LIVERPOOL HOPE UNIVERSITY

THRM002 Law, Religion and Judaism

Prof Bernard Jackson

November 2015

Week 1	Law and Religion in the Hebrew Bible and the New Testament
Week 2	The Historical Development of Jewish Law in Postbiblical Times
Week 3	The History of Jewish Family Law
Week 4	Law and Religion in the State of Israel
Week 5	Law and Religion in England, with particular reference to Jewish Issues

Course Synopsis:

This course provides an introduction to the historical, theological and legal issues arising in Judaism as regards the relationship between law and religion. The five 3-hour sessions are devoted to: (1) law and religion in the Hebrew Bible and the New Testament, as reflected in both law and narrative; (2) the historical development of Jewish law in postbiblical times; (3) the history of Jewish family law; (4) the relationship between law and religion in the State of Israel; and (5) the relationship between law and religion in England, with particular reference to Jewish issues.

Course Aims

This course aims to provide students with:

Aim 1 –A systematic introduction to the principal academic debates relating to the relationship of law and religion in the Bible, including the relationship of law to covenant and the nature of the "legal system" reflected in both laws and narratives.

Aim 2 –A critical introduction to the nature of the Jewish legal system, as it has developed from biblical to modern times and a capacity to evaluate and apply the full range of conceptual and methodological issues involved.

Aim 3 –A research-based overview of the history of Jewish family law, the changes which have occurred in it over the centuries and the relationship of these changes to the external social and religious environment.

Aim 4 -An historical and critical introduction to the relationship between law and religion in the State of Israel, including the conflicts between religious and secular interests, the jurisdictional compromises which have been adopted, and the role of the theological and ideological claims of modern Zionism.

Aim 5 -An analysis of the relationship between law and religion in England, in the light of the Archbishop of Canterbury's argument for a relationship of "transformative accommodation" between state and religious legal systems. The debate will be reviewed in the light of Jewish experience elsewhere, taking particular account of the material studied in weeks 3 and 4.

Aim 6 -Enhancement of oral interaction skills (confidence, expression, listening to the viewpoint of the other) in both academic and interfaith contexts

Aim 7 - Enhancement of personal research skills, including the development of personal critical judgement, the formulation of original hypotheses and the marshalling of evidence in relation to them.

Learning Outcomes

By the end of the course, students will be able to:

Outcome 1 -Appreciate in a mature and critical manner the conceptual and methodological issues involved in discussing the relationship of law and religion.

Outcome 2 –Understand in detail the particular characteristics of Jewish law as a religious "legal system"

Outcome 3 –Engage in a sophisticated manner with the particular religious elements involved in Jewish family law, including the issues involved in its application in modern states

Outcome 4 -Apply enhanced textual and conceptual skills to theological and legal issues.

Outcome 5 -Engage in writing and independent research at a level appropriate to master's study.

Outcome 6 – Demonstrate their transferable skills for (i) tackling and solving problems in an original fashion, (ii) autonomously planning and implementing tasks at a professional or equivalent level, (iii) exercising initiative and personal responsibility; and (iv) further advancing their professional development through independent learning.

Basic Reading: Hecht, Jackson, Piattelli, Passamaneck and Rabello, eds., 1996, *An introduction to the History and Sources of Jewish law*, Clarendon Press

Further Reading

Adler, R., 1998. Engendering Judaism: an Inclusive Theology and Ethics, Jewish Publication Society

Biale, R., 1984. Women and Jewish Law: an Exploration of Women's Issues in Halakhic sources, Schocken

Boecker, H.J., 1980. Law and the Administration of Justice in the Old Testament and Ancient East, SPCK

Breitowitz, I.A., 1993. Between Civil and Religious Law: the Plight of the Agunah in American Society, Greenwood Press

Cohn, H.H., 1984. Human Rights in Jewish Law, Ktav Publishing House Inc

Douglas, G., Doe, N., Gilliat-Ray, S., Sandberg, R., Asma Khan, A., Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts. Report of a Research Study funded by the AHRC, 2011: http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf

Elon, M., 1994, Jewish Law: History, Sources, Principles, Jewish Publication Society

Englard, I., 1975. Religious Law in the Israel Legal System, Hebrew University of Jerusalem, Faculty of Law, Harry Sacher Institute for Legislative Research and Comparative Law

Feldman, D.M., 1974. Marital Relations, Birth Control, and Abortion in Jewish Law, Schocken

Haut, I.H., 1983, Divorce in Jewish Law and Life, Sepher-Hermon Press

Jackson, B.S., 1993, "Who is a Jew?: Some Semiotic Observations on a Judgment of the Israel Supreme Court", International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique VI/17:115-146.

Jackson, B.S., 2000, Studies in the Semiotics of Biblical Law, Sheffield Academic Press

Jackson, B.S., 2001, "Moredet: Problems of History and Authority", in The Zutphen Conference Volume, ed. H. Gamoran, Global Publications, 103-123.

Jackson, B.S., 2002, "Judaism as a Religious Legal System", in Religion, Laws and Tradition. Comparative Studies in Religious Law, ed. A. Huxley, RoutledgeCurzon, 34-48

Jackson, B.S., 2008, Essays on Halakhah in the New Testament, E.J. Brill

Jackson, B.S., 2009. "'Transformative Accommodation' and Religious Law", Ecclesiastical Law Journal 11:131-153

Jackson, B.S., 2010, "Jewish Approaches to Law (Religious and Secular)", Law & Justice. The Christian Law Review 164:63-74.

Jackson, B.S., 2010, "Marriage and Divorce: From Social Institution to Halakhic Norms", in The Dead Sea Scrolls. Texts and Context, ed. C. Hempel, Brill, 339-64

Jackson, B.S., 2011, "The 'Institutions' of Marriage and Divorce in the Hebrew Bible", Journal of Semitic Studies LVI/2:221-251

Jackson, B.S., 2011, Agunah: The Manchester Analysis, Deborah Charles Publications

Jackson, B.S., 2011, "Constructing a Theory of Halakhah", available from http://www.legaltheory.demon.co.uk/jlas/resources.htm

Jacobs, L., 1984. A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law, Oxford University Press

Rayner, J.D. Jewish religious law: a progressive perspective, 1998, Berghahn Books

Roth, J., 1986. The Halakhic Process: a Systemic Analysis, Jewish Theological Seminary of America

Silberg, M., 1973. Talmudic Law and the Modern State, Burning Bush Press

Teaching Methods 5 x 2-hour interactional lectures, working through this class handbook which specifies themes and provides both primary texts for discussion and other materials and references to further reading, plus one tutorial taking account of the available further reading.

Assessment You are required to submit a 4000 word Essay to the Faculty Office by Monday Jan. 8th 2016 via Turnitin on the Moodle page. Provisional feedback within four weeks.

Essay Topic	Discuss the religious and other ideological elements in the history and application of the Jewish law of marriage and divorce, with particular reference to ONE of the following: (1) the biblical period. (2) the rabbinic period (ancient and mediaeval), (3) the modern period.
Administrator Contact Details:	Lauren Whiston, Faculty Office (FML065); e-mail: whistol@hope.ac.uk: 0151 291 3225

Week 1: Law and Religion in the Hebrew Bible and the New Testament

Bibliographic material in red = to be supplied by BSJ

1. Themes

A. Semantics
   i. *Torah* and *Nomos*, but see **Alan Segal, "Torah and Nomos in recent scholarly discussion", *Studies in Religion* 13/1 (1984), 19-27**
   ii. The role of written law: the *sefer torah*: 2 Chron. 17
   iii. Mitsvah, Mishpat, Hok
   iv. Covenant and Law; Abraham, Noah, Exod 19, Exod. 24

B. Law and Theology in the Hebrew Bible, Early Rabbinics and the New Testamentt
   i. In relation to ongoing human/social relationships
   ii. In relation to reward and punishment during one's lifetime
   iii. In relation to 'salvation'
   iv. Human Law and Divine Justice: 'monistic' v 'dualistic' models
      a. institutional aspects
      b. substantive aspects

C. How did law "work" in the Hebrew Bible?
   i. Dispute Settlement and the Role of Courts: **Texts**
      (a) Was courtroom adjudication the regular way of resolving disputes?: Prov. 25:7-9, Readings C below
      (b) Who appointed the judges? II Chron. 19, Deut 16:18-20, Exodus 18, Deut 1, Ezra 7
      (c) What was the relationship between the local and central courts?: II Chron. 19, Deut. 17, Exodus 18, Deut 1
      (d) What sources were the courts supposed to use? II Chron. 19, Deut 16:18-20, Ezra 7, Readings D below
      (e) What procedures did they use? 1 Kings 21
   ii. Reading biblical "statutes": semantic v. narrative approaches, e.g. 'lex talionis' texts, Readings A and B below: **Texts**Law and Theology: The rights of daughters on intestacy in Numbers 27 and Job: **Texts**

D. Law in the New Testament
   i. Jesus and Paul: **Texts**
   ii. Law and Theology: The Parable of the Prodigal Son

2. Texts for discussion

Texts for Ci: Dispute Settlement and the Role of Courts

Prov.25:7-9

What your eyes have seen
    do not hastily bring into court
For what will you do in the end
    when your neighbour puts you to shame?
Argue your case with your neighbour himself
    and do not disclose another's secret.

- **What kind of anti-institutional polemic does the above text from Proverbs reflect?**
- **What alternatives to institutional adjudication may have existed?**

2 Chron. 19

4 Jehosh'aphat dwelt at Jerusalem; and he went out again among the people, from Beer-sheba to the hill country of E'phraim, and brought them back to the LORD, the God of their fathers. 5 He appointed judges in the land in all the fortified cities of Judah, city by city, 6 and said to the judges, "Consider what you do, for you judge not for man but for the LORD; he is with you in giving judgment. 7 Now then, let the fear of the LORD be upon you; take heed what you do, for there is no perversion of justice with the LORD our God, or partiality, or taking bribes." 8 Moreover in Jerusalem Jehosh'aphat appointed certain Levites and priests and heads of families of Israel, to give judgment for the LORD and to decide disputed cases. They had their seat at Jerusalem. 9 And he charged them: "Thus you shall do in the fear of the LORD, in faithfulness, and with your whole heart: 10 whenever a case comes to you from your brethren who live in their cities, concerning bloodshed, law or commandment, statutes or ordinances, then you shall instruct them, that they may not incur guilt before the LORD and wrath may not come upon you and your brethren. Thus you shall do, and you will not incur guilt. 11 And behold, Amari'ah the chief priest is over you in all matters of the LORD; and Zebadi'ah the son of Ish'mael, the governor of the house of Judah, in all the king's matters; and the Levites will serve you as officers. Deal courageously, and may the LORD be with the upright!"

- **On what basis were the local courts to judge?**
- **On what basis was the central court in Jerusalem to judge?**
- **In what circumstances are cases likely to have been referred to the central court by (the court in?) the local cities?**
- **What is the significance of the "divided presidency" of the central court indicated in v.11?**

2 Chron. 17

7 In the third year of his reign he sent his princes, Ben-hail, Obadi'ah, Zechari'ah, Nethan'el, and Micai'ah, to teach in the cities of Judah;
8 and with them the Levites, Shemai'ah, Nethani'ah, Zebadi'ah, As'ahel, Shemi'ramoth, Jehon'athan, Adoni'jah, Tobi'jah, and Tobadoni'jah; and with these Levites, the priests Eli'shama and Jeho'ram.
9 And they taught in Judah, having the book of the law of the LORD with them; they went about through all the cities of Judah and taught among the people.

- **What does this tell us about the function of the "book of the law of the LORD" at this period?**
- **Who taught and who was the audience?**

Deut 16

18 "You shall appoint judges and officers in all your towns which the LORD your God gives you, according to your tribes; and they shall judge the people with righteous judgment.
19 You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous.
20 Justice, and only justice, you shall follow, that you may live and inherit the land which the LORD your God gives you.

- **What does this passage have in common with the practice under Jehoshaphat, and in what respect does it add to it? In the next chapter of Deuteronomy, we find:**

Deut. 17

8 "If any case arises requiring decision between one kind of homicide and another, one kind of legal right and another, or one kind of assault and another, any case within your towns which is too difficult for you, then you shall arise and go up to the place which the LORD your God will choose,
9 and coming to the Levitical priests, and to the judge who is in office in those days, you shall consult them, and they shall declare to you the decision.
10 Then you shall do according to what they declare to you from that place which the LORD will choose; and you shall be careful to do according to all that they direct you;
11 according to the instructions which they give you, and according to the decision which they pronounce to you, you shall do; you shall not turn aside from the verdict which they declare to you, either to the right hand or to the left.
12 The man who acts presumptuously, by not obeying the priest who stands to minister there before the LORD your God, or the judge, that man shall die; so you shall purge the evil from Israel.

13 And all the people shall hear, and fear, and not act presumptuously again.

- **What does this passage suggest regarding jurisdictional divisions?**
- **Compare this with the account attributed to Jehoshaphat (2 Chr.19, above).**

Exodus 18:

10 And Jethro said, "Blessed be the LORD, who has delivered you out of the hand of the Egyptians and out of the hand of Pharaoh.
11 Now I know that the LORD is greater than all gods, because he delivered the people from under the hand of the Egyptians, when they dealt arrogantly with them."
12 And Jethro, Moses' father-in-law, offered a burnt offering and sacrifices to God; and Aaron came with all the elders of Israel to eat bread with Moses' father-in-law before God.
13 On the morrow Moses sat to judge the people, and the people stood about Moses from morning till evening.
14 When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?"
15 And Moses said to his father-in-law, "Because the people come to me to inquire of God;
16 when they have a dispute, they come to me and I decide between a man and his neighbor, and I make them know the statutes of God and his decisions."
17 Moses' father-in-law said to him, "What you are doing is not good.
18 You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone.
19 Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God;
20 and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do.
21 Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens.
22 And let them judge the people at all times; every great matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you.
23 If you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace."
24 So Moses gave heed to the voice of his father-in-law and did all that he had said.
25 Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, of hundreds, of fifties, and of tens.
26 And they judged the people at all times; hard cases they brought to Moses, but any small matter they decided themselves.
27 Then Moses let his father-in-law depart, and he went his way to his own country.

- **How was Moses adjudicating the disputes of the people?**
- **What problem was identified by Jethro, and how did he propose to resolve it?**
- **Who does he propose be appointed as judges?**
- **On what basis are (i) the judges and (ii) Moses to decide cases in future?**
- **What might be the point of attributing this judicial organisation to Jethro, before the revelation at Sinai? Note the different view taken in:**

Deut 1:

9 "At that time I said to you, 'I am not able alone to bear you;
10 the LORD your God has multiplied you, and behold, you are this day as the stars of heaven for multitude.
11 May the LORD, the God of your fathers, make you a thousand times as many as you are, and bless you, as he has promised you!
12 How can I bear alone the weight and burden of you and your strife?
13 Choose wise, understanding, and experienced men, according to your tribes, and I will appoint them as your heads.'
14 And you answered me, 'The thing that you have spoken is good for us to do.'
15 So I took the heads of your tribes, wise and experienced men, and set them as heads over you,

commanders of thousands, commanders of hundreds, commanders of fifties, commanders of tens, and officers, throughout your tribes.

16 And I charged your judges at that time, 'Hear the cases between your brethren, and judge righteously between a man and his brother or the alien that is with him.

17 You shall not be partial in judgment; you shall hear the small and the great alike; you shall not be afraid of the face of man, for the judgment is God's; and the case that is too hard for you, you shall bring to me, and I will hear it.'

18 And I commanded you at that time all the things that you should do.

- **Who is to choose the judges here?**
- **Who are appointed as judges?**
- **What does the charge to the local judges here add, by comparison with 2 Chron. 19 and Deut. 16?**
- **When are the local courts to refer the case to Moses? How is Moses to decide it?**

Ezra 7

25 "And you, Ezra, according to the wisdom of your God which is in your hand, appoint magistrates and judges who may judge all the people in the province beyond the River, all such as know the laws of your God; and those who do not know them, you shall teach.

26 Whoever will not obey the law of your God and the law of the king, let judgment be strictly executed upon him, whether for death or for banishment or for confiscation of his goods or for imprisonment."

- **What relationship between God, (Persian) king (Cyrus) and Israel is here envisaged?**
- **Might this model have any contemporary relevance?**

1 Kings 21:

1 Now Naboth the Jezreelite had a vineyard in Jezreel, beside the palace of Ahab king of Sama'ria.

2 And after this Ahab said to Naboth, "Give me your vineyard, that I may have it for a vegetable garden, because it is near my house; and I will give you a better vineyard for it; or, if it seems good to you, I will give you its value in money."

3 But Naboth said to Ahab, "The LORD forbid that I should give you the inheritance of my fathers."

4 And Ahab went into his house vexed and sullen because of what Naboth the Jezreelite had said to him; for he had said, "I will not give you the inheritance of my fathers." And he lay down on his bed, and turned away his face, and would eat no food.

5 But Jez'ebel his wife came to him, and said to him, "Why is your spirit so vexed that you eat no food?"

6 And he said to her, "Because I spoke to Naboth the Jezreelite, and said to him, 'Give me your vineyard for money; or else, if it please you, I will give you another vineyard for it'; and he answered, 'I will not give you my vineyard.'"

7 And Jez'ebel his wife said to him, "Do you now govern Israel? Arise, and eat bread, and let your heart be cheerful; I will give you the vineyard of Naboth the Jezreelite."

8 So she wrote letters in Ahab's name and sealed them with his seal, and she sent the letters to the elders and the nobles who dwelt with Naboth in his city.

9 And she wrote in the letters, "Proclaim a fast, and set Naboth on high among the people;

10 and set two base fellows opposite him, and let them bring a charge against him, saying, 'You have cursed God and the king.' Then take him out, and stone him to death."

11 And the men of his city, the elders and the nobles who dwelt in his city, did as Jez'ebel had sent word to them. As it was written in the letters which she had sent to them,

12 they proclaimed a fast, and set Naboth on high among the people.

13 And the two base fellows came in and sat opposite him; and the base fellows brought a charge against Naboth, in the presence of the people, saying, "Naboth cursed God and the king." So they took him outside the city, and stoned him to death with stones.

14 Then they sent to Jez'ebel, saying, "Naboth has been stoned; he is dead."

15 As soon as Jez'ebel heard that Naboth had been stoned and was dead, Jez'ebel said to Ahab, "Arise, take possession of the vineyard of Naboth the Jezreelite, which he refused to give you for money; for Naboth is not alive, but dead."

16 And as soon as Ahab heard that Naboth was dead, Ahab arose to go down to the vineyard of Naboth the Jezreelite, to take possession of it.

17 Then the word of the LORD came to Eli'jah the Tishbite, saying,

18 "Arise, go down to meet Ahab king of Israel, who is in Sama'ria; behold, he is in the vineyard of Naboth,

where he has gone to take possession.

19 And you shall say to him, 'Thus says the LORD, "Have you killed, and also taken possession?"' And you shall say to him, 'Thus says the LORD: "In the place where dogs licked up the blood of Naboth shall dogs lick your own blood."'

- **On what grounds does Naboth resist Ahab's offer?**
- **Who does Jezebel get to carry out the conspiracy against Naboth?**
- **Who comprised the court and what does this suggest about the "independence of the judiciary"?**
- **Comment on the procedure of the court**
- **Why, impliedly, was Ahab entitled to take the vineyard once Naboth was executed? Are there any parallels to this?**
- **Who exercises judgement over the king? Was this entirely fair to Ahab?**
- **With what might one compare the relationship between Ahab and Jezebel?**

Texts for Cii: 'lex talionis' texts

Exodus 21:

22 When men strive together, and hurt a woman with child, and her children come out, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine.
23 If any harm follows, then you shall give life for life,
24 eye for eye, tooth for tooth, hand for hand, foot for foot,
25 burn for burn, wound for wound, stripe for stripe.

Genesis 4:

23 Lamech said to his wives: "Adah and Zillah, hear my voice; you wives of Lamech, hearken to what I say: I have slain a man for wounding me, a young man for striking me.
24 If Cain is avenged sevenfold, truly Lamech seventy-sevenfold."

- **Was is Lamech's approach to retribution for bodily injuries?**

Judges 1:

5 ... They (the tribe of Judah) came upon Ado'ni-be'zek at Bezek, and fought against him, and defeated the Canaanites and the Per'izzites. **6** Ado'ni-be'zek fled; but they pursued him, and caught him, and cut off his thumbs and his great toes. **7** And Ado'ni-be'zek said, "Seventy kings with their thumbs and their great toes cut off used to pick up scraps under my table; as I have done, so God has requited me." And they brought him to Jerusalem, and he died there.

- **What view of talionic punishment is reflected in this passage?**

Leviticus 19:

18 You shall not take vengeance or bear any grudge against the sons of your own people, but you shall love your neighbor as yourself: I am the LORD.

- ***How* restricted is vengeance?**
- **Is this a legal, a moral or a religious command?**
- **Where is the relationship between this and Exodus 21:24 (above) taken up in the New Testament?**

***Prov*. 24:29:**

Do not say, 'I will do to him as he has done to me;
I will pay the man back for what he has done.'

- **Is this directed against talion as found in social practice or narrative sources?**

***Matt.* 5:38-39:**

(38) "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' (39) But I say to you, Do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also.'

- **What does this imply as to Jesus' interpretation of 'An eye for an eye and a tooth for a tooth'?**
- **On this, see also Daube as cited in n.26 of B>S> Jackson, "Revisiting Daube on Lex Talionis", 2001 SBL Conference Paper, downloadable from** http://jewishlawassociation.org/resources.htm **and see further D. Daube, "Eye for Eye", in his *The New Testament and Rabbinic Judaism* (London: Athlone Press, 1956), 254-65, reprinted in *Collected Works of David Daube, Vol. 2: New Testament Judaism*, ed. C.M. Carmichael (Berkeley: The Robbins Collection, 2000), 177-185.• What might Jesus have said about Lamech (above)?**

Texts for Ciii: inheritance

Num. 27

1 Then drew near the daughters of Zeloph'ehad the son of Hepher, son of Gilead, son of Machir, son of Manas'seh, from the families of Manas'seh the son of Joseph. The names of his daughters were: Mahlah, Noah, Hoglah, Milcah, and Tirzah.
2 And they stood before Moses, and before Elea'zar the priest, and before the leaders and all the congregation, at the door of the tent of meeting, saying,
3 "Our father died in the wilderness; he was not among the company of those who gathered themselves together against the LORD in the company of Korah, but died for his own sin; and he had no sons.
4 Why should the name of our father be taken away from his family, because he had no son? Give to us a possession among our father's brethren."
5 Moses brought their case before the LORD.
6 And the LORD said to Moses,
7 "The daughters of Zeloph'ehad are right; you shall give them possession of an inheritance among (*betokh*) their father's brethren and cause the inheritance of their father to pass to them.
8 And you shall say to the people of Israel, 'If a man dies, and has no son, then you shall cause his inheritance to pass to his daughter.
9 And if he has no daughter, then you shall give his inheritance to his brothers.
10 And if he has no brothers, then you shall give his inheritance to his father's brothers.
11 And if his father has no brothers, then you shall give his inheritance to his kinsman that is next to him of his family, and he shall possess it. And it shall be to the people of Israel a statute and ordinance, as the LORD commanded Moses.'"

- **Note there is no issue of parental preference here. This is a case of pure "intestacy"**
- **What is it that the daughters are claiming? See also Num.36, below.**
- **Does this suggest that a system of "precedent" existed?**
- **Is the decision as regards the daughters the same as the rule laid down for the future? (compare Job 42, below)**

Num.36

1 The heads of the fathers' houses of the families of the sons of Gilead the son of Machir, son of Manas'seh, of the fathers' houses of the sons of Joseph, came near and spoke before Moses and before the leaders, the heads of the fathers' houses of the people of Israel;
2 they said, "The LORD commanded my lord to give the land for inheritance by lot to the people of Israel; and my lord was commanded by the LORD to give the inheritance of Zeloph'ehad our brother to his daughters.
3 But if they are married to any of the sons of the other tribes of the people of Israel then their inheritance will be taken from the inheritance of our fathers, and added to the inheritance of the tribe to which they belong; so it will be taken away from the lot of our inheritance.
4 And when the jubilee of the people of Israel comes, then their inheritance will be added to the inheritance of the tribe to which they belong; and their inheritance will be taken from the inheritance of the tribe of our fathers."

5 And Moses commanded the people of Israel according to the word of the LORD, saying, "The tribe of the sons of Joseph is right.
6 This is what the LORD commands concerning the daughters of Zeloph'ehad, 'Let them marry whom they think best; only, they shall marry within the family of the tribe of their father.
7 The inheritance of the people of Israel shall not be transferred from one tribe to another; for every one of the people of Israel shall cleave to the inheritance of the tribe of his fathers.
8 And every daughter who possesses an inheritance in any tribe of the people of Israel shall be wife to one of the family of the tribe of her father, so that every one of the people of Israel may possess the inheritance of his fathers.
9 So no inheritance shall be transferred from one tribe to another; for each of the tribes of the people of Israel shall cleave to its own inheritance.'"

Job 42

12 And the LORD blessed the latter days of Job more than his beginning; and he had fourteen thousand sheep, six thousand camels, a thousand yoke of oxen, and a thousand she-asses.
13 He had also seven sons and three daughters.
14 And he called the name of the first Jemi'mah; and the name of the second Kezi'ah; and the name of the third Ker'en-hap'puch.
15 And in all the land there were no women so fair as Job's daughters; and their father gave them inheritance among their brothers.

- **What distinguishes the position of Job's daughters from that of the daughters of Zeloph'ehad?**
- **What does this suggest regarding the status of the rules of succession?**

Texts for Di: Law in the New Testament

***Matt.* 5:17-21:**

17 "Think not that I have come to abolish the law and the prophets; I have come not to abolish them but to fulfil them. 18 For truly, I say to you, till heaven and earth pass away, not an iota, not a dot, will pass from the law until all is accomplished. 19 Whoever then relaxes one of the least of these commandments and teaches men so, shall be called least in the kingdom of heaven; but he who does them and teaches them shall be called great in the kingdom of heaven. 20 For I tell you, unless your righteousness exceeds that of the scribes and Pharisees, you will never enter the kingdom of heaven. • **What does this imply as to Jesus' interpretation of 'An eye for an eye and a tooth for a tooth'?**

- **What is the nature of Jesus evaluation of the teachings of the scribes and Pharisees, and how does he see his own teaching as different?**

***2 Corinthians* 3:6 (Paul):**

The qualification we have comes from God; it is he who has qualified us to dispense his new covenant — a covenant expressed not in a written document but in a spiritual bond; for the written law condemns to death, but the spirit gives life. (King James: For the letter killeth, but the spirit giveth life.)

- **What is the role of the distinction here between 'letter' and 'spirit'?**
- **In what sense does the written law "condemn to death" (and would the Rabbis agree)?**
- **Is the notion of a 'new covenant' Christian as opposed to Jewish?**

***Galatians* 3:16-18:**

3:16 Now the promises were made to Abraham and to his offspring. It does not say, "And to offsprings," referring to many; but, referring to one, "And to your offspring" [the reference here is to זרעך (*zarakha*: lit. "your seed") in *Gen*. 17:7] which is Christ. 3:17. This is what I mean: the law, which came four hundred and thirty years afterward, does not annul a covenant previously ratified by God, so as to make the promise void. 3:18 For if the inheritance is by the law, it is no longer by promise; but God gave it to Abraham by a promise.

- **What strategy is Paul using here to justify the argumemt that Christians are not bound by the Mosaic law?**

Luke 15:

11 And he said, There was a man who had two sons;
12 and the younger of them said to his father, 'Father, give me the share of property that falls to me.' And he divided his living between them.
13 Not many days later, the younger son gathered all he had and took his journey into a far country, and there he squandered his property in loose living.
14 And when he had spent everything, a great famine arose in that country, and he began to be in want.
15 So he went and joined himself to one of the citizens of that country, who sent him into his fields to feed swine.
16 And he would gladly have fed on the pods that the swine ate; and no one gave him anything.
17 But when he came to himself he said, 'How many of my father's hired servants have bread enough and to spare, but I perish here with hunger!
18 I will arise and go to my father, and I will say to him, Father, I have sinned against heaven and before you;
19 I am no longer worthy to be called your son; treat me as one of your hired servants.'
20 And he arose and came to his father. But while he was yet at a distance, his father saw him and had compassion, and ran and embraced him and kissed him.
21 And the son said to him, 'Father, I have sinned against heaven and before you; I am no longer worthy to be called your son.'
22 But the father said to his servants, 'Bring quickly the best robe, and put it on him; and put a ring on his hand, and shoes on his feet;
23 and bring the fatted calf and kill it, and let us eat and make merry;
24 for this my son was dead, and is alive again; he was lost, and is found.' And they began to make merry.
25 Now his elder son was in the field; and as he came and drew near to the house, he heard music and dancing.
26 And he called one of the servants and asked what this meant.
27 And he said to him, 'Your brother has come, and your father has killed the fatted calf, because he has received him safe and sound.'
28 But he was angry and refused to go in. His father came out and entreated him,
29 but he answered his father, 'Lo, these many years I have served you, and I never disobeyed your command; yet you never gave me a kid, that I might make merry with my friends.
30 But when this son of yours came, who has devoured your living with harlots, you killed for him the fatted calf!'
31 And he said to him, 'Son, you are always with me, and all that is mine is yours.
32 It was fitting to make merry and be glad, for this your brother was dead, and is alive; he was lost, and is found.' (RSV)

- **This appears only in Luke. Is the theological approach closer to that of Jesus or Paul? See also Jackson, *Halakhah in the New Testament (HNT)*, pp.134-37. See also the first half of "A Tale of Two Prodigals" (Inaugural Lecture), at https://www.youtube.com/watch?v=ZjaUU-d2BuE**

3. Readings

A. B.S. Jackson, *Studies in the Semiotics of Biblical Law*, §3.1 (footnotes omitted)

... literacy, as scholars like Walter Ong and Jack Goody stress, is not simply an alternative channel of transmission of meaning; it is a way of thought. 'Writing restructures consciousness.' Two aspects of the transformation of structures of consciousness, between orality and literacy, are particularly relevant here. First, orality favours events rather than concepts or system; the kind of connections we can best process through speech are those of narrative rather than logical sequence. We can tolerate a complex story told orally, but not a complex legal document. Secondly, the distinction between orality and literacy very frequently coincides with what the linguist Basil Bernstein has termed 'restricted code' rather than 'elaborated code'; indeed, for Ong restricted and elaborated linguistic codes 'could be relabelled 'oral-based' and 'text-based' codes respectively.' In restricted code we need *not* say everything which we mean, because we can rely upon the shared social knowledge within a small community to fill in what, at the explicit level, would be gaps; elaborated code, by contrast, makes no such

assumptions. Everything we want to say must be elaborated; the people with whom we are communicating are not expected to share our cultural, contextual assumptions; any such assumptions therefore need to be spelled out. This extends also to the pragmatics of communication (of which the illocutionary force of speech acts is one aspect). As Olson argues, many of those signs of an utterance's illocutionary force which are available in direct, interpersonal oral communication are lost in the written form, and therefore have to be supplied ('elaborated') by the writer, failing which the reader must make judgments about them.

These two facets of the distinction between orality and literacy come together in the following opposition: literal meaning assumes elaborated code and is applicable in principle to any content, so long as we spell it out and expect the reader to pay full attention to everything we have written (and no attention to what we have not written); narrative meaning, by contrast, consists not in a paraphrase, the substitution of one set of words by another, but rather the typical stories, or narrative images evoked by the words within a group which shares the social knowledge necessary to evoke those images without fully spelling them out. Such a conception of narrative meaning is not, however, lost the moment speech is reduced to writing: in the early stages of literacy, we encounter what has been termed 'oral residue'.

The claim that 'writing restructures consciousness', supported by considerable research into pre-literate peoples, is explained thus. In writing, as one reads through a text, that which has been read remains available for consultation. It is possible to engage in 'backward scanning'. This is not possible in traditional oral cultures (though it is now possible with technologies which allow for the permanent recording of speech, as in film, video, tape recordings). In order to remain intelligible, therefore, oral language requires a great deal more repetition and redundancy, clues which allow the listener to grasp the direction of the ongoing argument. On the other hand, 'sparsely linear or analytic thought and speech is an artificial creation, structured by the technology of writing'. The very act of writing (at least in traditional ways, before the use of modern computer keyboards) is so much more consuming of time and effort than is speech — it has been calculated that oral speech is typically ten times faster than handwriting — that relative economy in the written word becomes a very practical necessity.

