

## The Impact of Jewish Law on Contemporary Legal Systems with Special Reference to Human Rights.

Asher Maoz

### A. JUDAISM

Judaism - *Yahadut* in Hebrew - is first and foremost a religion. The term Judaism – *Judaismes* in the Greek form – is first found in the Jewish-Hellenistic literature of the first century as a synonym for ‘the religion of the Israelites’.<sup>1</sup> The same sense is found in St Paul’s Epistles to the Galatians – ‘And profited in the Jews’ religion’.<sup>2</sup>

This term does not appear in the Bible<sup>3</sup> or in rabbinical literature and only occasionally is found in medieval literature. In classical sources the term used for the body of Jewish teachings is *Torah*. The term Judaism became popular during the Age of Enlightenment.<sup>4</sup> Judaism, as an appellation, means Jewish Religion<sup>5</sup> and as such is equivalent to Christianity or other named religions. However,

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<sup>1</sup> *Maccabees II*, 2:21; 8:1; 14:38. S. Cohen wrote: "The term Judaism (*Ioudaismos*) appears to have been coined by Greek-speaking Jews to designate their way of religious belief and practice as distinct from Hellenism which was the religion of their neighbors"; *The Universal Jewish Encyclopedia*, 10 vols., (19...) VI, 232.

<sup>2</sup> 1:14, King James Version. Other versions translate this term as ‘Judaism’, see e.g. E.J. Goodspeed, *The Parallel New Testament: The American Translation and the King James Version* (Chicago & London, 1943) 432.

<sup>3</sup> Save for the verb *mityahadim*, [becoming Jewish] in *Esther* 8:17. The term *yehudim* originally meant ‘the inhabitants of the kingdom of Yehuda’, later it gained the meaning ‘Jews’.

<sup>4</sup> *Encyclopaedia Judaica*, 16 vols. (1971-72), X, 383; *Encyclopaedia Hebraica*, 32 vols., (1968) XIX, 159 (*Heb.*).

<sup>5</sup> *The Oxford Dictionary of the Jewish Religion* (New York & Oxford: R.J. Werblowsky & G. Wigoder eds., 1997), in the entry “Judaism” refer to “Jewish Religion”; at p. 382; In *The Encyclopedia of Judaism* (Jerusalem: G. Wigoder ed., 1983), at 397, Wigoder defines Judaism as "The monotheistic faith of the Jews". *Encyclopaedia Britannica* defines Judaism as “the religion of the Jews”: *Macropaedia*, vol. 10, p. 623; *Micropaedia*, vol. 5, p. 244. The 1971

this is only partially true, for Judaism is also a comprehensive legal system. In their famous work *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law*,<sup>6</sup> R. David & J. Brierly define Judaism as ‘essentially a religion of the law.’<sup>7</sup> ‘[T]he Catholic Church’, on the other hand, ‘...did...feel it unnecessary to develop a Christian law to take the place of Roman law... Canon law was not a complete legal system designed to replace Roman law. It complemented Roman law or other “private” laws, never anything more, and regulated subjects not covered by these laws such as Church organization, the sacraments, and canonical procedure.’<sup>8</sup> The separation between spiritual and temporal matters, which is at the foundation of Christianity,<sup>9</sup> is alien to Judaism for Judaism encompasses all aspects of society and of an individual’s life.<sup>10</sup> As Professor Freiman wrote:

Jewish religion and law are a single entity. The *Torah* makes no dogmatic distinction between religious teachings and legal provisions.<sup>11</sup>

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edition of *Encyclopaedia Britannica* defined Judaism as “the Hebrew religion”; vol. 13, p. 103.

<sup>6</sup> R. David & J. Brierly, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law* (London, 1985).

<sup>7</sup> *Ibid.*, at 456. Professor Rackman wrote: "... it is more accurate to conceive of Judaism as a legal order rather than a religion or faith."; E. Rackman, *One Man's Judaism* (NY: Philosophical Library, 1970), at 4.

<sup>8</sup> *Supra*, note 6, at 464.

<sup>9</sup> This distinction was expressed in Matthew’s rule: “*Reddite ergo quae sunt Caesaris, Casari; et quae sunt Dei Deo*”; *Matthew*, XXII, 21. *See, generally*, A. Maoz, ‘The Rabbinate and the Rabbinical Courts Between the Hammer and the Anvil’, 16-17 (1990-1991) *Shenaton Hamishpat Ha’Ivri* [Jewish Law Annual], 289, 311-312 (*Heb.*).

<sup>10</sup> A. Maoz, ‘State and Religion In Israel’, in *International Perspectives on Church and State* (M. Mor (ed.), Omaha, 1993), 239, 242.

<sup>11</sup> A. H. Freiman, ‘Jewish Law in the Land of Israel’, 5704 [1944] *Ha’aretz Calendar*, 110 (*Heb.*). In his thesis *The Law of Unjust Enrichment: A Philisophical Perspective* (J.S.D. dissertation submitted to the Yale Law School, 1993), Hanoch Dagan notes: "The term Talmudic civil law refers to the legal - as distinguished from religious - part of the Jewish *Halakha*; but the legal and the religious are inextricably woven together in the *Halakha*; *ibid.*, at 262.

In addition, Judaism is an ethical system, teaching a moral way of life: 'Jewish law is a combined system, consisting of law, religion and morality. These three elements are intertwined and interrelated, and form one system, known as *Halacha*, which means a way of life.'<sup>12</sup>

After defining Judaism as "[t]he religion of the Jewish people", Kohler Kaufmann admits:

A clear and concise definition of Judaism is very difficult to give, for the reason that it is not a religion pure and simple based upon accepted creeds, like Christianity or Buddhism, but is one inseparably connected with the Jewish nation as the depository and guardian of the truths held by it for mankind. Furthermore, it is as a law, or system of laws, given by God on Sinai that Judaism is chiefly represented in Scripture and tradition, the religious doctrines being only implicitly or occasionally stated; wherefore it is frequently asserted that Judaism is a theocracy (Josephus, "Contra Ap." ii. 16), a religious legislation for the Jewish people, but not a religion. The fact is that Judaism is too large and comprehensive a force in history to be defined by a single term or encompassed from one point of view.<sup>13</sup>

## II. JUDAISM AND HUMAN RIGHTS

The fact that Judaism is not merely a religious system dealing solely with the relations between man and God may account for the fact that even non-religious people accept its teachings and norms. However, further explanation is needed for the thesis that Judaism has and continues to serve as a valuable source of human rights. The explanation is found in the fact that the civil and ethical tenets of Judaism, not less than its 'religious' aspects, stem from divinity. The Ten Commandments include religious norms, such as the forbidding of idolatry; ethical principles, such as the commandment to respect one's parents; social values, exemplified by the universal day of rest; moral rules as in the

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<sup>12</sup> Ch. Povarsky, in 'The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?', (April 2000) *Jewish Law Report*, 1, 3.

<sup>13</sup> *The Jewish Encyclopedia*, 12 vols., (1904) VII, 359. However, scholars of Judaic studies criticize Josephus' observation and regard Judaism as a religious nomocracy, or a theonomy rather than a theocracy; see: A. Kirschenbaum, "Jewish Theocracy", (1977) 8 *Dine Israel: An Annual of Jewish Law And Israeli Family Law*, 223, 223-225. Cf. J. Faur, "Some General Observations on the Character of Classical Jewish Literature: A Functional Approach", (1977) XXVIII *Journal of Jewish Studies* 37, fn. 44-45.

prohibition of adultery and legal provisions, such as the prohibition against false testimony. All these norms were given by God on Mount Sinai and are equally binding. From a religious point of view there is no distinction between the religious and civil norms of *Halacha*.<sup>14</sup>

It might seem surprising that Jewish law, being a religious legal system, incorporates principles of human rights. *Prima facie*, such values and principles contradict a religious normative system in which the ultimate task of the individual is to serve God.<sup>15</sup> This is especially so since Judaism does not propound a concept of rights but adheres to a concept of duties, not only in the relationship between man and God, but also in the relationship between man and man. Indeed, even the term 'human rights' is absent in Jewish classic texts,<sup>16</sup> as is the term 'rights' in general. Yet while 'Jewish

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<sup>14</sup> The interplay between religious and legal norms in *Halacha* may be demonstrated through the controversy as to whether paying a debt is a legal duty or merely a religious one. This controversy is reported in the *Babylonian Talmud* [a collection of commentaries and expositions on the *Mishna* - a codification of post-Biblical oral law, circa year 200 - compiled in Babylon in the sixth century. Reference to the *Talmud*, or to a tractate in general, is always to the *Babylonian Talmud*], Tractate *Ketuboth* 86a. One of the Sages expressed the view that a debtor is under a legal obligation to pay his debt, just as a bailee is under an obligation to return the bailed chattel to the bailor. Another Sage rejected this comparison, stating that the bailor's right to demand the return of the bailed chattel is based on the fact that he retains the title to the chattel. In contrast, a loan is usually spent and does not remain in the hands of the debtor. Therefore, the obligation to pay the debt rests on the debtor's promise. The obligation to fulfill this promise is based on a religious commandment, as 'paying off a debt is a *mitzva*' [a religious commandment]. When asked what is the rule if the debtor abstains from fulfilling this obligation, the Sage answered that just as a Rabbinical Court may enforce religious obligations, so too the Court will compel performance of the religious obligation to pay a debt. See, generally, M. Elon, *Jewish Law – History, Sources, Principles*, 4 vols. (B. Auerbach & M. Sykes, (trans.), Philadelphia and Jerusalem, 1994), I, 117-9.

<sup>15</sup> Y. Leibovitch, *Judaism, Human Values and the Jewish State* (Cambridge, Mass., 1992), 14. Cf. S.D. Goitein, "Human Rights in Jewish Thought and Life in the Middle ages", *Essays on Human Rights - Contemporary Issues and Jewish Perspectives* (Philadelphia, D. Sidorsky, ed., 1979) 247.

<sup>16</sup> M.R. Konvitz, 'Introduction', in M.R. Konvitz (ed.), *Judaism and Human Rights* (New York, 1972), 13.

law... postulates a system of duties rather than a system of rights',<sup>17</sup> the protection of these rights might actually be more effective under such a system.<sup>18</sup> Thus, the suggestion that "[t]he absence of an explicit vocabulary of human rights in the Bible" ought to lead to "the conclusion that the search for this concept in biblical literature is a futile, anachronistic exercise", has been rejected. Instead, explained Brichto, "the interpretation of biblical thought requires the translation of concepts rather than of words."<sup>19</sup> Likewise, explained Daube: "There is no rubric *human rights* in rabbinic literature or in Philo, yet the documentation bearing on the topic constitutes a veritable *embarras de richesses*."<sup>20</sup>

Evidence of this may be found in relation to the right to life. This right is paramount in Western civilization<sup>21</sup>, nonetheless, an American court stated a century ago that failing to rescue a two-year old baby seen on a railroad track would not comprise a breach of the law. The bystander 'may be styled a

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<sup>17</sup> H.H. Cohn, *Human Rights in Jewish Law* (New York, 1984), 18. Cf. A. Kirschenbaum, *Equity in Jewish Law – Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (Hoboken, New Jersey, 1991), 1-8.

