REVIEW OF RECENT HALAKHIC PERIODICAL LITERATURE

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Our introduction to this department in the last issue was devoted to a brief survey of contemporary rabbinic literature and its halakhic component. We will introduce the present review by some reflections on the characteristics of rabbinic law-making as a prime feature in the evolution of Jewish law.

In the jurisprudence of Judaism, the legislature and judiciary are fused together. Rabbis are charged to determine as well as to administer the law. They serve as judges in applying the rulings of existing laws to cases in doubt or under dispute; and when faced with situations lacking any precise precedents, they act as legislators by issuing new rulings.

In the exercise of both functions, rabbis are subject to a "constitutional" system, as presently practiced, which is altogether unique. Unlike any other national or religious legal system, Judaism does not vest the authority to make or adjudicate laws in any clearly defined individual or group. It has neither a supreme court nor a hierarchy, neither a chief justice nor a supreme pontiff to lay down the law with finality. In fact, there is no formal office or official appointment at all which would automatically authorize its incumbent to demand universal submission to his rulings. Even a Chief Rabbi of Israel — tenant of the highest ecclesiastical office in Jewry — may readily defer to the judgment of some superior scholar who holds no official position altogether, and any duly qualified rabbi may presume to challenge a decision rendered by others if his interpretation of the law conflicts with theirs.

How then does the juridical process of Judaism operate? Under such conditions of apparent licence and individual independence, how can order be joined to law? By what methods do rabbinical rulings eventually command the assent of rabbis and religious laymen the world over? Who and whose decisions enjoy final and binding authority?

In contrast to all other legal systems, whether on a state or church level, the administration of Jewish law is highly decentralized and yet subject to universal sanctions, and it is uniquely democratic whilst at the same time acknowledging the supremacy of individual authority. Thus it operates on three principal levels:

1. *Local Autonomy*. The authority of the local rabbinical head (the *Mara d'Atra*) of a congregation or community (e.g. the chief rabbi of a city or country) is traditionally binding for the members of such congregation or community, and it cannot be challenged by any other rabbinate, however superior its rank or area of jurisdiction. But such authority can only be exercised on a strictly

local level; it does not extend beyond the confines of the individual rabbi's official jurisdiction.

2. *Consensus of Opinion.* When the principles of Jewish law have to be applied to new problems, a verdict one way or another is not usually accepted as authentic until it is endorsed by a number of leading rabbis constituting the majority of those consulted. As a a rule, such problems are submitted quite independently to the judgment of various rabbinical authorities. As the replies accumulate, often in the form of printed responsa, a trend of opinion gradually becomes crystalized, and this is then accepted as the binding norm of the law, against any minority views of dissent, by virtue of the numerically superior weight of its endorsement.
3. *Individual Authority by Popular Acclaim.* A rabbinical ruling may also enjoy unquestioned validity by reason of the supreme excellence of the scholar who issued it. Such authority is quite informally, and solely as an expression of religious public opinion, bestowed on one or more of the *gedolei ha-dor* — the Sages of the Generation — purely because of the popular recognition of their pre-eminent scholarship and saintliness. Their word is law, but it is their public esteem which makes it unchallenged and absolute.

With the exception, then, of the first category, which is strictly limited in scope and therefore immaterial as a general guide to rabbinic law-making, all new decisions of law derive their validity ultimately from their implicit or explicit assent by the majority. This system insures that:

1. the development of Jewish law, by virtue of its strongly democratic direction, will always be a dynamic and organic process commanding the indispensable sanction of public endorsement;
2. by vesting authority with duly qualified individuals rather than impersonal offices, legislative power will never be abused or exploited by unscrupulous and unworthy persons seizing control of such offices by political manipulation or the patronage of vested interests; and
3. the door is left open to individual dissent, based on a scholar's conscientious objection to the consensus of the majority, thus allowing for the possibility of the law's constant re-examination and revision in the continuous study and debate among scholars.