B. B.S. Jackson, *Studies in the Semiotics of Biblical Law,* §10.4: Talion, Semantic and Narrative Readings (footnotes omitted)

Consider, next, the type of meaning to be attributed to the talionic formulae. When we find them in the narratives, we have the context in which they are to be understood. What about the social context? As in the case of homicide, the nature of the intention with which the blow was struck is not determinative of legal categories: the law does not operate through legal categories at this stage; rather, it focuses upon the social experience of typical situations such as ambush, brawl, the wood-chopping accident. Intention is part and parcel of what makes such situations appear significantly different, but it is not utilised as a necessary condition (an 'element' of a crime) as in the modern, positivist model. The perceived intention of the offender might well influence the moral outrage felt by the victim, and thus his willingness to compromise. Thus, payment of *kofer* is that much more likely in practice the less the moral outrage felt by the victim, just as much as in the case of homicide. Conversely, the greater the moral outrage — whether in terms of the perceived intention of the offender or the gravity of the result of his activity — the more likely that talion will have been demanded.

The situation does not necessarily change, I would argue, as soon as the formula is incorporated into a written text. The phenomenon of 'oral residue' requires us to consider whether the text should be read 'literally' (semantically) or by reference to the typical narratives it evokes (§3.2). Take the *tahat* formula in *Exod*. 21:24-25:

> eye for eye, tooth for tooth, hand for hand, foot for foot,
> burn for burn, wound for wound, stripe for stripe.

It is partly through the Sermon on the Mount that this provision has been taken as representative of a crude and cruel legalism attributed to Jewish law. Whether Matthew was indeed referring to physical retaliation for loss of a limb has indeed been doubted. Suffice it to say that readers of the New Testament have adopted such a 'literal' reading of it, which makes, *inter alia*, the following assumptions: (a) it applies whatever the circumstances of the injury (deliberate or accidental); (b) it applies whatever the relative bodily conditions of offender and victim (c); the remedy is mandatory: you have to apply it.

In what circumstances may talionic punishment be demanded? Are we to take a 'literal' (semantic) view, and say that because the formula does not address the circumstances of the offence, the latter are irrelevant, so that the provision 'applies' whether the injury was inflicted deliberately or accidentally? Or are we to understand it narratively, in terms of the typical image of the infliction of bodily injury, which is a deliberate attack? As we have seen, there is only one mention of the actual *practice* of *talio* as a measure of human justice (though there the *ka'asher* formula is used): the story of the king Adoni-Bezek. His offence was clearly deliberate. By contrast, the

tahat formula occurs in narratives where the wrongdoer is acting negligently. Whether talionic punishment could ever have been applied where the injury was caused accidentally is a matter for speculation. If the text is read narratively, we do not have to assume that it was intended for application way beyond the scope of the typical narrative images it evoked. That would be a matter for debate.

Similar considerations apply to the relative bodily conditions of offender and victim. Arguing that *ayin tahat ayin* refers to compensation rather than bodily retaliation, the Rabbis asked:

> What then will you say where a blind man put out the eye of another man, or where a cripple cut off the hand of another or where a lame person broke the leg of another. How can I carry out in this case [the principle of retaliation of] '*eye for eye*', seeing that the Torah says, *Ye shall have one manner of law,* implying that the manner of law should be the same in all cases.

Since the biblical text stated no limitations on the relative bodily conditions of offender and victim, the Rabbis understand that no such limitations can apply. But such a 'literal' application of *talio* would mean that the eye of the offender must be taken, notwithstanding the fact that he will thereby be rendered completely blind, etc., whereas his victim was left half-sighted. Such a conclusion is rejected as self-evidently impossible. The range of the biblical provision cannot however be restricted to exclude such cases (while preserving it for the 'normal' case), in the light of the 'one law' principle. If we cannot modify the range of the principle, we must then seek an alternative meaning for the penalty, one where the blind, crippled or lame offender will suffer no more than the able-bodied offender. *Ayin tahat ayin* must therefore mean compensation rather than retaliation.

This rabbinic argument, we may note, depends upon two aspects of the literary presentation of talion. First, the range of application of the formula is given a 'literal' reading: since no limitations on the relative bodily conditions of offender and victim have been stated, no limitations apply. Second, the justification for not making an exception for the atypical (blind, crippled, lame) offender is taken from the literary association between the talionic formula as it appears in *Lev*. 24:20 and the (closely juxtaposed) 'one law' principle (*Lev*. 24:22), even though the latter is actually used in the biblical text for a quite different purpose: to stress that the law of blasphemy applies equally to the *ger,* here the son of an Israelite woman and an Egyptian man. If, by contrast, we replace this by asking what would have been the meaning of the talionic formula as transmitted orally, and thus replace a literal by a narrative reading, we can hardly suggest that the image of the typical offender was that of the blind, crippled or lame! The exception to which the Rabbis objected would have been implicit: physical retaliation (subject to the argument below) could be applied to the typical case; it need not be applied to the atypical case, notwithstanding the unqualified range of the words.

Such an argument would appear to support what is generally viewed as a 'literal' approach to the penalty: bodily retaliation rather than monetary compensation. But there is a further issue to be considered: whether such a sanction was mandatory or not. The view that talionic punishment is here presented as mandatory cannot in fact be based upon any notion of literal meaning, since there is no linguistic expression in the text on which it can be based. The Hebrew formula has no verb at all. Without a verb, there is nothing explicit to indicate which modality — prescription or permission — is intended. It is simply the assumption of a (modern, positivist) reader that 'an eye for an eye' means 'you *must* give/take an eye for an eye', rather than 'you *may* give/take an eye for an eye'. In short, the mandatory character of talionic punishment derives from discourse assumptions, not literal meaning. And the particular discourse assumption here made turns out to be unjustified. As argued above, *kofer* appears always to have been an option.

C. B.S. Jackson, *Studies in the Semiotics of Biblical Law,* §3.4: Early adjudication (footnotes omitted)

Even if I am correct in stressing the 'arbitrary' character of these rules, each designed to provide a so-called 'objective' test which can readily be applied in practice, without entering into difficult issues of fact, it is still possible to dispute the significance to be attached to this phenomenon. I first became aware of this in the context of the evidentiary rules regarding theft. Daube argued that there was a stage when sale or slaughter of the stolen animal (*Exod*. 21:37) was the only admissible evidence of theft, followed later by a stage when the evidence could extend to 'hot possession'; he assumed that the purpose of such rules was to make life easier for the courts. Even today, we find in some circumstances the use of somewhat arbitrary tests in order to make dispute-resolution that much easier for the courts, even though we know that a more sophisticated approach to the issue would be preferable in an ideal world. But it is precisely because this phenomenon fits with — and no doubt is drawn from — a modern legal model that I suggest that we should pause, and ask whether the evidence really does support our reading back of that model to the ancient sources. Legal anthropology presents non-institutionalised models of dispute resolution, either purely bilateral (involving only the parties) or with assistance from bystanders who volunteer to mediate on a purely ad hoc basis. It makes a great deal of sense to see the 'arbitrary' objective tests encountered in the Bible as originating in a period before institutionalised dispute-resolution was the norm.

As the process of institutionalisation increased, of course, such rules could very readily be taken over into the forensic context.

Moreover, *Prov.* 25:7-9 provides evidence of a strong cultural prejudice against the use of judicial adjudication:

> What your eyes have seen
> do not hastily bring into court
> For what will you do in the end
> when your neighbour puts you to shame?
> Argue your case with your neighbour himself
> and do not disclose another's secret.

Conversely, the several descriptions we find in the Bible of the judicial role all omit, until the time of Ezra in the post-exilic period, any mention of their use of written rule-books. What, then, was the function of such judges? Clearly, it was not the 'application' of written rules to facts. Taking these sources together with the internal evidence of the Covenant Code and the cultural antipathy towards formal adjudication, we may suggest that the original function of courts was restricted to cases perceived as too far distant from the typical narrative images evoked by (what I have called) the 'wisdom-laws', and that in resolving them the judges were expected to deploy their intuitions of justice — intuitions claimed to be divinely inspired.

Two well-known narratives in the Bible appear bear out the claims that (i) adjudication initially concerned cases where a narrative understanding of the rules failed to produce a clear result, and (ii) the Biblical judges are presented as enjoying a form of authority more 'charismatic' than 'legal-rational' (Weber). As part of a plot to secure the return to court of the exiled Absalom, during the reign of King David, a 'wise woman' is recruited to present a fictitious case to David, to serve as a parable to influence him to pardon and recall Absalom (*2 Sam.* 14). The claim she presents to the king is as follows (vv.5-7):

> Alas, I am a widow; my husband is dead. And your handmaid had two sons, and they quarrelled with one another in the field; there was no one to part them, and one struck the other and killed him. And now the whole family has risen against your handmaid, and they say, 'Give up the man who struck his brother, that we may kill him for the life of his brother whom he slew'; and so they would destroy the heir also. Thus they would quench my coal which is left, and leave to my husband neither name nor remnant upon the face of the earth.

The king is thus asked to intervene to prevent the normal operation of blood vengeance for homicide. On what grounds? Partly, because the supplicant is a widow (or perhaps that is the basis of jurisdiction, rather than the cause of action). More substantially, because this is hardly a typical narrative of homicide such as might be evoked by the biblical rules: the narrative of homicide does not typically result in the total extinction of the deceased's immediate family! David, nevertheless, proves reluctant to intervene. He agrees only when the woman urges the king to apply a measure of *divine* justice (v.11): 'Pray let the king invoke the LORD your God, that the avenger of blood slay no more, and my son be not destroyed.'

David is here presented as responding to the 'wisdom' of the woman of Tekoah. That wisdom was itself viewed as a form of divine inspiration. David's son, Solomon, is also depicted as deploying divinely-inspired wisdom in the case of the two prostitutes. He resolves the matter by what many have regarded as a psychological ordeal. The conclusion to the narrative shows that the narrator's main purpose was to stress the fact that Solomon was endowed with divine wisdom and that he deployed such wisdom in the course of adjudication (*I Kgs* 3:28):

> And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.

The claim is made general in *Prov.* 16:10:

> Inspired decisions are on the lips of a king;
> his mouth does not sin in judgment

The claim here is not merely that the adjudication is *on behalf of* God, but that — failing perversity or corruption — adjudication mediates divine decisions. Oracles, wisdom and prophecy are all possible media for the transmission of the divine will. The king has special claims to be the mediator, but where delegation is required, as here in the exercise of the judicial function, divine inspiration is also claimed to be delegated.

There are indications in the Bible that this kind of charismatic judicial authority was originally intended to be hereditary. That was soon found to invite abuse. Neither the hereditary principle of succession nor bureaucratic practices of delegation could be guaranteed to produce judges and officers who would live up to the standards expected of those in receipt of a divine mandate. According to *1 Sam.* 7:15-8:3, this problem became manifest already in the period of the judges:

> Samuel judged Israel all the days of his life. And he went on a circuit year by year to Bethel, Gilgal, and Mizpah; and he judged Israel in all these places. Then he would come back to Ramah, for his home was there, and there also he administered justice to Israel. And he built there an altar to the LORD. When Samuel became old, he made his sons judges over Israel. The name of his first-born son was Jo'el, and the name of his second, Abijah; they were judges in Beer-sheba. Yet his sons did not walk in his ways, but turned aside after gain; they took bribes and perverted justice.

It is likely that the earliest use of written law in the Bible was designed precisely to limit the (hereditary) powers of the monarchy. We may see in this just one manifestation of a more general pattern. Contrary to the theory of Sir Henry Maine, who saw 'equity' as a stage later than the 'early codes', the biblical evidence suggests that laws (in the modern sense) were a reaction against discretionary justice. Comparison may be made with Greek and Roman views of the origins of their own earliest codes, as representing democratic opposition to the exercise of royal and aristocratic discretion.

D B.S. Jackson, *Studies in the Semiotics of Biblical Law*, §5.1 "Legislation" in the HB (footnotes omitted)

... Once the character of modern legislation is made explicit in this way, we can ask whether it is applicable to the Bible. I maintain that it is not so applicable, at least until we reach the period of Ezra. The modern legislative model breaks down for the following reasons. When communication takes place between the legislator (whether the king or the divinity) and the judges, there is no suggestion that the medium of a written text is used; conversely, when we do have the communication of a written text of laws, the judges are not the receivers. Moreover, there is no evidence that the texts of biblical law enjoy that form of force here described in relation to modern statutes, certainly before the time of Ezra.

The evidence for these claims can be summarised quite briefly. The norms of Deuteronomy and the account of Jehoshaphat's reform in 2 Chronicles present a very significant parallel on one central point, despite other differences in detail. Both of them record that the instructions given to the judges are of an entirely general character — to do justice and avoid partiality/corruption (Cf. *Deut.* 1:17, 16:19-2).

The charge given to the judges in the fortified cities of Judah by king Jehoshaphat is simply this (*2 Chron.* 19:4-7):

> Jehoshaphat dwelt at Jerusalem; and he went out again among the people, from Beer-sheba to the hill country of Ephraim, and brought them back to the LORD, the God of their fathers. He appointed judges in the land in all the fortified cities of Judah, city by city, and said to the judges, 'Consider what you do, for you judge not for man but for the LORD; he is with you in giving judgment. Now then, let the fear of the LORD be upon you; take heed what you do, for there is no perversion of justice with the LORD our God, or partiality, or taking bribes.'

The claim here is not merely that the adjudication is *on behalf of* God, but that — failing perversity or corruption — adjudication mediates divine decisions: *ve'imakhem bidvar mishpat*. We may compare the terms in which God promises that he will put words into Moses' mouth: *Exod.* 4:12: 'and I will be with your mouth (*im piykha*) and teach you what you shall speak'.

Very similar is the Deuteronomic conception of the judicial role. According to *Deut*. 16:18-20:

> You shall appoint judges and officers in all your towns which the LORD your God gives you, according to your tribes; and they shall judge the people with righteous judgment. You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice, and only justice, you shall follow, that you may live and inherit the land which the LORD your God gives you.

The Deuteronomic version of 'Jethro's' reform again stresses the application of a general conception of justice and the avoidance of corruption. Again, there is no mention of recourse to a written text, but Jehoshaphat's invocation of divine guidance (*ve'imakhem bidvar mishpat*) may also be implied in *Deut.* 1:16-17:

> And I charged your judges at that time, 'Hear the cases between your brethren, and judge righteously between a man and his brother or the alien that is with him. You shall not be partial in judgment; you shall hear the small and the great alike; you shall not be afraid of the face of man, for the judgment is God's (*ki hamishpat lelohim hu*); and the case that is too hard for you, you shall bring to me, and I will hear it.'

The narrative of Jehoshaphat does indicate a two-tier judicial system. Members of the educated elite are appointed to be judges in Jerusalem, 'to give judgment for the LORD and to decide disputed cases' (*2 Chron.* 19:8). But even here, no mention of a written source of law is found, and the charge to the judges, once again, is predominantly general (*2 Chron*. 19:9-11):

> Thus you shall do in the fear of the LORD, in faithfulness, and with your whole heart: whenever a case comes

> to you from your brethren who live in their cities, concerning bloodshed, law or commandment, statutes or ordinances, then you shall instruct them, that they may not incur guilt before the LORD and wrath may not come upon you and your brethren. Thus you shall do, and you will not incur guilt. And behold, Amariah the chief priest is over you in all matters of the LORD; and Zebadiah the son of Ishmael, the governor of the house of Judah, in all the king's matters; and the Levites will serve you as officers. Deal courageously, and may the LORD be with the upright!

There is, indeed, a tension in this passage, which appears to speak of sources of law ('statutes or regulations'), while at the same time insisting upon the authority of specified officials. In fact, the phrase *lechukim ulemishpatim* can hardly refer to 'sources of law' in the modern sense; the whole context, commencing with *dam ledam,* indicates that the meaning to be assigned to these words is in terms in the type of subject matter, rather than the source of rules for adjudication. It is in just this sense that *mishpat* is used in the introduction to the 'Covenant Code' (*Exod.* 21:1). It is very likely, moreover, that the reference to 'bloodshed, law or commandment, statutes or ordinances' reflects an attempt by the Chronicler to harmonise this model with later conceptions.

On the other hand, both Deuteronomy and 2 Chronicles also provide explicit information about the use of a written text of law. In Deuteronomy, this is a book *(sefer)* which is to be prepared for the use of the king himself, and through the study of which the king shall learn to be god-fearing and not rise above his station — a combination of positive and negative generalities comparable, in this respect, to the charge to the judges (*Deut.* 17:19-20). In 2 Chronicles the king orders his officers to take copies of the book around the country, and to teach it to the people. In both sources, written law has a didactic function; it is not the basis of adjudication.

4. Reading and Questions for tutorial

Required Reading

Jackson B.S., "Human Law and Divine Justice: Towards the Institutionalisation of *Halakhah*", *JSIJ* 9 (2010), 1-25, downloadable (Word or pdf) from http://www.biu.ac.il/js/JSIJ/jsij9.html

Jackson B.S., "*Lex Talionis*: Revisiting Daube's Classic", presented at the SBL session in Daube's memory, Denver 2001, downloadable from http://jewishlawassociation.org/resources.htm

1. Download and read Jackson B.S., "*Lex Talionis*: Revisiting Daube's Classic". What aspects of Daube's account do you find (i) most surprising, (ii) most plausible, (iii) least plausible?

2. Download and read Jackson B.S., "Human Law and Divine Justice: Towards the Institutionalisation of *Halakhah*", *JSIJ* 9 (2010), 1-25. What does this account indicate about the differences between biblical and modern law?

Week 2: The Historical Development of Jewish law in Postbiblical Times

1. Themes

A. History, Periodisation and cultural influences: see **Readings A, below**
   i. Biblical
   ii. Second Commonwealth
   iii. Talmudic: Tannaitic (Mishnah, Tosefta), Amoraic (Jerusalem and Babylonian Talmudim)
   iv. Geonic (Halakhot Gedolot)
   v. Rishonim
   vi. Aharonim
   vii. Relative authority of the different periods

B. Sources of Jewish law
   i. Biblical texts as interpreted by the "oral law": the *middot*: **Texts**
   ii. Rabbinic legislation: *taqqanot* and *gezerot.* Distinguish *taqqanot haqahal* (communal regulations): **Texts**
   iii. 'Codes'
      (a) Alfasi (Rif), *Sefer Halakhot*
      (b) Maimonides (Rambam), Mishneh Torah ("Yad"), 1180
      (c) The Arba'ah Turim (Tur) of R. Jacob b. Asher (14th cent.). For an example (on medical ethics), see **http://www.jewishvirtuallibrary.org/jsource/Judaism/Arba.pdf**
      (d) R. Joseph Karo, Shulhan Arukh, 16th cent
      (e) Authority and relative weight of these and other 'codes'
   iv. Shut (she'elot uteshuvot), cf. responsa prudentium
   v. Custom: See **http://jbq.jewishbible.org/assets/Uploads/321/321_kamsler4.pdf**
      (a) Creating new law: criteria
      (b) Custom as negating *halakhah*?

C. System of Authority
   i. The problem of authority without a state
   ii. The principle of majority decision-making
   iii. Supremacy of the Talmud
   iv. *Hilkheta kebatra'i*: ("the law is according to the later generations") and its qualification by Rema: **Texts**
   v. Capacity to override the law
      (a) In Talmudic times
      (b) Emergency decision-making: **Texts**
   vi. Where there is no clear *halakhah*: discretion in cases of doubt
      (a) *Safeq de'oraita lehumra*: a doubt on a 'biblical' matter is to be resolved strictly
      (b) *Safeq derabbanan lekula*: a doubt on a 'rabbinic' matter may be resolved leniently
      (c) *Sfeq sfeqa*: double doubts may be resolved leniently even in 'biblical' matters

D. Scope of Jewish Law
   i. Ritual
   ii. Family
   iii. Civil Law
   iv. Criminal Law: **Texts**
   v. Public Law
   vi. 'Private international law' (conflict of laws): *dina demalkuta dina*

E. The Theory of Jewish law: **See Readings B below**
   i. Law as a system of commands (Austin, Bentham)
   ii. Law as a system of rules (Hart)
   iii. Law as a system of rules and principles (Dworkin)
   iv. Separation of law and morality?
      a. Middat hasidut
      b. Dinei shamayim (causation cases)
      c. Modalities of secular and religious laws: Islamic law's five modalities: required, encouraged, permitted, discouraged, prohibited
   v. Certainty and the Rule of Law
   vi. Law as a System of Trust (in the current rabbinic leadership)?
   vii. 'Private international law' (conflict of laws): *dina demalkuta dina*

2. Texts for discussion

Bi Rabbinic Hermeneutics: the *middot* for interpretation of the Biblical text [from the 13 rules of R. Ishmael, in *Sifra,* Introd. §5. See further L. Jacobsk, "Hermeneutics", at http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0009_0_08805.html]

***Kal va-homer*: an argument from the minor premise *(kal)* to the major *(homer)*.**
"If priests, who are not disqualified for service in the Temple by age, are disqualified by bodily blemishes (Lev. 21:16–21) then levites, who are disqualified by age (Num. 8:24–25), should certainly be disqualified by bodily blemishes" (Hul. 24a).
- **Describe the logic**

***Gezerah shavah*: comparison of similar expressions**.
But the words of the *gezerah shavah* must not only be similar but also superfluous (*mufneh*, "free") in the context in which they appear, so that it can be argued that they were placed there for the express purpose of the *gezerah shavah* (Shab. 64a). It would appear that the school of R. Akiva disagrees with that of R. Ishmael and does not require *mufneh* (TJ, Yoma 8:3, 45a)."
- **What theological assumptions might underlie this?**

***hekkesh* ("comparison"): where two laws are present in the same verse, it may be inferred that whatever is true of one is true of the other.**
For example, "Thou shalt eat no leavened bread with it; seven days shalt thou eat unleavened bread therewith" (Deut. 16:3). Although women are exempt from carrying out positive precepts associated with given time, they are nevertheless obliged to eat unleavened bread on Passover since the verse, by combining the two laws compared the duty to eat unleavened bread with the prohibition against eating leaven, which, being a negative precept, is binding on women (Pes. 43b).
- **What theological assumptions might underlie this?**

***Semukhin* is an inference from the juxtaposition of two laws in two adjacent verses.**
For example, "Thou shalt not suffer a sorceress to live; Whosoever lieth with a beast shall be put to death" (Ex. 22:17, 18). Just as one who lies with a beast is put to death by stoning, so, too, a sorceress is put to death by stoning (Ber. 21b).
- **What theological assumption might underlie this?**
- **R. Judah, however, rejects the universal application of the *semukhim* rule:** "Just because the two statements are juxtaposed, are we to take this one out to be stoned?" *(ibid)*. **What is the nature (and significance) of his argument?**

Babylonian Talmud, Sanhedrin 74a
Incest and murder [may not be practiced to save one's life], — even as Rabbi's dictum. For it has been taught: Rabbi said, *For as when a man riseth against his neighbour, and slayeth him, even so is this matter.* But what do we learn from this analogy of a murderer? Thus, this comes to throw light and is itself illumined. The murderer is compared to a betrothed maiden: just as a betrothed maiden must be saved [from dishonour] at the cost of his [the ravisher's] life, so in the case of a murderer, he [the victim] must be saved at the cost of his [the

attacker's] life. Conversely, a betrothed maiden is compared to a murderer: just as one must rather be slain than commit murder, so also must the betrothed maiden rather be slain than allow her violation. And how do we know this of murder itself? — It is common sense (*sevarah*). Even as one who came before Raba and said to him, 'The governor of my town has ordered me, "Go and kill so and so; if not, I will slay thee"'. He answered him, 'Let him rather slay you than that you should commit murder; who knows that your blood is redder? Perhaps his blood is redder.'

- **In what respect does this passage illustrate the use of *sevarah*?**
- **What is the relationship here between biblical interpretation and "common sense"?**

Mekhilta to Ex. 21:24

"An eye for an eye" — that means money. You say it means money, but perhaps you are wrong and it really does mean an eye? — R. Ishmael used to say: 'Behold it says: "And he that killeth a beast shall make it good and he that killeth a man shall be put to death" (*Lev.* 24:21). The Torah compares damage caused to a man to damage caused to a beast, and damage caused to a beast to damage caused to a man. Just as in the case of damage caused to a beast there is a monetary payment, so in the case of damage caused to a man there is also monetary payment.'

- **This is typical of early halakhic midrash. What can be said about**
  - **(a) the nature of the argumentation (hekkesh?) and**
  - **(b) its literary form?**
- **The Rabbis claim that monetary compensation id the "plain meaning" of "An eye for an eye". What can that mean??**

Bii Ribash on validity of a communal enactment

In a responsum by *Ribash* (R. Isaac b. Sheshet Perfet, 14th cent.), such reserve generates a doctrine of consensus. *Ribash* was asked about the validity of a communal enactment (*Resp.* #399):

> ... providing that no one may marry any woman except with the knowledge and in the presence of the communal officials, and in the presence of ten persons; and that if anyone should violate the law and marry contrary to these requirements, the marriage is void. At the time a marriage is contracted [in violation of the enactment], the community expropriates the money or other property given to effect the marriage, and the property is considered to be ownerless and of no value. The marriage is annulled, and the woman may marry without any divorce and is not even required to obtain a divorce to remove any possible doubt.

Ribash seeks to reassure the questioner: there is an (independent) power conferred by the Talmud on *bnei ha'ir·* (*B.B.* 8b); moreover, he buttresses this with a "consensual" argument: the communal institutions represent the people, so that the people are by such *takkanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. He adds, moreover, that even if it were necessary to rely upon the principle of *kol hamekadesh* in cases such as this, the questioner need not hesitate in attributing that power to the *kahal* as well as to the Rabbis: indeed, once the people of a town agree to such conditions by enacting the *takkanah,* those conditions will serve as implied terms (binding even on one who *mekadesh stam*). *Ribash* thus concludes unequivocally that the community has the power to adopt the proposed *takkanah*. That being so, the final paragraph comes as a surprise:

> This is my opinion on this matter in theory. However, as to its practical application I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a "chip of the beam" [cf. *Sanh*. 7b] should reach me [i e., so that I do not take upon myself the full responsibility, but only part of it].

Ribash is not willing to bear the responsibility for this decision alone; he requires the concurrence of "all the halakhic authorities of the region"— despite the fact that he had earlier pronounced the approval of the local scholar as desirable but not essential. We are thus left with a paradoxical situation: such a power of communal enactment may itself be halakhically exercised without a consensus of rabbinic authorities, but a consensus is required for a formal *haskamah* for such exercise, since the individual authority consulted is

reluctant to take sole responsibility for giving such an *haskamah*. Elon observes (*Jewish Law,* II.856) that this reflects a desire "to divide the responsibility for the decision among as many authorities as possible"; perhaps we should say, rather, that it reflects a desire to divide the responsibility for *authorisation* of the decision among as many authorities as possible.

Civ *Hilkheta kebatra'i*

Rema to *Shulḥan Arukh Ḥoshen Mishpat* 25:2: "In all cases where the views of the earlier authorities are recorded and are well known (מפורסמים) and the later authorities disagree with them – as sometimes was the case with the later authorities who disagreed with the *geonim* – we follow the view of the later, as from the time of Abbaye and Rava the law is accepted according to the later authority. However, if a responsum by a *gaon* is found that had not been previously published, and there are other [later] decisions that disagree with it, we need not follow the view of the later authorities (*aḥaronim*), as it is possible that they did not know the view of the *gaon*, and if they had known it they would have decided the other way."

Cv(b) Decision-making not in accordance with the law

A R. Eleazar intended to allow maintenance out of movable property. Said R. Simeon b. Eliakim to him: Master, I know that in your decision you are not acting on the line of the law but on the line of mercy (*midat rahmanut*), but [the possibility] ought to be considered that the students might observe this ruling and fix it as a *halakhah* for future generations. (*Ketubot* 50b, Ben-Menahem 70)

B A certain man who misappropriated a pair of oxen from his fellow went and did some ploughing with them and also sowed with them some seeds, and at last returned them to their owner. When the case came before R. Nahman he said [to the sheriffs of the court]: Go forth and appraise the increment. But Rava said to him: ... since the oxen were misappropriated they merely have to be returned intact, as we have indeed learnt: "All robbers have to pay in accordance with [the value] at the time of robbery." [Why then pay for any work done with them?] He [R. Nahman] replied: ... ? That man [who misappropriated the pair of oxen] is a notorious robber and I want to penalize him. (*B.K.* 96b, Ben-Menahem 112)

C Come and hear: *unto him ye shall Hearken,* even if he tells you "Transgress (*avor)* any of all the commandments of the Torah" as in the case, for instance, of Elijah on Mount Carmel (*1 Kings* 18:31ff.), obey him in every respect in accordance with the needs of the hour.

NB: The rabbis both appropriated and restricted the tradition of the prophet-like-Moses. The interpretation which cited Elijah as an example of the authority conferred in *Deut*. 18 (*Yeb*. 90b, *Sifre ad Deut*. 18:15) became the basis of a *rabbinic* power of legislation in emergency situations. Appropriation was facilitated by an interpretation, that the prophet does *not* have to perform miracles in proof of his status provided that he is *mumheh lekha shehu tsaddik gamur* (*Rashi ad Deut.*18:21), publicly known to be righteous. The principle was adopted that *eyn navi rashai lehaddesh od davar me'attah*: a prophet has no greater power to innovate than a rabbi (*Sifra ad Lev*. 27:34, *Behukkotai* 13:7)

D Even if 1000 prophets like Elijah and Elisha take one view, and 1001 rabbis take an opposite view, we follow the majority. (Maimonides, Mishnah Commentary, Preface)

Div Examples of Criminal Law

1 *Tosefta Sanhedrin* 8:3, interpreting the two or three witnesses requirement of *Deut*. 19:15:

With what object is this [the rule that witnesses should not testify according to "merely your own opinion": *Mishnah Sanhedrin* 4:5] said? In order that the witness should not (for example) bring forward as evidence: "We saw the defendant with a sword in his hand running after his fellow; the latter thereupon fled into a shop followed by the other; we went in after them and found the one slain, and in the hand of the murderer was a sword dripping blood." And lest thou shouldst say: "If not he, who then did kill him?" (take warning from the example of) Shimon, the son of Shatah, who said, "May I not live to see the consolation if I once did not see a man with a sword in his hand running after his fellow; the latter thereupon went into a

deserted building followed by the other; I entered after him and found the one slain and a sword in the hand of the murderer dripping blood. I said to him: Wicked man, who slew this one? May I not live to see the consolation if I did not see him; one of us two must have slain him. But what can I do to thee, since your condemnation cannot rest in my hands? For the Law says: AT THE MOUTH OF TWO WITNESSES, OR AT THE MOUTH OF THREE WITNESSES, SHALL HE WHO DIES BE PUT TO DEATH. But he who knows the thoughts, he exacts vengeance from the guilty; for the murderer did not stir from that place before the serpent bit him so that he died.

2 R. Israel b. Hayyim of Brunn was consulted about a murder which occurred within the Jewish community of 15th century Posen, in Germany. Clearly, the Jewish community did not have criminal jurisdiction over such matters. Nevertheless, the Rabbi thought it appropriate to intervene. The murder had been committed by two Jews, of whom one was said to show no remorse, and to seek no atonement. For him, R. Israel makes no provision: since the offender seeks no atonement, he will be given no penance in order to achieve it. The other murderer, on other hand, does seek atonement. For him, the Rabbi makes extensive provision: by doing penance in this world, he may achieve the salvation of his soul in the next. And so, the Rabbi requires:

> He shall journey about as an exile for a full year. Every day he shall appear at a synagogue — or at least on every Monday and Thursday. He shall make for himself three iron bands, one to be worn on each of his two hands, which were the instruments of his transgressions, and one to be worn about his body. When he enters the synagogue, he shall put them on and pray with them on. In the evening he shall go barefoot to the synagogue. The hazan shall seat him (publicly) prior to the *Vehu Rahum* prayer. He shall then receive a (symbolic [?] public) flogging and make the following declaration: "Know ye, my masters, that I am a murderer. I wantonly killed Nissan. This is my atonement. Pray for me. When he leaves the synagogue he is to prostrate himself across the doorsill; the worshipers are to step over him, not on him. Afterwards he is to remove the iron bands ... After one year he shall continue his fasts on Mondays and Thursdays. He shall, for the rest of his days, carefully observe the anniversary month and the anniversary date of the killing. He shall fast at that time (the date) three consecutive days if he is healthy or only two days, the day of the wounding and the next day, the day of Nissan's death, if he is infirm. He shall, for the rest of his days, be active in all enterprises to free imprisoned Jews (i.e., hostages held by gentiles), charity, and the saving of lives. He shall work out an arrangement with his (Nissan's) heirs to support them properly. He shall ask their pardon and the widow's pardon. He shall return to God, and He shall have mercy on him. And since Simha has expressed remorse and seeks repentance and atonement, immediately upon his submission to the program of public degradations, he becomes our brother once again for every religious purpose (i.e., the quorum for worship, cf. *B. Makkot* 23a) ... (Translated by S.M. Passamaneck in *An Introduction to the History and Sources of Jewish Law*, 1996, pp.346-350)

Not only does the respondent confine himself to prescribing a penance for the one offender who does seek atonement, and who thus may be described as voluntarily submitting himself to rabbinic jurisdiction. There is no means of enforcement of the measures the Rabbi requires — other than further appeals to the conscience and to the man's standing within the religious community. But this raises no definitional issues for Jewish law.