<sup>18</sup> Cf. R.M. Cover, 'Obligations: A Jewish Jurisprudence of the Social Order', (1987) 5 *J. L. & Religion* 65. Rene Cassin, who was assigned to write the first draft of the Universal Declaration of Human Rights, expressly mentioned the duties of man. This idea met with objections from members of the United Nations Commission on Human Rights, both on liberal and religious grounds; R. Cassin, 'From the Ten Commandments to the Rights of Man', in *Of Law and Man – Essays in Honor of Haim H. Cohn* (S. Shoham, ed., New York and Tel-Aviv, 1971), 13, 14.

<sup>19</sup> H.C. Brichto, "The Hebrew Bible on Human Rights", in Sidorsky, *Essays on Human Rights*, n. 15 above, 215, 216.

<sup>20</sup> D. Daube, "The Rabbis and Philo on Human Rights", *ibid.*, 234.

<sup>21</sup> See Y. Dinstein, "The right to Life, Physical Integrity, and Liberty", *The International Bill of Rights: The Covenant on Civil and Political Rights* (L. Henkin, ed., New York, 1981), 114: "The right to life is incontestably the most important of all human rights... The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization". The Human Rights Committee regarded the right to life, declared in Article 6 of the International Covenant on Civil and Political Rights, the "supreme right of the human being"; *Communication No. R. 11/45, submitted on behalf of the husband of M. F. Suarez de Guerrero v. Columbia* (views adopted on 31 March 1982, GAOR A/37/30, Report HRC, p. 146, para. 13.1, quoted in A.L. Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, 1998)398.

ruthless savage and a moral monster', the learned judge tells us, 'but he is not liable in damages for the child's injury, or indictable under the statute for his death'. 'With purely moral obligations', the court noted, 'the law does not deal'.<sup>22</sup>

Similarly, a contemporary writer refers to a person, who while sitting in a lounge chair next to a swimming pool, sees a child drowning in the pool. All he has to do in order to save the child "is put down my drink, reach down, grab him by the trunks, and pull him out", all this "without even getting out of my seat". Nevertheless, "[I]f I do not save him I violate no rights... but would still reveal myself as a piece of moral slime properly to be shunned by all decent people".<sup>23</sup> Possibly, this is not the most extreme formulation of the rule, for several writers share the view that to lend active aid in order to prevent harm from others "confers a mere gratuitous benefit, and therefore cannot have been required by duty, not even by moral duty."<sup>24</sup> It has, moreover, been noted that "[o]fficial sources of American law have done their best to discourage Good Samaritans."<sup>25</sup>

No 'right to life', as such, exists in Jewish law, yet the *Torah* commands us: 'Neither shalt thou stand against the blood of thy neighbour'.<sup>26</sup> This duty takes precedence over almost every other commandment. Maimonides summarized this rule as follows:

If one person is able to save another and does not save him, he transgresses the commandment, *neither shalt thou stand idly by the blood of thy neighbour*. Similarly, if one person sees another drowning in the sea, or being attacked by bandits, or being attacked by wild animals, and, although able to rescue him alone or by hiring others, does not rescue him; or if one hears heathens or informers plotting evil against another or laying a trap for him and does not call it to the other's attention and let him know; or if one knows that a heathen or a violent person is going to attack another and although able to appease him on behalf of the other and make him change his mind, he does not do so; or if one acts in any similar way - he transgresses the commandment, *neither shalt thou stand idly by the blood of thy neighbour*.<sup>27</sup>

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<sup>22</sup> *Buch v. Amory Manufacturing Co.* 69 N.H. 257, 260; 44 A. 809, 810 (1897).

<sup>23</sup> J.F. Murphy, "Blackmail: A Preliminary Inquiry" (1980) 63(2) *The Methodist* 168 n. 6.

<sup>24</sup> J. Feinberg, *The Moral Limits of the Criminal Law*, 4 vols., vol. One: *Harm to Others* (New York, 1984), 130.

<sup>25</sup> J.P. Dawson, "Rewards for the Rescue of Human Life?", *The Good Samaritan and the Law* (Garden City, J.M. Ratcliffe ed., 1966), 63.

<sup>26</sup> *Leviticus* 19:16.

<sup>27</sup> Maimonides, *Torts*, 'Murder and Preservation of Life', 1:14; *Yale Judaica Series Translation*, 21 vols. (New Haven, 1947-).

Failure to save human life is tantamount to actively shedding blood. Maimonides goes on and explains that though a breach of this commandment, being an act of nonfeasance, is not punishable in court, “the offence is most serious”.<sup>28</sup> To emphasize this point he quotes the *Mishna* Asserting that “whoever destroys one human life is deemed by Scriptures to have destroyed the whole universe and if a man saves a single soul, Scriptures regards him as having saved the whole world”.<sup>29</sup> A rabbinical source of the 15<sup>th</sup> century even stated: “If he can save him and does not do so, it is as if he himself killed him.”<sup>30</sup>

Kirschenbaum summarizes the attitude of Jewish Law in this matter as follows:

It would be misleading... to interpret the lack of judicial punishment in Jewish law for the innocent bystander who fails in his duty to come to the rescue of his fellow-man in distress as indicating that the duty is merely moral. Rather, Jewish law views such failure as nonfeasance, a formal offence of inaction (*delictum mere omissivum*) where action is a duty required by law.”<sup>31</sup>

This is so since “in Jewish society... non-prosecutable injunctions, by their sheer religious weight, were effective in their deterrent power.”<sup>32</sup> The Good Samaritan in the New Testament, on the other

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<sup>28</sup> *Ibid.*

<sup>29</sup> Tractate *Sanhedrin* 4:5. In some versions reference is made to destroying and saving the life of an Israelite; See E.E. Aurbach, “‘*Kol Ha-Mekayem Nefesh Ahat...*’ - Development of the that whoever destroys one human life is deemed by Scriptures to have destroyed the whole universe and if a man saves a single soul, Scriptures regards him as having saved the whole world Versions, Vicissitudes of Censorship, and Buisness Manipulations of Printers”, (1971) *XL Tarbis* 268 (*Heb.*, with English summary).

<sup>30</sup> *Issur Ve’heter Ha’arokh* 59:38 (Vilna, 1891), at 267, attributed to Rabbi Jonah Ashkenazi.

<sup>31</sup> A. Kirschenbaum, ‘The Bystander’s Duty to Rescue in Jewish Law’, (1980) 8 *The Journal of Religious Ethics*, 204, 207.

<sup>32</sup> *Ibid.* For a comparison of the Jewish and the common law approach to the duty to rescue and to render aid, see A. Cucchiara Besser & K.J. Kaplan, “The Good Samaritan: Jewish and American Legal Perspectives”, (1993-94) 10 *J. Law & Religion* 193; E. Weinrib, “Rescue and Restitution”, (1990) 1 *S’vara* 59. For a comprehensive analysis of the legitimacy of bad samaritan laws, see J. Feinberg, *The Morality of the Criminal Law*, 4 vols., I, *Harm to Others* (New York, 1984), Ch. 4: “Failure To Prvent Harm”, pp. 126-185; T. Nagel, *The Possibility of*

hand, while aiding the wounded man on the road to Jericho<sup>33</sup>, merely performed a moral duty. Referring to this parable, Carpenter C.J. wrote::

The priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have prevented or relieved.<sup>34</sup>

Analysing the difference between the Jewish and the Christian attitudes in inspiring a duty to rescue, Judge Hendel wrote:

There is, certainly, a difference between the inspiration of the Good Samaritan and that of 'Neither shalt thou stand against the blood of thy neighbour'. The Good Samaritan is a notorious important parable with a clear message which had influence for generations; yet it is no more than a parable. 'Neither shalt thou stand against the blood of thy neighbour' is a religious commandment and a law within a legal system.<sup>35</sup>

### C. HUMAN DIGNITY

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*Altruism* (Oxford, 1970); M.A. Menlowe, "The Philosophical Foundations of a Duty to Rescue", *The Duty to Rescue* (M.A. Menlowe & A. McCall Smith eds., Aldershot, 1993), 5; E.J. Weinrib, "The Case for a Duty to Rescue", (1980) 90 *Yale L. J.* 247; A.D. Woolley, "A Duty to Rescue: Some Thoughts on Criminal Liability", (1983) *Va. L. R.* 1273. For a survey of common law, see: A. McCall Smith, "The Duty to Rescue and the Common Law", *The Duty to Rescue.*, at 55; C.o. Gregory, "The Good Samaritan and the Bad: The Anglo-American Law", *The Good Samaritan and the Law*, above n. 25, at 23. Continental law differs from common law in its attitude advocating a duty to rescue; See A.W. Rudzinski, "The Duty to Rescue: A Comparative Analysis", *Ibid.*, at 91; A. Tunc, "The Volunteer and the Good Samaritan", *Ibid.*, at 43; A. Cadoppi, "Failure to Rescue and the Continental Criminal Law", *The Duty to Rescue.*, at 93. Cf. "The Failure to Rescue, A Comparative Study", (1952) 52 *Col. L. Rev.*, 631.

<sup>33</sup> Luke 10:30.

<sup>34</sup> *Buch v. Amory Manufacturing Co*, n. 22 above.

<sup>35</sup> N. Hendel, "The 'Thou Shall not Stand Passive' Law - Inspiration and Reality", (2001) 16 *Bar-Ilan L. Stud. [Mechkery Mishpat]* 229, 268 (Heb.).

A major crossroad where Western philosophy intersects with Judaism is human dignity. Human dignity is at the core of central international instruments including the Charter of the United Nations, 1945, the Universal Declaration of Human Rights, 1948, and the Human Rights Covenant, 1966. These documents regard human rights as deriving from the 'inherent dignity' of the human being.<sup>36</sup>

Several national constitutions, particularly those of recent origin as is the German *Grundgesetz*, explicitly recognize human dignity. Article 1, entitled "Protection of human dignity" provides:

- (1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

Commenting on this article Kommers wrote:

Article I, appropriately, is the cornerstone of the Basic Law... The principle of human dignity, as the Constitutional Court has repeatedly emphasized, is the foundation of all guaranteed rights.<sup>37</sup>

Constitutions which do not expressly refer to human dignity are not necessarily indifferent to it. An American writer stated firmly:

The basic value in the United States Constitution, broadly conceived, has become a concern for human dignity.<sup>38</sup>

Another writer noted:

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<sup>36</sup> See, generally, H.H. Cohn, "On the Meaning of Human Dignity", (1983)13 *Israel Yearbook on Human Rights [IYHR]* 226.

<sup>37</sup> D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, 2<sup>nd</sup> ed., 1997), 20. Cf. O. Lagodny, "Human Dignity and Its Impact on German Substantive Criminal Law and Criminal Procedure", (1999) 33 *Isr. L. R.* 575: "Human dignity is the article with which our constitution begins. The following guarantees may be seen... as an emanation of human dignity...".

