSKY dcd., p. 303.

7. Duty to Give True Judgment

See: ATTORNEY-GENERAL *et al.* v. MAZAN, p. 313.

See: WERTHEIM v. STATE OF ISRAEL, p. 324.

8. Judicial Truth and the Evidence

H.C. 152/82

ALLON v. GOVERNMENT OF ISRAEL

(1982) 36(4) *P.D.* 449, 471, 472-474

The Government decided to set up a Commission of Enquiry to examine charges and countercharges regarding the part two people had played in the assassination of Hayim Arlozorov. Proceedings during the time of the Mandate had at first instance resulted in the acquittal of one and the conviction of the other and his being sentenced to death. The appeal by the latter was allowed and he was acquitted because of lack of corroboration of the evidence of the wife of the victim. In 1964 and 1971 the former had begun proceedings for libel that attributed to him participation in the assassination and he was awarded damages. The present petition concerns the question of whether the Government's decision constitutes interference with final judgments of the judiciary.

Elon J.: The judiciary does indeed endeavour as far as possible to adapt its principles to the truth of a situation and directs the course of its deliberation to arrive, as close as may be, at the factual truth. From the viewpoint of the very nature of the judicial system, even if a mistake occurs in a particular instance, the decision is still judicial "truth" and the force of this—with respect to recognition of its binding validity by the legal system—is even greater than the scientific "truth" that a scientist may achieve... the first

"truth" is valid and binding even if it is clear that it rests on an error, so long as it has not been duly modified within the framework of the legal system, whereas the latter truth is nullified *ipso facto* once an error is revealed...

The thinking of the Sages on this very important subject is instructive. There is the well-known *aggadah* (legend) regarding the disputation between R. Eliezer b. Horkanos and R. Yehoshua and his comrades over the oven of a man called Akhnai (*M. Kelim* 5:10; *Y. Mo'ed Katan* 3:1). According to R. Eliezer the oven could not become unclean but was "pure", whilst according to R. Yehoshua and his companions the oven became unclean and impure. A *Beraita (Baba Metzia* 59b; *Y. Moed Katan* 3:1) informs us:

> On that day R. Eliezer brought every possible argument but (the others) did not accept them. So he said to them, "If the *halakhah* is as I say it is, let this carob tree prove it". Thereupon the carob tree was uprooted and thrown one hundred cubits... They said, "No proof can be brought from a carob tree". He said again to them, "If the *halakhah* is as I say it is, let the stream of water prove it", whereupon the water flowed backwards. They replied, "No proof can be brought from a stream of water". Once more he said, "If the *halakhah* is as I say it is, let the walls of the study house prove it", and the walls began to fall. R. Yehoshua grew angry with the walls and said, "When scholars strive with one another in a matter of the *halakhah*, what have you to do with it?" And the walls did not fall, out of respect for R. Yehoshua, nor did they become upright again, out of respect for R. Eliezer, and they still stand leaning over. Once more he said to them, "If the *halakhah* is as I say it is, let it be proved from Heaven", and a Heavenly Voice issued forth: "Why do you dispute with R. Eliezer, for the *halakhah* is according to him in all matters." R. Yehoshua rose to his feet and exclaimed, "It is not in Heaven!" What does this mean? Said R. Yirmiyah, "The *Torah* was already given on Mount Sinai; we disregard a Heavenly Voice since it was already written in the *Torah* at Mount Sinai: 'One must follow the majority' " (*Ex.* 23:2).

The story reaches its climax at the end:

> R. Nathan met Elijah and asked him, "What did the Holy One blessed be He then do?" He replied, "He smiled and said 'My sons have defeated me. My sons have defeated me.' "

The ideas which the Sages wished to express through this *aggadah* possess several features, and this is not the occasion to elaborate (see M. Elon, *Jewish Law*, 227 ff.). For the present purpose, may I quote some observations I made regarding this agaddah (*ibid.* 228):

> The Holy One blessed be He in person, the Giver of the law and its source, who, as it were, let it be known by means of a Heavenly Voice that R. Eliezer, though in the minority, had rightly enunciated the law, admitted that the majority had overridden Him. In theory the truth may therefore be with an individual... but the halakhic truth lies with the majority since the *halakhah* is the responsibility of the halakhic scholars and the Giver of the Law, as it were, concurs in their decisions. It is difficult to find a more material example of the exclusive authority of the halakhic scholar and the absolute rule of the law even as against its Legislator.

R. Aryeh Leib haCohen says in his preface to *Ketzot haHoshen* to *Hoshen Mishpat* (see also Elon, *op. cit.* 230-31):

> Although a person should fear to say things of the law which are not correct, the human mind being incapable of arriving at the truth... the *Torah* was not given to the Ministering Angels but to man with his human understanding... The *Torah* was given to us as to decide according to our human understanding even though that may not be the truth.

This fundamental concept is basic to the *halakhah*. Hillel and Shammai, the "fathers of the world" (*M. Eduyot* 1:4), and their schools after them were divided over a number of matters, but of them the Sages said, "Both are the words of the Living God but the *halakhah* is according to the school of Hillel" (*Y. Berakhot* 1:4; *Y. Yevamot* 1:6). In theory there are, so to speak, two "truths", but in practice the halakhic decision with binding legal effect follows the school of Hillel. "What merit did Bet Hillel have that the *halakhah* was determined according to their rulings? Because they were affable and patient (modest)" (*Eruvin* 13b). Much has been written to explain the phrase "both are the words of the Living God", but again we need not elaborate (see *Tosafot Schantz* to *M. Eduyot* 1:5; *Kli Yakar* to *Deut.* 17:1; Elon, *op. cit* 226-27 and 870 ff.).

Cr.A. 115/82

MOADI *et al.* v. STATE OF ISRAEL

(1984) 38(1) *P.D.* 197, 259

The three defendants were convicted of murder, largely on their admissions to the police. They chose not to give evidence at the trial and they argued that their confessions were invalid because the means adopted by the police investigators "broke" their free will.

The investigators, they said, also told them that only a confession would prevent family revenge from being taken for the murder and would assist in their obtaining a pardon after some years of imprisonment. Failing a confession, they were also told, the police would widen the net and arrest their father.

Elon J.: It seems to me that in the present wide-ranging discussion concerning the interpretation of sec. 12 [of the Evidence Ordinance (New Version) 1971], the emphasis should properly be placed upon a basic principle of the legal and judicial system. This principle, in essence the substructure of legal policy, is the primary basic obligation of the court to uncover the factual truth in the case before it and determine the judicial truth accordingly. While these principles, regarding the education of those in authority, the preservation of respect for the individual, his body and soul, and protection of public order, are legal principles involving values that do not follow immediately from the provisions of sec. 12, the obligation to give true judgment becomes a judicial value intrinsically connected with the very essence of that section in the law of evidence. And it is in accordance with this obligation that the section must be interpreted and conclusions drawn therefrom.

The task of the court in arriving at the factual truth is an integral part of the judicial process itself, and the value of evidence delivered in court is determined by the "indications of truth" that are revealed (sec. 53 of the above Ordinance). This task itself constitutes the rule, since every judge is commanded to give true judgment (*Shabbat* 10a; *Eruvin* 54b; *Megillah* 15b; *Sanhedrin* 7a and 111b and elsewhere). A "true judgment" (literally "a true judgment according to its truth"), a phrase peculiar to Hebrew, has received various explanations (see, e.g., *Derishah* to *Tur*, *Hoshen Mishpat* 1:2; Gra to *Prov.* 6:4). For our present purpose, the explanations of *Tosefot* are interesting: " 'true' excludes 'fradulent'; although the witnesses attest to something, judgment is not given accordingly when the judges know they are lying. 'To its truth' so that judgment is not wrested" (*Baba Batra* 8b). In other words, "truth" is the factual truth and "according to its truth" the legal truth. The onus is on the judge to decide according to the two "truths" in concurrence.

9. Judgment According to the Claim

See: SCHWARTZ v. STATE OF ISRAEL, p. 305.

10. Taking Sides

S.F. 2254/80

SOLIMANI v. SOLIMANI

(1982)(2) *P.M.* 80, 84

This was an application by a wife to enforce an agreement for the sale of the dwelling of the spouses (after an effort to restore domestic peace had failed) in accordance with an agreement approved by the court but not given the force of a judgment.

Gross J.: The result is that for the applicant to enforce the agreement she must bring a separate action in which she can obviously ask for various forms of relief to effect enforcement. In these circumstances, the application cannot be granted, although it is regrettable that her course cannot be shortened.

I must note that in fact the plea by reason of which the application is not to be granted was not raised by counsel of either party, and generally I am in favour of the rabbinical *dictum*, "Act not the part of counsel" (*M. Avot* 1:8), but I cannot close my eyes and ignore this situation, in which the applicant is not entitled to judgment.

C.A. 225/71 635/71

AUTOCARS LTD. *et al.* v. MARGOLIS *et al.*

(1972) 26(1) *P.D.* 682, 692

This appeal involved the validity of the acts of a company's liquidators acting under directions of the court, the application for such directions having been made by an ex parte *motion.*

Kister J.: Under its powers of supervision over officials, the court will give directions in reliance upon the information before it. Where, however, there are differences between an official and a third party, both sides must be treated equally by the court. It may then have to change its function, which is sometimes called administrative, into that of a court deciding a matter between opposing parties, and determine the law on the submissions and evidence brought by them.

Jewish law has long been concerned not to confuse these two functions. Thus, in connection with the guardianship of minor children, Rema to *Hoshen Mishpat* 290:1 cites Rashba to the effect that the court is the father of orphans and may itself fulfill this role without appointing independent guardians. He continues, however, to cite Ran to the effect that where it is necessary to differentiate between minors and others or where it is necessary to take proceedings against others, the court must appoint a guardian so that it does not give the impression of being partisan.

Here indeed some confusion of roles has occurred and an attempt has been made to convert the permission the trustee received into an order binding others as well. To have done so creates complications.

11. Judgment on the Evidence Produced

Cr.A. 80/81

KADOSH v. STATE OF ISRAEL

(1982) 36(3) *P.D.* 225, 230

The appellant was convicted on seven counts, mainly assault, theft and possession of arms. He was sentenced to prison, and a prior suspended sentence was activated. Before pronouncing sentence, the judge adjourned the proceedings for six months, after hearing the probation officer and having regard to the circumstances, and released the appellant on bail. Reports submitted by the probation officer during and at the end of the six months were positive. The appellant claimed that in view of all this a suspended sentence alone should be given and the prior suspended sentence, the activation of which is in the discretion of the judge, should in the circumstances not have been activated.

Elon J.: No one disputes that the experiment was successful. The learned judge himself, when sentencing the appellant, drew attention to that success. How then did he reach the conclusion that "the good conduct of the defendant during the experiment appears to be the result of fear of the law alone"? There is no foundation for this finding in the material before the learned judge. In such cases the *dictum* that "a judge is to be concerned only with what is before him" (*Sanhedrin* 6b) is favoured by us.

Cr.A. 190/82

MARKUS v. STATE OF ISRAEL

(1983) 37(1) *P.D.* 225, 302-303

The appellant, once a senior police officer, was convicted by a majority decision of giving false evidence in a case of murder which he had investigated. He complained that the lower court had ignored certain important facts and had come to incorrect conclusions and findings on the evidence before it and in its appraisal of the credibility of a witness who had contradicted many other witnesses.

Elon J.: There are many difficulties and obstacles in the path of a judge wishing to arrive at the truth. His tools are necessarily limited, "for man looketh on the outward appearance but the Lord looketh on the heart" (I *Samuel* 16:7). In *Pennekamp* v. *State of Florida* (1946) 1042, Frankfurter J. reflected: "Judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process." The Sages long ago dwelt upon the anguish of the judge who fears that he will not get at the real truth and asks why he should have all the trouble. The answer is that he "is concerned only with what is before him" (*Sanhedrin* 6b). This rule has been explained by Me'iri, an outstanding commentator of the *Talmud*, as meaning that all the judge has is "what his eyes see, his ears hear and his mind understands" (*Bet haBekhira* to *Ketubot* 51b; cf. *Is.* 6:10; I *Kings* 3:9).

12. Consultation of Professional Literature

C.A. (T.A.) 493/79

ASSULIN v. BENEFITS OFFICER

1980(1) *P.M.* 177, 208-209

The appellant had in the past been diagnosed as a psychotic. During and as a consequence of regular army service he became schizophrenic.

Porat J.: Before I conclude, I wish to clarify another matter connected with the manner in which my judgment has been prepared.

Some disagree with judges using scientific and medical texts, saying that it is a matter for expert witnesses, and yet I have cited from professional, non-legal, literature.

I do not dispute that evidence is only to be drawn from witnesses, but it is often difficult to understand the testimony given: then, in my opinion, it is proper to refer to the literature. *M.T. Sanhedrin* 2:1 states:

> One only appoints to the *Sanhedrin*, whether the Great or Lesser, persons who are wise, understanding, outstanding in their knowledge of the law and of considerable insight, who know something about other disciplines such as medicine, mathematics, astronomy and astrology, magic and witchcraft and so on, so that they are able to deal with these matters.

Thus, a judge is not only permitted to be assisted by "other disciplines" but he is expected to consider them in order to know how to deal with them. What is meant is to acquire knowledge and understanding, as distinct from testimony. The distinction made by Maimonides in the twelfth century is still to be found in modern literature.

13. Reliance on Experience

C.C. 289/60

ROSENBERG v. KLEIN

(1962) 30 *P.M. 94, 97*

The plaintiff was gored by a cow belonging to the defendant. The cow was known to be "a goring cow".

Cohen J.: As I have indicated, there had been previous incidents with this cow that attest to its dangerous propensities and I incline to the view that plaintiff's counsel was right in submitting that in such a small settlement as Miron, knowledge of these incidents must have reached the ears of the defendant in one way or another. An example of a presumption of knowledge based on experience of how information spreads is to be found in the *Talmud* (see *Ketubot* 110a: "Your friend has a friend and the friend of your friend has a friend"; so also *Baba Batra* 28b).

14. Duty Not to Bend the Law in the Case of Poor Persons

C.A. 409/78
GOLAN *et al.* v. FARKASH *et al.*
(1980) 34(1) *P.D.* 813, 820

The issue was the breach of a contract of sale by the appellants and its rescission by the respondents.

Cohn J.: Both the learned judge in the District Court and my friend Bekhor J. here feel with their keen sense of justice that the appellants have been wronged. All the time they were firm in their desire to perform the contract and did their best to do so. Now they find themselves frustrated by rescission of the contract because of "a fundamental breach" on their part. Not only will they not become entitled to the apartment they desire but they can expect an action for damages, with all the risks involved therein, the distress and the considerable expense involved. I am satisfied that the law is not powerless to give them relief.

Before I go into the matter as such, I find it necessary to remove one obstacle that counsel for the respondents has set up. He also fears the sympathy of which the appellants are worthy in their difficult position, and he very seriously warns us, "Thou shalt not favour a poor man in his cause" (and this is not only a "well-known rule" as he termed it but an express Biblical verse: *Ex.* 23:3; see also *Lev.* 19:15—"Thou shalt not respect the person of the poor nor favour the person of the mighty but in righteousness shalt thou judge thy neighbour"). Heaven bears witness that the cause of the poor man should not be favoured or justified unless he has some right in law, for it is written, "Thou shalt not pervert judgment for thy needy" (*Ex.* 23:6)—do not bend the law to decide that the wicked are guiltless and that the guiltless are wicked (*Mekhilta*, Tractate *Kaspa*, 20). Heaven also bears witness that we should not discriminate in favour of the poor so that they sustain themselves "in innocence" and neither you nor the wealthy need to sustain them (see *Torat Kohanim*, *Kedoshim*, 4:3). I fully confess, however, that I shall neither rest nor remain silent in trying to find for the poor, the oppressed and the miserable some legal right, and I shall not believe those who tell me that my efforts will be in vain. If counsel for the respondent expects an explicit verse to warn me also of that, here it is: "How long will ye judge unjustly and respect the person of the wicked? Judge the poor and the fatherless, do justice to the afflicted

and the destitute, rescue the poor and needy, deliver them out of the hand of the wicked" (*Psalms* 82:2-4).

15. Duty Not to Bend the Law in the Case of a Criminal

C.A. 711/72
ME'IR v. THE JEWISH AGENCY
(1974) 28(1) *P.D.* 393, 406

The appellant was sued for damages and unjust enrichment arising out of his bribing a functionary of the respondent of which the appellant had been convicted.

Kister J.: I should say that, in dealing with a claim for damages arising out of a criminal offence, the Court will regard it as one of the principles of justice to apply the same rules customary in other cases of a tortfeasor, wrongdoer, or person unjustly enriching himself.

This finds expression in Jewish law too. *Ex.* 23:6 tells us not to "pervert the judgment of thy poor in his cause", and the Sages explained that this rule applies also to the poor in *mitzvot* (good deeds or commandments), that is, the wicked. Maimonides in his *Sefer haMitzvot* (Negative Precept 278) expresses it as follows:

> The judge is cautioned against perverting his judgment when he knows that the person before him is wicked or a sinner... not to say that because he is wicked I will wrest judgment from him, for Scripture says 'Thou shalt not pervert the judgment of thy poor in his cause'—he is poor in *mitzvot*, that is, although he is poor in *mitzvot* thou shalt not pervert his judgment.

Cr.A. 39/66

KALO v. ATTORNEY-GENERAL

(1966) 20(2) *P.D.* 188, 191-192

The appellant had offered to sell the complainant a carpet which he said was Persian. The complainant agreed to buy the carpet and gave the appellant a cheque for IL. 400 for it. Afterwards it turned out that the carpet was not Persian, and the matter was turned over to the police. The District Court believed the complainant's story and convicted the appellant of an offence under sec. 2 of the Penal Law Amendment (Deceit, Blackmail and Extortion) Law, 1963. The Court sentenced him to three months' imprisonment and activated a previous suspended sentence under the same section. The appellant argued inter alia *that he had been questioned in the lower court about a previous offence and that the wife of the complainant who had been present during the incident had not been called upon to give evidence.*

Kister J.: In general a defendant is not to be questioned about his character and his previous offences unless there is a legally recognised exception to the rule. Counsel for the Attorney-General indeed argued that he was at liberty to ask this relevant question, but I find no substance in that.

This problem was recently considered by this Court in *Shiovitz v. Attorney-General* (1965) 19(3) *P.D.* 421, where rules were laid down as to when the prosecution may bring evidence about previous offences and similar acts. The present case, in my opinion, does not come within these rules and consequently the evidence with regard to the previous offence committed by the appellant was inadmissible.

The problem, however, of whether we must set aside the conviction because of this defect, remains. The reason for not allowing evidence of previous offences or bad character is well-known — the judge, or rather the jury, may become prejudiced against the defendant and he may suffer an injustice. Evidence of this nature should therefore not be introduced, if possible. This problem of doing justice to a person with a criminal past is of very long standing. According to Jewish law, in the event of two people appearing before a judge, one upright and the other wicked, he must not say that 'since he is a wicked man and is presumptively a liar... I shall rule against him'. On this it is said: 'Thou shalt not pervert the judgment of a poor man in his cause — although he is poor of good deeds you may not rule against him' (*M.T. Sanhedrin* 2:5). This rule is already to be found in the *Mekhilta* of R. Simeon bar Yohai and is repeated by the authorities, so that the duty of a judge towards a criminal is clear. R. Eibeschutz in his *Sefer haTumim* to *Hoshen Mishpat* 7:9 (*ad fin.*) writes that a judge may not try a person whom he dislikes for material

worldly reasons and deny him his rights, but where the dislike arises out of heavenly and spiritual matters a judge may sit in trial since he will seek to give him his rights so that he repents, and this applies in both civil and criminal law.

Alongside this rule, deeply rooted in halakhic literature, Maimonides holds (*M.T. Sanhedrin* 3:6) that it is best for a judge not to know the litigant at all or know of his previous acts, so that he does not find himself in a situation where he is required to apply the above mentioned rule: "If the judge does not know of the person or his acts, there can be no greater justice" (See also *Hoshen Mishpat* 7:7). Such an "ideal" situation is not to be expected in every case and therefore a judge is commanded to take care not to pervert the judgment of the wicked, as we have said.

16. Power to Waive Orphans' Rights to Avoid Recriminations

C.A. 14/74

SAPIR v. ASHER

(1974) 28(2) *P.D.* 153, 164

The appellant's wife was declared legally incompetent and the respondent was appointed trustee of her property and person. The appellant claimed that the house in which they lived and the income thereof belonged to them in equal shares. His request for a declaration to that effect was dismissed in the lower court which also held that the power of attorney which the wife had given him on the eve of their marriage was of no effect.

Kister J.: In his affidavit the appellant states that his wife became depressed after her daughter had pressured her for an apartment in the said house and he had refused. He also alleges that the action directed against him would do him serious wrong, and dispossess him of his property and savings in favor of his wife's heirs.

The following should be said. The appellant must understand that he is the owner of only twenty percent of the property and his wife may do with the rest of it as she pleases and that were she not legally incompetent he could not stop her. Should the wife desire to give part of her property to the daughter, she could do so and that would not be considered as dispossessing

him of his rights in the property. It should also be remembered that the wife's share in the house came to her from her family and her deceased husband and she cannot be prevented from conferring benefit from it upon her children, if she so desires. On the other hand, the respondent and the children of the ward should be told to forbear as far as possible and not insist on their full rights so as to avoid disputes. One may properly recall what is written in *Hoshen Mishpat* 12:3: "The court may go beyond the law and waive money due to orphans in order to minimise quarrels." The ward lives with the appellant and, it is understood, will continue to do so as long as the doctors do not think it necessary to hospitalise her. The decision, in the event of any dispute, rests with the court. In this situation, it is for the appellant and the family of the ward to endeavour not to disturb the peace.

17. Court as "Father of Orphans"

S.T. 1/51

ESTATE OF BAT ARTZI v. MINSKY

(1954) 8 *P.D.* 1041, 1054-1055

R. Waldenberg: Before dealing with the substance of this case, let me begin with a brief definition of the court's power to appoint a guardian...

The court's power to appoint a guardian derives from the fact that the *Torah* has empowered and entitled the court as agent of the public to stand in the stead of the head of a family and testator who himself has the power to appoint a guardian for his infant children and their property.

All this is widely evidenced in the *halakhah*, and for our present purpose it is enough to mention two pertinent halakhic statements. The first is: "Rabban Gamliel and his *bet din* [religious court] are the parents of orphans" (*Gittin* 37a; *Baba Kamma* 37a), which Rashi explains as meaning that they have control of their person and property....Meiri to *Baba Kamma* likewise observes that in every generation the permanently appointed *dayanim* (judges) are the parents of orphans. That also constitutes the basis for the power of the court by virtue of its "paternity" to control the property of missing persons, the mentally defective and the like. The second is: "How do we know that when (minor) orphans come to divide their

father's estate, the *bet din* appoints a guardian for them, whether to their disadvantage or advantage? Why to their disadvantage? Rather to their disadvantage in order that it be to their advantage. Scripture says 'and ye shall take one prince from every tribe to divide the land for inheritance'" (*Num.* 34:18) (*Kiddushin* 42a). Rashi explains the verse to mean that each prince acted as agent for his tribe and divided its land among the families in proper fashion as if he were appointed their agent. That is also the definition of the court's powers. The court is deemed to have been appointed the agent of its community to oversee all matters of property, including a power where necessary to appoint guardians for orphans, missing persons, the mentally defective and the like.

Moreover, there are matters in which the court's power prevails by reason of *hefker bet din* (the court's inherent power to expropriate property—see Nahmanides to *Gittin* 52). The primary source for this rule is the following:

> How do we know that *hefker bet din* is *hefker*, i.e. that property expropriated by the court no longer belongs to its former owner? Because it is written: "Whosoever came not within three days on the counsel of the princes and the elders, all his substance shall be forfeited and he shall be separated from the congregation of the captivity" (*Ezra* 10:8). R. Eliezer said we derive it from—"These are the inheritances which Elazar the priest and Yehoshuah b. Nun and the heads of the fathers' houses of the tribes distributed for inheritance" (*Josh.* 19:51). Why is "fathers" associated with "heads"? To show that just as fathers transmit to their children whatever property they desire, so the heads transmit to the public whatever they wish (*Gittin* 36b).

See: AUTOCARS LTD. *et al.* v. MARGOLIS *et al.*, p. 266.

18. *Hefker Bet Din Hefker* — Declaration of Ownerless Property

F.H. 22/73

BEN SHAHAR v. MAHALEV

(1974) 28(2) *P.D.* 89, 100

Under a consent judgment, it was ruled that if the tenant would fall into arrears with his rent, he would have to give up his apartment. Because of his general paralysis, the tenant was unable to discharge his obligations and an action for possession was brought. The Court held that it possessed inherent power to extend relief on equitable grounds.

Cohn J.: ...Nevertheless, it also has been said, that the court "may always declare property ownerless and give it away as it deems fit to circumscribe breaches of religion and strengthen its structure and penalise violence" (*M.T. Sanhedrin*, 24:6). Under this power a court can take property from one person and vest it in another and thus bring about the doing of justice when a decision in accordance with the law would cause calamity and injustice. In elucidating the function assigned to the court in upholding authority Ran cites the view that the court is empowered to expropriate property (*Nedarim* 27b). This broad and far-reaching power of *hefker bet din* (declaring property ownerless) includes indeed not only the power to uphold as valid obligations that would otherwise not attach but also the power to release from obligations or to extend the time for fulfilling them.

We do not possess the power of *hefker* and I only cite the ancient law to show how important it was for the talmudic Sages, that the court should have all the power needed to do justice even when the law might require it to decide otherwise.

19. Judicial Discretion — Domicile

H.C. 4/51

SCHWALB v. RASHISH *et al.*

(1951) 5 *P.D.* 207, 217-218

The issue in this appeal was the correct meaning of "place of permanent residence" in the Municipal Corporations Ordinance and how this differs from "domicile". What is the situation where a person apparently has two such places of permanent residence?

Silberg J.: Can one imagine that the court will hold that (a person) has two domiciles...? The answer given in principle by those learned in the law is that the court needs to make most careful inquiry, consider the finest of distinctions and then decide in which of the two places a person has his true domicile.

The Sages of the *Talmud* already faced this dilemma. It is told in *Ketubot* 85b that a man once said, "Let my estate go to Tobiah" and then died. Two Tobiahs appeared to claim the estate and the question was what to do in the circumstances, to which of the two was the estate to be given, particularly when the two Tobiahs were of equal status and quality and there was nothing to indicate that one was to be preferred over the other? The answer was that the matter was left to the judges' discretion (see Rashi and Tosafot *ad loc.*). That is also the only solution to the problem of two domiciles or places of permanent residence. Here also the court must conjecture the intention of the person concerned and determine which place... was "closest" to him. A court that has to go into this problem is not to be envied, but an answer must eventually be given, having in mind one consideration or another, as to a person's one and only domicile or place of permanent residence.

D. Arbitration

1. Appointment of an Acquaintance as Arbitrator

M. 386/80

ZIFZIF — SUKHRIR WORKS v. ROSENBERG

(1961) 15 *P.D.* 2499, 2504

An arbitration agreement provided that when one arbitrator resigned, the other two could continue and make an award if the party who had appointed the arbitrator who had resigned did not appoint another in his place within forty-eight hours after being so requested. In the present case the "substitute" did not turn up and the remaining two made an award against the party whose arbitrator had resigned. The parties applied to court, one for enforcing the award and the other to set it aside on the

ground that the arbitrator of the successful party had acted unfairly inter alia *by acting as counsel for the successful party. The District Court set aside the award.*

Cohn J.: I agree. The leading rule that a judge should not deal with a matter in which an intimate of his is involved does not apply to an arbitrator appointed as one of three, one being appointed by each of the parties and the third by the two of them or by the parties themselves. The *dictum* of Farwell J. quoted in the judgment of my friend Sussman J... was long preceded by a decision of one of our greatest authorities, Rema, who wrote that in such a situation each of the two arbitrators appointed by the parties may argue the law as much as possible in favour of the one who appointed him and the third arbitrator listens to them and decides the truth (*Hoshen Mishpat* 13:1).

It is a long-standing practice among Jews that each party appoints an intimate or relative or his lawyer as arbitrator, and that itself is in no way invalid, provided that the other party knows the nature of the relationship and consents either expressly or by implication.

Hence I am also of the opinion that the appointment and the conduct of the arbitrator here is in no way invalid.

E. Judgment

1. Publication of Minority Opinion

H.C. 228/64

A. v. JERUSALEM DISTRICT RABBINICAL COURT *et al.*

(1964) 18(4) *P.D.* 141, 156

The petitioner came to Israel to visit her son in 1964 and her husband then commenced proceedings in the Rabbinical Court claiming either domestic peace or divorce. The Court issued an order ex parte *preventing her from leaving the country. The wife sought to have the order annulled on the ground that being neither an Israeli citizen nor resident, she was not subject to the Court's jurisdiction. The Court did not accede and she obtained an order* nisi.

Cohn J.: The two lawyers who argued for the parties before us tried to make capital—each in his own way and for reasons of his own—out of the fact that in *H.C.* 129/63 *Matalon* v. *Tel Aviv District Rabbinical Court et al.*, (1963) 17 *P.D.* 1640, 1651-2, the judges were divided in their reasons, though they came to the same conclusion. Each of the lawyers argued that the view supporting his case in the present instance obtained a majority in court. For myself, I attach no value or importance to the number of judges who adhered to one view or another. The game of counting heads played by learned counsel before us derogates from respect of the court as a whole and each of the judges in particular. In view of the provisions of sec. 33(b) of the Courts Law, 1957, there is no need for or purpose in counting heads. The opinion of a single judge of this court is no less important in my eyes in establishing the law—as distinct from deciding the particular case concerned—than the opinion of the majority. R. Yehudah has already taught us that the observations of the individual are mentioned among the many, in case they will be needed on occasion for support (*T. Eduyot* 1:4). The history of the Supreme Court of the United States demonstrates that as well.

F.H. 13/80

HENDELES v. KUPAT AM BANK LTD. *et al.*

(1981) 35(2) *P.D.* 785, 786

The issue here was whether property found on the floor of a bank's safe-deposit room was property found "in the domain of another person" within the meaning of sec. 3 of the Restoration of Lost Property Law, 1973.

Elon J.: There are two reasons why I have somewhat enlarged on this theme in the course of the present hearing. The first is that until now I have had no better and more apt example with which to illuminate the course that should be followed, in my opinion, in interpreting Israeli legislation. The second reason is the following passage in *T. Eduyot* 1:4: "R. Yehudah said that the opinion of a single person is mentioned among the many in case it may be needed on occasion and be relied upon." (See also *M. Eduyot* 1:5; and consider well Rabad and Rash miSchantz *ad loc.*)

2. Error of Law

C.A. 434/79
GRAETZ v. DEJANI *et al.*
(1981) 35(2) *P.D.* 351, 354

The appellant, a German company, sued the respondents on the basis of a bill of exchange which had been accepted by the first respondent in East Jerusalem and had not been paid. The bill was issued in the period in which East Jerusalem was under Jordanian rule. The suit had been dismissed by the District Court, and hence the appeal.

Tirkel J.: The District Court's conclusion that there is no judge in whose jurisdiction the enforcement of the bill falls, and no legal system for making such a decision, is an elementary error in law (*ta'ut bidvar mishnah*). As such, the decision is legally invalid and must be reversed (*Sanhedrin* 33a).

3. Binding Nature of Judgment on Matter of "Status"

C.A. 431/80
ROSENBERG *et al.* v. HAZAN
(1981) 35(2) *P.D.* 742, 754, 756

The appellants were the parents of a person who had been declared the father of the respondent. Having failed to enforce a judgment for maintenance against her father, the respondent successfully proceeded against the appellants pusuant to sec. 4 of the Family Law Amendment (Maintenance) Law, 1959 and the appellants were ordered to pay her a sum larger than that awarded against her father. The issue whether the declaration of paternity in other proceedings bound the appellants, who were not themselves parties to such proceedings.

Tirkel J.: The main question in this appeal is whether the declaration of paternity is good against the whole world (a judgment *in rem*) or only against the parties involved (a judgment *in personam*). That has never

been decided by this court. We may nevertheless say in the words of our Rabbis that "the Elder has already given a ruling" (*Shabbat* 51a; *Yevamot* 105b) and that was said both in general terms and on a doctrinal basis...

It may be noted that examination of the sources of Jewish law reveals a similar approach among the later authorities: a judgment regarding personal status may bind a person who was not party to the proceedings. *Even haEzer* 11:4 states that "if witnesses attest that a woman had committed adultery, they need to be cross-examined", to which Rema adds "but the evidence is not to be accepted if it was given in her absence and in the absence of the husband." *Helkat haMehokek ad loc.* observes that—

> The same obtains if she has married the adulterer; although the evidence forbids her to him, it appears nevertheless that he does not need to be present when the evidence was taken... since she is *ipso facto* forbidden to him just as she is forbidden to all *kohanim* [members of the Priestly tribe] though they were not present when the evidence was taken.

4. Judgment by Full Bench

See: ABUDI v. MINISTER OF RELIGIOUS AFFAIRS *et al.*, Part 3, Social and Administrative Regulation, p. 159.

5. Duty to State Reasons

H.C. 7/83

BYARES v. HAIFA DISTRICT RABBINICAL COURT *et al.*

(1984) 38(1) *P.D.* 673, 688-690

In the course of divorce proceedings, the spouses agreed that the wife should have the custody of two children and the husband the custody of a third child. Provisions were made for access and education of the children. The husband discovered that the wife was living and bringing up the children with a non-Jew, and he sought to have custody

of them transferred to himself so that he could bring them up in a Jewish manner. They came before a bench of two, rather than three, judges in the rabbinical court with the consent of the parties, and after a very short and summary hearing that court transferred custody as requested but without giving reasons for its decision.

Beiski J.: It seems to me unnecessary to explain the importance of the principle that all members of a court or rabbinical court or other tribunal are to be present during the oral hearings of a case before them, since only by doing so can they take part in the consequent decision. This is not only so that justice may be seen to be done but also to ensure that the grounds of the decision are based on the personal and independent impressions that each of them has received. Here also the sources are to be found in Jewish law which regards a bench of two as "an even court" which cannot come to a decision (*Sanhedrin* 3b). In most matters a bench must be made up of three judges at least (*M. Sanhedrin* 1:1; *Hoshen Mishpat* 3:1-2), although there are exceptions in civil law where the parties may effectively consent otherwise...

There is no need to expand on the obligation to give reasons for every judgment or decision under the general law. "It is a leading principle —written or unwritten—that a court must set out the grounds for its decision" (*H.C.* 176/54 *Joshua* v. *Appeals Tribunals* (1955) 9 *P.D.* 617 at 635; D. Levin, *Judicial Tribunals in the State of Israel* (1969) 67 ff.; sec. 182 of the Crimninal Procedure Law (Consolidated Version), 1982; and reg. 215 of the Civil Procedure Regulations, 1958). This obligation encompasses not only judicial and quasi-judicial tribunals but also administrative authorities (Administrative Procedure Amendment (Statement of Reasons) Law, 1959) so that a court can review the reasons.

As regards the rabbinical courts, the obligation to state reasons is entrenched in chapter 11 of the Rabbinical Courts Procedural Regulations. Thus reg. 103 provides: "Every decision given in the course of legal proceedings must be in writing and must state reasons". And reg. 104 provides: "Judgment must also include, besides the decision in the matter, (a) a summation of the submissions of the parties, (b) a holding of the important facts, and (c) the reasons for the decision." The exception for not setting out, on some ground or another, such reasons, appears in reg. 105 which requires the consent of the parties and "their waiver of the right of appeal."

In an article by E. Schochetman — "The Duty of Stating Reasons in Jewish Law", 6-7 *Jewish Law Annual* (1979-80) 319, 353, 395, we find that the imposition of this duty is something new in the *halakhah*, particularly as regards the work of the rabbinical courts. However, in *H.C.* 142/70 *Shapira* v. *Jerusalem District Committee of the Israel Bar Association* (1971)

25(1) *P.D.* 325, 333-335 [see Part 3, Social and Administrative Regulation, p. 179], Kister J. gives in detail the halakhic sources regarding the duty to state reasons and the conditions thereof, as determined by *M.T. Sanhedrin*, and by Rema in *Hoshen Mishpat* and in *Resp. Havot Ya'ir*: "It is not sufficient to set out the submission, the facts as found or elucidated in court, but the actual reasons must be added, that is, the legal grounds for the decision." The observations of R. Uziel are very apt: "By writing a reasoned judgment we demonstrate the quality of justice that fills Jewish law and the efforts made by the judge to arrive at the truth as far as he can... and give true judgment" (*Mishpetei Uziel*, Part 3, *Hoshen Mishpat* 1:13).

In the present case, the reasons are exhausted in a couple of words—"In view of the foregoing"—i.e. as stated in the husband's application, and in the single sentence that each party uttered before the imcomplete bench. The respondent contends that these words actually embody the real grounds for the operative decision. If this means that the fact alone — which no one disputes — that the woman is living with a gentile justifies taking the children out of her custody, we have already enlarged on this aspect and have said that this reason by itself is not enough for any decision without examining the complex of circumstances and matters involved, from which one may deduce what the welfare of the children requires, and there is no reference to that in the decision. In such an instance, Elon J. has observed in *S.T.* 1/81 *Nagar* v. *Nagar* (1984) 38(1) *P.D.* 365: "With all respect, such extraordinary briefness on so basic a question as the education of the children, in the especially complicated circumstances of the case, is not enough."

See: SHAPIRA v. JERUSALEM DISTRICT COMMITTEE OF THE ISRAEL BAR ASSOCIATION, Part 3, Social and Administrative Regulation, p. 179.

F. Execution of Judgment

1. Collection of Debts by Self-Help

C.A. 216/73

SOLOMONOV v. AVRAHAM

(1974) 28(1) *P.D.* 184, 195-196

Two claims were here made against payment of certain cheques — coercion, and conditional drawing of the cheques.

Kister J.: Since my friend Laudau J. has raised... the question of public policy against permitting the collection of debts under coercion, it will not be amiss for me to mention the attitude of Jewish law on this matter.

Jewish law does not allow for the collection of debts by self- help (*Tur* and *Shulhan Arukh, Hoshen Mishpat* 4). Coercion is regarded as precluding the intention necessary for sustaining a transaction. The question is a large one and this is not the place to go into it extensively. I would only emphasize that a sale differs from a gift. A sale will in certain circumstances be treated as subsisting if there was no protest, since the money was paid over and in the course of the transaction the proper intention is ultimately forthcoming , whereas it is otherwise with a gift. This distinction is parallel to the one drawn by Etzioni J. between pressure in collecting a proved debt and pressure to undertake a new obligation. It would seem that under Jewish law too, it is permitted *ex post facto* to collect a debt pursuant to a deed made under pressure, provided that the debt is clear and certain and payment is already due. Such pressure is similar to that in the case of a sale. Pressure to enter into a new obligation, however, is like pressure to make a gift, and is a nullity. But even in the case of a sale the consideration offered must always be examined to see that it is full and immediate. In the present case the appellant gave cheques for a sum in excess of that which, he alleges, was due to the respondent. He also indicated his intentions by stipulating that if it turned out that the municipality made deductions from the payments, the cheque would not be honored: that constituted notice sufficient to rescind a sale made under pressure as well. The threat here was not an empty one, since the respondent had exerted force even before the cheques were drawn, and the appellant had reason to believe that he would be harmed by the respondent.

2. The Oath of *"Ein Li"*—"I Do Not Have"

C.A.(T-A) 435/80

FARJIN v. MORED *et al.*

(1982) (1) *P.M.* 409, 412-413

The appellant had applied to have a number of claims against him for repayment of debts consolidated, but the Execution Officer had rejected the application, largely because the monthly payments he proposed were insufficient ever to meet the debts due.

Harish J.: It has been a basic principle in execution matters since before the legislature enacted execution laws that just as a person must pay his debts, so a creditor must avoid oppressing the debtor to compel him to pay more than he can genuinely afford.

The law does not tolerate such oppression, nor is it reconcilable with basic principles regarding individual rights and good social order. Of that and its like, Scripture loudly protests, "If thou lend money to any of My people, even to the poor with thee, thou shalt not be to him as a creditor" (*Ex.* 22:24). Moreover, "No man shall take the mill or upper millstone to pledge, for he taketh a man's life to pledge", and "if he be a poor man, thou shalt not sleep with his pledge; thou shalt surely restore to him the pledge when the sun goeth down that he may sleep in his garment and bless thee; and it shall be righteousness unto thee before the Lord thy God" (*Deut.* 24:6, 13).

Maimonides bases the following rules on these verses (*M. T. Malveh veLoveh* 2:1):

> It is the (Biblical) law that when a lender claims his debt, if the borrower has possessions, they are arranged for his support, and the creditor is paid the rest as I have explained. [Maimonides interprets "arranged" in *M.T. Malveh veLoveh* 1:7: The borrower is told to produce all his movables, not omitting anything. Of this amount he is given maintenance for thirty days and clothing which is suitable but not luxurious for twelve months.] And if the borrower has nothing or just enough for his support he goes free without restriction, nor is he told to produce evidence that he is a pauper; he is not required to take an oath in the manner of the gentiles, for it says, "Thou shalt not be to him as a creditor". Instead, the lender is told that if he knows of any possessions of the person indebted to him, he may go and seize them.

Maimonides adds (*ibid.* 2:4):

> Where a person is reputedly a pauper, going around begging, and this is known to the judge and to most people, and the creditor wants him to take an oath...not being satisfied by the obvious poverty of the person but wishing to cause him grief and shame him in public in order to avenge himself or make him go and borrow from gentiles or take his wife's possessions to pay his debts so as to be released from the oath, it seems to me forbidden to a God-fearing judge to administer this oath, and if one is administered, the scriptural prohibition, 'Thou shalt not be to him as a creditor' is transgressed. Moreover, the judge should rebuke the plaintiff strongly for bearing a grudge and acting stubbornly (see also in this regard M. Elon, *Jewish Law*, Part 2, 535 ff.).

The difficulties and doubts facing an Execution Officer are very clear when duly enforcing the payment of debts, most debtors unfortunately being deceitful and evasive. Yet it certainly seems possible and necessary to apply these rules of Maimonides at the present time *mutatis mutandis.*

3. Satisfaction out of "Medium" Property

See: SHMUEL v. ISRAEL, Part 9, Property—Physical and Intellectual, p. 738.

G. Respect for Court

1. Refusal

C.A. 807/72

SOBOL *et al.* v. GOLDMAN *et al.*

(1979) 33(1) *P.D.* 789, 803-804

This appeal involved the dismissal in limine *by the District Court of an application for an injunction against a rabbinical court in a matter of succession and for a declaration that the court's decision was null and void.*

Elon J.: Whilst I shall not deal with the power of a rabbinical court to issue a warrant of refusal since it is not relevant in the present case, I shall preface a few observations on the nature of such a warrant and the manner of its issue by a rabbinical court. The form of *herem* (excommunication) given in *Darkhei Moshe* to *Tur*, *Hoshen Mishpat* 19—to which respondents' counsel referred and which was cited by my colleague — is set out in the geonic *responsa* (*Sha'are Tsedek* 14) by Rav Paltoi bar Rav Abaye. This form is connected with the talmudic "opening" (See G. Libsen, "For What is Excommunication Ordered: the Grounds for Excommunication in Palestine and Babylon in Mishnaic and Talmudic Times," 2 *haMishpat haIvri*, 323, 332 note 206). The warrant of refusal, in its institutionalised legal form, apparently evolved in later times and differed in its nature and consequences. The subject requires investigation but this is not the occasion to elaborate. The common feature is that both served as an important sanction available to a Jewish court which, although it enjoyed judicial autonomy in the diaspora, lacked the adequate means of coercion that were at the disposal of a sovereign state (see M. Elon, *Jewish Law*, I, 11-12).

Even in those times when such means were vital—and generally accepted —for maintaining Jewish judicial autonomy, the rabbis limited their use. On the observations of Rav Paltoi mentioned above, Ribash in the fourteenth century wrote: "The *geonim* were wont to be very strict in their decrees and with those who disobeyed their rulings... Subsequently, the rulings of the *Gemara* alone were followed, and it has already been said that our *niddui* [ban] is like their reprimand" (*Resp. Ribash* 173).

Not only with regard to the especially severe measures of which Paltoi speaks, but in general the rabbis limited as far as possible the use of the *herem* and *niddui*. Prof. Assaf has summed up the matter well in his *Punishment after the Close of the Talmud* (at p. 34):

> It is noteworthy that the leading rabbis in each generation refrained from employing the power of *herem*. It is reported of Maharil that he excommunicated a person only once in his lifetime, and no person is known to have been excommunicated by him before or after (*Minhagei Maharil*). A contemporary of his, R. Israel Bruna, wrote: "My father and teacher enjoined me in his will never to concur in any *niddui* anywhere" (*Resp. Mahari Bruna* 188)... When it was necessary to order *niddui*, it was not done without communal consent. Rabbenu Tam and his colleagues ordained that a rabbi was not to proclaim *niddui* without permission of the community nor the community without leave from the rabbi. Rosh also attests: "Never did I presume to order *niddui* without public concurrence" (*Resp. Rosh* 43:19).

The remarks of these great halakhic scholars apply *a fortiori* in our own days. It would seem that in the same spirit, the *Rules of Procedure of the Rabbinical Courts of Israel* do not mention the matter of issuing a writ of contumacy, although other coercive measures, such as prohibition against leaving the country and sequestration of property, are mentioned (see paras. 96-98).

2. Contempt of Court

H.C. 371/67

FOGEL v. LEVINGER *et al.*

(1968) 22(1) *P.D.* 344, 350

A writ of contumacy was issued against the first respondent, the rabbi of a settlement, for refusing to appear before the rabbinical court in a dispute between him and a local shohet *(ritual slaughterer), whose slaughtering he had invalidated.*

Kister J.: It should be observed that the true significance of "a letter of contumacy" is that it is a declaration that a given person refuses to appear before the court and he is to be regarded under religious law as guilty of contempt of court, with the various consequences that ensue. According to *Resp. Bet Ya'akov* 33, the consequence of a *dayan* (judge) refusing to appear in court is that he may not act as a *dayan*, one of the reasons being the rule that a person who is not judged cannot judge others (*Sanhedrin* 18a). I shall not enter into the question of when a *bet din* (religious court) should order a local rabbi to appear and issue a letter of contumacy. Here such a letter was issued, and although appeal is available and the Chief Rabbinical Council also has appropriate powers and functions, the first respondent did nothing to have the letter of contumacy withdrawn, and generally took no steps to have the matter remitted to another *bet din*, had he really wished to do so, or to have the decisions of the Petah Tikvah *bet din* set aside in the normal way. Apart from that, it must be stressed that in spite of the decision of the rabbinical court not to introduce another *shohet* into the settlement, which means that the petitioner remains qualified to act, the first respondent saw fit, of his own volition, to invalidate the slaughtering of the petitioner

without obtaining a decision of this or another court or of the Chief Rabbinate.

3. A Disciple Who Decides the *Halakhah* in the Presence of His Teacher

H.C. 361/67

GOLDENBERG *et al.* v. ATTORNEY-GENERAL *et al.*

(1968) 22(1) *P.D.* 365, 371

The petitioners submitted that the District Court had erred in dismissing their plea that the Amnesty Law required that pending proceedings against them should cease. That decision was upheld by the Attorney-General.

Cohn J.: Moreover, even setting aside the said intention of the legislature, it is good sense and courtesy that the Attorney-General, who himself or through his representative is a party to the proceedings in question, should not go against the court even by exercising the general powers vested in him by law, even when that is justified on the merits. To do so is like the halakhic student who lays down the law in the presence of his teacher —even though he is greater than his teacher and even if he is justified in his directives, he is banned (*Shabbat* 19b).

4. Respect for Judge

Cr.F. 5/48

ATTORNEY-GENERAL v. SHEINBERGER

1949 *Hamishpat* 28, 30

Halevi P.: The defendant, Sheinberger, was charged with contempt of court under sec. 131(1)(b) of the Criminal Code Ordinance, 1936...

However, in the humble opinion of this Court, the defendant is also

guilty under Jewish law: see *Hoshen Mishpat* 8:4 — "The community is bound to act respectfully towards a *dayan* (judge) and stand in awe of him." And paragraph 5 adds, "One may not act with frivolity towards an agent of the *bet din* [religious court] and the *bet din* may order any one who grieves such agent to be flogged *makat mardut* [flogging for disobedience to the rabbis] and the agent is as credible as two witnesses in testifying that he was abused".

See also paragraph 2:

> Every *bet din*, even if not ordained in Eretz Yisrael, when it sees that people are acting lawlessly (and it is urgently necessary — *Tur*) may impose the death penalty or monetary fines or other penal sanctions even in the absence of complete evidence... (And it may do what it thinks fit to contain the lawlessness then prevailing — *Tur*, citing *M.T. Sanhedrin* 24:4) and all that it does should be for the sake of Heaven, and this applies to a great authority or communal leaders who have been appointed as a *bet din* over the community.

See likewise *Resp. Zikhron Yehudah* 79 (by R. Yehudah the son of Rosh) (cited in Assaf, *Punishment after the Close of the Talmud*, 76), dealing with a case where a *dayan* was treated badly:

> It is well-known that law is one of the three foundations upon which the world rests and but for the judges the stronger would prevail. It is the judges who put the law on the sound foundation whereby the world is properly ordered. They are likened to royalty, as the Sages propounded... We are cautioned to respect them and all the more not to put them to shame, even when they are not acting as judges but especially so in connection with the very matter before them.

It seems to me that it is proper to rebuke him as if there were witnesses since the punishment is intended to limit this lawlessness so that every *dayan* will decide truthfully and not go in fear of any litigant.

H. Lawyers

1. Use of Polite Language

Ap.Ch.A. 10/81

DISTRICT BOARD OF ISRAEL BAR ASSOCIATION v. A.

(1982) 36(3) *P.D.* 379, 383

By a majority decision the District Disciplinary Court exonerated the respondent, a lawyer, from acting in a manner unbecoming the profession in using extremely sharp language in a defence against a claim for lawyers' fees.

Elon J.: It may be said that it is not only the duty of a lawyer to use restrained and polite language but it is in his own interest. The wisest of men has already said: "The words of the wise spoken in quiet are more acceptable than the cry of a ruler among fools" (*Eccles.* 9:17). This verse has been variously interpreted: as a commonplace, the words of a wise man are spoken and heard in quiet, unlike a foolish ruler who shouts and cries like a crane; others understand it in its simple and logical sense: the words of the wise are heard in quiet, unlike the shouts of a ruler among fools, for which reason they are listened to (Rashi *ad loc.*) more than the shouts of a foolish ruler whose words are not comprehended and absorbed in the noise he makes (see also Ibn Ezra *ad loc.*)... It follows that to defend one's client faithfully and devotedly, counsel should speak gently, for only then will he be sure of being heard by those who need to hear him.

Chapter Two

CIVIL PROCEDURE

A. Prescription

1. Grounds for Prescription

C.A. 158/54

DE BOTON *et al.* v. MIZRAHI BANK LTD. *et al.*

(1956) 10 *P.D.* 687, 688, 695

Silberg J.: This is an appeal against a judgment of the Tel Aviv District Court dismissing proceedings by the appellants for a declaration and a mandatory injuction in connection with certain land...

Prescription has a long history and a firm place in one form or another in the legal systems of all peoples and in all periods. Its source lies therefore in general human need and the basic requirements of social life everywhere and at all times. This universal law has several aspects and there are several reasons for it, of which the following are most important:

(a) The difficulty a defendant has in preserving his evidence and proof over a long period. Receipts are gnawed by mice, as the *Talmud* puts it (*M. Baba Batra* 170b), and witnesses may die. Hence almost every legislator has stipulated that when a claim is made after the passage of a period considered to be excessive the defendant is entitled to be believed in what he says and is not required to produce evidence in contradiction. It is this kind of action, or something like it, that accounts for "presumptive title" after three years of undisputed possession in the case of land in Jewish law. "For one, two and three years a person will take care of his title deeds; beyond that he will not" (*ibid.* 29b).