3. Readings

A: Periodisation

2nd Commonwealth: From Ezra, through the Hasmonean dynasty, down to the first Jewish revolt against Rome and destruction of the Temple (70 C.E.): sources include late books of Bible, Apocrypha, the Septuagint (Greek translation of the Hebrew Bible), Dead Sea Scrolls, Philo (esp. his treatise *De specialibus Legibus,* an account of biblical law), Josephus, New Testament, and the accounts there and in later rabbinic sources of the Sadducees, Pharisees, etc. and the "Houses" of Hillel and Shammai (proto-Rabbis). Evidence of legal practice comes from the Aramaic papyri from Elephantine (Egypt) in the 5th cent BCE, but the religious practices of this

group diverge from those of the Bible.

'**Tannaitic Period'**: From 70 C.E. until publication of the Mishnah under authority of R. Judah Ha-Nasi (the "Patriarch", a leadership role recognised by the Romans). Sources: *Mishnah* (the first codification of the "Oral Law") and much material in the "*halakhic midrashim*" — running commentaries on the "legal" parts of the Pentateuch, e.g. *Mekhilta* (on the latter half of Exodus), *Sifra* (on Leviticus), *Sifre* on Numbers and Deuteronomy; also Aramaic translations of the Pentateuch, "*targumim*", which incorporate much rabbinic interpretation. We now also have some documents from legal practice from this period, in the form of papyri preserved in caves from around the Dead Sea.

'**Amoraic Period':** From the early 3rd to the 6th cent.: the Rabbis of these generations are called Amoraim; their literary work consists largely in commentaries and highly discursive debates on the Mishnah and associated literature (including the *Tosefta*, a supplement to the Mishnah though probably belonging to the beginning of this period), ultimately preserved in the two Talmudim, the Talmud of Palestine (or *Jerusalem Talmud*) and the more finished and authoritative *Babylonian Talmud* (often referred to simply as "The Talmud"). Traditionally, the Talmud is regarded as the supreme authority in Jewish law, but its form often leads to difficulties in ascertaining what in fact it decided.

'Geonic Period': From the completion of the Babylonian Talmud to the 11th century, the principal Jewish leadership was the Gaonim, or Heads of the Babylonian Academies. They were responsible for various innovations in Jewish law (not all of which proved permanent) and a new genre of halakhic digests, summarising their view of the effect of Talmudic law (e.g. the *Halakhot Gedolot*, as well as the beginnings of the *responsa literature* (e.g. of R. Sherira Gaon), in which scholars replied to questions on *halakhah* put to them by rabbinical judges and others. Documents reflecting legal practice from the end of this period have survived in the Cairo Geniza, a room in a disused synagogue where sacred texts and other archives no longer in use were stored. Principal authorities include Natronai Gaon (Sura, 9th cent), Saadya Gaon (Sura, 10th cent), Sherira Gaon (Pumbeditha, held office 968-998). Hai Gaon (Pumbeditha, 11th cent).

'The Rishonim': The period of the "Rishonim" (lit. the "first" or "early" authorities) commenced in Europe in the eleventh century with the writing of glosses — short, marginal comments — to the text of the Talmud (cf. the glossators to the Roman *Corpus Iuris Civilis* and in Canon law to Gratian's *Decretum).* In 1178 Moses Maimonides ("Rambam"), completed the *Mishneh Torah*, the most systematic and comprehensive restatement of Jewish law since the Mishnah and Tosefta, but now embodying the results of the talmudic discussions and further mediaeval refinements. Its authority, however, was always persuasive rather than legislative. It was followed by other examples of the same genre, the most recent and important being the *Shulhan Arukh* of Joseph Karo in 1555. That Code in turn attracted commentaries. For example, to meet the fact that Karo was a Sephardi (broadly from one of the Jewish communities which had grown up in the Muslim world), a commentary was added to it by *Rema*, R. Moses b Israel Isserles (Poland, 1520-1572), reflecting Ashkenazi custom (that of the Jewish communities which had grown up in the North European, Christian world). Principal authorities include R. Isaac b Jacob Alfasi ("Rif", Fez, 11th cent), R. Solomon b Isaac ("Rashi", France, 1041-1105), R. Jacob b Meir ("Rabbenu Tam", France, 1100-1171), R. Moses b Maimon (Maimonides, "Rambam", Spain/Egypt, 1135-1204), R. Moses b Nahman (Nahmanides, "Ramban", Spain/Israel, d.1270), R. Meir of Rothenberg ("Maharam", Germany, 1215-1293), R. Solomon b Abraham Adret ("Rashba", Spain, 1235-1310), R. Asher b Yehiel (the "Rosh", or Asheri, Germany, 1250-1328), R. Isaac b Sheshet Perfet (Ribash, Spain and NA, 1326-1408).

'The Aharonim': Rabbinic authorities in the period since Karo's *Shulhan Arukh*. Aharonim will normally defer to Rishonim, despite the rule that, subject to the overriding authority of the Talmud, later generations are entitled to take a view different to that of earlier generations. The dominant literary form in this period has been the responsa literature, which continues with some vigour in modern times, e.g. the *Iggrot Moshe* of R. Moshe Feinstein of New York in the late 20th cent. Principal authorities include R. Jacob Emden (Amsterdam/Poland, 1697-1776), R. Elijah b Solomon Zalaman (the "Vilna Gaon", Vilnius, 1720-1797), R. Ezekiel Landau (Poland, 18th cent).

B. Positivism and the Theory of Jewish Law [from B.S. Jackson, "*Mishpat Ivri, Halakhah* and Legal Philosophy: *Agunah* and the Theory of "Legal Sources"", *JSIJ - Jewish Studies, an Internet Journal* 1 (2002), 69-107, full article [**with footnoted documentation]** available at http://www.biu.ac.il/JS/JSIJ/jsij1.html]

3.1 19th Century English Positivism: Bentham and Austin

3.1.1 That which unites different extant versions of legal positivism is what has been called: "the tenet ... of the social sources of law", that is, the claim that "the existence of laws depends upon their being

established through the decisions of human beings in society". This tenet has found expression in a number of different ways, and some interest attaches to the nuances which distinguish them. For Bentham, religious law fell outside his definition of "a law" since the latter required "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state". It was thus the source of the norm that distinguished "law". Bentham explicitly accepted the idea that the "force" of a law, the "motive the law relies upon for enabling it to produce the effects it aims at", could be of a religious nature; indeed, he noted that such "foreign sanctions" as religious or moral motives might occasionally dbe preferable to such "political" sanctions as were within the capacity of the legislator himself to create. But clearly this would constitute no more than incorporation by a social institution of some aspect of the religious system, for the purposes of the social institution itself. Since the source of the norm (and indeed the choice of sanction) resides, for Bentham, in the sovereign *in a state*, the religious character of the sanction is immaterial. Thus religious norms could not in themselves be regarded as "law", however much their divine author might be regarded as a sovereign who commanded them. (On the other hand, the Vatican being regarded as a state, a command by the Pope supported by a promise of eternal bliss would count for Bentham as a law.)

3.1.2 The approach of John Austin was different and for present purposes more interesting. He accepted that religious law was law "properly so called", but denied it the character of "positive law", which (alone) formed "the appropriate matter of jurisprudence". Thus, "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'', or more shortly – a "command". God was such an intelligent being and possessed power over man; hence the rules set by God for the guidance of man qualified as law "properly so called" ("without extension by metaphor or analogy"). "Positive law", however, required the satisfaction of a further test, namely that the law be "set by *political* superiors to *political* inferiors", the equivalent of Bentham's requirement that the expression of will be conceived or adopted "by a sovereign in a state".

3.1.3 Thus Bentham and Austin share one conceptual distinction, that there is an essential difference between religious law and secular law deriving from the fact that the latter alone involves political institutions, while differing on an issue which at first sight may seem to be restricted to terminology, namely whether religious law could properly be termed "law" at all. The terminological difference does, however, reflect a further substantive issue. Austin, unlike Bentham, believed in a form of natural law. Natural law, or the law of nature, consisted for him in the commands of the Deity, revealed or tacit. The role of such divine law was in part that of a "measure or test of positive law and morality: or (changing the phrase) law and morality, in so far as they *are* what they *ought* to be, conform, or are not repugnant, to the law of God." The study of positive law as it *ought* to be was termed "the science of legislation", in contrast to the study of positive law as it *is*, which was "the science of jurisprudence". Despite his insistence on these conceptual distinctions, Austin was concerned also to point out the connections. Divine law was related to secular, positive law "by way of resemblance", and since the sciences of jurisprudence and legislation were "connected by numerous and indissoluble ties", then "the nature of the index of the tacit command of the Deity" being "an all-important object of the science of legislation ... is a fit and important object of the kindred science of jurisprudence." In short, the study of divine law was related by affinity to that of positive law, since there were "numerous portions of the *rationale* of positive law to which (such affinities) are the only or principal key".

3.2 Kelsen

3.2.1 Twentieth century positivism has replaced the description of law in terms of a hierarchy of relations between people (subjects and sovereign) within a *political* system with a description in terms of hierarchical relations between rules within a *normative* system. This reduces the difficulty of regarding religious law as law, and indeed Kelsen is able to conceive of a "religious norm system" with a parallel (hierarchical) structure to that of a system of positive law. In fact, he defines the *Grundnorm* of such a system: "The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command." For Kelsen, a norm may be derived only from another norm, not from a fact. Kelsen goes to some length to stress that the source of authority of the Decalogue is not the *fact* (real or supposed) of divine command but rather "the tacitly presupposed norm that one ought to obey the commands of God". Of course, the nature of this tacit presupposition also falls for

examination. The *Grundnorm* is not itself "posited"; at most (he ultimately accepted) it is a fiction. Kelsen wants to view it in logical terms: as a necessary condition for normative obligation, rather than in social or psychological terms, like Hart's "acceptance" of the secondary rules of the system from the "internal point of view". For Kelsen, the *Grundnorm* does *not* depend on conscious acceptance by the community or officials, or even conscious knowledge of it on their part. It is, in his view, a logical presupposition of which they may be wholly unaware. As a logical presupposition, it cannot be falsified in terms of fact.

3.2.2 Nevertheless, law is for Kelsen virtually equated with positive law (like Bentham but unlike Austin): "Our task will he to examine whether the *social* phenomena described by these words ["law", "Recht", "droit", "diritto"] have common characteristics by which they may be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements of social-scientific cognition." For positive law, Kelsen has three requirements: it must (i) regulate human behaviour (ii) through orders which possess normativity, that is an objective meaning independent of the wishes of those who direct them (iii) using socially immanent rather than transcendental sanctions. Religious law fulfils the first two of these criteria of a legal system, but fails the third. Kelsen defines transcendental sanctions as "those that according to the faith of the individuals subjected to the order originate from a superhuman authority'', which he appears to understand (only) in terms of "punishment by a superhuman authority", an example of which is given as "the illness or death of the sinner or punishment in another world".

3.2.3 What, then, we may ask, would be Kelsen's attitude to a religious norm system which prescribed sanctions to be enforced by human, social institutions? If the means by which the sanction is to be enforced is social, does it matter for Kelsen that the source of that means is believed to be transcendental? In terms of Kelsen's desire for methodological purity, it might be thought that belief in such a source is a purely "historical" or "sociological" factor, and therefore irrelevant to the issue of legal validity. But the issue is far from clear. Natural law is distinguished by Kelsen from positivism not only in respect of the presence or absence of coercion, but also in terms of the claim not to have been made "artificially", i.e. by an act of human will, and it is this human source that is identified by Kelsen with the (apparently necessary) "positivity" of a legal system. Thus a claim on the part of the subjects of a normative system that its rules (even such as regulate human behaviour) and its sanctions (even such as are enforced through human institutions) have their origin in divine command, would appear to render such a system, for Kelsen, as "religious", non-positive, and therefore non-legal. It further appears to follow that the same normative system may be "religious" with respect to one section of its subjects, but legal with respect to another, according to whether it is or is not believed to be of divine origin. This has a paradoxical application to the law of personal status as applied in the State of Israel today: secularists, who accept its normative force because it is the law of the State, presuppose a *Grundnorm* in terms of which it may be viewed as a system of positive law (not as religious law); believers, who accept its normative force because of its divine origin, presuppose a *Grundnorm* in terms of which it may be viewed (only) as a "religious norm system".

3.2.4 Elon, as noted above (§2.2.2), identifies the source of authority of his basic norm of Jewish law as "the basic tenet of Judaism that the source of authority of the Torah is divine command". This is incompatible with the Kelsenian model, even that of a "religious norm system", since for Kelsen a norm may be derived only from another norm, not from a fact. Put differently, faith relates to the truth, not the use, of the initial hypotheses, whereas Kelsen's *Grundnorm* serves as a necessary presupposition *if* you want to operate an objective system of normative validity, and thereby justify the exercise of coercive power by the state. The theory is thus based ultimately on the assumption that such a system is in itself a value or desideratum; the *Grundnorm* functions as a *means* to achieve that objective. To be fair, Elon does indicate that when we seek to locate the ground of the basic norm of Jewish law in the "the basic tenet of Judaism" that the source of authority of the Torah is divine command, "we leave jurisprudence and pass into the sphere of faith." For Kelsen, on the other hand, the *Grundnorm* itself ("coercive acts ought to be performed only in accordance with the historically first constitution"), being a norm (if not a positive norm), is very much a matter of jurisprudence.

3.2.5 A second difficulty in the way of adoption of the Kelsenian model resides in the contingent, historical status which Kelsen accords to the "historically first constitution". Elon's equivalent to the latter is the

rule that everything stated in the Written Law is of binding authority. But Kelsen's "historically first constitution" may (necessarily) be changed by unilateral, revolutionary action of the subjects of the law. Secular jurisprudence thus accords the current constitution a merely contingent validity, until and unless a revolution occurs and succeeds; but such a possibility can hardly be accepted for Jewish law, wherein the basic law is eternal, or at least (even if we think of notions of *berit hadashah* or concepts of *Torah* in the messianic age) is not susceptible to change by unilateral action on the part of its subjects. The covenant may be broken, but it cannot be unilaterally revoked by its subjects.

3.2.6 Elon may well object to this assessment of his theory in Kelsenian terms on broader grounds: his explicit model is Salmond and he notes that Salmond (merely?) "compared" his "ultimate principle" to the *Grundnorm* of Kelsen. In fact, Salmond's own position, as quoted by Elon, is far from clear: "These ultimate principles are the grundnorms or basic rules of recognition of the legal system." The terminology of "basic rules of recognition" is Hartian, and there is a substantial difference between the ultimate bases of the legal system in the two theories. The validity of Hart's "ultimate rule of recognition" is based on the fact of "acceptance" by at least the officials of the system. Whether this would be a satisfactory alternative for Elon is a theological issue into which we need not enter. Suffice it to say that the applicability of Hartian theory to Jewish law prompts further questions, as the remarks on the *agunah* problem in the next section will show.

3.3 Our conclusion must be that the varieties of positivism here reviewed all concur in excluding religious law from their understanding of positive law, if by different routes. For Bentham, the exclusion of religious law indicates that greater significance is being attached, for the purposes of classification, to the role of human political institutions than to either linguistic usage or the nature of the sanctions applied. Austin effected a compromise, designed in part to give greater weight to linguistic usage, while at the same time stressing (with Bentham) the role of human political institutions: religious law might be "law", but was not "positive law". Kelsen stresses the nature of sanctions and the perception of divine origin as the points of differentiation, while conceding that religious law may belong to the wider *genus* of normative systems. In effect, however, Kelsen is at one with Bentham and Austin in adhering to the tenet of the social sources of law. For while the political structure (that complex of relationships which we refer to as the "state") is viewed by him as synonymous with the legal system, the requirement that law involve the use of socially immanent, coercive sanctions virtually restores political institutions to their role as a significant mark of distinction. This conclusion has, of course, a dual effect in terms of Elon's use of positivist jurisprudence. The objections to it largely evaporate *once* Jewish law has been adopted as the law of a state. They remain fundamental, however, in respect of the *halakhah per se.* In short, it is the nationalist agenda of the *mishpat ivri* movement which itself generates the theoretical model used to describe Jewish law. In what follows, I consider two aspects of Jewish law (largely) without such an agenda, and consider what jurisprudential model, if any, best fits them.

Further Reading

H. Ben-Menahem, "Postscript", in Hecht, Jackson, Piattelli, Passamaneck and Rabello, eds., *An Introduction to the History and Sources of Jewish law* (Oxford: Clarendon Press, 1996), 421-437

Jacobs, L., *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (Oxford Oxford: University Press, 1984).

Rayner, J.D., *Jewish religious law: a progressive perspective* (New York: Berghahn Books, 1998).

Roth, J., *The Halakhic Process: a Systemic Analysis* (New York: Jewish Theological Seminary of America, 1986)

4. Reading and Questions tutorial

1. Download and read Jackson B.S., , "Constructing a Theory of Halakhah", available from http://www.legaltheory.demon.co.uk/jlas/resources.htm. In what respects does this indicate a continuation beyond the biblical period of the differences between Jewish and modern secular law?

2. How do the sources of Jewish law compare with those of modern secular systems?

Week 3: The History of Jewish Family Law

Materials for session 3 illustrate many of the arguments of sessions 1 and 2 by tracing the development of the Jewish law of marriage and divorce from biblical to modern times, including the particular problem of the "chained wife" (*agunah*) and modern attempts to solve the problem, through the use of both secular and religious law.

A. Biblical period
   i. Primary focus on forbidden relationships: **Texts**
   ii. Polygamy, concubinage, surrogacy
   iii. Marriage weakly institutionalized: **Texts**
   iv. Divorce procedures and criteria: law and narratives: **Texts**
   v. Relationship of marriage and inheritance: **Texts**
   vi. Matrimonial property: the *mohar* in context of seduction/rape: **Texts**
   vii. Patrilineal descent

B. Second commonwealth and later non-rabbinic developments
   i. The marriage contract (*ketubbah*): **Texts**
   ii. Use of conditions in a marriage contract to determine succession to matrimonial property in polygamous marriages: **Texts**
   iii. Use of conditions in a marriage contract to determine the divorce régime: **Texts**
   iv. Qumran: marriage, divorce and eschatology (traditions of celibacy): **Texts**
   v. Bride-price (deferred) and dowry: the Shimon b. Shetah tradition: **Texts**
   vi. New Testament and divorce: **Texts**

C. Tannaitic law
   i. Distinction between betrothal (*qiddushin/erusin*) and marriage (*nissu'in*)
   ii. Methods of Betrothal: **Texts**
   iii. Criteria of Divorce: the Houses dispute: **Texts**
   iv. Compelling divorce: **Texts**
   v. Matrilineal principle and problem of *mamzerut*
   vi. Use of conditions to regulate marital relations?: **Texts**

D. Amoraic law
   i. Compelling divorce: **Texts**
   ii. Use of conditions to regulate divorce?: **Texts**
   iii. Annulling marriage: **Texts**

E. Geonic law
   i. The *takkanah* on the wife's divorce rights: **Texts**

F. Period of the Rishonim
   i. *Takkanot haqahal* on the formation of marriage: **Texts**
   ii. Rabbenu Gershom's reforms on polygamy and unilateral divorce: **Texts**
   iii. Reversal of the Geonic *takkanah* on the wife's divorce rights (Maimonides a partial exception) : **Texts**
   iv. Clauses in Geniza *ketubbot*: **Texts**
   v. *Takkanot* of Castille 1494 on succession

G. Period of the Aharonim
   i. Who follows Maimonides?
   ii. The French Rabbinate's attempt to solve the problem of the wife refused a divorce
   iii. Later attempts to solve the problem of the wife refused a divorce: **Texts**
   iv. R. Herzog's attempted reform of the law of succession: **Texts**
   v. A Modern Anglo-Jewish will: **Texts**
   vi. Coercion in the modern State of Israel: **Texts**

2. Texts for discussion

A(i): *Lev.* 18:18

And you shall not take a woman as a rival wife to her sister (*el ahotah*), uncovering her nakedness while her sister is yet alive.

- **Are there any examples of 'violation' in biblical narrative?**
- **Note the alternative translation/interpretation in Damascus Covenant, B(iv) below**

A(iii): *Exod.* 21:10

If he takes another wife to himself, he shall not diminish her food, her clothing, or her marital rights

- **Note the context for identification of the "her"**
- **There are alternative translations "marital rights" (e.g. accommodation). But see further C(vi) below, for a rabbinic view of the status of this right**
- **This clause is still reflected in the traditional Orthodox *ketubbah***

A(iv): *Deut.* 24:1-4

(1) When a man takes a wife and marries her, if then she finds no favor in his eyes because he has found some indecency in her, and he writes her a bill of divorce (*sefer keritut*) and puts it in her hand and sends her out of his house, and she departs out of his house, (2) and if she goes and becomes another man's wife, (3) and the latter husband dislikes her and writes her a bill of divorce and puts it in her hand and sends her out of his house, or if the latter husband dies, who took her to be his wife, (4) then her former husband, who sent her away, may not take her again to be his wife, after she has been defiled (*hutama'ah*); for that is an abomination (*to'evah*) before the LORD, and you shall not bring guilt upon the land which the LORD your God gives you for an inheritance.

- ***Isa.* 50:1 also knows of a written divorce document, using the same terminology as *Deut.* 24 (*sefer keritut*), but *Hos.* 2:4 appears to know of an oral divorce procedure:** "Plead with your mother, plead; for [otherwise I will say] 'she is not my wife, nor am I her husband'; let her therefore put away her harlotry away from of her sight, and her adulteries from between her breast."
- **Narratives appear to envisage simple expulsion as sufficient: Abraham and Hagar? Compare also 'sending away' as the procedure of disinheritance: *Gen.* 25:** 1 Abraham took another wife, whose name was Ketu'rah. 2 She bore him Zimran, Jokshan, Medan, Mid'ian, Ishbak, and Shuah. … 5 Abraham gave all he had to Isaac. 6 But to the sons of his concubines Abraham gave gifts, and while he was still living he sent them away from his son Isaac, eastward to the east country. **and *Judges* 11:1-2 (*garash*)**
- **What is the primary concern of Deut 24? For the palingamy taboo, see also *Jer.* 3:1:** If a man divorces his wife and she goes from him and becomes another man's wife, will he return to her? Would not that land be greatly polluted? You have played the harlot with many lovers; and would you return to me? says the LORD. **Contrast Islamic law, and might there be an economic explanation?**

A(v): *Num.* 27

1 Then drew near the daughters of Zeloph'ehad the son of Hepher, son of Gilead, son of Machir, son of Manas'seh, from the families of Manas'seh the son of Joseph. The names of his daughters were: Mahlah, Noah, Hoglah, Milcah, and Tirzah. 2 And they stood before Moses, and before Elea'zar the priest, and before the leaders and all the congregation, at the door of the tent of meeting, saying, 3 "Our father died in the wilderness; he was not among the company of those who gathered themselves together against the LORD in the company of Korah, but died for his own sin; and he had no sons. 4 Why should the name of our father be taken away from his family, because he had no son? Give to us a possession among our father's brethren." 5 Moses brought their case before the LORD. 6 And the LORD said to Moses, 7... The daughters of Zeloph'ehad are right; you shall give them possession of an inheritance among their father's brethren and cause the inheritance of their father to pass to them. 8 And you shall say to the people of Israel, 'If a man dies, and has no son, then you shall cause his inheritance to pass to his daughter. 9 And if he has no daughter, then you shall give his inheritance to his brothers. 10 And if he has no brothers, then you shall give his inheritance to his father's brothers. 11 And if his father has no brothers, then you shall give his inheritance to his kinsman that is next to him of his family, and he shall possess it. And it shall be to the people of Israel a statute and ordinance, as the LORD commanded Moses.

- **Is the decision as regards the daughters the same as the rule laid down for the future?**
- **What is the context (and thus real significance) of the dispute? See Numbers 26, esp. v.33.**
- **What does the subsequent dispute, in Numbers 36, add to our understanding of the issue?**

A(v): *Num*. 36

1 The heads of the fathers' houses of the families of the sons of Gilead the son of Machir, son of Manas'seh, of the fathers' houses of the sons of Joseph, came near and spoke before Moses and before the leaders, the heads of the fathers' houses of the people of Israel; 2 they said, "The LORD commanded my lord to give the land for inheritance by lot to the people of Israel; and my lord was commanded by the LORD to give the inheritance of Zeloph'ehad our brother to his daughters. 3 But if they are married to any of the sons of the other tribes of the people of Israel then their inheritance will be taken from the inheritance of our fathers, and added to the inheritance of the tribe to which they belong; so it will be taken away from the lot of our inheritance. 4 And when the jubilee of the people of Israel comes, then their inheritance will be added to the inheritance of the tribe to which they belong; and their inheritance will be taken from the inheritance of the tribe of our fathers." 5 And Moses commanded the people of Israel according to the word of the LORD, saying, "The tribe of the sons of Joseph is right. 6 This is what the LORD commands concerning the daughters of Zeloph'ehad, 'Let them marry whom they think best; only, they shall marry within the family of the tribe of their father. 7 The inheritance of the people of Israel shall not be transferred from one tribe to another; for every one of the people of Israel shall cleave to the inheritance of the tribe of his fathers. 8 And every daughter who possesses an inheritance in any tribe of the people of Israel shall be wife to one of the family of the tribe of her father, so that every one of the people of Israel may possess the inheritance of his fathers. 9 So no inheritance shall be transferred from one tribe to another; for each of the tribes of the people of Israel shall cleave to its own inheritance.'

- **According to *Bava Batra* 121a, the subsequent instruction to marry members of the same tribe (see *Num.* 36) only applied to that generation. Why?**

A(v): *Job* 42

12 And the LORD blessed the latter days of Job more than his beginning; and he had fourteen thousand sheep, six thousand camels, a thousand yoke of oxen, and a thousand she-asses. 13 He had also seven sons and three daughters. 14 And he called the name of the first Jemi'mah; and the name of the second Kezi'ah; and the name of the third Ker'en-hap'puch. 15 And in all the land there were no women so fair as Job's daughters; and their father gave them inheritance among their brothers.

- **What distinguishes the position of Job's daughters from that of the daughters of Zeloph'ehad?**
- **What does this suggest regarding the status of the rules of succession?**
- **Was Job making a will?**
- **With Job's action, compare the clause from Cowley 8 in B(ii) below**

A(vi): *Exod*. 22:15-16

If a man seduces a virgin who is not betrothed, and lies with her, he shall give the marriage present for her, and make her his wife. 16 If her father utterly refuses to give her to him, he shall pay money equivalent to the marriage present (*mohar*) for virgins.

- **Is seduction a sexual or a property offence?**
- **Compare *Deut*. 22:28-29:** If a man meets a virgin who is not betrothed, and seizes her and lies with her, and they are found, 29 then the man who lay with her shall give to the father of the young woman fifty shekels of silver, and she shall be his wife, because he has violated her; he may not put her away all his days. **Is rape a 'criminal' offence?**

B(i): *Tobit* 7:13-15, 8:19-21 (2nd cent BCE)

[13] Then he called his daughter Sarah, and taking her by the hand he gave her to Tobias to be his wife, saying, "Here she is; take her according to the law of Moses, and take her with you to your father." And he blessed them. [14] Next he called his wife Edna, and took a scroll and wrote out the contract; and they set their seals to it. [15] Then they began to eat. …. [ch8:19] After this he gave a wedding feast for them which lasted fourteen days. [20] And before the days of the feast were over, Raguel declared by oath to Tobias that he should not leave until the fourteen days of the wedding feast were ended, [21] that then he should take half of Raguel's property and return in safety to his father, and that the rest would be his "when my wife and I die."

- **How much of the contemporary Jewish wedding ceremony is pre-rabbinic?**
- **Is there a dowry here?**
- **What is the connection here between marriage and inheritance?**

B(ii) Cowley 8 (Elephantine Papyri, (460/459 BCE)

... (1) Mahseiah (2) son of Jedaniah ... said to lady Mibtahiah (3) his daughter: I gave you in my lifetime and at my death 1 house, land, of mine ... (9) You have right to it from this day and forever and (so do) your children after you. To whomsoever (10) you may love you may give (it) ...

- **What might be the meaning of "in my lifetime and at my death"?**
- **This contract is executed separately from, but in close temporal proximity to, Mibtahiah's marriage contract. What is the connection between marriage and succession?**

B(iii) Marriage Contract, Kraeling Papyrus 7, translated Ginsburg (Elephantine Papyri, 5th cent BCE)

(I) On (the first day of) the month of Tishri, that is Epiphi, the year 4 of King Darius, in the fortress Elephantine, said Ananiah son of Haggai, (2) an Aramean of the fortress Elephantine, [of] the detachment of [Iddin]-Nabu, to Zakkur son of Me[shullam, *an Arame]an* of Syene, of the same detachment, as follows: (3) I have come to your [hous]e and asked you for your sister the woman Yehoyishma' (as she is called) in marriage, and you have given her (4) to me. She is my wife and I am [her] husband from this day to eternity. I have paid to you as the bride price of your sister Yehoyishma' (5) I karsh of silver; you have received it [and have been satisfied therewi]th. Your sister Yehoyishma' has brought into my house a cash sum (6a) of two karsh, (two) 2 shekels, and 5 hallurs of silver ....

- **What is the relationship between the underlined declaration and Hosea 2:4 (above)?**
- **What are the financial arrangements accompanying the marriage?**

(21 cont.) If at some future date Ananiah should arise **in an/the assembly** and declare, "I divorce my wife Yehoyishma'; (25) she shall not be a wife to me," he shall become liable for divorce money. < He shall forfeit her bride price > he must surrender to her all that she brought into his house. Her dowry of cash (23) and clothing, worth karsh seven, sh[ekels eight, and hallurs 5] of silver, and the rest of the goods listed (above) (24a-b) he must hand over to her on one day and in a single act, and she may [leave him for where]ver [she will]....

- **In what sense is divorce now "supervised"?**

(24c) If, on the other hand, Yehoyishma' should divorce her husband (25) Ananiah and say to him, "I divorce you, I will not be wife to you," she shall become liable for divorce money. []. (26) She shall sit by the scales and weigh out to her husband Ananiah 7 shekels and 2 R and shall leave him with the balance of her (27) cash, goods, and pos[sessions, worth karsh 7; shekels 5+] 3, and hallurs 5; and the rest of her goods, (28) which are listed (above), he shall hand over to her on one day and in a single act, and she shall depart for her father's house.

- **Is the wife's right exactly equivalent to that of the husband?**
- **Note that this occurs in a marriage contract. What conclusions does that permit as to the status of the wife in relation to divorce?**

...

Further, Ananiah (38) may not omit to accord to his wife Yehoyishma' the right of any of the wives of his fellows. Should (39) he fail to do so, that shall constitute a divorce, and he shall implement for her the provisions for divorcement. Neither may Yehoyishma' (40) omit to accord to her husband Ananiah the right of any (husband). Should she fail to accord it to him, that shall constitute a divorce.

- **What situation is here contemplated?**
- **What is the relationship of the wife's rights here to (a) the Bible and (b) the Mishnah?**
- **What does this suggest about the procedure for divorce in these circumstances?**

B(iv) Damascus Covenant (Qumran) IV:20-21

The builders of the wall … are caught in fornication (*zenut*) twice by taking two wives in their lifetime (לקחת שתי נשים בחייהם), whereas the principle of creation (*yesod haberiyah*) is "male and female he created them" (Gen 1:27). Also, those who entered the ark went in two by two (Gen 7:9). And concerning the prince (*nasi*) it is written "he shall not multiply wives to himself" (Deut 17:17). (Vermes' translation)

- **Why are the opponents of the sect accused of fornication "twice"?**
- **Compare the use of Gen. 1:27 in *Matt*. 19 and *Mark* 10, in B(vi) below**

B(v) The Shimon b. Shetah tradition (c.100 BCE?)

Tosefta Ketubbot 12.1: "In olden times when her *ketubah* was at her father's house, it was easy for him to divorce her. Therefore Shimon ben Shetah enacted that her *ketubah* remain with her husband and that he write: "All my property be security and guarantee for the money of thy *ketubah*."

- **This source dates from the 2nd-3rd cent CE; later, more elaborate versions of the tradition are found in the Jerusalem (Ketubbot 8.11, 32b) and Bablylonian Talmuds (Ketubbot 82b)**
- **A 'pledging clause' is found in a 2nd cent CE Aramaic papyrus, P. Mur. 20:11-13, suggests that the clause may have originated to protect the *dowry*:** "All the goods which I have and which I] will acquire will guarantee and as[sure your dowry to maintain its validity] in your favour and in favour of your heirs against any [contest and claim"
- **Other marriage contracts suggest a two-fold settlement: on the one hand (moveable) property is actually handed over from the bride's side, described as both *prosphora* and *proix*; on the other, a debt is owed by the husband. Thus, in P. Yadin 18:40-56, we read:**

> ... she bringing to him on account of bridal gift (εἰς λόγον προσφορᾶς) feminine adornment in silver and gold and clothing appraised by mutual agreement, as they both say, to be worth two hundred denarii of silver which appraised value the bridegroom Judah called Cimber acknowledged that he has received from her by hand forthwith from Judah her father and owes to the said Shelamzion his wife together with another three hundred denarii which he promised to give her in addition to the sum of her aforestated bridal gift, all accounted toward her dowry (πρὸς τὰ {τα} τῆς προγεγραμμένης προσφορᾶς [α]ὐτ[ῆς] πάντα εἰς λόγον προικὸς αὐτῆς), pursuant to his undertaking of feeding and clothing both her and the children to come in accordance with Greek custom (ἑλληνικῷ νόμῳ) upon the said Judah Cimber's good faith and peril (πίστεως καὶ κινδύνου) and [the security of] all his possessions (καὶ πάντων ὑπαρ[χόν]των), both those which he now possesses in his said home village and here and all those which he may in addition validly acquire everywhere, in whatever manner his wife Shelamzion may choose, or whoever acts through her or for her may choose, to pursue the execution (τὴν εἴσπραξιν π[οιεῖσθαι).

