REVIEW OF RECENT HALAKHIC PERIODICAL LITERATURE

Immanuel Jakobovits

Our material for this Review is once again drawn principally from *No'am*, the valuable collection of halakhic essays published by the *Makhon Torah Shelemah*, of which the seventh volume has just appeared in Jerusalem. While this volume follows the usual pattern of featuring many or most contributions on some common theme — dealing this time with the writing and preparation of *Tephillin* and *Torah* scrolls — it also contains several responsa on subjects of topical interest.

ABORTION

A very thorough dissertation by the late Rabbi Mosheh Jonah Zweig (of Antwerp) discusses, in the light of Jewish teachings, the much-publicized verdict of the celebrated Liege trial in which a Belgian mother was acquitted although she had confessed to killing her child born with deformities as a result of thalidomide she had taken early in her pregnancy. This important contribution brings to three the number of responsa on this subject known to the reviewer (the other two were abstracted in this Department in the Spring 1963 issue).

Although the question treated by Rabbi Zweig deals with the killing of a born child, his answer is concerned mainly with the abortion of a foetus suspected to be deformed. The only direct references to abortion in the principal sources of Jewish law are (1) the biblical provision for monetary compensation payable for the loss of a pregnant mother's fruit resulting from an attack on her unless this involved her death, too (Ex. 21: 22, 23), and (2) the talmudic sanction to dismember a foetus inside the mother's womb if she is "in hard travail," i.e., if her life is otherwise in danger, unless the head or greater part of the child was already delivered (*Oholot*, 7:6; *Sanhedrin* 72b). Both passages imply that the killing of an unborn child does not constitute a capital act of murder, and that its claim to life is therefore inferior to that of the mother; "for as long as the child has not yet emerged to the light of day, it is not called 'a life' " (Rashi, *Sanhedrin* 72b; so also Me'iri, *a.l.*, and on *Shabbat* 107b; and *SeMA*, *Choshen Mishpat*, 425:5). Another view, however, holds that the destruction of a foetus is not culpable as murder because its viability is still in doubt, thus rendering the warning given to the killer "a warning under doubt" which is insufficient to press capital charges (R. Elijah Mizrachi, Ex. 21:22).

According to this view, foeticide is certainly a criminal offense, although it cannot be punished by death for technical reasons. Even Rashi appears to agree with this conclusion, since he permits the killing of the foetus only "to save its mother" (*loc. cit.*), a conclusion also borne out by the Mishnah itself

which sanctions embryotomy merely when the mother is "in hard travail" and only "because her life has *priority* over its life" (*Oholot*, 7:6). But if an unborn child does not enjoy human status as "a life," on what legal basis can its destruction be prohibited?

In answer to this question Rabbi Zweig suggests the following reasoning. Just as one may "desecrate one Sabbath (to save the life of a person in danger) so that he may be able to observe many Sabbaths later" (*Yomah* 85b), so must the unborn child be preserved in order to render possible the observance of "many Sabbaths later." For this reason, too, the law extends the right to violate the Sabbath even for the sake of saving the life of a foetus (RaMBaN, *Niddah* 44b). This consideration would explain the ruling of R. Joseph Trani—the first to deal specifically with abortion proper—recognizing only grave concern for the mother's health as a legitimate indication for abortion (MaHaRIT, no. 99). This is also implied by Maimonides, who countenances embryotomy only because the unborn child must be regarded as "an aggressor" in pursuit of the mother's life (*Hil. Rotze'ach*, 1:9), i.e., because of the hazard to the mother.*

Following this reasoning, it is clearly illegal (except to save the mother) to abort any human fruit, whether after or before the 40th day of gestation, although the latter is regarded as "mere water" in some other respects (*Yevamot* 69b; *Niddah* 30b). But some authorities in fact hold that the prohibition does not take effect until after the first 40 days following conception (e.g., *Chavat Yair*, no. 31).