(b) Over-long delay in commencing an action suggests forebearing and

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(b) Over-long delay in commencing an action suggests forebearing and

waiver. It is thus, for example, that Jewish law explains the "prescription" of a claim by a widow under her *ketubah* (marriage document), as long as she is residing with her father (*Ketubot* 104a), and because of this presumed forebearing she cannot claim her marriage settlement from the heirs after the passage of twenty-five years (*ibid.* 104a).

2. Conflicting Interests

C.A. 242/66

JACOBSON v. GAZ *et al.*

(1967) 21(1) *P.D.* 85, 99-100

A picture belonging to the appellant was borrowed for an exhibition in Johannesburg in 1949 and disappeared. It was discovered in 1960, but before the appellant could take steps to recover it, it disappeared again. It was finally discovered in an exhibition in Tel Aviv in 1964, apparently lent by the respondent who purported to be its owner. In the District Court the appellant's action was dismissed in limine *either under the* Mejelle *or under the Civil Wrongs Ordinance, 1944 because of prescription.*

Kister J.: In general, every legal system which contains provisions regarding periods of prescription provides for the benefit of injured parties who were unable to establish their claim within the normal period of prescription. There are systems in which greater concern is shown for the interests of the plaintiff, and others in which the interest of the defendant is safe-guarded.

An example of such opposing interests that are to be considered in deciding the law is to be found in Jewish law. A *Mishnah* in *Baba Batra* (10:6) tells us that—

> Where a person has paid part of his debt, R. Yehudah says he shall exchange his bond for another (expressing the remainder of the debt). R. Jose says he shall write a receipt. R. Yehudah said: "If so, he would have to guard his receipt from mice", to which R. Jose replied: "That is better for (the creditor) and the debtor's rights will not be harmed."

The rule is settled by *Hoshen Mishpat* 54:1, and represents a balancing between these two interests...

3. Presumption Without a Claim

See: GILBERG v. PANOSS, Part 9, Property—Physical and Intellectual, p. 703.

B. The Parties

1. Persons Having the Right to be Heard

C.A. 811/75

RUSSIAN ECCLESIASTICAL MISSION IN JERUSALEM v. ATTORNEY-GENERAL *et al.*

(1977) 31(3) *P.D.* 317, 323-324

The appellant claimed possession of certain property against three Russian nuns as the registered owner thereof. The respondent intervened under his statutory powers and supported the defendants. An affidavit which he desired to submit was opposed by the appellants on the ground that he had no right to do so under statute.

Cohn J.: I concur and I have nothing to add to the remarks of the President as regards the meaning of the words "to be heard" in sec. 1 of the Ordinance in respect both of the legislative history of this Mandatory enactment and of the aim and purpose of the Ordinance.

I am emboldened to add something of my own in order to show that the interpretation as aforesaid is invited also by Jewish law. The Ordinance in its New Version is binding law... and what requires construction is the Hebrew employed by the legislature.

The procedure which judges are commanded to follow is to "*hear* the causes between your brethren and judge them righteously" (*Deut.* 15:16). The halakhic *Midrash* explains "to hear" to mean that "the righteous claims with righteousness and presents evidence" (*Sifre Deut.* 16), which means that "to hear" includes the bringing of evidence.

Scripture also tells us, "And let them judge the people at all seasons: and it shall be that every great matter they shall bring unto thee but every

small matter they shall judge themselves" (*Ex.* 18:22) and then, some few verses later, "And they shall judge the people at all seasons; the difficult cases they shall bring unto Moses but every small matter they shall judge themselves" (*Ex.* 18:26). This teaches us that a "matter" brought before a judge means the entire case: i.e., the claim, the argument and the evidence. Thus we also call every legal proceeding between people a "cause and matter" and when a person gives up a claim he says "I have no cause or matter with you" (*Ketubot* 56a: 83a-b, 93a, 95a and elsewhere), just as we call a litigant "one who has a matter" (*Baba Metzia* 14a; *Baba Kamma* 8b and elsewhere).

That is what we have said: the power "to be heard" in trial is the power to be party to a matter in all respects.

2. Submissions Heard in the Absence of the Opposing Party

See: MA'ARAVI v. BENSHAR, p. 260.

C. Jurisdiction

1. Preference for Local Jurisdiction

C.A. 322/70

TEL AVIV MUNICIPALITY v. ARTISTS AGENCY LTD.

(1970) 24(2) *P.D.* 588

The respondent moved for a declatory judgment that it was entitled to a rebate given by the Municipality to Hebrew-language theatre. The main plea of the appellant was that such a declaration could only be made by the High Court of Justice.

Cohn J.: I find nothing wrong with a citizen having a choice between petitioning the High Court of Justice or proceeding in any other court.

The only bad thing is that instead of answering the citizen on the merits of his complaint and litigating in its own area, the local authority wastes public money and bothers the plaintiff and the courts by futile litigation over formal submissions of lack of competence. It has long been accepted that when one party says "Let us litigate here" and the other says "Let us go up to the Sanhedrin in Jerusalem", the latter is compelled to litigate in his own locality (*M.T. Sanhedrin* 6:6; *Hoshen Mishpat* 14:1).

2. "The Plaintiff Must Follow the Defendant"

H.C. 99/62

SULTAN v. TIBERIAS RABBINICAL COURT *et al.*

(1962) 16 *P.D.* 1763, 1767-1768

The second respondent, a very recent immigrant, claimed maintenance for herself and her four children from her husband, the petitioner, who, she alleged, had abandoned her and the children more than five years previously and had immigrated to Israel on his own and married another woman. The petitioner lived in Jerusalem and the Statement of Claim was sent to him there. His lawyer wrote to the Tiberias court that the petitioner would be on reserve duty on the day fixed for trial. He also asked for the claim to be dismissed for lack of jurisdiction. The Tiberias Court heard the case ex parte *and held that respondent should direct her complaints to the Jerusalem Court, which would deal with the entire matter. At the same time the petitioner was ordered to pay a sum for interim maintenance since the children were in dire distress. The petitioner sought to upset this order as well for want of both material and local jurisdiction.*

Silberg J.: As regards local jurisdiction, the situation is somewhat different. The rabbis themselves held in their judgment that the plaintiff was to address her complaints against her husband to the Jerusalem District Court. Thus they "admitted" that the Tiberias Court had no local jurisdiction to deal with the matter.

Nevertheless, as regards the interim maintenance, we are of the opinion that the Court had jurisdiction to make the order as it did. This matter is unlike the other. The general rule is that one "follows" the defendant, a rule also recognized by Jewish law (*Resp. Maharik* 21; Rema to *Hoshen Mishpat* 14:1; *Rules of Procedure of the Rabbinical Courts of Israel*, rule

7). It springs from a practical and logical consideration: a defendant whose obligation has not yet been established is not to be put out and have to proceed to the plaintiff wherever he may be sued. On the contrary, "if a man has a pain, he goes to the doctor" (*Baba Kamma* 46b). At the moment, the defendant has in fact no "pain". This consideration should rightly admit of certain exceptions, as when the justified interest of the plaintiff is so immediately and decisively important that it obviates taking account of the trouble to which the defendant is put. Indeed we find in the above Rules of Procedure two rules that point in the same direction:

> 16. Where a person has applied to prosecute a claim not in the locality of the defendant but in a court closest to the defendant's location, on the ground that in the circumstances of the case he is unable to litigate at the defendant's location, the court in which the claim was filed may deal with the matter and determine whether to entertain the claim.
>
> 17. Notwithstanding the foregoing, where an application has been made to a court to safeguard the rights of the applicant in a case of desertion or concealment of property, the court may, if it sees reason therefore, entertain the application and make interim orders accordingly. If the defendant requires that the continued hearing of the interim order should be conducted in some court having jurisdiction under the preceding paragraphs, the court that commenced to hear the application may decide in the given circumstances whether to continue the hearings or remit them to a court having jurisdiction as aforesaid.

The basis for rule 17 is—as indicated in the list of sources appended to the *Rabbinical Rules*—Rema to *Hoshen Mishpat* 73:10: "If a defendant is from another town and it appears to the *bet din* [religious court] that the defendant's assets situated in the plaintiff's town are property to be attached, the defendant must come and litigate in the town of the defendant in order to release the assets". Another precedent is found in *Terumat haDeshen, Pesahim* 64.

Examination of all the sources dealing with "local jurisdiction" under Jewish law demonstrates that no rigid rules exists: all depends on the circumstances and exigencies of the case and all rests on the discretion of the judges. This emerges, on careful consideration, from *Terumat haDeshen* 305 and the observations of Sema to *Hoshen Mishpat* 14:11 (*ad fin.*). See also *Resp. Mabit* 343, which relies upon the words "and the like" used by Tashbetz (see the *responsum* quoted by *Bet Yosef* to *Hoshen Mishpat* 14) and concludes that hearings may be transferred from the defendant's place to any other place in every case similar to that before Tashbetz, which is further evidence of the flexibility of the said rule.

If such is the situation, then the distinction which the Tiberias rabbis drew between interim and permanent maintenance seems to us to be logical and justified. On the claim for permanent maintenance the evidence and proof will necessitate a considerable number of court hearings. It is therefore proper that the plaintiff should follow the defendant to Jerusalem. By contrast, the claim for interim maintenance is very short and simple. There is on the one hand the woman looking after four children, all new immigrants who have not had enough time to settle down in the country, and on the other the father who sired them and — according to the plaintiff — has married another woman and is not concerned at all with the children. In these circumstances, the formal rule of local jurisdiction is not to be pedantically applied. The Tiberias rabbis did well in applying as it were, both before and after the event, the saying: "Speak therefore to him and see that he meets us in Tiberias" (see the explanation of this saying in *Sanhedrin* 31b), at least over the claim for interim maintenance.

We have gone into the question of jurisdiction under Jewish law because in our view the rabbis who heard the matter possessed local jurisdiction. We must, however, add that even if that were not so, it is very doubtful whether we would interfere with their judgment since questions of local jurisdiction are largely not among the matters in which this Court is obliged to intervene for the purpose of doing justice.

3. *Ne exeat regno*

M. 3/52

KOVETZ v. KOVETZ

(1952) 6 *P.D.* 112, 113-114, 118

The parties are husband and wife. After fourteen years of marriage the respondent abandoned the petitioner and their thirteen-year-old daughter and refused to live with them. The petitioner brought proceedings to order the husband to return to live with her and to charge him with maintenance until he did so, and meanwhile to forbid him to transfer his property without her consent. In connection with these proceedings, the court made certain interlocutory orders at the request of the petitioner, including an interim attachment of the husband's property and an order preventing his departure from the country.

Assaf J.: Without expressing my opinion on the actual question of whether an interim attachment may be made to assure the monthly payment of maintenance by the husband, I concur in the opinion of Cheshin J. that here the attachment should not continue until the fate of the appeal is decided. The respondent is well-to-do and owns a business and his affairs are not on the verge of collapse. There is therefore no sufficient basis to fear that his wife will find nothing from which to collect her maintenance in the amount fixed by the court until the appeal is heard. In imposing an attachment, even where it is empowered to do so, the court always has discretion.

As regards the injunction against departure from the country, I would bring support to my learned friend from *Hoshen Mishpat* 73:10, the terms of which are almost identical with art. 656 of the Mejelle: "If a person borrows money for a fixed period and within that period the lender sees that the borrower wishes to go abroad and [the lender] claims what is due to him or that a security be given him, he is listened to."

D. Compromise

1. Grounds and Scope

C.A. 807/77

SOBOL *et al.* v. GOLDMAN *et al.*

(1979) 33(1) *P.D.* 789, 798, 800-803

The issue in this appeal was a judgment dismissing in limine *an application for an injunction against a rabbinical court in a matter of succession.*

Elon J.: In the opinion of my learned friend, since the rabbinical court exercised its power of compromise when determining the rights of the parties in the estate, the question arises whether it did not act contrary to the rule requiring it to decide according to its religious law, thus leaving itself open to review by the High Court of Justice. In the present case,

however, no such claim will be heard in support of the appellant, for she was too late in raising it...

Three views are to be found in the Talmudic literature regarding compromise. In the opinion of R. Yehoshua b. Korha:

> It is a *mitzvah* [religious obligation] to compromise for it is said, 'Execute the judgment of truth and peace in your gates' (*Zech.* 8:16)....What is a judgment of truth that embraces peace? Compromise....What is a judgment that embraces justice? Compromise (*Sifre to Deut.*, para. 17; *T. Sanhedrin* 1:2-3; *Sanhedrin* 6b; *Y. Sanhedrin* 1:1).

A diametrically opposed view is that of R. Eliezer b. R. Jose haGalili:

> It is forbidden to compromise and anyone who does so is a sinner and anyone who welcomes a compromise is despicable....Let the law take its course, for it is written 'judgment is God's' (*T.* and *Sanhedrin loc. cit.*).

The third view is that of R. Shimon b. Menassia who holds that compromise is neither *mitzvah* nor transgression but is optional (*Sanhedrin loc. cit.*).

The *halakhah* has accepted the first view. Thus *M.T. Sanhedrin* 8:4 stipulates:

> It is a *mitzvah* to ask the parties at the outset, "Do you wish a judgment or a compromise?" If they wish a compromise, that is done. Every *bet din* [religious court] that always makes a compromise merits esteem, and of it it is said, "Execute the judgment of...peace in your gates" (*Zech.* 8:16). What judgment includes peace? Compromise. So of David it is written, "And David did justice and righteousness unto all his people" (*II Sam.* 8:15). What is justice that includes righteousness? Compromise. When does this apply? Before the verdict is pronounced; although argument has been heard and the *bet din* knows which way the law will go, it is still a *mitzvah* to compromise. After verdict has been pronounced and one party has been found innocent and the other liable, a compromise may not be made between them but the law must take its course (to the same effect *Tur* and *Shulhan Arukh, Hoshen Mishpat* 12:2).

In Jewish law, the nature and mode of making a compromise are clearly legalistic. Thus, compromise is not a matter of arbitrary decision but must be made after serious thought. "Compromise also needs thoughtful decision" (*Y. Sanhedrin* 1:1). *Tur* and *Shulhan Arukh* devote a special section (*Hoshen Mishpat* 12) to the laws concerning compromise. In *Shulhan Arukh*, sec. 12 contains nineteen paragraphs, explaining in detail how compromise is made, when it comes into effect and so on, and in

these provisions compromise emerges as an institution of manifest legal character. Thus, for example, one of these basic provisions is that "just as one is cautioned not to bend the law, so also is one cautioned not to bend a compromise in favour of one more than to the other" (Para. 2).

An interesting question was posed to R. Avraham di Boton (*Resp. Lehem Rav*, 87) about a litigant "who made a compromise agreement with *kinyan* [formal act of commitment] and oath, that he would accept all that was pronounced against him as the judge thought fit, as if it had been pronounced by the Sanhedrin in Jerusalem." The judge decided what he did by way of compromise in accordance with the agreement of the parties, and then one of them asked R. di Boton to revoke the decision on the ground that it had been given without hearing all submissions. The judge replied that he knew the matter well and all the arguments which that party had meant to put forward. R. di Boton, however, revoked the decision, saying *inter alia*:

> In *Tur, Hoshen Mishpat* 17, it is written that it is necessary for a judge to hear the parties and consider them well... and justify the judgment in his own heart. Only then shall he decide. Even when giving a compromise judgment, it appears certain that the same applies, since sec. 12 lays down that just as one is cautioned not to bend the law, so is one cautioned not to bend a compromise in favour of one more than to the other... A judge must be as meticulous in compromise as in judgment. Hence in the present case, whether the judge decided according to law or made a compromise, since he did not hear the arguments, his judgment is not law, nor is his compromise a compromise.

Because clear directives regarding the actual making of a compromise are lacking, some of the Sages prescribed more stringent rules for compromises than for judicial decisions. Thus, "if there is more than one judge, then a majority decision is not sufficient, but there must be unanimity" (*Hoshen Mishpat* 12:18). R. Meir haLevi Abulafia observed instructively in his commentary on *Sanhedrin* 32b that the verse 'In justice shalt thou judge thy neighbour' (*Lev.* 19:15) relates to judicial judgments, whilst the verse, 'Justice, justice shalt thou pursue' (*Deut.* 16:2) is directed to a decision as to compromise. For this reason "justice" appears once in the former and twice in the latter verse, because—

> for judicial judgment, lucidity and close examination are not as necessary; one must only judge in accordance with the law without fear of condemning the innocent or acquitting the guilty. Compromise, however, requires considerable examination and the use of one's discretion to determine who is speaking the truth and with whom one should be

more stringent (*Yad Ramah* to *Sanhedrin* 32b; see further, M. Elon, *The Principles of Jewish Law*, 570-73 and bibliography).

Thus we see that compromise is a substantive part of Jewish law, and is distinguished by clear juridical procedures and principles. Therefore, the provision in sec. 155(b) of the Succession Law, 1965, that a religious court may follow its religious law, has reference both to judicial judgments of the court and to decisions it makes via a compromise. In fact, the Rabbinical Court here dealt at length and in depth with the matter before it prior to arriving at its decision. And it is decided law regarding the decisions of the rabbinical courts that "what they decide is their religious law and no civil court may question their conduct regarding the nature of their religious law" (per Cohn J. in *Shtreit* v. *Chief Rabbi* (1964) 18(1) *P.D.* 598, 608).

I would add incidentally that this compromise is very close to the law, or more precisely, to the aim of Jewish law in regard to giving a daughter a right of succession. Many different *takkanot* (regulations) have been enacted to this end over the course of time in various communities of the Diaspora, and the rabbis grounded these *takkanot* in the *halakhah* (see Elon, *Jewish Law*, 682-86). Upon the establishment of the State the late Chief Rabbis, Herzog and Uziel, made similar efforts (*ibid.*, 104).

For the above reasons, the judgment of the Rabbinical Court in the present matter was correct. I would add a further practical point. If a compromise made by a rabbinical court were not regarded as "a decision in accordance with its religious law", the result would be that when a rabbinical court tries to settle the differences between parties who come before it voluntarily over matters of succession, it would have to avoid writing a compromise judgment on the basis of the parties' consent and remit the matter to the District Court to effect the compromise. This is a result that does not commend itself.

2. Duty to Propose Compromise

App. 288/57

BALIN v. EXECUTORS OF THE WILL OF RAYMOND LITWINSKY dcd.

(1959) 20 *P.M.* 60, 63, 79

Kister J.: In general, under Jewish law a person who inclines to compromise is commendable. Rashi comments on the verse, "And thou shalt do what is right and good" (*Deut.* 6:18) that this refers to a compromise, beyond the strict letter of the law, and Nahmanides also observes *inter alia* regarding this verse that "...it is not possible for the *Torah* to mention every feature of a person's conduct toward, and his dealings with, his friends and neighbours with regard to the public good; but after mentioning some of them, such as 'Thou shalt not go around as a talebearer' (*Lev.* 19:16) and 'Thou shalt not take vengeance nor bear any grudge' (*ibid.* 18), the *Torah* goes on to lay down the general rule of doing what is right and good in all things, including therein the making of compromises and acting with equity and maintaining a good reputation and speaking kindly with all people."

However, the court which is commanded to initiate a compromise and to persuade the parties to settle their differences amicably, may not do so when it already knows how the law will go. Just as a judge may not bend the law, he may not bend a compromise nor force a party to enter into a compromise; and a party is not bound to waive his rights and compromise. A guardian of property not his own certainly may not waive property of others: thus in relation to the property of orphans, *Hoshen Mishpat* 12 and others lay down certain rules regarding the authority of a guardian to compromise. Guardians and the court which supervises them have authority to compromise if that is clearly for the benefit of the orphans. *Piskei Mahara'i* 162 and *Hoshen Mishpat* 12:3 further comment that a court may waive the rights of orphans, aside from the law, in order to protect them from controversy (see also the glosses *ad loc*). Obviously, the court must carefully consider each case on its own so as not to cause any orphan any injustice. That is the duty of the guardian and of the court regarding property under their protection, on the one hand not to waive any part thereof and on the other hand to compromise when that will be advantageous.

3. Equal Division in Compromise

C.C. 1317/62

ASSNIN v. YAROSHAVSKY *et al.*

(1964) 40 *P.M.* 131, 135, 136

The defendants, as owners of an old-age home, received IL. 2,500 as an admission fee from a person since deceased. The plaintiff, the heir and executor of the deceased's estate, sued for the return of IL 2,020 on the grounds that the deceased had not acclimated herself to the place and had died suddenly within four months after arriving there. The parties had originally agreed that the fee would be returnable after deducting IL 160 per month if the deceased left the home on written notice. Nothing was provided in the agreement concerning death, although there was oral evidence that the defendants had agreed that in such event the parties would compromise. On this basis, the court charged the defendants with the return of half of the original sum.

Kister J.: On the other hand, there is some reason for the silence of the contract with regard to death. When an elderly person, sick and frail, enters an institution, it is not pleasant to include a condition ensuring that in the event of death within a given period a certain sum should be repayable to the heirs. This is particularly so in Jewish tradition, as the *Talmud* (*Berakhot* 19a) says, "A person should never speak in a way that gives an opening to Satan", and "A person does not meet trouble half-way" (*Gittin* 18a). In accordance with this, *Even haEzer* 145:8 states that where a man gives his wife a *get* [bill of divorce] on his deathbed, he should do so on the condition that if he does not die, the *get* will be void, but if he dies, it should take effect immediately from the date he gave it. In order, however, not to invite trouble from the start, he should not commence with the condition, "If I should die", but rather, "If I should not die." Here, where the daughter paid over the money and told her mother to sign the contract, it was certainly to be expected that she would avoid inserting a special condition referring to the death of her mother in the institution. It is well-known that sensitive people do not suggest that a relative should make a will for fear of hurting his or her feelings. Hence it cannot be said that the omission of the condition is due to a waiver of the return of the money in this event...

The plaintiff, through her lawyer, agreed that in the event of death not all the money was repayable but that the parties should compromise. The evidence was not controverted by any witness and I accept it. The question

remains how the court should proceed where the parties say that they will compromise. No precedent of English law is known to me to cover such a case, but in Jewish law I have found a *responsum* in *Resp. Shevut Ya'akov*, 2:145. There the parties chose a person to make a compromise between them which approximated the law insofar as possible, and the person so chosen requested guidance. This was the answer he received: "Justify the compromise according to your discretion, but do not be harsh on one person more than the other", from which we may infer that a compromise is an actual judicial judgment. The Hebrew for compromise comes from the same root as "lukewarm", neither hot nor cold, and as it is said, "judges made a division" of the matter in question, generally speaking. At all events, the person making the compromise is at liberty to act as he deems fit except that he should not favour one against the other, so that they come to an amicable settlement.

E. Varying the Amount Claimed

1. Judgment Not to be Greater than Amount Claimed

C.A. 222/66

SCHWARTZ v. STATE OF ISRAEL

(1966) 20(4) *P.D.* 237, 240, 247

The appellant worked as a stevedore in Jaffa and was injured in a work-related accident. He sued for IL. 27,000 in damages. That sum was reduced to IL. 20,000 as the result of a decision of the Registrar to exempt him from payment of court fees on such a sum. After evidence had begun to be heard, the appellant sought leave to amend his Statement of Claim by increasing the damages to IL. 87,000, the difference being explained by the fact that originally the appellant had calculated his damages on the basis of the disability he had suffered in the accident alone, which was thirty percent, and that in turn had caused him a loss of salary of IL. 150 per month. The larger sum was based on the addition to his disability of his prior deformity (deaf and dumbness), making his entire disability sixty-eight percent, entailing a loss of earning of IL. 250 per month...

Kister J.: Regarding the increase in the sum claimed, it is proper to mention the approach that Jewish law takes. Rema to *Hoshen Mishpat* 17:12 rules that "Where a person sues in a minor matter and the judge thinks that in law the other side should be charged with more, the judge may not award him more than claimed, and if he does award him more, it is an error and judgment is reversed."

The commentators agree that the basis for this rule is a waiver by the plaintiff, who has agreed to be satisfied with what he claimed. But what is the position where the plaintiff claims a lesser sum because of a mistake of law? Almost all the commentators of *Shulhan Arukh* and the *responsa* authorities pose the question of how a judge should act when he sees or fears that the plaintiff was mistaken in law: may he award him more than what was claimed or draw plaintiff's attention to the fact, or should he do nothing and award only what has been claimed? It is surely not fair for the defendant to exploit the plaintiff's error, and there is no need for me to set out in detail the significance of a person exploiting the error of his neighbour and paying him less than is due to him—I see no need to enter into a discussion of this question here. But one thing is clear. If a plaintiff who has erred becomes aware of his mistake during the proceedings and wishes to increase his claim, then so long as he has not made a binding waiver, he may ask for what is due to him under the law. R. Shmu'el Mohliver, in his *Studies in the Halakhah and the Responsa* (1944), favours the view that a judge should not interfere or award more than is claimed by the plaintiff, but the latter himself can change his mind and increase his claim.

F. Right to be Heard

1. Duty to Allow Sides to Bring All Their Evidence

H.C. 9/58

BERMAN *et al.* v. MINISTER OF INTERIOR

(1958) 12 *P.D.* 1493, 1496, 1503, 1506-1507

Silberg J.: On 16 January 1958 the following two notices were published by the respondent: (1) Tel Aviv—Jaffa (Change in Municipal Boundaries) Proclamation (Amendment), 1958, and (2) Local Councils (A) (Amendment No. 6) Order, 1958. These had been made on 25 January 1957, and the significance of the data they contained was that the district of Nahlat Yitzhak had been withdrawn from the municipal area of Tel Aviv and attached to the Local Council of Givatayim. Clearly, if the Proclamation were cancelled, the Order of Attachment would *eo facto* also become void, since one district cannot be controlled by two authorities or be an integral part of two different municipal areas. On the other hand, if the relief sought is not granted, and the Proclamation is not set aside, counsel for the petitioners — as they stated before us — will not appeal to void the Order of Attachment to Givatayim because their clients are not interested in restoring the independent status their district possessed until the end of March 1948. Thus, notwithstanding the sharp criticism levelled by petitioners' counsel against the Order of Attachment, the only question before us concerns the validity of the Proclamation...

Counsel for the petitioners urge that the Minister's action was improper. He had not heard "the other side" in a manner consonant with reaching a quasi-judicial decision. He did not even wish to listen to the arguments of the opponents but adopted an inflexible attitude not open to appeal, even before his final decision to sign the Proclamation. Such conduct was defective and invalidated the Proclamation itself...

Nevertheless, that does not exhaust the matter in all its seriousness because the principle of a fair hearing to both sides is not the only principle governing the problem before us. There is still another principle, certainly not less important, which I would phrase in the manner of the well-known maxim: "No punishment without forewarning"—"forewarning" by giving notice and the opportunity to be heard in defense. "Punishment" here

is not necessarily a criminal penalty. As early as the beginning of the nineteenth century Lord Ellenborough declared that "it is contrary to the first principles of reason and justice that either in civil or criminal proceedings a man should be condemned before he is heard" (*Buchanan* v. *Rucker* (1807) 170 *E.R.* 877, 878). And with regard to depriving Dr. Bentley of his academic degrees at the beginning of the eighteenth century, Lord Fortescue said that according to what he had heard, the source of the principle of first hearing a party who may be prejudiced is to be found in God's word to Adam before expelling him from the Garden of Eden (*Gen.* 3:9, 11). Here is the delightful passage:

> Besides, the objection for want of notice can never be got over. The laws of God and of man both give the party an opportunity to make his defense, if he has any. I remember having heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defense. Adam (says God), where art thou? Hast thou not eaten of the tree, whereof I have commanded thee that thou shouldst not eat? And the same question was put to Eve also (*R.* v. *The Chancellor, Master and Scholars of the University of Cambridge* (1723) 93 *E.R.* 698, 704).

H.C. 10/59

LEVI v. TEL AVIV DISTRICT RABBINICAL COURT *et al.*

(1959) 13*P.D.* 1182, 1187-1189

The main issue in this petition was whether the proceedings in the Rabbinical Court were defective by reason of a breach of the principles of natural justice, i.e. audiatur et altera pars, *"the other party must be heard".*

Silberg J.: This basic procedural rule [that the other party must be permitted to bring all his evidence] is not the monopoly of the laws of other people. In fact it exists in Jewish law too (consider *Baba Metzia* 112b; *M.T. Malveh veLoveh* 22:2-3; *Hoshen Mishpat* 98:4-5; *ibid.* 16:1). On reflection, it seems that its main source lies in the much wider and more profound principle of "the equality of litigants" which, according to the outlook of our Sages, is the very essence of "justice" in legal proceedings.

> It is a positive commandment for a judge to adjudicate justly, since it is said, 'In righteousness [justice] shalt thou judge thy neighbour' (*Lev.* 19:15). What is just judgment? The equality of the litigants in all

> respects. Let one not say all that he wishes and the other be bidden to be brief. One should not be greeted cordially and addressed gently and the other frowned upon and addressed harshly. Where one is dressed in costly garments and the other in poor garments, say to the former, 'Either clothe him as yourself before you litigate with him or dress yourself as he so that you are equal and then appear for trial'. One should not sit and the other stand, but both should stand, and if the court wishes to have them sitting, both should be seated. One should not stand above and the other below, but side by side (*M.T. Sanhedrin* 21:1-3, based upon *Shevuot* 30a-b).

We read in *Resp. Rema* 108:

> It is therefore plain that a matter cannot be heard without hearing the argument of the defendant, for the *Torah* says: 'Hear your brethren.' Although this is obvious, we may learn from the ways of God blessed be He for all His ways are just and His ways are ways of pleasantness and his paths — peace. He began with Adam by asking him: "Who told you that you are naked?" and to Cain He also said: "Where is Abel your brother?" And this in order to hear his argument. How much more so with the ordinary human. Thus our Sages explained the verse, "I shall go down and see", and instructing judges not to decide until they have heard and understood. Even when it is clear to them that the defendant is guilty, they must first hear what he has to say.

In the case before us the learned rabbis did not act in the spirit of these words and, with all due respect, they violated one of the principles of natural justice. It is certainly true that according to Jewish law, "a man is not bound to maintain his wife unless she lives with him" (Ritba to *Ketubot* 12). Here the woman admitted that she no longer lives with her husband, testifying that "for ten days I was not at home". But in the same breath she added, "because my husband and children are killing me", which means in professional terms, "I cannot get on with him". If that is so, the husband, as we know, is liable for maintenance even if the wife leaves home.

> Where a woman leaves her husband's home and goes elsewhere because, she says, the home is situated in a place where people speak badly of her and the like, he must maintain her if she claims it... The same applies if she quarreled with her husband and could not get on with him and kept herself from him and had to borrow for her maintenance —he must pay (*Even haEzer* 70:12 and Rema *ad loc.*).

Counsel for the wife asked that he be allowed to show why she had left her husband. He could not produce the witnesses immediately, because he in

fact did not know that this question of the duty of maintenance ceasing by reason of the wife leaving would then come up before the judges. We regard it as an infraction of the principle of natural justice not to give the woman the opportunity of disarming the husband's arguments, which requires the hearing of both sides in a proper manner.

H.C. 91/74

GABARA *et al.* v. TEL AVIV DISTRICT COURT *et al.*

(1974) 28(2) *P.D.* 518, 526

Cohn J.: As for the nature of the principles of natural justice, some say that they can be reduced to two: that each person looks out for himself and therefore may not sit in judgment on a matter in which he has an interest, and that a person is not to be judged until he has been heard, as it is written, "Hear the causes between your brethren and judge righteously" (*Deut.* 1:16). All the other rules of natural justice are derived from these two (Marshall, *Natural Justice* (1959) 5 ff.).

See: THE RUSSIAN ECCLESIASTICAL MISSION IN JERUSALEM v. ATTORNEY GENERAL *et al.*, p. 294.

See: A. v. B., Part 3, Social and Administrative Regulation, p. 170.

Misc. 31/81

BEN SIMON *et al.* v. THE STATE OF ISRAEL

(1982) (1) *P.M.* 436, 438

This was an application for an order nisi *against the Governor of Beer Sheba Prison. The petitioners, who were imprisoned there, were deprived of the right to buy what they needed in the prison canteen in consequence of a report from the warders that one of them had started a fire in his cell and the other had refused to get up and appear at morning parade. They claimed they had not been given an opportunity to be heard.*

Laron J.: Recently I had a similar case in which I decided on the spot that to act in this way is basically a violation of one of the rules of natural

justice, i.e., that the rights of a person are not to be prejudiced without giving him an opportunity to be heard, and accordingly I revoked a denial of a benefit. Since it has been made clear to me that the attitude of the State is not to accept this decision and amend procedures accordingly and its argument is that in the present petition there was nothing defective in the procedure followed, I shall enlarge somewhat on the matter.

The judgment in *Beker* v. *Rehovot District Rabbinical Court* (1973) 27(1) *P.D.* 568, at 572 states:

> It is not superfluous to recall that the sacred principle of natural justice regarding the need to hear every person before deciding his cause, has its sources in the *Torah*. That was explained in the old English judgment in *R.* v. *University of Cambridge*, where one of the judges observed that before Adam was expelled from the Garden of Eden for eating from the tree of knowledge, he was asked by God, "Who told thee that thou wast naked? Hast thou eaten from the tree whereof I commanded thee that thou shouldst not eat?" (*Gen.* 3:11). When Adam put the blame on the woman for giving him of the tree of knowledge to eat, she also was given the opportunity to explain her action. The same thing happened in the incident of Cain and Abel. After Cain had killed Abel, God asked Cain, "Where is Abel thy brother?" (*ibid.* 4:9). God himself who is omniscient was not prepared to condemn Cain and punish him without giving him the opportunity of putting his case.

G. Finality of Judgment

1. Reopening a Case When Judge is Aware of Error

C.A. 37/68

GINZ v. MEIRI

(1968) 22(1) *P.D.* 525, 531-532

The respondent was imprisoned for failing to obey an order charging him with the interim maintenance of his wife and daughter. Subsequently he had the interim order set aside as regards the appellant, his wife. The reason given by the Court for

setting aside the order was that it had erred in regard to the respondent's ability to pay maintenance as well as in not taking into account the wife's waiver of maintenance in the parties' agreement to be divorced.

Kister J.: It seems to me that in this case the learned judge acted correctly and did well in examining the previous decision he had given. Had it remained in effect, even though he was aware of his mistake, an injustice would have been done, for not only is it an injustice to imprison a person undeservedly but it is also an injustice to take money from one and give it to another who is not entitled thereto... In *Shevuot* 30b it is stated that "a judge should not appoint an advocate for what he has said," which Rashi *ad loc.* explains as meaning that "if he realises he has made a mistake and fears to admit it, he should not bolster up his decision by bringing evidence in support because he is ashamed to change his mind, but he should recall the parties and issue a true judgment."

Hoshen Mishpat 17:8 sums it up the same manner. The judge here examined the question exhaustively and reached a conclusion which appears to us to be correct, even after the explanations which counsel for the appellant put to us.

2. Rehearing in Questions of Age

C.A. 395/60

AMRANI v. ATTORNEY-GENERAL *et al.*

(1961) 15 *P.D.* 594, 602

The appellant had applied for a declaratory judgment regarding her age. She tried to prove, by means of evidence that did not satisfy the judge, that she was older than the age appearing in her identity card, in order to be entitled to an old-age pension under the National Insurance Law. Her application was dismissed but no findings were made regarding her age. She applied again to the same end and brought other evidence, but the application was dismissed in limine *as* res judicata.

Berinson J.: Counsel for the appellant finally submitted that since the English rules regarding *res judicata* can only become a part of the law of this country by virtue of art. 46 of the Palestine Order in Council

and sec. 11 of the Law and Administration Ordinance, 1948, one must inquire whether these rules are suited to the conditions of this country and its inhabitants. In counsel's opinion, they are not to be applied precisely and categorically in applications for amendment of age, which have nothing comparable in England and English case law, and the need for which has arisen because of the special conditions in this country and of its inhabitants, members of different waves of immigration from various parts of the world. A reservation should therefore properly be made to the English doctrine of *res judicata*; the decision should in every case be left to the discretion of the court in the light of the special circumstances of each instance, without being hindered by obstacles that derive from the operation of the rules of the English *res judicata*. In citing in this connection the rule of Jewish law (*Hoshen Mishpat* 20) — counsel hints that it is better to be assisted by this rule which is more appropriate to the local situation than to adhere to the severe and inflexible rules of the English law.

3. Evidence Not to be Admitted After Judgment

C.A. 211/65

ATTORNEY-GENERAL *et al.* v. MAZAN

(1965) 19(3) *P.D.* 32, 42-44

After a previous application for declaration of age had been dismissed, the respondent applied once again, subsequent to the enactment of the Determination of Age Law, 1963, and this time was successful.

Kister J.: It can be said that every judge and court must strive to clarify the true facts and give judgment accordingly. In Jewish law, one can find Scriptural verses and *dicta* of the Sages and halakhic literature on this subject which I shall not cite at length. I shall content myself with quoting the conclusion formulated in *Hoshen Mishpat* 8:3: "Every judge who does not give true judgment causes the Divine Presence to depart from Israel... and every judge who gives true judgment even once is as if he repaired the entire world and causes the Divine Presence to rest in Israel."

The plea of *res judicata* bars the way from arriving at the truth in a particular situation, but the law requires it for reasons of public policy: *interest rei publicae ut sit finis litium: nemo bis vexari pro eadem causa* [the public interest requires an end to litigation; a person should not be troubled twice for the same cause]. A litigant must therefore be alert and plead everything and adduce the requisite evidence in the case, for otherwise he will be crying in vain.

Even without the doctrine of *res judicata* one can guard against the abuse of court procedure, for example, by the various regulations in succession matters. In addition, attention should be given to the view of Jewish law as reflected in *Hoshen Mishpat* 20. Jewish law enables a person to bring further evidence in opposition, but where he says he has no witnesses and no testimony, and he is adjudged, and only then suddenly produces evidence... it is of no avail and no attention is paid to him or his evidence. The reason, according to the commentators, is that "he appears a fasifier and a liar." Initially it may not have been convenient for him to be assisted by the evidence as long as he did not need it. Some commentators give another reason, i.e. that a party who admits he has no witnesses is bound by his admission... Nevertheless, even where he said that he has no witnesses, and then witnesses arrive from abroad or evidence is produced from documents that had been deposited by his father with others, and these are important for the trial, he is permitted to adduce the evidence even after judgment.

Regulations 116 and 117 of the Regulations Governing Procedure in the Rabbinical Courts, prescribe how to proceed when the court itself fears that it has erred in judgment or when a party wishes to produce evidence not known during the original hearing.

4. Rehearing on Discovery of New Evidence

C.A. 238/58

YARMITZKY v. MA'AYANI

(1959) 13 *P.D.* 1497, 1498, 1502

This was an appeal against the dismissal of an application for leave to appear and defend an action on a bill.

Landau J.: As far as I know, there is no precedent in this country since the Civil Procedure Rules of 1938, which enabled the court to rehear a civil matter already decided by judgment, on the grounds that new facts or new evidence had been discovered. I should incidentally mention here that the Ottoman Civil Procedure Law permits a case to be reopened upon discovery of new evidence but only when such evidence consists of documents concealed by the other party: See sec. 27 of the Schedule which replaces sec. 202 of the Law. On the other hand, Jewish law is very lenient with a party wishing to upset a judgment by reason of a witness having been abroad during a prior hearing (see *M.T. Sanhedrin* 7:8).

Chapter Three

CRIMINAL PROCEDURES

A. Detention

1. Detention of Suspect

Misc. 71/78

STATE OF ISRAEL v. ABUKASIS

(1978) 32(2) *P.D.* 240, 248-250, 251-252

Elon J.: The important subject of striking a balance between two basic needs, i.e. protecting the freedom of the individual suspected of an offense, on the one hand, and in certain circumstances detaining a suspected person, on the other, is dealt with instructively by Jewish law and it is right that we should briefly look at it.

The right to personal freedom is one of the foundation-stones of Jewish law and it left its mark in the earliest of times in various areas of civil law, such as the relationships between debtor and creditor, and employer and employee (see M. Elon, *Jewish Law*, Part 2, 483 ff.; Elon, *Freedom of the Individual in the Collection of Debts in Jewish Law*, 1 ff. and 111 ff.) How far this goes can be learned from the fact that where one voluntarily relinquishes his personal freedom by, for instance, undertaking to go to prison if he does not pay a debt, his relinquishment is null and void in every respect since he has stipulated contrary to the *Torah* which forbids the denial of freedom to a person (see Elon, *Freedom of the Individual in the Collection of Debts in Jewish Law*, 1ff. and 111 ff. and *Jewish Law*, Part 1, 163, note 106). Alongside this basic rule there are also Mishnaic *dicta* (inferred from *Ex.* 21:18-19 and *Num.* 15:32 ff.) to the effect that a person suspected of a capital offense should be held in custody even before conviction. This teaches that "all those liable to the death penalty

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are incarcerated" (*Sifre* to *Numbers*, para. 114; *Mekhilta, Mishpatim*, 6). Several other rules were laid down but this is not the place to enlarge on them (see *Ketubot* 33b; *Sanhedrin* 78b; and more particularly Elon, "Imprisonment in Jewish Law", in *Pinhas Rosen Jubilee Volume* (1962) 174 ff.).

As early as the beginning of the fourth century the Palestinian *Amoraim* held that a judge may detain a suspect only when evidence of the commission of the offense is available. In *Y. Sanhedrin* 7:8 it is said that suspicion that "a given person killed someone" is enough for him to be imprisoned until the trial is concluded. R. Jose expressed surprise at that, saying, "Is a person to be seized in the market place and put to shame? Rather, when a given person kills another and there are witnesses that he killed him, he should be held until the witnesses appear."

"There are witnesses that he killed him" means simply... that in addition to suspicion one must show that witnesses are available to testify to the killing. That is enough for holding him in custody and the witnesses do not need to appear in court and testify (see *Pnei Moshe ad loc.*). R. Nissim Gerondi in the fourteenth century thought otherwise: the existence of witnesses who can testify against a suspect is not sufficient; they must appear and give evidence, except that at this stage they need not also be closely examined in the manner required at the actual trial.

> It appears from the *Yerushalmi* that since witnesses have appeared and say that a given person has blasphemed, although their evidence is not accepted, the person is incarcerated. If, however, no witnesses appear, there is nothing in the law to enable him to be detained and unnecessarily shamed (*Novellae* of Ran to *Sanhedrin* 56a).

The law relating to detention and release on bail in Jewish law was consolidated in *Resp. Ribash* 234-239, in the fourteenth century. Certain communal leaders of the city of Teruel in Aragon—where a large Jewish community existed with judicial autonomy even in many areas of criminal law—consulted Ribash about a Jew suspected of being an informer who was put on trial before the Jewish Court there. Many substantive and procedural problems in connection with informing were involved, as well as the question of whether the person could be kept in custody and on what terms he might be released on bail... The answer of Ribash is illuminating in its clarity and in the rules he lays down.

> There is no doubt that where a person is suspected of an offense that entails punishment, the *bet din* [religious court] must detain him until they have ascertained that no punishment but only a monetary fine is involved, and he is not to be released on guarantees.

If the offender sees that he will be convicted, he will surely abscond, and then what can the *bet din* do to the guarantors, what will it help if they are proceeded against, they who have committed no offense? "Tuvyah sinned and Zigud is punished?" (see *Pesahim* 113b). If [the guarantors are to be punished] because they entered into an undertaking, then [recall that] no one can obligate himself to something to which he is not bound, except in money matters; he cannot do so in penal matters.

Moreover, the offender would go without punishment, and we would not be able to observe the commandment, "And thou shalt burn out the evil in your midst".

Furthermore, a person suspected of a penal offense ought not to be allowed to go about freely in public whilst the *bet din* is considering his case. That is what we learn in *Mekhilta, Mishpatim* 6: "Then shall he who smote him be quiet" (*Ex.* 21:19). Can he give a guarantee and be free to go about? Scripture tells us: "If he arise again and walk abroad" (*ibid.*) which means that the confessor is imprisoned until the victim is healed. Hence, if the court thinks that there is substance in the words of the complainant and if it becomes clear that the offender is liable to bodily punishment, he is not to be allowed to go free on guarantee.

The following are therefore the rules laid down by Ribash:

(a) imprisonment is only entailed when the suspected offense carries with it "corporal punishment", i.e., death or imprisonment, but not a mere fine;

(b) a *bet din* should order detention of a suspect only when "there is substance in the words of the complainant": in modern terms, when the evidence in the hands of the police gives rise to reasonable suspicion against the person the police suspect of being involved in the given offense (*per* Agranat P. in *State of Israel* v. *Ben-Meir* (1973) 27(1) *P.D.* 502);

(c) the grounds of detention are

(i) to assure that the suspect will stand trial,

(ii) to ensure that if found guilty he will bear his punishment, and

(iii) to prevent the free circulation of a person suspected of a serious offense whilst the court is considering his case. This last ground can be explained from the viewpoint of "public opinion", which would wonder about the inconsistency of a suspect going about

> freely whilst the hearing of a serious offense is pending. We may also take into account other reasons common among us, that a "freed" suspect may tamper with the evidence, intimidate witnesses and create public concern about the commission of further offenses and the like...

Thus far, I have not pointed out as a reason for my decision the personal circumstances of the respondent, since these should not be determinative, but they also certainly add weight to my decision not to grant the State's appeal. As I said at the outset, the woman is of mature age and the mother of five children, the youngest of whom is aged five years and the oldest sixteen. Since her husband is also in custody, there is no one to look after the children. To this "added weight" I would point to a further reason which is also a consideration for my dismissing the appeal: what is involved is the imprisonment of a woman, and although it is fundamental that all are equal before the law in every respect — "Scripture has made man and woman equal regarding all the penalties of the *Torah*" (*Baba Kamma* 15a) — there are situations in which the feelings of a woman are more harshly affected than those of a man, and detention or imprisonment is one of these. That is indicated at least, if not proved, by the observations of Maimonides, based on the talmudic rule regarding the case where a man and woman fall into captivity and funds are insufficient to redeem both of them. "The woman takes precedence over the man in respect of food, clothing and ransom, since a man may well go around asking for charity but not a woman whose feeling of shame is great" (*M.T. Matnot Aniyim* 5:15). In Jewish law there also exist special and ameliorating provisions regarding the imprisonment of women convicted by a Jewish court and held in a prison supervised by the Jewish community and staffed by Jewish warders: such prisons existed in different parts of the Diaspora which enjoyed judicial autonomy (see Elon, "Imprisonment in Jewish Law" *ubi supra*; Elon, *Jewish Law*, Part 2, 664 ff.). This regard for the feelings of a woman "seized in the market place" in the words of R. Jose, and put under detention, is equally pertinent today. Her shame is greater than the shame of a man. And that may serve in some way as an additional ground for weighing the balance in favour of her release.

Misc. 172/81

STATE OF ISRAEL v. LUBNIOV

(1981) 35(4) *P.D.* 780

The issue in this application was whether an indictment for murder setting out facts that connect the suspect with the act of murder is enough to prevent his release on bail under sec. 31 of the Criminal Procedure Law, 1965.

Elon J.: With the enactment of sec. 31, no question of practice from which one may diverge in special circumstances arises any more. The Law is peremptory and the legislature has again shown that murder as such is a grievous offence. ("There is nothing which the *Torah* is more strict about than the shedding of blood...which involves destruction of an orderly world": *M.T. Rotze'ah* 1:4 and 4:9.) This prevents the release of the person accused, and no need exists for any further grounds, such as fear of influencing witnesses, previous convictions, safe-guarding public order and the like, that are taken into account when exercising discretion over whether to detain a suspect or defendant in other cases. The reason seems to be that any one charged with so serious a crime "ought not to be allowed to circulate whilst the court is considering his case" (*Resp. Ribash* 236; see more expressly *State of Israel* v. *Abukasis* above).

Misc. 691/82

SURAH v. STATE OF ISRAEL

(1982) 36(4) *P.D.* 10, 12-13

This was an appeal against the remand of the appellant for ten days on a charge of manslaughter following a road accident, of which the prosecution had prima facie *evidence.*

Elon J.: With regard to only two kinds of serious offences — murder and serious state security offences for which the penalty is life imprisonment — did the legislature indicate that reasonable suspicion is sufficient not only to detain a person suspected of being involved but also to prevent his release, without need for the further grounds that witnesses might be influenced or that the commission of additional offences is feared or like considerations that are taken into account in releasing a suspect on bail or a person charged with other offences (sec. 34, Criminal Procedure Law (Consolidated Version), 1982; *State of Israel* v. *Lubniov* above). It seems

that the reason for this special provision regarding a suspect or person charged with such serious crimes is that "it is not right that he should circulate freely in public whilst a court is considering his case" (in the words of Ribash, dealing with release on bail under Jewish law: *Resp. Ribash* 236; see also *State of Israel* v. *Lubniov* above, at 785 and *State of Israel* v. *Abukasis* above, at 249 ff.).

Misc. 22/83

KRAUSS v. STATE OF ISRAEL

(1983) 37(1) *P.D.* 365, 368-369

The issue here was the propriety of the detention of the appellant under an indictment containing thirteen counts relating to bribery, blackmail, fraud, breach of confidence, theft and forgery committed during the course of one year when he was serving as chairman of the Tel Aviv University Students Union.

Elon J.: It seems to me that when murder and the like is not involved — express statutory provision exists regarding detention until the end of the proceedings where a serious crime is concerned, which by its nature and the circumstances raises fears of disruption of legal process or of danger to public order — a person is not to be confined before he is duly convicted unless the prosecution proves the existence of such fear and danger. When these exist, "It is not possible for a person suspected of a serious offense to circulate freely whilst the court is considering his case" (*State of Israel* v. *Abukasis* above, citing Ribash). But when these do not exist, the basic rule is that a person's freedom is not to be denied before he is adjudged. Accordingly, when such fear and danger do not exist, even if the offense is extremely serious, such as breach of confidence by a bank clerk and the like, we may not, in my opinion, detain the person before trial because of "what people will say". Far be it from me to deride this important consideration in deterring offenders and fighting crime, which we are commanded to do, but this justified legal policy is a matter for the legislature to deal with and it should provide that since crime and criminals have increased, prejudicing public confidence and property, it prefers in the light of contemporary and local needs to keep these elements in custody... It is indeed true, as the learned judge said, that we learn from our Sages that "a *bet din* [religious court] may administer flogging and punishment, even without authority from the *Torah*; not, however, because of transgressing the *Torah* but in order to set a fence for the *Torah*... not because the

penalty is deserved but because the exigencies of the hour require it" (*Yevamot* 90b; *Sanhedrin* 46a). This was because lawlessness had spread (Rashi to *Sanhedrin loc. cit.*). The task, however, was given over to the *bet din*, which acted as legislature in making *takkanot* [regulations] as well as judge. By virtue of this principle, Jewish criminal law and procedure underwent considerable development, having regard to social and moral changes that had occurred. It is otherwise in a system that distinguishes between the legislature and the judiciary. A basic innovation such as the detention of people because of contemporary exigencies demands legislative enactment.

Misc. 862/85

STATE OF ISRAEL v. BEN-LIOR *et al.*

(1985) 39(3) *P.D.* 441, 447

This was an appeal against a release on bail of the respondents who were charged with a number of offenses of fraud and conspiracy.