That combination already existed in the Elephantine papyri (see Kraeling Papyrus 7, B(iii) above, except that there the *mohar,* counted as part of the dowry, was actually handed over.

B(vi) *Matt.* 19:3-15

(3) And Pharisees came up to him and tested him by asking, "Is it lawful to divorce one's wife for any cause (κατὰ πᾶσαν αἰτίαν)?" (4) He answered, "Have you not read that he who made them from the beginning made them male and female (Gen. 1:27), (5) and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? (6) So they are no longer two but one flesh. What therefore God has joined together, let not man put asunder." (7) They said to him, "Why then did Moses command (ἐνετείλατο) one to give a certificate of divorce, and to put her away?" (8) He said to them, "For your hardness of heart Moses allowed (ἐπέτρεψεν) you to divorce your wives, but from the beginning it was not so. (9) And I say to you: whoever divorces his wife, except for unchastity (μὴ ἐπί πορνείᾳ), and marries another, commits adultery (μοιχᾶται).

- **What view of the criteria of divorce underlies the question of the Pharisees?**
- **In what respects is the account of Mark different?:** Mark 10: (2) And Pharisees came up and in order to test him asked, "Is it lawful for a man to divorce his wife?" (3) He answered them, "What did Moses command you?" (4) They said, "Moses allowed a man to write a certificate of divorce, and to put her away." (5) But Jesus said to them, "For your hardness of heart he wrote you this commandment. (6) But from the beginning of creation, 'God made them male and female.' (Gen 1:27) (7) 'For this reason a man shall leave his father and mother and be joined to his wife, (8) and the two shall become one flesh.' (Gen 2:24) So they are no longer two but one flesh. (9) What therefore God has joined together, let not man put asunder." (10) And in the house the disciples asked him again about this matter. (11) And he said to them, "Whoever divorces his wife and marries another, commits adultery against her (μοιχᾶται ἐπ' αὐτήν); (12) and if she divorces her husband and marries another, she commits adultery."
- **Note Mishnah Sotah 5:1: "**... Just as she is prohibited to the husband (*asurah labe'al*) so is she prohibited to the paramour . . . Rabbi says: the word defiled (*nitma'ah*) occurs twice in the scriptural portion [*Num*. 5:14, 29], one referring to the husband, the other referring to

the paramour."

(10) The disciples said to him, "If such is the case of a man with his wife, it is not expedient to marry." (11) But he said to them, "Not all men can receive this saying, but only those to whom it is given. (12) For there are eunuchs who have been so from birth, and there are eunuchs who have been made eunuchs by men, and there are eunuchs who have made themselves eunuchs for the sake of the kingdom of heaven. He who is able to receive this, let him receive it." (13) Then children were brought to him that he might lay his hands on them and pray. The disciples rebuked the people; (14) but Jesus said, "Let the children come to me, and do not hinder them; for to such belongs the kingdom of heaven." (15) And he laid his hands on them and went away.

- **What is the issue Jesus discusses with the disciples, and where else does it occur?**

B(vi) *Luke* 16:18

Every one who divorces his wife and marries another commits adultery (μοιχεύει), and he who marries a woman divorced from her husband commits adultery.

- **This has been described as "the most demonstrably authentic form of Jesus' teaching" (G.J. Wenham, "Matthew and Divorce: An Old Crux Revisited", *JNTS* 22 (1984): 96). How does it compare with (i) Qumran and (ii) rabbinic law?**

C(ii) *Mishnah Kiddushin* 1:1

A woman is acquired [in marriage] in three ways ... by money, by deed, or by intercourse

- **Note the relationship with *Mishnah Kiddushin* 1:5:** Property which offers security [i.e. land] is acquired by money, by deed or by *hazakah* [taking possession]
- **What then is the relationship between *kinyan* (property acquisition) and *kiddushin* (lit. sanctification, here betrothal)**

C(iii) *Mishnah Gittin* 9:10

The School of Shammai say: A man may not divorce his wife unless he has found unchastity (*devar ervah*) in her, for it is written, *because he has found some indecency* (*ervat davar*) *in her.* And the School of Hillel say: [He may divorce her] even if she spoiled a dish for him, for it is written, *because he has found some indecency in her.* R. Akiba says: Even if he found another fairer than she, for it is written, *if then she finds no favor in his eyes*.

- **Compare the difference between the Schools with that between Matthew and the other Gospels**
- **Which view in the Mishnah became normative?**
- **Is Rabbi Akiba trying to prove?**
- **What if a woman "found another fairer than *he*"? See *Mishnah Nedarim* 11:12: "At first they used to rule: three women must be divorced but take their *ketubbah* payment [e.g. a woman married to a priest who claims she was raped] … but later they changed the ruling, in case she had perhaps cast her eyes on another [and was using the claim simply to get a divorce] …"**

C(iv) *Mishnah Ketubbot* 7:10

[10] The following are compelled to divorce [their wives]: a man who is afflicted with boils, or has a polyp, or gathers [excrement] or is a coppersmith or a tanner, whether these [defects] were there before they married or whether they arose after they had married. Rabbi Meir said regarding all of them: "Even though he stipulated a condition, she can say, 'I thought I would be able to endure it, but now I cannot bear it'". The Sages say: "She must endure it in spite of herself, except when he is afflicted with boils, because [sex with her] can cause bodily decay. There was a case in Ziddon in which a certain tanner died and he had a brother who was a tanner. The Sages said: "She can say, "I could bear your brother, but I cannot endure you."

- **What is the underlying reason for granting the wife a right to compel the divorce in these cases?**

C(vi) *Tosefta Kiddushin* 3:7-8

[If he says] "I hereby betroth you ... on condition that if I die you shall not be subject to levirate marriage," she is betrothed, and the condition is void, as he has contracted out of a Law contained in the Torah, and when anyone stipulates out of a Law contained in the Torah, the condition is void. [If he says] "on

condition that you have no claim against me for food, clothing, or conjugal rights," she is betrothed, and the condition is valid. This is the principle: Contracting out of a Law contained in the Torah as to a monetary matter is valid, but as to a nonmonetary matter is void.

- **Note the validity of contracting out of the obligations of Exod. 21:10, including the wife's conjugal rights**
- **So what of a condition that says: "I hereby betroth you ... on condition that if you hate me you shall not need a *get*"??**

D(i) *Babylonian Talmud Ketubbot* 63b

What is to be understood by [the term] rebellious wife (*moredet*)? Amemar said: She who says "I wish [to remain married] to him, but I want to cause him pain (ומצערנא)"; if she says, however, "He is repulsive to me (מאיס עלי)," she is not forced (לא כייפינן לה) [to resume sexual relations concurrent with the steady reduction of her alimony sum]. Mar Zutra said: She is forced (כייפינן לה).

- **What is the position of Amemar where the wife claims "He is repulsive to me"?**
- **But note the variant text in MS Leningrad Firkovitch: "…if she says, however, "He is repulsive to me," *he* is forced (כייפינן ליה [to divorce her]). Can this be used in halakhic argument, and if so how?**

D(ii) *Jerusalem Talmud Ketubbot* 5:9 (30b)

R. Yose said: For those who write [a stipulation in the marriage contract] that if he grow to hate her or she grow to hate him [a divorce will ensue, with the prescribed monetary gain or loss, and] it is considered a condition of monetary payments, and such conditions are valid and binding.

- **Does this allow the wife to compel the divorce, overriding the husband's veto?**

D(iii) *Baba Batra* 48b

Amemar has laid down that if a woman consents to betroth herself under pressure of physical violence, the betrothal is valid. Mar son of R. Ashi, however, said: In the case of the woman the betrothal is certainly not valid; he treated the woman cavalierly and therefore the Rabbis treat him cavalierly and nullify his betrothal. Rabina said to R. Ashi: We can understand the Rabbis doing this if he betrothed her with money, but if he betrothed her by means of intercourse, how can they nullify the act? — He replied: The Rabbis declared his intercourse to be fornication.

- **Note the two different rationales for annulment**
- **Might the principle: "He acted improperly, they, therefore, treated him also improperly" have any relevance to current problems?**

E(i): Responsum of R. Sherira Gaon (Gaon of Pumbeditha, held office between 968-998), translated by Elon, *Jewish Law,* II.659

Your question is: A woman lived with her husband and told him, "Divorce me; I do not wish to live with you." Must he give her any part of her *ketubbah*? In such a case, is she a *moredet*?

[Response:] This is our opinion: The law originally provided that a husband is not compelled to divorce his wife when she demands a divorce, except in those instances where the Sages specifically declared that he is compelled to divorce her.

- **What is he referring to here?**

Afterwards, another *takkanah* was enacted, which provided that a public proclamation should be made concerning her on four consecutive sabbaths and that the court should inform her: "Take notice that you have even forfeited one hundred *maneh* of your *ketubbah*.... "Finally, they enacted that public proclamation is to be made concerning her on four sabbaths and she forfeits the entire amount [of her ketubbah]; nevertheless, they did not compel the husband to grant her a divorce....

- **The reference here is to here Tosefta Ketubbot 5:7**

They then enacted that she should remain without a divorce for twelve months in the hope that she would become reconciled, and after twelve months they would compel her husband to grant her a divorce.

- **The reference here is to the final conclusion (not the opinion of Amemar) in *Ketubbot* 63b (2) above, though the latter does not explicitly mention coercion.**

After the time of the savoraim, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands; and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law

[as under the law one may not use duress to force the giving of a divorce].

- **What is meant by "attached themselves to non-Jews", and why would this form of coercion by a gentile court render such a divorce invalid?**

When the disastrous results became apparent, it was enacted in the days of Mar Rav Rabbah b. Mar Hunai that when a *moredet* requests a divorce, all of the guaranteed dowry that she brought into the marriage (*nikhsei zon barzel*) should be paid to her — and even what was destroyed and lost is to be replaced — but whatever the husband obligated himself to pay [beyond the basic *ketubbah* amount], he need not pay, whether or not it is readily available. Even if it is available and she seizes it, it is to be taken from her and returned to her husband; and **we compel him to grant her a divorce forthwith** and she receives one hundred or two hundred zuz [the basic ketubbah amount]. This has been our practice for more than three hundred years, and you should do the same.

- **What was the justification for this last stage (which has not survived in Jewish law)?**
- **What does "we compel him to grant her a divorce forthwith" actually mean? What if he resists the compulsion? Sherira's language is:** וכופין אותו וכותב לה גט לאלתר
- **Consider the different answers to this question implied by the formulations of other Geonim, in the following texts:**

  Rav Hananiah b. Yehuda Gaon: "[the court] coerces the husband until he divorces her" (וכופין את הבעל עד שיגרש)

  Rav Shmuel ben Ali: "[The court] endeavors to make peace between [husband and wife], but if she refuses to be appeased they grant her an immediate divorce (נותנין לה גט לאלתר), and do not30publicly] proclaim against her for four weeks".

  ***Halakhot Gedolot* (ascribed to Rav Shimon Kiara, 9th cent.)** "... we grant her a bill of divorce immediately (ויהבינן לה גיטא אלתר)"

  13th-cent. Responsum: "... temporary need (*shehayah tsorekh sha'ah*) in their day to go beyond the words of the Torah and to build a fence (*geder*) and a barrier (*seyag*) ... in order that she not be made dependent upon the Gentiles and that Jewish women [not] come to a bad end (... either prostitution or apostasy, בין בזנות בין בשמד). ... they wrote her an immediate bill of divorce" (וכתבי לה גט לאלתר)

  Rosh, *Resp*. 43:8, p.40b: "... For they relied on this dictum: "Everyone who marries, marries in accordance with the will of the Rabbis" [bKet 3a] (דרבנן מקדש בל המקדש אדעתה), and they agreed to annul the marriage (והסכימה דעתם להפקיע הקידושין) when a woman rebels against her husband"

- **If this last (Rosh) is an accurate account of what the Geonim were doing, how does it differ from all the others?**

F(i): ***Takkanah of Judah Gaon*** **(early 10th cent.; see Elon, *Jewish Law,* II.656f.)**

Hai Gaon wrote: "Take notice that you are causing great harm to yourselves in that it is your custom to permit betrothals without simultaneously writing a *ketubbah* or a betrothal document. Although a woman may [legally] be betrothed even in the marketplace in the presence of two witnesses, there is harm in this practice. Such a practice has not been heard of in Babylonia for a hundred years, and a betrothal at a time other than at the signing of the *ketubbah* is completely unknown.

"Over a hundred years ago there was a practice in Chorosan for a man to betroth a woman by means of a ring at parties and similar occasions. The disputes multiplied; there were claims in favor of and against the validity of the betrothals, and much harm resulted. Our forefather, teacher, and rabbi, Judah Gaon, enacted that a woman must be betrothed under the Babylonian procedure with the writing of the *ketubbah*, the signatures of the witnesses, and the betrothal benedictions, and **that whenever this procedure is not followed, the betrothal is invalid on the basis of the principle that 'all who marry do so subject to the conditions laid down by the Rabbis, and the Rabbis annul this marriage.**'

"You, too, should do away with such a practice [as yours], and whoever betroths a woman at a time other than at the writing of the *ketubbah* and the document of betrothal should be punished [lit. "fined"] until he rectifies the matter."

- **What kind of rabbinic defect in a (biblically valid) *kiddushin* is here being made subject to the *kol hamekadesh* principle?**

F(i): Ribash (R. Isaac b. Sheshet Perfet, 14th cent.), *Resp.* #399, when asked about the validity of a communal enactment

... providing that no one may marry any woman except with the knowledge and in the presence of the communal officials, and in the presence of ten persons; and that if anyone should violate the law and marry contrary to these requirements, the marriage is void. At the time a marriage is contracted [in violation of the enactment], the community expropriates the money or other property given to effect the marriage, and the property is considered to be ownerless and of no value. The marriage is annulled (*nifka'in*), and the woman may marry without any divorce, and is not even required to obtain a divorce to remove any possible doubt.

[ANSWER] *Ribash* seeks to reassure the questioner: there is an (independent) power conferred by the Talmud (*B.B.* 8b) on the townspeople (*b'nei ha'ir*); moreover, he buttresses this with a "consensual" argument: the communal institutions represent the people, so that the people are by such *takkanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. He adds, moreover, that even if it were necessary to rely upon the principle of *kol hameqadesh* in cases such as this, the questioner need not hesitate in attributing that power to the *kahal* as well as to the Rabbis: indeed, once the people of a town agree to such conditions by enacting the *takkanah,* those conditions will serve as implied terms (binding even on one who *meqadesh stam*). *Ribash* thus concludes unequivocally that the community has the power to adopt the proposed *takkanah*. That being so, the final paragraph comes as a surprise:

This is my opinion on this matter in theory. However, as to its practical application I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], **unless all the halakhic authorities of the region concurred**, so that only a "chip of the beam" [cf. *Sanh*. 7b] should reach me [i e., so that I do not take upon myself the full responsibility, but only part of it].

F(ii): Decrees of Rabbeinu Gershom, 'The Light of the Exile', Germany, 960-1028

A man should not be allowed to take a second wife unless a hundred rabbis authorize it, in cases in which the first one cannot be divorced, or when divorce is required and she does not want to accept the get. (*Per* Beit Shemuel, Shulhan Arukh, Even Ha'ezer 119:6, subpar. 8 (Rabbi Shmuel ben Uri Shraga Faibesh, Poland 1640-1698)

- **What earlier practice does this prohibit?**
- **It was accepted directed to and accepted only by Ashkenazi, and not Sephardi, communities. Why?**

And Rabbeinu Gershom enacted a decree that a wife could not be divorced against her will unless she transgressed the law... there are those that say then when a commandment must be fulfilled [i.e. he cannot procreate with his wife], he can divorce her against her will or he is allowed to marry two women. (*Per* Rema, (Rabbi Moses Isserles, Poland, 1525-1572) gloss on Shulhan Arukh, Even Ha'ezer 119:6)

- **Note that this was originally intended as of only temporary effect (though its precise extent was debated)**
- **What is the combined effect of the two decrees? Do husband and wife have equal protection against unilateral divorce without cause?**

F(iii): Rabbenu Tam (R Jacob b Meir, France, 1100-1171, a grandson of Rashi), *Sefer Hayashar LeRabbenu Tam*

A And that which Rabbenu Shmuel [R. Samuel ben Meir (Troyes, c. 1085 – c. 1158, Rashbam] wrote — that the Geonim decreed that we do not delay twelve months for a divorce but rather, they force him – far be it from our teacher to increase the number of *mamzerim* in Israel. We hold the halakhic principle that Ravina and Rav Ashi are the last authoritative halakhic decisors, and even were the Ge'onim able to decree that a woman could collect her alimony from movable property, whether it be on the basis of Talmudic law or their own reasoned judgment, that is only as far as monetary value is concerned. But as for permitting an invalid bill of divorce (גט פסול), we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah. And this is an invalid bill of divorce. After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Ge'onim] advanced the forcing of the divorce before [the time which] the law [allows].

- **What is the distinction made by Rabbenu Tam between what the Geonim were and were not entitled to do?**

B And that which Rav Yitzhak [Alfasi] wrote: "But now in the court of the Metivta [Academy] in such

a manner do they adjudicate concerning a rebellious wife who comes and says: 'I do not wish [to be married to] this man, let him give me a bill of divorce' and she is given a divorce immediately." This is the interpretation concerning a rebellious wife without a reduction of the alimony, who [voluntarily] forfeits [her alimony] and merely wishes a divorce. [Alfasi] did not [think it necessary] to explain that the husband's consent [is necessary for a divorce], for this is obvious to him. Anyone who interprets [it] in another way is considered to be in complete error and increases [the number] of illegitimate children; and so do I always rule ...

- **Rabbenu Tam is here seeking to rebut an apparent indication that Alfasi had earlier understood and endorsed the practice of the Geonim to be coercion of a unilateral divorce initiated by the wife. How does he do so?**

C And regarding [this ruling], all those suffering [the Exile] suffer [further pain]! How could a scholar make [such a] mistake as to say that we force a husband to divorce [his wife] when she says "He is repulsive to me!" Did they not state that she had perhaps cast her eyes on another [even in such extreme cases as when she states] "The Heavens are between me and you" or "I am taken from the Jews!" … And we do not find in any [part of the laws of divorce] that the husband is forced to give a divorce ...

- **Does Rabbenu Tam reject any coercion of the husband in thgese cases, or only within the first 12 months (A, above)?**

D And if we have learned [the rule] that custom may overcome a law, God forbid that [this should apply in a case which involves] a ritual prohibition, [the penalty of] strangulation, [the penalty for adultery], and the [birth of] illegitimate offspring.

ואם שנינו מנהג עוקר הלכה, חלילה גבי איסורא וחנק וממזרות.

- **This must be in reply to an alternative argument regarding the authority to be ascribed to the Geonic measures? See also Maimonides, *Hilkhot Ishut* 14:14, below.**

E A case was once decided by me regarding someone who had betrothed the daughter of R. Samuel in Chappes. The one who had betrothed her was ordered to divorce her, and I arranged it by having them give him money and goods [to get him to agree]. These matters are well known and recorded, [and I state them] in order that people not say that he disagrees with his masters, since I continually so rule. I should be obeyed [in this].

- **Thus Rabbenu Tam himself provides a precedent for solving the matter by ....** השחידוהו בממון

F(iii): Maimonides, *Mishneh Torah,* 1178

The Geonim have said that in Babylonia they had different customs regarding a rebellious wife, but these customs have not spread among the majority of Israel, and many great scholars in most places disagree with them. It is proper, therefore, to follow the rule of the Talmud and decide accordingly.

- **What does Rambam regard as the criterion for a valid custom?**
- **However, this does not mean that Rambam is unwilling to coerce in these circumstances; rather, he adopts a different basis (and terms?) for coercion:**

The woman who refuses her husband sexual relations - she is the one referred to as "the rebellious wife". So we ask her why she is rebelling. If she says 'because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,' we force him to divorce her immediately, for she is not as a slave that she should be forced to have intercourse with one who is hateful to her. (*Hilkhot Ishut* 14:8)

האישה שמנעה בעלה מתשמיש המיטה--היא הנקראת מורדת, ושואלין אותה מפני מה מרדה: אם אמרה, מאסתיהו ואיני יכולה להיבעל לו מדעתי, כופין אותו להוציא לשעתו, לפי שאינה בשביה שתיבעל לשנוי לה

- **By implication from *Hilkhot Ishut* 14:14, above, what is Rambam's authority for this?**
- **What, then, is the difference between Rambam and the Geonim?**

F(iv): Marriage Contract from Cairo Geniza (TS 24.68; M.A. Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study* (New York: JTSA, 1980) no.3, at II.55-56):

1. [...] ...—15 [dinars], a *mwtly* container—15, two curtains—8 dinars, eight copper vessels—15,
2. a *mwlh* container—15 dinars, a table and all that goes with it—six and one third dinars. The sum of what this bride Maliha, the virgin, brought in from the house
3. of her father totals 456 dinars. They agreed and fixed between themselves—this master Sa'id, the groom,

4. and this Maliha, his wife—the stipulations of the marriage contract, as the law of Moses and the Jews: If this Sa'id, the groom, hates this Maliha does not desire her, and wants to separate
5. from her, he shall pay her all that is written and specified in this marriage contract completely. **And if this Maliha hates this Sa'id, her husband, and desires to leave**
6. **his home, she shall lose her *ketubba* money, and she shall not take anything except that which she brought in from the house of her fathers alone; and she shall go out by the authorization of the court (על פם בית דינה) and with the consent of**
7. **our masters, the sages**. "And if you are taken captive among the gentiles, I will ransom you with my possessions, exclusive of your *ketubba* money, and I will take you back as my wife, as at first. And I (will) have
8. no right to wrong you concerning all of this." **And if this Sa'id goes to his eternal home before this Maliha, his wife: "Male children which I may have by you (they)**
9. **shall inherit your *ketubba* money, beyond their portions with their male siblings, if I have (sons) from another wife.** And if you have female children by me, they shall
10. be sustained from my property until they are married to J[ewish] men. [And you shall dwell in my house and be supported from my estate for the duration of your widowhood, until you desire]
11. to be [ma]rried to another man [..."]

- **On what grounds may the wife terminate the marriage?**
- **To what does the clause in lines 5-7 bear the closest resemblance?**
- **What procedure is contemplated for a divorce under this clause?**
- **Compare and contrast this with R. Sherira Gaon's account (E(i), above) of the *takkanah* of the *moredet.***
- **Do the parties enjoy *equal* capacity to terminate? Is the court required to authorise divorce initiated by the husband?**
- **To what extent does the marriage contract serve also as a will (or marriage settlement), and what kind of family does it presuppose?**
- **Compare JNUL Heb.4 577/4 no.98, of 1023 C.E., at Friedman 1980:II.41, 44-44 (Friedman no.2, lines 33-34), discussed at Jackson, *Agunah: The Manchester Analysis* (2011), pp.95-98, in relation to clauses mentioned in the Jerusalem Talmud.**

F(v): *Takkanot of Castille,* 1494

When they leave after them both sons and daughters, the daughters shall inherit equally with the sons. (Castilian rabbis exiled to Fez)

G(iii): R. David Pipano (Chief Rabbi of Bulgaria, Sefardi), *Responsa Nose' Ha'Efod* no. 34 (1924)

The aforementioned groom at the time that he betrothed the aforementioned bride in the presence of witnesses made conditions with the aforementioned bride, absolute conditions like the conditions of *Beney Gad* and *Beney Re'uven*, with the condition preceding the declaration stating that he is wedding the aforementioned bride in accordance with these conditions and because of this the aforementioned bride agreed that if the conditions would be fulfilled the betrothal should be effective and if they would not be fulfilled – even one of them – the betrothal should be totally nullified and would have no effect at all and the article used for the betrothal should be a gift.

Thus did the aforementioned groom say to the aforementioned bride in the presence of the witnesses signed below: 'If it should ever happen that, in the course of time, I need to journey away from home, I shall ask permission of the bride for the agreed period and I shall be obliged to write to her from wherever I am, telling her where I am and if the time allowed should need to be extended I must ask permission yet again by letter. If, however, I tarry there without her permission more than the period fixed between us **… or if it be thus – that there be a quarrel between us and she sues me to judgment before a righteous *bet din* and the *bet din* make him [*sic*: read "me"] liable in any way and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown then the betrothal shall not be effective but shall be nullified retroactively and she will not need a *get*.**

The groom's declaration under the *ḥuppah* would be:

With reference to all the conditions which are written in the *ketubbah* – [if] they are fulfilled, behold you are betrothed to me with this ring according to the Law of Moses and Israel and if the aforementioned conditions are not fulfilled, or even one of them or even a part of one of them, then the *qiddushin* shall be cancelled and shall not take effect at all and you will not need a divorce from me nor [will you need] *ḥalitsah* and the wedding ring will be a [mere] gift and all the acts of intercourse that I commit with you shall be on this understanding (i.e. on the understanding that they remain subject to the conditions).

- **What is the relationship here between conditional marriage and annulment?**
- **What kind of decision of the *bet din* is required hereto "trigger" the procedure?**

G(iii): Yosef Eliyahu Henkin, *Perushey Ibra* 5:25 (1926)

At the time of the *qiddushin* and the *ḥuppah* the husband shall order the writing of a *get* that will take effect after the husband's last intercourse with his wife if, after that, he dies without surviving descendants or he becomes insane and remains so for three years or he leaves her an '*agunah* for three years whether through unavoidable circumstances or willingly and the *Bet Din* of Jerusalem before whom the claims shall be brought will recognise that they are true. So it shall be if the claim is that he is not fit for matrimony or that he has disgusting blemishes such as the various types of leprosy. In all these cases the *get* shall take effect after the final intercourse if and when the *Bet Din* set up for the purpose clarifies that the particular case before it is included in the enactment.

- **Why is the *get* said to *get* said to take effect "after the husband's last intercourse with his wife"?**
- **In what circumstances is the procedure triggered?**
- **What is the relationship between the will of the husband and the role of the *bet din*?**
- **See further Jackson, *Agunah: The Manchester Analysis* (2011), pp.115-117 (§§3.44-47)**

G(iii): R. Benzion Meir Ḥai Uzziel (Sefardi Chief Rabbi of Israel 1939-1953), *Responsa Mishpetey Uzziel*, '*Even Ha'Ezer* nos. 45 & 46 (1935-36) proposed

making the marriage conditional on the continuing acquiescence of the local *bet din*, the *bet din* of the locality/country and the *bet din* of the Chief Rabbinate in Jerusalem, who would thus be empowered to retroactively annul the marriage in cases of '*iggun*. The formula pronounced by the husband would be:

> "You shall be betrothed to me with this ring for as long as no objections are raised during my lifetime and after my death by the court in the city, with the agreement of the district court of the state, and the decision of the court of the chief rabbinate of Israel in Jerusalem, and on account of a persuasive claim of causing my wife to be an *aguna*."

- **R. Uzziel's preference for a conditional marriage dependent upon the will (and very wide discretion) of the *bet din* appears to have been based upon the view that such a condition could be regarded as in the interests of the spiritual well-being of the marriage, which would exclude any question of retrospective promiscuity**
- **See further Jackson, *Agunah: The Manchester Analysis* (2011), pp.113-115 (§§3.41-43)**

G(iv): R. Herzog's attempted reform of the law of succession [from Ben Tzion Greenberger, "Rabbi Herzog's Proposals for Takkanot in Matters of Inheritance", in *The Halakhic Thought of R. Isaac Herzog,* ed. B.S. Jackson, Atlanta: Scholars Press, 1991]

The following *takkanot*, that will be confirmed by the Council of the Government of Israel (the Parliament), shall be known as "*takkanot* Erets Yisrael 5709".

There shall be inserted in every *ketubah* a clause confirming that there is no objection to division of the estate in accordance with *takkanot* Erets Yisrael 5709 [if this is in fact the intent in any given case].

These *takkanot* shall not be applicable where the decedent left a will that is the expression of his last wishes, provided that the will is confirmed by bet din. This is the rule in cases where the will was executed before publication of the *takkanot*; thereafter, even if the will is not confirmed by bet din because of statutory reasons, nevertheless it does indicate that the testator did not wish to accept the *takkanot*, and the matter reverts to intestacy.

1. If a man dies leaving children, male and female, and did not leave a will, his entire estate shall be distributed (but not as an inheritance) in equal shares to all his children.
2. Assets "inherited by him in the grave" [i.e., shares of other estates that pass through him where he has predeceased the relevant decedent, and distribution is per stirpes] shall be similarly distributed.
3. In cases where the brothers inherit by Torah law and there are sisters, who do not inherit by Torah law, the estate shall also be distributed as aforesaid.
4. Where the father is living and an inheritance is distributable from a deceased son or daughter who leaves no issue, he [the father] has priority before his descendants, in accordance with Torah law.
5. Where the father is not living, the mother shall take a share in the inheritance equal to that of a single heir by Torah law.
6. The above is applicable only where the mother has not remarried, but where the mother has remarried before the inheritance became distributable, she shall not take any share whatsoever in the estate.

7. Where a wife has died, and according to Torah law the husband should inherit her estate, the inheritance shall be distributed in accordance with the *takkanot* of Toledo, as set forth in *Tur* and *Shulhan Arukh Even Ha'ezer*.
8. If the wife dies within one year of the marriage and leaves no children, her father shall inherit all her assets, including the dowry that she brought to her husband.
9. If she dies during the second year of her marriage and leaves no children, her father or his heirs shall inherit all her assets, and one-half the dowry that she brought to her husband if used by him for business purposes shall be returned by the husband to the father or his heirs.
10. If she dies during the third year, her father or his heirs shall inherit as above, but there shall be returned to the father or his heirs only one-third of the dowry that she brought in.

Note: Concerning paragraphs 8-10, it will be necessary for the great Rabbis, members of the expanded Council of the Chief Rabbinate of Israel, to determine whether these should be enacted, since we will be adopting the Toledo *takkanot*.

G(v): A Jewish Will, as drafted by Dayan I. Grunfeld, *The Jewish Law of Inheritance* (Southfield, Mi: Targum Press, 1987)

1. Being at present a person of good health and clear mind such as any ordinary person walking about and fully capable of effecting business transactions, I hereby instruct you to write this document comprising a gift by a person of good health, in accordance with all the particulars which I am now setting out to you ...
2. I also stipulate explicitly that I retain the right to revoke this gift in the course of my life until one hour before my demise; and if I do not revoke this gift during my life-time until one hour before my demise, the gifts made in this document shall be valid from now onwards ....
3. I hereby divide all my possessions into .... parts; my son(s) X, Y and my daughter(s) X, Y shall each receive an equal share in my estate. These are the particulars of my possessions...
4. To my wife X, ... I give the income from all my possessions during her life-time (life interest).
5. I appoint ... as my trustees and to them I transfer in the best effective manner in Jewish law, all my above-mentioned possessions ...
6. This is to be effective from now, with the intention that this deed of gift should be valid in Torah law as interpreted by our Sages of blessing memory and supplemented by their enactments, as long as there does not exist any other deed of gift contradicting this document signed by him as a later date.
7. X the son of Y further declared in our presence: 'I acknowledge before you, as one acknowledges before a properly constituted *Beth Din*, that I owe to my wife ... and to my daughter(s) ... the sum of ... and that I am legally bound to pay them the above-mentioned sum in the manner explained below. I also stipulated with them that I need not pay what I owe them until one hour before my demise. However, once that time has arrived, I shall not ask for a further moratorium, but I or my representatives are then bound to pay to my wife and daughter(s) the full sum of money mentioned above.
8. All the property that I have beneath heaven, that which I now possess or may hereafter acquire, ... shall be mortgaged to secure the payment of these debts during my lifetime and after my death from the present day and forever.
9. If my sons are prepared of their own free will to give my wife and daughter(s) their share of the inheritance as explained above, even when there is no legal obligation to do so, in that case they are not obliged to pay to my wife and daughter(s) the debt owed to them by me ...
10. And we the witnesses have effected with the testator the legal form of symbolic transfer (*kinyan sudar*) in a proper manner with an object suitable in law for such a symbolic transfer, in order to confirm in the proper legal manner all that has been said before.

- **Consider the halakhic significance of each clause (numeration here inserted for convenience):**

G(vi): Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, s.6

Where a rabbinical court, by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband, a District court may, upon expiration of six months from the day of the making of the order, on the application of the Attorney General, compel compliance with the order by imprisonment.

