Yitzchak D. Gilat

This essay has been excerpted and translated from a Hebrew article which was published by Professor Gilat in a number of Israeli journals and which has aroused widespread interest. The author is chairman of the Department of Talmud at Bar Ilan University.

THE HALAKHAH AND ITS RELATIONSHIP TO SOCIAL REALITY

INTRODUCTION

The Halakhah is often depicted as a monolithic cohesive structure—a massive pillar of solid iron. This description is based on several traditional teachings of the talmudic Sages, mainly of aggadic nature. The teachings reveal that the Torah together with its oral traditions, interpretations, as well as the niceties of Biblical exegesis, were all given to Moses during the Revelation at Mount Sinai.[1] The Revelation at Sinai was a unique experience and included all that the Almighty wished to announce to the Jewish people, both in the realm of the commandments and in the realm of prophecy.

A study of talmudic literature and halakhic sources shows that the halakhah is made-up of various components and different strata.[2] It was not created on one single occasion and underwent many changes. There are ancient halakhot which may be traced to the Revelation at Sinai. Other halakhot which originated in the tannaitic, amoraic and later periods. Many halakhot were orally transmitted from master to disciple. On the other hand, there are other halakhot which were created and instituted in the wake of temporal situations.

Students of the Oral law are cognizant that the Talmud itself differentiates between the Halakhot of Torah *de-orayta* and those of rabbinic origin *de-rabbanan*. Certains laws are attributed to Moses by ancient traditions. There are also laws

which reflect the ordinances, restrictions, and customs of the Rabbis. Halakhot defined as *de-orayta* maintain supremacy over those defined as *de-rabbanan*. And in those instances where there is a clash between two halakhot and it is impossible to abide by both of them, the halakhah stemming from Torah law takes precedence over the halakhah of rabbinic origin (*Shabbat* 128b).[3] Likewise, the punishment for transgressing a Biblical prohibition is much more severe than that meted out to the violator of a rabbinical prohibition.[4]

There is a marked tendency towards leniency in the consideration of specific individual problems as far as rabbinical injunctions are concerned. In a case of suffering the Rabbis relaxed their stringencies in order to prevent human pain and suffering (*Ketuvot* 60a). Transgression of rabbinical prohibitions were permitted in order to preserve human dignity and avoid embarrassing a person in public (*Menachot* 37b). Similarly, the maintenance of normal relation between Jews and Gentiles was responsible for several rabbinical dispensations "to prevent enmity."[5] The Halakhah enjoins the concept of "emergency"[6] whereby in times of extreme distress, the Rabbis accepted the more lenient opinion as binding even though this may have been a minority opinion, or the opinion of a disciple as opposed to that of his master. All of these leniencies, however, do not apply to *de-orayta* prohibitions.

I

What is the ratio between the *de-orayta* halakhot and *de-rabbanan* halakhot?

R. Yair Bachrach, a seventeenth-century Ashkenazic scholar, and Rabbi in Worms stated in his Responsa, *Chavat Yair*, No. 192.[7]

> The interpretation of Scripture and items dealt with by the hermeneutic rules are less than one-hundredth of the laws mentioned in the Mishnah and the Gemarah.

Accordingly, the ratio may be fixed as 1:100. Therefore, we

may assume that the overwhelming majority of extant Halakhot developed during the ensuing generations.

The expansion and development of the Halakhah was accomplished by various means. These include:

> 1. Deliberate legal enactments in the form of *takkanot* and *gezerot*. 2. Novel interpretations of Scriptures. 3. The diffusion of local communal customs whose roots lie in the practices of the common people and which were eventually accepted universally. 4. Legal precedents *et al.*

The common denominator of the above is *their close relationship to the social, economic and political reality of their times and their mutual influence.*

II

The first example concerns the halakhic activity of Hillel, the Elder. According to the Talmud:

> In the beginning when the Torah was forgotten from Israel, Ezra came up from Babylon and established its foundation. When the Torah was forgotten once again, Hillel the Babylonian came up and established it (*Sukkah*, 20a).

