

The tenth year of Israel's independence finds her citizenry not only in a state of political and social change, but also in a state of spiritual ferment, beset by religious problems of great moment, with the whole future cultural complexion of the State in the balance. To a great extent, these problems have revolved about the central issue of whether traditional Jewish law is applicable to an autonomous Jewish state, and hence relevant to the lives of its citizens. One of the foremost proponents of the view that the Halakhah contains within itself the means whereby its legislation may be adapted to the needs of a modern democracy is Rabbi Mosheh Zevi Neriah, an outstanding Israeli scholar whose greatest contribution to the State has been in the field of education. He is the *Rosh Yeshibah* of the *Benei Akiba* network of religious schools. This essay, adapted and translated from the original Hebrew, presents some of Rabbi Neriah's main points and is not intended as an exhaustive treatment of the subject.

## THE STATE OF ISRAEL AND THE HALAKHAH

### I

Torah and State—divine revelation and national consciousness—are inextricably bound to each other. One without the other is both meaningless and incapable of survival. Jewish national interests have no special claim upon our loyalties if not for Torah. And Torah is emphatically not to be understood as a private faith for individuals only. It is irrevocably identified with the people of Israel, and most especially with the Holy Land, although it remains authoritative for Israelites in the exile as well.<sup>1</sup>

However, despite the intimate connection between Torah and State, and despite the plethora of details in Torah governing the practical relations of the individual Israelite with his neighbors, there does not exist a corpus of all-inclusive rules and complicated laws for the government of the Jewish state and the conduct of its political affairs. The reason for this is evident: governmental

1. Nachmanides on Lev. 18:25 and on Dt. 11:18.

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systems and political institutions change with the times, whilst Torah was given for all time.<sup>1</sup> The Torah thus does not bind itself to specific forms of state rule which are, by nature, transitory and changing. Even the question of monarchy as the accepted form of Jewish government is not to be thought of as conclusive and beyond question. Aside from the fact that the prophet Samuel consented to a monarchy only begrudgingly, as a concession, the Halakhah itself records a controversy as to whether the appointment of a king is an *obligation* or merely *permitted* by Torah.<sup>2</sup> A renowned talmudist, much closer to our own day, has declared that the decision on the type of government ultimately rests with the people themselves.<sup>3</sup> Essentially, then, the Torah does not impose any preordained political institution upon the Jewish state, and leaves it to the leaders of each generation to promulgate the necessary rules and laws for the regulation of the mundane affairs of state provided, at all times, that they are in consonance with the spirit of Torah.

This process of temporal legislation as a supplement to the eternal legislation of Torah itself began almost at the very beginning, according to the rabbis of the Talmud. Thus, in his own generation, Moses had to formulate laws (*gezerot* and *takkanot*), in addition to those mentioned in the Torah, in order successfully to guide his people through the great desert.<sup>4</sup> If such legislation was necessary for the religious life of the people in the time of Moses, it was all the more necessary in public life later, under Joshua. ". . . And he set them a statute and an ordinance in Shechem" (Joshua 24:25) is understood by that profound thinker, Nachmanides,<sup>5</sup> to refer not to a confirmation by Joshua of the Torah of Moses, but to new political regulations and practices. Joshua's ordinances were designed to regulate the life of the country and to prevent quarrels amongst citizens and between one tribe and another.<sup>6</sup> During the years of the division of the land by the Israelite tribes, political problems arose concerning this division and the assignment of certain privileges, such as fishing rights in the Kinneret,<sup>7</sup>

1. cf. Nachmanides on Dt. 6:18.

2. *Sanhedrin*, 20b.

3. *Netziv* in *Ha'amek Dabar*, Dt. 17:14.

4. *Sabbath*, 30a.

5. on Ex. 15:25.

6. *Baba Kama*, 80b and 81a.

7. *ibid.*, 81b.

and the complex relationships with the tribes in Trans-Jordan.<sup>1</sup>

With the unification of the tribes under a new and vigorous Monarchy, a new kind of relationship between leader and individual arose which did not stem directly from the Torah's codes, but from the need of monarchical and public stability. Some of the developing laws, like that of the law of the captives,<sup>2</sup> were manifestly of temporary nature. Others, however, dealt with problems which have troubled Jewish thinkers down to the present day. From the perspective of a citizen of Modern Israel, these questions may be summarized as follows:

What are the halakhic principles permitting the imposition of the state's powers on the individual? What is the basis for the expropriation of the property of the individual? To what extent may the individual be asked to sacrifice himself for the welfare of the state?