- **Note the notorious case of the Yemenite husband who remained in prison for 32 years, until he died**
- **In 1995, this was strengthened by the Rabbinical Courts (Enforcement of Divorce**

Judgments) Law: by (i) allowing the Rabbinical Court to apply directly for this, and (ii) empowering the rabbinical court to impose a range of civil disabilities, including confiscation of passports and driving licenses: see further Y. Kaplan, "Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law", *The Jewish Law Annual* XV (2004), 57-145, at 122-29.

- **Nothing in the above prevents a later rabbinical court from deciding that a *get* given under such circumstances is *me'useh* (coerced, and thus invalid) and there has been an increasing trend to do so (extending also to a *get* given under threat of a tort action for emotional distress).**

3. Readings and Questions tutorial

Further Reading

Biale, R., 1984. *Women and Jewish Law: an Exploration of Women's Issues in Halakhic sources*, Schocken

Broyde, M., "A Proposed Tripartite Agreement to Solve the *Agunah* Problem: A Solution Without Any Innovation", in *The Manchester Conference Volume*, ed. L. Moscovitz (Liverpool: Deborah Charles Publications, 2010; Jewish Law Association Studies, XX), 1-15.

Haut, I.H., 1983, *Divorce in Jewish Law and Life*, Sepher-Hermon Press

Jackson, B.S., 2001, **"Moredet: Problems of History and Authority", in *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton: Global Publications, 2001; *JLAS* XII), 103-123.**

Jackson, B.S., 2004, **"How Jewish is Jewish Family Law?", *JJS* LV/2 (2004), 201-229.**

Jackson, B.S., 2008, *Essays on Halakhah in the New Testament*, E.J. Brill, ch.8

Jackson, B.S., 2009, "Launch Lecture", Working paper no 21 of the Agunah Research Unit, downloadable from http://www.manchesterjewishstudies.org/publications/

Jackson, B.S., 2011, "The 'Institutions' of Marriage and Divorce in the Hebrew Bible", *Journal of Semitic Studies* LVI/2:221-251

Jackson, B.S., 2011, *Agunah: The Manchester Analysis* (Liverpool: Deborah Charles Publications, 2011)

Questions for discussion in the tutorial:

1. Is the stereotype of Jewish family law as static and uninfluenced by external factors justified?: Read Jackson, "How Jewish is Jewish Family Law?"
2. How does the history of the *agunah* problem illustrate the problems of a 'sources' theory of Jewish law (Week 2)
3. What are the main obstacles to solution of the problem the *agunah*?

Week 4: Law and Religion in the State of Israel

Materials for session 4 focus on the law of the State of Israel, commencing with its legal ideology as expressed in the 1948 "Declaration of Independence" and the 1950 Law of Return (as amended in 1970), the 1951 Women's Equal Rights Law, the 1953 Rabbinical Courts Jurisdiction Law, and the 1980 Foundations of Law Act, together with seminal cases involving Jewish identity, conversion, marriage and divorce.

1. Themes

1 The Constitutional Structure
- (a) No written constitution
- (b) Status and Character of the 'Declaration of Independence': see also s.1 of the Basic Law: Human Dignity and Liberty, 1992, as amended in 1994 (1(d) below): **Texts**
- (c) Sources of Israeli Law
  - (i) prehistory: the British Mandate
  - (ii) Knesset Legislation
  - (iii) The mandatory 'lacuna clause' and its replacement in the Foundations of Law Act 1980: **Texts**
- (d) The Status of 'Basic Laws', e.g. Basic Law: Human Dignity and Liberty, 1992/1994: **Texts**
  - (i) On the background and history, see Amnon Rubinstein (2009), http://www.jewishvirtuallibrary.org/jsource/isdf/text/Rubinstein.html, commenting that "the Basic Laws came into being as the half-legitimate heirs to the defunct constitution"
  - (ii) Rubinstein: "There is no mention of judicial review in the laws, but the discussions in the Knesset Committee as well as the protracted conducted with Orthodox and other parties assumed that these Basic Laws would have constitutional standing and that any offending law could be judged invalid ….

    In 1995, the Supreme Court decided in the Mizrahi case that the two Basic Laws stand above ordinary legislation because in enacting them, the Knesset acted in its capacity as the inheritor of the 1949 Constituent Assembly. Consequently; the court had an inherent authority to judicially review laws which were incompatible with the 1992 Basic Laws.

    Since that decision, the judicial review of the Knesset Acts has become a fact of legal and parliamentary life. Since then, the Supreme Court has based its power of review on an article which appears in the two laws, popularly called the "limitation clause." Under this article – which is couched in terms similar to those of article 1 of the Canadian Charter of Rights and Freedoms – "The rights according to this Basic Law shall not be infringed 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."
- (e) The Status of the State Religious Courts: the ideological conflict: see Bazak in Readings I, below
- (f) The Role of the Supreme Court: the Courts Law 1957 (the *bagatz* procedure): **Texts**

2 Jurisdictional Issues: "exclusive" and "concurrent" jurisdiction
- (a) Under the Mandate (inheritance of the 'millet system' in issues of 'personal status')
  - (i) The Palestine Order in Council 1922, arts. 51-54: **Texts**
  - (ii) The Succession Ordinance 1923: **Texts**
- (b) In the State of Israel: the 'status quo':
  - (i) Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953: **Texts**
  - (ii) Women's Equal Rights Law, 1951: **Texts**
  - (iii) Succession Law 1965: **Texts**

3 The Definition of a 'Jew'
   (a) In the Declaration of Independence
   (b) The Law of Return, its interpretation and amendment
      (i) The Law of Return 1950: **Texts**
      (ii) The 'Brother Daniel Case' (Oswald Rufeisen v. Minister of the Interior 1962)
      (iii) The Shalit Case 1968
      (iv) The Law of Return (Amendment no.2), 1970: **Texts,** and see the Beresford case, discussed by Sinclair, Readings IV, below
   (c) The halakhic definition
   (d) Consequences of the dual definition (civil and religious)

4 Particular Areas of Law: see generally Kaplan, Readings II, below
   (a) Marriage
   (b) Divorce
   (c) Conversion: **Texts** and see further Sinclair, Readings III, below
   (d) Testate Succession: **Texts**
   (e) Intestate Succession: **Texts**
   (f) Day of Rest
   (g) Kashrut

2. Texts for discussion

1(b) The Declaration of the State of Israel (1948)

1. ERETZ-ISRAEL [(Hebrew) — the Land of Israel, Palestine] was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.
2. After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.
3. Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. Pioneers, ma'pilim [(Hebrew) — immigrants coming to Eretz-Israel in defiance of restrictive legislation] and defenders, they made deserts bloom, revived the Hebrew language, built villages and towns, and created a thriving community controlling its own economy and culture, loving peace but knowing how to defend itself, bringing the blessings of progress to all the country's inhabitants, and aspiring towards independent nationhood.
4. In the year 5657 (1897), at the summons of the spiritual father of the Jewish State, Theodore Herzl, the First Zionist Congress convened and proclaimed the right of the Jewish people to national rebirth in its own country.
5. This right was recognized in the Balfour Declaration of the 2nd November, 1917, and re-affirmed in the Mandate of the League of Nations which, in particular, gave international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.
   - The Balfour Declaration (1917): "His Majesty's government view with favour the establishment in Palestine of **a national home for the Jewish people**, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country".
   - The Preamble to the **Mandate** includes: "Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country";
   - s.2 of the **Mandate** states: "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

- For the full text of the Mandate, see http://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB
- For the full text of the 1947 UN General Assembly Partition Resolution, see http://www.yale.edu/lawweb/avalon/un/res181.htm: "Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem, set forth in Part III of this Plan, shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948"

6. The catastrophe which recently befell the Jewish people — the massacre of millions of Jews in Europe — was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the comity of nations.
7. Survivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to Eretz-Israel, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland.
8. In the Second World War, the Jewish community of this country contributed its full share to the struggle of the freedom- and peace-loving nations against the forces of Nazi wickedness and, by the blood of its soldiers and its war effort, gained the right to be reckoned among the peoples who founded the United Nations.
9. On the 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.
10. This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State.
11. ACCORDINGLY WE, MEMBERS OF THE PEOPLE'S COUNCIL, REPRESENTATIVES OF THE JEWISH COMMUNITY OF ERETZ-ISRAEL AND OF THE ZIONIST MOVEMENT, ARE HERE ASSEMBLED ON THE DAY OF THE TERMINATION OF THE BRITISH MANDATE OVER ERETZ-ISRAEL AND, BY VIRTUE OF OUR NATURAL AND HISTORIC RIGHT AND ON THE STRENGTH OF THE RESOLUTION OF THE UNITED NATIONS GENERAL ASSEMBLY, HEREBY DECLARE THE ESTABLISHMENT OF A JEWISH STATE IN ERETZ-ISRAEL, TO BE KNOWN AS THE STATE OF ISRAEL.
12. WE DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel".
13. THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.
14. THE STATE OF ISRAEL is prepared to cooperate with the agencies and representatives of the United Nations in implementing the resolution of the General Assembly of the 29th November, 1947, and will take steps to bring about the economic union of the whole of Eretz-Israel.
15. WE APPEAL to the United Nations to assist the Jewish people in the building-up of its State and to receive the State of Israel into the comity of nations.
16. WE APPEAL — in the very midst of the onslaught launched against us now for months — to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.
17. WE EXTEND our hand to all neighbouring states and their peoples in an offer of peace and good neighbourliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Jewish people settled in its own land. The State of Israel is prepared to do its share in a common effort for the advancement of the entire Middle East.
18. WE APPEAL to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding and to stand by them in the great struggle for the realization of the age-old dream — the redemption of Israel.

19. PLACING OUR TRUST IN THE ALMIGHTY (*Tsur Yisra'el*), WE AFFIX OUR SIGNATURES TO THIS PROCLAMATION AT THIS SESSION OF THE PROVISIONAL COUNCIL OF STATE, ON THE SOIL OF THE HOMELAND, IN THE CITY OF TEL-AVIV, ON THIS SABBATH EVE, THE 5TH DAY OF IYAR, 5708 (14TH MAY, 1948).

- **Identify the elements in this declaration which identify Israel as a liberal democracy**
- **Identify the elements in this declaration which identify Israel as religious state**
- **Identify the elements in this declaration which indicate compromise between the above**

1(c)(iii): Art.46 of the Palestine Order in Council (the "lacuna" clause)

... subject thereto, and so far as the same (Ottoman law and subsequent mandatory legislation) shall not extend or apply, (the jurisdiction of the civil courts) shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England ... Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.

- **This is termed the 'lacuna' clause. Why?**
- **What limitations apply to its application?**

1(c)(iii): Foundations of Law Act *(Hok Yesodot Hamishpat),* 1980:

Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.

- **This provision replaces the lacuna clause of the Palestine Order in Council 1922 art 46 (above). Compare the definition of a *lacuna* in the two enactments.**
- **Is the notion of analogy secular or religious?**
- **Note the similarity between the concept of "the principles of freedom, justice, equity and peace of Israel's heritage" (*ikronot haherut, hatsedek, hayosher vehashalom shel moreshet yisrael*) and the statement in the Declaration of Independence that: "The State of Israel ... will be based on the principles of liberty, justice and peace as conceived by the prophets of Israel ..."? Should it be interpreted in the light of that statement? Is its status comparable to that statement?**
- **By choosing this concept, to replace the "lacuna" clause of the Palestine Order in Council 1922 art 46 (above), what policy did the Knesset decide *not* to adopt?**
- **Is this statute the *only* route for the application of Jewish law by the civil courts in the State of Israel? Was there no such practice *before* the passing of the 1980 Law? Consider the nature of the use of Jewish law by Elon J. in a pre-80 torts case, *Kitan* v. *Weiss*, discussed by Sinclair in the Readings V, below.**
- **Do you consider *Military Appeals Court et. al.* v. *Vaknin* (discussed by Sinclair in the Readings VI, below, s.v. "*Protection of Privacy*"), a valid application of the 1980 Law?**

1(d): Basic Law: Human Dignity and Liberty, 1992, as amended in 1994

1 Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

1a. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

- **Does this represent a change?**

2. There shall be no violation of the life, body or dignity of any person as such.

3. There shall be no violation of the property of a person.

4. All persons are entitled to protection of their life, body and dignity.

- **Is "dignity" necessarily understood in the same way in religious and secular thought?**
- **What difference, if any, should the "Basic Law: Human Dignity and Liberty" make in cases such as *Vaknin* (discussed by Sinclair in the Materials, below, s.v. "*Protection of Privacy*")?**
- **What difference, in general, might the "Basic Law: Human Dignity and Liberty" make to the balance between State and Religion in Israel?**

8. 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 is required.
    - **This is the clause to which Rubinstein refers in 1(d)(iii) above**

12. This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required.
    - **Who will decide whether a new emergency regulations fall within the "notwithstanding" and when will they decide it?**
    - **On the status of Basic laws, see http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm and**

1(f): Courts Law, 5717—1957

s.7 (Supervisory Jurisdiction of the Supreme Court sitting as a High Court of Justice)

(b) Without prejudice to the generality of the provisions of subsection (a), the Supreme Court sitting as a High Court of Justice shall be competent—

...

(4) to order religious courts to hear a particular matter in accordance with their powers or to refrain from hearing or from continuing to hear a particular matter otherwise than in accordance with their powers; but the Court shall not entertain an application under this paragraph unless the applicant has raised the question of competence at the earliest opportunity; where he has not had a reasonable opportunity to raise the question of competence before a decision was given by the religious court, the Court may quash any proceeding taken or decision given, by the religious court without authority.
    - **How extensive is the supervision by the Supreme Court of the rabbinical courts?**

    NB There is an appeal court within the rabbinical court structure, but this appeal court is also subject to the Supreme Court's supervisory jurisdiction

2(a)(i): The Palestine Order in Council 1922

Article 47: The Civil Courts shall further have jurisdiction ... in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any Law, Ordinances or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable.

Article 51: ... jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the courts of the religious communities ... For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

Article 52: Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October, 1333, A.H.

Article 53: The Rabbinical Courts of the Jewish Community shall have:--

(i) **Exclusive jurisdiction** in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Article 59.

(ii) **Jurisdiction** in any other matter of personal status of such persons, **where all the parties to the action consent to their jurisdiction**.
    - **Note the greater extent of exclusive jurisdiction given to Moslem Religious Courts**
    - **Article 54 grants the same jurisdiction to the "Courts of the several Christian communities" as to the Rabbinical Courts**
    - **For the full text of the Palestine Order in Council 1922, see http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656**

2(a)(ii): The Succession Ordinance 1923

6.(1) The Moslem religious courts shall have exclusive jurisdiction as to all matters relating to succession upon death to the estate of a Moslem, whether under a will or otherwise.

7.(1) The courts of each of the religious communities shall have exclusive jurisdiction to confirm a will made by any member of the community who is not a foreigner.

8.(1) The courts of each of the religious communities shall have jurisdiction in matters relating to the intestate succession upon death to persons who, at the date of their death, were members of the community.

(2) Subject to the provisions of section 21, the estates of such persons shall be administered and distributed in accordance with the law of the community:

- **Compare the jurisdiction of the Muslim courts and the Rabbinic courts in matters of succession**

2(b)(i): Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953

1. Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts.
2. Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.
   - **Thus there is at present no civil marriage and divorce of Jews "in Israel"?**
3. Where a suit for divorce between Jews has been filed in a rabbinical court, whether by the wife or by the husband, a rabbinical court shall have exclusive jurisdiction in any matter connected with such suit, including maintenance for the wife and for the children of the couple.
6. Where a rabbinical court, by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband, a District court may, upon expiration of six months from the day of the making of the order, on the application of the Attorney General, compel compliance with the order by imprisonment.
9. In matters of personal status of Jews, as specified in article 51 of the Palestine Orders in Council, 1922 to 1947, or in the Succession Ordinance, in which a rabbinical court has not exclusive jurisdiction under *this* Law, a rabbinical court shall have jurisdiction after all parties concerned have expressed their consent thereto.

2(b)(ii): Women's Equal Rights Law, 1951

1. A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceeding, against women as women, shall be of no effect.
2. A married woman shall be fully competent to own and deal with property as if she were unmarried; her rights in property acquired before her marriage shall not be affected by her marriage.

5 This Law shall not affect any legal prohibition or permission relating to marriage or divorce.

7 All courts shall act in accordance with this Law; a tribunal competent to deal with matters of personal status shall likewise act in accordance therewith, unless all the parties are eighteen years of age or over and have consented before the tribunal, of their own free will, to have their case tried according to the laws of their community.

- **Why do you think s.5 was necessary?**

2(b)(iii): Succession Law 1965

s.150. In matters of succession, Article 46 of the Palestine Order in Council 1922-47 shall not apply.

- **Why? If the lacuna clause was not needed here, could it be justified elsewhere?**

s.151(a) The court having jurisdiction under this Law is the District Court within whose area of jurisdiction the deceased was domiciled at the time of his death; if he was not domiciled in Israel the Court having jurisdiction is the District Court within whose area of jurisdiction assets of the estate are found; if no assets of the estate are found in Israel the District Court of Jerusalem has jurisdiction.

s.155 (a) Notwithstanding section 15l, **the religious court** which had jurisdiction in matters of the personal status of the deceased is **competent** to make a succession order, grant probate and prescribe maintenance out of the estate **if all the interested parties under this Law have consented thereto in writing**.

(b) In a matter brought before a religious court in accordance with subsection (a) the religious court may, notwithstanding section 148, follow its religious law, provided that if a minor or a person

declared legally incompetent is one of the parties, his rights of succession either on intestacy or under will and his rights of maintenance out of the estate shall not be less than what they would be under this Law.

(c) Subsection (a) shall not affect section 4 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.

(d) In this section, "religious court" means a Rabbinical court, a Sharia court a court of a Christian community and a Druze court.

- **What is the nature of the jurisdiction of religious courts in matters of succession?**
- **To what extent does the law confirm the position under the Mandate, and to what extent does it change it?**

3(b)(i): The Law of Return 1950

1. Every Jew has the right to come to this country as an *oleh*
   - **"Jew" was undefined in the Law of Return. Why?**

2(a) *Aliyah* shall be by *oleh's* visa.

(b) An *oleh's* visa shall be granted to every Jew who has expressed his desire to settle in Israel, unless the Minister of Immigration is satisfied that the applicant —

(l) is engaged in an activity directed against the Jewish people; or

(2) is likely to endanger public health or the security of the State.

3(a) A Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in Israel may, while still in Israel, receive an *oleh's* certificate.

4. Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in the country, whether before or after the coming into force of this law shall be deemed to be a person who has come to this country as an *oleh* under this Law.
   - **Why include also "every Jew who was born in the country"?**

3(b)(iv): The Law of Return (Amendment no.2), 1970

"Jew" means anyone who was born to a Jewish mother or who has been converted, and who is not a member of another religion.

- **Was it mere membership of another religion which was the basis of the decision of the majority in the *Rufeisen* case?**
- **Consider, both before and after the passing of the Law of Return (Amendment No.2), 1970,**
  - **(i) the children of a Jewish father and non-Jewish mother, born in Israel, raised as Jewish (though not converted) and regarding themselves as Jewish (cf. the *Shalit* case)**
  - **(ii) "Messianic Jews" (see Sinclair, "Messianic Jews and the Law of Return", below)**
  - **(iii) People converted to Judaism by non-Orthodox Rabbis (Sinclair, "Defining Conversion To Judaism", below)**

4(c): Conversion: some Jewish law sources

Pes. 87b R. Eleazar also said: The Holy One, blessed be He, did not exile Israel among the nations save in order that proselytes might join them, for it is said: And I will sow her unto Me in the land; surely a man sows a *se'ah* in order to harvest many *kor*!

Yev. 46 ... he is not a proselyte unless he has both been circumcised and has immersed himself.

Yev. 47a In our days, when a proselyte comes to be converted, we say to him: 'What is your objective? Is it not known to you that today the people of Israel are wretched, driven about, exiled, and in constant suffering?' If he says: 'I know of this and I do not have the merit,' we accept him immediately and we inform him of some of the lighter precepts and of some of the severer ones... we inform him of the chastisements for the transgression of these precepts... and we also inform him of the reward for observing these precepts... we should not overburden him nor be meticulous with him...

- **How would you characterise the attitude to conversion in these texts?**
- **What are the (i) ritual and (ii) other conditions for conversion?**
- **Are the criteria in Yev. 47a generally applied by Orthodox authorities today, or do the criteria depend upon contemporary circumstances (and if so what?)?**
- **What different interpretations are adopted by Orthodox and non-Orthodox authorities?**

4(d): Succession Law 1965: Intestate Succession

s.18. A will may be made in handwriting or in the presence of witnesses or before an authority or orally.

s.19. A handwritten will shall be written entirely in the testator's own hand and shall be dated and signed by him.

s.20. A will made in the presence of witnesses shall be in writing and dated, and shall be signed by the testator before two witnesses after he has declared before them that it is his will; the witnesses shall thereupon attest by their signatures upon the will that the testator has made the declaration and signed the will as aforesaid.

s.22. (a) A will made before an authority shall be made by the testator stating its provisions orally before a judge or registrar of a District Court or Magistrate's Court or before a member of a religious court, as defined in section 155, or personally presenting its provisions in writing to such judge, registrar or member of a religious court.

s.23. (a) A person who is on his deathbed or who in all the circumstances reasonably regards himself as facing death may make an oral will before two witnesses who understand his language.

(b) The testator's directions, with a note of the day and the circumstances in which the will was made, shall be recorded in a memorandum which the two witnesses shall sign and deposit in a District Court; the memorandum shall be made, signed and deposited as soon as practicable.

(c) An oral will becomes void if the testator is still alive on the expiration of one month after the circumstances which warranted its making have changed.

s.56. Where the deceased leaves a spouse, children or parents who are in need of support, they are entitled to maintenance out of the estate under the provisions of this Chapter, whether succession is intestate or under will.

57. (a) The right to maintenance shall be as follows:—

(1) in the case of the spouse of the deceased, until remarriage, provided that the court may make a lump-sum grant to the widow of the deceased who remarries if in the circumstances of the case and having regard to the rights of the children of the deceased, it appears proper to the Court so to do;

(2) in the case of children of the deceased, until the age of 18 years, and in the case of an invalid child for the duration of his infirmity;

(3) in the case of an adult child of the deceased for whom in the circumstances the Court deems it proper to prescribe maintenance, until the age of 23 years;

(4) in the case of parents of the deceased who were dependent upon him immediately before his death, so long as they live.

(b) A spouse who immediately before his death was denied the right of maintenance by the deceased is not entitled to maintenance out of his estate.

(c) Where a man and woman, though not being married to one another, have lived together as husband and wife in a common household, then, upon the death of one of them, neither being then married to another person, the survivor is entitled to maintenance out of the estate as if they had been married to each other.

(d) For the purpose of maintenance, "child" includes a posthumous child, a child born out of wedlock, an adopted child and a grandchild of the deceased who became an orphan before the death of the deceased or a child who was dependent upon the deceased immediately before his death and whose parents are unable to provide him with maintenance.

- **Compare traditional Jewish law regarding**
  - **(a) the forms of will**
  - **(b) maintenance rights**

4(e): Succession Law 1965: Intestate Succession

s.11. (a) The spouse of the deceased takes the chattels which in the ordinary course and according to the circumstances belong to the common household, and from the remainder of the estate—

(1) where the children of the deceased by a previous marriage inherit with the spouse — one quarter;

(2) where children of the deceased other than those mentioned in paragraph (1) or their issue or his parents inherit with the spouse — one half;

(3) where the brothers or sisters or grandparents of the deceased inherit with the spouse — two thirds;

(4) where other heirs on intestacy inherit with the spouse — five sixths.

(5) where there are no other heirs — the whole.

(b) If at the death of the deceased the whole or the larger part in value of the property of the spouses was in their common ownership the share of the spouse in the estate of the deceased shall in the circumstances set out in subsection (a) paragraph (2) be one quarter

(c) There shall be deducted from the spouse's share in the estate anything due to the spouse on a claim which arises out of the marital bond, including anything which the wife receives under the *Ketubah*. This provision does not affect the right of the spouse to receive from the estate anything the deceased received on the occasion of the marriage upon condition to restore the same upon its termination.

s.12. The children of the deceased take precedence to his parents and the parents take precedence to his grandparents, provided that if the deceased leaves both children and parents, the parents take one sixth of the estate.

s.13. The children of the deceased share equally among themselves and so do the parents among themselves and the grandparents among them selves.

s.14. Where a child of the deceased predeceased him and left children, the children succeed in place of such child, and the children of each of the relatives of the deceased who predeceased him succeed in like manner; the same applies where a child or relative has been found to be disqualified from inheriting or has renounced the inheritance otherwise than in favour of the spouse or children of the deceased.

- **Compare traditional Jewish law regarding**
  - **(a) the position of the spouse**
  - **(b) female heirs**
  - **(c) distribution *per capita* or *per stirpes***

3. Materials:

I. Yaacov Bazak, "The Halachic Status of The Israeli Court System"

Reprinted with permission from "Crossroads: Halacha and the Modern World, Vol. II," Published by Zomet Institute (Alon Shvut-Gush Etzion, Israel) (http://www.jlaw.com/Articles/israelcourt.html)

A discussion of the status of Jewish law in the State of Israel necessitates the prior elucidation of several basic concepts in order to avoid the confusion and distortion common to most discussions of this problem, a situation which has effectively precluded logical analysis and the proper drawing of conclusions concerning this central issue in the spiritual life of the Jewish people.

Firstly, it is imperative to emphasize that the problem of the State and Jewish law is not essentially a religious-halachic one, but rather a national-cultural one.

A. Civil Law and Criminal Law

From a purely halachic point of view, the community has the power to autonomously establish laws and enactments, both in civil and criminal matters, that differ from Torah law. The Rosh, for example, writes: "In financial matters, the court has the power to enact enactments according to the times and the need, even if they overrule Torah law, taking from one and giving to the other (Responsa Rosh (55,10), cf. Rambam, Hilchot Sanhedrin, ch.24).

The same is true for criminal law. The community may establish laws and exact penalties not in accordance with Torah law, including the death penalty; cf. Responsa Rivash (234): "...for the court may punish not in accordance with the law, even without proper testimony, according to the need of the hour." This is recorded in the Shulchan Aruch (ChM, 2): "Any court, even if not ordained in the Land of Israel, if it perceives that the people are rife with transgressions and it is the need of the hour, may impose the death penalty or a fine or any other punishment, even without proper testimony."

This applies not only to a particular statute, but also to the composition of the court. Cf. Shulchan Aruch (ChM 8.1): "Any community may accept the authority of a court not qualified by Torah law."

This process reaches its acme in the statement that one should refrain from judging according to Torah law, because of the chance of error in the explication and application of the law. 'The judges should refrain as much as possible from obligating themselves to judge according to Torah law." (Shulchan Aruch, ChM 12,20). Indeed, the

phrase “I do not know Torah law” is common at the beginning of many halachic responses.

The Halacha is extremely flexible, as we have seen, concerning the content of the civil and criminal law. it allows the adaptation of these laws according to the changing times and conditions and the needs of the hour. There is no basis whatsoever for the charge that it is an inflexible, frozen, sanctified system that can never be changed.

On the basis of the preceeding paragraphs, we may conclude that anyone who labels the Israeli courts (established by law, with the concurrence of the public) “non-Jewish courts” (there are those who use the name “courts of idolaters”) does not know what he is talking about.

B. “Non-Jewish Courts”

The opposite conclusion was expressed in an article published in a religious academic journal, in which the distinguished author cited the following ruling of the Rambam (Hilchot Sanhedrin, 26,7): “Anyone who litigates with non-Jewish laws or in their courts... is an evildoer and is considered as though he has blasphemed and raised his hand against the Torah.” On the basis of this statement, the author concluded that the courts in the State of Israel “which rule according to foreign laws have the status of non-Jewish courts since they rule according to non-Jewish laws.”

However, a minor error in citing the Rambam has resulted in a major distortion of the Halacha, for the text reads not “non-Jewish laws” (“dinim”) but “non-Jewish judges” (“dayanim”). For our purposes the distinction is crucial. Both the Talmudic source of this law and its citation in the Shulchan Aruch demonstrate clearly that it does not refer to the character of the law by which one is being judged but only to the nationality of the judges, or more correctly the court, before which one is appearing. The source of the law is in the statement of R. Tarfon (Git. 88b): “Tanya, R. Tarfon would say: Wherever you find congregations of non-Jews. even though their laws are the same as Jewish law, you may not have recourse to them.” (Similarly in the statement of R. Elazar b. Azarya, Mechilta D’Rabi Yishmael Mishpatim, Masechta D’Nezikin, Parsha 1. ed. Horowitz, p.246).

The law against recourse to “non-Jewish courts”, as it appears in the Talmud, the Rambam, and the Shulchan Aruch, is explicitly directed against appearing before the judicial bodies of a foreign government, rather than utilizing the courts of the Jewish community. It makes no reference whatsoever to the nature of the legal system used; on the contrary, it emphasizes that one may not have recourse to a non-Jewish court even if it makes use of Jewish law. It may be stated with certainty that a Jewish court which utilizes non-Jewish law is preferable to a non-Jewish one which utilizes Jewish law.

In stating this I don’t wish to suggest for a moment that it is desirable that Jewish courts judge according to non-Jewish law. Not in the slightest! My only intent is to say that it is a total distortion to equate them with non-Jewish courts.

An uncircumcised Jew is undoubtedly flawed, as he has neglected a cardinal mitzvah; nonetheless, he is still Jewish and calling him a goy is both wrong and sinful. The same is true for a Jewish court in the State of Israel; it is a Jewish court. We should thank God that we have lived to see Jewish judges, appointed by the sovereign Jewish community, judging our people, rather than non-Jewish judges. The fact that the legal system by which they judge is not Jewish law is a serious defect; nonetheless, this does not bestow upon them the status of “non-Jewish courts”. It should be noted that the defect is not so much a religious-halachic one, for, as we have seen, the community has the power to accept any rules and laws it wants in this area, but rather is a national-cultural defect.

C. Two Systems

One can approach the subject of Jewish law from two viewpoints. On the one hand, it is a specific Jewish cultural creation which has objective reality like all other cultural objects, whether or not we fulfill it in daily life. On the other hand, it is a binding system of imperatives by which one is supposed to order his daily life.

We shall approach the problem firstly from the national-cultural point of view. Jewish law is one of the most exalted cultural assets of the Jewish people, one that has attracted the best minds and hearts of our people from Hillel and Shamai, R. Gamliel, R. Yehuda HaNassi, Abaye and Rava, until the Rif, the Rambam, the Rosh, the Maharam of Rottenberg, the Shulchan Aruch, the Shach, the Sma, the Taz, and the saints and scholars of every generation. It is a creation that gives expression to the history of the greatness and struggle of our nation, one that has been and will continue to be for generations to come the object of the thoughts of young schoolchildren and

aged jurists, one whose effects are present in the speech and thought patterns of every Jew wherever he may be.

Every cultured person in the world feels the need and the obligation to be acquainted with his people's history and major cultural achievements. Is it conceivable that any Jew with a measure of national self-consciousness shall not feel a corresponding need to study and know the principles of Jewish law, which are undoubtedly among the essentials of our cultural heritage?

There is, however, another aspect to this question. Jewish civil law is a system of binding rules, and we should strive to ensure that our legal existence be structured to the greatest extent in accord with this distinguished system. We should prefer our own indigenous legal system to foreign ones even if it includes several troublesome points, and even if modern legal methods are more amenable to study and application. The Hebrew language was equally difficult to use, but that did not inhibit us from making it into a living language. The Land of Israel was a barren desert, but we did not shrink from leaving bountiful and flourishing foreign lands in order to settle here. Why should the position of Jewish law be different. Just as language and state do not belong only to religious Jews, but to every Jew with a sense of national identification, so too should Jewish law be the common legal legacy of all Jews.

D. To Learn and to Study

What can be done to turn these romantic aspirations into reality?

The answer is that first of all we must study and come to know Jewish law. This requires the total abandonment of the assumption that mastery of Jewish law is possible only for one of superior intellect and endless perseverance who will spend day and night studying Torah. "It is not in the heavens" and "Torah was not given only to the angels". If we desire that Jewish law should be the common legacy of the Jewish community, we must inculcate the awareness that it can be mastered by an average jurist in a plausible number of years of study. It is imperative that we not sabotage this endeavor by spreading the belief that only select geniuses can achieve it.

At the same time we must correct the common error that all that is needed is a modern reformulation of the laws in the Shulchan Aruch. This belief was expressed by one of the founders of modern research into Jewish law, Prof. Asher Gulak, in an article written fifty years ago.

The system of Jewish laws must be adapted on the basis of ancient Jewish law and the principles of jurisprudence, arranged in a modern system. and corrected and improved so that it can be applied in a developed country according to the needs of our times.... This endeavor is indeed weighty and will undoubtedly continue two or three years, but it can be done by experts... (in Hamishpat Halvri U' Medinat Yisrael, ed. Dr. Y. Bazak. p.34).