Corneal Transplants

An instructive case illustrating the above-mentioned freedom to dissent is furnished by Rabbi Samuel Hibner in a challenging article on "The Utilization of the Eyes of the Dead for Restoring Vision to the Blind" which appeared in the current issue of *Ha-Darom* (Nisan 5721), the Torah journal of the Rabbinical Council of America. Admitting that the question of the permissibility of such eyes grafts had already been raised and an-

swered in the affirmative by many rabbinical scholars (two such permissive views were recently published in the fourth volume of *Noam*), the author nevertheless rejects their opinion on all counts after a thorough reappraisal of the main legal problems involved. These are:

1. *The prohibition of deriving a benefit from the dead.* This objection has been set aside in this case on the grounds that: (a) the restoration to life of the tissue from the dead removes the prohibition in the same way as such revitalization revokes the status of ritual defilement according to the Talmud; (b) the ban on benefiting from a forbidden substance, just as on consuming it, lapses when the substance is transformed into a different matter, such as from dead to live tissue; and (c) the blind should be regarded as a patient in danger of his life, for whose sake the law against utilizing the dead, like all other laws, ought to be suspended. But Rabbi Hibner refutes these arguments because: (a) there is no conclusive evidence in the sources to show that the conditions under which an article may be restored to purity are necessarily the same as the conditions under which the ban on benefiting from it may be removed; and (b) substances forbidden to be used (as distinct from such as are merely forbidden to be eaten) retain the prohibition even after they have undergone a chemical or physical change, since one would after all still derive a benefit from the original substance. Moreover, any part severed from the dead remains forbidden not because it is itself dead human matter (so that its return to life would remove the cause of the prohibition) but because it once belonged to a human corpse, as proved by the fact that a limb amputated from the living, though now dead, is not prohibited for use since it was never a part of a dead body. The further argument (c) that a blind person should be considered as a gravely sick patient is also invalid. For the symptoms of danger in eye-diseases listed in the Halakhah do not include blindness. Nor can the hazards to which the blind are exposed be compared to those of epileptics who may legally claim the concessions reserved for patients in danger; for, unlike epileptics who are subject to sudden seizures rendering them completely helpless and irresponsible, the blind can guard themselves against serious risks to life. This does not contradict the aggadic statement that "the blind are regarded as dead"; similar statements are made about leprous, poor, and childless people, and those surely would not be exempt from religious duties because of their comparison to the dead.
2. *The prohibition to desecrate the dead.* For the same reasons the needs of the blind cannot set aside the biblical law forbidding any interference with the integrity of a human corpse. The

consideration which might warrant such an attack on the otherwise inalienable rights of the dead is the immediate prospect of thereby saving a human life, and that does not apply here.

3. *The precept to bury the dead.* In view of the ruling, confirmed by several authorities, that the biblical commandments to inter a human corpse and not to leave it unburied overnight include any part removed from the body after death (see this Department's review of my study on the subject in TRADITION, vol. III, no. 1), the cornea as well as the eye itself requires burial. Consequently, the retention of the cornea for grafting purposes, even if the rest of the eye is interred, would constitute an offense, in the opinion of the author.

Rabbi Hibner concludes: "I admit the truth; my heart hesitates to forbid what many have permitted. But after I have studied and investigated their arguments and found them all liable to refutation, my heart does allow me to sanction the practice."

BINGO IN SYNAGOGUE HALLS

Another all too topical problem discussed in the same issue of *Ha-Darom* is "The Question of Bingo and Chance Games in Synagogue Halls" by Rabbi Gedalyah Felder. The questioner was concerned to elicit the guidance of Jewish law especially in cases when the proceeds of such games are devoted to support the synagogue or Jewish education.

In his response, Rabbi Felder quotes a number of the rabbinic sources mentioned in this Department's review under the heading of "Gambling" in the previous issue of TRADITION, and we will therefore not repeat these here.