On the strength of these considerations, the author concludes that nothing can justify recourse to abortion, not even radiological evidence that the child will be born deformed, except the safety of the mother. But he does not make it clear whether the sanction is contingent on a threat to the mother's life or merely to her health. Once the child is born, there cannot of course be any question at all of any right to attack its life in Jewish law. Rabbi Zweig found support for this view among leading doctors and jurists, too, and he adds: "Even the Church has expressed its disapproval of killing any unborn child, however deformed; hence there would be the additional element of *Chillul Hashem* in any permissive ruling given by us."

Inflation

With the devaluation of the Israeli pound by 67% some years ago, and with the frequent inflationary changes generally, a problem often treated in rabbinic writings has again become acute: According to what values must loans or business credits be repaid if the money was devalued between the time the debt was incurred and its repayment?

This problem is the subject of a wide-ranging article by Rabbi Samuel Hubner in the same issue of *Noam*. The talmudic source on this question is the following statement: If a man lends his neighbor something to be repaid in a certain coin,

* See also below, under EXTRADITION.

and that coin became obsolete, he must pay the creditor with the new coin according to Rav, and with the old coin according to Samuel (*Bava Kamma* 97a and b). Whilst *Tosaphot* (*a.l.*) does not differentiate, in interpreting Rav's view, between a loan of money and a credit on the purchase of goods, Rashi (*a.l.*) applies this ruling only to credits but not to loans, unless it was stipulated at the outset that the loan would be repaid "in coins" instead of simply being returned when due. The distinction Rashi makes between loans and credits is explained thus: In the latter case the seller can argue that had the goods remained in his possession until the time of payment, he could have sold them for the new money, whereas in the latter case the borrower can argue that the coin he borrowed would have lost its value in the hands of the lender too (*Sepher Ha-terumot,* 46). But, following some authorities, Rashi himself eventually withdrew his view in favor of *Tosaphot's* interpretation (Mordechai, *Bava Kamma,* 9:110; *SeMaG,* neg. com., 193).

The further point raised by Rashi regarding some prior stipulation is also a matter of dispute. Some hold with Rashi that the repayment must be made according to the new value only if the transaction was specifically made on condition that the money value would be returned (*Tosaphot, SeMaG, ROSH,* and *Tur, Chosen Mishpat,* 74, followed by *ReMA,* 74:7), whilst others follow Maimonides (*Hil. Malveh Veloveh,* 4:12) in requiring the new value to be paid even if no stipulation was attached to the transaction (*RIF, Bava Metzi'a* 43a; *SHaCH, Choshen Mishpat,* 292:9).

A similar division of opinion informs the views of the responsa dealing with this problem. Thus the 16th century scholar R. Samuel di Medina argued in favor of compensating the lender or seller for any devaluation of money by the government for two reasons: firstly, because the credit is extended on a value, and it would be illogical to insist on a lesser return to the creditor than he laid out; and secondly, because it may be assumed that he would not have advanced the money if he were to suffer a loss (*RaSHDaM, Choshen Mishpat,* no. 75). Most authorities agree with this view (e.g., *ROSH,* 103:1; *RIVaSH,* 193; *Shiltei Gibborim,* on *Bava Batra,* 10; *Shevut Ya'akov,* 2:175; and *Tumim,* 42:16). On the other hand, there are some who hold that the debtor need only return the coins he borrowed, unless their weight (i.e., their intrinsic value) was reduced in the devaluation by one-fifth or more (*RaSHBA,* 3:40; *MaHaRSHaCH,* 1:62; *Benei Shemuel,* 49; and *MaHaRaM Alshich,* 115). Yet other opinions are that the new value must be paid only if the old coins were completely invalidated and not merely devalued (*Chavat Da'at,* on *Yoreh De'ah,* 165:1), or that the loss should be equally divided between the creditor and the debtor (*responsa* of R. Chayim Hakohen, *Choshen Mishpat,* 3).

The author therefore concludes that, while considerations of equity demand that the creditor should not suffer any loss in return for his good deed, the disposition of the loss is legally a matter of rabbinical dispute, and it is a rule that no money

can be awarded from the party holding it to another on the strength of a doubtful verdict. Accordingly, Rabbi Hubner arrives at the following decision: If the creditor tied his loan to the dollar and stipulated that repayment was to be made in dollar value, this must obviously be done, since any condition attached to a financial transaction is valid. But if no such stipulation was made at the time of the loan, the debtor is entitled to limit his repayment to the amount he had received, even if its value had meanwhile depreciated. Nevertheless, in such cases many rabbinical courts endeavor to effect a reconciliation between the parties by dividing the loss equally between them; but this solution requires the free consent of the borrower.