## II.

We find three broad areas in which authority over the individual is granted by the Halakhah to the community:

- 1) The power of the court to declare property ownerless.<sup>3</sup>
- 2) Capital punishment for rebelling against the state.<sup>4</sup>
- 3) Optional warfare.<sup>5</sup>

The ultimate authority for the powers of the State Courts, as I have shown elsewhere, lies primarily in the public welfare. Because of this fact early commentators permitted the right of confiscation of property to public officials<sup>6</sup> even during times of peace, although these actions are not entirely in accord with normal judicial procedure. This is similar to the interruption of the normal process of law with regard to the integrity of the individual himself, like a military draft in peace time.

Now, just as special powers are granted to the instrument of public welfare, the courts, in such civil matters as expropriation

1. v. Joshua 22, and cf. *Ha'amek She'elah*, 142.

2. J. T. *Sanhedrin*, 2:5.

3. *Gittin*, 36b.

4. *Sanhedrin*, 49a.

5. *Sotah*, 44b; Maimonides, *Hil. Melakhim*, 5:1.

6. *Ha-torah ve-ha-medinah*, I, p. 55.

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of property, so the courts also have wide powers in decreeing capital punishment for rebellion against the state.

The source for this authority is not that of royal dignity, but rather communal peace, the peace of the nation. "For if men did not fear the government, they would swallow each other alive".<sup>1</sup> And the saving of many lives supersedes the interest of the individual.

Regular Torah procedure makes capital punishment difficult and rare. Thus, the Mishnah states "A Sanhedrin which imposes capital punishment once in seven years (once in seventy years according to R. Elazar ben Azariah) is called murderous."<sup>2</sup> And according to Maimonides, "It is preferable to exonerate one thousand criminals than to execute a single innocent person."<sup>3</sup> Yet, on the other hand, we note the expansion of the law of rebellion against the state to the extent that a man may be executed even as a result of self-incrimination.<sup>4</sup> Why such extremes? It is because of the public welfare and the welfare of the state at a given moment, whose claims the Halakhah recognizes.

The law of capital punishment for rebellion against the state is not limited specifically to treason against a king who has met all halakhic conditions of royal appointment. Rabbi Lipman Milhausen is explicit on this point: "He who rebels against a leader of Israel, even if that leader has not been anointed as a king, may be punished by death, for the leader stands in the place of the king."<sup>5</sup> The passage implies rebellion against the state (*Malkhut*) and not against the king (*Melekh*), for it is not the personal aspect of the revolt against a king which is the significant factor, but rather a revolt against the monarchy or state, against the public as represented by the institutions responsible for its peace and security.

Rebellion, indeed, need not mean armed action against the government. We learn from the author of *Sefer Ha-chinukh* (commandment 36) that it is permissible to execute extra-halakhic punishment against anyone who violates the interests of the public even in matters of finance. It is not the monetary value which

1. *Abot*, 3:2.

2. *Makkot*, 7a.

3. *Sefer Ha-mitzvot*, ed. Rabbi Chayyim Heller, *lavin*, no. 290.

4. Maimonides, *Hil. Sanhedrin*, end chap. 18.

5. In *Kuntres Kebod Melakhim*, at the end of the Schulsinger ed. of Maimonides' *Yad, Hil. Melakhim*, 1:30.

dictates the extra-legal and severe procedure, but rather the fact that the misuse of public funds can lead to the endangering of lives. It is this that may make the offense a capital crime under extreme circumstances.