Halakhically, there are two distinct objections to any form of gambling: the illegality of the winner's gain and the wasting of one's time with idle pursuits. The former objection may be mitigated by the fact that the players do not usually expect to make money and that they often lose more than they win; it is therefore mainly the second evil which prompted the rabbis from the early Middle Ages to our own day to denounce gambling as an immoral and demoralizing pastime.

But in view of the sacred purpose to which the money so raised is to be put, it might on first thought be inferred from a passage in the Jerusalem Talmud (*Moed Katan* 2:3), permitting one to borrow money on interest if needed for a religious requirement, that gambling for holy ends is likewise legitimate. Rabbi Felder reasons, however, that the two cases are not analogous. The Talmud merely permits the borrower to obtain a loan on interest if he cannot otherwise perform his religious duty, whilst the lender is still forbidden to accept the interest since it does not serve him in the performance of any religious act. In our case, too, the gambler himself, far from fulfilling any religious precept by his indulgence in illicit games (since he could help the cause without gambling, if he so desired), actually

transgresses the rabbinic edict against idle occupations. Furthermore, such games should be banned as disrespectful in synagogue halls. For, although no intrinsic sanctity attaches to these halls (any more than to any other places used casually for prayer), they should not be open to activities disgracing them, particularly since sacred functions are occasionally performed in them. "The matter is most reprehensible and accordingly should not be tolerated."

Illegitimate Children

A concise summary of rabbinical rulings on legal claims arising from the birth of illegitimate children, based mainly on many medieval and modern responsa, is given in an article by Rabbi Akiva Rudner in the fourth volume of *Noam* (Jerusalem, 5721). The following are among the decisions listed by the author:

The illegitimate child's maintenance:

1. If an unmarried woman sues a man for an allowance to support her child which, she claims, was begotten by him, he cannot be made liable for the payment of such an allowance unless he admits his paternity.
2. This applies even if, while he admits that he misconducted himself with the woman, he argues that she had relations with other men, too, and that the child belongs to one of them; but some authorities hold that he would then be required to confirm his denial by oath.
3. Even if there is evidence, or if he admits, that he misconducted himself with her, he cannot be made responsible for the child, since we assume that she may have had relations with other men, too, except in circumstances rendering such a possibility unlikely, such as the parties being engaged to each other or the woman being in the man's domestic service.
4. But if there are clear indications pointing to his paternity, such as his admission that the child is his or the fact that he hired a nurse for the child or the absence of any suspicion that the mother ever lived with other men, he is obligated to provide the child with all its needs in accordance with the duties of any father to his child, including the provision of its religious and vocational training and, in the case of a daughter, of its dowry.
5. These obligations likewise ensue if the parties were bound by a civil marriage only or even if they lived together without formal marriage; in that event his protest disclaiming paternity is ignored.
6. Upon the father's assuming these obligations, he may claim the custody of the child; in cases of dispute, custody is awarded to the mother only — despite the fact that the father bears the cost of maintenance — if the parents had been lawfully married to each other.
7. In the absence of legal proofs to establish the man's paternity blood-tests cannot be accepted as sufficient evidence. [This

verdict is based on an opinion of the late Chief Rabbi Benzion Uziel (*Sha'arei Uziel,* ii. 40). But in this connection it may be of interest to mention that certain blood-tests to establish paternity for legal purposes are said to have been recommended already by Saadya Gaon (*Sefer Hassidim,* ed. Wistinetzki, no. 291) and, according to a late Midrash, even by King Solomon (J. D. Eisenstein, *Otzar Midrashim,* ii. 531). For details on these and similar cases, see H. J. Zimmels, *Magicians, Theologians and Doctors,* 1952, pp. 156 and 261 f.]

The legitimacy of the child on the mother's evidence:

1. While the evidence of an unwed mother may not suffice to impose the child's maintenance costs on the alleged father, her claim that the child was conceived by her relations with a legitimate man (i.e. neither with a bastard nor by incest or adultery) is admitted to assure the child's legitimacy.
2. But if that man disputes her claim, the child is not definitely regarded as his in respect to inheriting him or to freeing its mother from the levirate bond to the man's brother in the event of the former's death, although her claim raises sufficient doubt to debar the child's marriage with the man's relations.