<sup>38</sup> W. F. Murphy, 'An Ordering of Constitutional Values', (1980)53 *Southern California Law Review [South. Cal. L. Rev.]* 703, 745.

Understood abstractly enough, the right to human dignity would gain unanimous adherence in the United States and in many if not all other contemporary societies.<sup>39</sup>

As with human rights, the term 'dignity' is absent from Jewish writings and in fact there is no parallel term in Hebrew. While the Hebrew term *kavod* literally means 'honour', it is accurate to translate the term *kevod ha-beriot* ('the honour of human creatures'), as used by the sagas, to mean human dignity.<sup>40</sup> This value which underlines the teachings of Judaism is supreme and even supersedes the commandments of God.<sup>41</sup> It is, moreover, essential to note, that "*Creature* is normally employed where the condition of man as such, irrespective of nation, rank, or the like, is in question."<sup>42</sup>

Human dignity stems from creation itself. We are told in *Genesis*<sup>43</sup> that man was created in the very image of God. Thomas Paine regarded this Biblical source as proof 'that the equality of man, far from being a modern doctrine is the oldest on record' and relied on it to support the principle in the American Declaration of Independence that all men are created equal.<sup>44</sup>

This succinct Biblical statement may well be regarded as the basis of human rights in Judaism. The variety of interpretations accorded to this verse cover most aspects of human dignity and freedom. The full verse reads as follows:

And God said: 'Let us make man in our image after our likeness'... So God created man in His own image, in the image of God created He him, male and female created He them.

The Psalmist described man as not worthy to be within the contemplation of God, yet he asserted:

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<sup>39</sup> P. Brest, 'Accommodation of the Majoritarianism and Rights of Human Dignity', (1980) 53 *South. Cal. L. Rev.* 761, 762.

<sup>40</sup> H.H. Cohn, n. 35 above, at 247. See, generally, N. Rakover, *Human Dignity in Jewish Law* (Jerusalem, 1998) (*Heb.*). The English title of the book hardly conveys its message. The exact translation of the Hebrew title would be: "Great is the Honor of Human Creatures: Human Dignity as a Super-Value".

<sup>41</sup> *Babylonian Talmud*, Tractate *Berakhot* 19b.

<sup>42</sup> D. Daube, n. 20 above, 234.

<sup>43</sup> *Genesis* 1:26-27.

<sup>44</sup> T. Paine, *The Rights of Man* (London, 1915), 43.

[T]hou hast made him a little lower than God,<sup>45</sup> and thou crownest him with glory and majesty.<sup>46</sup>

Ben Azzai, a fourth century Jewish scholar, inferred from this verse that all descendants of Adam - regardless of religion, race or colour - bear the imprint of divine creation and divine likeness and must be treated accordingly.<sup>47</sup>

Here it is relevant to mention a traditional commentary explaining why God created a single man, Adam, as opposed to a community of men: ‘Therefore each one ought to say: “It is for me alone that the world was created”’. This idea is given practical application in the caution administered by the Jewish Religious Courts to witnesses in criminal cases. The Court must warn the witnesses not to give hearsay or speculative evidence:

Man was created single to teach that whoever destroys one human life is deemed by Scriptures to have destroyed the whole universe and if a man saves a single soul, Scriptures regards him as having saved the whole world.<sup>48</sup>

Another interesting reason given for the creation of a single individual is ‘that no one may be heard to say to another: “My father was greater than yours”’.<sup>49</sup> This reminds us of another statement in the Bible: ‘Have we not all one father? Hath not one God created us?’<sup>50</sup>

The statement has more than philosophical value as God commanded the Children of Israel:

One law and one manner shall be for you and for the stranger that sojourneth with you.<sup>51</sup>

The idea of equality is expressed in the description of the covenant between God and the Children of Israel. Abba Hillel Silver wrote:

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<sup>45</sup> Interestingly, the King James translation could not accept the idea that man is just a little lower than God and replaced God with ‘the angels’.

<sup>46</sup> *Psalms* 8:6-7.

<sup>47</sup> *Sifra* [a collection of interpretations of *Leviticus*, compiled in the fourth century], *Kedoshim* 4:12.

<sup>48</sup> *Mishna*, Tractate *Sanhedrin* 4:5. Cf. the version in Maimonides, *Book of Judges*, 16b.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Malachi* 2:10.

<sup>51</sup> *Numbers* 15:16. See also, *Exodus* 12:49.

Judaism was essentially a democratic faith, a people's religion. The covenant was made with 'all the men of Israel, from the hewer of your wood to the drawer of your water' (*Deuteronomy* 29:11). The *Torah* was given to all and in sight of all (*Exodus* 19). The entire people was summoned to become a 'kingdom of priests and a holy nation' (*Exodus* 19:6)... On the verse: 'You stand this day all of you before the Lord your God, your heads, your tribes, your elders, and your officers, all the men of Israel' (*Deuteronomy* 29:10), a *midrash* expounds: God says: 'Even though I have appointed over you heads and judges, elders and officers, you are all equal in my sight'. This is the meaning of 'all the men of Israel' - all are alike (*Midrash Tanhuma*).<sup>52</sup>

The rule of law and equality before the law are universally applied in Judaism. We find, in Jewish ancient sources, two versions of a story relating to the status of kings in Judicial proceedings.

The *Babylonian Talmud* tells of Alexander Yannai, a most powerful king, who's slave stood trial for killing a person. Rabbi Simeon Ben Shetah, President of the *Sanhedrin*, the ancient Jewish Court, summoned the king to be present at the trial. The king appeared in court yet rejected Rabbi Ben Shetah's demand to stand during the trial. Rabbi Ben Shetah's reprimanded the king, saying:

Stand up on thy feet, King Yannai, and let the witnesses testify against thee; yet it is not before us that thou standest, but before Him who spoke and the world came into being, as it is written [in the *Torah*], 'Then both the men between whom the controversy is, shall stand before the Lord' (*Deuteronomy* 19:17).<sup>53</sup>

Yet the king refused to stand up saying he will not obey Rabbi Ben Shetah, but will do what the other members of the court will decide. Thereupon, the *Talmud* tells us, Ben Shatach turned his eyes on his colleagues, yet they all looked down at the ground out of fear of the king. Ben Shatach reacted with temper, saying: "Are ye wrapped in thoughts? Let the Master of thoughts [meaning God] come and call you to account". Thereupon "Gabriel [the angel] came and smote them to the ground, and they died". Following this episode it was enacted: "A King may neither judge nor been judged".

It is clear why this traumatic occurrence caused the sagas to grant immunity to the kings. It is less obvious why the kings were enjoined from sitting as judges in trials. In order to understand the reason for that we must look up at the beginning of the section. It is stated there that this rule applies to the kings of Israel only, but not to the kings of the house of David. The sagas learned this from the words

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<sup>52</sup> A.H. Silver, *Where Judaism Differed* (New York, 1956), 275-6.

<sup>53</sup> Tractate *Sanhedrin* 19. The translation is from the Soncino edition, by J. Shechter (I. Epstein, ed.), 18 vols. (1935-52). However, the transliteration of the names is that of *Encyclopaedia Judaica*.

of Jermeia the prophet: “O House of David, thus saith the Lord, execute justice in the morning and deliver him that is robbed out of the hand of the opressor...”.<sup>54</sup> And how do we know that they may be judged? The Talmud explains: “... and if they may not be judged, how could they judge?”. This logic is in accordance with Resh Lakish’s statement: “Adorn yourself first and then adorn others”.

A different version of this story appears in *Midrash Tanhuma*, a homletic interpretation of the Scripture, attributed to Rabbi Tanhum Bar Abba, of the second half of the fourth century. According to that source a plaitiff asked Ben Shatach to summon a Hasmonite king for a civil suit. Ben Shatach cheked with his colleagues whether they would try the king without fear. Upon their positive answer he summons the king who refused to stand and answer the claim. The story about the angel who hit the members of the court to death has here an addendum: “Immediately the king was shocked. Immediately Simeon Ben Shetah said to him: ‘Stand up on thy feet, and answer the claim, yet it is not before myself that thou standest, but before Him who spoke and the world came into being, as it is written: ‘Then both the men between whom the controversy is, shall stand before the Lord’. Instantly he raised to his feet and was sued “.”<sup>55</sup>

This episode was brought by the *Midrash* as a demonstration of the Biblical warning against discrimination in justice and against preferential treatment. This is expressed in the prohibition of having the poor litigant stand while the rich counterpart remains sitting. The *Midrash* concludes: “The judges must regard as if the Divine Presence sits among them, as it is written: ‘Amidst God will he judge’”<sup>56</sup>

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<sup>54</sup> Jer. 21:12.

<sup>55</sup> *Midrash Tanhuma*, Judges, 7.

<sup>56</sup> Psalms, 82:1. A third version of this story appears in Flavious Josephus’ book *Jewish Antiquities*. According to Josephus, the episode told in the Talmud related to Herod, the ruler of the Galilee, who was summoned by king Hyrcanus to court to stand trial for committing murder. Yet, Sextus, the governor of Syria, threatened the king to acquit Herod of the charge. The governor’s letter indeed “gave Hyrcanus a pretext for letting Herod go without suffering any harm from the Synhedrion [*Sanhedrin*]”. Josephus tells that Herod appeared before the *Sanhedrin* escorted by his troops, and frightened both the witnesses and judges. Samaias, a member of the *Sanhedrin* arose and said: “Fellow councilors and King, I do not myself know of, nor do I suppose that you can name, anyone who when summoned before you for trial has ever presented such an appearance. For no matter who it was that came before this Synhedrion for trial, he has shown himself humble and has assumed the manner of one who is fearful and seeks mercy from you... But this fine fellow Herod, who is accused of murder and has been summoned on no less grave a charge than this, stands here... with his soldiers round him, in order to kill us if we condemn him as the law prescribes, and to save himself by outraging justice.