I do not believe that it was excessive naivete for Gulak to believe that this reformulation could be done in a few years; rather, his error was in the assumption that all that was needed was a modern reformulation of the laws. It is clear that without continuous contact with the sources of Jewish law, in particular the responsa literature, there is not much value in a modern reformulation of an ancient book of laws.

E. Responsa Literature with Commentary

Several years ago the Knesset passed the Bailees Law (chok hashomrim), in order to regulate the responsibilities and the status of bailees. Assuming for the moment that all sections of this law were merely reformulations of the laws of the Talmud and the Shulchan Aruch, would that suffice? In my opinion the answer is definitely not. The important and definitive question is how will these laws be interpreted on a day to day basis, for if jurists will not know how to find precedents and interpretations in the source literature, the Bailees Law will quickly assume a form and interpretation completely foreign to the spirit and nature of Jewish law. It is necessary to provide a simple and efficient means of access to the sources of Jewish law, including responsa literature, in order to preserve the continuity and special nature of the law after it achieves a modern formulation. This entails not merely indices to responsa literature, important as that may be, but especially new and enlightening editions of various responsa works, together with a short topical commentary, as well as a systematic annotated edition of the Shulchan Aruch Choshen Mishpat. This is a major and weighty undertaking, but it can be done if approached with the spirit and energy appropriate to its importance.

F. Method of Study

Concurrently, the method of study of Jewish law in our universities should be changed. It is not possible for a

single teacher to be an expert in all areas of general law, such as criminal law, obligations, property. history of law, philosophy, etc. This is far more true in Jewish law, where there are no systematic textbooks or annuals, no tradition of academic teaching of the subject and no publication of research on a regular basis. The subject should be taught in several tracts. according to the various subjects, with the choice left to the students. This will facilitate specialization and research in each area. At the same time, seminars should be held for attorneys and jurists in all areas of Jewish law. Reference to Jewish law in court decisions will increase in direct proportion to the study and knowledge of the legal public. We will be able to see not only the return of our judges as of yore, but also of our laws.

II. A 'Jewish State': Law and Religion in Israel

Lecture by Jonathan Kaplan, "Religion and State"

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The issue of religion and state in Israel is one of the most burning social issues in the country today. … What should be the supreme authority: the will of the people as expressed through laws passed by a democratically elected Knesset and interpreted by the judiciary, or the will of God as passed down through sacred writings and interpreted by orthodox rabbis and religious courts?

- **Are these mutually exclusive alternatives?**

As a Jewish state, should Israeli culture and society conform with "halacha" (Jewish law) whenever possible or should society be essentially secular but rely on Jewish tradition for its values, symbols and ceremonies, or should Israeli society be as similar as possible to other western countries? The answers to these questions are crucial in determining laws of marriage and divorce, the status of women, the definition of a Jew and hence the major criteria for joining Israeli society, the character and desirability of a constitution, regulations for the operation of businesses and services, the nature of the school system, and many other important aspects of Israeli society.

Evolution of Religious Autonomy: Under Turkish rule, religious communities or "millets" were given their own jurisdiction over religious affairs and matters of personal status such as marriage, divorce and inheritance. This system was continued under the British Mandate in Palestine after World War I. The British recognized a Chief Rabbinate, Rabbinical Council and Rabbinical Courts, all comprised of orthodox Jews, as the sole authorities on issues of Jewish law, and invested them with exclusive jurisdiction over Jews in matters of marriage and divorce, alimony and confirmation of wills. Thus, in these areas, Jewish law, which was given an orthodox interpretation, became binding on the Jews of Palestine with the exception of those who held foreign nationality and could contract civil marriages before consular officers. Marriages and divorces effected abroad were recognized as valid by the courts of Palestine. In other matters of personal status, rabbinical courts could assume jurisdiction only with the consent of all parties concerned. Similar jurisdiction was accorded to various Christian and Moslem courts.

Israel maintained essentially the same arrangement with a few alterations. The Druze were recognized in 1957 as a separate religious community and they soon gained authorization for their own religious courts. All Jews without exception were put under the jurisdiction of the Jewish religious authorities. At present, all major religious groups in the country are autonomous in matters of marriage and divorce, and in some cases also in matters of child support and inheritance. The Moslem community enjoys more extensive autonomy than the other communities in these areas.

- **On this, see section iv, below.**

Each community celebrates its own Sabbath and holidays which are legally recognized in Israel as business holidays for that particular community. It can therefore be stated that there is no one established religion in Israel, although there is certainly a strong sense of Jewishness within the country. On the other hand, there has definitely been an established interpretation of Judaism.

- **What does he mean by "an established interpretation of Judaism".**

Israeli Political System: The Israeli political system is based on the principle of proportional representation. At election time, votes from the entire country are tallied up, and any party that succeeds in crossing a threshold set at 1.5% of the popular vote, will be represented in the Knesset in direct proportion to the percentage of votes received. This system facilitates the presence of a large number of small parties and makes it virtually impossible for any one

party to muster the 61 seats (out of 120) required to pass legislation and to govern. The resulting need to form coalitions comprised of several parties gives disproportionate power to smaller parties that are in a position to make or break a potential coalition. Religious parties, which together usually receive some 15 seats in the Knesset, have been partners in almost every coalition, largely due to the fact that their primary concerns have not centered on crucial foreign or economic policy, but rather on the religious nature of the state. This made the religious parties convenient partners who sought "only" to safeguard religious interests and guarantee that the state would maintain a Jewish character. In return for their support, the religious parties were given control of ministries that play an important role in these areas (usually Religious Affairs, Interior and sometimes Education and Culture) as well as coalition backing for legislation of a religious nature. As a result, the Knesset has passed a number of laws designed to ensure Jewish observance of halacha.

- **Over the years, the character of the religious parties in the Knesset has changed, from Religious Zionist (*Mizrachi*) to more haredi groups, including *Shas***

Desire for a Jewish Society: It would be a mistake, however, to conclude that the role of religion in Israel is only a result of a political game with religious parties pressuring the ruling party for concessions. A basic goal for many secular Zionists was the creation of a new Jewish culture. The intention of these Zionists was not to create a society based on religious observance, but rather to develop a new culture based on the interaction with the Land of Israel, the Hebrew language, historical Jewish symbols and ceremonies as well as values and motifs taken from Jewish literature, including sacred literature.

- **Whose approach is he referring to here?**

Traditional Jewish elements would thus become part of the national culture. Due to the intimate connection between Jewish culture and Jewish religion, it is hard to imagine how any Jewish society could be empty of religious elements.

- **In what sense are these elements "religious"?**

Even today, it is doubtful whether most non-observant Israelis would prefer a society devoid of Jewish ritual or symbolism. This is especially the case among those who came from traditional religious backgrounds in Asia and North Africa. Many aspects of Israeli life - Saturday as a day of rest without public transportation in most areas of Jewish residence, Jewish wedding rituals, Yom Kippur observance and customs pertaining to burial and mourning - reflect the general population's acceptance of a certain degree of Jewish observance.

Religious Activism in the Jewish State: It should not be assumed that the religious parties wish only the opportunities and resources necessary to pursue an orthodox life-style. This may be the case in the diaspora, where orthodox Jewry cannot radically affect the surrounding society and has only a limited capability of bringing "wayward" Jews back to the fold. The social and political structures of the state offer a more realistic possibility for creating a religious society. Religious Zionism has also been influenced by messianic ideas associated with Rabbi Abraham Isaac Kook, who contended that the return to Israel was part of the unfolding messianic process. Thus, just as socialist Zionist pioneers saw the Jewish settlement in Palestine as an opportunity to realize their ideological goals, so have religious parties, Zionist and non-Zionist, felt compelled to implement their vision for the Jewish state. This accounts for the desire to pass laws that enforce compliance with religious tradition.

- **What is meant by an "*unfolding* messianic process"? How long might it take to unfold? Is Judaism here presented with a similar problem as Christianity?**

Basic Policy: The Executive of the Jewish Agency spelled out its policy on the issue of religion and state on June 19, 1947, in a letter to the ultra-orthodox Agudat Israel, which, it was hoped, would cooperate in supporting the case put before the United Nations for a Jewish state. Four issues were clarified. The official day of rest in the Jewish state would be on Saturday - the Sabbath for other religious groups would be celebrated on the appropriate days. State kitchens for Jews would be kosher. The Jewish Agency would do all in its power to ensure that matters of personal status would be regulated by Jewish law "to prevent the division of the people." Finally, the autonomy of the different educational systems (including the religious one) was to be continued. This policy came to be known as the "status quo" in religious affairs.

- **What happens to a *status quo* when the balance of forces supporting it changes, but there is no consensus on a new *status quo*?**

Marriage and Divorce: The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 placed matters of marriage and divorce involving Jewish residents or nationals in Israel under the exclusive jurisdiction of rabbinical courts which act in accordance with Jewish law. In other words, Jews in Israel can only marry or divorce according to Jewish religious law as interpreted by orthodox rabbinical courts: civil marriage and divorce

do not exist. The marriage ceremony must be according to Jewish law and religious intermarriage cannot take place. A cohen (member of the priestly class in Judaism) is prohibited from marrying a divorcee or a woman who has converted to Judaism.

- **For the legislation on this, see section above**

Divorce proceedings take place in a rabbinical court, but the court cannot dissolve a marriage. It can only supervise a procedure in which the husband delivers a "get" or bill of divorce to the wife who agrees to accept it. If one of the parties persistently refuses a divorce considered to be warranted by the court, the latter may order the unwilling spouse to carry out the procedure. However, if the order is not obeyed, the divorce does not take effect. In this instance, the situation for men is radically different than that for women. A husband whose wife refuses or is mentally unable to accept the "get", can be simply allowed to remarry without the termination of his prior marriage, since a Jewish man may have more than one wife. The wife of a husband who refuses to deliver the "get" is in a more difficult situation: though the courts may employ severe measures such as imprisonment to compel the husband to comply with the order, until he does so, his wife is regarded as being married and cannot remarry. A woman who is deserted by her husband cannot remarry as long as he is presumed to be alive, unless of course she receives a divorce from him. One of the most painful situations has to do with "mamzerim," the offspring of incestuous or adulterous unions (ie. extra-marital relations involving a married woman). A divorce which is not in accord with Jewish law is not recognized by the rabbinate as a divorce at all, and hence the woman in such a situation would be considered to be still married and any children she had from another man, including her second husband, would also be considered "mamzerim." By the same token, women who are denied a divorce or who have been deserted by their husbands are deterred from having children from other men. Men have less concerns in this regard because a child resulting from relations between a married man and a single woman would not be a "mamzer" due to the fact that in Jewish law, a man can be polygamous. As "Mamzerim" are permitted to marry only other "mamzerim" or converts to Judaism, their chances of getting married in Israel are very slim.

- **This is the problem of the "chained wife" (*agunah*), which can occur also in Diaspora Jewish communities. Why do Orthodox Jews not accept that a marriage may be terminated by a civil divorce?**

Day of Rest: The Provisional Council of State (the predecessor of the Knesset) enacted the Days of Rest Ordinance, 1948, which defined the Sabbath, the High Holidays and the Pilgrimage Festivals (Sukkot, Pesach and Shavuot) as days of rest. Non-Jews were to have the right to observe their own Sabbaths and festivals as days of rest. In 1951, the Knesset passed the Hours of Work and Rest Law which gave workers at least 36 consecutive hours of rest a week. For Jews, Saturday was to be the weekly day of rest and for non-Jews the respective Sabbath day was recognized. Special provisions were made for the supply of essential services on Shabbat.

- **In practice, this operates differently in communities with different religious balances, e.g. stoning of cars on the Sabbath in Jerusalem, permission of buses in Haifa**

Dietary Laws: The Provisional Council of State enacted the Kosher Food for Soldiers Ordinance in 1948 which ensured ritually acceptable food for all Jewish soldiers in the Israel Defense Forces. In 1962, the Knesset passed the Pig-Raising Prohibition Law which stated that "a person shall not raise, keep or slaughter pigs" although exception was made for Christian communities. A recent attempt to prohibit the sale of pork altogether was blocked in Knesset after the 1992 elections. A 1986 law, The Festival of Matzot Law (Prohibition of Leaven), prohibited the display of all leavened products (bread for example) for sale or consumption, in localities with a Jewish majority during the holiday of Passover although since then, the law has fallen into general disuse.

- **Does this amount to religious coercion?**

Who is a Jew?: The issue of "who is a Jew?" arises in cases of marriage, citizenship and registration with the Ministry of Interior. As marriage is under the authority of orthodox rabbinical authorities, the definition of a Jew for the purposes of marriage is strictly in accord with Jewish law: a Jew is someone born of a Jewish mother or someone who has converted to Judaism according to an orthodox interpretation of Jewish law. …

- **Does this mean that one can be a Jew for some purposes in Israel, but not for others?**

From the beginning of 1960, the government's policy was to register as Jews (in both the religious and national-ethnic categories) only those born to a Jewish mother. This was challenged in 1968 by a Jewish naval officer (Major Shalit), who insisted on registering his two children from his non-Jewish wife as having no religion at all but as Jewish in terms of national-ethnic group ("leom"). In its ruling, the Supreme Court disallowed the 1960 policy as not having the sanction of law, and ordered the Registry Office to register the children as demanded by the plaintiff. This led the Knesset in 1970 to amend the Population Registry Law so as to link its definition of a Jew to that of the Law of Return. The latter was also amended and the section defining a Jew was made to read:

"For the purposes of this law, "Jew" means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion."

Other Issues: Other questions continue to be matters of religious contention. The demand for Shabbat closure of major thoroughfares used by non-observant or even non-Jewish individuals, the ultra-orthodox opposition to archaeological excavations in ancient grave sites, the pressure for more stringent abortion laws and the opposition to any recognition of non-orthodox streams in Judaism will no doubt continue to attract considerable attention.

- ***Who* decides these matters in the State of Israel?**

III. D.B. Sinclair, "Defining Conversion to Judaism" (*The Jewish Law Annual* 10 (1992), 267-270)

In Association of Torah Observant Sefaradim — Tenuat Shas et al. v. *Director of the Population Registry at the Ministry of the Interior et al*., Shamgar P. defined the legal position regarding the registration of individuals converted to Judaism in Jewish communities in the Diaspora. According to Shamgar P., the requirements of the Population Registry Law, 5725-1965 were fulfilled for the purpose of establishing conversion to Judaism under this Law, when the convert made a statement to the effect that he or she had been converted to Judaism in a Jewish community in the Diaspora and a document was produced attesting to that conversion. There was no distinction — for the purposes of this Law — between Orthodox, Conservative and Reform communities. The religious validity of the conversion ceremony is not relevant to the registration process, and the only reason for refusing to register a convert who fulfilled the above requirement as a Jew in the population registry would be suspicion of fraud on his or her part.

Barak, Beiski and Bach JJ. all concurred with Shamgar P.

Elon D.P. dissented. According to s.3A(2) of the Population Registry Law, 5725-1965, the definition of "Jew" is the same as in s.4B of the Law of Return, 5750-1950, i.e. a person "born to a Jewish mother, or converted to Judaism and who is not a member of another faith". Section 4B of the Law of Return was legislated by the Knesset in 1970 in response to the decision of the High Court in *Shalit* v. *Minister of the Interior*. In this case, the majority held that the definition of "Jew" was of a subjective nature, and therefore, any *bona fide* declaration by an individual that he was Jewish was sufficient to establish his or her identity under the Law of Return. The legislator's response to this decision came two years later, and it was to define "Jew" in an objective-normative fashion by providing — in s.4B of the Law of Return — a legal criterion for defining Jewish nationality under Israeli law.

The phrase "converted to Judaism" was not coined by the legislator. Its origin lies in Jewish law, and it does not exist in any other normative system. In applying it, therefore, the court must turn to the legal system which gave it birth, i.e. the *halakhah* and its *Talmud*, commentaries, codes and *responsa*. Conversion to Judaism is a precise legal act under Israeli law, the content of which is determined by the *halakhah*. Conversions carried out in Reform Jewish communities lack this quality of legal precision demanded by the Israeli legislator. The content of their conversion ceremonies varies from community to community, and some of the converts in the present case have freely admitted that immersion in a ritual bath was not part of their conversion process. Without such immersion, there can be no halakhically valid conversion. In general, Shamgar P.'s definition is riddled with uncertainty. What constitutes a "Jewish community in the Diaspora"? What is the status of a Jewish community which does not belong to any of the three movements cited above? What is the status of a conversion certificate issued by such a community? The legislator clearly wished to avoid such uncertainty in an area of fundamental constitutional significance, and it would be improper for the court to frustrate this desire for certainty by formulating a very wide and ambiguous test for establishing Jewish identity in the present case.

It is no longer correct to maintain — as it was prior to enactment of s.4B of the Law of Return — that Israeli law recognizes two definitions of "Jew", i.e. the halakhic one for the purposes of personal status, and a secular one for the purposes of the Law of Return, the Population Registry Law and the Nationality Law. In the wake of s.4B, a unified definition of the term "Jew" is now applicable to every aspect of Israeli law and it is the halakhic one. This situation is both correct and desirable with respect to a concept which lies at the very heart of the definition of the State of Israel as a Jewish state.

Another argument in support of a halakhic definition of conversion in the Law of Return is the fact that the first criterion in s.4B, i.e. being born to a Jewish mother, is purely halakhic in nature. This argument was expressed by Silberg J. as follows:

> S.4B of the Law of Return stipulates two tests of Jewish identity. One is birth to a Jewish mother and the other is conversion to Judaism. The first is clearly a halakhic criterion ... the second must, therefore, also be a halakhic one ... my conclusion is that the phrase "converted" is technical, legal and halakhic, and can only be

interpreted in the light of the *Talmud* and its commentaries throughout the ages. Accordingly, a Jewish convert is only someone who underwent circumcision [males only] and ritual immersion.

These words, which were written in 1972, are especially significant in the light of the fact that some ten years later, the Reform movement decided that a child born to a Jewish father but not to a Jewish mother was still Jewish. This drastic deviation from traditional *halakhah* is at complete variance with s.4B, which is based upon the halakhic principle of matrilineal descent in the determination of Jewish identity.

Now, it is true that the Knesset rejected the addition of the phrase, "according to the *halakhah*" to the conversion criterion in s.4B of the Law of Return. It did so, however, because of a desire to avert the great public controversy that such a step would have provoked in Israeli society. Consequently, it left the matter in the hands of the judiciary. The legislator nevertheless maintained the word "converted" in s.4B with all the halakhic implications which this words carries. Surely this is an indication that the Knesset did not reject the notion of a halakhic definition of conversion to Judaism in the Law of Return. It is also noteworthy that the phrase, "converted according to the accepted norms of any of the contemporary streams of Judaism", which was suggested in the parliamentary debate prior to the passage of the Law of Return, was not accepted by the Knesset. Clearly, it is the halakhic definition of conversion to Judaism which was actually legislated by the Knesset, even though many of its members may have been of a different mind when they were voting for the Law.

It is also true that the population register is not valid evidence of personal status, and the legal significance of the definition of "Jew" under the Population Registry Law, 5725-1965, is therefore of marginal significance only. It would, however, be incorrect to dismiss the purely national aspect of Jewishness as an irrelevancy. The powerful emotions unleashed in the present proceedings are sufficient testimony to the significance of the definition of Jew in these purely national laws for many people. The issue of Jewish identity, even in the context of a secular law, is still of vital significance for the Jewish people, both in Israel and in the Diaspora.

Elon D.P. concluded with an impassioned appeal for the acceptance of an objective-normative approach to Jewish identity in the legal system of the State of Israel, and the preservation of a unified criterion of Jewish identity which could only be achieved by following the halakhic pattern of conversion procedures.

The majority decided against the opinion of Elon D.P. and concurred in the decision of Shamgar P.

IV. D. B. Sinclair, "Messianic Jews and the Law of Return", *The Jewish Law Annual* X (1992), 259-263 (on a later case in the Israel Supreme Court involving "Messianic Jews")

How does the approach taken by the judges differ from that in the "Brother Daniel" case?

In *Beresford and Another* v. *Minister of the Interior* (1989) the issue before the Court was the eligibility of Messianic Jews to enter Israel under the Law of Return, 5710-1950. According to s.4B of this Law — as amended in the Law of Return (Amendment no. 2), 5730-1970 — Israeli citizenship is granted as of right to any Jew, i.e. someone born to a Jewish mother, or a convert to Judaism, provided that he or she is not a "member of another religion". The appellants were Messianic Jews whose beliefs included the divinity of Jesus and his messianic role. The respondent argued that these beliefs rendered the appellants members of "another religion" for the purposes of citizenship under the Law of Return. The Court was also called upon to consider the proposition that evidence of the appellants' baptism by a Christian clergyman would be sufficient grounds to establish their membership in "another religion" irrespective of their subjective religious beliefs.

Elon D.P. began his judgment with a discussion of the criteria for defining membership of another faith in the context of the Law of Return. In *Dorflinger* v. *Attorney General*, Witkon J. held that these criteria were those dictated by the other faith. One of the main reasons for adopting this position was the fact that the Jewish religion defined a Jew as someone born to a Jewish mother, and refused to recognize the validity of conversion to another religion. Since this definition was already covered in the first part of s.4B, the phrase "and who is not a member of another religion" must refer to the identity criteria of that faith. Elon D.P. took issue with Witkon J.'s approach and argued that membership of another faith ought to be determined in accordance with criteria drawn from Jewish sources. The issue of the status of an apostate in the Jewish tradition was much more complex than the simple proposition of non-recognition of conversion articulated by Witkon J. An apostate born to a Jewish mother is deprived of a whole range of socio-legal rights, which results in a serious weakening of his or her affiliation with the family, the community and the entire nation of Israel.

A prime illustration of this weakening is the tradition, dating from Gaonic times, that an apostate does not inherit his father. According to R. Natronai Gaon, the exclusion of an apostate from the laws of inheritance is derived from the archetypal succession law in the Jewish tradition, i.e. the inheritance of the Land of Israel by the

progeny of Abraham:

> An apostate does not inherit from his father ... since he has lost the sanctity of his lineage ... for it is written: 'And I will give to you and to your seed after you the land of your sojournings.' One who possesses sanctity of lineage inherits; an apostate does not.

R. Solomon b. Duran, writing in fifteenth-century Algiers, concludes a lengthy discussion of the question of inheritance by an apostate as follows:

> Now that it has become an established custom throughout Israel to exclude an apostate from succeeding his father, the custom gains the force of law and no Jewish apostate is permitted to inherit from his relatives.

Another area in which an apostate is cut off from the family and community is in the context of the laws of mourning. R. Asher b. Jehiel, who lived in thirteenth-century German and Spain, was asked whether mourning rites should be performed for an apostate. R. Asher replied in the negative on the grounds that a person who "separates himself from the congregation" does not merit the performance of mourning rites on his behalf.

It is also noteworthy that in a fifteenth-century German *responsum*, an apostate is removed from the category of "Jew":

> It once happened that a young man took a vow not to gamble with any Jew. He asked the rabbi if he could gamble with an apostate living in Neustadt. The rabbi gave him permission since an apostate is not called a Jew. Although the *Talmud* states that a "sinful Israelite remains an Israelite," he is nevertheless not called a Jew, and the vow does not, therefore, apply to him.

The Talmudic statement regarding a "sinful Israelite" refers to the apostate's obligations in the area of personal status, i.e. intermarriage, divorce, levirate marriage and halitsah, and not to socio-legal rights, e.g. inheritance and mourning.

An accurate formulation of the halakhic status of an apostate is provided in the following excerpt from the commentary of R. Menahem Hame'iri, one of the outstanding Medieval Talmudists, who lived in Provence in the thirteenth century:

> Any Jew who leaves the Jewish religion and enters another faith is considered by us as a member of that faith in all respects except for marriage and divorce.

Elon D.P. concluded that since citizenship was a socio-legal right, it would not be granted to an apostate under Jewish law. It was therefore possible to argue that the requirement that a Jew under the first part of s.4B not be a "member of another religion" ought to be interpreted in terms of the faith criteria of Judaism and not of the other religion.

Other problems arising from the definition of "another religion" in terms of that religion are the difficulties of establishing the identity criteria of other faiths, especially if they lack simple institutional tests such as baptism. There is also the problem of conflicts between the identity criteria of Judaism and those of the other religion. Under Jewish law, the child of a Moslem father and a Jewish mother is Jewish: Islamic law, however, regards such a child as a Moslem. How is the Court to decide in such a case? Is it conceivable that in such a case, the child would not be recognized as a Jew under the Law of Return? Clearly, such a result is entirely unacceptable. According to Elon D.P., therefore, membership in another religion is to be defined in terms of Judaism and Jewish history.

The second point made by Witkon J. in the *Dorflinger* case was that the nature of the test of membership in another religion was theological rather than institutional. The mere fact of baptism did not strip a Jew of his identity unless it was accompanied by an acceptance of Christian religious doctrine. In that case, the petitioner believed in the divinity of Jesus and was therefore excluded from the definition of Jew under the Law of Return, even though she had not been baptized. In the present case, therefore, evidence of baptism was irrelevant. The only question was the compatibility of Beresford's' Messianic beliefs with a Jewish definition of membership in another faith.

Elon D.P. held that the appellant's belief in the divinity of Jesus constituted a rejection of two thousand years of Jewish history, i.e. from the split between Judaism and Christianity in the second century, until the present day. The fact that certain types of Messianic Jews existed in Second Temple times was irrelevant for the purpose of defining Jewish identity under the modern Law of Return.

In the final analysis, the petition failed both in terms of the approach adopted by Witkon J. and that articulated by Elon D.P. himself. Belief in the divinity of Jesus is the hallmark of membership in "another religion" according to both approaches.

Barak J. concurred with Elon D.P. in rejecting the petition; he did, however, dissent in relation to the criteria used by Elon D.P. for defining Jewish identity for the purposes of the Law of Return. Elon D.P.'s definition

constituted a departure from the secular one applied by the Court in the celebrated case of *Oswald Rufeisen* v. *Minister of the Interior.* In this case, the Court had ruled that Jewish identity in the context of the Law of Return was to be defined in terms of secular Jewish history and culture. Elon D.P.'s use of "Judaism" in his definition of s.4B, and his references to Jewish law, constituted a departure from this precedent. Moreover, Elon D.P.'s approach — based as it was on Judaism and Jewish law — was a static one which would not admit of any change in the future. The secular approach adopted in the *Rufeisen* case was more dynamic in nature and was capable of undergoing change in the course of time. The substance of Barak J.'s definition of Jewish identity for the purposes of the Law of Return was the existence of an "effective link" with another religion. The existence of such a link would constitute, according to the majority of secular Israelis today, a bar to secular Jewish identity under the Law of Return. The petition was, therefore, to be ejected. (Halima J. concurred.)

V. *Kitan* v. *Weiss,* C.A. 350/77, 33(2) P.D. 785, *per* D.B. Sinclair, "Beyond the Letter of the Law" *The Jewish Law Annual* 6 (1987), 203-206 (footnotes omitted)

In this case, the appeal was against the decision of the District Court awarding the respondent damages for the loss of her husband, who was shot to death by a watchman employed in the appellant's textile factory. At the time of the shooting, the watchman was in a state of mental depression, and was drinking heavily as a result of the loss of his son in an automobile accident. The respondent's husband, a lawyer, had represented the watchman in a civil suit against the driver responsible for the accident. The driver had been acquitted of the criminal charges, and the compensation paid by his insurance company fell well below the amount expected by the watchman. Owing to his heavy drinking, the watchman's economic situation had deteriorated, and he imagined that the blame lay with the respondent's husband who had failed to obtain sufficient compensation from the insurance company. Taking the gun provided by the appellant in his capacity as watchman, he shot the respondent's husband and killed him.

The District Court found that the appellant ought to have foreseen the potential danger in the watchman's depressed mental state and heavy drinking, and to have taken steps to relieve him of his weapon. Having failed to do so, the appellant was liable to pay compensation to the respondent and her family for the loss of her husband. It was, however, established that the watchman's license to act in this capacity and to carry a gun was entirely in order at the time of the shooting.

All three justices of the Supreme Court concurred in allowing the appeal, and the decision of the District Court was reversed on the grounds that there was insufficient evidence to establish the existence of the necessary chain of causation between the appellant's responsibility for its watchman, and the watchman's shooting of the respondent's husband. Since the watchman's license was in order at the time of the shooting, the appellants had fulfilled their legal obligations concerning the safety of their watchman, and were therefore not liable to pay the respondent any compensation whatsoever.

Elon J., commenting on the appellant's offer to pay a further voluntary amount in compensation to the respondent and her family, beyond the sum already paid, observed that this type of offer corresponds to the institution of "beyond the letter of the law" in Jewish law. This institution is particularly relevant in the area of tort law, where the Talmud itself introduces the concept of "Heavenly law" in order to bridge the gap between the legal and the moral aspects of responsibility for damage to both one's fellow man and his property. The rule that a person occasioning damage to another is "exempt from human law but liable according to the law of Heaven" applies to cases such as breaking down a fence in front of a neighbour's animal, and hiring false witnesses to testify against him. In both these cases, and in other instances of "Heavenly law" cited in the Talmud, the common factor is the absence of any direct causal connection between the act done and the resulting damage. According to Elon J., the rule requiring the person responsible to provide compensation for indirect damage of this type is a manifestation of the more general obligation to go "beyond the letter of the law" which, on occasion, may be translated by the Sages into positive law.

In the context of the Israeli legal system, Elon J. suggested that the judge ought to take an active part in persuading the litigants to follow their moral obligations and to go "beyond the letter of the law". Such a step would be in accordance with the spirit of Jewish law, whereby:

> there is a special reciprocal tie between law and morality ... which finds its expression in the fact that from time to time Jewish law, functioning as a legal system, itself impels recourse to a moral imperative for which there is no court sanction, and in doing so sometimes prepares the way for conversion of the moral imperative into a fully sanctioned norm.

Thus, the judge is required to act as the arbiter of both the legal and the moral obligations of the parties to the case.

This approach was severely criticized by Shamgar J., who gave the leading judgment for the Court. In

addition to factors such as the lengthy period of time normally elapsing between the incident in question and the court hearing, the systematic blurring of the border between law and morality in a system of a positive law such as Israeli law is totally unacceptable, the results of such an approach being only inequality and unfairness.

In his reply to this criticism, Elon J. observed that he did not have in mind any systematic introduction of moral obligations into the judicial process, but only that in special circumstances, the judge ought to use his discretion in order to request of the parties to act in accordance with moral principles, in the same way that he uses his discretion with respect to concepts such as "public interest" and "good faith" in the Contracts (General Part) Law, 5733-1973. Here, too, the judge weighs up "moral", rather than strictly "legal" principles, and nobody suggests that he is being discriminatory and unfair.

There is nevertheless a clear distinction between advising parties to a case as to their moral obligations in general, and interpreting a concept such as "public interest" and "good faith" in the context of an official piece of legislation, such as the Contracts Law. It is still open to question, therefore, whether the blurring of the border between morality and law, even in the informal manner suggested by Elon J., is really suitable for a positive system such as modern Israeli law. The general trend in this type of system is to restrict the exercise of judicial discretion, and in cases where this is unavoidable, to provide some basis for it — usually in the form of a standard concept — in the body of the law. The application of judicial discretion with respect to well-tried concepts explicitly incorporated into the law is, it is submitted, very different, and in positivist terms, far more acceptable, than the exercise of the general moral discretion suggested by Elon J.

VI. D.B. Sinclair, "Protection of Privacy" (*The Jewish Law Annual* 11 (1994), 233-237, footnotes omitted).

The respondent in *Military Appeals Court et. al.* v. *Vaknin* was incarcerated in a military prison, and his guards forced him to drink salt water in order to make him vomit up packages of dangerous drugs which they suspected him of having swallowed. The three packages of drugs subsequently vomited up by the respondent were then used in evidence against him. The respondent objected to the use of the packages as evidence on the grounds that they were obtained "by the commission of an infringement of privacy" and hence, were not to be "used as evidence in court" under s.32 of the Protection of Privacy Law, 5741-1981. The legal basis for the respondent's argument that forced-feeding of salt water constituted an infringement of privacy was s.2(1) of this Law, which provides as follows:

2(1) Infringement of privacy is any one of the following:

Spying on or trailing a person in a manner likely to harass him, or any other harassment.

According to the respondent, the phrase, "or any other harassment" included forcing him to drink salt water and hence, the packages of drugs obtained as a result of this infringement of privacy could not be used as evidence against him.

The appellants argued that the phrase, "or any other harassment", was confined to infringements similar in nature to "spying on or trailing", and did not include physical assaults or any other act which constituted a crime under Israeli law. This narrow interpretation of the phrase was supported by the claim that a wide understanding of "any other harassment" would effectively exclude all illegally obtained evidence from being used as evidence in court. Although this was the position under American law, i.e. the so-called "fruit of the poisonous tree theory", it was not accepted in the United Kingdom, and did not correspond to the situation under Israeli law. It would not be proper for the court to read a major change in Israeli evidence law into this phrase without a clear sign from the legislature that such a change was intended.