"Harlot's Hire":

1. If a woman claims a payment for her illicit relations with a man which he had allegedly promised her, and he denies having made such a promise, he is obliged to confirm his denial by oath.
2. But if their relationship involved transgressing the capital laws of incest or adultery, he is legally free from such payment (since any capital guilt sets aside all financial liabilities arising from the offense), although he is morally obliged to honor his promise.
3. If she argues that he promised to marry her, and she demands that he either marry her or pay her compensation, her claim is not granted; but some authorities hold him liable to the payment of compensation.

Medical Experiments on Animals

With the hue and cry once again raised by the anti-vivisectionists against the utilization of animals in the service of medicine in various parts of the United States and elsewhere, special interest attaches to the Jewish view on this topic discussed in a contribution to the same issue of *Noam* by Rabbi Abraham Haputin. Unfortunately, however, the article, while thorough and erudite in some parts, is sketchy and deficient in others.

The greater and best part is devoted to a lengthy analysis of the opinions in the Talmud and codes on whether the ban against inflicting pain on animals is of biblical or merely rabbinic status. The ban is derived from the injunction to assist in relieving overburdened beasts (Ex. 23:5). Most authorities,

including notably Maimonides (following the general consensus of views) and the *Shulchan Arukh,* hold that it is therefore a biblical offense to subject animals to cruelty; but others, led by the Gaon of Vilna following the view of Rabbi Jose Hagelili in the Talmud, deem such conduct as a violation of rabbinic law only.

Since the Talmud rules that the very precept to assist animals in distress is not applicable when it conflicts with "human dignity" (e.g. in the case of elders who in helping overloaded beasts would tarnish their honor), the law on cruelty to animals, whether biblical or rabbinic, must certainly give way to the superior consideration of human health. In reaching this conclusion, the author strangely omits to cite the explicit ruling by Isserles in the *Shulchan Arukh*: "The prohibition of causing pain to animals does not apply to whatever is needed for medical ends" (*Even Haezer,* 5:14). But he does mention that, according to Rabbi Jacob Emden, the prohibition covers only domestic animals working for man, not insects, reptiles, etc., while Rabbi Ezekiel Landau regards the ban as forbidding only pain to animals, not killing them.

It is regrettable that the author did not consult some of the important responsa already published on this specific subject. He might have referred in particular to the enlightening discussion between Rabbi J. M. Breisch — who concluded that, while there was no legal objection to experiments on animals, they were indefensible on moral grounds — and Rabbi Yechiel Weinberg — who reasoned that mere considerations of piety must be waived if suffering would otherwise be inflicted not on oneself but on others, adding "what right have you to assume that the pain of animals counts more than the pain of sick people who might be helped by these experiments?" (Breisch, Responsa *Chelkat Ya'akov,* part i, no. 30).

Opening the Refrigerator on Sabbath

The question of whether one may open the door of an electric refrigerator on the Sabbath has been treated frequently in the responsa literature of the past decade or two, but none of the written judgments are more exhaustive than the responsum by Rabbi Solomon Zalman Auerbach published in *Sinai* (June 1961).

The author first explains in detail the operation of the crucial thermostat control. This consists of a small container filled with a certain volume of gas attached to a special switch. When the temperature inside the refrigerator rises, the gas expands, eventually causing the one metallic surface in the switch to press against the other, thus completing the electric circuit and activating the freezer unit. As soon as the temperature is then reduced to a certain low degree (the exact degree can be determined beforehand by a regulator), the gas contracts again, breaks the circuit and stops the operation of the refrigerator. Each time one opens its door, therefore, one indirectly affects the switch by admitting comparatively warm air to the interior,

causing the gas to expand and the circuit to be closed (or to remain closed for longer than it would otherwise be). The question is, then, whether such indirect operation of the freezing mechanism violates the Sababth laws on the kindling and extinguishing of lights.