God himself is subject to the rule of law. The *Jerusalem Talmud*<sup>57</sup> states:

It is universal custom that when an earthly king issues a decree, at his will he observes it himself, and at his will only others are bound to observe it. But it is otherwise with the Holy One Blessed Be He, for He is Himself the first to observe all his decrees. This is deduced from the text 'And ye shall observe that which I observe... I the Lord' (*Leviticus 22:9*). That is to say, I, the Lord am the first to observe the commandments of the *Torah*.<sup>58</sup>

A vivid demonstration of the idea of the *Torah's* supremacy over its Giver is to be found in the *Babylonian Talmud*. The *Talmud* tells us of a *Halachic* dispute that arose between the *Tannaim* (Sages who lived in the first two centuries), in which, notwithstanding that all the Sages disagreed with Rabbi Eliezer, the latter tried to convince his colleagues that justice lay with him. We are told:

On that day Rabbi Eliezer brought forward every imaginable argument, but they [the Sages] did not accept them. Said he to them: 'If the *Halacha* [Law] agrees with me, let this carob tree prove it! Thereupon the carob tree was torn a hundred cubits out of its place - others affirm, four hundred cubits'. 'No proof can be brought from a carobtree', they retorted. Again he said

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But it is not Herod whom I should blame for this or for putting his own interests above the law, but you and the king, for giving him such great licence . Be assured, however, that God is great , and this man, whom you now wish to release for Hyrcanus' sake, will one day punish you and the king as well". Indeed, when Herod assumed royal power, he killed Hyrcanus and all members of the *Sanhedrin*, save for Samaias; *Josephus Flavius' Works*, 9 vols., vol. 7, *Jewish Antiquities* (Cambridge: R. Marcus, trans., 1943), Book 14, Chap. 4 vol. 7, p. 539-543. Interestingly, based on Josephus' account, Rabbi Adret Solomon Ben Abraham [the *RaShBa*], one of the foremost Jewish scholars in the twelfth century, in his interpretation to tractate *Sanhedrin*, regarded the account in the *Babylonian Talmud* erroneous, and suggested that the person charged before the *Sanhedrin* was Herod and not King Yannai. This is also the opinion of several researchers; see: Y. Ephron, "Simeon Ben Shetah and King Yannai", In Memory of Gedaliahu Alon: *Essays in Jewish History and Philology* (Tel-Aviv: M. Dorman, S. Safrai & M. Stern eds.,1970) 69, 94-98 (*Heb.*)

<sup>57</sup> Known also as the *Palestinian Talmud*, concluded in the second half of the fourth century.

<sup>58</sup> Tractate *Rosh Hashana*, Chap. 1, p. 57a.

to them: 'If the *Halacha* agrees with me, let the stream of water prove it!' Whereupon the stream of water flowed backwards. 'No proof can be brought from a stream of water', they rejoined. Again he urged: 'If the *Halacha* agrees with me, let the walls of the schoolhouse prove it', whereupon the walls began to lean. But Rabbi Joshua rebuked them, saying: 'When scholars are engaged in a *Halachic* dispute, what have ye to interfere?' Hence they did not fall, in honour of Rabbi Joshua, nor did they resume the upright, in honour of Rabbi Eliezer; and they are still standing thus inclined. Again said he to them: 'If the *Halacha* agrees with me, let it be proven from heaven!' Whereupon a Heavenly Voice cried out, 'Why do ye dispute with Rabbi Eliezer, seeing that in all matters the *Halacha* agrees with him!' But Rabbi Joshua arose and exclaimed, 'It is not in heaven' (*Deuteronomy* 30:12). What did he mean by this? Said Rabbi Jeremiah: 'The *Torah* had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Law at Mount Sinai, "After the majority must one incline"' (*Exodus* 23:2).<sup>59</sup>

There is an addendum to this legend:

Rabbi Nathan met Elijah [the prophet] and asked him: 'What did the Holy One, Blessed Be He, do in that hour?' – 'He laughed [with joy]', he replied. saying: 'My sons have defeated Me, my sons have defeated Me!'.<sup>60</sup>

Commenting on these two *Talmudic* passages, the late Justice Moshe Silberg of the Supreme Court of Israel, wrote:

Here we find the Rule of Law in the absolute sense of the term: The law ruling the lawgiver; the inclusion of the legislator himself within the framework of legal and decisional relationships created by the laws given by him. He observes 'the precepts of the Law', submits to the authority of the law, and furthermore submits to the authentic interpretation given by the interpreters, *i.e.*, submits himself to the jurisdiction of an authoritative body, the majority, authorized by him to determine in case of doubt, which for him is of course no doubt at all. If the law is 'After the majority must one follow', then this rule is to be applied even when the lawgiver himself is an interested party.<sup>61</sup>

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<sup>59</sup> Tractate *Baba Mezia* 59b.

<sup>60</sup> *Ibid.*

<sup>61</sup> M. Silberg, 'Law and Morals in Jewish Jurisprudence', (1961)75 *Harv. L. Rev.* 306, 310-11. A revised version of the article is included as chapter 6 in M. Silberg, *Talmudic Law and the*

Justice Silberg summarizes:

The idea is too great to be grasped by our ordinary mind, but one conclusion certainly rises from it: that the jurisdiction of Jewish law is not confined within the boundaries of relations between man and man. Matters concerning the relationship between man and God... are caught by the net of legal relations as well.<sup>62</sup>

Of special interest is the role of justice in Judaism. George Foot Moore stated:

In no sphere is the influence of the highest conceptions of Judaism more manifestly determinative than in that to which we give the general name of justice, including under it, *first*, fair dealing between man and man, the distributive justice which gives to each his due; *second*, public justice, the function of the community in defining and enforcing the duties and rights of individuals and classes; and, *third*, rectitude, or integrity of personal character. In all parts of the Bible, justice in the broad sense is the fundamental virtue on which human society is based. It is not less fundamental in the idea of God, and in the definition of what God requires of man.<sup>63</sup>

## **E. JUDAISM, HUMAN RIGHTS AND WESTERN PHILOSOPHY**

Western notions of human rights and democratic values have derived much of their substance from the Old Testament as well as from classic Judaic sources. Thus, Lecky wrote in his famous work *History of the Rise and Influence of the Spirit of Rationalism in Europe*:<sup>64</sup>

It is a historical fact that in the large majority of cases, the Protestant advocates of civil rights took most of their principles from the Old Testament, whereas the advocates of oppression took most of their principles from the New Testament.

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*Modern State* (New York: B-Z Bosker, trans., 1973). See, however, I. England, 'Majority Decision vs. Individual Truth: The Interpretation of the "Oven of Achnai" Aggadah', (1975) 15: 1-2 *Tradition* 137.

<sup>62</sup> *Ibid.*

<sup>63</sup> G.F. Moore, *Judaism in the First Centuries of the Christian Era: The Age of the Tannaim*, 3 vols., (Cambridge Ma., 1927) I, 180.

<sup>64</sup> Vol. II, 168 (rev. ed., 1871).

The American Bill of Rights is based to a large extent on the constitutions of the colonies which themselves drew extensively from the Old Testament.<sup>65</sup> The Puritan settlers of the first colonies of Plymouth and Massachusetts Bay chose the ancient laws of the Hebrews as their governing legal system. An American jurist colourfully depicted Jewish law sailing to America ‘aboard the Mayflower and the Alberta’ and striking ‘deep roots in rocky New England.’<sup>66</sup> A writer of that period asserted that ‘the people of Massachusetts adopted the laws of Moses.’<sup>67</sup> Moreover, it has been stated that ‘[t]he legacy of Hebrew laws... was to remain part of the American heritage.’<sup>68</sup> A contemporary American jurist states:

The fundamental liberties of man - as they are stated in the Bill of Rights or in the Universal Declaration of Human Rights - find their roots in the narratives and prophets of the Hebrew Scriptures and the teachings they have generated over the centuries.<sup>69</sup>

Another American jurist went so far as to declare that ‘[t]he Hebrew Bible [serves] as the primary source of American civilization.’<sup>70</sup>

Mr. Justice Brandeis was equally bold in his attribution, stating that ‘twentieth century ideals of America had been the age-old ideas of the Jew.’<sup>71</sup>

Professor Suzanne Stone has criticized of the heavy reliance placed on Jewish law in American legal thinking. She writes:

... the Jewish legal tradition has come to represent in this scholarship precisely the model of law that many contemporary American theorists propose for American legal society.<sup>72</sup>

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<sup>65</sup> On Puritan constitutionalism as ‘a fertile seed-bed out of which American constitutionalism grew’, see J. Witte, ‘How to Govern a City On a Hill: The Early Puritan Contribution to American Constitutionalism’, (1990) 39 *Emory L. J.* 41, 62.

<sup>66</sup> B. J. Meislin, *Jewish Law in American Tribunals* (New York, 1976), IX.

<sup>67</sup> H. St. G. Tucker, *Commentaries on the Laws of Virginia* 1, 6-7 (Winchester, 1831).

<sup>68</sup> Meislin, *Jewish Law*, n. 65 above, 28.

<sup>69</sup> Konvitz, *Judaism*, n. 16 above, 17.

<sup>70</sup> J.S. Auerbach, *Rabbis and Lawyers: The Journey From Torah to the Constitution* (Bloomington IN, 1990), xvii.

<sup>71</sup> A. Gal, *Brandeis of Boston* (Cambridge, Mass., 1980), 126.

<sup>72</sup> S.L. Stone, ‘In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory’, 106 *Harv. L. Rev.* 813, 819 (1993).

Extensive references to Biblical law as well as to classic Jewish sources are found in American judicial decisions.<sup>73</sup> In an article dealing with ‘Maimonides and American Case Law’<sup>74</sup> Bernard Meislin noted that ‘a computerized search of recent American legal decisions retrieves citations of Maimonides as authority for American legal propositions in the fields of criminal law, matrimonial law, bailment, arbitration, real estate, evidence and even corporate litigation’. He concludes: ‘Despite divergent legal systems, despite a sea change in culture and a different language, *Halacha* as ordered by Maimonides, speaks to American judges of the late twentieth century with a persuasive voice...’<sup>75</sup>

The first settlers in America brought the seeds of Biblical law from their English homeland. Jewish law had played a major role in the old world. Jewish rabbinical sources were cited in English courts and consulted by the English legislature as early as in the sixteenth century.<sup>76</sup> The theoretical basis for the application of Biblical law was supplied by a book from the sixteenth century, *Examen Legum Angliae: Or the Laws of England Examined by Scripture, Antiquity and Reason*.<sup>77</sup> In this book the author distinguishes between two sets of laws in the Bible: laws which deal with religious worship and laws which relate to the Kingdom of Israel. The former are designated for Jews only. The latter consisting of judgments which are ‘Laws of Common Justice and Equity belonging to the moral law’, have been given to the Jews as human beings and also apply to non-Jews, and as such were also to be applied in England. The author refers to a successful experiment conducted by King Alfred at the end of the ninth century, to enforce the laws of Moses throughout his kingdom. The king regarded the

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<sup>73</sup> See D. A. Ashburn, ‘Appealing to a Higher Authority? Jewish Law in American Judicial Opinions’, (1994) 71 *U. Detroit Mercy L. Rev.* 295. See also, B. Meislin, ‘Jewish Law in America’, in *Jewish Law in Legal History and the Modern World* (B.S. Jackson (ed.), Leiden, 1980); *Idem*, ‘The Ten Commandments in American Law’, in *Jewish Law and Current Legal Problems* (N. Rakover (ed.), Jerusalem, 1984), 109.

<sup>74</sup> In *Maimonides as Codifier of Jewish Law* (N. Rakover (ed.), Jerusalem, 1987), 269.

<sup>75</sup> *Ibid.*, at 270.

<sup>76</sup> See ‘Proceedings Against James Naylar and Charles II’ in Corbett’s *Collection of State Trials* (1565); cf. Abrahams I. & Sayle C.E., ‘The Purchase of Hebrew Books by the English Parliament in 1647’, (1918) *Jewish Historical Society of England: Transactions*, 63. This occurred notwithstanding the fact that the Jews had been expelled from England under a Royal order (*Statutum de Judaismo*) issued by King Edward I in 1275 and only repealed in 1656.