Elon J.: The State submits that it is not right, in view of the seriousness of the offenses, to allow the defendants to circulate freely as long as the trial has not been concluded. This subject has arisen repeatedly in the courts and has its source in the *Responsa* of Ribash no. 236. (See also *State of Israel* v. *Abukasis*, above; *Surah* v. *State of Israel*, above; *Krauss* v. *State of Israel*, above, etc.). This is something quite different from the situation where the court, under its procedural rules, adjourns a hearing for a lengthy time—which may continue beyond what is commonly reasonable, and which is undefined—in order to examine and discuss the case. Delay in sentencing, even if short, is a difficult matter both from the viewpoint of the defendant and from the viewpoint of the judiciary and especially so under Jewish law (see *Mekhilta, Mishpatim*, 18; *M. Avot* 5:9; *Shabbat* 33a). That is equally so with the present respondents, even though the court is compelled to act in such a manner by reason of some provision of the criminal procedural law. We may not deny personal freedom in addition to the delay in sentencing.

Misc. 15/86

STATE OF ISRAEL v. ZUR

(1986) 40(1) *P.D.* 706, 713-714

Elon J.: Since the above-mentioned decision in *Misc.* 290/76 (*Yadin* v. *State of Israel* (1977) 31(1) *P.D.* 671) there has been a change in the legal system of the State of Israel. The Foundations of Law Act, 1980, which "constitutes one of the basic laws of the State of Israel and part of its legal infrastructure" was passed. According to this law, the principles of justice, equity and peace of the heritage of Israel (Foundations of Law Act, sec. 1) serve as "the infrastructure and the basic principles of the entire legal system of the State" (*El.A.* 2/84 *Neiman* v. *Chairman of Central Elections Committee* (1985) 39(2) *P.D.* 225). The right to personal liberty is one of the cornerstones of Jewish law, and it is a major rule in that system that every man is assumed to be innocent as long as he has not been proven guilty. As a result, we find that in Jewish law, one may only detain a person on suspicion of the most serious crimes (*Resp. Ribash* no. 236 regarding a person suspected of murder or of informing on the whole Jewish community) or where there is a possibility that not doing so will pervert the course of justice (*Resp. Ribash loc cit.*; *Misc.* 71/78 *State of Israel* v. *Abukassis* (1978) 32(2) *P.D.* 240; *Misc.* 1044/82 *State of Israel* v. *Molkho* (1983) 37(1) *P.D.* 78; *Misc.* 691/82 *Surah* v. *State of Israel* (1982) 36(4) *P.D.* 10; *Misc.* 22/83 *Krauss* v. *State of Israel* (1983) 37(1) *P.D.* 365; and *Misc.* 693/84 *State of Israel* v. *Leviatan et al.* (1986) 40(1) *P.D.* 544). There is another major principle in the area of Jewish law, i.e. "You shall do no unrighteousness in judgment; you shall not respect the person of the poor nor favour the person of the mighty; but in righteousness shall you judge your neighbour" (*Lev.* 19:15). In the same way that this fundamental principle has served as the basis for decisions by this Court outlawing the favouring "of the person of the mighty" and dealing leniently with him by releasing him from detention following a guilty verdict (*Misc.* 118/79 *Rechtman* v. *State of Israel* (1979) 33(3) *P.D.* 45), so it must serve as the basis for not perverting the judgment of the "mighty" by dealing more strictly with him than with the "poor" in the matter of pre-trial detention. This interpretation of the verse is cited by the "great eagle", Maimonides, in his codification of Jewish law (*M.T. Sanhedrin* 21:1): "It is a positive commandment for the judge to judge righteously, as Scripture states, 'In righteousness shall you judge your neighbour'. What does righteousness in the judicial process consist of? It is the equal treatment of both parties throughout the trial." If this is the position with respect to legal procedure and the conduct of the

trial, *a fortiori* ought it to be the case in relation to substantive matters such as the deprivation of personal liberty pending trial.

2. Detention of Women

See: STATE OF ISRAEL v. ABUKASIS, p. 316.

B. Delay in Judgment and in Sentencing

1. Delay in Judgment

Cr.A. 188/77
WERTHEIM v. STATE OF ISRAEL
(1978) 32(2) *P.D.* 225, 234, 242

The issue in this appeal was whether a conviction for a traffic offense is to be upheld in view of the delay in proceedings before the Magistrate.

Elon J.: This important subject, known under the general name of *innui din* (delay of sentence), of which more later, has recently been considered at length and in depth, with all its implications, by Agranat P. and Witkon J. in *Cr.A.* 125/74, 152/74 *Mirom* v. *State of Israel* (1975) 30(1) *P.D.* 57. There a broad outline is given of the case law of this Court—and my friend Etzioni J. has now supplemented it by reference to the cases that have since accumulated—and to a considerable degree, the extensive American jurisprudence on this subject. It seems to me that we ought to examine the matter, if only in outline, as it is reflected in Jewish law.

Three legal technical terms are repeatedly used in respect of this subject in Jewish law — *halanat din* (postponing judgment), *hahmatzat*

hadin (reserving judgment) and *innui din* (delay of sentence). The first two terms have a positive connotation, but the third — *innui din* — is completely negative. Let us consider them in the given order.

Halanat din: the court is instructed to do this when dealing with capital offenses. Once the court has begun hearing a case and has found that the defendant should be convicted, it ought not to convict him on the same day but must postpone pronouncement of its decision to the following day. Thus, *M. Sanhedrin* 4:1 states: "Civil cases are concluded on the same day whether for acquittal or for condemnation. Capital cases may be concluded on the same day for acquittal but only on the next day for conviction." The reason for the latter rule is, according to Rashi (*Sanhedrin* 32a), in case something in favour of the defendant is discovered during the night. The obligation of *halanat din* (*Sanhedrin* 35a) exists not only where the court makes its decision to convict on the day trial commenced but "where all do not agree, they argue the matter even for several days until agreement is reached, and thereafter judgment is deferred and on the morrow the case is concluded" (Meiri, *Bet haBehira ad loc*). This is therefore an additional aspect in which capital cases differ from civil cases as regards the special consideration and great care required before convicting a defendant (and capital law includes any imposition of physical punishment and deprivation of liberty: *M.T. Sanhedrin* 11:4).

In this regard the *Talmud* has an instructive idea of particular importance to the present case. The idea is mentioned in connection with the following rule. Just as a duty exists to postpone judgment overnight, there is a duty not to postpone it for a longer period, in case the judges forget the arguments advanced for acquittal or conviction. For this reason trials are not held on the eve of the Sabbath or Festivals (*M. Sanhedrin* 4:1), since if the judges agree to convict on the same day and are required to postpone judgment, the postponement would have to extend over two nights and the trial could only be concluded on the morrow of the Sabbath. The *Talmud* wonders at this "forgetfulness", since two court scribes record the views of each judge during their discussion of the case among themselves and thus the views of each can be ascertained from the records kept, without fear of forgetfulness. The answer given is that only the actual words used are recorded but the spirit of the argument may not be recalled through the written word (*Sanhedrin* 35a; Rashi and Meiri *ad loc.*).

Hahmatzat hadin: This term also has a positive connotation. It is the judge's duty to reserve judgment ("just as we leave the dough to ferment" — *Yad Ramah* to *Sanhedrin* 35a [a play on the word *hametz*]) as may be necessary to bring out the truth. This term originates in the observations of Rava (*ibid.*): "Blessed is the judge who reserves his verdict" (derived from *Is.* 1:17 — *asheru hamotz* [relieve the oppressed]). Although originally

used in respect of reserving judgment, the underlying content of the term is to be found in many *dicta* of the *Tanna'im* and *Amora'im* throughout the *Talmud*, and the requirement of *hahmatzat hadin*, and of clarifying the case before deciding it, was adopted in all areas of the law, criminal and civil. One of the three *dicta* attributed to the Men of the Great Assembly is: "Be deliberate in judgment" (*M. Avot* 1:1). The judge is told: "If judgment is as clear to you as morning, pronounce it; if not, do not pronounce it" (*Sanhedrin* 7b). Resh Lakish understood the Scriptural injunction, "and judge righteously" (*Deut.* 1:16) to mean: "Consider the case properly and then give your verdict" (*Sanhedrin* 7b). These observations are repeated in all the halakhic codes. *Hoshen Mishpat* 17:7, reads as follows:

> The judge must hear the submissions of the parties and go over them in order to put the parties at ease so that they do not think that the judges argued the matter without understanding their own submissions... and moreover, the judges actually may not have comprehended well such submissions which should be repeated to the parties (Sema *ad loc.*, para. 15) since it is written (I *Kings* 3:23) "Then the king said 'The one sayeth, this is my son that liveth and thy son is the dead'. And the other sayeth, 'Nay, but thy son is the dead and my son is the living...' ": he establishes what is just in his heart, and then pronounces judgment. (According to Sema if the judge sits alone he must be certain in his own mind and if a bench of three sits, they must be certain after discussion.)

And elsewhere (*Hoshen Mishpat* 10:1):

> The judge must be deliberate and reserve judgment until, after careful consideration, it is as clear as day to him; the haughty who rush into judgment before they have well searched their minds... are foolish and wicked.

Maimonides adds (*M.T. Sanhedrin* 30:7): "We are so commanded by the Sages 'Be deliberate in judgment' as it says in *Job* (29:16): 'And the cause of him that I knew not I searched out.' "

The duty to reserve judgment in order to arrive at a truthful decision has always been regarded by *dayanim* (judges) as a primary duty. It is frequently mentioned in the *responsa* literature and here I shall quote only one such passage taken from *Resp. Ribash* 491:

> All the other pretexts about which you write I do not at all consider capable of voiding the deed; but the *dayan* should reserve judgment and consider it very well so as to come to the truth of the matter and give truthful judgment.

Innui hadin: This concept is obviously negative in significance and various meanings attach to it in Jewish law. Let us examine them briefly.

The first, the classic and best known, occurs in fact in the area of criminal law, where it means delay in carrying out the sentence. For example, where the Sages thought in a particular case of a person condemned to death, that the verdict should not be carried out immediately upon its being given in order that the matter might be publicized, R. Yehudah said that "the judgment of (the rebellious elder) is not delayed but he is executed immediately" (*M. Sanhedrin* 11:4; see also *Sanhedrin* 38a, 112a; *Arakhin* 7a). In this sense, *innui din* is delay after, but not before, verdict. "So long as the case is not concluded, there is no *innui din*, since one always hopes for acquittal; but once the case is concluded, one awaits death and that would be *innui din*" (Rashi to *Sanhedrin* 35a).

A second meaning of *innui din* is much wider and more embracing both as regards the length of the judicial process and as regards its application to civil law as well as to criminal law. *M.T. Sanhedrin* 20:6 observes:

> 'Ye shall do no unrighteousness in judgment' (*Lev.* 19:15) means miscarriage of justice, acquitting the guilty and condemning the innocent. So also, delaying judgment and enlarging on matters that are obvious in order to cause pain to one of the parties falls within the rule of not doing injustice (cf. *Maimonides' Commentary to the Mishnah, Avot* 5:9).

Such *innui din* may occur throughout the judicial hearing, both as to the need "to give judgment as soon as it is ascertained" (*Tur* and *Shulhan Arukh, Hoshen Mishpat* 17:11), when "it is known which way the law will go and one delays and does not decide it" (R. Ovadiah miBertinoro *M. Avot* 5:9) and as to any unnecessary delay. "*Innui hadin* occurs when the judges delay the case for no good reason, when after having ascertained the law, they postpone judgment" (Rashi to *Shabbat* 33a).

A third, far-reaching meaning of *innui hadin*, which applies to both civil and criminal law, is delay in hearing the case. It may be trivial or considerable. It is exaggerated in the example of the Sages given, as is their wont, in the form of an *aggadah* (legend).

> When R. Simeon and R. Yishmael were being led out to be executed [at the decree of Rome], R. Simeon said to R. Yishmael, "Master, my heart fails me for I do not know why I am to be killed". R. Yishmael said to him, "Did it never happen that a man came before you for a judgment or with a question and you let him wait until you had sipped your cup or had tied your sandals or put on your cloak? And the Torah has said, 'If thou afflict in any wise' [*Ex.* 22:22] whether it be severe or slight." Thereupon, R. Shimon said to him "You have comforted me,

master" (*Mekhilta, Nezikin*, 18; the verse cited is construed as applying to any person and not necessarily to the widow and the orphan.).

It follows from the above that Jewish law has two objectives regarding the conduct of a trial, its hearing and determination. With respect to the first, which is foremost in importance, the judge is commanded to be deliberate in his judgment, to be sure of it being right before he decides, not to jump to conclusions before the matter is well gone into. He must defer judgment until the matter has matured in his mind; this is so both in civil and criminal law. In the case of the latter something more is required, i.e., postponing judgment until the final verdict, since criminal conviction is involved and argument in favour of acquittal may yet be found. Regarding the second objective, without prejudicing a just and full hearing of the case, the judge is ordered not to put off and delay trial, both as regards its final determination when it is already clear to him how the law should go and as regards the hearing itself; delay in fixing commencement of trial is wrong, sometimes in a minor way and sometimes in a major way.

One further observation. We have found that Jewish law provides clearly and unequivocally that the judge must give judgment immediately upon the matter being clear to him (*Hoshen Mishpat* 17:11), similar to sec. 164 of the Criminal Procedure Law, 1965, (and consider reg. 213 of the Civil Procedure Regulations, 1963). On the other hand, Jewish law is content with a general provision regarding the course of the hearing, i.e. that deferment and delay should be avoided; it contains no unequivocal, restrictive provision regarding the hearing of evidence, once trial has commenced and regarding continuity of trial day after day until its determination, similar to that of sec. 115 of the Criminal Procedure Law (and reg. 152 of the Civil Procedure Regulations, 1963). The latter provision, as we know, is "very unfortunately not observed in practice in many criminal cases, if not in most" (per Agranat P. in *Cr. A.* 125/74, 152/74 *Mirom* v. *State of Israel* (1975) 30(1) *P.D.* 57.

It also seems that objectively — in view of the burden on the courts and pressing matters that arise from time to time, call-up to reserve army service of the parties and counsel and the like—there is hardly a judge who can avoid putting matters off. It might be better to formulate the provision regarding the taking of evidence in more flexible terms to conform to the actual situation, which is a matter of necessity not to be scorned, and so obviate justified complaints concerning the legitimate conduct of a trial and the observance of a law that we know in advance is not heeded. It goes without saying that a more flexible formulation will neither in any way release the courts from the duty not to delay trial nor will it remove the prohibition of *innui hadin*.

Now to the question posed at the beginning of our discussion: Does *innui hadin* entail moderation of the punishment imposed upon a guilty person or even, going further, setting aside the conviction? This Court has already held that where *innui hadin* oversteps reasonable bounds — and we are speaking of offences that are not "abhorrent", such as grievous violence, harming state security and the like — i.e. where delay involves the defendant suffering part of his punishment, then fear of judgment and verdict long postponed are considerations for ameliorating the verdict. Were that the argument in this appeal, we would certainly respond to it for these reasons alone. The offence of which the appellant was convicted is injury to a pedestrian due to lack of care — excessive speed in driving — and almost five years have elapsed from commission of the offence until the Magistrate's Court gave judgment. The appellant, however, argues that his conviction as such should be set aside for two reasons — because trial from its commencement in June 1972 until its determination in May 1976 was conducted in a manner of *innui din*, contrary to secs. 115 and 164 of the Criminal Procedure Law, and because, after such a lapse of time, the judge could not possibly remember the evidence presented to him in such a way as to relate to it properly and form the necessary impressions.

It seems to me that, in principle, it is unacceptable to set aside the conviction itself on the grounds of *innui hadin* as a result of non-observance of secs. 116 and 164. With all respect I concur in the view of Agranat P. in *Cr.A.* 152/74 *Mirom Ltd.* v. *State of Israel* (1975) 30(1) *P.D.* 57, and in the remarks of my friend Eztioni J. An offence which has been properly proven, irrespective of whether it is serious or not, entails conviction, and the legislature provided what it did in secs. 115 and 164 without including the sanction of annulment of the conviction. Jewish law also, which warns strongly against *innui hadin*, provides a purely moral-religious sanction, which does not include setting judgments aside. "The sword comes into the world for delay of justice" (*M. Avot* 5:9). This is measure for measure, since the purpose of the law is to save the oppressed from the oppressor, and *innui hadin* and deferment of decision causes the oppressed to grow angry with the one who oppresses him unlawfully and to take the law into his own hands and strengthen the "sword", i.e., social violence (see Meiri *ad loc.*; *Shabbat* 33a). Where indeed does the possibility of setting conviction aside figure? When the duty exists to reserve judgment and the court ignores that duty and executes judgment, a miscarriage of justice is involved. "A court that does not reserve a guilty verdict in capital matters is a murderer" (Meiri to *Sanhedrin* 35a), and "it is as if it had killed the accused unlawfully" (Yad Ramah *ad loc.*). Because the non-postponement of judgment denies the court the possibility of further consideration and

of finding argument for acquittal, the case has not been gone into as fully as it might and the conviction is unlawful (see also *Resp. Devar Avraham*, Part 2, 34). But *innui hadin* as such, i.e., delaying the hearing and decision, does not entail voiding of the conviction itself so long as it does not affect proper proof of the offense.

As against all this, in the case before us, the conviction should be set aside for the second reason of the appellant, because, as my friend Etzioni J. put it, the delay has led to a miscarriage of justice. Every record and note is deficient because, as I have already said, the record contains only the actual words uttered but not the spirit of the argumentation. To the extent that the interval between the taking of evidence, the consideration of the case and pronouncement of judgment is protracted—and proof rests on the impressions recorded in the notes of the case—suspicion may grow that the offence for which the defendant was brought to trial has not been proved. That indeed occurred in the present case. From the admission made by the appellant to the police, in which it was said that he drove at a speed of 40 to 50 km an hour, it is not at all clear whether that was when the accident happened or just before it; again the sketch made by the witness is also surrounded by doubt, as Etzioni J. has explained. Since these two matters alone were the foundations on which conviction rested, once the proof is not accepted because of its doubtful nature, the conviction must also be set aside.

2. Delay in Sentencing

See: WERTHEIM v. STATE OF ISRAEL, see previous, p. 324.

Misc. 693/84

STATE OF ISRAEL v. LEVIATAN *et al.*

(1986) 40(1) *P.D.* 544, 551-552

Elon J.: The two respondents were detained for the duration of the proceedings. The reason for their detention is not that their release on bail might prejudice the legal proceedings or constitute a danger to the public, but rather the seriousness of the offences which they are alleged to have committed, and the circumstances under which they occurred. Since it is now evident that the respondents are facing — through no

fault of their own — a severe and highly unusual delay in their trial, and when we reconsider—as we are bound to do by law—the justification for detaining the respondents pending trial for a period of almost a year without any discussion of their case, there is no doubt that the above-mentioned considerations of 'gain and loss" lead us to the conclusion that the respondents should have their liberty restored and should be released from detention. Counsel for the petitioner has argued that it would not be right, in the light of the seriousness of the present offences, for the respondents to "walk about freely" as long as their trial has not been concluded. This argument, which has often been cited by this Court, and the origin of which lies in the words of R. Isaac b. Sheshet Barfat (*Resp. Ribash* no. 236; and see *Misc.* 71/78, *State of Israel* v. *Aboukassis* (1978) 32(2) *P.D.* 240; *Misc.* 1044/82 *State of Israel* v. *Molkho* (1983) 37(1) *P.D.* 78, 83; *Misc.* 691/82, *Surah* v. *State of Israel* (1982) 36(4) *P.D.* 10; *Misc.* 22/83, *Krauss* v. *State of Israel* (1983) 37(1) *P.D.* 365, etc.) applies only to a person accused of the most serious crimes (e.g. murder or informing on the whole Jewish community). In such circumstances it is indeed "wrong that he should walk about freely as long as the *bet din* (religious court) is examining and discussing his case." It does not, however, apply to a situation in which the court, for reasons of a purely procedural nature, interrupts the trial for an unusually long and indeterminate period in order to discuss the relevant legal issues in a more extensive fashion. The unjustified protraction of judicial proceedings is a very grave matter both for the accused and for the legal system, and it is irrelevant whether the delay is slight or protracted....It is a particularly grave matter in the context of Jewish law (see *Mekhilta Mishpatim, Masekhta deNezikin* ch. 18; *M. Avot* 5:8; *Shabbat* 33a and see *Cr.A.* 188/77 *Wertheim* v. *State of Israel* (1978) 32(2) *P.D.* 225, 233 ff.). As far as the respondents are concerned, the present case is one of unjustified delay in the trial, notwithstanding that the court may be compelled to adopt such a course by virtue of a particular rule of criminal procedure. We may not add deprivation of personal liberty to unjustified delay in the trial. The argument put forward by the State Attorney and supported by the Vice-President of the District Court that the respondents should continue to remain in custody until some progress is made in the trial of the two witnesses (and the other accused persons) is unacceptable to me. There is neither reason nor justification for depriving someone of his freedom for a few more months solely on the grounds that he has "only been in custody for three months", and especially since both logic and legal experience dictate that the trial of the witnesses will take almost a year. This is a classical case of an "advance" on a prison sentence, of punishment pending trial, and we are neither authorized nor permitted to have any part in it.

C. The Hearings

1. Duty of the Court to Correct Indictment

Cr.A. 1/48

SYLVESTER v. ATTORNEY-GENERAL

(1948) 1 *P.D.* 5, 19

Smoira P.: It is also important that people should see that judges "enter the throne room" where wrongdoing is judged and punished and do not "tarry in the corridors" giving judgment on the technicalities of the indictment alone, be it complete or deficient or void. Far be it from me to encourage those lawyers who are negligent in properly drawing up charges. It is their duty to examine the indictment most thoroughly and see that it does indeed relate to an offence. But the courts have not only a right but also a duty to correct what the prosecutors have done incorrectly, provided that they do not thereby prejudice the principles of the rule of justice.

When, for example, I see from the conclusion of the judgment of the Chief Justice in *R.* v. *Hughes*, (1927-28), 20 *Cr.App.R.* 4, 5, 9 that he unwillingly set aside the charge sheet although on the merits and morally that case had another aspect, I take leave to say that one should avoid as far as may be possible such consequences that may perhaps satisfy formal legal reasoning but not one's sense of justice and equity. In my opinion our criminal procedure requires the courts to follow these principles and facilitate that process, and all that is necessary is to employ its provisions properly.

I have found it appropriate to utter these words not because I think they contain anything new in the law but because at this moment of the establishment of our State, it is right to reiterate two leading principles: "Then shalt thou inquire and make search and ask diligently" (*Deut.* 13:6).

The present appeal is an instructive example of two features which, in my view, are prerequisites for properly-conducted criminal hearings, i.e., the utmost care in examination, cross-examination and evaluation of the evidence, and giving the defendant the benefit of all doubt, since all are presumed innocent. Again, formality should be kept to a minimum so that the accused does not go free simply thanks to some formal defect which, in truth, has nothing to do either with him or with what he did.

D. Finality of Judgment

1. Acquittal and Retrial as *Res judicata*

H.C. 224/73
HAREL v. JUDGE GILADI *et al.*
(1974) 28(1) *P.D.* 337, 343-344

This was a petition against a civil examining magistrate who had held himself to be unable to enquire into the death of a soldier during military service, after a military examining judge had considered the matter and given directions that an indictment be presented.

Kister J.: We understand the feelings of the petitioner whose son died and who believes that it was murder and not merely the result of negligence, and who wants the accused to be convicted of this offence and not a lesser one. Although society also endeavors to uncover offenders, bring them to trial, establish the seriousness of their offences and punish them accordingly, the matter has a second side to it, i.e. the requirement of justice, that an innocent person should not be convicted because of some error and be punished for what he has not done. Jewish law displays particular caution in this matter and tends not to convict and punish a person on supposition: "It is better and more desirable to exempt a thousand wrongdoers than to kill one innocent person" (Maimonides, *Sefer haMitzvot* Negative Commandments, 290).

Modern law does not go as far as Jewish law: even where the death penalty is involved it is possible to sentence a person to death on circumstantial evidence. However, the leading rule, in Israel as well, is that if the offence has not been proved beyond all reasonable doubt the accused must go free.

The petitioner did all he could to bring the truth to light, but the decision on what was proved does not lie in his hands but in the hands of the judicial authorities. After the accused were convicted, there is no place for applying to reopen proceedings.

It would be worthwhile to mention here the following guiding legal principles:

(a) A person is presumed to be innocent until proven guilty, even when brought to trial.

(b) Where a person is acquitted of the crime of which he has been accused, or is convicted of a lesser offense, then, subject to any right of appeal that may exist, it is *res judicata* and he is not to be tried again for the same act, unless some special statutory provision permits that to be done.

This is also the case under Jewish law:

> Our Rabbis taught: whence do we know that if the accused leaves the court guilty and someone says: 'I have something to say in his favour' that he is brought back? Scripture tells us 'The guiltless slay thou not.' And how do we know that if he leaves the court not guilty and someone says, 'I have something to say against him' he is not brought back? Scripture tells us 'And the righteous slay thou not' (*Sanhedrin* 33b).

(c) Where a person is not to be charged again, there is no place for charging and sentencing him indirectly by bringing him before a tribunal of inquiry or an examining magistrate, even if these bodies will not impose punishment but will be content solely with determining his guilt.

It should be added that the citizen, though personally affected or a relative of the one injured, is expected to respect the court's decision; this is a rule of ancient standing, and I will recall the attitude of Jewish law in this regard. *M. Sanhedrin* 6:6, states that after a person had been sentenced to death and executed, "the relatives came and greeted the judges and the witnesses, as if to say 'We have no ill-feelings against you, for you gave a true judgment.' *Tiferet Yisrael ad loc.* explains this as meaning that they wish to utter these words but refrain from doing so expressly, out of respect for the dead and also because it is difficult for them out of self-respect."

If we expect the relatives of a person lawfully convicted, who denied his guilt, to act in this manner, *a fortiori* relatives of a murdered person are expected to act so when the one accused of the murder is not convicted, even if acquitted only because of a doubt.

For these reasons we have decided to deny the petition.

Cr.A. 384/78

STATE OF ISRAEL v. MISHALI

(1978) 32(3) *P.D.* 245, 250

This was an appeal against a lenient sentence for fraud and theft committed whilst a suspended sentence was in force.

Elon J.: It is noteworthy that according to Jewish law, a person found not guilty of a criminal offence will not be retried and convicted. Maimonides in *M.T. Sanhedrin* 10:9 sums up the law as follows:

> When a court has erred in a criminal matter and has found an innocent person guilty, and then a reason occurs to them to controvert the judgment and find him innocent, the judgment is set aside and he is retried. Where, however, they release in error a person guilty of a capital offence, the judgment is not reversed and he is not retried.

This far-reaching principle is not found in our criminal law, according to which we must adjudicate, but the general idea it embodies finds expression in the accepted principle: that the appellate court should not exhaust the severity of the law in an appeal by the State against a lenient sentence, and in the further principle which we also follow that an appellate court will not interfere in the discretion of a lower court regarding sentence unless such discretion is deviant and unreasonable. This latter principle should, in my opinion, be zealously followed when an appellate court is asked to increase the severity of a sentence passed in a lower court.

2. Rehearing on New Submissions in Capital Cases

H.C. 320/80

KUASSMA *et al.* v. MINISTER OF DEFENCE *et al.*

(1981) 35(3) *P.D.* 113, 125

The appellants were deported to Lebanon under the Emergency Regulations, 1945, without being allowed to apply to the statutory advisory committee, on the grounds that their immediate deportation was urgent in order to avoid a dangerous escalation of the threat to security.

Cohn D.P.: One who claims a right and petitions this Court for relief is told to state his case. If it emerges that there is nothing in his case, his right is rather abstract. It is a leading rule in this Court that orders are not to be made purely for glorification of the law when no real practical purpose is served. That does not mean, however, that this Court will turn itself into a committee or other authority which the person involved

can petition to argue his right and have it considered on its merits one way or the other. If he has or may have something to submit, it is his right to put his submission to the competent committee or authority and not only to this Court. I agree, however, that the question whether or not he has something to submit is not to be determined automatically or mechanically on the grounds of what he states. If he makes a statement, even a silly one, he has fulfilled the duty to submit; and it is for the court to say whether there is any merit in it. This is like the right of a person sentenced to death to say that he has something to state in his own favour and having said so a number of times he is retried, "provided that there is substance in what he says" (*M. Sanhedrin* 6:1). How can we know that there is substance in what he says? Two learned men accompany him to the place of execution and they decide whether his statement has substance (*Sanhedrin* 43a and Rashi *ad loc.*). The same applies to the right to make submissions to an administrative authority. The court must find some substance, even if only *prima facie*, before it will recognize the right. The court cannot be expected to do so when the submission is futile and on the face of it a figment of the imagination.

3. Rehearing for a Convicted Person

C.A. 572/74

ROITMAN v. UNITED MIZRAHI BANK LTD. *et al.*

(1975) 29(2) *P.D.* 57, 58, 64

The appellant claimed damages for false evidence and conspiracy to give false evidence. The issue was whether local law recognised the tort of false evidence.

Kister J.: The principle of *res judicata* should properly be mentioned here. This principle, which is intended to give finality to litigation, is not found in Jewish law, at least not to the same extent. Where a person has been sentenced to death he can ask that he be tried again and his submissions heard. As Maimonides *M.T. Sanhedrin* 13:1 states: "If he says I have something to argue in my favour... he is retried the first and second time... On the third occasion, if there is substance in what he says, he is retried any number of times." In civil law, Maimonides (*M.T. ibid* 7:6) holds that when

new evidence "controverts the judgment, a retrial is held even though the previous trial has been concluded." (See also *Hoshen Mishpat* 20.)

Part Five

EVIDENCE

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Chapter One

GENERAL

1. Fraud in Proceedings — Credibility of Parties and Evidence

C.A. 646/78
BOROCHOVITZ LTD. v. RAMAT GAN MUNICIPALITY
(1979) 33(3) *P.D.* 690, 697-698

The sole question in this appeal was whether a lawyer had been appointed as an arbitrator or as an umpire.

Cohn J.: As the learned judge rightly saw, the circumstances and indicators revealed in this case cast serious doubt as to the veracity of the statement of the director of the appellant company. His declaration that he did not know or agree that the third arbitrator should be appointed as an umpire is irreconcilable with the action of the arbitrator, Ehrlich, for the appellant, and with the conduct of the appellant itself. The lack of credibility which the director's declaration met with on the part of the learned judge, in the light of those circumstances and indications, is enough to deprive it of all evidentiary value.

Even under Jewish law, where, in criminal matters at least, a court will not decide "according to its appraisal but on the clear evidence of witnesses" (*M.T. Sanhedrin* 20:1), judges are cautioned not to decide even on clear, uncontradicted and seemingly compelling evidence, if they do not believe it. "How do we know that a judge who is rightly aware that he is being deceived should not say that he will come to a decision and leave the responsibility to fall upon the witnesses? Scripture says that one should keep distant from falsehood" (*ibid.* 24:3). The same applies in our own legal system and in our own times. No court will knowingly decide something untrue on the basis of uncontradicted evidence and put the

blame on the witness (or on the lawyer who neglected to cross-examine the witness). The difference between the system of the early Sages and our own is that we discharge our judicial duty by simply rejecting the evidence or denying it weight, whilst they were concerned with the perplexities of a judge who must decide on the strength of valid evidence given by competent witnesses, which he finds tendentious. According to Maimonides, if a judge has no hesitation about—

> not relying on a witness, even though he is unable to disqualify the witness, or if he inclines to think that a party is lying and deceitful and has procured witnesses, although they are competent and have given evidence in good faith...he may not decide the case but must absent himself from the bench and leave the decision to those who can reconcile themselves with the situation (*ibid.*).

Rosh, however, disagrees and holds that the defendant is to be given a quasi-decision, "that no judge is to endeavour to hear the case", and this when the lying "appears more than certain" (*Resp. Rosh* 68:20 also cited in *Hoshen Mishpat* 15:3). It is otherwise when the defendant is lying, in which event, if the judge is "sure" that he is guilty, he must decide against him so that the one at fault is not rewarded (*Resp. Rosh* 107:6, cited in *Hoshen Mishpat* 15:4)...

The circumstances of the present matter and the indications of the truth revealed during trial prove, and the learned judge, notwithstanding the affidavit of the appellant's director, was at liberty to hold, that the appellant did in fact agree to the appointment of the arbitrator as an umpire.

2. Credibility of a Proven Liar

C.A. 70/60

MENASHE v. ATTORNEY GENERAL

(1960) 14 *P.D.* 1625, 1626, 1627

Cohn J.: This appeal should be accepted.

The appellant sued...for a declaratory judgment that he was born in 1905 and not 1910. Three witnesses gave evidence on his behalf—he himself, his

brother...and his sister....Their evidence on this point was not contradicted on cross-examination. Nevertheless the learned judge dismissed the claim and in his judgment, marked by extreme brevity, gave his reasons for doing so, as follows:

> I do not ignore the evidence of (the sister), the only one of the witnesses whom I heard whose veracity I would be prepared to accept. Her evidence could serve to corroborate other evidence that I might have considered credible. But the difficulty is that I am not prepared to rely on the testimony of (the brother) nor on the credibility of the applicant. I have not been persuaded to my satisfaction and accordingly dismiss the application.

The sole question before us is whether the appellant brought evidence that was credible to the lower court, and that can prove his claim. The fact that the learned judge does not disclose the reason why he is not prepared to believe the evidence of one witness or rely on the evidence of another cannot move us to follow the same course. We have before us only the evidence which was credible to the learned judge; in viewing such evidence, however, we are not bound to follow the learned judge regarding the weight to be attached to it. The question whether some particular evidence is sufficient proof is a juridical question and an appellate court will deal with it as it thinks fit...

Counsel for the respondent goes on to submit that in any event the appellant is not entitled to the relief he claims since the observations of Olshan P. in *C.A.* 282/59 *Attorney-General* v. *Amar Simon* (1959) 13 *P.D.* 1387, 1389 apply to him "literally" that the fact that the appellant lied—as he admits—in order to facilitate his immigration to this country "is likely to create doubt whether on this occasion as well he is prepared to resort to a lie so as to deceive some other public institution." I can imagine that doubt of this kind lurked in the mind of the learned judge when he had reservations about the veracity of the appellant. Indeed I agree with all respect that applicants for a change of age, who change their age according to time and place, should be treated with all reasonable suspicion and that a person who claims one age today and another age tomorrow should not be presumed to be speaking the truth. On the other hand these doubts and suspicions carry no force as long as the suspicion has not been proved by credible evidence. In place of a presumption of honesty of which he cannot avail himself, satisfactory evidence must be adduced. That applies not only to independent evidence but also to the evidence of the applicant himself. When the court is about to decide on the issue of credibility, these doubts and suspicions need not be an unsurmountable obstacle in every instance. If we can find no suggestion

of that in the law of evidence of the English Common law — where the credibility of witnesses falls to the decision of a sworn jury or a judge at first instance and is not open to argument or appeal—there are abundant suggestions of that in the law of evidence of Jewish law.

> It once happened with a woman of great beauty whom men were ardent to marry, that told her suitors that she was already betrothed. Some time later she became betrothed and the Sages asked her why she had chosen to do so. She replied that at first when unworthy men approached her she had said that she was already betrothed, but now that worthy men had approached her she had betrothed herself. And this rule R. Aha...put to the Sages of Usha and they said that if she gave a good reason for her words, she is believed (*Ketubot* 22a).

Here also, a person who gives rhyme and reason for his incorrect statements in the past, which appear good and substantive to us (see *M.T. Ishut* 9:31) may be believed in the present. Only when given no good reason or when we find no substance in it is his credibility affected by previous utterances.

3. Credibility of a Criminal

See: KALO v. ATTORNEY-GENERAL, Part 4, Regulation of the Courts, p. 276.

4. Evidence of a Minor

See: ESTATE OF REICHMAN, Part 9, Property — Physical and Intellectual, p. 715.

5. Weight of Evidence by Court Official

See: ATTORNEY-GENERAL v. SHEINBERGER, Part 4, Regulation of the Courts, p. 284.

6. Giving Testimony on Oath

C.A. 269/64

MARTZAFOT LTD. v. ALFASI

(1964) 18(4) *P.D.* 63, 64-65

The question here was whether to accept the evidence of a witness given by solemn affirmation and not under oath.

Manny J.: In an action in tort...the second appellant appeared to give evidence for the defence. In the witness box he said: "I am prepared to be sworn but wish to give evidence on solemn affirmation. I am a Jew and have never been sworn." His counsel then asked the court to allow him to give his evidence under solemn affirmation. The respondent (the plaintiff in the lower court) having objected to this course, the District Court judge decided: "I will not accept the evidence of the witness unless it is given under oath." Was the court right in so deciding?

Rule 182(a) of the Civil Procedure Regulations of 1963 provides as follows:

> Every witness shall be examined under oath unless the court is convinced that an oath is contrary to the religious principles of the witness or that he is not religious at all: in each of these cases the witness may be examined on solemn affirmation alone.

It is clear from this rule that the principle is that every witness must take the oath. When he objects, the grounds of his objection must be examined, and if the court is convinced that his objection is due to the fact that to take the oath conflicts with his religious principles, or the fact that the witness is not religious at all, the witness may then be allowed to give evidence on declaration only. Exemption from the oath can only be given for one of the two reasons indicated in the rule.

It is clear from the decision of the Court that it was not "convinced" that either one of these reasons existed, and it seems to me that it cannot be criticized for that.

As I have said, two reasons were given by the second appellant for not being prepared to be sworn: (a) that he is a Jew and (b) that he has "never" been sworn. In my opinion, neither of these reasons justifies departing from the basic principle that every witness must take an oath. The fact that a person declares himself to be a Jew does not by itself mean that the oath "conflicts with his religious principles", witness the fact that many

verses are to be found in the *Torah* itself, which pronounce on, and even render obligatory, a religious oath. I shall mention a few of these verses.

1. In *Gen.* 21:23, Avimelekh, the king of Gerar, says to Abraham: "Now therefore swear unto me here by God that thou wilt not deal falsely with me, nor with my son, nor with my son's son; but according to the kindness that I have done unto thee, thou shalt do unto me and to the land wherein thou hast sojourned." And in the next verse, Abraham replies "I will swear."

2. In *Gen.* 24:3, Abraham says to his servant, the elder of his house, "And I will make thee swear by the Lord, the God of heaven and the God of the earth, that thou shalt not take a wife for my son from the daughters of the Canaanites among whom I dwell." In verse 9 we read, "And the servant put his hand under the thigh of Abraham, his master, and swore to him concerning the matter."

3. *Ex.* 22:9-10 states that "If a man deliver unto his neighbour an ass, or an ox, or a sheep, or any beast to keep and it die or be hurt or driven away, and no man saw it, the oath of the Lord shall be between them both, that he has not put his hand unto his neighbour's goods, and the owner thereof shall accept it and he shall not make restitution."

4. *Lev.* 19:12 prescribes "And ye shall not swear by My name falsely so that thou profane the name of thy God: I am the Lord."

C.A. 216/65

ARTAN v. 4 NAGARIM

(1966) 50 *P.M.* 352, 354-360

This was an appeal by leave against a decision of the Magistrate's Court that the appellant must be sworn by a religious oath before his evidence will be heard.

Lamm J.: The appellant was called by his counsel to give evidence in an action against him brought by the Negarim Partnership. The learned judge refused to allow the evidence since he thought that the view expressed in *C.A.* 209/64 *Martzafot Ltd.* v. *Alfasi* [above, p. 347] prevents him from hearing the evidence of a person who refuses to be sworn. Counsel Sheinbaum for the appellant attacked the decision of the judge...and maintained that the case cited is not decided law. There, he said, Jewish

law was applied to a matter unconnected with personal status, and such law does not possess the character of local enacted law.

Jewish law, argued counsel, is a question of fact, and no inference is to be drawn from a view cited in some other matter on how to proceed in the present instance. He also thought that Jewish law is like foreign law, and as decided in *Lazard Bros.* v. *Midland Bank* [1933] *A.C.* 289 and in *Ottoman Bank of Nicosia* v. *Chakarian* [1937] 4 *A.E.L.R.* 581, the determination of the Supreme Court regarding the nature and interpretation of foreign law is not binding on other courts.

I am not prepared to regard Jewish law as foreign law. A Jewish judge cannot be required to hear expert opinion in order to establish what Jewish law requires. I therefore agree with counsel (for the respondent) that Jewish law in the State of Israel is not to be considered foreign law, to be proved as if it were foreign law binding on the residents of a foreign state. Nevertheless, it seems to me that counsel for the appellant was right to say that when dealing with Jewish law, a view expressed by the highest instance is not to be treated as decided law in those cases in which the legislature did not unequivocally render it applicable to particular matters, as it did to matters of the personal status of Jews.

Accordingly there was no occasion to say in the decision against which appeal is made that the view expressed by Manny J. in the above case prevents a judge from admitting unsworn evidence, especially as in that case the witness said "I am a Jew and have never been sworn", whereas in the present case the witness was not satisfied with that but stressed that he was religious and would never swear an oath, and there is no reason to assume that he said what he did other than in good faith.

As to the question itself, whether swearing by the Divinity in accordance with Rule 182(a) of the Civil Procedure Regulations, 1963, conflicts with the religious observations made in the above case. Manny J. sets out five Biblical sources from which he infers that there is nothing in Jewish law to prevent a Jewish witness from swearing by the Divinity. Appellant's counsel submits, and it seems to me correct, that it is not possible to determine Jewish law in reliance on the Bible alone. To support his argument, he gives an example. A restaurant worker who made it expressly conditional that the *kashrut* (observance of dietary laws) of the restaurant should be a term of his employment gave up his job because the restaurant had become non-*kosher* (i.e. it no longer observed the dietary laws). He claimed severance pay, maintaining that this change was indeed a deterioration of the conditions of his employment. Could the employer be exempted from paying severance pay on proving that the food served in the restaurant was biblically *kosher* (in accordance with the dietary laws)? According to the Bible, meat boiled in milk is not prohibited so long as

it is not a case of seething a kid in the milk of its mother. Moreover, Scripture relates that the Patriarch Abraham provided his three visitors with curd and milk together with a good and tender calf (*Gen.* 18:7-8). Clearly a court cannot disregard the aggregate of rules regarding meat and milk, referred to in the *Talmud* and in the earlier and later authorities, an aggregate of rules according to which Jews have conducted themselves over the generations.

It therefore appears that I have no choice but to review the opinions expressed down the ages by our Rabbis. I shall permit myself to cite certain matters which seem to me of importance in the present case.

Respondent's counsel drew my attention to the following sources:

a) *M.T. Shevuot* 11:1 decides that just as it is a negative commandment not to swear falsely or tell a lie, it is a positive commandment to submit to an oath required in court. Maimonides describes the taking of an oath as follows:

> The person to be sworn holds a *sefer Torah* in his arm and he stands and swears by the Divine Name or its equivalent or by the utterance of an oath, such as "I hereby swear by the Lord the God of Israel or the One Whose name is 'Gracious' or 'Merciful' etc."

b) For authority in the post-Maimonides period I was referred to the work by Dr. M. Elon on *Freedom of the Individual in the Collection of Debts in Jewish Law* (1964) where a description is given of an oath taken before an open Ark.

To clarify Maimonides' position, it is important to quote what he says in his *Sefer haMitzvot* (Positive Commandment 7):

> The *Torah* says 'Swear in His Name' but it also says 'Do not swear.' That is to say, just as one must be careful about an unnecessary oath, for that is a negative commandment, an oath that is necessitated by the circumstances is a positive commandment...

One may not ignore Nahmanides' comments in his critique to Maimonides' statement...he would certainly agree with Maimonides that the taking of an unnecessary oath is a transgression, but he goes further and disagrees with Maimonides that a necessary oath is a positive commandment and holds rather that it is allowable under a number of conditions.

Appellant's counsel drew my attention to the following halakhic sources and asserted that the problem is not whether religious principles are at all contrary to every oath in every circumstance and in every matter, but whether the specific oath which a witness must take in a matter is in conformity with religious principle.

a) *Midrash Tanhuma* to Num. *Mattot* 1 (Buber ed.) reads:

> The Holy One blessed be He said to Israel: Do not think that you may be sworn by My Name, even as to the truth, unless you possess all these qualities: "And you shall fear the Lord thy God"—that you are like the three who feared God, Abraham, Job and Joseph....If you turn to the *Torah* and keep the commandments and have no other service....If you have these qualities you may be sworn but not otherwise.

b) *Midrash Vayikrah Rabba*, 6:3 states:

> One who gets another to swear to a lie will not succeed. R. Assi said that this applies to a lie. R. Yonah said it applies also to the truth.

c) *Hovot haLevavot* "Love of God" ch. 6, (written by Bahya ibn Pekudah in the eleventh century):

> He must be careful about swearing by the name of the Creator to uphold the truth and avoid a lie; *a fortiori* to maintain a lie and avoid the truth.

d) The *Midrash on the Ten Commandments* (attributed to Asher ben Meshulam of Lunel), regarding the Third Commandment:

> Accordingly, even as to the truth a person may not be sworn....Anyone who profanes the Holy One blessed be He and swears to a lie or even to the truth, his end is that God will make apparent his evildoing and punish him. Woe to him in this world and woe to him in the world to come.

Counsel for the appellant pointed out that this view was accepted as binding *halakhah*.

e) *Tur, Orah Hayim* 156:

> A person should be extremely careful about swearing an oath since our Rabbis were very critical about false oaths and even about oaths to the truth.

f) So also in *Shulhan Arukh, Orah Hayim* 156:1:

> One should be careful about swearing even to the truth.

In addition to the foregoing sources, counsel cites other authorities who indicate that the oath was abolished since the penalty therefor is very high even in those instances when a person is bound to take an oath in court.

g) *Tur, Hoshen Mishpat* 87 states:

> Rashi has written that the oath has today been abolished because of

> the high penalty that attaches to it....So also wrote Ramah, that in post-Talmudic times, it was customary to administer a dire warning [of the consequences of perjury]...

h) *Hoshen Mishpat* 87:19 is to the same effect. Counsel observes that although the *Shulhan Arukh* cites this rule as an opinion held by some authorities, no opposing view is given and the authorities generally hold that this is decided *halakhah*.

i) Appellant's counsel quotes a further source that describes the formal procedure for the taking of an oath and sets out in detail the warning given to a witness and calls those parties evildoers who are not satisfied with the warning but insist on an actual oath...

In addition to the precedents mentioned by counsel for the appellant and for the respondent one may point to other sources that are not consistent with each other.

1) The *Gemara* in *Gittin* 35a states:

> R. Kahana, and some say R. Yehudah in the name of Rav, relates that in a year of scarcity a certain person deposited a gold *dinar* with a widow who placed it in a jar of flour which she then baked and gave to a poor man. Subsequently the owner of the *dinar* claimed it and she said, "May one of my sons die if I had any benefit from your *dinar*." A little while later one of her sons died. When the Sages heard of this, they said, "If that can happen to one who swears to the truth, how much more so to one who swears falsely."

2) *Hatam Sofer* writes in a *responsum* (*Hoshen Mishpat* 162):

> What is worse is that he asked the witnesses to take an oath, which is indeed secular usage and obligatory under state law, but he was unaware that according to the law of our Holy *Torah* the contrary is the case.

3) R. Benzion Meir Hai Uziel in *Mishpetei Uziel* (*Hoshen Mishpat* 13:2) observes:

> Certainly, people are not sworn to tell the truth because such an oath is in vain and it is forbidden...and if anyone demands it, he is not listened to. That is the reason why the law relating to witnesses in Jewish law does not mention the swearing of witnesses as to their personal knowledge or the truth of the evidence they give.

4) A slightly different view appears by Rashbatz in his *Responsa* (*Tashbetz* 3:15):

> You wish to know my view about the practice in Spain of swearing

> witnesses, whether it has taken root anywhere....I attest as you do that R. Yitzhak bar Sheshet (Ribash) was so accustomed to proceed here. I am also informed that as to all evidence taken in Barcelona R. Nissim used to require an oath.

He goes on to write:

> It seems that although it is not obligatory for witnesses to be sworn...an oath taken to attest to the truth is not a superfluous oath...In any event, no obligation arises for witnesses to be sworn and all that we can say is that it is permitted and does not involve the unnecessary mention of the Divine Name. I would add that a court may require an oath if it considers that people treat false evidence lightly....If that is so and people claim that evidence given without an oath does not involve the prohibition of lying, we must act according to their error....I myself do not swear witnesses unless the defendant requests it and the witness stands silent, since people in this country find the local practice difficult and in Christian Spain it is customary to administer an oath, not that it is permitted to follow their practices, but because of the ideas of witnesses who have grown up on such practice and think it is law. I have not seen anything like this in the early authorities except Rabbenu Hai Gaon....Substantively, it seems, that the rule that witnesses need to be sworn is derived from the law of evidence.

It follows from all the sources cited above that no hard and fast rule can be laid down. One view is that there is nothing debarring a Jewish witness from being sworn. Another view is that a Jewish witness may be debarred from swearing even as to the truth. Whatever the *halakhah*, it is a fact that God-fearing Jews are careful not to be sworn even where that might involve them in pecuniary loss. That was already the case in olden times as the *Mishnah* in *Baba Metzia*, 3:1 demonstrates:

> Where a person deposits an animal or utensils with his neighbour and they are stolen or lost, the neighbour pays, not wishing to be sworn, since the ruling is that a gratuitous bailee may swear and be obligated no further. If the thief is found, he must pay double.

In this case, the bailee refused to swear even to the truth, as emerges from the reference to "if the thief is found". Hence the bailee was certain that he was not the thief and yet refused to swear that "he had not possessed himself of something belonging to his fellowman". Further proof of this may be derived from the fact that in the period of the *Gemara*, a bailee was required to take an oath by virtue of a *takkanah* (regulation) promulgated by the rabbis of the *Gemara*, even after he had paid. The need for such

an oath arose from the fear that the bailee was deceiving the court and for reasons of his own was prepared to pay for the goods which in fact remained with him although he claimed that they had been stolen. He was therefore made to take an "exemptory" oath instituted by the rabbis, by which he swore that the goods were not in his possession. If a bailee was indeed scared only of swearing falsely, it would be of no avail to him that he paid, for he would still be forced to take the exemptory oath. Why should he swear falsely and also be out of pocket?...

Consult in this connection the article by Dr. I. Englard, "The Oath of a Witness" in 21 *haPraklit* 435. It seems therefore that the court must leave the decision to the witness, the religious Jew, in accordance with his religious conscience. And if he refuses in good faith to be sworn, in sincerity, and out of understanding that his religion prevents him from taking an oath which the court wishes him to take, the court may not refuse to hear his evidence even under the regulations in force when the lower court decided not to hear the appellant without his being sworn.

See: GERSHT v. VILDENBERG, Part 12, Interpretation, p. 868.

H.C. 172/78

BECKER v. EILAT *et al.*

(1978) 32(3) *P.D.* 370, 378-386

The petitioner, an agnostic, asked for a declaration that he might for reasons of conscience give evidence under solemn affirmation.

Elon J.: The two questions that we have been asked turn on the construction of sec. 154 of the Criminal Procedure law, 1965:

> Before taking the testimony, the court shall caution the witness that he must testify truthfully or be liable to the penalty prescribed by law. The witness shall take an oath to testify truthfully: Provided that if he states that he is prompted by reasons of religion or conscience he may refrain from taking an oath and may make a solemn affirmation unless the court is satisfied that those reasons are not invoked in good faith.

The questions are as follows: (a) May a witness who declares himself to be an agnostic make a solemn affirmation upon stating that he is prompted

by reasons of conscience; (b) To what extent must the court be persuaded in order to reach the conclusion that the reasons of the witness were not given in good faith?

It seems to me that learned counsel for the petitioner was not precise in his search for the source of sec. 154 and therefore erred in finding that it is to be construed by comparing it with, and against the background of, the legal situation that preceded it. But although my conclusion is the same as that of counsel, i.e. that under sec. 154 an agnostic, including the petitioner, may give evidence on solemn affirmation alone and is not to be required to be sworn, the manner in which this conclusion is reached differs from that of counsel. I shall explain.