In the first hearing before the Supreme Court, the majority accepted the respondent's argument and declared that the drugs were inadmissible evidence. The minority, however, rejected the wide approach to the phrase, "or any other harassment" in the Protection of Privacy Law, upon which the decision of the majority was based. The drugs could, therefore, be used in evidence against the accused. The wide approach was incorrect because it opened up the way to the "fruit of the poisonous tree theory", which, if adopted, would constitute a major change in Israeli evidence law, and no such step should be taken by a court without a strong indication that the legislature favoured such a change.

In the Further Hearing, the majority reversed the earlier decision of the Court and cancelled the order declaring the drugs inadmissible evidence. The view of the minority was accepted, and the ambit of s.2(1) of the Protection of Privacy was confined to violations of privacy peculiar to the modern age, such as sophisticated eavesdropping techniques and media hounding.

In supporting the majority decision, Elon D.P. observed that the aims of the Protection of Privacy Law were outlined in its preamble, and that they clearly supported the narrow interpretation of "any other harassment". He also pointed out that since the preamble made explicit reference to the long tradition of protection of privacy in

Jewish law, it was only right that in cases such as the present one, the court should turn for guidance to the sources of the Jewish legal tradition. This was also the direction in which the Foundations of Law Act, 5740-1980 directed the court in cases in which no answer was available in the existing law.

Jewish law prohibits any unauthorized betrayal of a person's confidence On the basis of this prohibition, it is forbidden to open a person's mail, or to engage in any other activity which might lead to obtaining unauthorized information about that person. It is a particularly reprehensible offence to open another person's correspondence in order to obtain access to commercial secrets.

There are, however, circumstances in which this absolute ban on the infringement of privacy is lifted, e.g. where it is necessary to invade a person's privacy in order to gather evidence regarding the commission of a serious crime. Similarly, it is permitted to open another person's mail in order to forestall the commission of a crime. A balance must therefore be struck between the requirements of confidentiality and the need to infringe privacy in the context of criminal wrongdoing.

Domestic privacy is strongly emphasised in Jewish law. A person is not to "enter his fellow's house without permission" and this even applies to "one's own home." Special protection is afforded to a debtor who is required to provide a security for his debt:

> When you lend your fellow a loan of any thing you shall not go to his house to fetch his pledge. You shall stand outside, and the man to whom you are lending shall bring the pledge out to you.

This provision is rather ideal, and in the course of time, ways were found for the creditor to invade the debtor's privacy in order to obtain the necessary security for the debt. According to a number of Sages, this Biblical rule only applied to the creditor personally: it did not apply to the creditor's agent or to an officer of the court. Although this limitation was not codified by Maimonides or R. Joseph Karo, it was widely accepted by many Medieval authorities. It serves as a fine illustration of the delicate balance achieved by Jewish law between the need to protect the privacy of the debtor and creditor's right to secure his debt.

An important aspect of privacy law in the Jewish tradition is the principle that a person has a right to be protected against being viewed by others in his or her own residence (*hezek reiyah*). This right is traced to the famous utterance of Bilam: "How goodly are your tents, O Jacob, and your dwellings O Israel." This statement is preceded by the verse: "And he [Bilam] saw Israel dwelling in its tents according to its tribes." The Rabbis link the two verses as follows:

> This indicates that he saw that the doors of their tents did not exactly face one another, whereupon he exclaimed: Worthy are these that the Divine Presence should rest upon them!

Preservation of domestic privacy was, therefore, the key to the special spiritual distinction conferred upon the Israelites by God.

The preservation of domestic privacy is mandated in all the classical codes of Jewish law, and applies not only to a person's house but also to his courtyard. The Mishnaic ruling applicable to tenants living in the same courtyard is as follows:

> In a courtyard which he shares with others, a man should not open a door facing another person's door nor a window facing another person's window.

According to Elon D.P., the provisions of Jewish law in this area constitute an ideal source for interpreting the Protection of Privacy Law, and there is ample indication that the legislature intended the judiciary to use Jewish law in the interpretation of its provisions.

4. Further Reading

Cohn, H.H., "Jewish Law in Israel", in *Jewish Law in Legal History and the Modern World*, ed. B.S. Jackson (Leiden, E. J. Brill, 1980), 124-46

Elon, M., *Jewish Law: History, Sources, Principles* (Philadelphia, JPS, 1994), Vol IV

Englard, I., *Religious Law in the Israel Legal System* (Hoboken NJ: Ktav, 1975)

Jackson, B.S., **"Who is a Jew?: Some Semiotic Observations on a Judgment of the Israel Supreme Court", *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* VI/17 (1993), 115-146.**

Jackson, B.S., (second half of) "A Tale of Two Prodigals" (Inaugural Lecture), at **https://www.youtube.com/watch?v=ZjaUU-d2BuE**

Landau, A.F., *The Jerusalem Post law Reports* (Jerusalem: Magnes Press, 1993) for the text of the Brother Daniel judgments

Maoz, A., ed., *Israel as a Jewish and Democratic State* (Liverpool: Deborah Charles Publications, 2010; Jewish Law Association Studies, XXI)

Silberg, M., *Talmudic Law and the Modern State* (New York: Burning Bush Press, 1973)

Sinclair, D.B., "Jewish Law in the State of Israel", in Hecht, Jackson, Piattelli, Passamaneck and Rabello, eds., *An introduction to the History and Sources of Jewish law* (Oxford: Clarendon Press, 1996), 397-419

Sinclair, D.B., ed., *Law, Judicial Policy and Jewish Identity in the State of Israel* (Binghamton NY: Global Academic Press 2000; Jewish Law Association Studies, XI)

5. Questions for tutorial next week

1. To what extent is the law of the State of Israel based on Jewish Law?
2. What does the case of Brother Daniel tell us about the role of Jewish law in the State of Israel, taking account also of later developments: the 1970 Amendment to the Law of Return and later cases on Messianic Jews.

Week 5: Law and Religion in England, with particular reference to Jewish Issues

1. Themes:

1 Issues decided in legislation and the courts
- (a) Status of religious marriages: The Marriage Act 1836 named the President of the Board of Deputies of British Jews as the authority for certifying Marriage Secretaries of Synagogues: for the current position, see 2(a)(i) below. On the history of the Board see http://www.bod.org.uk/live/content.php?Category_ID=14
- (b) Validity of restrictions in wills and trusts: see further Herman ch.3
- (c) Freedom of Religious Expression
  - (i) European Convention of Human Rights (incorporated into English Law by the Human Rights Act 1998), article 9: **Texts**
- (d) Criminal Law; the Racial and Religious Hatred Act 2006: **Texts**
- (e) Discrimination Law
  - (i) The Race Relations Act 1996 as protecting Jews from discrimination: the *Mandla* v. *Dowell Lee* definition of ethnicity: **Texts**
  - (ii) The Race Relations Act 1996 as preventing Jews from discriminating against other ethnic groups or Jewish sub-groups: the JFS case: see detailed discussion in Reading below

2 The Status of Jewish Courts (*batei din*)
- (a) Marriage and Divorce
  - (i) The civil registration of synagogue marriages: the Marriage Act 1949: **Texts**
  - (ii) Divorce
  - (iii) The Divorce (Religious Marriages) Act 2002: **Texts**
- (b) Under the Arbitration Act 1996
  - (i) Practical Implications: need for a deed of binding arbitration
  - (ii) The special position of family law: the principle that the jurisdiction of the (civil) family law courts should not be ousted: see Reading A, below, at n.8.
  - (iii) Implications for matters 'ancillary' to divorce
- (c) The position of Shari'a Councils
  - (i) In the UK
  - (ii) The Ontario controversy: see Reading A, below (where **events in Ontario** is highlighted)

3 The Archbishop of Canterbury's 2008 Lecture: see further **Jackson, "'Transformative Accommodation' and Religious Law", *Ecclesiastical Law Journal* 11 (2009), 131-53**
- (a) Criteria for "overlapping jurisdictions"
  - (i) the meaning of "transformative accommodation": **Texts**
  - (ii) "accommodation" with religious law should not deprive citizens of rights which they have under state law
  - (iii) "Christians cannot claim exceptions from a secular unitary system on religious grounds (for instance in situations where Christian doctors might not be compelled to perform abortions), if they are not willing to consider how a unitary system can accommodate other religious consciences" (AoC)
- (b) To what extent can Jewish law "accommodate"
  - (i) The principle of *dina demalkhuta dina* ("the law of the state is law"): see Readings, below, at n.11
  - (ii) The distinction between *mamona and issura*: Week 3, C(vi); see Reading A, below, at nn.11-15
  - (iii) The motivation for Rabbenu Gershom's ban on polygamy: Week 3, F(ii); see Reading A, below, at nn.16-19
  - (iv) R. Herzog's attempt to "accommodate" the Jewish law of succession: Week 3, G(iv); see Reading A, below, at nn.20-25

(c) To what extent can English law "accommodate"
  (i) The 'one law' principle (and Baroness Cox's Bill)
  (ii) Existing (and proposed) religious exemptions: *kashrut*, circumcision
  (iii) The distinction between direct and indirect discrimination (the latter justifiable if is "a proportionate means of achieving a legitimate end")
  (iv) Issues of Human Rights

4 The arguments in 3 as applied to the JFS case (see Reading A below, from text at n.33 to the end) and **Jackson, "Jewish Law and State Law: "Formative Accommodation" and the JFS case in England", in *The Fordham Conference Volume*, ed. D.B. Sinclair and L. Rabinovich (Liverpool: The Jewish Law Association, 2012; Jewish Law Association Studies XXIII), 76-92.**
  (a) The 'one law' principle [or a specifically Christian conception of religion:: Lord Brown]: text at nn.53-54
  (b) The distinction between direct and indirect discrimination:) text at nn.56-59
  (c) could Jewish law "accommodate" (the *kiruv* argument)?: text at nn.48-49
  (d) could English law "accommodate" by granting an exemption (from the law as laid down by the Supreme Court)?: text at nn.61-63
  (e) the practical outcome of the JFS case:): religious practice test or synagogue membership?: text at n.60

2. Texts for discussion

1(c)(i): European Convention on Human Rights, Article 9

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

- **How does this function in France?!**

1(d): Racial and Religious Hatred Act 2006 (adding the following clauses to the Public Order Act 1986):

29a In this Part "religious hatred" means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

- **Is this an adequate definition (cf. that under the Race Relations Act, below)?**

29b A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.

1(e)(i): Race Relations Act 1996, s.1

A person discriminates against another ... if – (a) on racial grounds he treats that other less favourably than he treats or would treat other persons"

"racial grounds" is defined as including "colour, race, nationality or ethnic or national origins.

1(e)(i): The definition of an ethnic group (deriving from *Mandla* v. *Dowell Lee* 1983)

"For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered

people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups …"

2(a)(i): The civil registration of synagogue marriages: the Marriage Act 1949

This legislation authorises the appointment of Jewish officials as civil registrars, so that the civil marriage is traditionally performed in synagogue (immediately after the religious ceremony, conducted "according to the usages of the Jews"), by signing the civil register.

- **Thus, it is the State which defines the procedures for a civil marriage; it does not simply recognise a religious marriage. The religious ceremony itself is not sufficient if the other provisions of the Act, regarding registration and certification, are not complied with.**

According to s.26(1)(d), the procedure applies to "a marriage between two persons professing the Jewish religion according to the usages of the Jews". S.53(c) provides that such marriages shall be registered "by the secretary of the synagogue of which the husband is a member". Such a secretary is, however, to be certified by the President of the Board of Deputies (s.67(a)) as "the secretary of a synagogue in England of persons professing the Jewish religion", the West London synagogue for Reform Jews and the Liberal Jewish Synagogue, St. John's Wood for Liberal Jews.

- **What group is missing?**
- **Why this should not be extended to Muslims?**
- **Is the State, through s.67, in effect defining membership of religious groups?**

2(a)(iii): The Divorce (Religious Marriages) Act 2002

(1) In the Matrimonial Causes Act 1973 (c. 18), insert-

"10A Proceedings after decree nisi: religious marriage

(1) This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned-

(a) were married in accordance with-

(i) the usages of the Jews, or

(ii) any other prescribed religious usages; and

(b) must co-operate if the marriage is to be dissolved in accordance with those usages.

(2) On the application of either party, the court may order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court.

(3) An order under subsection (2)-

(a) may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so; and

(5) The validity of a decree of divorce made by reference to such a declaration is not to be affected by any inaccuracy in that declaration.

- **What are the weaknesses in this procedure?**
- **For the full Act see http://www.legislation.gov.uk/ukpga/2002/27/pdfs/ukpga_20020027_en.pdf**

3(a)(i): "Transformative accommodation": the AoC on Ayelet Shachar

It would be a pity if the immense advances in the recognition of human rights led, because of a misconception about legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties and the law's function was accordingly seen as nothing but the securing of those liberties irrespective of the custom and conscience of those groups which concretely compose a plural modern society.

- **What does she mean by this? How does it relate to 'one law' arguments?**

Certainly, no-one is likely to suppose that a scheme allowing for supplementary jurisdiction will be simple, and the history of experiments in this direction amply illustrates the problems. But if one approaches it along the lines sketched by Shachar in the monograph quoted earlier, it might be possible to think in terms of what she calls 'transformative accommodation': a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that 'power-holders are forced to compete for the loyalty of their shared constituents'. This may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution – the main areas that have been in question where supplementary jurisdictions have been tried, with native

American communities in Canada as well as with religious groups like Islamic minority communities in certain contexts.

- **Note 'carefully specified matters'. What area is *excluded* (by omission)?**

In such schemes, both jurisdictional stakeholders may need to examine the way they operate; a communal/religious *nomos*, to borrow Shachar's vocabulary, has to think through the risks of alienating its people by inflexible or over-restrictive applications of traditional law, and a universalist Enlightenment system has to weigh the possible consequences of ghettoising and effectively disenfranchising a minority, at real cost to overall social cohesion and creativity.

- **Is the primary problem of religious law that of "alienating its [own] people by inflexible or over-restrictive applications of traditional law?"**

Hence '*transformative* accommodation': both jurisdictional parties may be changed by their encounter over time, and we avoid the sterility of mutually exclusive monopolies.

- **So secular and religious law are expected to converge as a result of this process??**

3. Readings:

A. Bernard S. Jackson, "Jewish Law and State Law: "Transformative Accommodation" and the JFS case in England" (see also pdf of full published version)

Introduction

In February 2008, the Archbishop of Canterbury delivered a lecture entitled "Civil and Religious Law in England: a Religious Perspective" at the Royal Courts of Justice.[1] Much media attention was directed to the Archbishop's alleged argument in favour of the "unavoidability" of the application of *Shari'a* law (a claim really constructed by the BBC's interviewer[2]). Dr. Williams does indeed speak about the problem of jurisdiction, but in the lecture did not endorse any idea of "parallel" jurisdictions, but rather proposed that we consider the possibility of (what his web site later termed) "overlapping" jurisdictions.[3] The Archbishop, however, gave no specific indication of what (if anything) he had in mind as to the working relationship between these jurisdictions. Most likely, he simply wanted to open up the question. He did, however, introduce into his discussion a highly interesting and potentially fruitful model for the possible relationship between secular law and the *Shari'a*. Citing a book by an Israeli scholar teaching in Canada,[4] he observed:

> It would be a pity if the immense advances in the recognition of human rights led, because of a misconception about legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties and the law's function was accordingly seen as nothing but the securing of those liberties irrespective of the custom and conscience of those groups which concretely compose a plural modern society. Certainly, no-one is likely to suppose that a scheme allowing for supplementary jurisdiction will be simple, and the history of experiments in this direction amply illustrates the problems. But if one approaches it along the lines sketched by Shachar in the monograph quoted earlier, it might be possible to think in terms of what she calls 'transformative accommodation': a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that 'power-holders are forced to compete for the loyalty of their shared constituents'. This may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution – the main areas that have been in question where supplementary jurisdictions have been tried, with native American communities in Canada as well as with religious groups like Islamic minority

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1 Full text now at http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective.

2 Full text at http://www.archbishopofcanterbury.org/1573.

3 Full text at http://www.archbishopofcanterbury.org/1581. In fact, the expression he used most frequently in the lecture was "supplementary" jurisdictions.

4 Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001). See also her "Religion, State, and the Problem of Gender: Re-Imagining Citizenship and Governance in Diverse Societies", University of Toronto Legal Studies Series Research Paper 921290, downloadable at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921290.

communities in certain contexts. In such schemes, both jurisdictional stakeholders may need to examine the way they operate; a communal/religious *nomos*, to borrow Shachar's vocabulary, has to think through the risks of alienating its people by inflexible or over-restrictive applications of traditional law, and a universalist Enlightenment system has to weigh the possible consequences of ghettoising and effectively disenfranchising a minority, at real cost to overall social cohesion and creativity. Hence '*transformative* accommodation': both jurisdictional parties may be changed by their encounter over time, and we avoid the sterility of mutually exclusive monopolies.

In short, "transformative accommodation" implies a willingness on both sides to contemplate internal change (resulting in part from mutual influence), in competing for the loyalty of subjects who are simultaneously members of both civic and religious communities.

The lecture prompted an enormous controversy, and calls for the Archbishop's resignation.[5] If it had been designed to promote an increase in religious jurisdiction, it was counter-productive. This, indeed, might well have been predicted, in the light of **events in Ontario** just a few years earlier, where street protests against a proposal to allow Islamic couples to have recourse to private tribunals applying Shari'a law in matters ancillary to divorce, in order to obtain legally binding decisions under the authority of Ontario's Arbitration Act, ultimately prompted legislation in 2006 banning any use of arbitration by religious courts in matters of family law.[6] Since this was a practice already adopted by Orthodox Jews and Catholics, the politicisation of the issue in fact resulted in a setback for religious jurisdictions.[7] In England, the official courts (*batei din*) of the mainstream Jewish community have sought to avoid this danger. Indeed, the London Beth Din, though centrally involved in the process of granting Jewish religious divorces (by the *get* procedure), will not entertain ancillary issues, since it upholds the principle that the jurisdiction of the family law courts is not to be ousted.[8] Nevertheless, the Archbishop's speech prompted one Jewish religious judge to argue for an extension of *bet din* jurisdiction in such ancillary matters.[9] His view was publicly opposed by a member of the Manchester Beth Din, more sensitive to the current political climate.[10]

Transformative Accommodation in the History of Jewish Law

The issue is not a new one. We may draw on the history of Jewish law for concepts and examples which may assist in clarifying what is involved.

A famous principle found in the Talmud is *dina demalkhuta dina*: "the law of the land is (recognised as part of Jewish) law".[11] The primary context there is taxation, but more broadly it is taken to apply to "monetary" (*mamona*) as opposed to "religious" (*issura*, literally "prohibition") matters. In this way, Jewish law staked out a boundary between those issues on which it was prepared to "accommodate" and those issues which were non-negotiable. For any system of religious law, there must be matters of religious principle which are sacrosanct, while

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5 See, e.g., "Archbishop of Canterbury warns sharia law in Britain is inevitable", *The Independent*, 8th Feb. 2008 (http://www.independent.co.uk/news/uk/home-news/archbishop-of-canterbury-warns-sharia-law-in-britain-is-inevitable-779798.html); "Sharia law row: Archbishop is in shock as he faces demands to quit and criticism from Lord Carey", *The London Evening Standard*, 9th Feb. 2008 (http://www.thisislondon.co.uk/news/article-23436203-sharia-law-row-archbishop-is-in-shock-as-he-faces-demands-to-quit-and-criticism-from-lord-carey.do).

6 Family Statute Law Amendment Act 2006.

7 For the background. see Christopher L. Eisgruber and Mariah Zeisberg, "Religious Freedom in Canada and the United States", *I-CON* 4/2 (2006), 244-268, at 265f. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914991).

8 The same principle was affirmed by Minister of Justice Jack Straw in Parliament on 24th November 2008, in relation to Muslim arbitration in such matters: "Arbitration is not a system of dispute resolution that may be used in family cases. Therefore no draft consent orders embodying the terms of an agreement reached by the use of a Sharia council have been enforced within the meaning of the Arbitration Act 1996 in matrimonial proceedings."

9 Dayan Lichtenstein, of the *bet din* of the Federation of Synagogues, commenting in *The Jewish Chronicle* of 14 February 2008 on the Archbishop's argument, observed: "Although commercial disputes, when the parties have signed a deed of submission to arbitration by the beth din, are enforced by the English courts, marital issues are not. The beth din's authority to deal with assets in divorce proceedings is doubtful and it has no say over custody of children — although a rabbi who lives in the Orthodox Jewish world is better placed to understand its nuances and to rule on details of access and contact than an English family court judge."

10 Dayan Berger, also writing in *The Jewish Chronicle* of 14 February 2008.

11 *Nedarim* 28a, *Gittin* 10b, *Baba Kamma* 113a, *Baba Batra* 54b-55a; see the article of Shmuel Shilo in *Encyclopedia Judaica* (Jerusalem: Keter, 1973), vol.6, cols.51-55.

other matters, albeit developed within the religious system and informed by religious principles, may in appropriate circumstances be subject to accommodation.

Nor is it surprising that the exact borderline may be subject to dispute and change. There has been considerable debate, for example, over whether the Jewish law of wills is subject to *dina demalkhuta dina*, the dominant contemporary opinion being that it is not.[12] In the 1920's Rav Isaac Herzog, while Chief Rabbi of Ireland, still thought the matter sufficiently open to seek the opinion of Rav Abraham Isaac Kook, the Ashkenazi Chief Rabbi of Palestine under the British Mandate.[13] Conversely, a surprising aspect of marital law, the husband's obligation to have sexual relations with his wife, has sometimes been classified as "monetary" and thus subject to modification (as regards frequency) or even complete release by agreement of the spouses.[14] This is an application of a general principle established already in early rabbinic times (probably 3rd cent., CE) that "Contracting out of a Law contained in the *Torah* as to a monetary matter is valid, but as to a nonmonetary matter is void".[15] It should be stressed that such monetary matters from which contractual opt-out is possible are themselves *Torah* laws, and thus part of the religious law of the community. Nevertheless, it is clear that they have less religious weight than other areas of religious law. Concessions may here be made to either the will of contracting parties or the law of the state within which the community resides.

Yet even what may be considered fundamentals of family law have not been immune to "accommodation". In 11th cent Germany, Rabbenu Gershom of Mainz pronounced a ban (*ḥerem*) against those practicing polygamy, and also tightened the law of divorce by banning unilateral divorce without cause. These reforms, however, applied only in Ashkenaz and were not accepted as normative by Sephardi Jews.[16] There is an unsurprising correlation here with the Christian/Muslim environments in which Ashkenazi/Sephardi Jews largely lived. Indeed, the late Ze'ev Falk argued that Rabbenu Gershom was largely prompted by pressure from Christian morality, and the desire to avoid a "*ḥillul hashem*" (desecration of God's name) by giving the impression that Jewish law endorsed lower standards.[17] If so, we may regard this as an early example of a Jewish "transformative accommodation". Of course, Jewish law never *required* polygamy:[18] the fact that Ashkenazi and Sephardi practice differed[19] might suggest that this was a matter of community custom rather than law, and for this reason too susceptible to "accommodation".

A modern, and quite explicit, attempt at accommodation with secular law was made by Rav Herzog, by then Ashkenazi Chief Rabbi of the State of Israel, in the context of his attempt to have the *halakhah*, Jewish religious law, accepted as the law of the State of Israel. In 1949 he prepared a manuscript entitled "A Proposal for *takkanot* in Matters of Inheritance", seeking to equalise the rights of daughters with those of sons in the law of

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12 Jewish lawyers in England have, however, found ways of adapting the formalities of Jewish wills in such a way that the resulting documentation conforms to both Jewish and English law.

13 He received a somewhat dismissive reply: see Ben Tzion Greenberger, "Rabbi Herzog's Proposals for *Takkanot* in Matters of Inheritance", in *The Halakhic Thought of R. Isaac Herzog*, ed. B.S. Jackson (Atlanta: Scholars Press, 1991; Jewish Law Association Studies V), 60f., quoting R. Kook's responsum in *Teḥumin* 3 (1929), 231.

14 See Y. Margalit, "On the Dispositive Foundations of the Obligation of Spousal Conjugal Relations in Jewish Law", in *The Bar-Ilan Conference Volume*, ed. J. Fleishman (Liverpool: The Jewish Law Association, 2008), 161-86 (Jewish Law Association Studies, XVIII).

15 *Tosefta Kiddushin* 3:7-8.

16 The issue presented itself again with the immigration to the modern State of Israel of polygamous Yemeni and Iraqi Jews. Mandatory legislation (Criminal Code Ordinance 1936 s.181), which remained in force in the State of Israel and is now reflected in the *Ḥok Ha-Onshin* 1977 ss.176, 178, made bigamy a criminal offence, and in 1950 the Chief Rabbinate of Israel extended Rabbenu Gershom's *ḥerem* to all Jews. However, Jews who married two wives before migrating to Israel were not required to divorce; indeed, those polygamous marriages remained recognised for various purposes (including inheritance). Mandatory law exempted Muslims from the sanctions for bigamy if their personal law allowed them more than one wife. See further R.H. Eisenman, *Islamic Law in Palestine and Israel* (Leiden: E.J. Brill, 1978), 98f., 104f., 183f.

17 Z.W. Falk, *Jewish Matrimonial Law in the Middle Ages* (Oxford: Clarendon Press, 1966), ch.IV; see further B.S. Jackson, "How Jewish is Jewish Family Law?", *Journal of Jewish Studies* LV/2 (2004), 201-229, at 226f.

18 Except, arguably, where a Jewish man was childless and his wife after 10 years did not agree to a divorce.

19 In fact, many Sephardi communities adopted the Ashkenazi position (even though they did not regard themselves as bound by Rabbenu Gershom's ban), by inserting a monogamy clause in the marriage contract (which was never regarded as "Contracting out of a Law contained in the Torah"), or by taking an oath.

inheritance, through enacting that a standard clause to that effect be inserted in the marriage contract.[20] His motivation is described thus by a recent commentator:[21]

> Rabbi Herzog's aspirations to achieve the adoption of Jewish law as the law of the State were nevertheless tempered by the sober realization that many aspects of Jewish law were simply unacceptable to the vast majority of Israelis. Up until the creation of the State, the image of Jewish law, as perceived by most Jews in the country, was one of fossilized antiquity, of a system that could not presume to cope with the complexities of a modern state or to adapt itself to the fundamental liberalism of a modern democratic society. A cardinal case in point is that of Jewish inheritance law, which denies any right of inheritance to women, whether as wives or daughters, in all cases where the decedent leaves male heirs, and which grants the firstborn son a double share vis-a-vis the other heirs. These are entirely inconsistent with modern notions of equality, and were frequently cited as examples par excellence of the kind of rules that made Jewish law inappropriate for the modern State of Israel. ... Rabbi Herzog was convinced that the machinery in fact exists within Jewish law to introduce changes that would go a long way toward answering the arguments of its critics. ... Rabbi Herzog believed adoption to be critical to the future survival and development of Jewish law, he believed that a sufficient justification therefore existed for enacting *takkanot* that would explicitly and directly equalize the inheritances of all heirs.

Rabbi Herzog failed, however, to persuade his rabbinical colleagues to adopt the reform. Moreover, it is clear that his underlying theological approach, which claimed that the foundation of the State of Israel represented the "beginning of redemption",[22] and thus justified a greater measure of halakhic innovation to meet the needs of the hour, was also rejected. The rabbinic leadership in Israel has since Herzog's day moved from a "Religious Zionist" to an Ultra-Orthodox ("*Ḥaredi*") orientation, for whom, in effect, the secular government is no different from the Diaspora governments under which the *halakhah* developed through the two millennia of exile.[23] Any "transformative accommodation" which has occurred has been accommodation of the secular law to religious demands, as in the Law of Return (Amendment No.2), 1970, which rejected the "secular" definition of a Jew[24] (as self-definition) in favour of a quasi-halakhic definition.[25]

The Israeli history indicates very clearly not only that "transformative accommodation" may go in either direction, but also that the accommodation which secular law makes is not limited to granting some form of jurisdictional pluralism,[26] but may also extend to the substantive modification of secular law to meet the demands of religious minorities, albeit through the operation of the democratic process. This does not appear to be what the

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20 "A Constitution For Israel According to the *Torah*" (Heb.), ed. I. Warhaftig, published posthumously in his *Collected Works* (Jerusalem: Mossad Harav Kook, 1989), Vol. II; extracts translated in Greenberger, *supra* n.13, at 49-112.

21 Greenberger, *supra* n.13, at 50.

22 He refers to "the light of Israel that, with the help of its Redeemer, has now begun to shine again": see Greenberger, *supra* n.13, at 50.

23 This is well discussed by Yaacov Bazak, "The Halachic Status of The Israeli Court System", in *Crossroads: Halacha and the Modern World*, Vol. II (Jerusalem: Zomet Institute, 1987; http://www.jlaw.com/Articles/israelcourt.html).

24 *Shalit* v. *Minister of the Interior,* H.C. 58/68, *P.D.* 23(2) 477.

25 "Jew" means "anyone who was born to a Jewish mother or who has been converted, and who is not a member of another religion".

26 As in the basic "status quo" in Israel, which adopted the "millet" system which the British Mandate had itself inherited from the Ottoman Empire (and which is still used in varying degrees in Egypt, Iran, Iraq, Jordan, Lebanon, Morocco and the Palestinian Authority). Under this system, "exclusive" jurisdiction is granted to religious courts in central matters of "personal status" (for Jews, this is confined to marriage and divorce); "concurrent" jurisdiction applies in other areas of personal status, notably (for Jews) succession. Here the parties have a choice of court, and therefore a choice between the application of *halakhah* and Israeli state law, and this not infrequently results in a "race for jurisdiction" — to get to the desired court first. Despite this, however, secular law exercises a supervisory role in relation to religious law. The decisions of the religious courts may be challenged in the (civil) High Court on grounds of breach of the rules of natural justice (the *bagatz* procedure); on the Women's Equal Rights Law of 1951, see n.32, below. We may note that Dayan Berger, as reported in *The Jewish Telegraph* of 14 February 2008, specifically rejected any reversion to the *millet* system, in his comments on the Archbishop of Canterbury's lecture.

Archbishop had in mind. But we do encounter examples in the United States, in the areas of abortion and single sex unions.[27]

Transformative Accommodation and Modern English Law

We may now return to English law, and the possibility of "transformative accommodation". It is clear that both state law and religious systems have to ask what their respective ideologies regard as non-negotiable, and what may be subject to "accommodation". No one that I know of, least of all the Archbishop, advocates the introduction of any form of exclusive religious jurisdiction in England (comparable to that in Israel in marriage and divorce[28]), such that Jews could get married and divorced only in a rabbinical court, Muslims in a *Shari'a* court. This would violate the general principle on which the Archbishop rightly insists, namely that any accommodation with religious law should not deprive citizens of rights which they have under state law. English law has, however, accommodated to Jewish law in one particular aspect of divorce law: in response to the problem of the *agunah*,[29] the Divorce (Religious Marriages) Act 2002 grants a discretion to the civil judge in such cases to delay the decree absolute of divorce until satisfied that the barrier has been removed. This certainly represents a "transformative accommodation" of state to religious law. It is designed to provide a partial remedy to what is widely regarded as an abuse of Jewish law,[30] where the husband uses withholding of the *get* (the Jewish bill of divorce, whose writing and delivery to the wife is in principle a private act, rather than an act of the court) as a means of pressure in respect of ancillary matters, or even as a straightforward form of extortion.

However, all this may be a red herring in terms of the Archbishop's real agenda. From a Christian point of view, he is not interested in jurisdictional issues. The role of consistory courts applying the ecclesiastical law of the Church of England is not mentioned. There is no argument that these courts (which concern themselves only with internal church matters) should acquire jurisdiction (whether exclusive or concurrent) over marriage and divorce of Christians. The situation of Catholicism is, of course, different, but the Archbishop does not address questions of the domestic application of Roman Canon Law.

If jurisdiction is not in fact the Archbishop's primary interest, what is that interest and where does the question of jurisdiction come into the argument? The answer appears to be that the Archbishop is seeking to build a religious coalition, led by the Church of England (as the "Established" Church) in favour of exemptions from secular law on grounds of religious conscience. The Archbishop fears that secular society is in danger of going too far in applying the "one law" principle (a phrase, incidentally, clearly of biblical origin: e.g. *Leviticus* 24:22). But the Church cannot argue for such privileges on a purely Christian basis. On this, the Archbishop is quite explicit: "Christians cannot claim exceptions from a secular unitary system on religious grounds (for instance in situations where Christian doctors might not be compelled to perform abortions), if they are not willing to consider how a unitary system can accommodate other religious consciences".[31] There is a combination of moral equity and political strategy in this argument. But the link with jurisdictional issues is far from necessary.