<sup>77</sup> Published in 1656, attributed to A. Boots. Excerpts from the book were published in M. De Wolfe, *Readings in American Legal History* (Cambridge, 1949).

judgments specified in chapters 20-23 of *Exodus* 'the most apt and compatible for the government of his kingdom'.

The reliance on Biblical and other Judaic sources is not unique to American scholars. While stating that '[t]he spirit prevailing during the preparation of the Universal Declaration of Human Rights was completely at variance with any intention of drawing deliberate and direct inspiration from the Ten Commandments', and while 'any relationship between the Universal Declaration... and the Decalogue as the first formulation of man's basic duties... is not a formal one', yet it 'does exist' and 'its reality is evident',<sup>78</sup> for 'the Decalogue... is the point of departure, and the present Charter ... is our temporary point of arrival'.<sup>79</sup>

## F. CONTEMPORARY APPLICATION OF JEWISH VALUES

In 1979 criminal proceedings were instituted against a Jewish husband who had forced himself on his wife.<sup>80</sup> In his defence against the charge of rape, the husband relied upon the well established common law rule that by virtue of a marriage contract a wife is under a duty to cohabit, an essential component of which is to consent to sexual relations. A husband cannot, therefore, be convicted of raping his wife, as this offence is committed only if sexual intercourse takes place without the woman's consent.<sup>81</sup> The Court rejected the common law defence which is based on ecclesiastical law, as inapplicable to Jews in Israel. This decision was upheld on appeal.<sup>82</sup> The Court based its decision on Jewish family law which applies to Jewish couples under Israeli law.<sup>83</sup> Under this

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<sup>78</sup> Cassin, n. 18 above, 14.

<sup>79</sup> *Ibid.*, at 22. When asked about the sources from which he derived the principles of the Universal Declaration of Human Rights, Rene Cassin is said to have answered that he had just rephrased the Ten Commandments; A. Rubinstein, *Constitutional Law of the State of Israel*, 2 vols. (5th ed., Jerusalem & Tel-Aviv, 1996), 907 (*Heb.*). Rubinstein makes no reference to any specific source for this anecdote; it is certainly not supported by Cassin's article.

<sup>80</sup> Cr. F. [Criminal File] 163/79, *State of Israel v. Cohen*, 5740(1) P.M [*Psakim Mehozi'im* = Law Reports of the District Courts] 245.

<sup>81</sup> M. Hale, 1 *The History of the Pleas of the Crown* (1773) 629.

<sup>82</sup> Cr. A. [Criminal Appeal] 91/80, *Cohen v. State of Israel*, 35(3) P.D [*Piskei Din* = Law Reports of the Supreme Court] 281; an English translation of the main parts of the decision appear in N. Rakover, *Modern Applications of Jewish Law*, 2 vols., (Jerusalem, 1992), I, 457. The translation in this essay is, however, the author's.

<sup>83</sup> Rabbinical Law Jurisdiction (Marriage and Divorce) Law, 1953, 7 *LSI* [*Laws of the State of Israel*] 139; A. Maoz, 'Enforcement of Religious Courts' Judgments Under Israeli Law',

law, although a wife is under a marital obligation to have intercourse with her husband, the common law doctrine of the husband's 'domain' over his wife and of the wife's 'submission' to him is totally unacceptable, and the husband is prohibited from forcing himself upon her. To use Maimonides' words: 'The wife is not a captive taken by sword to please her master's desires'.<sup>84</sup> Justice Bechor of the Supreme Court summarized the decision as follows:

The conclusion... is consistent with the fundamental principles of protecting a woman as a free person, not as a slave subject to the whims of her husband on such a sensitive matter which, unfortunately, has not been embodied in the legislation or judicial opinions of some of the most enlightened and progressive nations... The Jewish people should be proud of the progressive and liberal approach of its traditions and *Halacha* on the subject throughout the ages.<sup>85</sup>

The common law rule, on the other hand, 'does not fit human dignity and the dignity of the marriage institute'.<sup>86</sup>

The rationale underlying the *Cohen* decision is questionable. The common law rule became part of the Palestinian Criminal Code of 1936.<sup>87</sup> This Code became part of Israeli law when, upon its establishment, the State of Israel adopted Mandatory law.<sup>88</sup> Section 152 of the Code specifically provides that only 'unlawful' sexual intercourse with a woman, which takes place 'without her consent', constitutes rape, while under the common law, sexual intercourse with a wife is 'always

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(1991) 33 *J. Church & State* 473, 473-75; A. Maoz, 'Religious Human Rights in the State of Israel', in *Religious Human Rights in Global Perspective - Legal Perspectives* (J.D. van der Vyver & J. Witte Jr. (ed.), 1996) 349, 354-57.

<sup>84</sup> Maimonides, *Laws of Marriage* 14:9. Compare this language with Hume's harsh assertion that '[T]he husband... cannot... commit a rape on his own wife, who has surrendered her person to him in this regard', Hume, *The Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes*, (4<sup>th</sup> ed. by Bell, 1984) vol. 1, 306. See also N. Rakover, 'Coercion of Conjugal Relations', *Jewish Law and Current Legal Problems* (N. Rakover (ed.), Jerusalem, 1984) 137.

<sup>85</sup> N. 81 above, at 291, *per* Bechor J.

<sup>86</sup> Quoted from Justice Halevi's opinion in Cr. A. 353/62, *El Fakir v. A.G.*, 18(4) P.D. 200, 219.

<sup>87</sup> Official Gazette, First Supp., 652.

<sup>88</sup> See Section 11a of the Law and Administration Ordinance, 5708 – 1948, I.R. [*Iton Rishmi* – Official Gazette during the tenure of the Provisional Council of State] No. 2 (1948), 1 *LSI* 7.

lawful'.<sup>89</sup> Arguably, religious law, which applies in Israel in matters of marriage and divorce, should have no bearing on this issue. Moreover, concern has been expressed that the *Cohen* decision might discriminate against wives whose religious law permits their husbands to have sexual intercourse without their consent.<sup>90</sup> Yet, when a further case involving rape within marriage in a Muslim family appeared before the Court, it applied the *Cohen* decision, disregarding the fact that that decision was based on the personal law of the couple involved.<sup>91</sup>

At the time that the *Cohen* decision was delivered, several states in Australia were involved in legislative initiatives to remove the protection accorded to husbands accused of sexual assault within the marriage. The editor of the *Australian Law Journal* who became aware of the Israeli judgment, reacted enthusiastically:

It is supremely ironical that the newly contemplated States legislation... merely echoes after thousands of years the age-old doctrine of rabbinical law that aggressive sexual assaults by a husband on his wife are prohibited.<sup>92</sup>

Over a decade later the House of Lords handed down a decision in line with that of the Israeli court.<sup>93</sup> Their Lordships were aware of the Israeli judgment as it had been referred to by an English Law Commission shortly before the House of Lords' decision.<sup>94</sup> Moreover, the House of Lords used language which resembles that of Maimonides: '[M]arriage is in modern times no longer one in which the wife must be the subservient chattel of the husband'.<sup>95</sup> It seems, therefore, that Maimonides has

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<sup>89</sup> F.H. [Further Hearing] 37/80, *Cohen v. The State of Israel*, 35(1) P.D. 371, 373, *per* Cohn J.

<sup>90</sup> *Cf.* Y. Shachar, 'Lawfully Raped', (1982) 8 *Iyunei Mishpat* (Tel-Aviv University Law Review), 649, 689-691 (*Heb.*).

<sup>91</sup> Unreported case of the District Court of Be'er-Sheba.

<sup>92</sup> Note, 'A Wife's Right to Say "No"', (1981) 55 *Australian Law Journal* 59, 60.

<sup>93</sup> *R. v. R.*, [1991]4 All ER 481.

<sup>94</sup> *Law Commission Working Papers* No. 116: *Rape Within Marriage* 126 (1990).

<sup>95</sup> N. 92 above, at 484 *per* Lord Keith.

influenced the legal approach to rape within marriage both in Australian and English law,<sup>96</sup> and indirectly in other legal systems.<sup>97</sup>

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In 1970 the Israeli Military Court in Gaza convicted a person of committing an act of terror which cost several lives. The Court was asked to impose capital punishment in accordance with its authority under the Defence (Emergency) Regulations, 1945<sup>98</sup> promulgated during the British Mandate and maintained in force in Gaza under prevailing Egyptian law.<sup>99</sup> The Court declined to make this order, declaring:

The Military Court is one of the judicial arms of the State of Israel. Therefore, although it has the authority to impose capital punishment, the moral concepts of the Jewish heritage of the State must serve us as a guideline. In our heritage a *Sanhedrin* [the Supreme Court in ancient Israel] that had imposed capital punishment was named ‘a murderous court’.<sup>100</sup>

Twenty years later the Military Court in the West Bank followed this decision.<sup>101</sup> Further, the court quoted a *responsa* from the eleventh century providing that when handing down a verdict, the judge must be moderate, reconsider the matter and remove all anger from his heart, lest the desire to take revenge divert him from ‘the good and right path’.<sup>102</sup>

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<sup>96</sup> Since the publication in the *Australian Law Journal*, all the Australian States have removed the common law defense.

<sup>97</sup> For the American approach, which is by far inferior to the *Cohen* formula, see J.E. Hasday, ‘Contest and Consent: A Legal History of Marital Rape’, (2000) 88 *California Law Review*, forthcoming.

<sup>98</sup> P.G. [The Palestine Gazette], Supp. 2, 1055.

<sup>99</sup> Egyptian law was preserved in Gaza by virtue of the Law and Administration Ordinance Proclamation (Gaza Strip and Northern Sinai Region) (No. 2), 5727-1967, *Proclamation, Orders and Announcements of the Headquarters of the IDF Forces in the Gaza Strip and Northern Sinai Region*, p. 4. For an English translation, see (1971) 1 *IYHR*. 421.

<sup>100</sup> Gaza 652/70, unreported.

<sup>101</sup> Ramallah 3009/89, *The Military Prosecutor v. Takruro*, unreported, abridged in 25 *HaLishka* 33 (1995) (*Heb.*).

<sup>102</sup> *Responsa Rashba*, Part 5, 238 [a].