A *baraita* in *Tosephta Ketubot* 4:9 and *Baba Mezia* 104a reads:

> Hillel, the Elder used to interpret common speech. For it has been taught: The men of Alexandria customarily betrothed their wives. However, before entering the wedding canopy, others would come and snatch them. The Rabbis wished to declare their children bastards. Hillel, the Elder, said to them: Bring me your mother's *ketubah*. They brought him their mother's *ketubah* and he found that it contained the reading: Upon entering the bridal canopy, you are my wife: They did not declare their children to be bastards.[8]

The Jews of Alexandria, influenced by the local Egyptian legal system, were quite lenient concerning the severity of betrothal and engagement.[9] Greco-Egyptian law did not recognize betrothal as a specific legal institution. The betrothed woman

woman was not dependent on her fiancé and each of the parties could retract prior to the formal act of marriage. Because of this, there were cases where the betrothed bride was abducted and married to another. These marriages were usually consummated under force. There were instances, however, where the abduction met with the complete approval of the bride.

According to the rabbinical authorities of Hillel's time, the children of the second husband were illicit offspring; the woman was technically betrothed to the first husband and was forbidden to all others. However, in order to avoid the stigma of illegitimacy, Hillel inspected the text of the writs of engagement, hoping to find a way of legitimatizing the children. He discovered that in writs of betrothal the clause "upon entering the bridal canopy, you are my wife."[10] He interpreted this that as long as the betrothed woman had not entered the bridal canopy, the betrothal had no legal significance whatsoever. Hillel gave halakhic sanction to the custom of the common folk and rendered his decision according to this custom as if the formula had been enacted by the Rabbis. On this basis, he decided that the children were not bastards.

R. Shlomo B. Aderet (Rashba), one of the leading Jewish authorities during the medieval period who was active in thirteenth century in Spain, commented that Hillel did not inspect the writs of betrothal of the women whose sons were suspected as being illegitimate, but inspected the engagement documents of other Jewish women in Alexandria. From the latter he deduced that some Alexandrians were used to writing this formula in their writs of betrothal. On the basis of these documents, Hillel substantiated the validity of those children whose mother's betrothal documents lacked this clause.[11] Unlike the rabbinical authorities who tended to declare the children bastards, Hillel searched for and found the means for establishing their legitimacy.

III

The approach of Hillel the Elder, might be better understood on the background of the midrashic statement in Leviticus

Rabba 32:7 which is lacking in the printed editions of the Midrash and has remained extant in manuscripts:[12]

> Rav Huna said: If the Halakhah is not decided according to R. Jose, the generations are despicable.

This statement refers to the controversy between R. Meir and R. Jose. According to R. Jose, the bastards will be declared legitimate in the future world. R. Meir was of the opposite opinion. The Talmud quoted this controversy, commenting that Rav Judah in the name of Samuel decided the halakhah according to the opinion of R. Jose (*Kiddushin* 72b).

In Leviticus Rabba, this dictum is attributed to Rav Huna and its style is most blatant:

> If no solution to legitimize the bastards will be found, at least in the future world, then the generations and their leaders were worthless.

The Midrash quotes the following passage:

> But I returned and considered all the oppressions that are done under the sun; and behold the tears of such as were oppressed and they had no comforter; and on the site of their oppressors there was power but they had no comforter (Ecclesiastes 6:1).

This passage was expounded by Hanina,[13] the tailor as applying to bastards:

> "But I returned and considered" — These are the bastards. "And behold the tears of such as were oppressed" — Their mothers committed transgression and these poor souls are ostracized; his father cohabited with a forbidden woman, what sin has he (the child) committed? "And they had no comforter; and on the side of their oppressors there was power" — This is the Great Sanhedrin of Israel which comes against them with the power derived from the Torah and removes them from the fold in virtue of the commandment: "A bastard shall not enter into the assembly of the Lord" (Deuteronomy 23:3) "But they had no comforter" — Said the Holy One, blessed be He "It is my task to comfort them" — For this world they bear the blemish of illegitimacy but in the world-to-come, their situation shall be as described by Zechariah (cf. Zechariah 4:2): "I have seen them all of gold" (*Leviticus Rabbah* 33:8).

According to the Midrash, God supposedly refers to the great *Sanhedrin* as "oppressors" since they alienated the bastards according to the law in the Bible, and failed to find dispensations for them. Nevertheless, the promise is made that, in the future, there will be no difference between the bastards and all other Israelites ("all of gold").

In some difficult cases connected with the law of persons, the Rabbis were required to employ drastic measures. These measures were enacted "for the general good" (*Gittin* 4:2ff.) *i.e.*, the prevention of suffering from women and the removal of the stigma of bastardism from their children, gave the impression of having abrogated a Biblical injunction.