Whence did the legislature draw this provision regarding the cautioning of witnesses...? There is nothing like it either in English or American law which counsel cited so extensively. It is, however, found in a legal system much closer to us, Jewish law. For that reason alone, clearly we must turn to the sources of Jewish law if we wish to understand properly the content and aim of sec. 154. There is no need to prove this origin, since it is explicitly mentioned in the Bill of the Law of Evidence published by the Ministry of Justice in December 1952, and it may also be inferred, again very obviously, from the Explanatory notes to the Bill of the Evidence Ordinance Amendment Law, 1955...

Before, however, we examine these Bills, we must glance...at the manner in which the subject is regulated in Jewish law.

The giving of false evidence is a serious offence under Jewish law. It is prohibited in the Ten Commandments: "Thou shalt not bear false witness against thy neighbour" (*Ex.* 20:13; cf. *Deut.* 5:17). Thus, according to Jewish law, there is no good reason for administering an oath to tell the truth in evidence, since "he has already so been sworn on Mount Sinai"....A witness suspected of transgressing this Commandment is equally suspected of transgressing "Thou shalt not take the name of the Lord thy God in vain" which is also one of the Ten Commandments (*Ex.* 20:7; *Deut.* 5:11). What is the reason for being sworn, what benefit does it bring? Not only does swearing a witness not ensure the truth, but it may be forbidden for him to be sworn; since he was sworn to tell the truth on Mount Sinai, there is no occasion to administer another oath, for that may involve the taking of the name of God in vain. (The latter observation is in dispute but this is not the place to enlarge on that; see further below.)

To obviate any confusion let me say at once that the *halakhah* certainly recognises the institution of the oath, but the area of its legal application is largely confined to a mode of evidence by which a party may prove the rightness of his claim (see M. Elon, *Jewish Law*, Part 2, 504 ff.). There also exists in Jewish law an institution named "the Oath of Evidence" but that

has nothing to do with the swearing of witnesses in order to authenticate what they say. The "oath of evidence" means that one person makes another—who has information about a matter pending in court—swear to appear and give evidence and not refrain from doing so.

> Where witnesses who possessed evidence in a civil matter were asked by the party concerned to give testimony on his behalf but they denied that they had such evidence and did not testify, they were sworn that they knew nothing of such evidence. That is the Oath of Evidence (*M.T. Shevuot* 1:12; see also 9 ff.; *Shevuot* 30a).

However, Jewish law originally never required that a person about to give evidence be sworn in order to authenticate that evidence, and never recognised such an oath. Furthermore, the view is found that witnesses "are not credible after being sworn, since the *Torah* says, 'by the mouth of two witnesses...shall a matter be established' (*Deut.* 19:15) which signifies that they are believed on the basis of what they say alone. Where witnesses need to be sworn before being believed, their evidence has no substance" (*Tosafot* to *Kiddushin* 43b; this is also the conclusion in *Resp. Hatam Sofer, Hoshen Mishpat* 162; see also *Mishpetei Uziel*, Part 3, *Hoshen Mishpat* 13).

Jewish law too was aware that it was right and proper to bring to the attention of a witness about to give testimony that he must testify to the truth, and to that end it provided that a witness was informed of this requirement, of the serious offence of giving false evidence and of the penalty entailed. Such warning differed as between testimony given in civil cases and that in penal cases. Everything depended on the gravity of the matter. The formula used is discussed in detail in the *Talmud* (*Sanhedrin* 29a and 37a) but here it is sufficient to set out the summary given in *M.T. Edut* 17:2):

> Witnesses in civil matters are also warned....They are warned in the presence of all (who are in court, the reason being, according to Radbaz, that they should be shamed from giving false evidence) and they are informed of the force of false evidence and the shame that attaches to it both in this world and in the world to come.

Hoshen Mishpat (28:7, relying on *Sanhedrin* 29a) supplements the formula with the words "and that they are despised by those who suborn them." That was the warning given in civil cases. In capital cases where the fate of a person was involved, the formula was as follows (*M.T. Sanhedrin* 12:3):

> They are told: Perhaps what you say is based on conjecture and hearsay, on what another witness, even a trustworthy person, said. Perhaps you do not know we will ultimately cross-examine you. Know therefore that

civil matters are unlike capital matters. In civil matters a person may atone by giving his money. In capital cases, he is responsible until the end of time for the blood of the accused and of his [potential] descendants. Thus it is said regarding Cain, "The bloods of thy brother cry out to Me" (*Gen.* 4:10): that is, his blood and the blood of his descendants. Therefore man was created alone, to teach us that whoever destroys a single soul is imputed to have destroyed a complete world, and whoever sustains a single soul is imputed to have preserved a whole world. Every man was fashioned in the form of Adam and yet no one resembles his fellow. Therefore every man can say that the world was created for his sake.

Lest you should say, what has all this got to do with us? Has it not already been written, "And he being a witness, whether he has seen or known, and sayeth not, then shall he bear his iniquity" (*Lev.* 5:1). Or lest you should say, What guilt have we for the blood of this person? Has it not already been said, "When the wicked perish there is joy" (*Prov.* 11:10).

To sum up: a witness is not required to take an oath since he has already sworn to tell the truth and not to bear false witness against his neighbour. Instead of being sworn he is solemnly warned to understand the nature of testimony, as something in his personal knowledge and not hearsay, and the gravity of giving false evidence and the punishment that may ensue.

Before proceeding to consider Jewish law as it developed over the ages, the situation regarding the oath of a witness in other legal systems may be briefly noted. The need to swear in witnesses was common long before the rise of Christianity. It is as old as the Creation (see Willes L.C.J. in *Omichund* v. *Barker* (1744), and W.M. Best, *The Principles of the Law of Evidence* (1922) 42-43). The duty of a witness to be sworn, as a necessary condition for his testimony to be received, still persists down to modern times, along with the additional alternative of making a solemn declaration....It is noteworthy that the leaders of the Church based the need for the oath on a verse in Scripture: "When a man voweth a vow unto the Lord or sweareth an oath to bind his soul with a bond, he shall not break his word; he shall do according to all that proceedeth out of his mouth" (*Num.* 30:3). (See the remarks of Archbishop Secker quoted by Best, *op. cit.* 44-45.) This verse clearly has nothing to do with the need and duty to swear in a witness so as to substantiate his testimony. (See also J.H. Wigmore, *Evidence* (1976) 380 ff.; "Oaths in Judicial Proceedings and their Effect upon the Competency of Witnesses", *The American Law Register* (1903) 373, 376-77, 384-89.)

From the beginning of the fifteenth century a material change occurred in Spain and North Africa in the position taken by Jewish law in respect of the witness oath. For our present purpose it is sufficient to quote two *responsa* that indicate the nature of this change and its extent, as well as the social and psychological reasons that gave rise to it.

In 1405 the communal leaders of Barshak in Algeria addressed a question to Ribash, as to whether evidence given by witnesses was good, when "the court wished to receive such evidence under oath on a scroll of the *Torah*, but the witnesses refused to swear out of fear of the punishment the oath entailed." From the very character of the question we may discern the revolutionary change that had occurred in legal realities. The question was not whether the evidence given on oath was void, as under the original *halakhah*, but the reverse, whether evidence given not on oath, although such oath was requested, was valid. Ribash replied:

> To receive evidence from witnesses without an oath is not contrary to the law. We have not found anywhere that witnesses need to be sworn to tell the truth; for that they were sworn on Mount Sinai....In some places, however, it is customary to swear witnesses so as to put them in fear, but not under law. We here are accustomed to swear witnesses when they are suspected of suppressing evidence in order to flatter the accused....The witnesses themselves also wish to be sworn so as to be able to counter the accused against whom they testify with the argument that the oath compelled them to tell the truth (*Resp. Ribash* 170).

From the very same period there has come down a *responsum* by R. Shimon bar Tzemakh Duran in answer to R. Amram of Grenada (*Resp. Tashbetz* Part 3, 15), which adds important details about the background and the motivation for the change in Jewish law in this regard and the extent of its reception by the Jewish courts in the different communities:

> You wish to know my view about the practice in Spain of swearing witnesses, whether it has taken root anywhere, for you find it strange although you are aware that many worthy people so act. I too can attest that R. Yitzhak Bar Sheshet used to do so here. I am also informed that in Barcelona R. Nissim used to require an oath....It seems that whilst it is not obligatory, it is not in vain to swear an oath to tell the truth for we surely know that people are sworn to obey the Commandments....In any event, it is not obligatory for witnesses to be sworn and all that we can say is that it is permitted and does not involve the unnecessary mention of the Divine Name.
>
> I would add that a court may require an oath if it considers that people treat false evidence lightly. Although false evidence and false oaths both

> involve transgression of a negative commandment, if you suspect that a person may testify to a lie, how can you believe him on oath? Why is one a greater sin than the other? If, nevertheless, we find that people today make light of things and seek license that evidence not given on oath does not involve the prohibition of lying, we must act according to their error and administer an oath, as it is said:" 'Thou shalt not covet' is understood by people to apply to what one is not prepared to pay for" (*Baba Metzia* 5b). I myself do not swear witnesses unless the defendant requires it and the witness stands silent, since people in this country find the local practice difficult and in Christian Spain it is customary to administer an oath, not that it is permitted to follow their practices but because of the ideas of witnesses who have grown up on such practice and think it is law.

This substantive change in the law regarding the swearing of witnesses is based on contemporary moral, social and psychological changes and increasingly it came to be accepted as part of the Jewish legal system. The change is summed up by Rema in his annotations to *Hoshen Mishpat* 28:2 —"If the court finds need to swear them to tell the truth, it is permitted to do so." (See also Elon, *op. cit.* 107-10; Z. Warhaftig "The Swearing of Witnesses in the Courts of Israel" 3 *Yavneh* (1949) 147-51).

This approach of Jewish law was adopted by the Ministry of Justice in its Bill of the Evidence Law, published for public consideration in 1952. Secs. 19 and 20 provide as follows:

> 19. Before giving evidence a witness shall first be warned by the court in a language he understands that he must tell the whole truth and that if he does not do so, he will be liable to the penalty prescribed by law; after the witness has been warned, his evidence shall be treated as evidence under oath for the purpose of sec. 117 of the Criminal Code Ordinance, 1936.
>
> 20. Where the court has grounds for assuming that the swearing of a witness may help in discovery of the truth, it may administer an oath, in the following terms: I swear that my evidence in this court shall be the truth, the whole truth and nothing but the truth.

The Explanatory Notes to these sections explain that the oath has turned into a common-place formula which witnesses mumble without thought or understanding. The Bill adopts the position of Jewish law:

> It is ancient Jewish tradition that the court would warn the witnesses before they gave evidence or, in the terms of the *halakhah*, threaten them, pointing out the force that attaches to false testimony and the dishonour

> it entails in life and after death, as well as the contempt in which they are regarded by those who suborn them (*Hoshen Mishpat* 28:7). Such caution given by the judge in a form and in a language which a witness can comprehend may influence him and render him conscious of the value of testimony, which is the purpose of every oath in the view of the law.

The very reason which we came across in the *responsa* of Ribash and Tashbetz regarding judicial discretion in administering the oath is set out in the Explanatory Notes to sec. 20:

> There are some people, particularly judges, who urge that in this country the time is not yet ripe for abolishing the oath. According to those who so think, primitive persons are deterred from swearing false oaths, but not from giving false evidence. Should such a person appear in court as a witness, the court, under this section, would be permitted to swear him, whether after or before he had commenced to testify. The Divine Name has been omitted from the formula of the oath in order to avoid religious implications.

In 1955 a Bill was published to amend the Evidence Ordinance by providing that a written declaration required to be given under oath or by solemn affirmation before a Magistrate or District Court registrar, according to existing Mandatory law, should also be valid if given before a *dayan* (religious court judge), a lawyer or other person learned in the Law, and in place of the oath or solemn affirmation "the declarant is to be warned that he must declare the truth or be liable to the penalties prescribed by law, if he does not do so". It was also provided that the sections of the Criminal Code pertaining to false evidence should apply to such a declaration. The Bill also cites in its Explanatory Notes the reliance placed upon Jewish law. The Bill was shortly afterwards enacted into law.

We now return to sec. 154 of the Criminal Procedure Law of 1965 which is the subject of the present hearing. Although, as the petitioner's counsel has observed, this section did not figure in the original Bill but was introduced in Committee, it is clear beyond doubt that the Committee drafted it with secs. 19 and 20 of the Bill of 1952, as above, in mind. The Committee, however, did not accept those sections as they were, but made an important change. Sec. 19 was adopted in full except for some insignificant verbal variations, and it forms the first part of sec. 154: "Before taking his testimony, the court shall caution the witness that he must testify truthfully or be liable to the penalty prescribed by law". This caution is the very same caution found in Jewish law, which has the singular purpose of warning the witness and reminding him of his obligation to speak the truth.

As against what is said in sec. 20, which leaves the oath to the discretion of the judge if it appears to him in the given circumstances that it would help in discovering the truth, sec. 154 of the Criminal Procedure Law contains a general provision regarding the oath and adds a proviso that the section shall not apply when the witness states that for reasons of religion or conscience he will not swear but desires to make a solemn affirmation alone. Why was this change made? The report of the proceedings in the Knesset provide the answer. During the second and third reading of the Bill, members of different parties and of a variety of outlooks, each for his own reason, had reservations, and proposed that the phrase, "the witness shall take an oath to testify truthfully" should be replaced by "the witness shall make a solemn affirmation to testify truthfully" (see 43 *Divrei haKnesset* 2370 and 2434). The majority of the Committee, however, rejected these reservations. The explanation for the text actually adopted was *inter alia* given by one member (*ibid.* 2434-35) as follows:

> All those who propose to abolish the oath today suppose prematurely, in my opinion, a certain development. Possibly in a generation or two the Israeli population may come to value the caution and warning of the court before taking evidence as a sufficient deterrent, instead of the oath.

Thus we see that even in the view of the majority, the basic provision of sec. 154 is that contained in the beginning of the section, i.e. the warning and caution. However, as Tashbetz indicates, there are some who whilst they treat false evidence lightly, do not do so with a false oath. The Committee preferred to make it a requirement to take an oath rather than follow sec. 20 of the earlier Bill, under which the matter would in each case be left to the discretion of the court. That constitutes an example of the reception of a principle of Jewish law by the Knesset, whilst adapting it, however, to the social and moral actuality of the present day and with the prospect that at some future date the oath will be abolished, in the same manner as it was adapted in Jewish law in the fifteenth century in accordance with the social and moral realities of that period. The change then introduced was greater than the present one, since no possibility then existed of compelling a witness to take an oath; on the contrary, it was something that was not to be done (see Eibeschutz in his *Urim veTumim* to *Hoshen Mishpat* 28:10: "The exigency of the hour—since it is customary among the gentiles to swear witnesses to speak the truth, the mass of the Jews think that those who are not sworn are not prohibited from testifying untruthfully. Thus the court usually administers an oath". The words "usually administers an oath" would seem to mean automatically and in every case, and if this is indeed so, it means that this was the

practice in the times of R. Eibeschutz, because thus does "the mass of the Jews think"...)

Incidentally, it may be noted that a formula identical to that of sec. 154 was adopted a short while later as an amendment to the Civil Procedure Regulations, 1963 in rule 182(a).

Let us now go back to the matter before us. The leading principle in sec. 154, as we have seen, is contained in the first part: the giving of truthful evidence is assured by cautioning the witness that he must testify truthfully or be liable to the penalty prescribed by law. The subsequent provision that the witness shall take an oath is secondary and subordinate to the principle and is to be construed in its light and its spirit. Indeed, the legislature amply allowed for exempting a witness from taking an oath; the grounds for that may be reason either of religion or of conscience. If a witness honestly seeks to be exempted on these grounds, he is not to be cross-examined thereon, and in that event it is sufficient for him to make solemn affirmation. But more than that, a court may not deny a witness his right not to take an oath unless it is satisfied that the witness did not give his reasons in good faith...

What follows from the foregoing is that one purpose informs sec. 154 as a whole, which is to make the witness aware that he must speak truthfully, or else he will be liable to the statutory penalty. Each era has its own requirements; sometimes it is enough to caution and "threaten", sometimes a different course must be taken. Wigmore has put it very well: "It follows that the form of the administration of the oath is immaterial, provided that it involves, in the mind of the witness [cf. the remarks of Tashbetz], the bringing to bear of this apprehension of punishment" (*op. cit.* 387). A little further on he adds:

> The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness wherever such a stimulus is feasible. Until the 1800's, however, this advanced notion of its purpose had not been reached (*ibid.* 413-14).

Jewish law reached that stage some 1800 years ago. The principle in its unfolding development lies behind sec. 154 of the Criminal Procedure Law, 1965.

In view of that, the present petitioner, having stated that for reasons of conscience he wishes not be sworn, is entitled under sec. 154 to refrain from the oath and his evidence is to be accepted on solemn affirmation alone.

Learned counsel for the petitioner further argues that the said policy emerges not only from an interpretation of the words of sec. 154, but also from the point of view of desirable policy, such policy being to restrict the

need for an oath insofar as possible, both in order to safeguard freedom of religion and conscience by not forcing an oath upon a person who does not believe, and because of the serious doubts as to the advantages of an oath over a declaration on affirmation as a means of assisting in eliciting the truth (see E. Harnon, *Law of Evidence*, Part 1, p. 46).

I agree that this is desirable policy, and we have seen that this is the legislative intent (*Divrei haKnesset, op. cit.*), i.e. that the legislature anticipates the day when it will be possible to do away with the oath altogether. I have an additional reason for supporting this policy. Great are the degradation and the insult when we see daily how the oath, which holds deep significance for the believer, becomes a hum-drum matter to be mumbled and held lightly. Our Sages warned repeatedly that a person should not become accustomed to swearing, even as to the truth (see *Midrash Tanhuma, Mattot* 1; *Vayikrah Rabba* 6:3; *Midrash on the Ten Commandments*, Jellinek ed., 1:72; *Hovot haLevavot*, "Love of God", 6). The *halakhah* was stated in the following form:

> And he will deal faithfully, and will take care not to mention the Divine Name in vain...and a person will take the utmost care in the matter of oaths, for our Rabbis spoke extensively on the matter of false oaths, and even on an oath as to the truth (*Orah Hayim* 156).

Every man is presumed not to bear false witness against his neighbour, and it falls to us only to remind and warn him that he is so sworn. This is the policy to which we should aspire and in the light of which the said sec. 154 should be interpreted.

7. Evidence of Single Witness

C.A. 88/49

ROSEN v. BIALI

(1951) 5 *P.D.* 72, 73, 78-80

Silberg J.: This is an appeal by leave against a decision of the Tel Aviv District Court dealing with an application to enforce the award of arbitrators. The Court had decided to remit the award to the arbitrators...

The main question before us is the meaning of "uncontradicted" that

appears in sec. 6 of the Evidence Ordinance: not controverted in any way, even by way of pleading, or not controverted by evidence and only by evidence...

If the latter, one could argue that the plaintiff has been benefited but not the defendant. What should an honest defendant do, when unable for lack of information to attest under oath in denial of the claim, and how can he defend himself against the sole but false evidence of a fraudulent plaintiff? For example, a closed box, deposited with a paid bailee, is lost. The bailee does not know what the box contained. He can challenge the claimed value thereof but he cannot testify to the true value. Is that not sufficient and decisive ground to require the plaintiff to bring evidence in support of his sole testimony, even if that is denied only in the pleadings of the defendant? The answer is more than plain.

In the first place, the danger of fraudulent plaintiffs cannot be overcome, even if evidence corroborating their claims (denied only in the pleadings) is always required. A dishonest plaintiff who knows that his opponent is truthful but cannot give evidence (or call witnesses) in his defence will exploit the situation and be ready to confirm his pleadings by sworn evidence. Such a plaintiff is also capable of producing, in more than one sense, evidence in support.

Secondly — and this is the important point — a judge may, on the view I have expressed, charge a defendant on the solitary uncontradicted evidence of the plaintiff, but he is not obliged to do so. All depends on the credibility he gives to the single witness, and if he is not convinced of the truthfulness of that witness — even if it is not readily apparent that he is lying — he may decide not to accept the evidence and to dismiss the action. On the other hand if the judge is wholly persuaded of the truth of the evidence, and the defendant has merely denied the claim and brought no contrary evidence, why should we always assume that the judge has erred in appraising the evidence and order him not to rely thereon and to dismiss the action?

In any event, by weighing the two considerations — the difficulties and the wrong that might be caused to an upright plaintiff if corroboration is asked for, and the wrong that may be done to an upright defendant by a fraudulent claim if no such evidence is required — it appears to me that the first prevails, because by reason of "the legitimate tactic" of denial which we noted above, the danger of the harm that can be done by "denying" defendants — denying but not calling evidence — is much more imminent and more real than the danger of the opposite harm by lying plaintiffs.

It may be observed here that under Jewish law as well — which classically represents the concept that two witnesses are required to establish a

matter — whilst one witness cannot bind the defendant, the evidence may compel the latter to take an oath and only when he does so is he free from paying. If he refuses to be sworn, although only one witness gave evidence against him, he must pay (*Shevuot* 40a and elsewhere; *M.T. To'en veNitan* 1:1 and 3:6; *Hoshen Mishpat* 87:1). One must only emphasize, in order to avoid error, that the oath of a defendant denying the evidence of another witness, is the oath of a party and not evidence under oath since, as is well-known, in Jewish law a party is incompetent to give evidence.

In brief, the rule is that the evidence of a single witness is not regarded as being "contradicted" in the sense of sec. 6 unless it is contradicted by a witness for the other side. Since in the present case the appellant did not call any contrary evidence, there was nothing in law to prevent the evidence of the single witness from being accepted even though it was not supported and reinforced by other evidence.

8. "Wrongdoer" Disqualified as Witness

C.A. 41/75

NILI v. SHLOMI

(1976) 30(2) *P.D.* 3, 4, 6-7

The appellants sold their apartment to the respondents but did not fulfill their obligation to transfer it. In an action for enforcement of the agreement, the vendors pleaded illegality of contract but the Court rejected this plea and ordered them to transfer the apartment on payment of the balance of the purchase price. The vendors appealed. There was no dispute that the written agreement did not specify the true purchase price agreed but a smaller amount, the difference to be paid to the vendors in the guise of a loan that was not intended to be repaid. Each of the parties testified that it was the other party which had instigated the drawing up of an agreement not disclosing the full consideration, but the Court explicitly held that it was unable to say which version was correct.

Cohn J.: The President of the District Court is to be congratulated for not sitting back at ease and for not sparing effort or thought until he found a means which satisfied him to prevent the wrongdoer from benefiting from his wrongdoing. Since he did not believe the appellants' claim that

concealment of part of the purchase price in the contract had an illegal purpose, they had not discharged their evidentiary obligation. In this regard the path pursued by the Court which heard the evidence is not to be cast into doubt. The repugnance with which, as is well-known, we are filled when illegality is pleaded by the parties themselves guilty thereof naturally enough makes us suspect them of giving false evidence as well. Just as they are not deterred from deception and lies in order to evade tax (or some other breach of the law) they are also suspected of not being deterred from deception and lies in order to succeed in trial. It is not for nothing that in Jewish law, wrongdoers are incompetent to give evidence, among them those "who take money that is not theirs" (*M.T. Edut* 10:4).

9. Disqualification of a Witness

C.A. 238/53

COHEN-BUSLIK v. ATTORNEY-GENERAL

(1954) 8 *P.D.* 4, 30-31

Silberg J.: At this point it will be asked, why indeed were the witnesses not disqualified at the time of the actual sanctification of the marriage? If infringement of the *herem* [the Salonica ban upon marriage not in the presence of ten witnesses] disqualified the witnesses attending the ceremony, surely the sanctification itself was invalidated?

The answer is to be found in *Resp. Maharshakh* 3:1 (cited from Freimann, *Seder Kiddushin veNissu'in*, 175). After...stating that in spite of numerous cases at the time of "fraudulent sanctification in the presence of two witnesses" in Salonica, he had never heard of a decision invalidating the sanctification because of infringement of the *herem* by witnesses, he offers a solution:

> In my humble opinion, it seems that a possible reason for this is that there is no reason for disqualifying the witnesses...since the infringement occurred when they witnessed the sanctification and they were under no prior disqualification before they attended the ceremony. It follows that the witnesses were not disqualified until after the woman was sanctified. Thus the sanctification is complete but the witnesses are evil men and thereafter disqualified.

The language is somewhat difficult but the idea is clear and simple: a person who is disqualified as a witness by reason of some transgression is so disqualified upon completion of the transgression—in this instance, on completion of attending the act of sanctification, and by that time the sanctification is perfectly valid.

Exactly the same idea, regarding a very similar question, occurs in *Resp. R. Moshe Rotenberg, Hoshen Mishpat* 5 (quoted in *Pithei Teshuvah* to *Hoshen Mishpat* 34: 5). The question there was the validity of evidence given by witnesses...who by their very testifying in court had transgressed a biblical prohibition. Was their testimony valid or not? The answer was that whilst a transgression had been committed, there was no disqualification because the disqualification was the result of giving evidence and commenced only when that was complete.

Such "arithmetical" calculation of hours and minutes will doubtless seem to many as being excessively formalistic or as insubstantial quibbling, but that objection is not justified. Let us note that the very disqualification of an "evil man" from giving evidence, in most cases issuing from a biblical prohibition (see *Sanhedrin* 25a and *Baba Kamma* 72b) is ultimately a formal disqualification...operating irrespective of the credibility of the witness (see Shakh to *Hoshen Mishpat* 34:1). Hence it is right that the parameters of the disqualification should be zealously observed, in this formalistic way, in order to reduce its actual application.

10. Evidence of the Mentally Ill

See: LEVI v. STATE OF ISRAEL, p. 411.

11. Personal Knowledge of Witness

Cr.A. 20/61

SAHAR v. ATTORNEY-GENERAL

(1961) 15 *P.D.* 561, 576, 579, 581-582

The appellant, who was at one time Inspector General of the Israeli Police, had testified in a civil action, that as a member of the police force he had not regarded a given person in question as a suspect and on being asked by counsel to produce police files, he had

pleaded privilege. Some few weeks later, after such privilege had been removed in respect of a number of files by order of the Supreme Court, he persisted in testifying that he had not known that the person was then a suspect or that he had ever been such. The appellant was subsequently convicted of having given false evidence. A suspended sentence was imposed and also the maximum fine. He appealed against conviction and sentence.

Silberg J.: Briefly, "suspicion" is the doubt harboured by one person about another, whether it is reasonable or not. That is the correct meaning of the term. If proof is necessary, it may be found in abundance in the sources of Jewish law. "Whoever suspects proper people will suffer in his own person" (*Yoma* 19b). "May my portion be of those who are suspected but are innocent" (*Shabbat* 118b). " 'For they have dug a ditch to ensnare me'...they suspected [Jeremiah] of lying with a harlot" (*Baba Kamma* 16b). "Is the Holy One blessed be He suspect of punishing without justice?" (*Berakhot* 5b). "Suspicion of the public...suspicion of townspeople..." (*Shabbat* 23a with reference to the various degrees of suspicion). More examples in the same vein are to be found throughout the *Talmud* and later rabbinic literature down to modern times. In Yiddish as well, the language of millions of Jews, the term "hashud" has the very same significance—the doubt that gnaws in one's mind without becoming a certainty...

The question of the "non-believing" witness (non-believing in the sense of lacking positive personal knowledge of what he is attesting to) was already dealt with in the *Talmud*, and it is interesting that the Talmudic Sages not only considered him a false witness who transgresses the Ninth Commandment, but they were also amazed that anyone could think the opposite. A *beraita* (*Shevuot* 31a) says:

> How do we know that a disciple whose master tells him, "You know that if a hundred *maneh* [type of coin] were given to me, I would not lie. At this moment someone owes me a *maneh* and I have only one witness against him", may not join with that witness to give evidence of what is owing to the master? Because Scripture says, "From a false matter keep far" (*Ex.* 23:7). Is that indeed inferred from the words, "From a false matter keep far"? Surely he would definitely be lying? And the *Torah* says "Thou shalt not bear false witness against thy neighbour" (*Ex.* 20:13).

Thus a disciple who joins with a witness of his master to testify that he personally knows that someone borrowed from his master a sum of money is actually lying and there is no need to learn about the prohibition from the words "From a false matter keep afar". The lie he utters is not so

"distant" but very close, an intimate part of the very giving of the evidence. That is the nature and obvious interpretation that the Sages attributed to the expression "false witness" in the Ten Commandments. And that is also...the natural and obvious meaning to attach to "false testimony" that appears in sec. 117(1) of the Criminal Code Ordinance...

Sahar well knew that the impression left in the mind of the Court from his evidence would be that the person involved was not a "suspect" in the usually accepted meaning of the term and that the police had not conducted any criminal investigation. It follows that the appellant lied at least in the first part of his testimony before privilege was removed. Even if in his heart — as learned counsel tried to persuade us — he was thinking about something else such as a proven criminal charge or material sufficient for putting him on trial, that was an unspoken condition, a mental reservation, which is not taken into account when evaluating the truth or falsity of sworn evidence. Our Sages have already pointed out that when a person is sworn, he is admonished: "Know that we do not swear you for what you have in your heart but according to our mind and the mind of the court" (*Nedarim* 25a. As an example of what a person has in his heart, a story of deceit is told in the *Talmud*, known as "Raba's cane". A dishonest borrower was asked to swear that he had repaid the lender. Thereupon he brought a thick hollow cane and secreted the money inside. He then gave the cane to the lender to hold for a moment whilst he swore on a *Torah* scroll that he had paid all that was due from him. The lender in rage broke the cane he was holding and the money fell out).

The modern legislature considers it unnecessary even to give an explicit warning of the kind mentioned in the *Talmud* as above.

See: DEKUSSIAN v. STATE OF ISRAEL, Part 6, Penal Law, p. 478.

12. Contradictory Evidence on Minor Matters

Cr. A. 106/53

SULIMAN *et al.* v. ATTORNEY-GENERAL

(1953) 7 *P.D.* 824, 826

This was an appeal against conviction for robbery, relying on various inconsistencies in the prosecution's evidence and in the evidence which each witness had given as compared with what he had told the police, the Examining Magistrate and the Court.

Assaf J.: As regards inconsistencies disclosed in the evidence, this Court has already said that not every inconsistency renders the evidence contradictory. An inconsistency in substance must be distinguished from an inconsistency in some minor detail. If a witness was not precise as to a detail in his evidence, that does not mean that his evidence was false. Actually, false witnesses who harmonise their remarks can give evidence that is perfectly consistent, whereas truthful witnesses may well contradict each other and even themselves in some unimportant particular, especially the incidental circumstances of the case, since their attention wandered in the confusion and excitement following the event.

During the Mandate this Court also held that inconsistencies in the evidence do not as such disqualify it unless they give rise to doubt about the defendant's guilt (*Cr.A.* 42/47 *Faraj* v. *Attorney-General* (1947) A.L.R. Vol. 1, 422).

All this is of ancient lineage. Rav, the foremost Talmudic Sage, put his seal upon it by closely examining witnesses whose evidence seemed to be consistent (*Y. Sanhedrin* 4:9).

> When he saw witnesses giving evidence in the same concerted language, he would suspect that they were lying and had deliberately planned their testimony and would cross-examine them. If, however, they did not speak in the same terms, he did not examine them provided that the evidence was consistent (Rosh to *Sanhedrin* 3:31; *Tur, Hoshen Mishpat* 28).

"If two prophets do not prophesy in the same style, *a fortiori* ordinary people do not speak in the same terms" (*Resp. Zikhron Yehudah* 72).

13. Distinction Between Contradictions on Substantive and Marginal Issues

Cr. A. 3/48

KATZ-COHEN v. ATTORNEY-GENERAL

(1949) 2 *P.D.* 681, 686-687

This is an appeal by the defendant against his conviction of killing his wife.

Assaf J.: Husband and wife were married in 1938 and from the very beginning they quarrelled because of the excessive jealousy of the husband. On the morning of the very day when the killing occurred...a bitter dispute broke out between them. The woman's father said that the whole business must stop and that his daughter and her child should come and live with him. Before that could be done, the woman was killed, at about 4:30 in the afternoon. Neighbours who entered the apartment soon after hearing shots found the woman dying. They saw nobody in the house apart from her. The lower Court was satisfied as to the credibility of the prosecution witnesses and in reliance thereon came to the following conclusions: The accused had been alone with his wife in the apartment when the murder was committed, the shots were fired by him with a revolver he had bought two months previously, and the spent cartridges found in the place matched almost identically the bullets the accused had bought with the revolver. In the opinion of the lower Court the prosecution had proved the first and third constituents of the offence of murder, i.e. "resolve" and "preparation" to kill, but it had doubts about the second constituent, whether he had killed "in cold blood". It therefore acquitted him of premeditated murder and found him guilty of manslaughter.

The accused did not admit his guilt but pleaded that it was entirely untrue that he had bought a revolver and bullets, or that he was at the scene of the crime when the killing occurred: he had gone to Petah Tikvah to talk to his nephew whom he had been asked to look up. The lower Court did not give any credibility to the accused or the witnesses he had brought in his defence...

The second important witness for the prosecution was Rahel Wiener, who places the accused at the place and time of the crime. She testified that when she went out onto the balcony of her apartment, after hearing the shots, she saw the accused in the road adjoining the house, walking quickly away....At the same time she heard him shouting "*Magen David, Magen David*" ("Ambulance, ambulance").

In the conclusion to which the lower Court came, it said:

> The accused was at that time...in his apartment with his wife and there was nobody else there. This emerges from the evidence of the accused who said that he came home about noon and from the evidence of Rahel Wiener who said that immediately after hearing the three shots she saw the accused rushing away, shouting "Magen David, Magen David." These facts are confirmed by the evidence of the witness who ran to the place instantly after hearing the shots and who testified that they found no one in the apartment or on the staircase. There was also the evidence of the driver who took the accused to Petah Tikvah within half an hour of the killing.

Counsel submitted that the lower court had unjustifiably come to incorrect and far-reaching conclusions from this evidence and the facts that had been shown. The accused said that he had left home about an hour before the killing. The court did not believe him. But how had the court come to the conclusion that no other person was there? Moreover, Mrs. Wiener told the police that she had gone out on to her balcony only ten minutes later and not at once. Her evidence that she heard the accused shouting "Magen David, Magen David" was contradicted by another witness who said that she had heard the woman shouting "Magen David, Magen David." The conclusion of counsel was that the accused was not at the scene of the crime at all.

14. I do not agree with him. That there was no other person in the home follows from what was said by the witnesses who rushed there as soon as they had heard the shots and found nobody else there or on the staircase. As to the time when Mrs. Wiener went out on to her balcony, she explained to the Court, that she had meant ten seconds; the Court was satisfied that she had so meant. We think that this is not an instance of second thoughts, if a witness himself explains what he said in an acceptable manner (see *Hoshen Mishpat* 29). It is also apparent that Mrs. Wiener ran to the balcony at once after hearing the shots, fearful of her young son who was then in the street below. As to what another witness said that she had heard a woman shouting "Magen David, Magen David", which counsel regarded as completely inconsistent with Mrs. Wiener's evidence, it is possible that another woman did so or that what one thought was a man's voice another thought was a woman's voice. But that was not the main element of Mrs. Wiener's evidence but the fact that she saw the accused leaving the house immediately after the three shots were heard. That is decisive.

This is the point at which a general observation may be made about counsel's submissions, in which he tried to show certain inconsistencies in

the evidence of the prosecution's witnesses and on that basis claimed that we should look upon it as contradictory evidence. We are of the opinion that not every inconsistency renders the evidence such. An inconsistency as to the substance of a matter is to be distinguished from one affecting marginal issues (see *Sanhedrin* 41a). If one witness is not precise as to the particulars, that does not mean he is a false witness. It is in fact false witnesses who have connived together that are capable of giving perfect evidence without any inconsistencies, whereas truthful witnesses may contradict one another and indeed be inconsistent themselves in unimportant details, especially as regards incidental circumstances, since they may become confused by the excitement the incident created.

Cr.C.(Misc.) 540/85

STATE OF ISRAEL v. DADON

(1987) 3 *P.M.* 127, 130

The accused was charged with carrying out an indecent act by force in violation of sec. 354(a) of the Penal Law, 1977. The issue before the Court was the weight to be attached to the evidence of a minor given to the Juvenile Investigator but not to the Court, and the corroboration of such testimony.

Pilpel J.: The Sages taught (see *M. Sanhedrin* 5:1) that witnesses are to be examined as follows:

> They used to examine them [i.e. the witnesses] with seven searching queries: in which septannate [of the Jubilee] was the crime committed? In what year? In what month? On which day of the month? On what day? At what hour of the day? And, at what place?

The Mishnaic rules reflect the importance attached by the Sages to the examination of witnesses, and the need to establish the basic factual framework of the evidence which consists of the time, the place and the alleged crime. It is inconceivable that the victim of the attack, a three-year-old female minor, should have been interrogated in such a brief and superficial fashion. As any father knows, it is extremely difficult to get any three-year-old to express himself or herself in a coherent fashion. It is, therefore, also somewhat disturbing to find that the testimony given to the Juvenile Investigator was as concise and to the point as if it had been given by a mature girl.

It is difficult to imagine that a three-year-old could have provided the

Investigator with such a short and lucid report of the events. In my opinion, the Juvenile Investigator ought to have asked the child many more questions concerning the alleged incident (in accordance with the second *mishnah* in the above-mentioned chapter: "The more exhaustive the cross-examination, the more praiseworthy the judge") and should have written down her answers in a full and exact form.

14. Retraction by Witness

C.A. 238/53

COHEN-BUSLIK v. ATTORNEY-GENERAL

(1954) 8 *P.D.* 4, 26-27

Silberg J.: It happened that a young man spread a report that he had solemnly married his brother's daughter, a girl of twelve or thirteen, and he produced in evidence a deed certifying the act of solemnization. The deed was signed by two witnesses and "confirmed [that is to say, the signatures of the witnesses were authenticated] by three by-standers" [that is, persons who were not expert religious judges or expert at all]. Two or three days later, the matter came before the community and the witnesses tried to retract. One of them said that nothing like it had happened. The other said that it was true that the young man had given the girl a certain sum of money but he had said nothing to her at all (about marrying her thereby): all he had said to the witnesses was "Be my witnesses" but the girl had not heard that. Thus there were grounds for believing that the entire matter was a fabrication. What is to be done when the law is that a witness cannot go back on his original testimony (*Ketubot* 18b and elsewhere)? The only question remaining is the value to be attached to the deed, whether it could serve as evidence of the solemnization of a marriage. R. Shmuel di Medina (Rashdam) was asked to make a thorough investigation. He considered the case in all its aspects and ruled that the marriage was beyond all doubt invalid and the girl remained unmarried (*Responsa, Even haEzer* 21).

Cr. A. 421/71

MYMARAN v. STATE OF ISRAEL

(1972) 26(1) *P.D.* 281, 287

The appellant was accused and convicted of rape. The complainant was aged thirteen-and-a-half at the relevant date. The court had accepted evidence of what had occurred that was given by her to the youth investigator. During the trial the complainant turned fourteen and was called to give evidence for the defence. Under oath, she denied her previous evidence.

Cohn J.: A lesson which experience teaches must be added to the simple psychological fact that in seeking the truth, earlier evidence is to be preferred to later evidence. If a witness goes back on his original evidence and testifies the opposite, he does so not in order to correct a *bona fide* error but, generally, to achieve a purpose that has nothing to do with the truth, whether he has been influenced by those involved in the matter or whether he anticipates some benefit from changing his evidence, or whether his new evidence has been adapted to the requirements of the trial. It is perhaps this consideration that lies behind the provision of Jewish law that a witness cannot go back on his earlier evidence ("Once a witness has testified, he cannot retract", *Sanhedrin* 44b; *Makkot* 3a and elsewhere), even if he gives reasons for doing so, such as that he had been mistaken or had spoken unwittingly and then remembered that it was otherwise or had spoken in fear (*M.T. Edut* 3:5).

See: KATZ-COHEN v. ATTORNEY-GENERAL, p. 371.

15. Circumstantial Evidence

See: NAGAR *et al.* v. STATE OF ISRAEL, p. 396.

See: GOLDSTEIN v. STATE OF ISRAEL, p. 405.

16. Probative and Constitutive Evidence

C.A. 99/63

PELEG *et al.* v. ATTORNEY-GENERAL

(1963) 17 *P.D.* 1122, 1128

This was an appeal against a refusal to grant probate of an oral will made on two occasions just prior to death and before separate pairs of witnesses, leaving his property to stepchildren who cared for him after his wife's death. The property consisted of the testator's share of his wife's estate.

Cohn J.: There remains the question of the difference between probative and constitutive witnesses. This difference has become the backbone of the law of evidence in matters of personal status, ever since the judgement of this Court in *C.A.* 26/51 *Kutik* v. *Wolfson* (see below). For myself, without this difference I cannot imagine the possibility of civil jurisdiction in matters to which religious law applies. In the present case there can be no doubt that even if a death-bed will made orally, not before witnesses (constitutive witnesses), is valid, under religious law it still requires two competent witnesses (probative witnesses) to evidence it, unless the heirs make acknowledgement, since the admission of a party is equal to the testimony of one hundred witnesses. If indeed religious law applies not only to the nature and validity of a will but also to its proof, that will not assist us at all since fully competent witnesses under religious law are almost impossible to find today: at least we are unable to investigate with any thoroughness their competence in the strict religious sense.

The learned judge regarded the distinction between probative and constitutive witnesses—

> ...as something artificial....It is very difficult to establish when witnesses are required under Jewish law for the purpose of the law of evidence in the English sense and when the requirement for witnesses under Jewish law is a procedural requirement under English law. It is perhaps impossible to import into English law the concepts of evidence and witnesses of Jewish law. In the latter the question of testimony and admissions by a party, of evidence in matters of marriage and divorce and generally in civil cases derive from the same source and these matters are closely related.

Everyone who is acquainted with the *Talmud* and the later authorities will

agree with the learned judge that such is the situation. Nevertheless, there is no escaping this "artificiality", and the civil courts must give regard to it so long as they have jurisdiction under religious law. As Silberg J. has already said in *C.A.* 26/51 *Kutik* v. *Wolfson* (see below), such a situation is no different from that which prevails when a court is obliged to proceed according to foreign law and elucidate the substantive foreign law and decide according to that law alone; but insofar as the procedural rules of that foreign law are not part and parcel of the substantive law, the court may not apply them but they must yield before the court's municipal procedural rules. Every occasion of choice of law entails a confusion of disparate elements. However, it seems to me that in our special circumstances such confusion is the lesser of two evils.

17. Examination of Witnesses

Cr.C.(Misc.) 540/85
STATE OF ISRAEL v. DADON
(1987)(3) *P.M.* 127, 130

The accused was charged with carrying out an indecent act by force in violation of sec. 354(a) of the Penal Law, 1977. The issue before the Court was the weight to be attached to the evidence of a minor given to the Juvenile Investigator but not to the Court, and the corroboration of such testimony.

Pilpel J.: The Sages taught (see *M. Sanhedrin* 5:1) that witnesses are to be examined as follows:

> They used to examine them [i.e. the witnesses] with seven searching queries: in which septannate [of the Jubilee] was the crime committed? In what year? In what month? On which day of the month? On what day? At what hour of the day? And, at what place?

The Mishnaic rules reflect the importance attached by the Sages to the examination of witnesses, and the need to establish the basic factual framework of the evidence which consists of the time, the place and the alleged crime. It is inconceivable that the victim of the attack, a three-year-old female minor, should have been interrogated in such a brief

and superficial fashion. As any father knows, it is extremely difficult to get any three-year-old to express himself or herself in a coherent fashion. It is, therefore, also somewhat disturbing to find that the testimony given to the Juvenile Investigator was as concise and to the point as if it had been given by a mature girl.

It is difficult to imagine that a three-year-old could have provided the Investigator with such a short and lucid report of the events. In my opinion, the Juvenile Investigator ought to have asked the child many more questions concerning the alleged incident (in accordance with the second *mishnah* in the above-mentioned chapter: "The more exhaustive the cross-examination, the more praiseworthy the judge") and should have written down her answers in a full and exact form.

Chapter Two

EVIDENCE IN CIVIL CASES

A. Admissions

1. Scope and Types

C.A 26/51
KUTIK v. WOLFSON
(1951) 5 *P.D.* 1341, 1343-1344, 1346-1347

Silberg J.: This is an appeal against a judgment of the Tel Aviv District Court, holding that the appellant is the father of the child born to the unmarried respondent, and charging him with maintenance of the child and the expenses of the pregnancy and delivery.

The submissions made in this appeal are largely legal and accordingly it is unnecessary to reiterate the facts and the evidence. It is enough to point out that the learned judge decided the question of paternity also upon the admission of the appellant which was made (a) outside the court and (b) before the birth of the child — two details by means of which appellant's counsel seeks to attack the judgment, as will appear below... .

The question on which the appeal turns is when and upon what proof will Jewish law order a defendant to pay maintenance for a child born to an unmarried woman? The answer which counsel propounded was that it does so only when the defendant makes his admission in an action in court. He relies on *Even haEzer* 71:4 — "When a man has intercourse with an unmarried woman and she bears him a child, he is required to maintain the child if he admits that it is his child." "Admits", counsel urges, means "admits in court and after the child was born", since the rule says "when a man has intercourse with an unmarried woman and she bears him a child...".

What is the nature of an admission under Jewish law—a mode of proof or a basis for a cause of action? In Talmudic terms, is an admission "a ground of credence" or "a ground for acquisition?" There is no short and simple answer, for it all depends on the kind of admission, its contents and the occasion when it is made.

Two kinds of admission exist in Jewish law, although they have not been precisely defined in the literature: (a) an abstract admission of the obligation of the person making it or of the entitlement of another; (b) a concrete admission of facts. A further division that cuts across the first is (c) an admission of truth, that one does not know that a thing is untrue, and (d) a "false" admission, which the person receiving the admission and the court know is untrue.

Without a doubt, an admission coming under (a) and (d) is "a ground for acquisition", i.e., it gives rise to the obligatory or real right of the person receiving the admission. A classic example of "an admission of falsehood" in the abstract is the well-known admission of the proselyte Issur,* (*Baba Batra* 149a; see *Tosafot* to *ibid.* 44b and *Baba Metzia* 46a; *Noda biYehudah*, (*Mahadura Kamma*) 30; *Resp. Haham Tzvi* 16; cf. *Hoshen Mishpat* 40:1 and annotations thereto and note the title of the section "The Law Relating to a Person Who Binds Himself to Another").

On the other hand, I equally have no doubt that an admission under (b) and (c) is "a ground for credence", testifying with the force of a hundred witnesses that the facts admitted occurred. Here no special formality is necessary, neither court nor witnesses, neither formal mode of acquisition nor deed. It is enough that witnesses subsequently appear in court and testify that they heard the admission, although the person making it knew nothing of their presence and did not say to them "You are my witnesses" or "Be my witnesses." (This ensues from the discussion of "an admission after loan" in *Sanhedrin* 30b and *Hoshen Mishpat* 30:5-6.) All the formalities involved in admissions are applicable only to an abstract admission "which is not true"; i.e. an admission that does not speak to the past but is

* Issur on his deathbed wished to transfer money he had deposited with Rava to R. Mari, his "illegitimate" son (by Rachel, the daughter of Mar Shmuel) who was conceived "not in holiness", i.e. whilst Issur was still a heathen, but who was born "in holiness", i.e. after Issur had converted to Judaism. The matter was very urgent and R. Mari was far distant. For reasons explained in the *Talmud* it was not possible legally to employ any other mode of acquisition. Issur therefore "admitted" that the money belonged to R. Mari, who thus "acquired" it. The admission (*udita*) relates to something belonging to the person making the admission, stating that it actually belongs to another, although everyone knows otherwise.

intended, by mere utterance and deliberately, to create an obligatory or property right that did not exist before the admission was made. In view of this basic logical distinction one can, I think, explain sensibly the entire law relating to admissions and reconcile the apparent contradictions that may be met in this area. But the present is not the occasion to enlarge thereon.

What does all this tell us regarding the problem of the present appeal? That even the admission of paternity by the appellant, which was not an abstract admission of an obligation to maintain the child nor on the face of it "a false admission", is in the view of Jewish religious law, "a ground of credence", and is thus not a norm of Jewish law. Hence the last ground which counsel invoked for employing the rules of the Jewish law of evidence—its restrictiveness—regarding the determination of the appellant's paternity, falls away. The learned judge was therefore at liberty to decide what he did in accordance with the provisions and principles of secular law.

2. Weight

C.A. 168/55

CONRADS *et al.* v. TRUSTEES OF THE WILL OF Z. LEVI dcd.

(1956) 10 *P.D.* 1310, 1315

Silberg J.: The testator admitted that "all the above-mentioned matters were arranged in the most effective manner...each according to its (mode of) acquisition." The admission of a party is equivalent to the evidence of a hundred witnesses and binds the court to give judgment accordingly, as if it were proven that such indeed was the case. Now, Jewish law enables a thing which does not yet exist to be acquired upon its coming into existence by annexing existing capital to future income—"and this is not the vesting of a nonexistent thing for the capital exists and the income thereof is annexed" (*M.T. Mekhirah* 23:1), and a debt can also be vested, though not by *kinyan sudar* or *agav* (two forms of legal acquisition) but in the presence of all three parties concerned in the transaction or by deed signed, sealed and delivered (*ibid.* 22:9; *Hoshen Mishpat* 205:9, 66 and 126) and in fact there is nothing that cannot be vested in one manner or another under

Jewish law. Therefore, the verbal admission as above of the testator that the things mentioned in the will were vested "each according to its (mode of) acquisition" created a kind of estoppel barring the heirs from attempting to show that no proper vesting had been effected when the will was drawn up or before then. The force of an admission in Jewish law is so strong that in the view of one of the leading Tosafists, a person who owns no land at all can vest by *kinyan agav* (transfer of ownership of something as an adjunct to transfer of title in land) any movable property whatsoever by virtue of an admission that he possesses such land.

> It appears to Rabbenu Tam that the reason (why even a person who owns no land can utilise *kinyan agav*) is because he admits that he has land and assumes an obligation, having vested it in his neighbour by means of land, even if several witnesses contradict him, since a party's admission is equivalent to a hundred witnesses and there is no fear that it may appear to be a falsehood, as we have found in the case of Issur the proselyte. (*Tosafot* to *Baba Batra* 44b).

Even those who do not acknowledge this extreme rule and think that an admission cannot create something *ex nihilo*—for example, Rema to *Hoshen Mishpat* 202:7, or *Bet Yosef* to *Tur, Hoshen Mishpat* 202:1, do not dispute that a person who makes an admission against interest can properly and irrevocably vest his possessions, since his admission is equivalent to the testimony of a hundred witnesses. (Consider carefully the observations of Rema *loc. cit.*; *Be'er Hetev, ibid.*; *Hoshen Mishpat* 103:4.)

C.A. 211/63

YEHEZKEL v. KALPER *et al.*

(1964) 18(1) *P.D.* 563, 567, 571

Halevi J.: The grounds of the judgment here involve a question of principle: how far will a party be bound by the version he has given in evidence, and more particularly how far will he be prevented from relying on other evidence in his favour which contradicts his own testimony?

There can be no doubt that a party's evidence can serve as an "admission", which can be used by the other party. As Lord Jessel said in *Ex parte Hall* [1882] 19 *Ch. D.* 580, 583: "Any statement made by a man on oath may be used against him as an admission".

In Hebrew, one can say that a party's admission is involved here, but this does not entail—as was suggested to us—the application of the rule

of Jewish law that "the admission of a party is equivalent to the testimony of a hundred witnesses". This rule means, as Rashi explains in *Baba Metzia* 3b, that "if a person admits a debt of a *maneh* and witnesses appear who contradict him, saying that he owes nothing, he is not exempt, since the admission of a party is equivalent to a hundred witnesses". Or as Rema puts it in *Hoshen Mishpat* 79:1, a party who makes an admission "is believed in respect of himself more than a hundred witnesses". That is to say, his admission *replaces* all other evidence and binds him even if such other evidence is to the contrary.