In 1920, a vineyard worker from Rishon Le'zion who had been dismissed from his employment, sued his employer before the District Jewish Court of Arbitration (*Mishpat Ha'Shalom Ha'Ivri*) in Jaffa. These Courts were established in 1909 by the Office of the Zionist Organization and resumed operation after the British were granted a Mandate over Palestine. These Courts functioned as arbitration tribunals and purported to revive and renew Jewish law as a national law.<sup>103</sup> The worker, who at the time of his dismissal was 64 years old, sued his employer for 'a steady salary which would suffice for his family's living'. The Court rejected his suit on the grounds that only the legislature could introduce compulsory pensions, but nonetheless ordered the employer to pay the employee compensation equivalent to a month's salary for each year the plaintiff had worked for him. The Court based its decision on 'the custom accepted in the country to pay a month's compensation to a worker who had been dismissed after a year's work'.<sup>104</sup>

Indeed, in a restatement of Hebrew labour law published in 1942, it was stated that:

It is an accepted and absolute custom among Jewish workers in Eretz Israel that in the case of every worker, employee and permanent official who is dismissed by an employer, the employer is obliged to give compensation to the person dismissed of a month for every year that he worked for him, a month per year according to the amount of the wage of the last month prior to his dismissal.<sup>105</sup>

The custom referred to by the Court had Biblical foundations. It had its roots in the command not to let a Hebrew released slave go away empty handed but to 'furnish him liberally out of thy flock, and out of thy floor, and out of thy winepress'.<sup>106</sup> The Jewish Courts of Arbitration consistently applied the

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<sup>103</sup> For the Jewish Courts of Arbitration, see Elon, *Jewish Law*, n. 12 above, 1532-96; P. Dykan (Dickshtein), *History of the Jewish Court of Arbitration* (Tel Aviv, Yavneh, 1964) (*Heb.*); P. Dykan (Dickshtein), *The Jewish Court of Arbitration – Its Theoretical and Practical Problems* (Tel Aviv, The Supreme Jewish Court of Arbitration, 1925) (*Heb.*).

<sup>104</sup> District Court of Jaffa, Case No. 162; approved by the Supreme Court of Arbitration, Case No. 93; see M. Wager & P. Dickshtein, *Compensation for Dismissal: A Chapter in the Development of Labour Law in the New Jewish Settlement of Palestine* (Jerusalem, 1940), 45-48 (*Heb.*).

<sup>105</sup> S.B. Bar-Adon, *Book of Labour Laws: Collection of Laws and Customs in Work and Employer Relations* (Haifa, 1942) 24 (*Heb.*).

<sup>106</sup> *Deuteronomy* 15:14. See M. Elon, *Jewish Law* n. 14 above, II 924-26; IV 1631-34; and P. Dickshtein, "Compensation for Dismissal", in *Korengreen Book, Articles in Research of the*

duty to pay compensation to a worker upon the termination of work relations. In contrast, British judges dismissed similar claims on the grounds that such custom had not been proved 'beyond any reasonable doubt' to be 'the creation of a long established uniform practice, accepted by the public of its own free will'.<sup>107</sup> After the establishment of the State of Israel, the Supreme Court consistently recognized the practice. Finally, the *Knesset* intervened and enacted the Severance Pay Law, 5723-1963,<sup>108</sup> which imposed a duty to give severance pay to a worker who is dismissed after one year of continual employment. Introducing the Bill the Minister of Labour praised this right as 'the first social right that the worker in this country has achieved... in continuation of the ancient Jewish tradition'.<sup>109</sup>

Finally, reference should be made to a relative new statute, the Thou Shalt Not Stand Idly by the Blood of Thy Neighbour Law, 5758-1998.<sup>110</sup> This statute imposes a legal duty to aid a person who, due to a sudden occurrence, faces a severe and immediate danger to his life, corporal integrity or health. The name of the statute quotes verbally the Biblical source for the duty to rescue. The central provision of the statute, imposing a duty to aid and rescue, seems as adopting the wording of the *Shulhan Aruch*, the central codification of Jewish Law.<sup>111</sup> Moreover, the explanatory notes to the Bill<sup>112</sup> expressly state, that the statute is meant "to anchor in legislation the moral and social duty, stemming from the *Torah* (*Lev. 19:16*)' under which there is a duty to assist in saving the life of the other". The reference to Jewish Law was emphasized during the deliberations in the *Knesset*. Thus, M.K. Binyamin Elon stated, in the Constitutional, Legislative and Judicial Committee of the *Knesset*, that in Israel, being a Jewish State, "there is a meaning to the concept of human dignity, that it is categorical, perhaps even absolute... It is important to state on the declaratory level, and not merely the declaratory, that as a human being has basic rights... he has also basic duties."<sup>113</sup>

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*Bible in memory of Y.P. Korengreen*, (A. Vizer and B. Z. Luria (eds.), Tel-Aviv, 1964), 275, 276-281 (*Heb.*).

<sup>107</sup> *Cohen v. Copun*, 7 P.L.R. [Palestine Law Reports] 80, 88 (1940).

<sup>108</sup> 5723-1963 S.H. [*Sefer HaHukim* = the official publication of Israel's primary legislation]136; 17 LSI 161.

<sup>109</sup> D.K. [*Divrey ha'Knesset* = Records of the *Knesset*] 33 (1962) 1050; see also M. Elon, *Jewish Law* n. 14 above, vol. III, 1367-1370.

<sup>110</sup> 5758-1998 S. H. 245.

<sup>111</sup> See *Shulhan Aruch, Hoshen Mishpat*, sec. 426; Cf. Hendel, "The 'Thou Shall not Stand Passive' Law", above, n. 35, at 259.

<sup>112</sup> 5755-1995 H.H. 456.

<sup>113</sup> 129 *Proceedings of the Constitutional, Legislative and Judicial Committee of the 14<sup>th</sup> Knesset*, Dec. 10, 1997, p. 18; quoted in Y. Eldan, "Do Not Stand by the Blood of Your Neighbor",

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*Ethics, Judaism and Democracy* (Jerusalem, A. Berholtz & D. Anaki, eds., 2002) (*Forthcoming*). In one aspect the statute goes beyond Jewish law, in that it imposes a fine for the violation of the duty (The Bill proposed a sanction of six months imprisonment for violating the statute). This is a result of imposing a provision which applied in a religious society to a civil one; *Cf., supra*, text to note 32. On the other hand, a person fulfills his duty to rescue by reporting the case to the appropriate authorities or by calling another person who is capable of rendering the necessary assistance.

Hendel regards this statute as the climax of a serial of four statutes which have been inspired by Jewish Law. The three other are: The Restoration of Lost Property Law, 5733-1973 (5733 *S.H.* 172, 27 *LSI* 187), imposing the duty to return found property to its owner; The Unjust Enrichment Law, 5739-1979 (5739 *S.H.* 44, 33 *LSI* 44) imposing a duty on the beneficiary to make restitution to the benefactor of any benefit obtained from him without legal cause, unless no loss has been inflicted thereby on the benefactor; Penal Law (Amendment No. 37), 5752-1992 (5752 *S.H.* 59), extending the defences of self defence, necessity and duress to acts done in order to defend the legitimate interests of any person or property, not necessarily those for whom the defendant is legally responsible; Hendel, "The 'Thou Shall not Stand Passive' Law", above, n. 35, at 271-273. Hendel emphasizes that, while in these three statutes the law is brought into action *post facto*, the new statute imposes a duty on the bystander: in this statute "the unfortunate situation of the [other] suffices for the law to impose on the bystander to come to his rescue"; *ibid.*, at 273.

On the *Halakhic* foundations of the Restoration of Lost Property Law, see N. Rakover, *Jewish Law in the Debates of the Knesset*, 2 vols., (Jerusalem, 1988), II, 835-52 (*Heb.*); N. Rakover, *Maimonides and the Law of the State of Israel* (Jerusalem: 1985), 505-24 (*Heb.*); N. Rakover, "Restoration of Lost Property", *A Serial of Researches and Surveys of Jewish Law* (Jerusalem: 1971), pamp. No. 15. On the *Halakhic* foundations of the Unjust Enrichment Law, see: Rakover, *Jewish Law in the Debates of the Knesset*, 853-74; . Rakover, *Maimonides and the Law of the State of Israel*, 525-40; N. Rakover, *Unjust Enrichment in Jewish Law* (Jerusalem: 1987) (*Heb.*); J. Blass with M. Vygoda, *Unjust Enrichment Including Building and Planting on Another's Property* (Jerusalem: 1991) (*Heb.*). For *Halakhic* law of unjust enrichment, see: A. Kirschenbaum, *Equity in Jewish Law: Halakhaic Perspectives in Law: Formalism and Flexibility in Jewish Civil Law* (New York: 1991).....; Dagan, *The Law of Unjust Enrichment*, *supra*, note 1, 262-306. See also "Symposium: Unjust Enrichment" (1980) 3 of *The Jewish L. Ann.* On the *Halakhic* foundations of the amendment to the Penal Law, see 5751-1991 *H.H.* (*Hatza'ot Hok* = Legislative Bills) ....; ... *D.K.* (*Divrei HaKnesset* = Records of Knesset Proceedings)..... .

These four cases serve as instructive examples of the impact of Jewish teachings on the Israeli legal system.<sup>114</sup> These ramifications are natural given that Jewish law is the national legal system of the Jewish people. Moreover, Jewish principles serve as positive sources of Israeli law. Thus, under the provisions of the Foundation of Law Law, 5740-1980<sup>115</sup> the courts are referred to ‘the principles of freedom, justice, equity and peace of Israel’s heritage’, whenever a legal question arises to which the court finds no answer in statute law, case-law or by analogy. The referral to Jewish principles was re-emphasized in 1992, with the enactment of Basic Law: Human Dignity and Freedom<sup>116</sup> and Basic Law: Freedom of Occupation.<sup>117</sup> Both Basic Laws include ‘purpose’ clauses. Section 1A of Basic Law: Human Dignity and Freedom provides:

The purpose of this Basic Law is to protect human dignity and freedom in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic State.

A similar provision appears in section 2 of Basic Law: Freedom of Occupation.

The limitation clause<sup>118</sup> provides:

There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required...

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<sup>114</sup> For a general survey of the influence of Jewish law on Israeli law See M. Elon, *Jewish Law* n. 14 above, IV (Part Four): “Jewish Law in the State of Israel”. For application of Jewish law by the judiciary see N. Rakover, *Modern Applications of Jewish Law*, n. 81 above. For references to Jewish law in *Knesset* debates, see Rakover, *Jewish Law in the Debates of the Knesset*, *supra*, note 113. See also, A. Maoz, “The Place of Jewish Law in the State of Israel”, (1991-92) 40 *Hapraklit* 53 (*Heb.*).

<sup>115</sup> 5740-1980 *S.H.* 163; 34 *LSI* 181.

<sup>116</sup> 5752-1992 *S.H.*, 150. For an unofficial translation see (1992) 26 *Is. L. Rev.* 248. This translation is not used in this article.

<sup>117</sup> 5752-1992 *S.H.*, 114. For an unofficial translation see (1992) 26 *Is. L. Rev.* 247. This Basic Law was replaced in 1994, 5754-1994 *S.H.*, 90.

<sup>118</sup> Section 8 of Basic Law: Human Dignity and Freedom and Section 4 of Basic Law: Freedom of Occupation.

It has been decided by the Supreme Court that ‘the values of the State of Israel’, in the limitation clause are identical to ‘the values of the State of Israel as a Jewish and democratic State’, which are specified in the purpose clause.<sup>119</sup>

It would be wrong to suppose that Jewish principles have significance only for the Jewish people and within the State of Israel, just as it would be wrong to suppose that only Jews follow the teachings of the Bible. We have already seen the indirect influence of the Jewish approach to rape within marriage on the legal systems of Australia and England. The influence of Jewish law is even more direct.