For this reason the matter is not limited only to a king or to the institution of monarchy. When there was no king in Israel, it was the courts who were required to guard the public welfare, and political laws become the province of the judiciary, who were often obligated to rule, not in accordance with regular halakhic procedure, but according to emergency regulations. "When there is no king in Israel, the judge has two functions, that of judge and that of king."<sup>1</sup> Thus the court may become more than a judicial body. Rabbi Eliezer ben Yaakov remarks, "I have heard that the court may flog or inflict punishment without sanction from the Torah."<sup>2</sup> And the *Ran* comments that "flogging and punishing not in accordance with law do not derive from the court's judicial authority but from its legislative power." Analogously, as we saw above, the court's power to expropriate property stems not from its strict Torah status, but from its status as a political institution.

Later scholars attempted to justify these laws but could find no explicit authority for them in Scripture. The earliest source for the law of the rebel is the verse in Joshua (1:18): "whosoever . . . doth rebel against thy commandment . . . shall be put to death." However, these scholars were troubled because of the principle that a prophet, like Joshua, may not introduce new laws. Attempting to base this obviously logical and inevitable law of the rebel upon halakhic foundations, two modern talmudists, Rabbi Zvi Chayut<sup>3</sup> and the *Netziv* of Volozin<sup>4</sup> both wrote that the main source of the law of the rebel against the state is the law of *rodef*, or pursuer. (It is permitted to slay a "pursuer", i.e. one who pursues another with the manifest intention of committing violence, without bringing him to trial.<sup>5</sup>) The rebel becomes a "pursuer" of the many because he disrupts public peace and security. Hence the rebel, like the pursuer, is subject to extra-legal treatment. The *Chatam Sofer*, however, prefers another source for the law of the rebel.

1. *Derashot ha-Ran*, XI. This is also the opinion of Abravanel, *Sidra Shoftim*.

2. *Sanhedrin*, 46a.

3. in his *Torat Nebiim, din melekh*.

4. *Ha'amek She'elah*, 142:9.

5. *Sanhedrin*, 72b ff.

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He bases this law on the *Cherem* or powers of excommunication of the community.<sup>1</sup> In his response to Rabbi Chayut, he cites Nachmanides<sup>2</sup> who writes that the verse, "None devoted (*cherem*), which shall be devoted of men, shall be redeemed, but shall surely be put to death," must not be taken literally. Rather, it is to be understood as empowering the duly authorized leader of the people, by virtue of their own authority, to declare a ban or *cherem* ("devoted of men"—or excommunication) under pain of death. If all Israel agrees on the *cherem*, he who violates the ban is guilty of death. This is therefore, a clause granting wide powers to the state to act on behalf of society.<sup>3</sup>

The *Ran* explains, in a homily, why such harsh laws (like the *cherem*) are referred to only indirectly in the Torah: Divine law is eternal and its paths are pleasant; only in times of emergency is it permissible to utilize such human laws as those of excommunication, the pursuer, and the rebel.

We might add that such eminent later talmudists as Rabbi Meir Simchah and Rabbi Meir Dan Plotski both agree with the opinion we have mentioned that political legislation is determined by the logical demands of the time and are not circumscribed by the precise legal strictures of Torah.

For our own day, what has been stated above may best be summarized in the words of the late Chief Rabbi Kook who wrote, "It is evident that when there is no king, these legislative rights revert to the nation as a whole. . . . And in whatever pertains to public leadership, to all who lead the nation, . . . (the leaders are to be considered) judges in political matters; for these rights and political privileges are requirements necessary, at least for the time being, for the stability of the nation and of the world."<sup>4</sup>

### III.

The most developed type of the state's potential authority over the individual occurs during a "permissive" war. The king has the power to call the people to arms when necessary "not only for a

1. Responsa *Chatam Sofer*, Or. Ch. 208.

2. on Lev. 27:29.

3. cf. *Chidushei Rashba* on *Ned.*, 7a.

4. *Mishpat Kohen*, 337.

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defensive war, but to lessen the possibility of attack by heathen tribes," also to "ease the situation,"<sup>1</sup> and to broaden the boundaries of Israel.<sup>2</sup> It must be presumed that all these activities are calculated to increase the security of the state and secure the peace of the inhabitants.

But there are restrictive conditions on the king in these instances. The Mishnah states explicitly, "Permissive wars are declared only by a court of seventy one (i.e. a full Sanhedrin)."<sup>3</sup> The seriousness of the matter and the grave responsibility which involves many lives requires the consent of the judiciary, i.e., the consideration and decision of the highest tribunal, a tribunal established by the Torah itself.