See: ROSENBERG v. KARMARJ *et al.*, p. 392.

3. Conditions for Application of Rule *Tacitare est consentire*

C.A. 502/69

BET YANNAY...LTD. v. HOLLANDER

(1970) 24(1) *P.D.* 378, 388-389

Since becoming a member of the appellant cooperative agricultural society, the respondent had, according to the society's books, accumulated a number of debts.

Cohn J.: The rule is that silence alone does not give rise to estoppel: "Where there is no obligation to answer and speak, no inference may be drawn from the silence" (see Everest and Strode, *Law of Estoppel*, 3rd ed., 290). If a person is under no obligation to act and protest when he receives a demand for payment which he does not admit that he owes, then his silence and inaction cannot create estoppel.

And again, I know of no such obligation. If payment of a tax is demanded of me and I know that by law I am not obliged to pay it, I cannot become liable for it merely by ignoring the demand for payment and throwing it in the wastepaper basket; and this applies to demands for payments based on a contractual or other obligation when in fact no such obligation exists.

This is what we learn from the *Mejelle* (sec. 67): "A person's silence says nothing, but some would view silence as admission. In other words, one

cannot say of a person who has said nothing that he has said something definite; but where he ought to have spoken, his silence is like an admission and notice."

Jewish law is somewhat different from Moslem law. There the rule is that a person's silence indicates nothing, whereas in Jewish law the rule is that *tacitare est consentire* (silence constitutes agreement) (*Yevamot* 87b). There are, however, exceptions that balance the rule. In Moslem law, the exception occurs where a person was under an obligation to speak but said nothing. With us the exception is where a person was under no obligation to speak and kept silent (see *Hoshen Mishpat* 81:7—"If the plaintiff says, 'You owe me a *maneh*' and the defendant keeps silent, and then the plaintiff says to the witnesses, 'You are my witnesses' and the defendant still keeps silent, his silence has no effect since silence is not an admission except where a person first makes a statement and the other agrees, and then when the plaintiff calls upon bystanders to be his witnesses, the defendant remains silent. Where, however, a person keeps silent throughout, he can say 'I did not think that an answer was necessary' "). A defendant has no duty to say "yes" or "no" when someone claims that he owes something, but he may remain silent; if later on it is claimed that his silence amounted to an admission, he may say that he did not think it necessary to respond.

Here also the respondent could say to the appellant, "I did not think it necessary to react to your requests and arguments, I had no duty to respond, and since I kept silent throughout my silence does not amount to an admission."

4. Ambiguous Admissions

C.A. 505/64

ABU YONAS *et al.* v. ZBEYDAT *et al.*

(1965) 19(4) *P.D.* 169, 172-173

A parcel of land belonged to the appellants and the first respondent in equal shares. When the parcel was partitioned, the respondent claimed half of one plot and the whole of another. His claim succeeded. The appellants unsuccessfully asked for a declaratory judgment that they were half owners of the other plot.

Silberg J.: The facts of the present case remind us of the incident where application was made of the well-known talmudic rule: "If one says 'I did not borrow' it is as if he said 'I did not repay' " (*Shevuot* 41b). A person there said to his neighbour, "Give me the hundred *zuz* I lent you" and the neighbour replied "Nothing of the kind ever occurred", and then brought witnesses that he had borrowed the money but repaid it. Rava said that the law is, "If a person says he did not borrow, it is as if he said he did not repay". Rashi (*ad loc.*) explains "as if he said he did not repay" as meaning that since he did not borrow, as he has asserted, he therefore did not repay. However, there are witnesses that he did borrow and they are believed as regards the loan but not as regards the repayment, since the admission of a party is equivalent to the testimony of a hundred witnesses (cf. *M.T. To'en veNitan* 6:3; *Hoshen Mishpat* 79:1)...

I am well aware that the above talmudic rule does not bind the civil courts. Had the learned judge held that he believed the witnesses...notwithstanding the inconsistency between their evidence and the defendant's own version as such, I would have said nothing, but it seems to me from the recital of the facts by the learned judge that he paid no attention to this inconsistency and that it did not serve him as a consideration in deciding the question of credibility.

B. Presumptions

1. A Person Does Not Discharge a Debt Before It is Due

C.A. 332/76

GRAND HOTEL THEODORE HERZL LTD. v. DAKLO

(1977) 31(1) *P.D.* 228, 234-235

Cohn J.: Secondly, the vendors argue and the learned registrar decided, that the purchasers could not plead that the date for payment of the balance of the purchase price had not yet arrived since they had (earlier) paid the vendors the amount they considered to be the balance, a sure

sign that it did not occur to them at all that the terms of clause 4(c) of the original contract might defer the payment. The learned registrar attached considerable importance also to the letter which the purchasers' lawyer wrote to the vendors when he sent them the money, from which it would appear that the purchasers thought they were then bound to pay the balance of the price (as they themselves understood it).

I do not suggest that the vendors are debarred from arguing that they paid what they did before the due time. No one argues—or thinks—that by paying the vendors half a million lira when they did the purchasers adversely affected the vendors' position. On the contrary, that payment changed their position to the good, and I have never heard that the good is to be penalised in the same way as the bad.

Some Sages of the *Talmud* decided that a debtor is not believed when he says he paid in advance, since the presumption is that a person does not do so (*Baba Batra* 5a-b). Although this is a minority view (Resh Lakish and Mar bar R. Ashi as against Abaye, Rava, R. Pappa and R. Huna de R. Yehoshua) the law was so decided. But that is only where the defendant claims that he paid in advance and is no longer bound to pay and the plaintiff denies the payment, for then the defendant is required to take an oath to prove that he has paid (*M.T. Malveh veLoveh* 14:1). The presumption was further restricted to loan and hire and did not apply in bailment and sale or otherwise (*Hoshen Mishpat* 78, annotations and Shakh, *ad loc.*). In any event the presumption cannot displace evidence that the date when the debtor made payment was the date agreed upon by him and his creditor.

Even had the purchasers and their advisers thought that they must pay the balance immediately and the terms of clause 4(c) of the original contract were not applicable to them, that is no reason to stop them now from admitting their error, because that error only caused the vendors to profit financially.

2. *Tacitare est consentire*

See: BET YANNAI...LTD. v. HOLLANDER, p. 383.

3. A Person Does Not Implicate Himself

C.A. 384/61

STATE OF ISRAEL v. PESLER

(1962) 16 *P.D.* 102, 103, 106-107

Cohn J.: This is an appeal by the State against a decision...in favour of the respondent, granting her a declaratory judgment that she was the "common law" wife of the late Aryeh (Leon) Schiff, and was living with him at the date of his death...

Marriage by repute or marriage *de facto* as distinct from marriage *de jure* is not the preserve of Scottish law alone. We find it or something like it in most legal systems. But whereas in Scottish law, as in Jewish religious law, cohabitation is regarded as one of the modes by which a "wife is acquired", in most other systems persistent reputed cohabitation does not serve as an alternative to the marriage ceremony but merely as evidence of the subsistence of a marriage. The fact that a man and woman have lived together continuously for some time as married persons creates a presumption that they are in fact lawfully married or constitutes *prima facie* evidence thereof...

> The doctrine of this issue is simply a part of the important rule that when a man and woman are living together in apparent matrimony, so that they are accepted by the community as husband and wife, they are presumed, in the absence of contrary presumptions or proofs, not to be violating the due order of society and breaking the law, but to be in fact married (Bishop, *Marriage, Divorce and Separation* (1891) vol. I, 405-6).

The same presumption is found in Jewish religious law. A person is presumed not "to put aside permitted food and eat what is forbidden" (*Gittin* 37b; *Hullin* 4a), i.e., where a person is faced with the alternative of doing something which is allowed or something which is prohibited, the presumption is that he will do the former and not the latter....Silberg J. has anticipated me in writing that this presumption—

> ...forms the basis of the known presumption that 'no man turns his intercourse into an act of prostitution' (*Ketubot* 73a) and it normally converts the cohabitation of a man and woman into marriage by way of intercourse according to the *Torah*, making it necessary for her to

receive a *get* [bill of divorce] (*Principia Talmudica* (in Hebrew) 113, note 64).

As to the specific matter involved here — cohabitation over a lengthy period — a particular presumption exists in Jewish religious law:

> When a man and woman come from overseas and he says "She is my wife" and she says "He is my husband"—the death sentence for adultery is not executed in their regard. Where a presumption arises (that they are husband and wife), the death sentence for adultery is executed. When does the presumption arise...after thirty days (*Y. Kiddushin* 4:10).

In terms of the contemporary law of evidence, the fact that a man and woman live together is not in itself sufficient for her to be regarded as a married woman for criminal purposes; that is to say, if another man has intercourse with her, he is not charged with adultery by reason only of the woman living with the first man. But where the couple are presumed man and wife for thirty days that is sufficient for the conviction of the other man as an adulterer.

The fact that this presumption does not create, so to speak, a married status and does not change a single woman into a married woman but is simply one way of proving that the female participating in the act of intercourse was a married woman forbidden to the male, emerges clearly from the context in which the rule appears in Maimonides. Before he cites the presumption mentioned above, he lays down two rules of evidence (*M.T. Issurei Bi'ah* 1:19-20):

> Witnesses are not required to see the adulterers actually copulating...but when they are observed embracing one another in a sexual manner they are condemned on such evidence and we do not say perhaps they were not copulating, because the presumption arising from this form of behaviour is that they were copulating.
>
> Whoever is presumed to be a kinsman is adjudged on the basis of that presumption although there is no evidence that the latter is a relative (and due punishment is exacted on the strength thereof)....It is related of a woman who came to Jerusalem bringing with her a young child whom she reared presumptively as her son. He had intercourse with her and she was charged and sentenced by the *bet din* [religious court]. Proof of this rule lies in what the *Torah* decides in the case of one who curses his father or fatally strikes him. Have we clear evidence that the victim is his father? Only presumptively. The same applies to other relatives.

It must be noted that the presumption that a person will not put aside

permitted food and eat what is forbidden, like the presumption that no man makes his intercourse into an act of prostitution, serves as evidence which the law itself provides and which, therefore, a party need not adduce. It is otherwise with the presumption of thirty days' cohabitation as man and wife or the presumption of kinship. These arise from repute, matters of public knowledge for those interested, and need to be proved as such in court. The common denominator of these two different presumptions is that they are both part of the law of evidence and have nothing to do with substantive law of marriage.

4. The Holder of a Deed is at a Disadvantage

See: MIZRAHI v. YADID, Part 10, Commercial Law, p. 783.

5. The Holder of a Deed has a Lawful Claim

See: BEN SHITREET v. BEN SHITREET, Part 10, Commercial Law, p. 782.

6. A Signatory Knows the Contents of the Deed

C.C. 364/75

SHIMONI v. MIF'ALE REKHEV ASHDOD LTD.

(1977) 1 *P.M.* 444, 446, 454-455

The plaintiff claimed damages from the defendant for breach of contract to deliver a truck. One of the arguments of the defendant which is material in this case was that the delivery date agreed upon was merely "estimated", and that it was stipulated expressly in the contract that this date was not binding on the defendant.

Tirkel J.: The final outcome accords with Jewish law, too, as set out in *Hoshen Mishpat* 61:13: "Whosoever pleads against his wife's

ketubah [marriage document] that he was uneducated and did not understand when the *ketubah* and the terms therein were read out during the marriage ceremony, is not heard". The same view is expressed by Bet Yosef in the name of Ribash in sec. 480: "The same applied with regard to other particulars of a deed to which attention must be paid, and no one is to be heard to say that he did not pay attention". Siftei Kohen adds, *ad loc.*, that "even if it is known that he does not understand the language of the deed, he is bound thereby because he adopted it and kept silent".

That is the law which, in my humble opinion, applies to the present case, but cf. Z. Warhaftig, *The Law of Contract in Jewish Law* 232-239, dealing with the validity of a standard contract, or of a standard term that is inconsistent with some other contractual term, either in law or in logic.

7. *Omnia praesumuntur legitime facta*

See: STATE OF ISRAEL v. PESLER, p. 387.

8. Witnesses Have Satisfied Themselves as to Capacity of Signatory

See: SHARABI v. SUBERI. Part 10. Commercial Law, p. 784.

C. Modes of Proof

1. Matters of Expertise

C.A. 407/60
A. v. B.
(1961) 15 *P.D.* 212, 216

The appellant claimed that the respondent was the father of her child. He refused to undergo a blood test. The action was dismissed for lack of evidence.

Cohn J.: Appellant's counsel voiced another grievance, that the learned judge who had seen both the child and the respondent did not in his judgment say anything about his impression concerning the likeness of the two. In fact, counsel submitted, they clearly and obviously resembled each other. With all respect, the learned judge acted wisely in keeping his impression to himself. If he saw no resemblance, his impression would have helped neither the appellant nor the respondent; if he did find a resemblance, that might harm the respondent but would not help the appellant since in a case such as the present the judge's perception is not in the nature of corroborative evidence. The situation is unlike that of distinctive marks which a person may perceive at once without reasonable fear of doubt or error, such as that a child is an infant or grown up, male or female, dark or fair, and the like, where no need arises in general for expert opinion in order to discern them, and the impression of the judge is sufficient. It is different with matters that may be understood in several ways; these require evidentiary proof, and if an impression is required, it must be of experts giving their opinion as witnesses in the trial. It is very true that in the books many precedents are to be found of judges reaching a decision in disputed instances of this kind according to their perception, instances that include paternity based on the child resembling the defendant (Wigmore, *Evidence*, 624 note 2). In Israel, too, the courts have decided cases of mental illness based on "what the judge has observed" (in the words of *M.T. Edut* 9:10). All these, however, are matters of the past, before the era of the "experts". Today, blessed as we are with qualified experts in every area and on every subject, no judge will presume to decide scientific questions that lie in the realm of expert knowledge simply on his own perception. (Maimonides expressed a similar idea—"Today," he said, judges "not being as wise and understanding as they should, most Jewish courts have agreed not...to decide in reliance on their own views and without knowledge, saying 'I believe this in my heart and I put reliance on that,' but on clear evidence, not as they think it should be, by appraisement" (*M.T. Sanhedrin* 24:2).)

2. Presumption that is Baseless

See: GILBERG v. PANOSS, Part 9, Property—Physical and Intellectual, p. 103.

3. *Miggo* — "Because"

C.A. 88/57
ROSENBERG v. KARMARJ *et al.*
(1958) 12 *P.D.* 1096, 1102, 1103

Cheshin D.P.: Admission by heirs is not the only way of proving an unwitnessed deathbed will. Jewish law recognizes two further ways of doing so: "*miggo*" ("because"—see below for explanation) and deeds made in gentile courts. The following rule is to be found in *Resp. Rosh* (83:4):

> As to what the Sages have said, that the directions of a person on his deathbed are as if they were duly signed and sealed...as to whether they are effective if they are not in writing and there are no witnesses, know that without writing, they are as effective as a deed sealed and delivered by a healthy person and even better than what has been written and vested, although the latter point is disputed, some thinking that no vesting can occur after death. However, witnesses are certainly required if the assets are held by the heirs, but if they are held by one who claims that he was given a gift, he is believed by virtue of *miggo* for he could have said that he has nothing or has already returned the assets, and could have taken an oath to that effect.

The meaning of the plea of *miggo* is well-known: because (*miggo*) he might have pleaded that he held nothing belonging to the deceased or that he had returned to the deceased what he had held, but in fact did not so plead but said that the deceased had given him a gift, credence is therefore given him, since had he wished to lie he could have chosen another plea better suited for him in order to keep what he had. It follows that *miggo* is a mode of proof. A will acquires validity not when the argument is voiced during the proceedings concerning the directions of the deceased but at the moment the directions are given by him. *Miggo* serves only as a ground for believing the donee of the gift. In other words, it is the directions of the deceased themselves that vest the gift in the donee even if not made before witnesses and the *miggo* is only advanced to persuade the court that the deceased did in fact make the disposition as the donee claims. It is easy to assume that were the donee to deliver the gift to the heirs before the court comes to deal with the matter, the basis for the plea would disappear and the recipient would not be believed because of *miggo*. But in these circumstances the will would be invalid

not because it was not made in the presence of constitutive witnesses but because of the absence of one of the two possible modes of proof mentioned above, the admission of the heirs or *miggo*. This is demonstrated by a *responsum* of Rabbenu Gershom, Me'or haGolah, reproduced in *Resp. Maharam miRotenberg* 861:

> A and B were partners and went overseas together. A fell ill and was on the verge of death. He called B and directed him to give to a third person certain assets of his which B held...A died...and B returned home. On his return he addressed himself to the *bet din* [religious court] and told them what A had directed, and then carried out what A had directed. Now A's widow is claiming from the donee what B had given him, (maintaining) that A could not have given him anything since all was charged to her under her *ketubah* [marriage document]. In whose favour is the law? I am inclined to think that the widow cannot obtain anything from the donee, since the directions of a person on his deathbed are as if they were duly signed and delivered...B is believed in what he says, since before he disposed of the assets, he turned to the *bet din* and told them what had happened, and our rabbis have taught [*T. Baba Metzia* 1] that admission by a party is as valid as the testimony of a hundred witnesses (see also *Resp. Maharam miRotenberg* 870).

D. Litigants' Oaths

1. Orphans

C.A. 459/59

FINKELSTEIN *et al.* v. ESTATE OF MOSHE FREUSTEIER *et al.*

(1960) 14 *P.D.* 2331, 2333

This appeal involved a claim made against the estate of a deceased person for repayment of a loan, allegedly admitted by the deceased during his lifetime.

Silberg J.: Both Ottoman and Jewish law adopt a similar—if not quite identical—approach to claims made against a deceased person's estate.

Art. 1746(1) of the *Mejelle* provides that—

> When a person lays claim to and proves that he has an interest in the estate of a deceased person, the Court requires the plaintiff to swear an oath that he has not received anything in any way whatsoever in satisfaction of his interest from such deceased person, either directly or indirectly, nor that he has given a release thereof, nor transferred it to any other person...nor received any pledge from the deceased by way of security of his interest.

Jewish law has the following to say on the matter:

> A widow has no right to recover [her *ketubah*] (marriage settlement) from the property of the orphans except on oath (that she had not received any part thereof — Rashi, *ad loc.*). (The rabbis), however, abstained from requiring her to take an oath. Rabban Gamliel the Elder then made a regulation that she should take any vow which the orphans chose to impose on her and so recover her *ketubah* (*M. Gittin* 34b).

> Thus they provided that where a widow claims her *ketubah* after the husband's death she should not do so until she takes an oath that nothing was left with her and that she had not commuted her *ketubah* to the deceased nor foregone it (*M.T. Ishut* 16:4).

> A widow will only collect her *ketubah*, principal or supplementary, on her taking an oath....When the court or orphans require her to swear, that is done outside court since the courts refrain from administering an oath in case she is careless, but an oath taken outside court is not serious (*ibid.* 16:11).

As regards an admission discovered in the accounts of the deceased—as in the case before us—we find in *Shulhan Arukh* two seemingly contradictory statements:

> Where Reuven died and there was found among his papers a note in his handwriting that he owed Shimon a sum of money, the orphans are exempt, since an oral loan even with witnesses is not recoverable from orphans unless it is not yet due (*Hoshen Mishpat* 107:12).

> One is to adjudge a matter according to the papers of a person in which he was accustomed to note down his affairs, even if this requires minor orphans to discharge a debt, where some grounds exist that what the deceased wrote down was the truth (*ibid.* 91:5).

Prima facie, here is an obvious contradiction, but in fact there is none. A condition is appended to the second above rule—"where some grounds exist

that what the deceased wrote down was the truth." In modern terminology, there must be some "corroboration" from elsewhere as to the veracity of the admission found in the deceased's papers. That is what Sema to *Hoshen Mishpat* 108:27 indeed observes.

We can thus see the suspicion and distrust with which Jewish law regards claims made against heirs. But the following observation must be added. Since Jewish law, as we know, adopts the view that evidence is to be formally evaluated, as opposed to a free evaluation that characterises modern statutes, and the judge must — except in the case of "deceit" (see *Hoshen Mishpat* 15:3) — rule in reliance upon the testimony of two competent witnesses, then if such witnesses are available to testify to the loan/debt of the deceased, the suspicion arising on the latter's death is not whether he did not borrow anything but whether he had discharged the debt before his death.

The common formula by which to define the position taken by the three systems of law, English law, Ottoman law and Jewish law, is that where a claim is against the estate or one of the heirs, one must have no doubt as to whether the deceased might have had some defense that militates—either by way of denial or by way of contrary evidence—against the claim. Where such doubt is not removed, the claim fails since the claimant bears the burden of proof, i.e. conclusive proof.

This notion requires that caution be applied not only to the evidence of the plaintiff, since the doubt persists, but to a somewhat lesser degree also when the claim is based on the evidence of a witness not involved in the matter.

E. Burden of Proof

See: Part 7, Torts, p. 511.

Chapter Three

EVIDENCE IN CRIMINAL CASES

A. Conviction and Acquittal

1. Conviction on Circumstantial Evidence

Cr. A. 543/79
NAGAR *et al.* v. STATE OF ISRAEL
(1981) 35(1) *P.D.* 113, 154, 163-170

A majority in the District Court convicted the appellants of the murder of one Yosef Arbiv, although his body was not found. The Court relied on the evidence of the principal witness, which was corroborated to some extent, and according to which the appellants separately confessed to the murder though each attributed it to the other of them. The judges held that they would have convicted the appellants even without such confessions because of circumstantial evidence. The judge in the minority held that it had not been proved beyond all reasonable doubt that the appellants had committed the murder since no credibility was to be given to the principal witness. The central question in the appeal was whether the conviction could stand in the absence of the body of the victim and in reliance on the confessions made out of court and on circumstantial evidence.

Elon J.: Opinions in various legal systems are divided as to whether a person can be convicted by a confession made outside court when there is no independent evidence, in addition to the confession, of the existence of the *corpus delicti*, i.e., proof of the occurrence of the event — here the death of a man — effected by criminal conduct and not by natural causes. This Court has held that when there is such a confession, no such proof is needed and some minor corroboration is sufficient (*C.A.* 290/59 *A.* v. *Attorney-General* (1960) 14 *P.D.* 1489, 1496). Later I shall have something to say about that. No one disputes that failing a confession from

that what the deceased wrote down was the truth." In modern terminology, there must be some "corroboration" from elsewhere as to the veracity of the admission found in the deceased's papers. That is what Sema to *Hoshen Mishpat* 108:27 indeed observes.

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the accused, the prosecution must first prove the existence of the *corpus delicti*, and before everything else in a charge of murder, the death of the victim. Of the three elements of murder mentioned above—death of the victim, in consequence of criminal conduct, and identification of the accused—the first two lead to the very existence of a criminal offence, and in the absence of either of them there is no such offence at all. Of these two elements, in the nature of things, proof of the first—the actual death—calls for the strongest and most reliable evidence, since without it the elementary factual basis of murder, the deprivation of human life, is lacking. For this reason, stress was laid in the past, as Shamgar J. has pointed out, on finding the body or upon direct evidence of the victim's death, in case at some future date "the victim arrives on his own feet" (*Baba Kamma* 74b; *Keritut* 24a) and the fatal error in convicting the accused becomes apparent...

The path pursued by Jewish law in the present regard is most interesting and instructive. In *Halihal* v. *State of Israel* (1969) 23(1) *P.D.* 733, the late Silberg J. quoted the statement of R. Tarphon and R. Akiva: "Had we been members of the Sanhedrin, no one would ever have been executed" (*M. Makkot* 1:10). The *Talmud* (*Makkot* 7a) explains:

> How would they have proceeded? Both R. Yohanan and R. Elazar suggested that the witnesses would be asked, 'Did you see whether the victim was fatally sick or perfectly healthy?' R. Ashi said that if the reply was that he was perfectly healthy, they would be asked, 'Perhaps the weapon penetrated an internal lesion, (and the victim would have died in any event)?'

Silberg J. cites this view which would acquit an accused in mere reliance on the remote and rare possibility that his deed did not cause the victim's death, as against the usual view taken in modern case law:

> Since judicial proceedings are necessary to punish criminals, it is essential to ignore remote circumstances, i.e. extraordinary events far removed from reality, although this may lead to a miscarriage of justice. That is to say, the legislature perceived the risk, but found it unavoidable, since otherwise judicial requirements would never be satisfied, and necessity should not be denigrated (*Halihal*, as above, at 741).

Nevertheless, the extreme view of R. Tarphon and R. Akiva was disputed, even by their contemporaries. R. Shimon b. Gamliel, the President, reacted caustically: "And they would also multiply the shedding of blood" (*M. Makkot* 7a), since, according to Rashi, people would not go in fear of the law (see also *Tosafot* to *M. Makkot* 7a). Yet it is true that with regard to the means of proving the facts of a case, whether or not A stabbed B

with a sword, Jewish law was careful to insist on direct evidence. This requirement is explained clearly by Maimonides (*Sefer haMitzvot*, Negative Commandment 290) as follows:

> The caution against carrying out punishment on very strong and even almost certain conjecture—such as arises where one pursues another to kill him and the latter seeks refuge in a house and is followed by the former and then upon entering we find the pursued slain or in the throes of death with the pursuer standing over him, sword in hand, and both covered in blood—even in such a case the Sanhedrin would not order the execution of the accused since there were no witnesses who saw the killing...
>
> Do not find this difficult and do not think that it is a miscarriage of justice—of things that are possible, some are very possible and some not, and others lie in between. The "possible" is extensive in range. Had the *Torah* permitted punishment to be exacted on a very strong possibility alone, which the actual circumstances render likely, as in the example I have mentioned, we would impose punishment for what is more remote and still more remote, until a person might wrongfully be put to death on some slight conjecture of the judge. Accordingly the Supreme Being closed this avenue and commanded that no punishment should be inflicted unless two witnesses have testified clearly to the act beyond all doubt and admitting of no other explanation. If punishment is not imposed on the strongest conjecture, all that will happen is that the guilty person will die a natural death. If, however, it is imposed on the basis of conjecture and imagination, an innocent person may sometimes be deprived of life. It is better and more desirable that a thousand wrongdoers should go free than that one innocent person ever be killed.

...On this last *dictum*, see Glanville Williams, *Proof of Guilt* (1963) 186 ff.

Towards the close of the Mishnaic period a principle was laid down that had long before been applied (see the story related to Shimon b. Shetah in *Sifre* to *Deut., Ki Tetze* 221). The principle made a substantive change in Jewish criminal law with regard to both punishment and procedure.

> Eliezer b. Ya'akov said, "I heard that even without Scriptural authority the court administers flogging and other penalties, not in order to transgress the words of the *Torah* but in order to make a fence around it" (*Yevamot* 90b; *Sanhedrin* 46a; see *Y. Hagigah* 2:2 for a slightly different version).

According to this principle, a court may render judgment, not in accordance with the *Torah*, over the entire field of penal law and criminal procedure if circumstances require it in a given situation, so as to set up a barrier to wrongdoing and to criminals. To this end the courts and public leaders exercised their authority to enact, via broad legislation, regulations in every generation and at all times for a variety of religious, social, economic and moral reasons. These regulations were formally said to be instituted as "emergency legislation" because "the times necessitated it" and the like. They became in fact a substantive part of Jewish law generally, and are cited and discussed in halakhic literature, particularly the *responsa* (see M. Elon, *Jewish Law*, Part 2, 421-25, 566-69. Much material is to be found in S. Assaf, *Criminal Law After the Close of the Talmud*; M. Ginzburg, *Law for Israel*, and Y. Bazak, "The Taking of Life and its Law in the *Responsa*" *Proceedings of the Fifth World Congress on the Science of Judaism* (1969) 37). I permit myself to quote what I wrote in summary elsewhere (*op. cit.* 424-25):

> This far-reaching legislative principle in penal law and criminal procedure served at all times as a very valuable and important tool in regulating Jewish social life, and by virtue thereof there developed in Jewish law —as far as the judicial autonomy granted to various Jewish centres made it possible — an extensive range of legislation in matters of penal law and procedures. This legislation provided wide authority in determining penalties and regulating procedure appropriate for contemporary social needs but without being unnecessarily oppressive. Maimonides, after setting out this wide authority of the Sages of the *halakhah* in matters of criminal law, sums up the duty which its exercise entails: "All these things are according to what the judge thinks proper and required by necessity; in everything he should act for the sake of Heaven and let him not treat lightly the honour of human beings" (*M.T. Sanhedrin* 24:10).

An instructive development occurred in the modes of proof under criminal law, which is the subject under discussion here. Some of the leading precedents which concern the present case may be examined.

(a) At the end of the thirteenth century, Rashba in Spain dealt with the question of receiving evidence from relatives, from a wife and a minor, as well as with self-incrimination (*Resp. Rashba* 4:311); the inquiry was as follows:

> The public has agreed to appoint us to act as judges in criminal matters and we have sworn to do so. The (relevant) *takkanah* [regulation] states that we shall have authority from the state to chastise and punish physically and by fine as we see fit. Inform us, if witnesses

> who are relatives of A testify that he had transgressed his oath, are they fit to be relied upon, or if a woman and minor relate something in good faith, may we chastise A? So also, if the witnesses or one of them is a relative and we find grounds for thinking that they are telling the truth, may we act accordingly although the evidence is not clear?

Rashba's reply was clear and unequivocal:

> These things seem to me very simple. You may do whatever you find proper. What you have said (about witnesses who are relatives and so on) applies only to a court that adjudicates according to the *Torah*—such as the Sanhedrin or the like. One, however, that is appointed by communal *takkanah* does not deal with matters according to the law actually written in the *Torah* but according to what is required at the moment by leave of the state. If that were not so...no person would be punished on his evidence since under law no one can incriminate himself....All these matters arise only where the court acts according to the *Torah*....Thus it has been said that flogging and other punishments may be administered not in accordance with the law, not to transgress the words of the *Torah*, but to make a fence around it....That is clear for us in every place where a *takkanah* has been made in this respect.

(b) In the fourteenth century, a *responsum* of Ribash...dealt with a conviction for murder. Ribash held that the conviction would stand on circumstantial evidence if there is no doubt about the death of the victim, provided "the evidence is strong and there are grounds supporting its truth" (*Resp. Ribash* 251).

> You already know that, where the state has permitted it, capital offences at the present time are not dealt with in accordance with Jewish law, since Jewish law relating to capital offences has long been abolished (see on this Elon, *op. cit.*, vol. 1, pp. 7-8 note 10), but because the situation requires it, the court would administer flogging and punishments not in accordance with the *Torah*, in order to make a barrier around the *Torah*....If, regarding other offences, people were executed not in accordance with the law because the times made that requisite, then needless to say the same applied to the spilling of blood, where the rabbis were very severe....If you find it proper to sentence a person to death because he acted abhorrently and defiantly and with malice, such as by ambushing the victim at night or being armed during the daytime and waiting to attack the victim in a public place in the sight of leading citizens, you have authority to do so, as Maimonides wrote [*M.T. Rotze'ah* 2:4-5] even where there are no witnesses but only strong evidence and indications for what actually happened.

(c) As the *responsum* of Rashba cited above indicates, at this new stage in its development Jewish law adopted the view that a person may be convicted by self-incrimination. This conflicted with the attitude originally taken by Jewish law, the confession of the accused not being admissible to convict him under the rule that a person is "a relative to himself and therefore no man can render himself a wrongdoer" (*Yevamot* 25b) as we have seen from the passage from Maimonides cited above. We may learn something about the background of this innovation in the Jewish law of evidence from a *responsum* written by Ribash to the communal leaders of Teruel in Aragon, where there was a large Jewish community with judicial autonomy in many areas of criminal law. The *responsum* concerned a Jew suspected of being an informer who was put on trial before the local Jewish court (*Resp. Ribash* 234):

> Nowadays, a Jewish court is permitted to deal with capital cases only under royal authorization and the judgment must be verified before the local non-Jewish judges so that they do not suspect us of giving unjust and illegal verdicts. Moreover, at the present time capital offences are dealt with according to the exigencies of the hour, such jurisdiction having been abolished among us, and flogging and other penalties are imposed not under law but when the times require it, even without complete evidence, as long as clear grounds exist for believing that an offence has been committed. To this end, it is usual to accept confessions made by the accused even in capital cases so that the issue is also clarified out of his own mouth.

Where no other evidence exists to convict a person, a confession alone is not enough. Some ground must, as Ribash says, be available to support the confession, a rule which reminds us of the requirement of corroboration that has been introduced into Israeli case law in *Cr.A.* 3/49 *Andlarski* v. *Attorney-General* (1949) 2 *P.D.* 589 (see *Cr.A.* 290/59 *A* v. *Attorney-General*, below).

(d) Jewish scholars attached importance to the fact that the secular authorities had conferred criminal jurisdiction upon Jewish courts, and regarded that as a vital factor for maintaining good public order in the Jewish community, for which purpose they initiated far-reaching regulations in the law of criminal procedure and evidence. Thus we hear from R. Yehudah b. Asher in fourteenth century Spain that—

> ...it is well-known that from the time that the Sanhedrin was removed from the Chamber of Hewn Stone, the law relating to capital offences has been set aside among us Jews and all that remains for us is to circumscribe blatant violations. Blessed be God for putting into the

> minds of the rulers of this country the thought of empowering Jews to deal with and eradicate evil-doers. Otherwise Jews would not be able to maintain themselves in this country....The laws which we apply in capital offences are not at all in accordance with the *Torah* (*Resp. Zikhron Yehudah* 58).

What are these laws by which capital offences are judged? An answer is given by another *responsum* sent to the Jewish Court in Cordova regarding a person charged with attacking and grievously wounding a member of that Court (*ibid.* 79):

> It is well-known that it is not possible to set out in detail in the texts all the innumerable new situations that occur today. For this reason our Sages provided us with one rule that covers many matters, and enabled the court to set a boundary at any time as necessity might require....Even if there are no witnesses that he attacked the judge, persistent report has it that he did so. Further, there are grounds and indirect testimony to that effect, as well as evidence that he was lying in wait at the place where the judge was attacked and his face was masked so that he should not be recognised. Moreover, after striking the judge he ran away and was not seen again in the town....It seems to me that he may properly be punished as if there were witnesses of his attacking the judge, since the punishment is intended to contain such lawlessness and every judge must be able to adjudicate truthfully without fear of the parties....Every law may be applied and punishment inflicted by a court as it deems fit in times of emergency, provided that the intention is solely to pursue justice and the truth.

(e) Not in all periods of the Diaspora was such a wide autonomy in criminal law enjoyed by Jews. The situation varied even in the same place from age to age (Elon, *op. cit.*, Part I, 11 notes 23-25, and 36 note 112). In Spain, as we have seen, Jews did enjoy this autonomy—even to the extent of imposing the death penalty—for considerable periods of time. A like autonomy was at one time to be found in Poland as well, where we witness changes in the law of evidence in Jewish criminal law. Thus, for example, we read in a *responsum* by R. Meir of Lublin in the sixteenth century (*Resp. Maharam miLublin*, 138):

> I have received a judgment which you gave about a strange and fearful act, the slaying of a person by a tyrannical Jew, as mentioned in the evidence which you...sent me. Since the evidence of one witness is hearsay, it would appear that the evil act was widely known....The basis on which the authorities decide that today also the court has the power to impose punishment, whether corporal or capital, rests on what

> is said in the *Talmud* [*Sanhedrin* 46a and *Yevamot* 90b]....Rabbenu Yeruham has written that all this applies even outside the land of Israel and without formal warning and the like, and even in the absence of clear testimony. What a judge deems requisite he may do [see *Resp. Eitan haEzrahi* 43-44 by R. Avraham Rapaport, *responsum* No. 45 *loc. cit.* by R. Meir bar Avraham Zak].

(f) These rules were expressed concisely in the later literature. *Tur. Hoshen Mishpat* 2 devotes one section and part of another (425) to criminal jurisdiction in his day, observing *inter alia*:

> Where the court sees that the exigencies require it because people are lawless, it may impose the death penalty and fines and other forms of punishment....Even, it seems, when no complete evidence exists, as required when penal matters are dealt with, but there are grounds, even if slight, to support judgment...provided that all is done for the sake of Heaven and human honor is not treated lightly.

R. Yosef Karo in *Shulhan Arukh, Hoshen Mishpat* 2:1 is even briefer regarding modes of proof (see also 425:1):

> Every court that sees people acting lawlessly (Rema adds: "...and the exigencies of the hour call for it") may issue the death sentence or impose fines and other penalties even if complete evidence is not available.

The brevity with which *Tur* and *Shulhan Arukh* deal with criminal law, substantive and procedural, is very patent, in contrast to the detailed manner in which these two authorities deal with civil law. One may reasonably assume that the narrow autonomy in criminal jurisdiction at the time contributed in part to that, as against the much wider civil and administrative autonomy enjoyed in different parts of the Diaspora. A further factor may lie in the fact that lawlessness was not very widespread in the Jewish communities, although, as we have seen, there were times when this was not so.

To sum up: over long periods of time and in changing circumstances, Jewish law could not meet the requirement that "no punishment may be imposed unless witnesses are available to testify clearly to the act beyond all doubt and admitting of no other explanation" (Maimonides, *Sefer haMitzvot*, cited above). In times of emergency it might be necessary to pronounce sentence based on circumstantial evidence, "conjecture and probability". In order to dispel the fear that a person might be condemned by reason of some easy conjecture of the court, it was repeatedly reiterated that the evidence, even if not direct and clear, must be such that it appears to the court to reflect the truth (*Resp. Rashba* attributed to Nahmanides

279) and judgment was to be given only when the situation was confirmed, when "the intention is solely to pursue justice and the truth." Thus Jewish law admitted the evidence of relatives and the legally incompetent as well as confessions, if there was some supporting ground, and circumstantial evidence in murder cases when no doubt existed about the death of the victim.

Cr.C. 683/79

STATE OF ISRAEL v. PRESSMAN *et al.*

(1982) 2 *P.M.* 98, 117

In the course of dealing with the charges against the accused, the Court was asked to consider three specific issues: (a) the interpretation of the laws concerning the regulation of foreign currency with respect to the element of "aggravating circumstances" in the offences of possessing gold and dealing in it without a permit; (b) the significance of the refusal of the accused to provide the Inspector with information and documents to which he is legally entitled on the basis of their right to avoid incriminating themselves; (c) the significance of the term "breach of faith" in sec. 248 of the Penal Law 1977.

Ilan J.: In fact, the Supreme court has already addressed itself to the question of whether protection against self-incrimination is a basic right in the State of Israel as well. In *Cr.A.* 242/63 *Kiryati* v. *Attorney General* (1964) 18(3) *P.D.* 477 at p. 497, Halevi J. made the following statement, after having observed that the right to avoid self-incrimination is one of the sacred rights of the Common law:

> With the adoption of the "essence of the Common law" in our country by way of art. 46 of the Palestine Order in Council, and sec. 11 of the Law and Administration Ordinance, 1948, this principle of Jewish law has been restored to the rock from which it was hewn.

In order to understand this extract, it is necessary to recall that it begins with a citation from the 1820 case of *Ex Parte Cossens* in which Lord Eldon declared that the right to avoid self-incrimination "is one of the most sacred legal rights in this country." The Honorable Judge then proceeded to observe that the origin of the Common law principle lies in the Jewish legal maxim: "A man may not declare himself guilty", which is exactly paralleled in the Latin: "*nemo tenatur se ipsum accusare.*" Finally, he concludes that the principle has returned to its roots, although he also takes care to distinguish between the Hebrew source according to which a

man may not incriminate himself, and its Common law form in which a man is not obliged to do so.

Cr. A. 90/81
GOLDSTEIN v. STATE OF ISRAEL
(1982) 36(1) *P.D.* 610, 612

Shilo J.: Early Jewish law refused to convict without direct evidence and refrained from deciding a case on "conjecture", i.e., on circumstantial evidence. In distinguishing between direct evidence and "conjecture" [probability], the *Talmud* (*Sanhedrin* 37b) gives a clear example of circumstantial evidence which, although it would to all appearances lead necessarily to a conviction, is without foundation because of the doubt that attaches to it:

> What is meant by "based on conjecture"? The judge says to the witnesses: Perhaps you saw him running after his neighbour into the ruins and you pursued him and found him sword in hand with blood dripping from it, whilst the murdered man was writhing. If that is what you saw, you saw nothing.

2. No Conviction on Probability

See: HAREL v. GILADI *et al.*, Part 4, Regulation of the Courts, p. 333.

Cr.A. 360/80
STATE OF ISRAEL v. AFANGAR
(1981) 35(1) *P.D.* 228, 234

The respondent was found guilty by the District Court of the offence of acting as an agent for the purpose of dealing in drugs under sec. 14 of the Dangerous Drugs Ordinance [Consolidated Version] 1973. The State appealed on the grounds that the respondent ought to have been convicted of trafficking in drugs, and that the sentence was too lenient. The respondent appealed against the severity of his sentence.

Elon J.: The principle in our legal system — as formulated by the Sages concerning the temptation of Eve by the primordial serpent—is, "When the words of the teacher and those of the pupil [are contradictory], whose words should be heeded: surely the teacher's!" (*Sanhedrin* 29a). The very same expression is used in order to establish criminal responsibility of an agent who commits an offence at the behest of his principal (*Kiddushin* 42b). When the words of the law and those of a seducer are contradictory, those of the law should be heeded, and the person led astray cannot free himself of criminal responsibility with the primordial claim, "Someone seduced me and as a result, I sinned."

Cr.A. 88/86

ZUCKERMAN v. STATE OF ISRAEL

(1986) 40(4) *P.D.* 209, 211

The appeal was against the severity of the sentence imposed upon the appellant for the offences of accepting bribes, supplying forged documents, theft by a government employee, forgery of documents, receiving property obtained illegally and breach of trust. The appellant's deeds were exposed on television and were the subject of a programme. The grounds for the appeal were principally the shame, disgrace and suffering endured by the appellant and his family as a result of the programme.

Elon J.: Now, whatever the case may be regarding the merits or demerits of investigation by television, it is evident that the programme caused an almost unbearable amount of suffering to the appellant, his wife, children and whole family as a result of the shame and disgrace to which he was subjected as a result of the broadcast. In the appellant's own words —"from the day of the broadcast...I, my wife and my two small children have been constantly hounded and have been mentally ravaged as a result. Wherever we go there is an accusing finger pointed at us." Such suffering is an extremely severe punishment—"a punishment which is not written in any law" (as stated by Witkon J. in the context of the undue protraction of judicial proceedings in *Cr.A.* 125/74 *Mirom International Trading Co. et al.* v. *State of Israel* (1976) 30(1) *P.D.* 57, 152) for the offender, his wife, and most seriously, for their children. There is surely no greater torment than that undergone by children whose companions taunt them in the wake of the exposure of their father's crime. The Sages took pains to administer the following warning to a judge passing sentence on an accused person: "Do not let the dignity of your fellow man be a small thing in your

eyes..." (*M.T. Sanhedrin* 24:10); and the cardinal principle in the *Torah*, "...And you shall love your neighbour as yourself..." (*Lev.* 19:18), was also applied by the Sages to convicted criminals. Care must be taken not to disgrace a criminal sentenced to death, and his execution must be carried out in a dignified fashion (*Sanhedrin* 45a). The fundamental rule in Jewish penal theory is that "once punishment has been administered, the offender becomes one of your brethren" (*M. Makkot* 3:15, and see at length *C.A.* 4/82 *State of Israel* v. *Tamir* (1983) 37(3) *P.D.* 201). All this must be taken into account when considering the degree of punishment imposed upon the criminal.

3. Acquittal in Cases of Doubt

Cr. A. 112/69
HALIHAL v. STATE OF ISRAEL
(1969) 23(1) *P.D.* 733, 741

The appellant was convicted of murder on the evidence of a ballistics expert. On appeal, the qualifications of this expert and the results of his tests were challenged.

Silberg D.P.: My learned friend criticizes the learned judges for applying to the present case an observation of Glanville Williams quoted above. My friend says that this observation is not relevant.

> He [Williams] proceeds on the assumption that the defendant's guilt has already been abundantly proved—for example, that the defendant fired the shots which brought the death of the victim. After such proof there is no need to go much further and surmise whether the victim died from heart failure a moment before the bullet penetrated his heart.

For all the high regard I have for my learned friend, it seems to me that Williams did not have in mind a case where it had already been proved that it was the defendant who fired the shots that led to the victim's death. The English scholar is there expressing the view that it is not for the court to think of some remote and exceptional event which, if indeed it occurred, is reconcilable with the innocence of the defendant, when the evidence given in the case, which the court believed, leads to the much more reasonable

conclusion that the defendant is not innocent. Here Williams in fact differs from the attitude taken by R. Tarphon and R. Akiva who said that had they been members of the Sanhedrin no person would be executed (*M. Makkot* 7a). The *Gemara* says about this:

> What would they have done? R. Yohanan and R. Elazar both suggested that the witnesses might be asked "Did you notice whether the victim was fatally sick or in perfect health?" R. Ashi went on to say that should the reply be that he was in perfect health, the witnesses might be asked whether the weapon merely severed an already existing internal lesion (from which he might in any event have died)?

The reason why Williams "differs" from the *Tanna'im* (sages predating redaction of the *Mishnah*) is that notwithstanding that such rare events may at times occur, and to ignore them could on rare occasion involve a miscarriage of justice, this possibility does not counterbalance judicial requirements, and the risk must be taken. That is to say, contrary to the views of the *Tanna'im* who think that a defendant is to go free whenever the least doubt of his guilt exists, Williams is of the opinion — and this is the view reflected in all modern case law — that because of judicial requirements to punish wrongdoers, it is essential to disregard "remote circumstances", events that are exceptional and far from reality as such, although that might well involve a miscarriage of justice. The legislature, that is to say, had the risk in mind but found it necessary to ignore it since otherwise judicial needs would never be satisfied.

See: KOBI v. STATE OF ISRAEL, Part 6, Penal Law, p. 433.

4. Conviction on Confession

Cr. A. 290/59

A v. ATTORNEY-GENERAL

(1960) 14 *P.D.* 1489, 1494-1495

This was an appeal against conviction and sentence for an offence under the Official Secrets Ordinance and the Prevention of Infiltration (Offences and Jurisdiction) Law, 1954.

Landau J.: In order to understand the problem that faces us, we might do well to discover the reasoning of those who follow a "strict" line and are not prepared to convict a person simply on his confession made outside court. The solution according to Willis in his classic work *Circumstantial Evidence* (6th ed. 109) is as follows:

> Judicial history presents abundant warning of the danger of placing implicit dependence upon confession even where exempt from all suspicion of coercion, physical or moral, or other sinister influence. How greatly must such danger be aggravated where confession constitutes the only evidence of the fact that a crime had been committed; and how incalculably greater in such cases is the necessity for the most rigorous scrutiny of all collateral circumstances, which may induce a false confession! The agonies of torture, the dread of their infliction, the hope of escaping the rigours of slavery or the hardships of military service, a weariness of existence, self-delusion, the desire to shield a guilty relative or friend from the penalties of justice (Chitty's *Criminal Law*, vol. i., p. 85), the impulses of despair from the pressure of strong and apparently incontrovertible presumptions of guilt, the chance of escaping unmerited punishment and disgrace, the hope of pardon, even the love of notoriety—these and numerous other inducements have not infrequently operated to produce unfounded confessions of guilt.

Fear of false confessions stems, therefore, from the possibility of external physical and moral pressure exercised by others, as well as internal factors that operate in the mind of the person making the confession without any undue external pressure. As to the internal factors, Silberg J. has drawn my attention to Maimonides' description of "mental fatigue":

> The Sanhedrin does not sentence to death or impose flagellation on one who admits an offence, in case his mind is deranged over the matter, in case his intense anxieties in waiting for death when the sword strikes, releasing him from disgrace, may bring him to admit something he did not do (*M.T. Sanhedrin* 18:6).

Cr. A. 242/63

KIRYATI v. ATTORNEY-GENERAL

(1964) 18(3) *P.D.* 477, 497

This appeal involved conviction for offences under the Income Tax Ordinance.

Halevi J.: The principle of immunity against self-incrimination—"one of the most sacred principles in the law of this country" according to Lord Eldon in *Re Worral. Ex parte Cossens* (1820) *Buck. 531, 540 L.C.*—a principle of the Common law which has been raised to the rank of a constitutional rule of the Fifth Amendment...has its source, it appears to me, in Jewish law in the form set by the Sages—"No man can render himself a wrongdoer" (*Sanhedrin* 9b). This source of the rule is attested to by the Latin maxim *nemo tenetur se ipsum (prodere) accusare*, which is a literal translation of the Hebrew. It is also attested to by the writings of the Church Fathers (see the quotations in Riesenfeld, "Law Making and Legislative Precedent in American Legal History", 33 *Minn. L.R.* (1949) 103, 118, reproduced in McCormick, *Law of Evidence* (1954) 253 notes 9-10; see also as regards the history of the principle in England, Wigmore, *Evidence* (McNaughton rev.) (1961) para. 2250). With the reception of the substance of the Common law in this country, through art. 46 of the Palestine Order in Council, and sec. 11 of the Law and Administration Ordinance of 1948, the principle returned to its original home.

One must indeed distinguish carefully between the wide scope of the principle in Jewish law, under which no one can incriminate himself by confession, and its more limited meaning in the Common law, under which no person is obliged to incriminate himself. "Everyone is treated as a relative to himself and no man can render himself a wrongdoer" (*Sanhedrin* 9b). As Rashi explains, his own evidence cannot incriminate him since such evidence is disqualified.

See: BAHAMOTZKY v. STATE OF ISRAEL, Part 6, Penal Law, p. 486.

Cr. A. 774/78

LEVI v. STATE OF ISRAEL

(1979) 33(3) *P.D.* 228, 240, 241

The appellant was convicted of murder by a majority decision. The minority view was that he should be convicted of manslaughter.

Cohn J.: There was no medical evidence before the court to negate the free will of the mentally sick person. The circumstances that were in evidence...gave rise to no fear of "external pressure" which might have negated his desire to make the confession he did. In that event, the question of the authenticity of the confession would arise, which, as my learned friend pointed out, is a question about the evidentiary weight of the confession. Just as, regarding the testimony of a mentally sick person, the court has judicial notice that mental sickness may sometimes lead to delusions, hallucinations and imaginings completely divorced from reality, so also as regards the confession of a mentally sick person the court has judicial notice that some mental sickness may lead to delusions of confession, self-torment over a wrong, which issue from hidden and impelling feelings of guilt that have nothing to do with the offence involved (see, e.g. Noyes, *Modern Clinical Psychiatry* (4th ed.) 106).

This kind of pathological phenomenon was already known to our Master, Maimonides, who wrote:

> It is a Scriptural command that a court shall not sentence a person to death or order flagellation on his own admission...in case his mind is deranged over the matter, in case his intense anxieties in waiting for death when the sword strikes...may bring him to admit something that he did not do (*M.T. Sanhedrin* 18:6).

If according to the Torah, the confession of a person is disqualified as evidence against himself for fear that he is mentally sick, no wonder that a mentally sick person is incompetent to act as a witness under the Torah (*M.T. Edut* 9:9). There the manner of seeking out the truth differs from our law of evidence mainly in that before disqualifying any evidence because it is false, any witness who is presumed to be lying is first disqualified, either because he is a wrongdoer who is likely to lie deliberately or because he is mentally sick and might lie out of delusions.

See: NAGAR *et al.* v. STATE OF ISRAEL, p. 396.

Cr.C. 683/79

STATE OF ISRAEL v. PRESSMAN *et al.*

1982(2) *P.M.* 98, 117

In the course of dealing with the charges against the accused, the Court was asked to consider three specific issues: (a) the interpretation of the laws concerning the regulation of foreign currency with respect to the element of "aggravating circumstances" in the offences of possessing gold and dealing in it without a permit; (b) the significance of the refusal of the accused to provide the Inspector with information and documents to which he is legally entitled on the basis of their right to avoid incriminating themselves; (c) the significance of the term "breach of faith" in sec. 248 of the Penal Law 1977.