On 17 October 1718 a ‘congregation’, summoned by the vice-chancellor of the University of Cambridge, decided to deprive Dr. Richard Bentley of his academic degrees in accordance with its authority under a custom from ‘time out of mind’. The congregation’s decision followed a decision by the vice-chancellor to suspend Dr. Bentley upon the latter’s refusal to appear before him in connection with a monetary suit which had been brought against Bentley before the vice-chancellor. Dr. Bentley was not summoned to the congregation’s hearings and it did not rehear the matter.

In *mandamus* hearings before the King’s Bench, the congregation’s proceedings were declared illegal for want of summons on the grounds that ‘surely he could never be deprived without notice’ of his academic degrees.<sup>120</sup> Of interest is Fortescue J.’s reasoning:

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have 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 defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.<sup>121</sup>

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<sup>119</sup> A. Maoz, ‘The Values of a Jewish and Democratic State’, (1995) 19 *Iyunei Mishpat* 547, 552 (*Heb.*).

<sup>120</sup> *R. v. The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Strange 557, 566; 93 E.R. 698, 703.

<sup>121</sup> *Ibid.*, at 567 (704).

Across the ocean, in the celebrated *Miranda* case,<sup>122</sup> Chief Justice Earl Warren relied expressly on Jewish law, as pronounced by Maimonides, in establishing the privilege against self-incrimination. In an effort to prove the antiquity of this privilege, Warren wrote, ‘We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervour with which it was defended.’ ‘Its roots’, explains Warren, ‘go back into ancient times’.<sup>123</sup> In a footnote, Chief Justice Warren elaborates:

Thirteenth century commentators found an analogue to the privilege based on the Bible. ‘To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree’. Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of the *Sanhedrin*, c. 18, par. 6, 3 *Yale Judaism Series* 52-53.<sup>124</sup>

Distinguishing the *Bentley* decision from the *Miranda* case is the fact that the English judges referred to a Biblical source whereas Chief Justice Warren expressly referred to *Halachic* law.<sup>125</sup> It is indeed

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<sup>122</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>123</sup> *Ibid.*, 458.

<sup>124</sup> *Ibid.* n. 27. Chief Justice Warren also refers to N. Lamm, ‘The Fifth Amendment and its Equivalent in *Halacha*’, (1950) 3 *Judaism* 53, also established in 17 Decalogue, Four (Jan-Feb., 1967) 1. References to the *Halachic* approach to the issue of self incrimination may also be found in *Garrity v. New Jersey*, 385 U.S. 493, 497-98, n.5, (1967); *Younie v. Maryland*, 272 Md. 233, 322 A.2d. 211 (1974); *New Jersey v. McCloskey*, 90 N.J. 18; *New York v. Jo-Anne Brown*, 86 M.2d. 339

<sup>125</sup> Though Chief Justice Warren speaks of ‘an analogue to the privilege grounded in the Bible’, n. 119 above, at 458, he refers to Maimonides. Moreover, ‘the Pentateuch is silent on the role of the criminal confession’, (A. Kirshenbaum, *Self-Incrimination in Jewish Law* (New York, 1970) 32), and the exclusionary rule is laid down by ‘Talmudic or Rabbinic law’, (G. Horowitz, ‘The Privilege Against Self-Incrimination – How Did it Originate?’ (1957-1958) 31 *Temple Law Quarterly*, 121, 125). The Judaic foundations of this privilege in Anglo-American law are controversial. The opponents of such *nexus* stress the different scope and background of the rule disqualifying confessions in criminal cases in Anglo-American and Jewish law (*see e.g.* A. Enker, ‘Self-Incrimination in Jewish Law (An Essay)’, *Dine Israel*, CVII, *see also* Kirshenbaum above). Others point to the fact that John Lilburn, whose trial served as a landmark in establishing the privilege, raised in his defence ‘the laws of God’, and the practice of the High Priest in trying Jesus Christ (3 How. St. Tr. 1315 (1637)). It was suggested, therefore, that the privilege had its origin in Jewish law (S. Mandelbaum, ‘The Privilege

necessary to distinguish between references to the Old Testament and Jewish law.<sup>126</sup> But the matter is not as simple as it would appear. While Fortescue J. referred to the story in *Genesis*, he relied on a Jewish classical interpretation of the Biblical verse, for this is what Don Yitzhak Abarbanel, one of the greatest commentators on the Bible, inferred from the verse from *Genesis*:

And He taught us, Blessed Be He, that it is not appropriate for the judge to try a person, if he does not hear his version. Because God Blessed Be He, while knowing the mysteries of the heart, did not punish him [Adam] till he listened to his arguments. <sup>127</sup>

Similarly, one of the leading *Halachic* authorities, Rabbi Moses Isserles, known by his acronym 'Rema', wrote in his *responsa*<sup>128</sup>:

It is obvious that one cannot adjudicate in a matter without hearing the defendant's argument, since the *Torah* said: '[And I charged your judges at that time] hear the causes between your bretheren [and judge righteously between every man and his brother, and the stranger that is with him'. (*Deuteronomy*, 1:16).

And though this is obvious, we might learn from the paths of God Blessed Be He, whose paths are just and whose ways are pleasant. He approached Adam and asked: 'Who told thee that thou wast naked? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?. And the man said...'

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Against Self-Incrimination in Anglo-American and Jewish Law',(1956) 5 *The American Journal of Comparative Law*, 118, 119). Another writer attributes the Jewish foundations of the privilege to the works of the seventeenth century Hebraists of England and to the revolt of the Puritans against compulsory self-incrimination practiced under Canon law (G. Horowitz, above, 136-143). Another writer points further out a development in United States law relating to the privilege against self-incrimination - from exclusion of confessions obtained by coercion likely to produce unreliable confessions to a stage 'very close to an absolute law on extra-judicial confessions', an absolutism which underlines the Judaic attitude (M. Halberstam, 'The Rationale For Excluding Incriminating Statements: U.S. Law Compared to Ancient Jewish Law' in *Jewish Law and Current Legal Problems* (N. Rakover (ed.), Jerusalem, 1984) 177, 185.

<sup>126</sup> See D.A. Ashburn, 'Appealing to a Higher Authority?' n. 71 above.

<sup>127</sup> *Abarbanel on the Torah, Genesis* 3:9.

<sup>128</sup> *Responsa Rema*, 108.

Likewise, the Lord said unto Cain: ‘Where is Abel thy brother?’ And he said: ‘I know not’... And [the Lord] said: ‘What hast thou done?’ in order to hear his arguments. The more so, a layman [*i.e.* a human judge].

The Sages have given a similar interpretation. From what was said [by God following the events of Sodom and Gomorrah]: ‘I will go down now, and see whether they have done altogether according to the cry of it.’ (*Genesis* 18:21) ‘He taught the judges not to judge until they have heard and understood.’ The conclusion is that even if it is clear to the judge that the defendant is guilty, he must first hear his arguments.

Referring to this issue, the Deputy President of the Supreme Court of Israel, Justice Elon, held that ‘the right to argue and be heard in Court originates and is based in the heritage of Israel from times immemorial, and the Sages of Israel saw it as the earliest basic right in human culture.’ Justice Elon added:

As the right to be heard is a basic right in the legal system in Israel, it is right and proper that this right be implemented in every place where an Israeli authority acts and functions, even if the laws applicable in that place – whether domestic or public international laws – do not require such implementation. Silence on the part of domestic law and public international law regarding this right is not in the nature of a negative arrangement.<sup>129</sup>

Indeed, the Supreme Court applied the right to be heard to the activities of the armed forces in the territories administered by Israel, notwithstanding that no provision is made for this right either in the law applicable to the territories by virtue of which the civil administration operated or in international law.<sup>130</sup> In fact, Israel is the only country in the history of international law which has opened the doors of its courts before the petitions of residents of occupied territories against the actions of the occupying military forces.<sup>131</sup> The rationale for this is similar to that of the military courts in the territories in refraining from imposing capital punishment:

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<sup>129</sup> H.C. [High Court] 4112/90, *The Association for Civil Rights in Israel v. Commander of the Southern District*, 44(4) P.D. 626, 637; 23 (1993) *IYHR* 333.

<sup>130</sup> G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, 1957) 108.

<sup>131</sup> *Amnesty International Report, 1984*, p. 84; E. Nathan, ‘The Power of Supervision of the High Court of Justice over Military Government’ in M. Shamgar (ed.) *Military Government in the Occupied Territories Administered by Israel, 1967-1986: The Legal Aspects*, vol. 1

Indeed, the rules of Israeli law have not been made applicable to the region, however, an Israeli official in the area carries with his office the duty to behave in accordance with the additional standards required by the fact that he is an Israeli authority, wherever the place of its activity... An official, generally, does not meet his obligations if he only acts as required by the norms of international law, because, as an Israeli authority more is required from him, and this is because he should also act in an area under military government in accordance with the rules laying out fair and proper administrative processes.<sup>132</sup>

An interesting point in this context relates to the post-Biblical sources of *Halacha*. These draw their authority from Biblical law itself and see themselves only as interpreters of it. Nonetheless, under the guise of interpretation, the Sages have occasionally modified Biblical law to the extent of even reaching opposite conclusions. Reference was made above to the refusal of the Military Court in Gaza and the West Bank to impose capital punishment. The Court based its decision on ‘the moral concepts of Jewish heritage’<sup>133</sup>, yet a review of the *Torah* reveals that the death penalty was commonly applied in Biblical times. Referring to this issue, Haim Cohn wrote:<sup>134</sup> ‘The question whether capital punishment can qualify as a Jewish value is, in view of its many Biblical instances, generally answered in the affirmative’. Indeed, Maimonides lists thirty-nine offences for which a court is ordered to impose capital punishment.<sup>135</sup>

Nevertheless, adds Cohn, ‘the true Jewish value now is the abolition of capital punishment’. This is so, as ‘in *Talmudic* law, ways and means were deliberately sought, and actually found, to render capital punishment nugatory’.

Obviously, the Sages could not abolish capital punishment imposed by the *Torah*. However, they achieved this end by laying down several requirements which made it impossible to carry out

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(Jerusalem, 1982) 450; A. Maoz. ‘Defending Civil Liberties Without a Constitution – The Israeli Experience’, (1988) 16 *Melbourne University Law Review* 815, 824.

<sup>132</sup> H.C. 64, 493/81 *Abu Ita v. The Commander of Jerusalem and Samaria Region*, 37(2) P.D. 197, 231; abridged in (1983) 18 *Israel Law Review* 475.

<sup>133</sup> Text accompanying n. 80 above.

<sup>134</sup> H. Cohn, ‘Capital Punishment – A Jewish Value’, (1999) 1 *Democratic Culture* 37 (Heb.). The quotations here are from the English abstract, at p.p. 10-11.

<sup>135</sup> *Maimonides, Hilchot Sanhedrin*, 15:10-13.