Extradition

The sequel of another celebrated trial is the subject of a further contribution to *Noam*. In an extensive and closely-argued article Rabbi Benjamin Rabinowitz-Teumim discusses the action taken by Israel in the Soblen affair. Was it right to deport a Jew, who had been sentenced to life imprisonment for espionage in America, after he had sought sanctuary in Israel, even if by offering him asylum Israel might somewhat jeopardize its security?

The principal source used and greatly elaborated by the author is a far-reaching ruling in the *Tosephta* on the sanctity of human life: "If a group of people were told by strangers 'Give us one of you and we will kill him, or else we will kill all of you,' let them all be killed rather than surrender to them a single Jewish life; but if they had singled out one person asking for his surrender as Sheba the son of Bichri was singled out (2 Sam. 20), let them surrender him and let them not be killed. Rabbi Judah adds that only if all are inside, so that he and they alike would be killed, they should surrender him and not let themselves be killed, whilst Rabbi Shimon says that whoever rebels against the kingdom of the House of David incurs the death penalty" (*Terumot*, 7:23). Accordingly, even Sheba the son of Bichri could be handed over only because they would otherwise all die in any event, or because he was legally under a sentence of death.

The reference in this law to Sheba the son of Bichri concerns his rebellion against King David and his pursuit by Joab. After he fled to Abel, Joab besieged that city, threatening to destroy it unless the fugitive was surrendered, whereupon "the wise woman of the city" advised her fellow-citizens to cast Sheba's head over the wall to Joab (2 Sam. 20:22). According to the Rabbis, she had justified the action on the grounds that Sheba and the citizens would otherwise all be doomed; but if he had had an opportunity to escape and save his life, the citizens would not have been entitled to protect their own lives at the cost of surrendering his, since one life must never be sacrificed to save one or even more other lives (Rashi, a.l.). (Since every life is of *infinite* value, it cannot be outweighed by any number of lives, being *equally infinite* in value—*I.J.*).

Maimonides, too, rules that hostages must not deliver one of them

for execution in order to save their lives, unless that one was under sentence of death like Sheba (*Hil. Yesodei Ha-torah,* 5:4), though he adds "but one does not issue such a ruling directly" (*ibid.*), i.e., one does not impose a decision on such matters but leaves it to the group to determine on an *ad hoc* basis.

It is clear, then, in principle that a community has no right to save itself at the deliberate expense of a single life. Even where the alternative to the surrender of one is the death of all, the one included, the right to hand him over is not unqualified. Otherwise it would follow that if A were told to kill B or else both would be killed, A could in fact kill B—a conclusion which is untenable, since murder is among the three cardinal offenses to avoid for which one must lay down one's life. Hence the right to surrender a fugitive requires two conditions: Firstly, the alternative must be the death of all, the fugitive included, thus invalidating the argument "How do you know that your blood is redder than his?" on the basis of which one life should not normally be sacrificed to save others; and secondly, the person to be surrendered must be the cause of the danger to the others, thus marking him as a kind of pursuer whom one may strike down in self-defense to save one's life, and thus excluding (in the above case) the right of A to kill B (since the latter was innocent and not the cause, as a pursuer, of the threat to A).

This explains Maimonides' recourse to the "pursuer"-argument to justify the abortion of an unborn child in order to save the mother's life (*Hil. Rotze'ach,* 1:9): such a child may be sacrificed only because two conditions are met: it is not yet regarded as a full human life, and it is something like a pursuer, since it causes the peril to the mother, even though it does so innocently. But once the greater part of the child is born, it must not be sacrificed to save the mother (*ibid.*); in this case it is considered a full life, and the "pursuer"-argument is insufficient to warrant its destruction since it was not, after all, a guilty party in threatening the mother (following R. Chaim Ha-Levi, *a.l.*).[1]

The distinction between a guilty and an innocent "pursuer" is further borne out by the ruling that one who engages in forgeries may be informed against and handed over to the non-Jewish authorities if he endangers the public welfare, provided he disregards warnings and persists in his nefarious activities (*Choshen Mishpat,* 388 12, gloss). But once he heeds the warning, he can no longer be surrendered for his past conduct.