Ilan J.: In fact, the Supreme court has already addressed itself to the question of whether protection against self-incrimination is a basic right in the State of Israel as well. In *Cr.A.* 242/63 *Kiryati* v. *Attorney General* (1964) 18(3) *P.D.* 477 at p. 497, Halevi J. made the following statement, after having observed that the right to avoid self-incrimination is one of the sacred rights of the Common law:

> With the adoption of the "essence of the Common law" in our country by way of art. 46 of the Palestine Order in Council, and sec. 11 of the Law and Administration Ordinance, 1948, this principle of Jewish law has been restored to the rock from which it was hewn.

In order to understand this extract, it is necessary to recall that it begins with a citation from the 1820 case of *Ex Parte Cossens* in which Lord Eldon declared that the right to avoid self-incrimination "is one of the most sacred legal rights in this country." The Honorable Judge then proceeded to observe that the origin of the Common law principle lies in the Jewish legal maxim: "A man may not declare himself guilty", which is exactly paralleled in the Latin: "*nemo tenatur se ipsum accusare.*" Finally, he concludes that the principle has returned to its roots, although he also takes care to distinguish between the Hebrew source according to which a man may not incriminate himself, and its Common law form in which a man is not obliged to do so.

Cr. A. 556/80

ALI *et al.* v. STATE OF ISRAEL

(1983) 37(3) *P.D.* 169, 184, 186-188

This was an appeal by some of the appellants against conviction for murder and by another appellant against sentence for attempted robbery. This was also a counter-appeal by the State against the acquittal of the latter for murder.

Elon J.: This Court has adopted in its decisions the leading principle that no person is to be convicted solely on confessions made by him outside court, even when properly made without external pressure. Foremost of our fears is that because of the "internal pressure" besetting the defendant, he believes that he has committed an offence which in fact another had committed. This fear has been well expressed by Maimonides (*M.T. Sanhedrin* 18:6): "Perhaps because out of the pangs of desperation they contemplate killing themselves and admit to something they do not do..."

In view of the foregoing it is in my opinion right that the policy of relying on confessions should be different from that adopted lately by the legislature, which has been lenient with respect to statements made outside of court in certain circumstances (see sec. 10 of the Evidence Ordinance (New Version)). There may be some good reason for that, having regard to the growing phenomenon of witnesses being terrorized to go back on statements they have made to the police. But such reason cannot prevail against the necessary requirement of some supporting evidence in the case of a confession by an accused person. On the contrary...the growth of crime and of criminals who forcefully dominate their weaker associates calls for particular caution when relying solely on the confession of an accused person, even when made in court. In this context, we have adopted the great rule that "it is better and more desirable that a thousand sinners go free than to punish one innocent person" (Maimonides, *Sefer haMitzvot*, Negative Commandment 290). Moreover, to punish the innocent on their own admission may lead to the acquittal of the guilty who evade their deserts and continue to endanger the public good and our security. It seems that the growth of violence among dangerous organised gangs who cast fear not only on people in general but also on their "petty" collaborators who take upon themselves the offences committed by the "bosses", requires us to proceed with the utmost caution before convicting anyone on his own confession alone. I would therefore advise the legislature to consider supplementing the existing law by providing that even when a confession is made in court, conviction should not rest on that alone unless there is something to strengthen and corroborate the confession.

It is instructive to note the position taken by Jewish law on this weighty matter. Jewish law, as we know, originally urged that the confession of the accused not be accepted, on the ground that "a man is a relative to himself and cannot (be a witness to) render himself a wrongdoer" (*Yevamot* 25b). Self-incrimination was in no way admissible, whether the confession was made outside or in court, and even when some support existed for it. Conviction could only occur on the evidence of witnesses. In the course of time, as social circumstances necessitated it, far-reaching changes were introduced to render proof in criminal matters easier. The evidence of witnesses who were strictly speaking disqualified was made valid, and circumstantial evidence was allowed if it was strong and significant (see *Cr.A.* 543/79 *Nagar* v. *State of Israel*, above, 163-170). Conviction could also stand on self-incrimination (*Res. Rashba* 4:311) although confession alone was not enough unless there was some ground that authenticated the confession in the absence of the clear evidence (*Resp. Ribash* 234)....This course would appear to be desirable both in respect of a defendant who is not convicted if he is innocent of wrong and as regards the apprehension of the truly guilty so that they do not evade due conviction.

B. Extent of Proof

1. Intimidation and Guilt

Cr.A. 19/50

DANOCH, AFANGER, ZUCKERMAN v. ATTORNEY GENERAL

(1951) 5 *P.D.* 81, 84, 88-89, 91

Assaf J.: The present case is an appeal against the decision of the Tel Aviv District Court, given on 7.2.50, according to which the appellant Yehoshua ben Yichyeh Danoch was found guilty of premeditated murder and was sentenced to death under sec. 214(b) of the Criminal Code Ordinance, 1936.

The facts are as follows: The accused, Danoch, and the murdered man, Massaoud Suissa, dealt in black market meat. The deceased was suspected of having links with the police, and was paid by the butchers to keep silent. Relations between the accused and the deceased were extremely strained. A few days prior to the murder, the bad feeling between the two grew more intense as the result of a police raid in the Yemenite Vineyard district and their confiscation of contraband meat. The accused suspected the deceased of having tipped the police off, and subsequent to the police confiscating more meat, the accused charged the deceased with informing and said to him: "You have fixed me but I will also fix you." According to another version, he said to him: "I will fix you by the evening." In his testimony in Court, the accused admitted to the first version and denied the second. That evening, the eve of the [Passover] festival...the deceased was shot as he was leaving his home. He was hit by five or six bullets and died of his wounds about half an hour later.

The decision in *Cr.A.* 203/45 *Akileh* v. *Attorney- General* (46 *A.L.R.* 16) is also relevant here. In that case, two people were accused of armed robbery, and only one was found guilty. The decision was appealed, and the judge held that two people had indeed taken part in the robbery, and the sole question was one of identification. One witness had identified both accused, but the judge accepted his testimony regarding only one of them...

In that case, the witness saw only one of the accused, whose mask had slipped off his face during the robbery. The other one had his mask on all the time and the witness only saw part of his face. Such partial testimony is invalid, and in the case of witnesses testifying with regard to the death of a man whose wife wishes to remarry, the Sages held that "no testimony may be accepted unless it includes the whole face together with the nose. Identification [of the corpse] based upon bodily marks and clothing is insufficient." The *halakhah* was decided accordingly (*M.T. Gerushin* 13:1; *Even haEzer* 17:24), even though there is a general tendency to rule leniently in order to prevent a woman from remaining an *agunah* (abandoned wife). The present circumstances are different. Here, Nissim testified that he saw the three accused, Yehoshua, Shimshon and Najar walking in the direction of the home of the deceased, carrying guns in their hands. A few minutes passed, shots were heard, and then he maintains that he saw the three accused running away in the opposite direction. The three accused were therefore seen together on two separate occasions. There is no uncertainty in the testimony regarding Gedalia Najar. That testimony is as certain as the evidence concerning Yehoshua and his son, Shimshon...

Having reached the conclusion that Yehoshua ought not to be found guilty on the basis of the testimony of Nissim Suissa, there is no need to examine Simha Suissa's testimony in relation to which the Court

had expressed doubts concerning its veracity. As a result, both Nissim's testimony and its supporting evidence become legally irrelevant. The quarrel between Yehoshua and Massaoud, and Yehoshua's threat that he would "fix" Massaoud are central to the decision of the District Court, and the testimony regarding the quarrel between Yehoshua and Massaoud is also cited in the conclusion as grounds for the guilty verdict. However, the threat alone is not sufficient for a guilty verdict. The *Talmud* recounts that a certain man grabbed an axe and said: I will go and cut down so-and-so's date tree, and some time later, the tree was found cut down and lying on the ground. The *halakhah* in such a case is that a person may very well make a threat and not carry it out (*Shevuot* 46a). It is also possible that the quarrel and the threat, coupled with Nissim's awareness that notwithstanding his efforts, relations between the two men, Yehoshua and Massaoud, remained strained, caused him to testify that the appellant, his son and son-in-law had gone to murder his son, Massaoud. Nissim's evidence, therefore, is the lynchpin of the entire case, and if it is dismissed, then the entire case fails. In the light of all this, there is no need to express any opinion in relation to the appellant's alibi, a matter which caused much concern in the lower court. An alibi is only required when there is sufficient evidence to convict the accused: in the present case, Nissim Suissa's evidence is insufficient for this purpose.

2. Intimidation and Proof of Contemplating Offence

See: SUISSA v. ATTORNEY-GENERAL, Part 6, Penal Law, p. 440.

3. Extent of Proof in Cases of Unlawful Relations

See: BALILI v. STATE OF ISRAEL, Part 6, Penal Law, p. 455.

C. Identification

1. Voice

Cr. A. 87/53

EL-NABARI v. ATTORNEY-GENERAL

(1953) 7 *P.D.* 964, 965, 972

This was an appeal against a conviction for murder. The judgment was a majority judgment; the minority judge thought that the appellant should enjoy the benefit of the doubt and be acquitted.

Silberg J.: There is no doubt that the identity of a person can be established with the utmost certainty by the sound of his voice alone. It is widely known that one person can recognise and "identify" another by hearing his voice without seeing him at all and the first person has no fear that the voice which is known to him might "belong" to a third person. If, however, he wishes to explain expressly how he recognised and identified the other and what he said, we know from experience that he cannot do so at all or can do so only partially. The reason for this is that the qualities of a person's voice are, in the vast majority of instances, so individual, so unique, that the dictionary does not attribute to them any names or descriptions. This is the immediate, complete and absolute recognition which our sources call "the impression of the voice" (*Gittin* 23a).

Cr.A. 234/81

HARBON v. STATE OF ISRAEL

(1982) 36(1) *P.D.* 90, 98

This appeal involved the identification of the appellant by the sound of his voice.

Shilo J.: At times an impression is composed of features that come to us through more than one of our senses, which makes identification generally easier, but even in such a case the instinctive reaction is decisive. If we may perhaps mention the first case known to us in our history, in the meeting between Isaac and Jacob when the latter came to ask for the blessing of his father. Jacob was clothed in the garment of Esau to mislead his father and one can distinguish the double identification in Isaac's remarks—"The voice is the voice of Jacob but the hands are the hands of Esau." The identification by the voice was instructive and it was the correct identification but the imposture of covering Jacob's arms with the hairy garments of Esau misled blind Isaac. He felt the hairy garment on Jacob's arms and honestly believed that it was Esau, his eldest, who stood before him. Isaac's error was in putting aside the first instinctive identification. Isaac was also deceived by his sense of smell, because it is likely that the impression he received from the voice as opposed to that he obtained from his sense of touch left some doubt in his mind and he used a third sense, that of smell—"And the smell of my son is as the smell of the field" (*Gen.* 27:27).

2. Physical Features

See: DANOCH *et al.* v. ATTORNEY-GENERAL, p. 414.

3. Blood Tests

See: SHARON *et al.* v. LEVI, Part 7, Torts, p. 516.

4. Facial Resemblance

C.A. 407/60

A. v. B.

(1961) 15 *P.D.* 212, 216-219

In an action involving paternity, the respondent refused to take a blood test and the action was dismissed for want of evidence.

Silberg J.: The learned judge at the beginning of his judgment describes briefly, but with feeling and incisively, the tragic condition of the child. He cited *Eccles.* 4:1—"But I returned and considered all the oppressions that are done under the sun; and behold the tears of such as were oppressed and they had no comforter." I imagine that the learned judge had in mind not only that verse but also the comment in *Lev. Rabba*, 32:8, which applies the verse to parents and their pitiful children.

Certainly, the pain of the unfortunate child penetrates the heart. He was certainly oppressed, but preventing oppression should not entail further oppression, i.e., the attribution of lawful parenthood to one who is not his father. For that reason, the learned judge dismissed the mother's claim.

I came to that conclusion because I thought that the learned judge gave no credence at all to the appellant's evidence. Had I thought that the judge believed what she said or did not reject her words in entirety but dismissed her action for want of corroboration — necessary by virtue of sec. 6 of the Evidence Ordinance in respect of the sole evidence of a plaintiff when that is denied by the evidence of the defendant...had I thought so, I would remit the case to the lower court for the learned judge to examine carefully and decide upon the close physiognomical resemblance that exists, according to the appellant, between the child and the respondent. For if indeed the facial features of the child are so strikingly similar — as counsel submitted — to the respondent's features, I would have regarded that as corroboration of the mother's evidence. The *Talmud* (*Baba Metzia* 87a) relates:

> On the day that Abraham weaned his son Isaac, he made a great banquet, and all the peoples of the world derided him, saying, "Have you seen that old man and woman who brought a foundling from the street and now claim him as their son. And what is more, they make a great banquet to establish their claim". What did our father Abraham do? He went

> and invited all the men of the time, and our mother Sarah invited their wives and each brought her child with her but not the wetnurse. And a miracle happened to our mother Sarah...she suckled them all. Yet they still scoffed and said "Could Sarah give birth at the age of ninety? Could Abraham beget at the age of a hundred?" At once the features of Isaac's visage changed and became like Abraham's. Whereupon they all cried out "Abraham begat Isaac."

Rashi to *Gen.* 25:19—"And these are the generations of Isaac"—comments "because the scoffers of the time said that Sarah had conceived from Avimelekh, since she had been with Abraham many years without conceiving from him. What did the Holy One Blessed be He do? He changed the visage of Isaac into that of Abraham. And they all testified that Abraham begat Isaac."

Obviously I do not overlook the fact that all this is legend, but in all legend there is a grain of reality and experience of life. The grain of reality, the "prosaic" from which the legend stems, is that it is possible to attribute paternity based on facial resemblance. I do not say that such resemblance is complete and convincing proof — as with Abraham and Isaac—but it is corroboration and in association with the credible evidence of the mother may sometimes turn the scale.

Not only rabbinical legend, but English and Canadian case law does not make light at all of the weight of physiognomical resemblance...but regards it as evidence or evidence supportive of paternity (see Wigmore, *Evidence*, 3rd ed., I, 622, para. 166 note 2).

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PENAL LAW

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Chapter One

GENERAL PRINCIPLES

See further, Part 5, Evidence, p. 339.

1. *Ein Onshin Min Hadin* — No Creation of Offences by Inference

Cr.A. 41/52

WILKOMIRSKY v. ATTORNEY-GENERAL

(1952) 6 *P.D.* 663, 664, 669-670

The appellant was convicted of leaving a motor vehicle for which he was responsible on a public highway, without taking proper steps to prevent it from moving or being moved from its stationary position.

Silberg J.: It seems to me that from a purely literal point of view, reg. 11(c) of the Traffic Regulations applies to the present offence. No vehicle has yet been made that will move by itself. If it does begin to move by itself, as it were, that is a sign that something has pushed or pulled it. This is the "movement" of which the regulation speaks. Even if we assume that the regulation does not in so many words include "self-propulsion", it certainly, to my mind, includes it in point of law. If the regulation applies when a driver does not take care that the vehicle should not be moved, it is all the more so when he does not take care to prevent it from moving.

In saying all this we are not violating the well-known rule of interpreting a criminal provision strictly. This rule itself is not so strict and in recent years breaches have been made in it. I do not mean to recommend a liberal use of inference to create offences not explicit in the law....An inference intended to reach a logical conclusion drawn from one particular to another is unlike

an inference intended to reach a conclusion, more logical by far, drawn from one explicit particular to the generalization included within it, in a subjective rather than a literary sense: "Two hundred" includes "one hundred". To take care to prevent a vehicle from being moved is certainly the more "general" in comparison with the lesser concern of preventing self-propulsion. He who bears the first obligation bears *ipso facto* the second obligation. The situation is very similar to the case in which a person tells a neighbour to look after an animal of his so that it is not stolen. Does not this include an almost express request that it should not be allowed to stray? The rule of strict construction common in English and Israeli criminal law is not as rigid and severe as its counterpart in Jewish law: "No penalty is inflicted on the strength of a logical inference" (*Makkot* 5b). Were that the binding norm in Israeli criminal law, it is possible that the above reasoning could not be employed here.

I have said "possible" but not certain, since we also find in the *Talmud*, in the observations of one *amora*, some indication or ground for the idea expressed above: "How can we inflict a penalty by inference alone? Because it merely explains the matter" (*Sanhedrin* 76a) i.e., this is not an inference from what is written to what is not written but a demonstration of the substantive intention of the explicit rule. This is a fine but very clear distinction.

Cr.A. 205/73

ROSS v. STATE OF ISRAEL

(1973) 27(2) *P.D.* 365, 372

Cohn J.: According to sec. 2(2) of the Extradition Law, 1954, a person may be extradited only if the offence of which he is charged in the requesting state would have been "one of the offences set out in the Schedule to the Law" had it been committed in Israel. The offences of which the accused is charged in the U.S.A. are first, the transporting of a kidnapped person from one state to another and secondly the receipt of money paid as ransom. Counsel for the appellant submits that neither is an offence under the Schedule if committed in Israel.

It is a leading principle in penal law that "no penalty is inflicted on the strength of a logical inference" (*Sanhedrin* 54a and elsewhere) by way of arguing from minor to major, or by similarity of phrase, by syllogism or analogy, but only by virtue of enacted law. It is a law alone that can render an act, with all its defined constituents, criminal. What the

law does not render criminal in clear, explicit terms, no interpretation, analogy or logical inference can render so. All this is axiomatic and there is no need to expand thereon. Since on one view extradition is a criminal process it follows that with respect to extradition, one must be meticulous not to treat a criminal act as an offence punishable in Israel simply because it has been made an offence under the law of another country, as long as the Israeli legislature has not, in clear and precise language, made that same act an offence in Israel as well.

Assuming even that extradition is a criminal process, it is in any case not intended as a punishment but merely to compel the accused to abide by his obligation to be answerable to the law for the act he had committed.

2. Forewarning

Cr.A. 1/48

SYLVESTER v. ATTORNEY-GENERAL

(1948) 1 *P.D.* 5, 29

The case dealt with the publication of information that was liable to benefit the enemy and harm State interests.

Smoira P.: I may add for my own satisfaction that in recognizing the retrospective validity of this Law I am far from recognizing a "barbaric" enactment, since, in following Blackstone's definition, I think it is not to be said that the act of which the appellant is charged was an indifferent act when committed, which the legislature thereafter, for the first time, pronounced to be a criminal act. The legislation with retrospective effect here did not create a new crime unknown until then in the occupied part of Jerusalem, and it could not therefore be said that a person who committed the act of which the appellant was charged could not have had *mens rea* since he did not know or could not have known that what he did was criminal. On the contrary, good sense requires that whoever actually committed an act of the kind charged, after the declaration of the State of Israel, in the territory of the Israeli state which was fighting for its existence, knew that that kind of act was criminal.

I am therefore of the opinion that in concluding that the Official Secrets Ordinance has retrospective effect, I am not in conflict with any rule of natural justice or elementary equity.

The rule of Jewish law also — that no one is to be punished unless forewarned—does not assist the defence....If a person has spied in Jerusalem during the period in question, it would be impossible to say in the words of Scripture regarding the person who was found cutting down trees on the Sabbath that "it had not been declared what should be done to him" (*Num.* 15:35). Here the consequences were declared in the Official Secrets Ordinance.

3. Emergency Legislation

See: NAGAR *et al.* v. STATE OF ISRAEL, Part 5, Evidence, p. 396.

Misc. App. 22/83

KRAUSS v. STATE OF ISRAEL

(1983) 37(1) *P.D.* 365, 369

This was an appeal against a decision to detain the appellant until the end of proceedings against him on thirteen counts, including bribery, blackmail, deceit, breach of confidence, theft and forgery committed during the year he acted as chairman of the Tel Aviv Students Union.

Elon J.: In flagrantly serious offences, such as breach of trust by bank officials and the like, we may not, in my opinion, detain a person before trial merely because of "what people might say", not that I denigrate this important consideration of deterring criminals and fighting crime. Such proper judicial policy is, however, a matter for the legislature—it should provide that, when crime and criminals are on the increase, involving abuse of public trust and public moneys, it is better in the exigencies of the time to detain offenders rather than abide by the principle of not depriving the individual of his freedom before due conviction. Indeed, as the learned judge below observed in his decision, our Sages have told us that "a court may impose flogging and other punishment not in accordance with the *Torah*; not in disregard thereof, but to set a fence around the *Torah*...not

because he merited the penalty but because the exigencies of the time make it necessary" (*Yevamot* 90b; *Sanhedrin* 46a), because "people are acting lawlessly" (Rashi to Sanhedrin *loc. cit.*). Under the *halakhah*, however, this task was placed upon the *bet-din* (religious court), that acted both as legislature in promulgating *takkanot* (regulations) and as judiciary. By virtue of this principle, Jewish penal law and criminal procedure underwent considerable development, having regard to the social and moral changes that occurred periodically (see *Cr.A.* 543/79 *Nagar et al.* v. *State of Israel* (1983) 35(1) *P.D.* 113, above). It is different in a legal system that distinguishes between the legislature and the judiciary. The revival of a rule such as this of detaining a person because of exigencies should come by way of legislative enactment.

See: STATE OF ISRAEL v. EFRATI, p. 501.

4. *Res judicata*

See: HAREL v. GILADI *et al.*, Part 4, Regulation of the Courts, p. 333.

See: STATE OF ISRAEL v. MISHALI, Part 4, Regulation of the Courts, p. 334.

5. Confiscation of Property

See: ESTATE OF SHLOMO dcd., p. 497.

6. Conspiracy

Cr.A. 381/62

SALIMAN v. ATTORNEY-GENERAL

(1962) 16 *P.D.* 1981, 1982-1983

Silberg J.: The appellant was tried...for conspiracy to commit a felony under sec. 2A of the Prevention of Infiltration (Offences and Jurisdiction) Law, 1954...in crossing the border into the Gaza Strip. His two associates...were caught near the border and were tried. The appellant himself never left his place of residence in Lod, but the Court held that he had agreed...to join in with the others and to commit the offence together with them.

Counsel for the appellant raises the interesting question of whether the offence of leaving the country is one to which the idea of "conspiracy" attaches, having regard to the fact that the offence is "individual" to a person and two "leavings" of two different people do not combine to make one "joint" leaving. Because of the mutual "agency" created as a consequence of criminal conspiracy, learned counsel sought to apply by way of analogy the well-known rule of Jewish law that there is no agency with respect to matters of the "person", according to the explanation of *Ketzot haHoshen* to *Hoshen Mishpat* (Law of Agency, 182).

The submission is a good one but cannot be accepted, for the simple reason that leaving the country in a group usually makes the commission of the offence easier...hence a common element exists in the offences of the accused persons which gives room for conspiracy between them.

7. Attempt

Cr.C. (T.A.) 909/82

STATE OF ISRAEL v. EDRI

(1983) 2 *P.M.* 179-180, 184

The defendant was charged with attempt to possess and deal in drugs, when unbeknown to her the police had exchanged the packet she was supposed to have picked up and transferred to another, for another packet containing cocoa powder. She claimed that in

the circumstances she had committed no offence and that her belief that the packet contained drugs was not an offence.

Strusman J.: It is an age-old question whether a person can be convicted for wilful attempt when for reasons not dependent on him there was no possibility of committing the offence even if the attempt had been completed....As in the matter dealt with by the Sages in *Nazir* 21b:

> If a woman undertakes a Nazirite vow and then drinks wine or is defiled by a corpse, she is to receive forty stripes for she committed an offence, but if her husband nullifies the vow without her being aware of it and she drinks wine or is defiled by a corpse...

What would be the law?

The English rule that a person cannot be convicted of attempt to commit an offence when completion of the attempt does not entail an offence does not apply in our law, according to the definition of "attempt" in sec. 33(c) of the Penal Law, 1977, since under that section the acts of the person concerned can constitute an attempt to commit an offence even though it was impossible to commit the offence, provided only that he intended to commit it and began to effect his intention by the appropriate means.

Similarly, the said woman who took a Nazarite vow and "transgressed", not knowing that her husband had nullified the vow, does not receive forty stripes. R. Yehudah says that she does not receive stripes by virtue of Scriptural command, but she is lashed under rabbinical regulation. Maimonides (*M.T. Nedarim* 12:18) adds that this is because of her intention to transgress.

8. Punishment in Cases of Doubt

F.H. 30/75

KOBI v. STATE OF ISRAEL

(1976) 30(2) *P.D.* 757, 786-787

Cohn J.: As for the doubts expressed by my learned brethren...respecting the interpretation and scope of sec. 297 of the Criminal Procedure Law, 1965, which they resolved each by their historical-judicial research according to different schools of thought, I shall not go into pros and cons but say

simply that if doubt exists about the intention of the legislature or the powers of the court in penal law, our predecessors have already taught us that we must act leniently. If we do not even award monies when there is a doubt, *a fortiori* we do not exact punishment where doubt exists as to the law (*Tosefot* to *Baba Batra* 50b).

9. Human Dignity

See: KATLAN *et al.* v. THE PRISON SERVICE *et al.*, Part 3, Social and Administrative Regulation, p. 199.

Chapter Two

MENTAL ELEMENT

A. Volition

1. Ability to Distinguish Good from Evil

Cr.A. 118/53
MANDELBROT v. ATTORNEY-GENERAL
(1956) 10 *P.D.* 281, 285, 317

Agranat J.: The appellant was charged...with murder under sec. 214(b) of the Criminal Code Ordinance, 1936...for causing the death of Meir Shifman with malice aforethought. The appellant's defence was based mainly on a plea of insanity. The learned judges who tried the case rejected this plea but on the other hand decided to convict the appellant of manslaughter under sec. 212, after finding that the element of "preparation" had not been proved. In the event they sentenced him to life imprisonment. Both the appellant and the Attorney-General appealed...

What is meant by "volition"? First of all, it is important to note that when speaking of "volition", the Common law largely refers to the process by which a person exercises a "choice" between alternative objectives and therefore also a "choice" between alternative lines of conduct. The basic approach—again a clearly ethical approach...is that every normal person is endowed with "free will" and is therefore able to choose between right and wrong, between conduct that is morally proper and conduct which the criminal law (giving expression to the rules of morality) regards with disfavour. Thus an offender is one who, faced with the choice of doing "as one should", misbehaves and does wrong. As Maimonides puts it (*M.T. Teshuvah* 5:1), "Every man may, if he wishes, freely follow the good path

and be righteous; if he desires to follow the evil path and be wicked, he is equally free to do so."

B. Knowledge

1. Absolute Liability

Cr.A. 17/59

MAOR-MIZRAHI v. ATTORNEY-GENERAL

(1960) 14 *P.D.* 1882, 1893-1895

The appellant, a truck driver, was convicted of an offence involving absolute liability under the Traffic Regulations.

Silberg J.: I have read the notable judgment of my learned brother, Witkon J. He has covered the problem in all its aspects and I respectfully concur entirely in the conclusion he has reached.

The following observations have only one purpose, i.e. to indicate the position taken by Jewish law on the question under consideration, the question of absolute liability. I am of the opinion that when we encounter such basic questions, we must...examine them from the standpoint of Jewish law. Who knows, the time may perhaps arrive when the Israeli legislature may wish to compile a written code based upon the foundations of our national law. It will then be of benefit if it finds a long line of judgments from the standpoint of Jewish law dealing with practical questions considered by the courts. Such an over-view may well be preferable to the trend of abstract research into the sources of Jewish law.

Thus, Jewish law does not recognise absolute liability in criminal law. Maimonides (*M.T. Yesodei haTorah* 5:4; see *Sifra to Lev.* 20) says:

> Corporal punishment or the death penalty is only inflicted when a person transgresses wilfully in the presence of witnesses and after formal forewarning, since it is said of one who sacrifices his children to Moloch, "And I shall set My face against that man". Traditionally, "that man"

> has been explained to exclude one who acts under compulsion or without intent or mistakenly. Since in the case of idolatry, which is the most serious offence of all, one who practises it under compulsion is not subject to *karet* (Excision), and, needless to say, the death penalty, *a fortiori* with regard to other commandments of the *Torah*.

That means that no penalty is imposed unless it is accompanied by *mens rea* in the original sense of the term, i.e. evil intent, because "man looketh on the outward appearance but the Lord looketh on the heart" (I *Sam.* 16:6) or "the Merciful reaches the heart" as regards both the positive and the negative commandments (see *Kesef Mishneh* to *M.T. loc. cit.*, in the name of Ramakh). Hence a person is only punished when his act issues from the evil instinct of his heart.

On the other hand, we find in Jewish law absolute liability *outside* the area of criminal law, in the field of torts.

> A person always acts at his peril (*mu'ad*) whether inadvertently or wilfully, whether awake or asleep (*Baba Kamma* 26a).

> A person always acts at his peril whether inadvertently or wilfully, whether awake or asleep, or drunk; if he injures his neighbour physically or damages his property, he must make compensation from the best of his possessions (*M.T. Hovel uMazik* 1:2).

> He who damages another's property must make compensation in full. Whether he acted inadvertently or under compulsion, he is like one who acted wilfully. For example, if he fell from a roof or if he stumbled and fell whilst walking and broke someone's vessels, he must pay for the loss in full, since it is said "And he that killeth a beast shall make it good." Scripture does not distinguish between one who acts inadvertently and one who acts wilfully (*ibid.* 6:1).

Here we encounter a notion which somewhat blunts the edge of absolute liability and associates it with negligence, as my colleague did with regard to Anglo-Israeli criminal law. The *Jerusalem Talmud* states:

> R. Yitzhak said, Our *Mishnah* deals with the case where both were sleeping, but where one was asleep and the other came to sleep alongside him, the latter acts at his peril (and the former is not liable if he causes any damage) (*Y. Baba Kamma* 2:7).

> When must a sleeping person make compensation? When two are sleeping together and one of them turns over and injures the other or tears his clothes. Where, however, one was sleeping and another came and lay down beside him, the latter acts at his peril and if the

> former injures him he is exempt. Likewise where one places a vessel at the side of a sleeping person who breaks it, the sleeping person is exempt because the other acted carelessly (*M.T. op. cit.* 2:11 *ad fin.*).

The idea underlying the *Jerusalem Talmud* and Maimonides is not, as might appear, that the stringent liability of the second sleeper supersedes the lesser liability of the first but that the former is not liable at all because he acted entirely accidentally.

> Although above [folio 26b] we treat an act done accidentally as intentional where a person causes injury...the *Torah* does not so treat an act which is entirely inadvertent, since in the Jerusalem Talmud he who was first asleep is exempt if he causes injury to the one who came to sleep beside him (*Tosafot* to *Baba Kamma* 27b; cf. Rema to *Hoshen Mishpat* 375:1 and 2).

The absolute liability of Jewish law is the other side of the coin of the duty of absolute care. In every case—except absolute compulsion—it is possible *ex hypothesis* to avoid causing harm by adopting effective preventive measures; not to take such measures is considered *ex lege* negligence on the part of the tortfeasor. When, however, the accidental act is completely unavoidable, when "no weapon forged against it can avail" and every preventative measure that might be taken would be ineffective, there is no justification for imposing liability.

Accordingly, Jewish law is both contrary to and in accordance with English law. Jewish law rejects the notion of absolute liability with regard to the punishment of the criminal offender, but where it recognises such liability, in respect of making good damage caused by a tortfeasor, it regards the same as a consequence of negligence.

That is the plain stand taken by Jewish law towards absolute liability, and it needs no vindication.

2. Foreseeability

Cr.C.(T.A.) 135/75

KARIM v. STATE OF ISRAEL

(1976) 1 *P.M.* 307, 312-313

The appellant was convicted of negligently causing the death of a young child whilst driving a tractor along an unpaved road.

Sheinbaum J.: I wish to observe that Jewish law also recognises the foreseeability test and accordingly distinguishes the degree of liability to be imposed for unintentional killing.

The second chapter of *M. Makkot* states that "a person who throws a stone into the public domain (and kills another) is banished" to a city of refuge, as is the case with an unintentional killing. The *Gemara* (*Makkot* 8a) asks "if into the public domain, is he not a deliberate offender?"....He has acted recklessly without concern, which brings the situation closer to the case of the wilful offender and not to manslaughter. The *Gemara* explains that it was not an instance of throwing a stone but of dismantling a wall and one of the dislodged stones hit and killed a person. This answer, however, did not satisfy the Sages, since although a person demolishing a wall has that purpose alone in mind, he must look around, and if he carries out his work without doing so he is nearer to being a wilful offender than an inadvertent one. The *Gemara* goes on to explain that he was dumping the debris onto a rubbish heap and not throwing it into the public domain but rather in a place which people generally do not frequent. This answer too is unsatisfactory. "Under what circumstances?" it is asked. "If the public usually frequent the place, he is guilty of negligence, and if not, it is accidental." That means, two situations are possible: that the wall was being demolished and disposed of in a place where people either are or are not usually to be found. In the former instance it is foreseeable that a person might be injured by a falling stone, and therefore not to take due precautions renders the act close to wilful; if people are never to be found, it is not to be foreseen that anyone might be injured and there is no negligence but rather, accident. The *Gemara* replies that the rubbish heap was not frequented when the wall was being demolished but sometimes the public did resort to the place. Foreseeability is not very high and the negligence does not reach a degree of wilfulness, but it is still foreseeable that someone might be there and therefore this is an instance of a careless act not amounting to culpable negligence in the terms of sec. 218 of the Criminal Code Ordinance.

We may therefore conclude that the test of negligence is the degree of foreseeability. If that is high, almost certainly the matter will be treated as one of willfulness or culpable negligence that is close to it. If there is no foreseeability at all, the matter will be treated as an accident.

A person acts unintentionally only where foreseeability is not close to certain.

In the present case the situation is very much like the definition given by Maimonides of a case that is considered to be almost an accident. "There may be a killing done unintentionally that approaches accident where death occurs in extraordinary circumstances" (*M.T. Rotze'ah* 5:3).

The foreseeability test is the same in Jewish law and in the legal system we have adopted, and in accordance therewith no negligence can be found in the act of the appellant.

C. Intention

1. Threats

Cr.A. 97/68
SUISSA v. ATTORNEY-GENERAL
(1968) 22(2) *P.D.* 759, 767-768

The District Court convicted the appellant of the murder of his brother-in- law.

Kister J.: The District Court judges regarded the removal of the knives from the sink and his pointing of them at his guests as evidence of the appellant's decision to kill. Although one might infer from such conduct that a person had made up his mind to kill, and on occasion a threat to kill may be foundation for finding an intent to do so, this should not be made a hard and fast rule. Long ago our Sages stated (*Shevuot* 46a): "A person may make an extravagant remark and not carry it out." As regards the present appellant, one should not deduce any intention or decision to kill by reason only of his drawing out the knives and pointing them at his father and brother-in-law. It was proved in the lower Court that the appellant would often threaten people with a knife, even his children, in order to persuade them to eat their food. Hence the drawing of the knives as such cannot serve as proof of his decision to kill. True, had further circumstances been drawn to the attention of the Court, such as that immediately upon seizing the knife the appellant approached the victim and stabbed him fatally—and particularly had he approached the victim from behind and there stabbed him (see *Danoch* v. *Attorney-General* (1947) 14 *P.L.R.* 275), that could serve as a foundation for proof of intention to kill. There is, however, no evidence of that. Here, as the father attested, they seized the appellant's hands and then, in the course of their quarrel,

the precise course of which was not evidenced in court (although in his statement to the police, the father stated that he tried to separate the deceased and the appellant), the deceased was stabbed to death. The actual threatening with the knife and pointing it at the visitors were not enough to prove beyond all reasonable doubt that the appellant had made up his mind to kill at least one of them.

2. Killing of the Wrong Person

Cr.A. 406/72

SNIR v. STATE OF ISRAEL

(1974) 28(1) *P.D.* 234, 235, 239-240

This was an appeal against a conviction for murder, attempted murder and other incidental offences. The main submission on appeal was the absence of intent to kill and alternatively, that the intention was not to kill the deceased, who was killed due to mistaken identity, but another who was present.

Cohn J.: The question of one who intends to kill one person and actually kills another was already disputed by the Sages of the *Mishnah*: the majority held that the defendant was guilty, while R. Shimon held that he was not (*Sanhedrin* 9b). Maimonides decided according to R. Shimon (*M.T. Rotze'ah* 4:1), but at another point he expressed the opposite view, "since he carried out what he had intended" (*M.T. Shabbat* I:10), and since the act was prohibited it is immaterial who was the victim. Whilst Maimonides gives a reason for holding a person guilty when he intends to kill one and actually kills another, he adduces no reason for holding him innocent; this indicates that he accepted the reason given by R. Shimon as set out in the *Gemara* (*Sanhedrin* 79a), that the *Torah* made the law relating to murder conditional precisely upon his lying in wait and rising up "against him" (*Deut.* 19:11) i.e. a specific person. Moreover, witnesses must warn the accused before he commits the act that he may not kill the person in question, and a general warning about murder is not sufficient (*Sanhedrin loc. cit.*: He is not liable unless he declares, "My intention is to kill so and so").

It follows that R. Shimon's exemption is entirely consequent upon interpretation of written Scripture and is an integral part of Talmudic

procedure that requires forewarning of the accused. Yet in contemplation of legal logic, the ground previously given by Maimonides, that since he committed the act that he intended he must be found guilty, recommends itself: here is a criminal act and a criminal intention — and a prohibited consequence was also achieved, i.e. the death of a person.

Chapter Three

DEFENCES

1. Self-Defence

Cr.A. 232/55

ATTORNEY-GENERAL v. GREENWALD

(1958) 12 *P.D.* 2017

Agranat J.: I must add that if these conclusions are correct there is no occasion to apply Jewish law, upon which the President based himself, nor does any importance attach to the example of the "guardian of the camp" from which he drew an analogy. The essence of that rule is that "one soul does not yield to another" and behind it lies the concept, "Is your blood redder than mine?" Rav was asked by a person what he should do, the local governor having ordered him to kill another on threat of being himself killed. Rava's answer was, "Let him kill you rather than that you should commit murder. Why do you think your blood is redder, perhaps his blood is redder?" (*Pesahim* 25b). In the words of Rashi *ad loc.*, "Who says your life is more beloved by God than his? Perhaps his life is more beloved." To save your own life you may not transgress the prohibition, "Thou shalt not kill." The rabbis accordingly ruled that the life of an individual, innocent of all crime, is not to be abandoned in order to save the many. Thus Maimonides states (*M.T. Yesodei haTorah* 5:5):

> If gentiles tell them to yield up one of them to be killed, otherwise they themselves will be killed, let them be killed but not yield up one Jewish soul. If a person is specified...if he is guilty of murder...they should give him up, but they are not so informed of this rule at the outset...

It is obvious that this rule embraces the case where a person is faced with the option of committing (or not committing) a real act of violence against another who has never done or is not about to do him any harm and is wholly innocent, and he himself can find no other way of avoiding

immediate danger to himself. The problem was posed in the very same form in the legal philosophy of other peoples (see the summary in G. Williams, *Criminal Law*, para. 176). So was it dealt with in English law (*R.* v. *Dudley and Stephens* (1884) 14 *Q.B.D.* 273) and in American law (*U.S.* v. *Holmes* (1842) 26 Fed. Cas. no. 15,383. It is sufficient to cite Cairns in his *Philosophy of Law from Plato to Hegel*, 409.

> In its general aspect the right of necessity raises the question whether I may use violence against one who has used none against me. Concretely, may a man who is shipwrecked and struggling in extreme danger of his life, in order to save himself, thrust another from a plank on which he had saved himself. This is not the case of a wrongful aggressor making an unjust assault upon my life, and which I anticipate by depriving him of his own.

The case before us is quite different because the problem here is essentially whether Kastner's omission to do anything at all regarding the Jews of Klaus and other towns—not informing them about Auschwitz—was equivalent to abandoning the majority of these Jews to the Nazi murderers in order to save a few of them. The President also sensed the difference between these two kinds of cases, when he said, "I do not intend to lay down the law according to Maimonides as to whether Kastner delivered, in the full sense of the word, the Jews of Klaus and the others into the hands of real murderers." Clearly the solution of this problem depends — as we have repeatedly said — upon definition of the moral obligation which Kastner bore towards Hungarian Jewry as a whole. The matter reminds us somewhat of the well-known *beraita* in *Baba Metzia* 62a of "two people travelling on a journey and one carried a pitcher of water. If both drank, both would die, but if one only drank, he could reach an inhabited place. The son of Petura taught: It is better that both should drink and die rather than that one should see his companion's death. Then R. Akiba came and expounded: '...that thy brother may live with thee — thy life takes precedence over his life.' " In his essay "On the Horns of a Dilemma" Ahad Ha'am supports the view of R. Akiva, explaining that no "moral obligation" rests on one to save another when in doing so his own life is put at peril. Referring to the case that came before Rav, he writes: "Had the situation been the reverse, a person coming and asking, 'So and so has been taken to be killed but I can save him by offering myself in his place, what shall I do?' Rav would have replied 'Let him be killed but do not take your life into your own hands, for yours is redder' " (*The Writings of Ahad Ha'am*, 370, 373).

And so in the case before us, had Kastner reasonably believed that no useful purpose would be served by telling the Jews about Auschwitz,

but that this might rather harm the negotiations he was conducting with the Nazis in which he saw the sole chance of saving most of Hungarian Jewry from the danger that faced them, he had no moral obligation at all to act in the suggested manner, only because some thousands of Jews might thereby be saved.

See: A. v. STATE OF ISRAEL, p. 480.

Cr.A. 89/78

AFANGAR v. STATE OF ISRAEL

(1979) 33(3) *P.D.* 141, 150, 160

Elon J.: Sec. 18 of the Criminal Code Ordinance, 1936, now sec. 22 of the Penal Law, 1977, deals with a principle of criminal responsibility called "necessity", a name which by itself is not sufficiently instructive about the contents of the section. As we shall see, the section does not embrace only one principle but serves as the home for two principles of criminal responsibility, each of which has its own history and independent existence. Sec. 22 of the Penal Law provides as follows:

> A person may be exempted from criminal responsibility for any act or omission if he can show that it was only done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge; provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.

As I have said, this section covers two principles of criminal responsibility —the defence of "necessity" in the classic strict sense and self-defence...

Learned counsel for the appellant drew our attention also to the position under Jewish law on this subject, and I commend him for that since the position under Jewish law on the matter is important for us, as shall emerge below.

Self-defence of the individual in Jewish law is provided for in two *beraitot*. The first is found in *Sanhedrin* 73a:

> The Rabbis taught: Whence do we know that where one pursues his fellow man to kill him, he may be saved by taking the life of the pursuer? Scripture says, "Thou shalt not stand by the blood of thy brother" (*Lev.* 19:16).

For an additional source of the rule, see *Sifre* to *Ki Tetze*, 223 and *Baba Kamma* 41b and *Sanhedrin loc. cit.*

An additional provision is made by the second *beraita*, found in *Sanhedrin* 74a:

> It has been taught, R. Yonatan b. Shaul said: If one pursued his fellow man to kill him and the pursued could have been saved by maiming one of the pursuer's limbs (but without killing him)and he did not do so but killed him instead, he is liable.

Both these *beraitot* therefore deal with individual defence. Everyone may, indeed must, rescue the pursued from the pursuer who seeks to kill him. This duty is anchored in the Scriptural verse, "not to stand by the blood of thy brother". The rescuer must take steps that cause only the minimum harm to the pursuer in rescuing the pursued; as long as he can save the pursued by injury to a limb of the pursuer...he may not kill him, and if he does kill him, he is to be executed.

Maimonides sums up this rule (*M.T. Rotze'ah* 1:6-16) as follows:

> Where one is pursuing his fellow man to kill him...every Jew is commanded to save the pursued from the pursuer even by taking the life of the latter....If, however, he can be saved by injuring one of the pursuer's limbs...that is to be done; but if that is not possible and the pursuer must be killed, he is to be killed although he has himself not yet killed anyone... If a person intends to strike his fellow man to death, the pursued is to be saved by cutting off the hand of the pursuer, and if that is not possible, by taking the life of the pursuer, since it has been written "thine eye shall have no pity" (*Deut.* 25:12).
>
> Anyone who is able to save another and does not do so, is in breach of "Thou shalt not stand by the blood of thy brother".
>
> Although flogging is not imposed for breach of these negative commandments because there is no act of commission, they are nevertheless serious offences. Anyone who causes a Jewish life to be lost, it is as if he destroyed the entire world, whilst any one who sustains one Jewish life, it is as if he sustained the entire world.

(See also Maimonides, *Sefer haMitzvot* Negative Commandment 293, regarding circumcision...)

The rule as formulated by Maimonides confines individual defence to cases where the attack is a serious one and may result in the death of the pursued....In the later literature, the defence was broadened to cover every assault, even when there was no fear of death. Thus Rosh in the thirteenth century writes: "The law is that if a person is seen striking his father or son or brother and some one beats the striker, he is exempt. Likewise if a Jew is seen striking his fellow man and the latter cannot be saved without beating the striker, even to death, the striker may be beaten to keep him from a prohibition" (*Piskei haRosh* to *Baba Kamma*, 3:13, 126a). So also Maharshal in sixteenth century Poland, decided that "in relations between men, as where one strikes his neighbour, every one —even an ordinary person—is permitted to rescue his fellowman and beat the striker" (*Yam Shel Shlomo* to *Baba Kamma*, 3:9).

Here, too, restrictions exist on the measure of force that might be employed to save the person being struck. It goes without saying that "if a person can save himself by inflicting a minor injury but inflicts a serious injury, he is guilty" (*Piskei haRosh, loc. cit.*). Mordekhai b. Hillel, a contemporary of Rosh, adds that "one should not thrust out at anyone who is fighting with his neighbour but should gently separate them. If he does thrust out, he must answer to the law" (Mordekhai to *Baba Kamma*, 38).

The force that may be employed in individual defence is dealt with at length in the Responsa but this is not the occasion to enlarge thereon. We may note one responsum of R. Israel Isserlein, in fifteenth century Germany. A person who pleaded self-defence was convicted because he used exaggerated force in defending himself by cutting off the hand of the person attacking him. Isserlein (*Pesakim uKetuvim* 208) held as follows:

> Who permitted him to cut off the other's hand? He should have extricated himself in a less serious manner...where one can only save oneself by inflicting injury one may do so, on the principle that if another is preparing to kill you, anticipate him and kill him. If, however, he felt that the other did not intend to be brutal, he should not have saved himself by hitting out at the other with loss of limb. Although the person attacked did not do what he did intentionally but rather, acted with insufficient care and recklessly, the rule nevertheless is that a person acts at his own risk and will be punished.

Just as the rescuer offends if he employs undue force, he is also prohibited from using any force at all when in the circumstances it appears that the attacker has desisted, in which case self-defence is no longer an act of saving the attacked person, but rather a fight for the sake of punishing the attacker. So Maharam miRotenburg...decided in the thirteenth century.

Assault occurs when "after one person attacks another and injures him and then has no intention to continue to attack him, but the other goes on to attack the first person and injures him. But as long as the attack continues, one may save oneself, and if that is not possible without inflicting injury, that is permissible and he is exempt" (*Resp. Maharam bar Barukh* cited in Mordekhai to *Baba Kamma* 196). The subject of self-defence has been dealt with in the *Talmud*, the *responsa* and the codes and many of the details are of no concern in this trial (see A. Enker, *Duress and Necessity in Penal Law* (1977) 212 ff.; Ben Zimra, "The Spilling of Blood through Necessity", 3-4 *Jewish Law Annual* (1976-1977) 117; I. Warhaftig, "Self-Defence in Murder and Personal Injury", 81 *Sinai* (1976) 48). We may sum up the matter by quoting Karo, *Hoshen Mishpat*, 421:13:

> Where one began (the attack), the other is exempt since he is at liberty to strike back to save himself; but the response must be measured; where it is possible to use moderate means but he inflicts serious injury, he is guilty. The position is the same where a person sees a Jew striking another and cannot save the latter without attacking the attacker, he may strike him to keep him from breaching a prohibition.

It follows from the foregoing that—

(a) in Jewish law every one has the duty of coming to the help of another who stands in serious danger of being killed; if there is only danger of injury, no such duty arises according to many of the Sages but it is permitted to do so even if injury is thereby inflicted on the "pursuer"; it is superfluous to add that this right avails the pursued himself in self-defence;

(b) Such duty and right obtain in respect of any one and against any one and obviously no kinship or other relationship need exist between a rescuer and the pursued involving any responsibility for mutual well-being:

(c) The duty and right are only available as the circumstances may require for the defence of the pursued, i.e. when the pursuer is likely to continue attacking the pursued, but not when it appears that the danger has passed and the intervention of the "defender" does not have the character of defence and is otherwise motivated;

(d) The leading rule is that a balance must be maintained in the amount of force the intervener employs in defence of the pursued, and exemption from criminal liability is conditional upon the employment of the minimum force required for the purpose...otherwise criminal liability attaches for any injury caused to the pursuer and clearly for killing the pursuer (see Maimonides, *loc. cit.* 13 and c.f. *Hagahot Maimuniot ibid.*).

It is noteworthy that the basic idea behind the law relating to the defence of others in Jewish law lies in values informing the philosophy of Judaism, which are expressed in the verse "Thou shall not stand by the blood

of thy brother." This verse has been interpreted to go beyond the duty and the right in criminal law of saving the pursued, and to embrace a general moral religious duty to come to the assistance of anyone who finds himself in danger.

This also is a very broad subject and we shall only point to a passage in Maimonides (*loc. cit.* 14) that relies on the Talmudic sources (*Sifra* to *Kedoshim* 2:4, 8 and *Sanhedrin* 73a):

> Anyone who is in a position to rescue another and does not do so, transgresses 'Thou shalt not stand by the blood of thy brother.' Likewise anyone who sees another drowning in the sea or being attacked by bandits or by wild animals and is able himself to save him or to get others to do so and does not do so is equally in transgression.

...It appears to me that the rule of self-defence, to the extent that it concerns the physical injury of another person, applies in every instance where a reasonable person who is concerned regards it his moral, civic duty in the particular circumstances to go to the assistance of the "attacked"....Israeli law indeed, like most modern legal systems, does not impose a legal duty of rescuing those who find themselves in danger. (A single example of such a legal duty is seemingly reg. 146 of the Traffic Regulations of 1961, which obligates the driver of a vehicle who comes across a person injured in a road accident to extend assistance to him.) The "good Samaritan" has not been legislated for. In Jewish law as well, non-observance of the duty resting on every one to save another who is in danger...is not punishable by stripes because no positive act is involved....An act, which in normal circumstances is an offence, but which is done out of good will to rescue another from danger of physical injury, is unassailable as a criminal act, taking into account, of course, the amount of force used and keeping some balance between "the two evils."....The statutory limitation of saving another is not intended to exclude one or another group of people but only to restrict the defence to a case where some specific person is in danger of injury, and not where the defendant is acting on behalf of the general public (see Enker, *op. cit.* 111 and Feller, " 'Necessity' *Stricto Sensu* as a Situation Negating the Criminality of Conduct" (1972) 4 *Mishpatim*, 5, 12). The defence will not only not apply when a person intervenes "just for the fighting" (see *R.* v. *Duffy* (1966) 1 All *E.R.* 62) but also when intervention is mainly motivated by a desire to do justice because someone has been unlawfully attacked and not by a desire to defend him, for instance when the quarrel is subsiding and the rescuer then intervenes (see the *Responsum* of Maharam miRotenburg quoted above).

2. Theft for Charitable Purposes

Cr.A. 515/75

KATZ v. STATE OF ISRAEL

(1976) 30(3) *P.D.* 673, 705

This was an appeal against conviction for the offence of stealing public funds.