Biblical law, while at the same time basing these requirements on the Bible itself. This technique is described by Cohn as follows:

[F]or capital punishment to be imposed under Biblical law by the courts, it was laid down that no person was to be tried and convicted of a capital crime... unless it was first established, by the testimony of at least two competent witnesses, that they had, immediately before the commission of the criminal act, given the offender a specific warning to the effect that what he was about to do was a criminal offence, that the capital punishment provided for that offence would be carried out in such and such a fashion, and that he would do better to abstain from carrying his intention into effect. That warning, however, was useless, unless the would-be offender replied that he had understood it, and that he was proceeding to act nevertheless, even if he would have to suffer that particular capital punishment.

In concluding this issue, Cohn writes:

This procedure is shown to be wholly illusory; and it is submitted that it was designed as a well-nigh infallible means to prevent capital punishment from ever being executed. Without abrogating, formally or at all, any Biblical law, the Sages merely put in the way of capital trials such insurmountable obstacles as would suffice to accomplish their purpose.<sup>136</sup>

Similarly, it is agreed that the legal institution of employee severance pay is rooted in the Biblical law relating to the gratuity that the Hebrew slave is entitled to receive when he obtains his freedom. Nevertheless, '[t]he *Halachic* authorities found in this law the concept of giving a certain sum to an employee at the termination of his employment.'<sup>137</sup> No specific obligation to provide severance pay is to be found in the Bible. As explained by Professor Elon '[t]he inference from the law of the Hebrew slave to the law of an employee was possible because under Jewish law the status of a Hebrew slave is comparable to the status of an employee'.<sup>138</sup> To use Philo's expression, '[f]or people in this position, though we find them called slaves, are in reality labourers'.<sup>139</sup>

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<sup>136</sup> For an analysis of the approach of Judaism to capital punishment, see D. Di-Sola, 'Capital Punishment Among the Jews', in (1916) *Jewish Eugenics and Other Essays*, 51.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, 925.

<sup>139</sup> *Philo: With an English translation by F.H. Colson*, 11 vols. (London, 1937) VII, 357.

## G. EPILOGUE

Yeshayahu Leibowitz, one of the most eminent Jewish thinkers of the present age, emphasized an inherent contradiction between Judaism, as a religion, on one hand, and humanism and morality as civil phenomena, on the other. In his view:

No social, political or economic program could be derived from Judaism. Judaism does not engage in social or in human problems as such. This is so because man is meaningless... there is no intrinsic value in man himself but only in his position before God. Judaism is not humanism... The social constitution of the *Torah* is neither social nor philanthropic: it does not stem from the concept of human rights but rather from man's duty.<sup>140</sup>

In Leibowitz' opinion:

The attempt to fuse morality and religion is not a happy one... Judaism did not produce an ethical theory of its own, was never embodied in a moral system, and made no pretence of representing a specific moral point of view.<sup>141</sup>

Leibowitz' approach is that of the believer who adheres to the precepts of religion merely because it is God's will. Under this approach the moral basis of religious precepts should be totally irrelevant. Leibowitz' approach touches upon fundamental philosophical dilemmas concerning the relationship between religion and morality and between divine supremacy and human autonomy, which have engaged theologians and philosophers since the beginning of civilization. This is not the proper place to deal with these dilemmas<sup>142</sup>. Suffice it to mention that Leibowitz was sharply criticized from even a religious point of view<sup>143</sup>. Leibowitz' philosophy is unique in Jewish religious thought and he was

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<sup>140</sup> Y. Leibowitz, *Judaism, Jewish People and the State of Israel* 310 (Jerusalem, 1975) (*Heb.*).

<sup>141</sup> *Ibid.*, at 6-7.

<sup>142</sup> For a comprehensive discussion of these issues, see D. Statman & A. Sagi, *Religion and Morality* (Jerusalem, 1993) (*Heb.*). See also, D. Weiss Halivni, 'Can a Religious Law be Immoral?', *Perspectives on Jews and Judaism: Essays in Honor of Wolfe Kelman* (New York, A.A. Chiel ed., 1978), 165; A. Lichtenstein, 'Does Jewish Tradition Recognize an Ethic Independent of Halakha?', *Modern Jewish Ethics* (Columbus OH, M. Fox ed., 1975) 62.

<sup>143</sup> For criticism of Leibowitz, see *Negation for Negation's Sake: Versus Yeshayahu Leibowitz - Essays and Comments* (Ch. Ben-Yerucham & Ch. E. Kolitz (eds.), Jerusalem, 1983) (*Heb.*); M. Granot, *A Singular Faith* (Tel Aviv, 1993) (*Heb.*); M. Gilboa, *Y. Leibowitz: Ideas and Contradictions* (Sede Boker, 1994) (*Heb.*).

accused of entertaining a superficial and one-dimensional perception of the essence of Judaism<sup>144</sup>. Yet, even if sound from a religious point of view, this perception is irrelevant to the thesis advocated in this article. In the opinion of Leibowitz, ‘the religious end is the ultimate end’ and ‘is desecrated when it is made to serve as a means to some other end’.<sup>145</sup> In his view ‘a person acting as a moral agent cannot be acting as a religious agent.’ This is so since ‘human actions... can only be identified in terms of the agent’s intention.’ Therefore, ‘a religious action cannot be simultaneously a moral action.’<sup>146</sup> Leibowitz stresses the idea that ‘[t]he Bible does not recognize the good and the right as such, only “the good and the right in the eyes of God”’.<sup>147</sup> Yet, the real question is whether that which is good and right in the eyes of God is also good and right from a moral point of view. I have tried to show throughout this article that fundamentally this is so.

Speaking of ‘the character of God’, Moore wrote:

God’s justice is first of all man’s assurance that God will not use His almighty power over His creatures without regard to right.<sup>148</sup>

It is, moreover, disputable whether what is ‘good and right in the eyes of God’ is the ultimate good even in the eyes of the Bible. The Bible records several episodes where the acts of God were challenged from a moral point of view. Thus, when God informed Abraham of his decision to destroy Sodom and Gomorrah as an act of retaliation for the sins of the inhabitants of these cities, Abraham reprimanded ‘the Judge of all the earth’ for failing to do justice.<sup>149</sup> Furthermore, it has been suggested

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<sup>144</sup> See A. Sagi, ‘The Punishment of Amaleck: The Ways Jewish Tradition Competes With the Moral Issue and the Status of Morality in the Jewish Tradition’ in *Multiculturalism in a Democratic and Jewish State* (M. Mautner, A. Sagi and R. Shamir (eds.), Tel-Aviv, 1998), 477, 509 (*Heb.*); L. Jacobs, ‘The Relationship Between Religion and Ethics in Jewish Thought’, in *Contemporary Jewish Ethics* (M.M. Kellner (ed.), New York, 1978), 41.

<sup>145</sup> E. Goldman in his Introduction to Y. Leibowitz, *Judaism, Human Values and the Jewish State*, (Cambridge: E. Goldman, ed. & trans., 1992), xvi.

<sup>146</sup> *Ibid.* See also Statman & Sagi, n. 139 above, Ch. 7.

<sup>147</sup> N. 137 above, at 7, quoting from *Deuteronomy* 12:28.

<sup>148</sup> N. 61 above, vol. I, at 387-88.

<sup>149</sup> *Genesis* 18:25.

that Judaism recognizes the autonomy of morality and accords it religious value.<sup>150</sup> Yet, even if we disregard this well reasoned model, it is hard to accept Leibowitz' attempt to divorce Judaism from morality and deny it any social mission.

We have encountered an episode where God's ruling was overruled by the Sages and he was defeated.<sup>151</sup> This does not derogate from God's supremacy as it was he who laid down the rule that 'after the majority must one incline'.<sup>152</sup> Yet, as explained by Justice Silberg,<sup>153</sup> this episode does subject God, like human beings, to the rule of law. Moreover, the fact that God instituted the majority rule may indicate that God does not act arbitrarily, but rather is led by moral considerations. The morality of God and its direct impact on human behaviour is vividly demonstrated in a *midrash* included in the *Babylonian Talmud*. The Biblical verse: 'Ye shall walk after the Lord your God'<sup>154</sup> is interpreted in the *Talmud* as follows:

What means the text?.. Is it then possible for a human being to walk after the *Shechinah* [the Divine Presence]; for has it not been said 'For the Lord thy God is a consuming fire'? (*Deuteronomy* 4:24) But [the meaning is] to walk after the attributes of the Holy One, Blessed Be He. As He clothed the naked..., so do thou also clothe the naked. The Holy One, Blessed Be He, visited the sick..., so do thou also visit the sick. The Holy One, Blessed Be He, comforted mourners..., so do thou also comfort mourners. The Holy One, Blessed Be He, buried the dead..., so do thou also bury the dead. (Tractate *Sotah* 14a).

At the end of this brief survey of Judaic teachings it is submitted that Judaism does indeed play a central role in advancing human rights. One may ask why it should matter whether Judaism propounds the preservation of human rights. The answer is that the doctrine of human rights is still fragile. It cannot exist in the abstract divested of social concepts. Religion plays a major role in society, Jewish ideas and values have infused western culture directly and have had an indirect impact through

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<sup>150</sup> See, A. Sagi, *Judaism: Between Religion and Morality* (Tel-Aviv, 1998) (*Heb.*); L. Jacobs, 'The Relationship Between Religion and Ethics in Jewish Thought', in *Religion and Morality* (G. Outka and J.P. Reeder (eds.), 1973).

<sup>151</sup> Text accompanying n. 58 above.

<sup>152</sup> Text accompanying n. 57 above.

<sup>153</sup> Text accompanying n. 59 above.

<sup>154</sup> *Deuteronomy* 13:4.

Christianity, enriching western humanistic and liberal thinking. Jewish ideas and values are capable of enriching it still further.<sup>155</sup>

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<sup>155</sup> Judge Hendel examines three models advanced in American law to justify the introduction of a duty to rescue in the law of torts (the communal theory; the economic theory; and the feminist theory) and rejects them as being infeasible and unjustifiable. The law of torts, explains Hendel, is basically concerned with the past, trying to establish the fault for damages that have occurred. The duty to rescue, on the other hand, is foreseeing the future, trying to avoid a catastrophe. Unlike the law of torts, this duty concentrates on the needs of the victim, rather than the activities of the rescuer: "In order to create a duty to rescue, the law needs an external source, an inspiring source, which enjoys a status and recognition, that is capable of creating a duty to rescue *per se*, beyond the framework of the law of torts.... The source for such duty must enjoy a wide social consensus. Religious law is an outstanding source for fulfilling such conditions. It enjoys a status which enables it to serve as kind of a bridge between law and morality, between *lex lata* and *lex ferenda*. It is of a firm standing enough to overcome the system's objection to adopt a duty to rescue, due to its legal heritage. There are possibly other sources that are able to found the duty to rescue and enable its acceptance by a legal system which rejected it in the past. However, this did not happen. An independent cover of the duty to rescue, even though by merely a title that reflects a religious origin, like the Good Samaritan in the United States and the Thou Shalt Not Stand Idly by the Blood of Thy Neighbour Law in Israel, will add moral and historical legitimacy for adopting a duty to rescue by the legal system"; Hendel, "The 'Thou Shall not Stand Passive' Law", above, n. 35, at 268.