Yet the "one (secular) law" from which exemptions may be sought is often itself a reflection of basic, underlying principle. If so, the secular state itself faces the same ideological problem as that illustrated above from Jewish law: what principles are so basic that they cannot be compromised for the sake of accommodation with other (religious) traditions? This was the issue faced by the State of Israel in its Women's Equal Rights Law 1951, outlawing discrimination against women.[32] And it has arisen recently in English discrimination law, in a much-discussed case, that concerning the admissions policy of the Jews' Free School (now known as the JFS).[33]

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27 The Archbishop recognised this kind of danger, but equated it with what we may term secular fundamentalism: "The danger arises not only when there is an assumption on the religious side that membership of the community (belonging to the *umma* or the Church or whatever) is the only significant category, so that participation in other kinds of socio-political arrangement is a kind of betrayal. It also occurs when secular government assumes a monopoly in terms of defining public and political identity."

28 See n.26, *supra*.

29 The "chained wife", whose husband (who may already have obtained a civil divorce), refuses to grant his wife a religious divorce, thus preventing her from entering into a new religious marriage.

30 On the problem, and attempts to resolve it internally, see now the publications of the University of Manchester Agunah Research Unit, downloadable from http://www.manchesterjewishstudies.org/publications/

31 Archbishop's web site, http://www.archbishopofcanterbury.org/1581, commenting on the controversy.

32 The Women's Equal Rights Law of 1951 applies even in the religious Courts (other than in matters of marriage and divorce). This may be regarded as an example of "accommodation", but it is not "transformative". It does not change the internal rules of Jewish law (according to which daughters do not inherit in the presence of sons), and indeed

The JFS admissions policy followed guidance from the Office of the Chief Rabbi (OCR), which applied the Orthodox halakhic definition of a Jew (viz, someone born to a Jewish mother or converted to Judaism under Orthodox auspices) irrespective of the family's level of actual belief or religious practice. Applying this criterion, the school rejected a boy (M) whose mother had converted (before his birth) to Judaism under non-Orthodox (Masorti) auspices. This was held by the court (by a majority of 5-4) to be illegal discrimination, contrary to the Race Relations Act 1976,[34] on the grounds of ethnic origins, the latter being defined in terms of a sense of common history and a cultural tradition of its own, often but not necessarily associated with religious observance (the *Mandla* criteria[35]). Boy M, whose application for admission had been rejected, qualified on these grounds as a member of a (Jewish) ethnic group, even though Orthodox Judaism did not regard his mother's conversion as valid and thus did not regard him as Jew; hence, the discrimination against him was on ethnic grounds, namely the (religious) status of his mother at the time of his birth.[36] The fact that the source of the discrimination was other Jews was for this purpose irrelevant: discrimination in favour of one sub-group of an ethnic group against another fell within the Race Relations Act.[37] Nor, for the majority, was it relevant that the

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traditional law may still be applied in the religious courts, despite the 1951 Law, if all interested parties are of age and consent thereto. Not everyone, however, is satisfied with the formality of an initial, written consent. Ayelet Shachar proposes, in the context of the Canadian controversy over religious arbitration, that (despite the concept of binding arbitration) a woman should have the right to withdraw from the proceedings of a religious arbitration *at any stage*, where she fears discrimination. See her "Religion, State, and the Problem of Gender", *supra* n.4, at 73: "the tribunal would have to ensure legal representation for both parties, clearly register their consent, and permit the parties to turn to the civil court at any time if they feared that their rights were being violated." See also pp.61-66 on "The Canadian Debate over the Establishment of a Private Islamic Arbitral Tribunal".

33 For the full text of the judgments, see http://www.supremecourt.gov.uk/docs/uksc_2009_0105_judgmentV2.pdf.

34 Race Relations Act 1976, s.1: "A person discriminates against another ... if – (a) on racial grounds he treats that other less favourably than he treats or would treat other persons"; "racial grounds" includes "colour, race, nationality or ethnic or national origins."

35 *Per* Lord Fraser in the (House of Lords) case of *Mandla v Dowell Lee* [1983] 2 AC 548 (adopted by Lord Phillips at §§28-30, see also §§42, 44; by Lord Mance at §83-86; and Lord Hope (in the minority) at §§185-86): "For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups … A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of section 3(1) 'references to a person's racial group refer to any racial group into which he falls.' In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group."

36 See Lord Phillips at §26; Lord Mance at §89; Lord Kerr at §107; Lord Clarke at §131.

37 Thus Lord Phillips at §48: "This suggests that those who decide to send their children to JFS satisfy the *Mandla* criteria for belonging to an ethnic group, even though some of them do not attend a synagogue. They live in the same part of London, they are conscious of the wife's Jewish descent, and they have a strong sense of Jewish identity. This is likely to include an appreciation of Jewish history and culture. If this is correct, then the reality is that the JFS, in common with other Jewish faith schools, is in practice discriminating in favour of a sub-group of *Mandla* ethnic Jews, who also satisfy the matrilineal requirement." On the other hand, Lord Browne (in the minority) asked: "Does the 1976 Act really outlaw discrimination in favour of the self-same racial group as are said to be being discriminated against? I can find no suggestion of that in any of the many authorities put before us." For the general principle that "it is just as unlawful to

motive for the discrimination was religious:[38] **the Race Relations Act forbade discrimination "on the grounds" of ethnicity, and it was irrelevant that the source of those grounds was, for the discriminator, the conviction that such discrimination was a matter of religious obligation.[39] Against this, it was argued for the minority that there was in this particular case no discrimination on the grounds of ethnicity; the issue was purely religious** — whether the criteria and procedures of conversion as practiced by the Masorti movement were sufficient to effect a conversion recognised by Orthodox *halakhah*.[40]

The judgments include some interesting observations on the different ways in which both Jewish identity and conversion were understood by (and within the different strands of) Judaism on the one hand, secular law on the other. We have noted already the conception of ethnicity adopted by English law — one which may broadly be categorised as historico-cultural. Lord Phillips found support for the view that for Jews it was "almost impossible

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treat one person more favourably on the ground of his ethnic origin as it is to treat another person less favourably", see Lady Hale at §68.

38 However, as Lord Mance indicated at §75, JFS, being a school designated as having a religious ('Jewish') character under the School Standards and Framework Act 1998, s.69(3), was exempted by the Equality Act 2006, s.50(1) from the prohibition against discrimination on the grounds of religion or belief which would otherwise apply under ss.45 and 47 of that Act. But that exemption did not affect the pre-existing prohibition of discrimination on the grounds of ethnic origin, under the 1976 Act.

39 Lord Phillips at §27, 35: "In answering this question it is important to distinguish between two different, albeit not wholly independent, considerations. The first is the reason or motive that leads the OCR [Office of the Chief Rabbi] to impose these criteria. The second is the question of whether or not the criteria are characteristics of race. The reason why the OCR has imposed the criteria is that the OCR believes that these are the criteria of Jewish status under Jewish religious law, established at and recognised from the time of Moses. This is not the end of the enquiry. The critical question is whether these requirements of Jewish law are racial, as defined by section 3 of the 1976 Act. Do the characteristics define those who have them by reference to "colour, race, nationality or ethnic or national origins? … The first part of this argument focuses, as has Lord Hope, on the reason why [the] matrilineal test is applied. The reason is that the JFS and the OCR apply the test for determining who is a Jew laid down by Orthodox Jewish religious law. What subjectively motivates them is compliance with religious law, not the ethnicity of the candidates who wish to enter the school. My reaction to this argument will already be clear. It is invalid because it focuses on a matter that is irrelevant – the motive of the discriminator for applying the discriminatory criteria. A person who discriminates on the ground of race, as defined by the Act, cannot pray in aid the fact that the ground of discrimination is one mandated by his religion." Cf. Lady Hale at §65; Lord Kerr at §§112-18; Lord Clarke at §§127-30, 147-49. *Aliter* (for the minority) Lord Hope at §187-204, including: "[§192] The need to establish an objective link between the conduct of the alleged discriminator and the unequal treatment complained of does not exclude the need to explore *why* the alleged discriminator acted as he did. … [§201] To say that his ground was a racial one is to confuse the effect of the treatment with the ground itself. It does have the effect of putting M into an ethnic Jewish group which is different from that which the Chief Rabbi recognises as Jewish. So he has been discriminated against. But it is a complete misconception, in my opinion, to categorise the ground as a racial one. There is nothing in the way the OCR handled the case or its reasoning that justifies that conclusion. It might have been justified if there were reasons for doubting the Chief Rabbi's frankness or his good faith. But no-one has suggested that he did not mean what he said. As Lord Rodger points out, to reduce the religious element to the status of a mere motive is to misrepresent what he is doing." See also Lord Rodger at §227: "The reality is that the Office of the Chief Rabbi, when deciding whether or not to confirm that someone is of Jewish status, gives its ruling on religious grounds."

40 Stressed by Lord Rodger (in the minority), at §229: "It was her non-Orthodox conversion that was crucial. In other words, the only ground for treating M less favourably than the comparator is the difference in their respective mothers' conversions – a religious, not a racial, ground ... The question then is: did the governors treat M, whose mother was an Italian Catholic who had converted under non-Orthodox auspices, less favourably than they would have treated a boy, whose mother was an Italian Catholic who had converted under Orthodox auspices, on grounds of his ethnic origins? Plainly, the answer is: No. The ethnic origins of the two boys are exactly the same, but the stance of the governors varies, depending on the auspices under which the mother's conversion took place." In response to the argument of one of the majority judges, he observed (§228): "Lady Hale says that M was rejected because of his mother's ethnic origins which were Italian and Roman Catholic. I respectfully disagree. His mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices."

to distinguish between ethnic status and religious status" [41] in an essay on conversion written by Chief Rabbi (now Lord) Sacks in 2005, and quoted the following passage from it:[42]

> What is conversion? People often refer to the case of Ruth the Moabite, whose story is told with such beauty in the book that bears her name. It is from Ruth's reply to her mother-in-law Naomi that the basic principles of conversion are derived. She said: 'Where you go, I will go. Where you stay, I will stay. Your people will be my people, and your God my God.' That last sentence – a mere four words in Hebrew – defines the dual nature of conversion to this day. The first element is an identification with the Jewish people and its fate ('Your people will be my people'). The second is the embrace of a religious destiny, the covenant between Israel and God and its commands ('Your God will be my God').

Lord Phillips was unaware of the fact that this invocation of the book of Ruth is (a) aggadic and not halakhic, and (b) long precedes the classical halakhic development of *gerut*.[43] Moreover, the "dual nature of conversion" (which we might broadly characterise as [*Mandla*] ethnic on the one hand, religious on the other) does not readily equate with Jewish identity, in either sociological or halakhic terms. Take the following four possible manifestations of "M", a candidate for admission to JFS:

Moishe has a halakhically Jewish mother and comes from a *shomrei mitsvot* [Orthodox observant] family: he is both halakhically Jewish *and* [*Mandla*] ethnically Jewish.

Monty has a halakhically Jewish mother and comes from a family which belongs to a non-Orthodox denomination: he is both halakhically Jewish *and* [*Mandla*] ethnically Jewish.

Morgan has a halakhically Jewish mother, but comes from a completely assimilated family: he is halakhically Jewish *but not* [*Mandla*] ethnically Jewish.

Maurice's mother had a non-Orthodox conversion, and comes from a family active in the Masorti community: he is *not* halakhically Jewish *but is* [*Mandla*] ethnically Jewish. [This was the situation in the JFS case.]

The result of the JFS case is:

1. **Discrimination in favour of Moishe or Monty against Maurice is discrimination in favour of a member of an ethnic group against a member of a different *sub-group* of that ethnic group;**
2. **Discrimination in favour of Morgan against Maurice is discrimination against a member of an ethnic group in favour of someone *not* a member of that (or maybe any) ethnic group (but rather defined only by parentage).**

We may see the differences in terms of the competing claims of the halakhic inheritance on the one hand, and the wider Jewish heritage on the other.[44] The tension between the two is reflected not only in the difference between English law and Orthodox *halakhah*, as manifest in the JFS case; it is also apparent in the internal Jewish denominational spectrum, which we may characterise as *ḥareidi,* modern Orthodox, Conservative/Masorti, Reform, Liberal, Secular. At one end, primacy (for many *ḥaredim*, exclusivity) is accorded to the halakhic inheritance; at the other, it is a matter solely of [*Mandla*] ethnicity; in the middle, the two are balanced in different ways.[45] Yet

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41 Lord Phillips at §39: "One of the difficulties in this case lies in distinguishing between religious and ethnic status. One of the criteria of ethnicity identified by Lord Fraser is a shared religion. In the case of Jews, this is the dominant criterion. In their case it is almost impossible to distinguish between ethnic status and religious status. The two are virtually co-extensive. A woman who converts to Judaism thereby acquires both Jewish religious status and Jewish ethnic status."

42 Lord Phillips at §39, citing a paper on conversion issued by the Office of the Chief Rabbi on 8th July 2005. In fact, it was published in *The Jewish Chronicle*, and is available at http://www.chiefrabbi.org/ReadArtical.aspx?id=429.

43 Notwithstanding its use as a proof text in *Yev*. 47b.

44 The historical relationship between these concepts is the theme of the Sherman Lectures I delivered at the University of Manchester in April 2010. See, for the moment, the abstracts at http://www.mucjs.org/sherman10abs.htm#mon.

45 Though if one follows the argument of the recent study of A. Sagi and Z. Zohar, *Transforming Identity: The Ritual Transformation from Gentile to Jew – Structure to Meaning* (London: Continuum Books, 2007), the tension between these two models dates back to talmudic times. They contrast they emphasis on kinship in the "Yevamot paradigm" (esp. at 158-73) with that on *kabbalat mitsvot* in the "Demai paradigm" (107-115 *et pass*.). See also Marc Shapiro's review essay in *Meorot* 8 (Tishrei 5771/2010), p.5 (online at http://www.yctorah.org/content/view/662/10/). A contrary view is taken by Michael Broyde and Shmuel Kadosh in their review essay in *Tradition* 42/1 (2009), 84-103. In response to the latter, see Sagi and Zohar, *Tradition* 42/4 (2009), 107-111; Michael Makovy, http://michaelmakovi.blogspot.com/2009/11/rabbi-michael-broyde-on-conversion.html.

even "Secular" Jews may (sometimes for entirely extraneous reasons) want their children educated in an Orthodox Jewish school.

We may return now to Moishe, Monty, Morgan and Maurice and ask what principles are involved, from the respective viewpoints of Jewish law and English law, in their admission/exclusion, in order to determine whether any "accommodation" (in the sense adopted by the Archbishop of Canterbury) may be possible.

The principle underlying the application of Orthodox halakhic criteria, resulting in the admission of Moishe, Monty and Morgan but the non-admission of Maurice, was accurately formulated by Lord Rodger[46] (in the minority) as follows:

> **From the standpoint of Orthodoxy, no other [admissions] policy would make sense. This is because, in its eyes, irrespective of whether they adhere to Orthodox, Masorti, Progressive or Liberal Judaism, or are not in any way believing or observant, these are the children – and the only children – who are bound by the Jewish law and practices which, it is hoped, they will absorb at the School and then observe throughout their lives. Whether they will actually do so is, of course, a different matter.**

Though there are *ḥareidi* schools in the U.K. which admit only children who are not only halakhically Jewish but also fully observant of both *halakhah* [Moishe] and the behaviour norms of the *ḥareidi community*, JFS is a "middle-of-the-road" Orthodox school, and, as Lord Rodger indicates, positively welcomes children from other Jewish denominations [Monty] or even entirely secular [Morgan] homes, provided they are halakhically Jewish. Indeed, it has traditionally applied a "first-come-first-served" policy which has resulted in some observant children [Moishe] being excluded in favour of non-observant children [Morgan].[47] The underlying philosophy, irrespective of the motives of the parents in sending their children to that school, is that of *kiruv*, bringing its pupils closer to Jewish observance. **But what is the halakhic status of such a policy of *kiruv*, and why should it not be extended (as has been advocated even by some Orthodox commentators, in the wake of the Supreme Court decision) to children like Maurice?** True, from an Orthodox viewpoint, the logical end-point of such a process would be a second (this time, Orthodox) conversion (a phenomenon not entirely unknown). Indeed, it may be argued that the prospects for *kiruv* amongst committed members of non-Orthodox families [Monty, Maurice] may be greater than that for children like Morgan. Moreover, **it is argued, admission to a particular school constitutes no certification of halakhic status (which can readily be made clear in a school's documentation[48]); and that there is no halakhic objection to teaching such "non-Jewish" children alongside Jewish. In short, there appears to be no halakhic objection to Jewish "accommodation" to the Supreme Court decision.[49]**

What of accommodation from the side of English law? Though the predominant view of the majority was that the objective of the Race Relations Act was to enforce secular anti-discrimination principles, it was observed by **Lord Brown** (in the minority) that the means by which it sought to do so, by insisting that the admission criteria to faith schools[50] must be based on belief and/or practice[51] rather than parentage, was in fact based on a

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46 At §223. Alan Rodger was, like the present writer, a doctoral student at Oxford under David Daube. Though not Jewish, and a student of Roman rather than Jewish law, his close connection with Daube undoubtedly provided him with the halakhic sensitivity manifest in his judgment in this case.

47 The school's web site stated: "Many [of the School's children] come from families who are totally committed to Judaism and Israel; others are unaware of Jewish belief and practice. We welcome this diversity and embrace the opportunity to have such a broad range of young people developing Jewish values together" (cited by Lord Phillips at §47).

48 See, for example, the current JFS Certificate of Religious Practice form, which states: "Note that for the avoidance of doubt this form does not confirm that the child for whom this application is made is Jewish in accordane with orthodox Jewish law."

49 But this is not really a matter of "transformative" accommodation, as it was in the case of Rabbenu Gershom and would have been for Rav Herzog. There would be no change here in Jewish law itself; the issue, rather, is one of social/educational policy, co-education prompting a fear of intermarriage.

50 The Act does not cover discrimination on religious grounds; hence the movement towards admissions tests based on religious *practice* (variously defined).

51 Typically, some combination of (a) certified synagogue attendance, (b) formal religious education, and (c) participation in some forms of Jewish voluntary communal activity, of which (a) at a certain frequency will suffice in itself while (c) will never suffice in itself. See, e.g., for Yavneh College: http://www.hertsdirect.org/docs/pdf/connected/15686092/15686173/15701078/4802crp.pdf; King David High School

specifically Christian conception of religion.[52] Be that as it may, the majority regarded these principles as judicially non-negotiable,[53] even though one of its members noted that: "Some may feel that discrimination law should modify its rigid adherence to formal symmetry and recognise a greater range of justified departures than it does at present." [54] For the minority, it was observed: "It has long been understood that it is not the business of the courts to intervene in matters of religion."[55] In fact, the very structure of English discrimination law indicates that accommodation is in principle possible. The law distinguishes between direct and indirect discrimination. Where discrimination is direct, no form of justification is admitted; where it is indirect, justification is possible, if it is "a proportionate means of achieving a legitimate end".[56] In the JFS case, the 5 majority judges considered that the discrimination was direct, and therefore did not consider the issue of indirect discrimination.[57] Of the 4 minority judges, who did not consider the discrimination to be direct, two thought there was indirect discrimination (which had not been justified),[58] while the other two judges thought that any such discrimination had been justified.[59]

Liverpool: http://www.kingdavidliverpool.co.uk/2010/Admissions/Certificate%20of%20Practice%20-%20Cat%20A1%20A2%20-%202011-Jewish%5B1%5D.pdf. The JFS certificate for admission in 2011 (http://www.jfs.brent.sch.uk/sites/default/files/pdfs/Sixth%20Form%20Certificate%20of%20Religious%20Practice.pdf) has prompted a recent controversy since it is based on Saturday morning synagogue attendance, when the principal service in some non-Orthodox denominations is Friday night. See Simon Rocker in *the Jewish Chronicle*, October 14th 2010.

52 Lord Brown at §§248, 258: "The Court of Appeal's judgment insists on a non-Jewish definition of who is Jewish ... [which involved] the imposition of a test for admission to an Orthodox Jewish school which is not Judaism's own test and which requires a focus (as Christianity does) on outward acts of religious practice and declarations of faith, ignoring whether the child is or is not Jewish as defined by Orthodox Jewish law. That outcome I could not contemplate with equanimity."

53 Lady Hale observed at §69 that if allowance were to be made, "it should be made by Parliament and not by the courts' departing from the long-established principles of the anti-discrimination legislation."

54 Lady Hale at §69. For a stronger statement, see Lord Rodger (in the minority) at §225.

55 Lord Hope at §157. However, the members of the minority, too, accepted that they had no power to exempt from the 1976 Act; the issue, rather was the application of the Act in the present case, in the light of earlier case law. Thus, Lord Hope at §160: "However distasteful or offensive this may appear to be to some, it is an issue in an area regulated by a statute that must be faced up to. It must be resolved by applying the law laid down by Parliament according to the principles that have been developed by the civil courts"; cf. §180: "JFS cannot be criticised for basing its oversubscription criteria on the guidance that it received from the OCR. But this does not excuse it from liability for racial discrimination under the Race Relations Act 1976 if the guidance that it received was itself racially discriminatory."

56 Lord Hope at §177, noting the amendment of the Race Relations Act in this respect, as implementing an EC Directive.

57 Thus Lord Phillips noted at §57 that "Direct and indirect discrimination are mutually exclusive. You cannot have both at once"; the issue of indirect discrimination was therefore irrelevant to the majority.

58 For the minority, Lord Mance at §§95-100 and Lord Hope at §§204-212 held that there was indirect discrimination on the grounds that, though the aim was legitimate, proportionality had not been shown.

59 Lord Rodger at §233 held that both elements of the test were satisfied and thus that there was no indirect discrimination; so too did Lord Brown at §§252, 255-56, arguing that: "The legitimacy of JFS's aim is surely clear. Here is a designated faith school, understandably concerned to give preference to those children it recognises to be members of its religion, but so oversubscribed as to be unable to admit even all of these. The School Admissions Code [a Code of Practice issued in 2007 by the Secretary of State for Education under the authority of Section 84 of the School Standards and Framework Act 1998] expressly allows admission criteria based either on membership of a religion or on practice. JFS have chosen the former. Orthodox Jews regard education about the Jewish faith as a fundamental religious obligation. Unlike proselytising faiths, however, they believe that the duty to teach and learn applies only to members of the religion, because the obligations in question bind only them." On proportionality, he endorsed the reasoning of Munby J., at first instance, who observed: "the kind of admissions policy in question here is not, properly analysed, materially different from that which gives preference in admission to a Moslem school to those who were born Moslem or preference in admission to a Catholic school to those who have been baptised. But no-one suggests that such policies, whatever their differential impact on different applicants, are other than a proportionate and lawful means of achieving a legitimate end. Why, [counsel] asks rhetorically, should it be any different in the case of Orthodox Jews? . . . I agree. Indeed, the point goes even wider than the two examples I have given for, as [counsel] submits, if E's case [E was the father of M, and the initiator of the litigation] on this point is successful then it will probably render unlawful the admission arrangements in a very large number of faith schools of many different faiths and denominations."

The point may be illustrated in the following way. At least one Orthodox school, in the wake of the Supreme Court decision, opted not to adopt a religious practice test but rather to admit on the (administratively simpler and less intrusive) basis of synagogue membership.[60] If such synagogue membership is restricted to membership of Orthodox synagogues, there is indirect discrimination, since such membership is itself conditioned upon satisfaction of the same halakhic tests of Jewish identity as were regarded as discriminatory when applied (directly) for admission to the JFS school. But since the discrimination would now be indirect, it would be open, in principle, to such a school to seek to justify its policy as being "a proportionate means of achieving a legitimate end". In short, English discrimination law is in theory open to a form of accommodation with other values. The problem, however, is that which besets many comparative enquiries: when two traditions conceptualise the issues in different ways, there is no simple equation for balancing their respective positions. We have seen, in this context, not only different conceptions of religious identity, but also different conceptions of the nature of conversion, and indeed of the relative significance, in secular and religious law, of motivation and effect.

We may return to our starting point. It would appear that the primary interest of the Archbishop of Canterbury, in his 2008 lecture, was that of exemptions from secular law on grounds of religious conscience.[61] What, then, has been his reaction to the JFS case? His immediate predecessor, Lord Carey, has backed calls for a change in the law to enable faith schools to determine their own admissions policy.[62] But from the present Archbishop, thus far[63] — silence.

B. REVISED JFS ADMISSION ARRANGEMENTS FOR SEPTEMBER 2010 (from http://www.jfs.brent.sch.uk/admissions.aspx=

In view of the recent Court of Appeal ruling, JFS will no longer be able to give priority according to Jewish status. Instead, the School will give priority to those who meet a religious practice test based on guidelines from the Chief Rabbi. The basis of that test has now been agreed with the Schools Adjudicator. Those applicants wishing to be considered as priority applicants for available places will need to obtain a certificate establishing religious practice, based on the child's synagogue attendance, Jewish education and/or family communal activity. This includes siblings and external applicants for Sixth Form places. The form of that certificate can be seen by clicking here [http://www.jfs.brent.sch.uk/sites/default/files/pdfs/Certificate%20of%20Religious%20Practice%20FAQ.pdf]. It will be seen that only synagogue attendance as from 1 September 2009 will be relevant. Applicants are strongly advised to contact a synagogue as soon as possible to establish what they need to do to be able to demonstrate attendance and get the certificate signed.

The School wishes to make it clear that it is making this change only because it is advised that legally it has no option in the light of the judgement of the Court of Appeal but to abandon the principle of giving priority to those children who are Jewish according to the religious principles stated by the Chief Rabbi. The School very much hopes that the Supreme Court will allow its appeal, so enabling the School to revert to the admission policy which the School considers to be appropriate, proportionate and necessary for it as an Orthodox Jewish school: that is, to give priority to those children who are Jewish according to religious principles stated by the Chief Rabbi, irrespective of the extent to which the applicants and their families practise their Judaism. It should be noted that the certificate of religious practice does not confirm that the child is Jewish in accordance with Jewish law.

4. Further Reading

Addison, Neil, *Religious Discrimination and Hatred Law* (London: Routledge Cavendish, 2006)

Cranmer, F. "Who is a Jew? Jewish Faith Schools and the Race Relations Act 1976", available from http://www.law.cf.ac.uk/clr/networks/ilan4.html

Douglas, Doe et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Report of

60 The King David High School in Manchester has offered a place to a child rejected by the King David High School in Liverpool for failure to fulfil the religious practice test (failure to get a rabbinic certification of synagogue attendance). See *The Jewish Chronicle,* 23 July 2010 (http://www.thejc.com/news/uk-news/36095/liverpool-mum-joins-shul-school-place).

61 See further B.S. Jackson, "'Transformative Accommodation' and Religious Law", *Ecclesiastical Law Journal* 11 (2009), 131-53, at 150-52.

62 See http://www.totallyjewish.com/news/national/c-13100/lord-carey-backs-call-to-change-law-after-jfs-verdict/.

63 Web site (http://www.archbishopofcanterbury.org/) searched 25sh October 2010.

a Research Project by the Centre for Law and Religion of Cardiff University, 2011), published at http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf

Herman, D., *An Unfortunate Coincidence. Jews, Jewishness and English Law* (Oxford: Oxford University Press, 2011)

Hill, Mark, *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002)

Malik, Maleiha, *Minority Legal Orders in the UK: Minorities, pluralism and the law*, The British Academy, 2012, downloadable from http://www.britac.ac.uk/policy/Minority-legal-orders.cfm

Robilliard, St. John A, *Religion and the law: religious liberty in Modern English law* (Manchester: Manchester University Press 1984)

Rosen, J., "Who is a Jew?", http://jeremyrosen.blogspot.co.uk/2009_11_01_archive.html (scroll down to November 12th entry)

Weiler, J.H.H., "Discrimination and Identity in London: The Jewish Free School Case" http://www.jewishreviewofbooks.com/publications/detail/discrimination-and-identity-in-london-the-jewish-free-school-case

Materials for session 5 include the Archbishop of Canterbury's 2008 lecture and the debate it prompted, together with subsequent research on the activities of religious courts in Britain conducted by the Centre for Law and Religion at Cardiff and a policy discussion paper from the British Academy.

5. Questions for tutorial

1. What are the underlying ideological issues reflected in different positions (Jewish, Christian, Islamic, including differences within them) on the relationship between state and religious law?
2. To what extent, and subject to what (if any) conditions, should religious tribunals be allowed to apply religious law which differs from the law of the State, especially in marriage and divorce? On the proposals of Baroness Cox, see Mohammend Amin, "A Review of the Arbitration and Mediation Services (Equality) Bill [HL] 2015-16", http://www.mohammedamin.com/Community_issues/Arbitration-and-mediation-services-bill.html
3. How far should the state regulate not only the admission criteria for religious schools but also what is taught there?

Selective Guide to Internet Resources in Jewish Studies (2012)

The Center for Online Judaic Studies (COJS)
http://cojs.org/cojswiki/Main_Page
Sections (with introductory texts, primary and secondary sources, and illustrations) on

1. Dead Sea Scrolls
2. Bible and Beyond: Archaeology and Ancient Documents
3. The Hebrew Bible
4. Digging Jerusalem: a Web-Based Archaeological Dig
5. Jews and Judaism in the Greco-Roman Period
6. The Jews of Medieval Western Christendom, 1000-1500
7. Jewish Mysticism And Esotericism
8. Jews in the Early Modern Period, 1450-1750
9. Returning and Redemption of the Promised Land: From Abraham to Einstein

Nathan Laski Internet Resource Centre
http://www.mucjs.org/laski/home.htm
An excellent portal to internet resources for the study of all aspects of Judaism. A good place to start.

Wikipedia: Judaism

http://en.wikipedia.org/wiki/Judaism
The Wikipedia is probably the best single resource on-line for the study of Judaism. Its coverage is vast, the articles are generally accurate, at least as to basic facts, though the analysis is very uneven. At the end of each article is a valuable list of live-links to other useful internet sites. If used with discrimination and caution this is a superb source of basic information.
User comments: "Wikipedia covers quite a lot. It is very good for basic understanding, but it is important to be wary of this site due to the fact that anyone can edit it."

Wikisource: Judaism
http://en.wikisource.org/wiki/Main_Page
This contains a useful collection of primary sources for the study of Judaism in English translation. The coverage is patchy, but there is some excellent material here. Relevant items in Wikisource are usually cross-linked from Wikipedia.

Jewish Encylopedia
http://www.jewishencyclopedia.com
"This is the old Jewish Encyclopedia of 1901-06 on-line. Though dated it is still useful and very academic. "Useful if you're looking for an entry on some specific thing, but otherwise can be overwhelming and difficult to navigate.'

Questia: Judaism
http://www.questia.com/library/religion/judaism.jsp
This has a vast range of top-notch academic books on Judaism on-line, including some excellent short introductions to Judaism (Norman Solomon, Nicholas de Lange, Jacob Neusner). Has annoying pop-ups and adverts if you are trying to read on-line, but a first-rate academic resource.

Judaism 101
http://www.jewfaq.org/toc.htm
A kind of encyclopaedia of Judaism, strong on practice and belief, less good on history. Strongly confessional (Orthodox perspective). Non-academic, so needs to be used with caution. Cross-links to other websites.

Encarta
http://encarta.msn.com/encyclopedia_761556154_1___3/judaism.html#s3
This is the Judaism section of Microsoft's Online Encyclopaedia, Encarta. The entry is brief, but basically sound, and contains a useful overview of Judaism.

BBC – Religion and Ethics
http://www.bbc.co.uk/religion/religions/judaism/
Part of the BBC website. An attractive and basically sound overview of Judaism, containing lists of links to interesting articles ranging from beliefs, holy days, and customs to the Holocaust and ethics. Some cross-links. Very basic and generally Orthodox perspective, but a useful read. Some good visuals.
"The multimedia aspect of the website allows the reader to engage with the audio and visual elements of Judaism as well as just text."

Reform Judaism
http://rj.org/whatisrj.shtml
An interesting if brief piece describing what Reform Judaism is. Acts as a handy portal to other Reform Judaism websites. Totally confessional, but good.

Orthodox Judaism
http://philtar.ucsm.ac.uk/encyclopedia/judaism/orth.html -
A brief look at the doctrines, history and symbols of orthodox Judaism. Confessional but academic tone. A useful overview.

Hasidism
http://www.chabad.org
"Hasidic website which offers well-presented and comprehensive information on Jewish matters."

Religious Tolerance
www.religoustolerance.org
User comments: "Description of Judaism, the Hebrew Scriptures, stories in the Hebrew Scriptures, religious groups blending Jewish culture with non-Jewish theology:

Jewish Humanism - A faith group with Humanist beliefs
Messianic Judaism - A faith group with an Evangelical Christian theology
Black Hebrew Israelites - A group believing that African Americans and other inhabitants of North and South America are the twelve lost tribes of South America are the twelve lost tribes of Israel
Seasonal days of celebration - Jewish beliefs about: abortion, homosexuality and the environment."

Jewish History
http://www.jewishhistory.org.il/history.php?startyear=69&endyear=199
includes a large number of historical dates provided on a timeline:
"The history of the Jewish people – very good for any dates and information."

www.guardian.co.uk/world/judaism
"Useful for current news items which touch on Jews and Judaism."