Schereschewsky J.: The fact that the appellant did not use the large sum involved for his own purposes but for charity is no defence against conviction (as opposed to sentence) for stealing. In Jewish law as well, he remains a thief, since when a person steals and consecrates the stolen thing he must pay the double penalty (*Baba Kamma* 68b), i.e. not only must he return the capital, but he must pay double the amount as a fine imposed by Jewish law on a thief.

3. Enticement

Cr.A. 360/80

STATE OF ISRAEL v. AFANGAR

(1981) 35(1) *P.D.* 228, 234

The respondent was found guilty by the District Court of the offence of acting as an agent for the purpose of dealing in drugs under sec. 14 of the Dangerous Drugs Ordinance [Consolidated Version] 1973. The State appealed on the grounds that the respondent ought to have been convicted of trafficking in drugs, and that sentence was too lenient. The respondent appealed against the severity of his sentence.

Elon J.: The principle in our legal system — as formulated by the Sages concerning the temptation of Eve by the primordial serpent—is, "When the words of the teacher and those of the pupil [are contradictory], whose words should be hearkened to? surely the teacher's!" (*Sanhedrin* 29a). The very same expression is used in order to establish criminal responsibility of an agent who commits an offence at the behest of his principal (*Kiddushin* 42b).

When the words of the law and those of a seducer are contradictory, those of the law should be heeded, and the person led astray cannot free himself of criminal responsibility with the primordial claim, "Someone seduced me and as a result, I sinned."

Cr.C.(T.A.) 503/81

STATE OF ISRAEL v. SHNERER

(1986) 3 *P.M.* 82, 86-87

In the course of a search of his premises, the defendant tried to bribe an excise officer. The latter, after reporting the matter, was sent back to entrap the defendant and was successful. The defendant submitted in defence that the agent had instigated the bribery.

Strusman J.: As a matter of public policy, I fear that any recognition of the defence of "entrapment" will make things very difficult for the police who are assisted by secret agents who penetrate the criminal community. Such recognition will also lead to attempts to uncover in court the identity of police informants, the manner in which they operate and the consideration they receive, and by the same token imperil them and reduce the possibility of the police continuing to employ them. The public, interested in uncovering criminals and bringing them to justice, would thus suffer. The police should, however, instruct their agents not to entice honest people or those who have given up their old ways or have no interest in breaking the law. If an agent wrongly led someone astray, the prosecution or the Attorney-General must decide whether it is right that the person be charged and convicted (for the judge has no authority to set the charge aside or stay proceedings, whereas they know the truth about the agent's doings and the defendant's criminal past, if any, before evidence is given in court), and whether public policy and justice do indeed justify criminal proceedings being taken against that person.

We may learn from our sources the extent to which the enticement of a person to commit an offence is invalid, even for the purpose of preparing the evidence against him, although he is a known criminal, so much so that eavesdropping [i.e. planting witnesses to listen to what criminals say] was prohibited except in order to obtain evidence against one who enticed another to idolatry and that only for the purpose of getting him to retract (*Sanhedrin* 67a).

Chapter Four

IMMUNITY

1. The President

See: JABOTINSKY *et al.* v. PRESIDENT OF THE STATE OF ISRAEL, Part 3, Social and Administrative Regulation, p. 141.

Chapter Five

EXTRADITION

1. Extradition to Foreign States

Cr.A. 308/75

PESACHOWITZ v. STATE OF ISRAEL

(1977) 31(2) *P.D.* 449, 465-466

Cohn J.: Those states which under their law do not extradite their own nationals do not "spread their tabernacle of peace" out of love for their own nationals but because of jurisdictional requirements: their law authorizes their courts to try nationals who have committed an extraditable offence beyond their frontiers. Furthermore, extradition treaties require them to try offenders instead of extraditing them. (The argument of counsel that this obligation is not binding since it only applies when "that appears proper" is no argument: all jurisdiction is conditional upon preconditions such as the health of the accused, the availability of witnesses and evidence and the like.)

The Deputy President has already drawn attention to the well-known dictum of Grotius that extradition and punishment are two alternatives long available to governments. This common purpose that underlies extradition agreements, not to allow offenders to escape the law, is attained in one of two ways, either by extradition to the requesting state for trial and punishment or by trial and punishment by the state to which the offender has escaped. A state which under its law cannot or is not prepared itself to try the offender cannot be allowed to say that it cannot or is not prepared to extradite him. This rule of Grotius continues to be effective down to modern times, at least as regards those states that have undertaken to extradite under agreement. (As regards states that have not so undertaken, it seems that the rule is no longer binding under international law: see Schultz, *Treatise in International Criminal Law*, vol. II, 309-10.) On the other hand, a state that is itself ready to try and punish an offender fulfils its obligation by such trial and punishment and need not extradite.

Thus trial in the requested state is equivalent to extradition. An extradition agreement provides for complete mutuality if it gives the parties thereto the choice of extradition or trial. The fact that one state may in practice choose to extradite whilst another may choose to try makes no difference so long as one of the alternatives of the mutual undertaking is followed (see S.Z. Feller, "The Scope of Reciprocity in Extradition" (1975) 10 *Israel Law Review*, 446).

It is perhaps pertinent to note that Grotius grounds this rule *inter alia*, as is his wont, in the Jewish sources. The people of Judah extradited Samson to the Philistines (*Judges* 15:13) and although they did so out of fear of a Philistine attack (*ibid.* 15:10) they at least regarded the request of the Philistines as being justified (*ibid.* 15:12) and Samson himself preferred extradition to being "fallen upon" by the men of Judah themselves. When the evil occurred in Gibeah, the tribe of Benjamin were asked to deliver up the base men of Gibeah to be killed so that the evil of Israel be put away (*ibid.* 20:13), and upon the refusal of the men of Benjamin to do so, war broke out (*ibid.* 14). Indeed, an unjustified refusal to extradite criminals is a valid ground for war (*The Laws of War and Peace*, vol. 2, ch. 21 para. 4).

Regarding the purpose of extradition not to enable a criminal to escape the law, Grotius relies on the verse, "Thou shalt take him from Mine altar that he may die," (*Ex.* 21:14) and if that is the case with the Holy of Holies, how much more so with a state of refuge. Grotius (*De Specialibus Legibus* III, 88) cites Philo the Alexandrian to the effect that the impure have no place in the Temple, all the more so criminals whose impurity is indelible and cannot be expunged except by punishment. Grotius goes on to say that the *Torah* of Moses tells us that non-extradition is only justified regarding those who have erred unwittingly, for example, those who have killed unintentionally and may escape to a city of refuge or those who are wholly innocent like the bondman who has escaped from his master (*Deut.* 23:16). Criminals, however, must be punished or extradited (*op. cit.* 5).

Chapter Six

OFFENCES

1. Unlawful Relations

Cr.A. 809/76
BALILI v. STATE OF ISRAEL
(1977) 31(2) *P.D.* 598, 602-603

The appellant challenged his conviction for unlawful sexual intercourse on the ground that the prosecution had not proved "penetration".

Cohn J.: Let us not think that the English have "copyright" on the need to prove "penetration"....The "copyright" belongs to our revered Sages:

> A Sanhedrin that orders execution once in seven years is called 'a bloody assize'. R. Eliezer b. Azariah says, once in seventy years; R. Tarphon and R. Akiva say, 'Had we been members of the Sanhedrin, no person would have been put to death' (*M. Makkot* 1:10).

The *Gemara* asks (*Makkot* 7a) how R. Tarphon and R. Akiva could have succeeded in their purpose, many offences being punishable by death, and upon proof by valid and sufficient evidence they would have been bound under law to impose the death penalty. R. Yohanan and R. Elazar replied, in respect of offences of manslaughter, and Abaye and Raba replied that in respect of sexual offences, they would have enquired whether the witnesses had actually observed intimacy, actual penetration by the male...and since witnesses could not attest to that, they would have been prevented from imposing the death sentence.

The Sages, were, however, not prepared to go to such extremes. Like Shmuel they ruled that witnesses need only attest to having seen the couple acting in an unchaste manner (*ibid.*; *Baba Metzia* 91a). Maimonides decided the rule (*M.T. Issurei Bi'ah* I:19) as follows:

> Witnesses do not need to see the adulteress copulating and the man penetrating the woman. Once they have been seen embracing in intimacy, they are executed on the evidence; we do not say perhaps they did not copulate since it is presumed that this kind of conduct is copulation.

Such copulation is, in the language of the *Talmud* (*M. Yevamot* 10:1; 54a), the penetration that is our present concern, except that for the purposes of the *halakhah* complete penetration is not necessary (see R. Ovadiah miBertinoro to *M. Yevamot* 8:2). So it is also in English law under which mere entry of the tip of the penis is enough without tearing the hymen.

Penetration is required, by the law of the *Torah*, with regard to "All of these abominations" (*Lev.* 18:29) which include all forbidden intercourse (*Yevamot* 54b), and without penetration no offence is committed. (In the *Torah* that is important not only with respect to penal law but also with respect to religious ritual law, since there is intercourse by reason of which a woman becomes forbidden to her husband and so on.) As the *Tur, Even haEzer* 20 puts it:

> Where a man has incestuous intercourse or forbidden intercourse...once he has penetrated the woman, both are liable to *karet* (Excision) or flogging or death by execution....Penetration consists of inserting the tip of the penis, although he withdraws at once and does not complete his intercourse with an emission....Witnesses need not testify that he made penetration but that they were intimate in the manner of adulterers and on such evidence they are condemned to death.

Thus we see that although in the law of the *Torah* penetration is a *sine qua non* of forbidden intercourse, explicit evidence is unnecessary but it may be inferred from the circumstances, "the manner of adulterers". When there is evidence of their embracing or lying together or *a fortiori* copulating, penetration is presumed and he who argues otherwise bears the burden of proof.

2. Rape of Spouse

Cr.A. 91/80

COHEN v. STATE OF ISRAEL

(1981) 35(3) *P.D.* 281, 283, 288-290, 291

The question in this appeal was whether a husband can be guilty of raping his wife by having "unlawful" intercourse with her against her will.

Bekhor J.: The parties married in 1976 and after a year they had a son. The marriage did not go well and it was alleged that the wife had entered into a relationship with her employer, even going abroad with him and others. The parties, however, continued to live under one roof. The offences charged against the appellant were committed in February and March 1979 whilst the parties were living in the same abode although the woman was already thinking of divorce: they were in fact divorced some months later...

Jewish law is part of the law effective in the present matter and it need not be evidenced and proved, the court having judicial notice of it. The Court was presented with an opinion by Dr. N. Rakover, Adviser on Jewish Law at the Ministry of Justice, reviewing the authorities on which the opinion is based. There is nothing wrong in this course so long as the court examines the cited authorities and adopts the view set out in the opinion after finding that the latter is in accord with the authorities. The learned judges indeed did so. I now turn to the substance of Dr. Rakover's opinion on "coerced sexual relations between spouses," which has since been published by the Ministry of Justice as Booklet No. 55 in the Series of *Studies in Jewish Law*. Like the judges in the lower court I can be brief and turn at once to the many authorities cited.

The starting point is that with regard to maintaining sexual relations, the duty falls upon the husband according to the *Torah* (*Ex.* 21:10): "Her food, her raiment and her conjugal rights he shall not diminish." (The duty on the husband to maintain sexual relations is quite apart from the duty to be fruitful and multiply.) On the other hand there is no provision either in Scripture or in the *Talmud* that places a corresponding duty upon the wife. Her duty emanates from her contractual obligation upon entering marriage, requiring her to be devoted to her husband. Hence the conclusion that whilst the woman's duty may be made conditional, it is otherwise with the man's duty which derives from the *Torah*. The same view is propounded in Dr. B. Schereschewsky's *Family Law* (2nd ed.) 109-110, which also cites the authorities.

According to Maimonides (*M.T. Ishut* 14:8) one limitation attaches to the wife's duty: if she pleads that he is "repulsive" to her, the man may be forced to divorce her since "she is not like a captive (to be compelled) to have intercourse with one who is hateful to her." Dr. Rakover cites authorities who disagree with Maimonides that the man may be forced to divorce his wife. According to Maimonides the wife does not become a rebellious wife (*moredet*) unless her refusal to have sexual relations with her husband is without foundation, for example, because she had set her eye on another man or because she refuses in order to make her husband suffer (*ibid.* 14:9, 11-12). In such cases, the plea "He is repulsive to me" is of no avail...

The question here is whether a woman is bound to have sexual relations forcibly. Dr. Rakover cites many authorities (e.g. R. Yosef miTrani, R. Rafael ibn Shimon, R. Ovadiah Hadayah and R. Shlomo Luria) according to whom forced sexual relations are forbidden, and even when the woman's refusal is not justified, she may not be compelled, although the consequence is likely to be that she will be regarded a *moredet* or be deprived of her rights under the marriage. Like the judges in the lower court, I also will not repeat the detailed treatment of the matter in Dr. Rakover's opinion, and shall satisfy myself by quoting a number of short passages from the authorities.

Eruvin 100b states: "Rami b. Hama, citing R. Assi, ruled that a man is forbidden to compel his wife to observe a precept." Rabad reinforces this ruling by quoting a scriptural verse and adds, "Thus rape of one's wife is forbidden and if he needs to have relations he must first appease his wife" (quoted in *Tur, Orah Hayim* 240 and *Even haEzer* 25). Maimonides observes, "He should not force himself on her and have intercourse against her wish" (*M.T. Ishut* 15:17) and *Even haEzer* 25:2 states that "he should not have intercourse with her except by her volition and if she does not desire it, he should appease her until she does."

In *Iggeret Kodesh* by leading contemporary rabbis (1968), a note is published anonymously (written by R. Yaakov Kanivsky) stating as follows:

> According to the law of the *Torah* sexual relations are forbidden when the woman is not willing and she must be appeased by embraces and kisses until she is willing, since otherwise it is as if she were thrown to a lion and ravaged, as explained in *Pesahim* 49b. It is a criminal wrong to do anything that causes pain to one's wife even if the intention is piety and abstinence, since one may not ill-treat one's wife in the name of piety and use her as a captive maid-servant. When a man has intercourse with his wife against her will, the children come within the category of "sinners and rebels" under the law relating to the issue of a rape victim.

In his summary Dr. Rakover says that a husband may not have sexual relations with his wife against her will, and a survey of the *Talmud* shows that fulfilling marital relations by rape is not permitted and constitutes a transgression. The rabbinical courts also treat a husband who has sexual relations by force with great severity. The sanction imposed upon a woman who refuses might be that she is declared a *moredet*, that she loses her entitlement under her *ketubah* (marriage settlement) and the like, but she cannot be forced to have sexual relations. Such compulsion is contrary also to the rule that a man must honour his wife more than himself (Maimonides, *op. cit.* 15:19) as well as the rule that the woman was "given [to her husband] to live but not to suffer pain" (*Ketubot* 61a)...

During the hearing of this appeal, counsel put in an opinion by Dr. B. Lifshitz. Dr. Lifshitz states that he does not contest Dr. Rakover's view that "a husband may not force himself upon his wife and the only means to be adopted is to declare her a '*moredet*' with the consequences that follow." Dr. Lifshitz also states, and this was urged by counsel, that refusal by a wife to have sexual relations does not deprive the husband of his right but only negates the use of force. That is different from what Dr. Rakover has to say. The latter, it seems to me, accords with the true state of affairs. Great importance attaches to the difference between a wife refusing to carry out her other duties, such as to do domestic work, and her duty to have sexual relations. Regarding the latter, an express prohibition of the use of force exists, in contrast to the other duties where compulsion may be used. I shall quote only part of what Rabad has to say (*Ba'alei haNefesh, Sha'ar haKedushah* (Ka'apah ed.) 122-23) which was cited by Dr. Rakover:

> Unnatural intercourse is only permissible, I say, when he has no respect for her and she is reconciled to it by his placations, but if he forces it on her he is certainly not free of wrongdoing: of him it is said that "even thoughtlessly it is not a good thing," for the Sages stated, "He sins even with his feet"....There are some who say that unnatural intercourse is permissible since she obtains satisfaction, although forced into it. But the situation is different when it is against her will since all intercourse by force is prohibited and is like prostitution.

These remarks of Rabad's are cited as the law in *Tur, Even haEzer* 25...

I would add that the Jewish people may congratulate itself on the advanced and liberal approach of our heritage and the *halakhah* with its long history. I have already mentioned the view that intercourse is meant to gladden and not cause pain. It is the husband's duty to give his wife pleasure. I would also quote R.M. Meiselman of Yeshiva University of Los Angeles

in his *Jewish Women in Jewish Law*, 116 (who also cites a considerable number of the authorities mentioned by Dr. Rakover).

> The fiction of the Judeo-Christian sex ethic has even convinced many Jews that Judaism shares Christianity's negative attitude towards sex in general and towards female fulfillment in particular. Nothing could be more mistaken.

3. Unnatural Relations

Cr.A. 224/63

BEN-AMI v. ATTORNEY-GENERAL

(1964) 18(3) *P.D.* 225, 231-232

The appellant was charged with unnatural intercourse.

Cohn J.: It is very true that both in Jewish tradition and in common speech "sodomy" refers only to males, whereas "to know a person unnaturally" may also apply between man and woman. Jewish tradition has its source in the *Midrash* on the verse, "Where are the men that came unto thee this night; bring them out so that we may know them" (*Bereshit Rabbah* 50:5 to *Gen.* 19:5). This is construed as meaning that the men of Sodom wanted "to know" them in order to lie with them (see Rashi and Ibn Ezra *ad loc.*). "Sodomy", however, as used in the Ordinance, is not to be construed according to Jewish tradition nor according to common speech, if grounds exist for thinking that the legislature used a technical term according to its meaning in long-decided law in England. Thus, already in 1716 an English judge doubted whether a man who lay with a woman in an unnatural manner had committed sodomy or whether that only obtained as between males: *R.* v. *Wiseman* (1716) 92 *E.R.* 774. These doubts were raised before Fortescue J., who—

> ...was exceeding sorry, that such a gross offence should escape without any punishment in England; when it is a crime punishable with death and burning at a stake, all over the world besides.
>
> It being so horrid and great a crime, and that no colour should be

> given to such an offence, Justice Fortescue A. wrote to the Earl of Macclesfield, then Chancellor of Great Britain, concerning this matter; and his answer was by way of letter, that he wondered at the variety of opinions; that he had not the least hesitation in agreeing it to be plain sodomy, that he could not think of one objection, to which he should be able to give the appearance of an argument; that it is a crime exactly of the same nature, as well as it is the same action, as if committed upon a male, the difference of the subject makes it more inexcusable.

Adopting this view, Fortescue J. gave his own opinion:

> The unnatural abuse of a woman, seems worse than either that of a man or a beast; for it seems a more direct affront to the Author of Nature, and a more insolent expression of contempt of His wisdom, condemning the provision made by Him, and defying both it and Him.

That the law relating to buggery or sodomy includes unnatural intercourse with a woman has long been accepted and is mentioned in all the text-books (see 9 Halsbury's Laws (4th edn), para. 673; Archbold, 31st ed. 1049; *Russel on Crime*, 9th ed., vol. I, 651). Sodomy in sec. 152(1) of the Criminal Code Ordinance must perforce be understood as comprehending unnatural intercourse with a woman.

I may point out incidentally that ancient Jewish law is totally different from English law. Not only is unnatural intercourse with a woman not regarded as being worse than intercourse with a man or an animal but whilst the latter two acts are treated as serious offences carrying the death penalty (*Lev.* 20:13, 15), the former is not an offence at all. The *Talmud* contains express permission for sleeping with one's wife howsoever it pleases one. R. Yohanan asserted that "a man may do with his wife whatever he pleases. The situation is similar to that of meat from the abattoir; it may be eaten salted or roasted or cooked or seethed" (*Nedarim* 20b). The story is related of a woman who came before Rebbi and complained "Rebbi, I set a table before my husband but he overturned it." (Rosh explains that what she meant was that he used her unnaturally.) Rebbi replied, "My daughter, the *Torah* has permitted it" (*ibid.*). Maimonides laid down the law accordingly (*M.T. Issurei Bi'ah* 21:9) and following him so did *Tur* and Bet Yosef (*Even haEzer* 25) and Rema (*Even haEzer* 25:2).

4. Suicide

C.C.(T.A.) 1593/60

SATSHI *et al.* v. STATE OF ISRAEL *et al.*

(1960-61) 25 *P.M.* 278, 281

Kister J.: In many respects the present case is similar to another which went to appeal (*State of Israel* v. *Hidena dcd. et al.* (1960) 14 *P.D.* 926). The difference is that the latter case involved a police paymaster who committed suicide after owing the police and others sums of money, whereas here it was an army pay-sergeant who committed suicide in similar circumstances. There the beneficiary of a police life insurance policy was his widow, so designated by the deceased; here the beneficiaries, again named by the deceased, were his parents...

According to Jewish law a man may not even cause himself an injury (*M.T. Hovel uMazik* 8:1). Certainly suicide is considered an offence when committed whilst of sound mind, unless under compulsion, as with King Saul (*M.T. Rotze'ah* 2:2; *Yoreh De'ah* 345). The pecuniary consequences of the offence are different in Jewish law and in English law, as I pointed out in *Estate of Shlomo dcd.* (1957-58) 15 *P.M.* 179, 186.

5. Physical Injury by Parents and Teachers

7/53

RASSI v. ATTORNEY-GENERAL

(1953) 7 *P.D.* 790, 792-793, 797-800

The appellant, a Greek Catholic nun, served as supervisor of a Nazareth orphanage and in 1952 was convicted on two counts of assault, causing injury, failure to record a death, and burial of a child without a medical certificate. In argument, counsel for the appellant did not challenge the findings of the learned judge, but submitted that the appellant had punished the children as a parent might do and that she was therefore not liable in law. Accordingly the question was whether and to what extent a teacher, the principal of a school or supervisor in a children's institution may inflict corporal punishment on the children under his or her care.

Assaf J.: I agree with the judgment of Cheshin J. and wish only to add some observations to what he said, based on our own sources. *Prov.* has already given general instructions to a father for educating his children: "He that spareth his rod hateth his son, but he that loveth him chasteneth him at times" (13:24). "Correct thy son and he shall give thee rest; he shall give delight to thy soul" (29:17). "Foolishness is bound up in the heart of a child but the rod of correction shall drive it far from him" (22:15). More specific instructions for both father and teacher are to be found in later sources. Rav, the first of the Talmudic Sages, instructed R. Shmuel b. Shilat, one of the leading educators of his time: "When you strike a child, do so with a shoe lace" (*Baba Batra* 22a), i.e. with a light strap. And relying thereon, Maimonides lays down that "the teacher should strike them to frighten them, not in hate or brutally. He may therefore not beat them with a whip or cane but only with a light strap" (*M.T. Talmud Torah* 2:2). These remarks were taken to be the rule and like provision is made in *Yoreh De'ah* 245 and in the other authorities. Thus Hai Gaon writes in his well-known poem, *Musar Haskel*: "If you have sons and daughters / Punish them always but with compassion."

One prominent rabbi in Palestine gives us a clear description of what was customary two centuries ago:

> There is a very bad practice of parents taking a child to school and cautioning the teacher in the child's presence not to beat him. Upon the child hearing this, he tends not to pay attention to his lessons and to become more and more wilful. In former times the practice was otherwise: when the child cried to his parents that the teacher had beaten him, they would give the child a gift to give to the teacher and would thank the teacher. The teacher received a suitable gift every time the child complained of being beaten (R. Moses Hagiz, *Tzror haHayim*, Wandsbeck 1728).

Although in the moral and pedagogical literature, and amongst the earlier and later authorities, one may find much sound comment and good advice on the relations between father and child and between teacher and child, practical questions arise infrequently and precedents are scarce....The few *responsa* dealing with the matter may well be cited.

I quote first a *responsum* of Natronai Gaon of Sura (853-58) (L. Ginsberg, *Geonica*, II, 119):

> As for the school teachers you mention, who beat the children a great deal—certainly children only learn by being beaten. The words of R. Shmuel b. Shilat reflect the law. Hence we usually deal with small children or even older children who are weak according to R. Shmuel's

> instructions. With healthy children, there is nothing against frequent punishment. To do so, however, with small and frail children is cruelty. In such cases we warn the teacher a number of times: if he mends his ways, well and good; if not, we dismiss him.

Clearly the Gaon is speaking of teachers who beat their pupils frequently but cause them no injury. And no question arises of the teacher having to pay compensation under the five categories of damages — injury, pain, medical expenses, loss of employment and hurt feelings. There are, however, two *responsa* of the first half of the eighteenth century that deal with teachers who inflicted injury on their pupils, and the position taken here is quite different.

The first and more important of them is by R. Ya'akov Reisher who served as Rabbi of Metz towards the end of his life, and it is taken from his *Resp. Shevut Ya'akov*, Part 3, para. 140:

> Is a teacher who became angry with a pupil and beat and injured him liable under the four 'headings' of damages or exempt? Clearly he is free of liability, as is patent from *Makkot* 8a: "Just as the hewing of wood is optional so are all optional acts, excluding a father who strikes his son or a teacher his pupil". (A person is not obliged to go into exile in a city of refuge when he kills someone unless the killing is a consequence of an "optional" act; if, however the killing was a consequence of a "commandment", e.g. a father striking his son, the teacher striking his pupil or an agent of the court striking the criminal as punishment — in such cases, the killer is not bound to go into exile.) There is no room for a party to plead that this exemption applies to expulsion and not to liability for damages. Exemption from expulsion is derived from Scripture....Although the rule is that a child may only be beaten with "a shoe lace" but not cruelly, a teacher is not in any event to be penalized *ex post facto* for striking a pupil...especially when the child is very difficult and does not attend to his lessons....I have, however, decided that the teacher should pay for good medical care so as to prevent him from making a practice of it, since it is not fitting for a scholar to get angry, and too strict a teacher cannot teach well and anger is the lot of fools.

It appears from this *responsum* that the teacher was learned and the pupil was grown up. R. Gershon Coblenz, one of the *dayanim* (judges) of Metz, held as follows (*Resp. Kiryat Hannah* 22):

> With regard to a teacher who in anger struck a young pupil of six or seven years and broke his leg and sought exemption from liability in damages...in accordance with *Makkot* 8a...in my opinion, he has got

> himself hopelessly involved and should be castigated until he makes his peace with the injured pupil....There is no difference in this regard between a teacher and any other person....The teacher who beats his pupil excessively is not like one who chastises a pupil, and he is liable in damages.

One of the outstanding teachers of his generation who wrote specifically on teaching methods observes:

> One piece of profound advice I offer to teachers. They should take great care not to beat a child on the head or face and not to become angry...for that is detrimental and far from effective (R. Avraham of Ettingen, *Ma'arekhet Avraham*, Fulda 1769).

This advice apparently never reached the appellant and for that reason she acted as she did.

6. Abortion

C.A. 413/80

A. v. B.

(1981) 35(3) *P.D.* 57, 73, 81, 83, 87, 88, 92

The issue in this appeal was whether the husband has any standing under the law on the application of his wife for an abortion.

Ben-Ito J.: I have already concurred in setting aside the decision of the lower court, ordering the appellant...to refrain from having an abortion...

The debate has always centred upon a number of questions which no one has yet been able to answer unequivocally—what is the secret of life, when does it begin, from what moment is it properly to be protected and should its deprivation be regarded as an offence or at least forbidden? At one extreme, there are those who think that from the moment the embryo is created as a "being" or "organic fact", which is the beginning of a human, any injury to it is forbidden. According to Jewish law, destruction of seed is a prohibited act, *a fortiori* the "killing" of the embryo: a heathen (Noahide) who kills an embryo is treated as a murderer (*Sanhedrin* 57b: see also *M.T. Melakhim* 9:4). The dictates of Catholicism also confer

"life" upon an embryo from the first moment of conception. It would be a mistake to think that only in modern times has this extreme view been disputed. Careful study of the opinion of R. Lichtenstein...shows that there is no consideration canvassed by modern legislatures and courts which was not raised by the Jewish authorities in earlier times. In the period of the *Gemara*, during the first forty days of conception an embryo was considered "a sac full of water" and if aborted within this period, the child that followed was the first born for ritual purposes (*Bekhorot* 47b). Similarly it was usual to divide pregnancy into periods with regard to the seriousness of injury to the foetus, periods which were characterised by criteria still accepted today. Some would adopt a lenient attitude during the first three months — since in the words of R. Lichtenstein, "murder is apparently defined as the cutting off of present life and not as frustration of potential development." There are also the tests of movement or "the ability of the foetus to live upon coming into the world" (which correspond to the notions of "quickening" and "viability"). Actual murder is perhaps confined to the last third of pregnancy, but we should not be disturbed by the term "murder", since a Jew who kills a foetus is not punished by the court as a murderer. Already in the period of the *Mishnah* a foetus was not considered a complete person or a "soul". "If a woman is in hard travail, one may cut up the child in her womb and remove it member by member, because her life comes before its life. If, however, the greater part has come out, one may not touch it, since one may not reject one life for another" (*M. Oholot* 7:6).

Counsel for the husband asked us also to consider his submission, dismissed by the lower court, that a husband has standing in the deliberations of the Abortion Committee by virtue of marriage—even if he has no right to ask for an injunction in a civil process in court. Since we are dealing with a complex of problems relating to abortion, we will not ignore this question.

"There are three partners in a person, the Holy One blessed be He, the father and the mother" (*Kiddushin* 30b). At all events, no one will contest the part played by the father in creating the foetus and his duty to maintain the child, rear him and educate him after he comes into the world. Hence the idea that the father must be joined in any decision regarding abortion is attractive at first glance. Undoubtedly, where married parents and a well-ordered family are involved, it is desirable and acceptable that the two parents should join in the decision. I would say that it is desirable not only in respect of the father but also of the mother, since it is a difficult decision that may often give rise to not inconsiderable hesitations, and it is easier for a woman to decide with the advice of her partner in life.

Our concern, however, is with those cases in which the father and the

mother take different views, and the question is that of the rights and standing of the father in such an event...

R. Lichtenstein in his opinion...defines the task of those who have to decide the law in so sensitive a matter as the present, and I have not found any formulation more suitable to define the task of the Abortion Committee which, though not indeed the decidor of the law, fulfills that function somewhat. I shall accordingly conclude by quoting what R. Lichtenstein has to say:

> In these areas—where on the one hand the details of the law are not explicitly elaborated in the *Gemara* or the early authorities, and on the other hand the personal situation is not infrequently most complicated and frustrating—there is room, and in my opinion an obligation, to adopt a measure of flexibility. The sensitive decision-maker is aware of the personal situation and equally of the halakhic factors and may therefore in one case bend his doubts in favour of one party and in another case in favour of the other party; he may reach a different balance in evaluating the views of his predecessors, give serious weight to far-reaching theories here and ignore them there; he may loosen the restraints where serious family tragedy is perceivable or insist upon the strict law, as he sees proper, where the pressures to be lenient issue from irresponsibility and are inherent to a lowered moral standard. This is not a matter of evasion or partiality. Flexibility comes from the recognition that halakhic decisions are not and need not be the work of a calculating machine but the outcome of thought.

Since I have reached the conclusion that the legislature did not intend that abortion should be dealt with by the courts but by Abortion Committees, I would recommend that we rely on the Committee for which the observations of R. Lichtenstein should serve as a guide.

Elon J.: It is decided law rooted in the judgments of this Court that "an administrative body—even a truly administrative body (not quasi-judicial)—will not be permitted to prejudice the person, property, calling, status and the like of a citizen, unless the party affected is given reasonable opportunity to be heard in his defence against any prospective prejudice. The scope of this duty and the manner of the opportunity to be accorded will obviously depend on the concrete circumstances of the matter concerned" (see *per* Silberg J. in *H.C.* 9, 3/58 *Berman* v. *Minister of the Interior* (1958) 12 *P.D.* 1493, 1508). The right to be heard before a decision is made that may affect a person is already found in Scripture: "Hear the causes between your brethren and judge righteously between a man and his brother" (*Deut.* 1:16), and its roots go back to the earliest times of mankind. It

began with Adam who was asked who had told him that he was naked; it continued with Cain who was asked where his brother Abel was in order to hear what he had to say. How much more so with the ordinary person. Thus our Sages deduced from "I shall go down and see" that judges should not decide a case until they have heard and understood (*Resp. Rema* 108: see *H.C.* 290/65 *Altagar* v. *Mayor of Ramat Gan et al.* (1966) 20(1) *P.D.* 29, 39)...

My learned friend has recommended that the apt observations of R. Lichtenstein should guide the Committee in its deliberations and decision. I agree wholeheartedly. Indeed, it is for the Committee to find a balance between "the serious family tragedy" on the one side and the pressures to be lenient that "issue from irresponsibility and that are inherent in a lowered moral standard", on the other side. This balance is to be found in the "flexibility that comes from the recognition that halakhic decisions are not and need not be the work of a calculating machine but the outcome of thought." It is, however, accepted that a precondition of such thought is a full and profound examination of the facts and problems arising in each instance in its particular circumstances. For this reason one must listen to the husband and hearken well to what he has to say and what is in his heart.

7. Mercy Killing

Cr.C.(T.A.) 555/75

STATE OF ISRAEL v. HELLMAN *et al.*

(1976) 3 *P.M.* 134, 135, 138-139

Bental J.: The defendant was brought to trial for causing the death of her terminally ill son by a gunshot to the head, an offence under sec. 212 of the Criminal Code Ordinance, 1936. She admitted all the facts with which she was charged...

The case reminds us that Jewish law, too, views with great severity the killing of a dying person (*Sanhedrin* 78a). Any act that hastens the death of a fatally ill person is strictly forbidden, from a moral perspective. Maimonides held that "such a killer is exempt from the penalty of death but only under human law and his wrong against morality is great" (Federbush,

Mishpat haMelukhah beIsrael, 224). The Sages were not indifferent to the suffering of a person about to die, and they even required that he be given wine to drink to numb his senses (*Sanhedrin* 43a). Nevertheless the distance between this and bringing about the death of one who is incurably ill is very great.

Let Maimonides' warning against relying on medical opinion about the chances of living be recalled. Such opinion may well be mistaken and it is interesting that even today fear of error is very real, notwithstanding the advances of medical science.

8. Autopsies

H.C. 66/81

INSPECTOR GENERAL OF THE POLICE v. BEIZER *et al.*

(1981) 35(4) *P.D.* 337, 348, 353

The police applied to the first respondent, a Ramallah Magistrate, requesting that he order the autopsy of the mother of the second respondent, suspecting that her death was caused by the commission of an offence. The second respondent opposed the application on the ground that the evidence in the hands of the police did not necessarily lead to the conclusion that the death had been so caused. The first respondent refused to permit an autopsy. The appeal centred on the function of the investigating judge and the considerations he must take into account.

Barak J.: It is noteworthy that counsel for the petitioner drew our attention to a book by R. Waldenberg, *Resp. Tzitz Eliezer*, Part IV, 14, dealing with the attitude of Jewish law to autopsies for establishing cause of death... "The dissection of corpses for pathological purposes when the cause of death is unknown, where the matter may involve criminal charges, is permissible." Thus religious reasons also exist not to oppose an autopsy in the present case.

Tirkel J.: This is not the place to dwell on the difficult questions of whether the body of a person constitutes property, who has the right of possession or other rights thereto and the like....Neither is the age-old question of whether

protection of a corpse is a matter of respect for the dead person or for the living (*Sanhedrin* 46b-47) of concern here. To my mind, protection of a dead person and his honour is like protection of a live person and his honour, and in this, too, a free and enlightened society is distinguished from an uncivilised or oppressive society, as Cohn J. said in *H.C.* 355, 370, 373, 391/79 *Katalan et al.* v. *Prisons Services et al.* (1980) *P.D.* 34(3) 294. We are concerned here with one of the basic rights of man; just as we do not deprive him of his freedom, so also we do not prejudice his person or property or assault his honour without clear, express provision of the law. I would add that a restrictive construction be given, that we do not prejudice his person or honour even when he has departed this life.

9. Deceit and Fraud

Cr.A. 224/57

LIEBERMAN v. ATTORNEY-GENERAL

(1958) 12 *P.D.* 665, 667-669

Silberg J.: In the judgment under appeal, the learned judge...says that in charging the appellant (with obtaining execution of a security by false pretences) the prosecution had to prove the following four elements — (i) false pretences regarding a matter of fact, (ii) defendant's knowledge of the inaccuracy of his statement, (iii) the obtaining of money or money's worth by means of such statement, and (iv) the intent to defraud. I harbour no doubt that the existence of these four elements was in fact proved...

"Intent to defraud": Here I wish to pause a moment and make one linguistic observation, since it involves a difference in law and error is induced or may be induced by confusion of translation that prevails on the subject.

There are two kinds of deception that serve as subject matter for the Criminal Code Ordinance — (i) ordinary deception and (ii) deception that leads the deceived person to act to his detriment...

The first kind is called, in English, "deceiving" and the second "defrauding" [Silberg J. goes on to discuss here the corresponding terms in Hebrew and the translations thereof in various sections of the Ordinance]. No

wonder therefore in the present instance there was "no single and uniform language" used by the prosecution and the judges. One employed one phrase (intention to deceive) and the other another (intention to cheat) when both meant the element of "intent to defraud" in sec. 302 of the Ordinance.

It seems to me that in order to remove all doubt one should indicate the first kind by the simple word "to mislead" and the second by "to cheat". The basis of "intent to defraud", as we have seen, is deliberate inflation of an error, that induces the victim to act against his interest. Cheating — financial cheating — is already known in Jewish law from Scriptural times: "If thou sell aught unto thy neighbour or buy of thy neighbour's hand, ye shall not wrong (cheat) one another" (*Lev.* 24:14). The distinctive character of cheating is that as a result, the cheater derives some benefit at the expense of the cheated (see *Baba Metzia* 49b-51a; 56b-58a; *M.T. Mekhirah* 12-14; *Hoshen Mishpat* 227-228). A common element, very close indeed, exists between the foreign and Hebrew terms, and it is right and proper to merge them. On the other hand, the word "to deceive" does not accord unambiguously either with the first or the second kind. The word, however, also indicates cheating (see *M.T. loc. cit.* 18:1; *Hoshen Mishpat* 228:6; cf. the deceivers of whom R. Elazar speaks: *Ketubot* 65a) but at times serves as a term of evasion by lies of a past responsibility (cf. the "sharpers of Pumbedita" *Baba Batra* 46a). Accordingly I think it would be better to translate the term "to deceive" by the Hebrew word which means "to mislead" and the term "to defraud" by the Hebrew "to cheat".

10. Bribery

C.A. 71/83

SHARON v. STATE OF ISRAEL

(1984) 38(2) *P.D.* 757, 771-773

Levin J.: It seems to us that it would be both useful and instructive to set out...the views of Jewish tradition and Jewish law on the subject of bribery. The approach of that tradition and that law to bribery, as a matter of values, is extremely negative. Already in Scripture we can see how

negatively our forefathers regarded the matter and completely condemned it. "Thou shalt not wrest judgment, thou shalt not respect persons; neither shalt thou take a bribe, for a bribe doth blind the eyes of the wise and pervert the words of the righteous" (*Deut.* 16:19). Again, "And thou shalt not take a bribe, for a bribe blindeth them that have sight and perverteth the words of the righteous" (*Ex.* 23:8). The bold expressions in this connection used in *Ketubot* 105b may rightly be cited here in brief.

> Our Rabbis taught: 'And thou shalt take no bribe'; there was no need to speak of a gift of money, for even a bribe of words is also forbidden, since Scripture does not say 'And thou shalt take no gain.'

Furthermore—

> What is to be understood by 'a bribe of words'? As in the case of Shmuel who was once crossing a bridge when someone came and offered his hand (to help him across). 'Who are you?' asked Shmuel, and the other replied, 'I have a lawsuit.' Thereupon Shmuel said, 'I am disqualified from acting as your judge.'

Even when the benefit is merely a courteous service it is enough to give rise to a defect.

Again—

> Rav stated: 'What is the reason for [a judge being prohibited from taking] a gift?' Because as soon as a man receives a gift from another he becomes well-disposed towards him and tends to treat him like his own person—and no man sees himself in the wrong (*ibid.*). (See also *Mekhilta* (ed. Horowitz) *Mishpatim* 20.)

The moment anyone takes a bribe from another he loses his independence towards the latter and no longer possesses freedom of decision and the capacity of independent determination of a matter.

This prohibition that is so stringent in our tradition is not confined to judges but affects all who engage in public work, who must act uprightly and faithfully and whose decisions must be immaculate. "Not only is the judge forbidden to accept a bribe but also all who are appointed to deal with public affairs, even though their decisions do not have the force of law; they may not bend matters out of love or hate, let alone receipt of a bribe."

Thus our Sages decided and thus was their thinking regarding bribery in general and thus also is the case with what we call election bribery. R. Moses Sofer at the turn of the nineteenth century ruled that if there are valid witnesses to attest that during the election of a community rabbi, some of those who constituted the electoral body received a bribe, the appointment

of the rabbi in question is void and new elections must be held. R. Sofer went on to prescribe that "if there are witnesses that the rabbi himself said that they be given a bribe, he is debarred from being a rabbi altogether until he truly repents of it." As for those who accepted the bribes, the opinion given is that they also may perhaps be debarred from all public appointment; at least they may no longer participate in the new election of the community rabbi, even when they have returned the bribe they received, have done penitence and have undertaken by oath not to do so again in the future. The reason for that is that they have already become well-disposed towards him and cannot revert, and they remain forever interested parties (*Resp. Hatam Sofer*, *Hoshen Mishpat* 160. See also *Resp. Minhat Eliezer* 1:6. For further precedents, see E. Schochetmann, *Ma'aseh Haba ba'Averah* (Jerusalem 1981) 232).

See: A v. ATTORNEY-GENERAL, Part 3, Social and Administrative Regulation, p. 222.

11. Invitees and Trespassers

See: ROTENSTREICH v. ATTORNEY-GENERAL, Part 7, Torts, p. 554.

12. Desecration of Tombstones

Cr.A. 176/71

BARUKH *et al.* v. STATE OF ISRAEL

(1972) 26(2) *P.D.* 667, 669

The appellants, directors of a Burial Society, were charged with the offence, under sec. 148 of the Criminal Code Ordinance, of trespassing on a burial place with the intent to wound the feelings of a person who had erected a tombstone over his mother's grave without paying the required fee, which he considered excessive. They were also charged under sec. 326 with unlawfully damaging property by having the tombstone removed.

Agranat P.: I am strengthened in my view already at this stage since I find good reason in the outlook of Cohen J. that whilst sec. 148 was enacted particularly to punish various acts in a burial place that wound the feelings of people and insult the deceased, consideration of sec. 326 has led in two courts and also in this Court to a pointless debate over the fine question of whether a tombstone is "property", which is an element in the offence. This is due to the submission by counsel for the appellants (which found favour with the learned magistrate) that under Jewish law, "no benefit may be derived from a built grave" (*Yoreh De'ah*, 364:1; Rema *ad loc.*: "Some prohibit sitting on the stone placed over a grave as a tombstone...but others disagree"; see also *Turei Zahav*: "Anything done for the purpose of the dead person and out of respect for him may not be enjoyed and therefore a broken tombstone may not be sold"; but cf. *Pithei Teshuvah ad loc.*; *Resp. Hatam Sofer*, *Yoreh De'ah* 335). For myself, I do not find any inconsistency between this rule—if it can indeed assist in interpreting the term "property" in the above statutory provision —and the view that relatives of the deceased have at least some interest that others should not destroy the tombstone, and they are entitled to the protection of the law against injury to that interest, i.e. anything which does a wrong to them and to the respect for the deceased. In the U.S.A. the law has been decided in this spirit.

13. Theft

See: TREIBISH *et al.* v. ATTORNEY-GENERAL, Part 9, Property—Physical and Intellectual, p. 705.

14. Extortion

C.A. 719/78

ILIT LTD. *et al.* v. ELKO LTD.

(1980) 34(4) *P.D.* 679, 685-687

The appellants had unsuccessfully asked for a declaration to set aside part of a memorandum made between them and the respondent, regarding limitation of relief in the event of arbitration.

Shamgar J.: The cause of action of extortion as defined in sec. 18 (of the Contracts (General Part) Law, 1972) comprises a number of cumulative elements: (i) a contractual relationship, (ii) taking advantage of distress, mental or physical weakness or inexperience, (iii) with the result that the terms of the contract are unreasonably less favorable than usual. The section therefore lays down that a causal connection must exist between the contractual relationship and the exploitation of the distress; that is, the cause of action arises only if the contract would not have come into being but for the exploitation of the distress, weakness or inexperience.

Elon J.: The term "distress" is a well-known and common Hebrew term, found in most of the sources. The learned judge construed it in accordance with a long series of quotations from the Prophets and Hagiographa (see e.g. *Zeph.* 1:15; *Ps.* 107:6) and from the writings of the Sages down to modern times, as cited in the Ben Yehudah and Even-Shoshan dictionaries....I favour the conclusion at which he arrived from these quotations that in general, "distress" signifies "a state of stringency and decline and not merely a temporary or passing difficulty of one whose creditors come to him at some time to claim what is due to them". For this reason no question of distress and its exploitation arises in the present case.

It is of the nature of concepts such as "distress" and the like, that even after they have been defined they are always very flexible and it is difficult to establish precisely what they encompass....Hence it is proper to be assisted by an understanding both of the concepts found in the section in connection with "distress"...and the general object of the section. For the present purpose we may reach the conclusion *inter alia* that the general object may be inferred from the sub-title of the section, "Extortion". This idea is a new thing in our legal system, penal and civil, but it may be found in the stores of the Hebrew language and the sources of Jewish

law. Extortion was made a criminal offence in 1963 as an entire novelty (see 37 *Divrei haKnesset* 2593; 34 *ibid.* 1943-49). We may note incidentally that the innovation was in contrast to English criminal law, whereas a similar provision appears in this or other shape in the European legal systems. The elements required for constituting "extortion"—now appearing in sec. 431 of the Penal Law, 1977 — are very similar to those in sec. 18 of the Contracts Law, which enables rescission of contract by the extortee....This is not the place to enlarge on the meaning of the idea in the sources of Jewish law, but I may allude briefly to a number of matters.

The ordinary and frequent use of the idea of extortion in Scripture and Talmudic literature is in connection with the withholding of wages and delay in their payment and the like. This is a manifest example of extortion based, as it is, on taking advantage of the distress of the worker without means, his weakness and inexperience. "Thou shalt not oppress a hired worker that is poor and needy, whether he be of thy brethren or of thy strangers that are in thy land within thy gates. On the same day thou shalt give him his hire, neither shall the sun go down upon it, for he is poor and setteth his heart upon it, lest he cry against thee unto the Lord and it be a sin in thee" (*Deut.* 24:14-15). Many other verses that simply mention extortion are interpreted by the Sages to refer to the withholding of wages from the worker (e.g. *Lev.* 5:21): "If any one sin...and deal falsely with his neighbour in a matter of deposit or pledge or robbery or has oppressed his neighbour." (See Rashi *ad loc.*) So also *Lev.* 5:23 and 19:13 — "Thou shalt not oppress thy neighbour, nor rob him; the wages of a hired servant shall not abide with thee all night until the morning." See further *Baba Metzia* 111a; *M.T. Sekhirut* 11:2. In the words of the prophets, the idea became descriptive of those who take advantage of the weak members of society: "And I will come near to you to judgment; and I shall be a swift witness against....falseswearers and against those that oppress the hireling in his wages, the widow and the fatherless, and that turn aside the stranger from his right, and fear not Me, saith the Lord of Hosts" (*Mal.* 3:5; see also *Sukkah* 29b). Frequently the term "extortion" expresses the taking advantage of the distress of the poor, the widow and the orphan. (*Prov.* 14:31; 22:16; 28:30; *Amos* 4:1; *Jer.* 7:6; *Zech.* 7:10) or one mode of deceit ("As for the trafficker, the balances of deceit are in his hand" (*Hos.* 12:8).

Talmudic *halakhah* extended the meaning of the term. A lengthy discussion occurs on the question, "Who is an oppressor [extortioner] and who a robber?" Of the different views expressed, it is enough to quote that of R. Hisda — " 'Go and come again, go and come again,' (based on the verse of *Prov.* 3:28: "Say not unto thy neighbour 'Go and come again and tomorrow I shall give,' when thou hast it by thee.") that is

oppression; 'You have indeed a charge upon me, but I will not pay it' —that is robbery" (*Baba Metzia* 111a; some of the early authorities are of the view that the discussion revolves round the question of withholding wages—see *Novellae* Ritba *ad loc.*).

Maimonides sums up the distinction as follows (*M.T. Gezelah veAvedah* I:3-4):

> What is robbery? The forceful taking of money from another, such as when one seizes movables or enters into another's domain against the wishes of the owner and takes away something...or when one enters the field of another and consumes the produce and the like...
>
> What is extortion? The holding back and non-return by force where money was given to one by the owner willingly and the latter now claims it, such as a loan or hire which cannot be extracted because of the other's muteness...

These two rules are also given as the law in *Tur* and *Shulhan Arukh, Hoshen Mishpat* (359:8 and 359:7-8, respectively). It is noteworthy that both these Codes go on at once to deal with transactions made under compulsion. "It is forbidden to compel another to sell something even if money is offered, although robbery is not Scripturally forbidden but only Rabbinically." In similar fashion "duress" is provided for in sec. 17 of the Contracts Law.

15. Defamation

See: FREEDMAN v. SEGAL, Part 7, Torts, p. 563.

See: HAHAYIM PUBLICATIONS v. BROADCASTING AUTHORITY *et al.*, Part 7, Torts, p. 563.

16. Publication of Suspicions

See: BEN-GURION v. APPLEBAUM *et al.*, Part 2, General Principles, p. 131.

17. False Evidence

Cr.A. 445/75

DEKUSSIAN v. STATE OF ISRAEL

(1977) 31(1) *P.D.* 294, 295, 296, 297-298

In a declaration submitted to the Custodian of Absentee Property the appellant stated that he was the owner of a house in Abu Tor in Jerusalem (an area which until the Six Day War was no-man's land) and that he had never mortgaged it. The appellant was permitted to take possession of the house. He was subsequently charged and convicted of knowingly making a false declaration.

Cohn J.: It emerges that the appellant had in fact mortgaged the house...and he no longer disputes that he signed the mortgage deed....Moreover, not having duly paid off the mortgage, execution proceedings had been taken under Jordanian law...and as a result the house was sold by public auction to the mortgagee and registered in the latter's name in the Jordanian Land Registry...

At all events, the appellant lied in declaring that he had never mortgaged the house. He signed the mortgage deed himself, and whether or not the deed needed to be registered or was properly registered, his declaration as above is inconsistent with his obligation to mortgage the house. Even if it be said that the mortgage does not attach without registration, the deponent should have stated that he had signed a mortgage and undertaken to charge the house, although the mortgage was not completed by registration, or that he did not know whether the mortgage was so completed...

The appellant in *Cr.A.* 187/57 *Kali* v. *Attorney- General* (1958) 12 *P.D.* 1009 was convicted under sec. 113 of the Criminal Code Ordinance, 1936, for giving "a certificate which was, to his knowledge, false in any material particular." Here the appellant was convicted under sec. 120 of "knowingly" making a "false declaration". Assuming that in both these cases it subsequently turned out that in fact the certificate or declaration was not false (objectively speaking), the criminal responsibility of the person who gave the certificate or made the declaration still subsists since to his knowledge it was false when given or made.

The learned judge found support in the law regarding a woman who vowed not to do a particular thing and then intentionally, in breach of her vow, did the thing, without knowing that her husband had already

released her from her vow by virtue of his marital authority. In that event, while she is exempt, since she only intended to do a prohibited act, which in fact was permitted when effected (*Nazir* 23a; *Kiddushin* 81b; *M.T. Nedarim* 12:18), she may still be punished for criminal intent under rabbinical rule. I fear that the analogy does not hold. There, when the woman acted as she did, she was already permitted to do so; here the deponent did something that was prohibited when he made his declaration and declared something he did not believe to be true.