A great Talmudist wrote,<sup>4</sup> "The principal reason for calling these wars *permissive* is, in my opinion, precisely because they require the *permission* of a court of seventy one." He finds the term ambiguous, if not unfortunate. "They are, rather, *mandatory* wars . . . it could not be otherwise. For how can all the wars since the days of Joshua be considered purely optional? Who permitted the leaders to endanger thousands of Jewish lives for something which is entirely optional and not mandatory at all? The thought is inconceivable. Nor can we assume that they (the people) went to war voluntarily; for even voluntarily they had no right to endanger themselves and the entire nation. On the contrary, they should have been restrained. In addition, how could these wars be completely optional and devoid of the sanction of Torah? And how did the Sages thus permit the desecration of the Sabbath, which was allowed in both mandatory and optional wars? Nevertheless, these are called *permissive* according to our Sages." By imposing upon the government the necessity to secure permission of the Great Sanhedrin before endangering Jewish lives and desecrating the Sabbath needlessly, the Torah attempts to prevent impulsive and irresponsible actions by those who stand at the head of the government.

We thus learn that, restraint notwithstanding, the public has the legal authority, through those who represent them, to exercise authority over the individual even when it involves danger to life.

1. *Sotah*, 44b.

2. Maimonides, *Hil. Melakhim*, 5:1.

3. *Sanhedrin*, 2a.

4. *Mekom Shemuel*, 8.

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Thus wrote the late Rabbi Kook, "There is no alternative but to assert that the public welfare in times of war is an exception to the rule, 'thou shalt live by them'<sup>1</sup> for we see that permissive wars are allowed. Otherwise, how can we find justification for endangering, human lives for purposes of expansion or comfort? But wars and public regulations are in a different category. Political laws need not conform to the Torah's regulations concerning the individual; and this includes laws of war, both mandatory and optional. Elsewhere, I have explained that these also have their source in the Torah, but that the means of their interpretation and application were granted to each ruler according to his own wisdom."<sup>2</sup> Rabbi Kook continues, "Therefore, we are told that the king must write two scrolls of the Torah<sup>3</sup>: the first scroll is in performance of his duty as a Jew, and the second, in order to learn the conduct of the state."<sup>4</sup>

For modern scholars, then, Torah has all the necessary principles for the conduct of the state, but gives a relatively great degree of freedom to the heads of state to operate according to their understanding of the needs of the hour. Along with this freedom of action, the Torah deems those heads of state responsible for acting in conformity with the spirit of Torah. Their "understanding" is not to be completely self-determined, but it is to grow out of the matrix of the Torah ideology.

By quoting the above mentioned talmudic passage from *Sanhedrin*, Rabbi Kook attempts to reiterate for our times the proposition with which this essay began: there is an inextricable bond between Torah and the State, between Divine Revelation and National Consciousness. It is evident that the divine and eternal Torah did not bind or subjugate itself to any specific political system. These systems are not permanent, they change according to the demands of the times, so that it would have been impractical to mention in the Torah all aspects of the regulations of society and of the state.<sup>5</sup> But everywhere and in everything, political

1. This biblical passage (Lev. 18:5) is the oft-quoted source for the suspension of most laws in order to save a human life. It is the source, therefore, for always favoring the preservation of life and opposing any unnecessary risk to human survival.

2. *Mishpat Kohen*, 315-17.

3. *Sanhedrin*, 21b.

4. *Mishpat Kohen*, 274.

5. See *supra*, p. 201, note 1.



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conduct must be imbued with the spirit of Torah. The additional Torah scroll that a king must write indicates that political laws pertaining to the community at large, which are apparently removed from the precise laws concerning individuals as delineated in the Torah, must be permeated with the knowledge of the Torah, with the general principles and goals of the Torah of the living God, and with the Jewish principles of the sanctity of life.

It is, therefore, necessary, from the state's point of view, to place the Torah at the base of its structure and with it to erect its solid walls.

The Torah's principle of the sanctity of the individual, created in God's image, must serve as the guide for the State of Israel, and it must determine the complexion and the direction of the State, regardless of the political problems within and without her borders.