That it is forbidden, then, in principle to expose one person to death in order to save a community (unless that one either would die in any event, or was under a sentence of death) is accepted by all authorities except two: R. Meiri (*Sanhedrin* 72a) and R. Mordecai Jaffe (*Levush, Yoreh De'ah,* 157) who hold that one may be surrendered to save the others, provided he had been

1. For other interpretations of this Maimonides passage, see also TRADITION, vol. 5, no. 2 (Spring 1963), pp. 267 ff.

singled out by the captors, even if he was not under a capital indictment. But these rulings may be disregarded as minority views.

The author expresses surprise, therefore, at the opinion of the *Chazon Ish* in the following case: An arrow was shot off. If allowed to run its course, it would threaten the lives of several people. But it is possible to divert its flight so that it will kill only one person. While the *Chazon Ish* inclined to the view that such diversion was justified in order to reduce the number of casualties as much as possible, the author disputes this view even following Meiri's opinion since the alternative victim was not here singled out as in the case of Sheba the son of Bichri, and certainly following the majority opinion since the victim neither would have died in any case nor had any guilt.

In the light of these considerations, Rabbi Rabinowitz-Teumim concludes that it was a miscarriage of Jewish justice for the Israeli authorities to deport or extradite a person for punishment elsewhere on charges of a past crime. Since by staying in Israel he would have saved his life, his deportation would have been indefensible even if his sanctuary there might have caused some threat to the Jewish community in Israel at large.[2] While the wrong committed in this case could no longer be undone, the author set out his opinions in order to prevent any such hasty judgments in future.

CIRCUMCISION OF PROSELYTES

May a non-Jewish male be admitted to Judaism if for grave health reasons he cannot be circumcised? This question is treated by several contributors to the latest issue of *Ha-Ma'or* (March 1964).

Only one contributor (Rabbi Zvi Kohn of Montreal) is prepared to answer this in the affirmative. He reasons that the command of circumcision is applicable only to the healthy. A convert whose life would be endangered by the operation would thus be exempt from this duty just as a Jew whose two brothers previously died from circumcision (*Yoreh De'ah,* 263:2), or as a convert whose *membrum* was sloughed off (Tosephot, *Yevamot* 46b).

But this opinion is uncompromisingly refuted by the other contributors (The editor, Rabbi Meir Amsel; Rabbi Isaac Stern of Jerusalem; and Rabbi Ephraim Greenblatt of Memphis, Tenn.) as being without any foundation or support in the sources. They argue that the exemption for health reasons from the law of circumcision applies only to Jews who are freed from the observance of any religious precept when this conflicts with the claims of life. In the case of a would-be proselyte, how-

2. In the opinion of this reviewer, the author's analogy with the law on the hostages and his resultant conclusions are not altogether incontrovertible, since it is questionable whether the conditions under which a *group* must choose martyrdom are also applicable to the Land of Israel as a whole; see the Symposium on "Red or Dead?" in TRADITION, vol. 4, no. 2 (Spring 1962), pp. 165 ff. Moreover, the circumstances in the two cases differ materially in several respects.

ever, circumcision is not a *duty,* but an indispensable *condition* to his conversion. Hence, his inability to undergo circumcision renders him ineligible to admission as a Jew. This view is supported by numerous earlier authorities, including Rabbi David Hoffmann (*Melamed le-Ho'il, Yoreh De'ah,* 86) and Rabbi Yechiel Weinberg, (*Seridei Esh,* 2:-102-103) who also cites a corroborating ruling by Rabbi Chaim Ozer Grodzinsky. In fact, even if such an applicant were willing to expose himself to the risk, one would not accept him, as any death resulting from the operation would result in a *Chillul Hashem* and a danger to the Jewish people.