No problem at all arises if the door is opened whilst the refrigeration unit is at work (provided, of course, that any electric bulb switched on and off by the movement of the door has been removed before the Sabbath). Although the admission of warm air will automatically prolong the operation of the unit, such an act would be analogous to closing a window in order to prevent the draft from blowing out a candle light. To prevent a light from being extinguished is not regarded as even causing it to be lit; hence there can be no prohibition involved in such an act. Nor can this be compared to adding oil to a burning lamp (which is forbidden under the heading of kindling a light), since the additional oil will itself burn, whereas in our case the warm air neither sustains nor causes a fire but merely prevents a break in the electric circuit.

The article then discusses the possibility that, in the event of the unit not working at the commencement of the Sabbath and the opening of the door being prohibited at that time, such an action may then be forbidden for the duration of the whole day, on the talmudic principle that anything forbidden to be handled (as *Muktzah*) at twilight on Sabbath eve remains so for the entire day. But this argument is refuted on the grounds that it is unlikely that the thermostat did not operate during the entire twilight period and that, even if it did not, it would still be permitted to open the door in an unconventional manner, since the opening would in any case not involve any biblical prohibition. Moreover, the activation of the switch caused by the door may, in the author's view, well be considered legitimate as "an unavoidable result of an act which one does not care for" (*pesik resheh delo nicha leh*), since one would obviously prefer that the warm air not enter the refrigerator thus necessitating the freezing unit to resume its operation. One's intention in opening the door is merely to remove or store food, and the incidental fact that the air inside is thereby warmed is against one's will. However, since the inevitable cooling action is after all desired in order to preserve the food, following the rise in the temperature after opening the door, the author leaves this issue unresolved.

Rabbi Auerbach therefore seeks the major argument in favor of a permissive ruling in another and altogether novel direction. The activation of an electric current, he reasons, can only be forbidden on account of its prohibited effect, such as cooking or lighting, whereas in our case turning on the current merely results in reducing the temperature. This, in the author's opinion, does not violate any established law, at least not biblically. Nor need one consider the often expressed fear that by closing the circuit some tiny sparks are ignited, involving the prohibition of

lighting a fire. First, according to the experts, the use of alternating current produces no sparks at all, or sparks so microscopic that they may be ignored. Second, even when such ignition does occur, far from being desired or useful, it only wears out the points and cannot thus be classified as work interdicted on the Sabbath.

Numerous additional arguments and halakhic considerations finally lead the author to the conclusion that there are no valid grounds whatever for denying oneself some of the delights of the Sabbath by refraining from the use of the refrigerator at any time, whether the cooling apparatus is at work or not.

The Jewish Claim to the Holy Land

The question of Israel's right to the Promised Land has exercised Jewish thinkers long before the Balfour Declaration and the United Nations Palestine Partition resolution. This question is treated in the very opening remarks of Rashi's monumental commentary on the Torah — the most popular Jewish work ever written — and much earlier still in numerous passages in the Talmud and Midrash. Some of these sources are the subject of a fascinating study by Rabbi Shelomo Goren under the title "The Patriarchs' Acquisition of the Land of Israel" which appeared in *Sinai* (May 1961). Although of mainly academic interest, the article is equally valuable as a halakhic dissertation of profound significance and as an essay of great merit on an aspect of Jewish nationalism.

The eternal right of the Jewish people to its land has been established by the Creator since the beginning. The Rabbis interpreted the verse "When the Most High gave to the nations their inheritance . . . , He set the borders of the peoples according to the number of the children of Israel" (Deut. 32:8) as referring to the provision God made in the distribution of the lands of the earth that the Holy Land shall be reserved for the people of Israel (*Yalkut Shimoni, Kedoshim* 615; *Sifre, Ha'azinu* 311).