In *Cr.A.* 20/61 *Sahar* v. *Attorney-General* (1961) 15 *P.D.* 561, 579 Silberg J. quotes a *beraita* that teaches us that in Jewish law too, every witness who attests not from his personal knowledge of the truth of a matter is considered a false witness (*Shevuot* 31a). Maimonides (*M.T. Edut* 17:5) puts it as follows:

> A student whose teacher says to him, "You know that were I given all the money in the world, I would not lie. A *maneh* is owing to me from X but I have only one witness. Join with him in giving evidence." If he did so, the student would be a false witness.

The evidence here might well be objectively true: the teacher is indeed owed money by X; but the student's evidence is false, even if he believed that the money was really owing, since he attested that he knew personally, not that he believed that it was so because his teacher never lied. *Hoshen Mishpat* 32:2 also rules that witnesses who are suborned to testify that a debt is owing are false witnesses, although the debt exists.

The rule is that a person who knowingly makes a false declaration, within the meaning of sec. 120, is a person who makes a declaration which at the time is to his knowledge false. It is immaterial that later it turns out that in his ignorance the declaration was not false. That is the definition of "deceit" in sec. 1 of the Penal Law Amendment (Deceit, Blackmail and Extortion) Law, 1963: a factual assertion must be either that the person making it knew at the time that it was untrue or that he did not believe it to be true. Objective truth is not the decisive factor but rather knowledge or belief of the truth.

See: ROITMAN v. UNITED MIZRAHI BANK LTD., Part 7, Torts, p. 569.

18. Failing to Take Reasonable Means to Prevent Wrongdoing

Cr.A. 496/73
A. v. STATE OF ISRAEL
(1974) 28(1) *P.D.* 714, 716, 719

Cohn J.: Sec. 33 of the Criminal Code Ordinance, 1936, provides that a "person who, knowing that another designs to commit a felony, fails to use all reasonable means to prevent the commission or completion of the felony, is guilty of a misdemeanor, punishable with two years' imprisonment." The question facing us in this appeal is whether the felony must be a specific act or may be a continuing offence not consisting of any specific act, such as membership and general participation in an unlawful association.

The few necessary facts are no longer in dispute. The appellant, a member of a minority group, had contact with one who was active in a terrorist organisation. On several occasions the latter tried to recruit the appellant into the organisation and its activities but the appellant always refused and contact ceased. It was only because the person in question left the country that the appellant got to know that he was an active member of the organisation and that his activities in particular and those of the organisation in general were not confined to recruiting adherents but extended to terrorist acts that were felonies; moreover, membership in the organisation as such was itself a felony (Defence (Emergency) Regulations, 1945, reg. 85 (a)).

The appellant was charged on these facts...with the very serious felonies of contact with a foreign agent (under sec. 24, as amended, of the Penal Law Revision (State Security) Law, 1957) and of covering-up security offences (under sec. 5 of that Law). The District Court acquitted the appellant of both charges but on the oral application of State Counsel convicted him of an offence under sec. 33 of the Criminal Code Ordinance, 1936, and sentenced him to the maximum term...

Whatever the position under current English law, with the introduction of the Criminal Code Ordinance in Palestine, concealment of knowledge of a past felony ceased to be an offence and the offence of concealing a future felony was introduced. If the Israeli legislature saw fit to retain sec. 33 (see sec. 5(b) of the Penal Law Revision (State Security) Law of 1957), perhaps it meant, even if only unintentionally, to uphold observance of a Scriptural commandment: "Thou shalt not stand by the blood of

thy brother" (*Lev.* 19:19). Among the examples given by the Talmudic Sages of the application of this rule is the case where bandits attack your neighbour, and you have an obligation to rescue him (*Sanhedrin* 73a; *M.T. Rotze'ah* 1:14). Under Jewish law also, a person must take reasonable steps to avoid a felony, since even when a life is at stake, one may not save the "pursued" by killing the "pursuer" unless no other way is available (*M.T. loc. cit.* 13).

Two things emerge from the foregoing. First, the duty to act to prevent a felony exists only when the danger of the felony is immediate and real. Secondly, sec. 33 is to be construed restrictively and cautiously so as not to give rise to a duty to inform, which reeks of totalitarianism. Where an immediate and real danger to the security of the State exists, for example when contact is made with an enemy agent for passing on secret information (*Cr.A.* 517/66 *Abu Kadra* v. *Attorney-General* (1967) 21(1) *P.D.* 246, 251) or when there is immediate and real danger to the life of an individual, no fastidiousness or nobility of mind can obviate the need for an act of rescue...

Here as well, had the appellant known that the people he met or the organisation on behalf of which they approached him were "planning" to carry out an act of terrorism which might endanger the life of others or the security of the State or public safety, he would have been bound to take reasonable preventative steps. The same applies according to the terms of sec. 33 if he knew that an act of terror was about to be committed, which might only endanger property, providing that he knew the act was a felony (or a very serious offence, see *Cr.A.* 517/66 above).

19. Contempt of Court

See: ATTORNEY-GENERAL v. SHEINBERGER, Part 4, Regulation of the Courts, p. 289.

Chapter Seven

PUNISHMENT

A. General

1. Punishable Persons

Cr.A. 222/60

ATTORNEY-GENERAL v. A. and B.

(1960) 14 *P.D.* 2511, 2515-2516, 2518-2519

This appeal involved the criminal responsibility of the mentally ill.

Silberg J.: The phrase "is not liable to punishment" in sec. 6(b) of the Treatment of Mentally Sick Persons Law, 1955, necessarily means that the person involved does not bear criminal responsibility, by virtue of either sec. 14 or sec. 11(1) of the Criminal Code Ordinance....Manifestly, the mental illness must exist when the offence was committed. That is very logical because in the event of hospitalisation under sec. 6(b), the Attorney-General cannot start criminal proceedings after the defendant has recovered, since from the outset he was free from responsibility for the act he had committed.

The everyday use of the phrase "is not liable to punishment" and every like phrase requires this construction. The Hebrew "ben" or the corresponding Aramaic "bar", when associated with some abstract noun always indicates potentiality or capacity. There are abundant examples, both negative and positive. [Silberg J. went on to quote from *Sotah* 26b; *Baba Metzia* 10b and 96a; *Makkot* 5a; *Niddah* 13a; and *Sanhedrin* 88b to illustrate the point.] The common denominator of the terms used is that they indicate the presence or absence of some quality, feature, potential or capacity either

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in a negative or a positive manner. "*Bar tashlumim* (payments)" is one whom the court orders to make payment; "*bar mitzvah* (commandment)" is not one who performs the Commandments but one capable, either by being of age or a Jew, of doing so; "*ben olam haba* (the world to come)" is one who is ready to depart this life...

In the present context as well, a person who "is not liable to punishment" (*eno bar onshin*) under sec. 6(b) is one who as a result of mental illness, the characteristic of which is the absence of understanding and intelligence, is not "competent" to have the statutory penalty applied to him: i.e. he does not bear criminal responsibility.

Cohn J.: After considering the matter...and reading the instructive judgment of Silberg J., I have also reached the conclusion that there is indeed nothing in sec. 6 empowering the court to make a hospitalisation order for a mentally ill person who has been convicted, that is, found criminally responsible notwithstanding his illness. I first thought of construing "is not liable to punishment" as not fit to be punished, since even if a person's illness is not enough to lead to the consequences described in sec. 14 of the Criminal Code Ordinance or to negate the criminal intention of which sec. 11 speaks, a mentally ill person in any case needs to be treated and is not fit to be punished. It now appears to me that "punishable" does not carry this broad interpretation.

The term is to be found in Jewish legal literature in connection with a minor: a lad between twelve and thirteen years of age may make an effective vow and take an effective oath, but he is not punished if he breaks his vow or oath (*Tur, Yoreh De'ah* 233). Bet Yosef observes that "this is obvious since he is not punishable." The *Talmud* also uses this expression in connection with the prohibition of polling the head and shaving the chin: one who is subject to the second prohibition is subject equally to the first; a woman to whom shaving the chin does not apply does not come within the prohibition of polling. The *Gemara* tries to draw an analogy between one who does the polling and one who is polled; where the latter has transgressed by allowing himself to be polled, the former is also in transgression; where the latter is not in transgression, the former goes free, but, "since a minor is not punishable...he who does the polling to a minor is also not guilty" (*Nazir* 27b).

A nice distinction is also made by the *Talmud* between being "punishable" and coming "within the category of being punishable." Some are not punishable, such as minors, but may become punishable on reaching maturity; others are not punishable and will never come within the category of being punishable, such as a non-Jew (*Temurah* 2b).

It follows that whoever is not liable to be punished does not bear criminal

responsibility. Only of one who does not bear criminal responsibility can it be said that he is not liable to punishment. (Moreover, although a minor is not liable to punishment and does not bear criminal responsibility, the court ought to inflict corporal punishment according to his bodily strength, for instance for theft, so that he does not become accustomed to committing a criminal act, as Maimonides puts it in *M.T. Genevah* 9:10; that is to say, the punishment a minor is given in chastisement does not render him one who is "liable to punishment".)

2. Judicial Considerations

Cr.A. 212/79
A. v. STATE OF ISRAEL
(1980) 34(2) *P.D.* 421, 425-426, 428

Elon J.: Appellant's counsel asked us to be lenient in punishing the appellant and expressed fears that the public storm that had arisen during the search for the appellant and when he was caught and brought to trial might influence the court to impose a very long term of imprisonment such as had never been imposed for rape...

It is superfluous to point out that the District Court was right in placing at the forefront of its considerations the need to ensure that the appellant will not repeat his wrongdoings, a need which derives from the duty to protect public tranquility and safety. The purposes and modes of punishment are many, but with grievous acts and great public dangers, the court does not fulfill its duty merely by ordering punishment that accords with the seriousness of the offence or the deterrence of the criminal himself or of other criminals, potential or actual: deterrence is not enough. The court must as far as possible assure that the appellant will not repeat his felonies and for this purpose must isolate him from free society. Reform of the criminal and his rehabilitation, which occupy a considerable place in penology, must also necessarily yield in circumstances as serious as the present, when they conflict with concern for public tranquility and safety. In such circumstances, the duty of the court towards the public as a whole, that a dangerous criminal should not circulate freely and endanger public welfare, is paramount over its duty towards one individual, the

criminal....Maimonides sets out this basic element of penology, after he lays down the extensive powers of punishment entrusted to the judge:

> All these things depend on what the judge deems proper and upon the exigencies of the hour. He must act always in the name of heaven and may not treat human beings lightly....He should be careful not to undermine their self-respect but only to serve the honour of heaven (*M.T. Sanhedrin* 24:10)...

Where, however, there is reasonable fear that concern for respect of the criminal may undermine respect of any woman, the duty to safeguard her honour is to be preferred to the personal honour of the criminal and the latter must yield, even if only temporarily.

As I have said, apart from the offence of murder, where a life has been taken, the maximum term of imprisonment under Israeli criminal law is twenty years, and is called life imprisonment. That is as it should be. Denial of a person's freedom by incarcerating him beyond what is reasonable is on the one hand less and less in accord with the object of punishment acceptable in our society and on the other hand, it increasingly oppresses and lowers a man's self-respect which we are all commanded to uphold. When a term of imprisonment reaches the pinnacle of twenty years, the entire world of the criminal has almost been taken from him. A term in excess of twenty years does not, it seems to me, serve any acceptable penal purpose except in rare and extraordinary instances. It denies the criminal almost all possibility of returning to and functioning in society after serving his sentence. Hence, when a court is about to impose a term longer than the excessive maximum fixed by law, as when different offences are being tried together, we must explain and justify such a sentence, whether indeed it is entailed by the nature of the criminal acts, the character of the criminal or the requirements of public security, and whether it is not affected unknowingly and indirectly by public sentiment. Rashba at the turn of the fourteenth century wrote illuminatingly:

> Moderation, consensus and consultation are necessary...for all that the act is serious, greater care and removal of angry feelings are necessary. The judge must fear, himself, that his zealousness for the Divine will lead him to close his eyes to the right and proper course. When, therefore, feelings of revenge rear their head he must not be overwhelmed but must moderate himself and be lenient in the manner of our ancients (*Resp. Rashba*, Part 5, 238; see also *Bahamotzky* v. *State of Israel*, below at page 486).

3. Plea Bargaining

Cr.A. 532/71
BAHAMOTZKY v. STATE OF ISRAEL
(1972) 26(1) *P.D.* 543, 554-555, 556-557

This appeal turned on the effect of plea-bargaining and an admission made in the course thereof.

Kister J.: I concur in the conclusion arrived at by my friend Cohn J. and generally with his reasons. I wish, however, to add a number of observations.

I find it difficult to define agreements entered into between defendants and prosecution as accepted practice in this country. I also find it difficult to accept the institution of the "State's witness" as a binding usage. For practical utilitarian reasons, however, we cannot abrogate entirely the usages in this area, though they are imperfect in point of justice and morality. We have not yet reached the era when "sin has ceased...and the wicked no longer exist." We cannot prevent crime without recourse to the legislature, judge and policeman. According to the *Metamorphoses* of the Roman poet Ovid, justice and equity prevailed without need of the law or of judges only in the golden age of the past, an age which has long departed from the earth. In the reality of today, the institutions of the State's witness and of plea-bargaining have blossomed. We no longer have an ideal means of battling crime, without recourse to the penalties common today, or a better way of locating wrongdoers and bringing them to justice than by the laws of evidence that now obtain.

Although the modern state does not spare effort or funds to raise the cultural, moral and even economic standards of its citizens, it has so far been unsuccessful in curbing crime. Furthermore, even when an offence has been committed, the state is prepared, under modern penal policy, to forego imposing a penalty if the person will mend his ways (suspended sentences), and even to assist him in resuming an orderly life by putting him on probation; and even if such a course is effective for some criminals, there is still a great need for a police force in order to prevent crime, to apprehend offenders and to bring them to justice, and, by the same token, for courts, in order to try them.

The approach of the Jewish tradition is also worthy of recall. To this end I quote the remarks of Hazon Ish to *Orah Hayim* 56:4:

> The basis of all criminal penalties is that because the wisdom of the Sages is very limited and insufficient to impart prudence to the simple-minded, punishment must be employed to set up barriers so that the world should not be prey to those physically strong but low in intelligence. Punishment needs, however, to be exacted in profound sorrow, free from narrow-mindedness towards others. Since man is imperfect and is moved by his evil inclination, one must not cease to be merciful and apply the law negligently; only then may he also be moved by feelings of vengeance, controlled by intelligence, the only effect of which is to speed up the process of judgment.

Thus the general opinion is that society has been unable to contend with criminality by ways of pleasantness and that there is no avoiding the imposition of punishment.

Not only have we been unsuccessful in "giving prudence to the simple" (*Prov.* 1:4) in order to reform them, but we have to battle with the guile of the criminal of another kind: he works to conceal his deeds and tries to veil his identity, which makes it difficult to bring him to trial and prove his offence in the normal manner: it may be difficult to find witnesses; it may be difficult to reach a decision if a defendant does not confess or does not give evidence against his accomplice. Hence the use of State's witnesses and plea-bargaining is sometimes necessary for the prosecution.

We must reconcile ourselves to plea-bargaining as an emergency measure. It seems to me that it is less injurious in point of justice than relieving a person from all criminal responsibility in exchange for serving as a witness for the state...

I may add here that the court must be very careful not to sentence a person for a crime he has not committed. Maimonides in his *Sefer haMitzvot* (Negative Commandment 290) writes, *inter alia*, that "it is better and more desirable to discharge a thousand sinners than to execute one innocent person". This rule is common in the civilized world. Accordingly, as regards a confession made in plea-bargaining, the courts in this country must proceed with caution, at least as much as do ordered states. I will employ some of the considerations found in Jewish law.

In the history of law in the western world, the confession of the accused was highly regarded: "confession est regina probationum." There were periods when the authorities did not hesitate to use torture to obtain a confession, but in the course of time a fundamental change occurred; not only was all torture or pressure to obtain confessions abandoned, but confessions are not now relied upon unless given voluntarily. At all events, an admission in court is sufficient for conviction.

Jewish law approaches that matter quite differently. The principles are

that "a person cannot incriminate himself", and that "a person is his own kin" (and therefore cannot give evidence against himself). As regards confessions made in court, Maimonides (*M.T. Sanhedrin* 18) writes:

> It is scripturally derived that the court does not sentence to death or order flogging on a person's own confession unless there are two (independent) witnesses. That Joshua executed Akhan and David executed the Amalekite stranger, on their own confessions, was due to emergency or royal decree. The Sanhedrin, however, does not sentence to death or inflict flogging on confession of the offence, in case it is due to unsoundness of mind or is a device of the mentally depressed to commit suicide.

The actual rule based upon Talmudic sources is not in dispute, although some have sought another explanation; this is not the occasion to enlarge on this aspect. It is sufficient to cite the view of Radbaz in his commentary to Maimonides, according to which a person's being is not his own but of the Holy One Blessed be He.

It is noteworthy that the Jewish approach received attention by the U.S. Supreme Court per Warren J. in *Miranda* v. *Arizona* (1966), 86 *S.Ct.* 1602, 384 *U.S.* 436 and per Douglas J. in *Garrity* v. *State of New Jersey* (1967) 87 *S.Ct.* 616, 617, 385 *U.S.* 493. I also note that there was available to the American judges an article by Professor Norman Lamm on "Self-incrimination and Psychology: The Fifth Amendment and the *Halakhah*" that originally appeared in *Decalogue Journal* and is now reprinted in his book *Faith and Doubt* (1971).

It is important to point out that as regards the Noahides, who according to the *halakhah* are under obligation to set up courts of law and prevent crime (murder, theft, etc.), opinion is divided in the *Talmud* as to whether their laws require the same attitude toward the confession of an accused. Discussion of the subject continues down to this day. An exhaustive article was published by Professor Aron Kirschenbaum (of the Law Faculty of Tel Aviv University) in *Dine Yisrael*, Vol. 2, 72 entitled: "On the Rule that a Person Cannot Incriminate Himself under Noahide Law"....In view of the Jewish legal tradition, we may certainly not hold a person to his confession even if made in court under a plea-bargain, so long as he was not properly cautioned by the court and had the opportunity to think about the matter.

4. Contempt of Court

See: ATTORNEY-GENERAL v. SHEINBERGER, Part 4, Regulation of the Courts, p. 289.

5. Punishment Fitting the Crime

Cr.A. 291/81
A v. STATE OF ISRAEL
(1981) 35(4) *P.D.* 438, 443, 444

This was an appeal against sentence for stealing, forgery and related offences. The appellant had committed the offences in the course of his duties while serving abroad in the foreign service.

Elon J.: There are also varying degrees of seriousness of breach of trust. Appropriation of public monies is more serious than appropriation of the money of some private individual. A person in breach of trust in respect of public moneys by fraud and deceit for his own purposes acts with complete irresponsibility, he abuses the good intentions of those who contributed to or provided the funds....Of such cases the Sages said, "Public theft is more serious than private theft, for the latter can make recompense, the former cannot" (*T. Baba Kamma* 10:14). "R. Levi said: The punishment for (false) measures is more rigorous than that for marrying within the forbidden degree" (*Baba Batra* 88b), and the reason is that it is impossible for the offender to repent properly (*Hoshen Mishpat* 231:19) since he cannot make amends, not knowing to whom he gave a false measure and how often (*Sema* to *Hoshen Mishpat* 231:34; see also *M.T. Genevah* 7:12 and Rashbam to *Baba Batra* 88b)...

Counsel emphasised in particular the good deeds of the appellant and his many virtues in his public career. He drew our attention to what Maimonides writes in *Mishneh Torah*—"Every individual has his virtues and failings: where the virtues exceed the failings, you have a righteous man; where the failings exceed the virtues you have a wicked man; where they are equally divided, you have a middling person" (*M.T. Teshuvah* 3:1; the source is *Kiddushin* 40a-b), and if the calculation is made here, the virtues of the appellant go beyond the failings mentioned in the charge.

This is indeed the attribute of the Holy One Blessed be He when the Day of Judgment comes for judging a man on his entire life (*M.T. Teshuvah* 3:3) and it is a function of His lovingkindness for His creatures, for man may do one good deed and "ensure for himself and the entire world great merit and bring to himself and the world salvation" (*ibid.* 4). But an earthly court is bidden to judge a person for each offence separately and according to its grievances. Although good deeds and past merit—and in converse earlier wrongdoings—are taken into account when passing sentence, we may not pass over the seriousness of one offence in the multitude of good deeds. Nor in the Heavenly Court is the calculation arithmetical or quantitative. Maimonides continues:

> This calculation is not according to the number of merits and failings but according to their magnitude. One merit can counter-balance a number of failings, as it is said, "because in him there is found some good" (I *Kings* 14:13); one failing may outweigh a number of merits, as it is said, "and one sinner destroyeth much good" (*Eccles.* 9:18)...and it is He who knows how merits are to be appraised against failings (*op. cit.* 2).

Cr.A. 419/81

FEIBUSH v. STATE OF ISRAEL

(1981) 35(4) *P.D.* 701, 708-709

The appellant was convicted with others of various offences connected with forgery. The others were convicted of only some of these offences and were sentenced with different degrees of severity. He appealed against his sentence, which he claimed was disproportionately onerous and departed from the principle of uniformity of sentence for the same offence when the decisive circumstances were similar.

Shilo J.: The first suggestion that sentence is to be commensurate with the offence is found in *Deut.* 25:2-3: "And it shall be, if the wicked man deserve to be beaten, that the judge shall cause him to lie down and to be beaten...according to the measure of his wickedness, by number. Forty stripes he may give him, he shall not exceed." Maimonides derives from these verses the following rule: "To what extent is the guilty person flogged? According to his physical strength....The reason why forty is mentioned is that the number may not be increased even if he is as strong and fit as Samson. For the weak the number is reduced lest he die if given many lashes" (*M.T. Sanhedrin* 7:1).

The idea of reward and punishment commensurate with the circumstances in which the deed is perpetrated is one of the foundation stones of Jewish legal philosophy and is expressed in the Thirteen Principles of Faith as Maimonides formulated them. Although there punishment by Heaven is involved, the principle is equally applicable in a terrestrial court. In the poem *Yigdal*, the poet mentions the principles in turn and, with regard to reward and punishment, says: "He bestoweth lovingkindness upon a man according to his work; he giveth to the wicked evil according to his wickedness."

We also say that the evil one (the person convicted by the court) must be meted out evil (punishment) according to his wickedness, according to his conviction. That is to say, not an objective punishment according to the type of offence but according to the particular "evil" of the offender. The evil of a person who commits a crime to obtain a piece of bread to eat is unlike the evil of a person who transgresses out of desire for riches. The evil of a first offender is unlike the evil of a hardened criminal. The evil of one who initiates, plans and controls the commission of a sophisticated crime is unlike the evil of one who is marginally or slightly involved. There is an abundance of similar considerations that go to the health, means, family and social situation of the person receiving punishment. The idea of punishment "according to his evil" includes in fact all the principles and considerations to which we have recourse in our courts daily when determining sentence.

6. Human Dignity

Cr.A. 344/81

STATE OF ISRAEL v. SEGAL *et al.*

(1981) 35(4) *P.D.* 313, 327-328

This was an appeal against sentence on conviction for dealing in dangerous drugs.

Elon J.: In consequence of the intolerable conditions prevailing in some of the prisons with regard to accommodation and food that are below minimum human standards, as recently reported...it is fitting to pursue more widely a policy of imposing heavy and onerous fines instead of

sending offenders to prison as long as that is not sharply inconsistent with the circumstances of the offence and the offender and the need to guard public well-being and security. A heavy monetary fine will often achieve its purpose of deterring offenders and reeducating them to a life of orderly work, whereas to our sorrow the prevailing conditions in the prisons—in addition to placing a defendant into a criminal society which is almost unreformable—often lead to demeaning his divine image, a course which, I fear, we may not follow.

It is instructive that Jewish law originally did not at all recognize imprisonment as a means of punishment. Even after it became reconciled to the idea, under the influence of surrounding judicial systems and inexorable necessity, the Sages of Jewish law protested against it and warned that human dignity must be safeguarded. The matter is treated in an illuminating fashion in a *responsum* of R. Hayim Palaggi of Ismir in Turkey in the first half of the 19th century, who spoke out against incarcerating people in "dirty and desolate jails"...(*Resp. Hikekei Lev*, Part 2, *Hoshen Mishpat* 5; see in greater detail M. Elon, *Freedom of the Individual in the Collection of Debts in Jewish Law* (1964) 228-37). I allow myself to quote something I have written elsewhere:

> What is noteworthy is that this absorption of the law current in the surrounding society did not bring with it the accompanying feature of the brutal treatment of prisoners, inhuman conditions regarding feeding and accommodation and the like, that persisted even into the nineteenth century in different countries. In the words of the historian, Salo Baron, "Jewish prisons, one of which may still be observed in the Altneuschul of Prague, resembled modern penitentiaries rather than medieval towers and dungeons."

It was forbidden to subject people awaiting trial to the same conditions of imprisonment as those already sentenced. Prisoners sentenced for non-capital offences were not to be housed in filthy places, since although they had sinned, they were still Jews and were to be kept in decent surroundings (M. Elon, "Imprisonment under Jewish Law", *Jubilee Volume in Honour of Pinhas Rosen*, ed. H. Cohn (1962) 171, 200).

See: KATLAN v. PRISON SERVICE, Part 3, Social and Administrative Regulation, p. 199.

B. Purposes of Punishment

1. Deterrence

Cr. A. 125/50

JAKOBOWITZ *v.* ATTORNEY GENERAL

(1952) 6 *P.D.* 514, 519, 543-544, 568-570

Agranat J.: The appellant was found guilty by the Tel Aviv District Court of murder under sec. 214(c) of the Criminal Code Ordinance, 1936, in that on 21.8.49, close to midnight, in the Meyer Garden in Tel Aviv, he deliberately caused the death of Daniel Pektori, in order to facilitate the commission of the crime, i.e. the rape of Naomi Stein. The appellant was sentenced to death, in accordance with sec. 215... The last question we must answer in this appeal is therefore what *mens rea* is needed in order to prove the offence under sec. 214(c), which states:

> Whoever wilfully causes the death of another person while preparing to commit an offence or in order to facilitate the commission of the offence or while committing the offence... will be accused of a crime. This crime is called murder.

In para. 18 of the decision which is the subject of this appeal, we find:

> We believe that the accused did not intend to kill Danny Pektori, but only to drive him away from the place so that he would not disturb him in perpetrating the rape.

Despite this determination, the learned judges found the accused guilty of murder, since their opinion was that "the offence is applicable even if the person who was striking did not intend to kill the deceased", and that "the striking of the deceased and Naomi Stein on the head with the tree stump was willful" (voluntary), and clearly "it constituted causing death wilfully, within the meaning of sec. 214(c)". The Court reached this conclusion in reliance on the ruling in *Cr. A.* 38/47, which in essence says as follows: A person will be found guilty of murder under sec. 214(c) if he merely intended the action that caused the death of the victim, even if he did not at all intend to bring about such a result.

Silberg J.: The question is: what is the meaning of the second alternative mentioned in sec. 214(c), and when will a person who caused the death of another in order to facilitate the commission of an offence be deemed a murderer? I have deliberately limited the scope of the question, confining it to the interpretation of the meaning of only the second situation, for two reasons: first, because that is the only question of practical import for us here, and secondly, because with such a limitation, it will be easier for us to reach a solution irrespective of the interpretation of the word, "wilfully".

....To what do the words, "in order to facilitate", refer? It would seem obvious that they refer to a person who kills, not for the sake of killing, but as a means of achieving a different objective. The objective is clear — to facilitate the commission of an offence. But what is it that is intended to facilitate the commission of the offence — the act or the result? The act of killing, or the death of the victim? It seems to me, that a literal reading would yield the second interpretation. Had the legislator been precise in his wording and written that a person who "does an act causing the death of a person to facilitate etc...", then the words "to facilitate" could have been attached to the word "act". This, however, is not what the Law says: it says, a person who "causes the death of any person to facilitate etc...", as if to say, "A caused the death of another, so that it would be easier for him to commit the offence." Does not our elementary feel for language whisper to us, whenever we hear this, that it is not the act of causing death, but rather the fact of death, which is the reason that the commission of the offence is facilitated? And indeed, it seems to me that this is the stipulation intended in the above phrase, even if (or precisely if) we completely omit the word "wilfully". And if this is so, if in the second alternative defined in sec. 214(c), it is the death of the victim which is intended to serve as a means of achieving the end, then it is clear that the will of the killer was here directed to the consequence of his act, and not only to the act itself.

What emerges from the aforesaid is, that without any connection to the word "wilfully"... when the only offence attributed to the offender is that the caused death in order to facilitate the commission of another offence, he will not be considered a murderer, unless he intended the victim's death.

And thus one of the riddles encountered by anyone who reads the above section is solved. I am referring to sec. 214(d), which designates as a "murderer" anyone who, "after the offence has been committed, causes the death of a person in order to secure for himself or for his partner in crime, escape or evasion of punishment for that offence."

In the definition of this offence, we do not find the word "wilfully"—it is missing. The question immediately arises: is the absence of this word

significant, and did the legislator intend to deal more severely with an offender under sub-sec.(d)?... No matter what the definition of "wilfully" in sec. 214(c), is it possible that the two acts mentioned in sub-sec.(d), i.e. causing death in order to secure escape, and causing death in order to evade punishment, will be considered to be so much graver than the second act mentioned in sub-sec.(c), i.e. causing death in order to facilitate the commission of the offence to the extent that in the case of sub-sec.(d) the law foregoes the said requirement of wilfulness? It seems to me that the answer to this can only be negative, because it is absolutely impossible, and it is inconceivable that a reasonable person could reach such an absurd conclusion.

From a moral point of view, there is certainly no point in being more severe in the case of sub-sec.(d). On the contrary! To facilitate or to make impossible the commission of an offence is undoubtedly a more criminal purpose than to seek to escape or to evade punishment for an offence that has already been committed. Indeed, the whole purpose of the punishment is to prevent the commission of the offence. How can evasion of punishment be considered a more grievous act than the commission of the offence? Beruriah, the wife of R. Meir, pointed out that the text states that "sins" — not sinners — "will cease", and R. Meir, as we know, agreed with her (*Berachot* 10a); this means that the eradication of crime is a more elevated goal than the punishment of offenders. It seems to me that no one would want to argue against this view. It is therefore clear that an offender under sub-sec.(d) cannot be judged more severely than the offender under the second alternative in sub-sec.(c): if in the latter case, a person is not to be considered a murderer unless he committed the offence wilfully, then *a fortiori* the same will apply to the two cases mentioned in sub-sec.(d).

2. Suspended Sentence and Repentance

Cr.A. 395/65

IBRAHIM v. ATTORNEY-GENERAL

(1965) 19(3) *P.D.* 581, 584

The appellant was convicted of obtaining things by deceit and, on being fined for that offence, an existing suspended sentence for obtaining money by false pretences was activated. The appeal was against activation of the suspended sentence for an offence not identical with the one for which he was newly convicted.

Kister J.: In the present case we have no need to construe precisely the condition attaching to offences of a particular kind, whether what was intended were acts that constituted the offence at the date the suspended sentence was imposed or also acts of the same type which the legislature later treated as an offence and of which the accused was convicted.

I incline to the view that the condition regarding a type of offence is to be interpreted as applying also to acts forbidden by the legislature with criminal sanctions after the imposition of the suspended sentence. This latter institution was intended to pardon an offender who had mended his ways, and it introduces an element of repentance into criminal law. Society may be ready to waive the punishment of an offender in certain instances provided he mends his ways; generally the condition is not to commit serious offences or offences of the same kind for which he was convicted.

That is one of the concerns of repentance, for who is repentant if not "he who is confronted with an act regarding which he offended but keeps himself from it and does not commit it because of repentance" (*M.T. Teshuvah* 2:1). One mode of repentance is "to keep away from something in which he sinned" (*ibid.* 4). Although in judicial proceedings we do not read a man's thoughts or require repentance in the moral sense but are content that a man who might commit an offence desists from doing so....A person who offended by taking money not his own must be cautious not to do anything which the legislature regards as a wrongdoing in his craving for money; in the case of traffic offences, the offender must be most careful not to commit anything the legislature at the time regards as an offence of the same kind. It cannot be said, therefore, that it is a necessary condition that the new provision must cover precisely the same acts as the previous provision. Generally no such identity exists between the new provision

and the one repealed. That was pointed out by the judge in the District Court. Accordingly, the construction given by appellant's counsel cannot be adopted, since were we so to understand the section it would always be possible to argue in like cases that the new provision is not completely identical with its predecessor, and the purpose of the legislature in putting the offender to the test of observing the law would be largely frustrated.

3. Benefiting from Criminality

App. 327/57

ESTATE OF SHLOMO dcd.

(1958) 15 *P.M.* 181, 186

Kister J.: In an application...concerning the estate of the deceased it was stated that there were eight heirs — the mother of the deceased, her six brothers and sisters and her husband. After hearing the application the Registrar made a succession order in accordance with the application and determined the shares of the heirs as follows: 6/24 to the mother, 1/24 to each of the brothers and sisters and 12/24 to the husband. It should be added that the application affirmed that the deceased had no land or other assets beyond a sum of IL. 1,000 owing to her.

After the order was made, one of the brothers applied to amend it on the ground that the husband had been charged with her murder after the order was originally made. He was convicted of killing her and no appeal was lodged against conviction. Accordingly, it was submitted, the husband was not entitled to any inheritance, since no wrongdoer can benefit from his wrongdoing: "Have you slain and also inherited?"

Speaking of the outlook of Jewish law, the personal law of the parties, regarding public policy, there is the rule "let not the sinner be remunerated." On the other hand there is no rule confiscating the possessions of an offender beyond the penalty prescribed for his offence. The court will not charge with payment a person sentenced to capital punishment, even though there is a moral, and even quasi-judicial, obligation to compensate the heirs of the victim (see Asheri to *Baba Kamma* 4:4; *Ketzot haHoshen* 28:1 and 410:4; Shakh to *Hoshen Mishpat* 28:2). There is no rule in Jewish law

for expropriating the share of a murderer and giving it to others, similar to the outlawry and forfeiture of English law.

C. Reasons for Severity or Leniency

1. Custom to be Uprooted

Cr.A. 596/73

MAHAMID v. STATE OF ISRAEL

(1974) 28(1) *P.D.* 773, 776

The appellant, a Moslem, was convicted of bigamy and was duly sentenced to fine and imprisonment. He appealed against imprisonment, on the ground that his first wife who could not bear children had consented to his marrying a second wife, a course permitted by his religion.

Cohn J.: The present appellant...has not committed any previous offences. The nature of his offence does not give rise to fear of any danger that threatens the public by allowing him to go free. But bigamy is still wide-spread among certain sections of the population, and, although the legislature has not said so explicitly, there is ground for the view that by the imposition of a fine alone the courts will not succeed in doing their part to uproot it. Maimonides already saw that regarding offences to which man is led by desire, and the abstinence from which will cause him great discomfort, "surely he will not desist there from other than out of fear of onerous punishment" (*The Guide for the Perplexed*, Part III, 41). And if that is so with regard to individual conduct, it is all the more so with regard to practices anchored in religious customs.

2. Seriousness of Offence against the Public

See: A. v. STATE OF ISRAEL, p. 489.

3. Past Merit of the Condemned Person

See: A. v. STATE OF ISRAEL, p. 489.

4. *De minimis*

Cr.C.(T.A.) 537/79

STATE OF ISRAEL v. LAUFER

(1981) 2 *P.M.* 309, 312-313

The defendant was convicted on his own confession of the offence of stealing by an employee. The articles involved were of very little value and were actually meant to be sold as scrap. The defendant had no previous conviction and was known to be a good and devoted employee. The prosecution did not ask for a sentence of actual imprisonment but a suspended sentence in order to make public the seriousness with which the offence was to be regarded.

Strusman J.: The prohibition of stealing is of ancient origin. In my deliberations....I consulted the literature to see what our Sages had to say. I found the following:

> It is forbidden to steal or to oppress. If it is something that no one cares about, such as taking a fragment of wood from a bundle or a fence to clean the teeth — it is permitted. But even this is forbidden in the *Jerusalem Talmud* as being contrary to the ways of the pious (*Hoshen Mishpat* 359:1).

The reason is obvious, since "if everyone did so, the entire bundle would disappear or the fence would collapse" (Sema *ad loc.*).

Thus the Sages distinguished between stealing, which is known to be a serious offence, and the taking of a petty thing, about which people are not meticulous. Here (the employer) was right to be concerned even with scrap and material of little value so that "the bundle does not disappear"...but is the act of taking something of very little value that no one is concerned with or even knew about until the defendant drew attention to it, properly to be dealt with as strictly as stealing?

The prosecution urges that the rule—issuing from the Supreme Court—is that every employee who steals from his employer (exceeding IL. 500 in value) is liable to imprisonment. If that is indeed the law, we should amend it. "Why was Jerusalem destroyed?...Because they insisted on the strict letter of the law and did not go beyond it" (*Baba Metzia* 30b). But this is not the law, and the defendant must be judged according to his personal qualities and the circumstances of the crime. Similarly, in the case of the serious offence of theft (from an employer), each instance must be distinguished to determine what was stolen and the use made of it. It cannot be said that an employee must be sentenced to imprisonment, even if only a suspended sentence, if by bad luck his case gets to court and he is convicted of the offence.

A fortiori the defendant here does not merit imprisonment or a suspended sentence when I am impressed by what he said and by the view taken by his superiors that his repentance was sincere: that he would stop his wrongdoing and had made up his mind to that effect...that he regretted what he had done..It is praiseworthy that he publicly admitted and gave information about his misdeed and that he regretted it all (see *M.T. Teshuvah* 2:2, 5).

To conclude, it is clear to me that the defendant does not merit imprisonment, or even a suspended sentence, neither as a deterrent nor in point of the offence committed. "Every human being has his merits and failings. He whose merits exceed his failings is a righteous person. He whose failings exceed his merits is a wicked person" (*ibid.* 3:1, 2).

5. Negative Effect on Public

Cr.C.(T.A.) 764/82
STATE OF ISRAEL v. EFRATI
(1983) *P.M.* 522, 525-526

The defendant, an investment broker, was charged with misappropriating $165,000 given to him for investing on the U.S. Stock Exchange. He was remanded until the close of proceedings in view of the large amount involved and the fear that he might abscond.

Strusman J.: One reason for remanding until the close of the proceedings emerges from a decision of Sussman P. in Misc. 153/79, where he ordered the remand of a drug dealer, not merely because of the heavy penalty that might be imposed, but because "regretfully we find ourselves here in Israel in an atmosphere of mounting crime connected with drugs, and the public interest requires that anyone suspected of such offences shall not be allowed to go free, provided the evidence possessed by the State shows that a conviction is as near as certain." Judicial consideration of the influence of the acts of the accused on the public and the relationship of the law to the accused is not something new to our times. It has been the *halakhah* from ancient days. We learn in *Sanhedrin* 46a:

> R. Eliezer b. Ya'akov said: I have heard that a court may impose flogging and pass sentence even not according to the *Torah*, not in order to disregard the *Torah* but in order to safeguard it. It once happened that a man rode a horse on the Sabbath in Greek times and he was brought to court and stoned, not because he deserved it but because the times required it. Again it happened that a man had intercourse with his wife under a fig tree and he was brought to court and flogged, not because he merited it but because the times required it.

Rashi explains *ad loc.* this last phrase as meaning that stringent measures had to be taken because loose morals prevailed and there was widespread religious laxity. Moreover, the individual transgressor is so punished even if there is no widespread laxity, when there is occasion to fear that if we let this individual be, people will learn from his example and this will lead to public deterioration (*Pithei Teshuvah*, *Hoshen Mishpat*, *Hilkhot Dayanim* 2:1).

Thus, the need of the moment to enforce the law with a strong hand

against offenders has prevailed over the pure law, according to which an accused presumed to be innocent is entitled to circulate freely until his case is concluded, which, in turn, creates the impression that the arm of the law is too short to achieve its ends, and we must surrender to offenders and their misdeeds. That is the public aspect that requires and justifies detaining an accused until the close of proceedings, when the prosecution has evidence that persuades the judge that the prospects are good of convicting him for an offence from which the public suffers.

6. Return of Stolen Goods

Cr.A. 395/75

ZUR v. STATE OF ISRAEL

(1976) 30(2) *P.D.* 589, 599

The appellant was convicted, on his own confession, of obtaining property by fraud, breach of trust, theft by a public servant, bribery and offences under currency law. He was sentenced to a cumulative period of eighteen years' imprisonment. Appeal was against sentence.

Cohn J.: With regard to those who inflict physical injury, tortfeasors, thieves, robbers, embezzlers and swindlers of all kinds, practical remorse is more important than verbal remorse. Our forebears have already taught us that one who confesses to his wrongdoing but does not correct his ways and does not make amends is like the person who holds a dead reptile in his hand and immerses himself for cleansing (*Ta'anit* 16a; and Rashi *ad loc.*); but he who restores a thing he has stolen, his confession and repentance are complete. Again, the fact that the criminal is motivated by self-serving motives does not detract from the value of restoration of the theft as a ground for mitigating his punishment. The main purpose of penal law is to secure the rule of law; once the law has been broken by theft, that rule is principally secured by restoring the stolen goods. I incline to the view that the law regarding capital offences follows civil law, just as equity follows law. Once the civil law has been satisfied, criminal law is no longer as demanding or avaricious. But when the civil law is not satisfied, penal law will arise to do its part in keeping lawlessness in check and maintaining observance of the law.

7. Penitents

See: STATE OF ISRAEL v. LAUFER, p. 499.

Cr.A. 705/81

MIARA v. STATE OF ISRAEL

(1982) 36(4) *P.D.* 223, 224

The appellant was convicted of certain property offences and was sentenced to a term of imprisonment, and given a suspended sentence. In addition, the court ordered the implementation of an earlier suspended sentence against him. The Probation Service recommended that he be placed on probation since he had changed his life style completely. The lower court saw no way of being able to grant the request.

Ben Porat J.: From the judgment of the lower court...it is apparent that it was ready to accede to the application of the Probation Officer but could not see its way to doing so because a suspended sentence is not to be extended when a defendant has been sentenced to imprisonment or given a suspended sentence and it found no occasion for releasing the defendant from prison for the present offence.

In normal circumstances, the lower court would be right, but the force of repentance is great when it is clearly authentic and not merely verbal and external. Our ancestors have said (*M.T. Teshuvah* 2:2) that "complete repentance is present when He who knows the secrets of the heart testifies that a person will never return to sinning." We do not know the secrets of the heart but the conduct of the present defendant over a lengthy period of two years since his release from jail gives very earnest hope that he has indeed been able to cut himself off from the world of crime and resume the proper path. We are prepared to assist him.

8. Shame as Punishment

Cr.A. 88/86

ZUCKERMAN v. STATE OF ISRAEL

(1986) 40(4) *P.D.* 209, 211

Appeal against the severity of the sentence imposed upon the appellant for the offences of accepting bribes, supplying forged documents, theft by a government employee, forgery of documents, receiving property obtained illegally and breach of trust. The appellant's deeds were exposed on the television and were the subject of a programme. The grounds for the appeal were principally the shame, disgrace and suffering endured by the appellant and his family as a result of the programme.

Elon J.: Now, whatever the case may be regarding the merits or demerits of investigation by television, it is evident that the programme caused an almost unbearable amount of suffering to the appellant, his wife, children and whole family as a result of the shame and disgrace to which he was subjected as a result of the broadcast. In the appellant's own words —"from the day of the broadcast...myself, my wife and my two small children have been constantly hounded and have been mentally ravaged as a result. Wherever we go there is an accusing finger pointed at us." Such suffering is an extremely severe punishment—"a punishment which is not written in any law" (as stated by Witkon J. in the context of the undue protraction of judicial proceedings in *Cr.A.* 125/74 *Mirom International Trading Co. et al.* v. *State of Israel* (1976) 30(1) *P.D.* 57, 152) for the offender, his wife, and most seriously, for their children. There is surely no greater torment than that undergone by children whose companions taunt them in the wake of the exposure of their father's crime. The Sages took pains to administer the following warning to a judge passing sentence on an accused person: "Do not let the dignity of our fellow man be a small thing in your eyes..." (*M.T. Sanhedrin* 24:10); and the cardinal principle in the Torah "...And you shall love your neighbor as yourself..." (*Lev.* 19:18), was also applied by the Sages to convicted criminals. Care must be taken not to disgrace a criminal sentenced to death, and his execution must be carried out in a dignified fashion (*Sanhedrin* 45a). The fundamental rule in Jewish penal theory is that "once punishment has been administered, the offender becomes one of your brethren" (*M. Makkot* 3:15, and see at length *C.A.4 4/82 State of Israel* v. *Tamir* (1983) 37(3) P.D. 201). All this must be taken into account when considering the degree of punishment imposed upon the criminal.

D. Rehabilitation

1. General

H.C. 147/72

SALAMEH v. INSPECTOR OF TRAFFIC *et al.*

(1972) 26(2) *P.D.* 658, 661

The petitioner's application for a licence to drive a taxicab was denied because of previous convictions.

Kister J.: The tendency today in the world at large and in Israel as well is to enable a person who has worked hard to mend his ways to reintegrate himself into normal civilian life. In the tradition of Jewish law, the concept exists of "regulations for helping the penitent"....One rule is that where a person steals a beam of wood and uses it for building he is not required to destroy what he built and restore the beam but may restore its value. This apart, it has been said that where thieves and usurers make restitution, it is not accepted from them, and the Sages are displeased with a person who does accept restitution from them, and this is in order to encourage people to reform themselves (*Baba Kamma* 94b, 95a).

See: BISHOR LTD. v. TAVBA *et al.*, Part 9, Property — Physical and Intellectual, p. 729.

See: STATE OF ISRAEL v. LAUFER, p. 499.

See: MIARA v. STATE OF ISRAEL, p. 503.

2. Validity of Pardons

H.C. 28/50

MINTZER v. TEL AVIV PLANNING COMMITTEE

(1950) 4 *P.D.* 492, 494

Silberg J.: It seems to me that ultimately counsel for the respondent was right and that the demolition order is not a "penalty" in the accepted meaning of the word. It is very difficult, if not impossible, to determine the precise meaning of "penalty" and to distinguish it entirely from other sanctions. Great Jewish law scholars have already pondered the problem without coming to a decision. No one will dispute...that there is no punishment without an offence and that punishment is only to be imposed after conviction. If our legislature...allows the demolition of the house of a person who has not committed any offence — i.e. punishes the purchaser instead of the builder of the house—does that not demonstrate beyond all doubt that demolition is not part of the punishment, even when accompanied by a conviction? It seems to me that here the purpose of the legislature in enabling the issue of a demolition order was not only the usual, "traditional" purpose of criminal law, so that others may be deterred in the future, but also, and mainly, to prevent any mishap in the actual case before the court. It is very possible that the Town Planning Ordinance is in truth deficient and that *de lege ferenda* it would be best to enable a demolition order to be made when the offender is caught but cannot for some reason be convicted. But this lacuna in the Ordinance need not entail others, nor need it lead us to the absurd conclusion that when some happy day the State decides to grant an amnesty to offenders and forgo their punishment, it should simultaneously penalise the public by leaving it open to the dangers of forbidden building. Just as the Day of Atonement—a time for religious amnesty—brings no pardon for wrongs between man and his neighbour until the neighbour is appeased (*Yoma* 85b), so secular amnesty will not discharge the offender of his social obligation, and demolition of a building erected without licence is entirely in compliance with such obligation since every building of this kind is a potential "nuisance", a kind of "pit in a public place", a nuisance which the person who dug it is commanded to close up and remove. That certainly is not "punishment", and pardon does not apply.

E. Status of Ex-Convict

1. Innocence

H.C. 301/66

EZRA v. DIRECTOR OF THE LICENSING AUTHORITY

(1967) 21(1) *P.D.* 128, 135-136

The petitioner, a cab driver, was convicted of committing an indecent act by force on a woman passenger, and of false imprisonment. He was sentenced to a term of imprisonment and was disqualified from holding a cab licence for three years. The sentence was affirmed by the Supreme Court. After his period of disqualification had terminated, he applied for his licence to be restored but was refused, in view of the Regulation that barred a person convicted of such offences from driving a public vehicle. The issue was whether the Licensing Authority may decide that disqualification for a given period is not enough and that he is to be permanently disqualified.

Cohn J.: My friend, Landau J., has already pointed out that since judgment was handed down against the petitioner, nothing has occurred to give rise to any fear that he would resume his past deviations. That means that the respondent cannot, and in fact does not, base his fear on anything other than the fact that four years ago the petitioner committed offences of which he was convicted and for which he was punished. I am not saying that such conviction cannot serve as a basis for reasonable fears that the offender may return to his old ways. Possibly in the course of trying him or in connection therewith or subsequent thereto facts or circumstances might be revealed that justify such fears. But far be it from us to raise the presumption that a person is wicked merely because he once or twice fell by the way or took the wrong path. If any presumption is to be raised at all, it is that he has presumably paid the penalty which has effectively rendered him fully repentant. As we have learnt, "Lest thy brother shall be dishonored in thine eyes" (*Deut.* 25:3): after he has undergone flogging (for his offence) "he is thy brother" (*M. Makkot* 3:15).

2. Freedom of Activity

H.C. 245/66

SACHA v. INSPECTOR GENERAL OF POLICE

(1966) 20(4) *P.D.* 441-442, 447-448

The petitioner applied for a licence to run a restaurant and bar and was refused. He submitted that account should have been taken of the impression gained by the municipal court from unchallenged evidence when he was tried for carrying on business without a licence, that the place did not have "the general character of a rendezvous for criminals." It was also urged that he had invested large sums to improve and decorate the place and the refusal of a licence would involve him in great loss and deprive him of his livelihood. The respondent claimed that he had an extensive criminal past and that the place was frequented by the underworld, drug addicts and prostitutes; local residents had also complained about the nuisance the place would cause.

Kister J.: I concur and desire to add a few observations regarding the influence of convictions on restricting the pursuit of certain occupations.

Today the principle is that only the penalty fixed by law is to be imposed on an offender, that once he has paid the penalty he is no longer restricted in his rights, including his civil rights. In Jewish law, the rule is that "all who have sinned and been flogged become fit again" (*M.T. Sanhedrin* 17:7; *Makkot* 23a).

Another important principle, recognised by the Common law, is that of freedom of trade: a person may pursue the calling and occupation he chooses. Nevertheless, the legislature sometimes finds it right to deny, or enable the denial of, the opportunity of engaging in a particular occupation, of filling a particular post either temporarily or absolutely, if the person involved has been guilty of some kind of offence.

The reason that at times the legislature thinks it proper to restrict a person's freedom of trade may be either to "contain the situation", that is, as punishment, or because the trade sought to be pursued involves a particular task or occupation which requires that it should not be pursued by a person who has committed an offence, mainly of calumny. There are also occupations that require the person engaged therein to be trustworthy and experienced or to possess certain qualities that ensure that public mishaps will be avoided. A person with a criminal past may shake public confidence in him. Without a doubt, having served one's sentence does not confer upon an offender any right to receive a certificate of probity.

The question therefore remains, how can we determine that an offender has reformed his ways. Jewish law gives examples: see *Sanhedrin* 25a; *M.T. Edut* 12:9; *Hoshen Mishpat* 34:29 to end; *Yoreh De'ah* 119:15 and 18. In modern law, lines of thought are to be found that the lapse of a particular period, varying with the seriousness of the offence, during which the conduct of the offender has been unexceptionable, will be enough for past offences no longer to be taken into account.

According to the law prevailing here, there is no such line of thought and it is sufficient for a person who has committed an offence to demonstrate by external indications that he is worthy of the required confidence.

3. Public Office

See: A. v. ATTORNEY-GENERAL, Part 3, Social and Administrative Regulation, p. 167.