But the legal validation of this provision still required a formal act or token of acquisition, particularly since the land was originally inhabited, and thus possessed, by other peoples. Halakhically, the Talmud presumes that Israel's legal title to the land dates back from the time of the Patriarchs. This is derived from the verse "And I gave it to you for a heritage" (Ex. 6:8) — "it is an inheritance for you from your fathers" (*Baba Batra* 119b). Consequently, at the time of Joshua's conquest the first-born received a double portion, a right which can only be justified on the assumption that Israel took hold of the land as a bequest from its ancestors.

According to an opinion recorded in the Jerusalem Talmud, it was this consideration which made Israel liable to set aside *challah* from produce found on entering the land under Joshua; for such produce was technically in Jewish possession even before the conquest, as proved by the verse "To thy seed I *gave* the land (Gen. 15:18) — "and not 'I shall give the land'"

(*Jer. Tal., Challah* 2:1). The difference between the Babylonian and Jerusalem Talmudim would then merely concern the biblical source on which this teaching is based.

But this agreement of views between the two Talmudim extends only to the land's legal ownership; it evidently does not include the views on the land's sanctity. The Jerusalem Talmud, since it refers to the liability of giving *challah* which is limited to the Holy Land, seems to hold that this sanctity antedates Israel's conquest of the land. The Babylonian Talmud, however, always speaks of the land having received its sacred status at the time of Joshua and again later when the Babylonian exiles returned to it.

A third view, which apparently challenges both Talmudim, is expressed by the Midrash. It refers to the arguments between Abraham's and Lot's shepherds (Gen. 5:7). The latter, who refused to muzzle their animals to prevent them from thievishly grazing on Abraham's pastures, had argued that since Abraham was old and childless, his possessions would in any event soon be inherited by Lot, his next-of-kin, so that there was no theft involved. Whereupon, in the words of the Midrash, God told them: "When will I give the land to him [to Abraham's seed]? When the seven nations have been uprooted from it" (*Gen. Rabba* 41:6). For this reason the verse in which this quarrel is mentioned expressly concludes "And the Canaanite and the Perizzite dwelt in the land" (cf. Rashi, *a.l.*). This would indicate that Israel's legal title to the land did not take effect until Joshua's conquest.

But if we assume, with the Talmud, that the Patriarchs' acquisition of the land was never nullified, why should the inception of the land's sanctity have had to await its conquest and reconquest under Joshua and Ezra? To this question Rabbi Goren ventures an original answer. The transfer of the land's ownership to Israel was a divine act and as such perpetually and irrevocably valid. Hence, once the land was given to Abraham as a heritage, it remained in Jewish possession even during the Egyptian and Babylonian exiles. The sanctification of the land, however, required Israel's physical occupation of it, and it thus lapsed with Israel's departure from it; for anything determined by human action is rendered nugatory as soon as its cause is eliminated.

This distinction may also explain why, according to the accepted Halakhah, the first sanctification of the land by Joshua was merely temporary and ceased with the Babylonian exile, whereas the second under Ezra remained permanent (see Maimonides, *Hil. Terumot* 1:5). Joshua's conquest, because it did not serve to establish Israel's legal title to the land which goes back to the Patriarchs, was merely the means whereby the land was sanctified. Hence, when that conquest was cancelled by the Babylonians' conquest, the land lost its sacred status. With the return of the exiles under Ezra, however, the land was not conquered at all; it was resanctified by virtue of its *de facto* seizure as an inheritance (not by *kibbush*, but by *chazakah*). A

foreign conquest can undo the effects of Israel's conquest (i.e. the land's sanctification), but it cannot reverse the effects of seizure by occupation (*chazakah*). The first was a national act; this could be neutralized by the act of another nation. The second return, however, amounted to nothing more than the resumption of the rights of possession by *individual* Jews (which resulted in the land's resanctification); the legal consequences of this cannot be set aside by any alien conquest which merely removes Jewish national control of the land but not the presumptive rights of its individual citizens.