IV

According to the early Halakhah, a husband who sent a bill of divorce to his wife via an agent was permitted to appear before a local court and announce that he had changed his mind concerning the divorce and declare the bill of divorce as null and void.[14] This announcement was sufficient to nullify the divorce. There was no necessity to notify the woman or the agent. Thus Rabban Gamliel the Elder (ca. 20-50CE) enacted the ordinance that "for the general good" such a form of nullification was invalid since it might lead to an unfortunate situation; *e.g.*, on the basis of the bill of divorce received by her, the woman could remarry and her children from the second husband would be declared bastards because the *get* had been previously cancelled.

The tannaitic authorities raised the question concerning the husband who did not heed the ordinance of Rabban Gamliel the Elder and cancelled the *get,* in a local court, without notifying the woman or the agent. Is the *get* legally binding or not? According to Rabban Shimeon B. Gamliel (*ca.* 140-170 CE), the actions of the husband have no influence whatsover and the *get* is not invalidated, since Rabban Gamliel the Elder, specifically ordained that one should not do so. This opinion is questioned by the Babylonian and Palestinian Talmuds who both ask: Is this possible? According to Biblical law, the bill of divorce is

nullified and the woman still married, and because of a rabbinical ordinance, a woman is freed from the bonds of marriage and permitted to marry another man?

Different answers were offered. According to the *Yerushalmi,* indeed, it is so! The teachings of the Rabbis may uproot a Biblical law! *The Yerushalmi* adduces the following Mishnah:

> Heave-offering may not be given from olives instead of from oil, or from grapes instead of from wine. If this is done, the School of Shammai say: It may still be deemed a heave-offering of the olives or of the grapes themselves. And the School of Hillel say: Their heave-offering is not valid (*Terumot* 1:4).

According to Bet Hillel the olives that were set aside as *Terumah* for their oil are recognized as untithed produce (*tevel*) and so a priest who ate of them suffers the death penalty. On the other hand, if the priestly and levite dues had been extracted from some other produce in order to be considered as payment of the dues and tithes outstanding from the olives, these very same olives are permitted even to Israelites. It should be remembered that the prohibition of setting aside a heave-offering from the olives instead of from the oil or from the grapes instead of from the wine is nothing more than a rabbinical ordinance "because of pilfering the tribe," *i.e.,* by doing so it was as if he were defrauding the priestly tribe.[15] By setting aside the heave-offering according to the measure of the olives instead of oil he was causing the priests to relinquish part of the dues and tithes which they should have received. But could the Rabbis do away with the law of *Terumah* which is of Biblical origin and declare that "their heave-offering is not valid?" It is evident from Bet Hillel that the Rabbis are permitted to bypass the Biblical law of *Terumah* by a positive act when they feel the need to do so. In this instance, the guiding principle was to guarantee the priests against a monetary loss.

The approach of the *Yerushalmi* failed to receive recognition in the halakhic reality of later generations. This approach was accepted in ancient times when the authority of the Rabbis and the High-Court in Jerusalem was at its height. And the Rabbis did not refrain from enacting ordinances and issuing restrictive

laws even if they involved the abrogation of a Biblical law. During the Amoraic period, however, the authority of the High-Court had dwindled, greatly limiting the power of the Rabbis to abrogate Biblical laws.[16]

The Babylonian Talmud answers the betrothal question differently from that of the *Yerushalmi*: "Yes when a man betroths a woman, he does so under the conditions laid down by the Rabbis, and in this case, the Rabbis annul his betrothal" (*Gittin* 33a). In other words, anybody betrothing a woman does so by announcing that he has betrothed her "according to the law of Moses and Israel." This implies that a person bases his betrothal on the condition that the Rabbis will agree to it: if the Rabbis confirm the betrothal — it is a betrothal, and if they do not confirm to it or see reason to annul it they are permitted to do so. In the cases cited above, wherein the bill of divorce was nullified without the knowledge of the agent, the Rabbis thought it necessary to annul the betrothal completely.

Although this reasoning first appeared in the writings of late *Amoraim,* it was nevertheless accepted as halakhah. The Babylonian Gaonim, who were active following the redaction of the Babylonian Talmud, utilized this reasoning in order to solve difficult contemporary problems.

During that period there were numerous cases of clandestine betrothals and hasty betrothals. Often when a suitor who was interested in a certain maiden whose parents refused to give him her hand would claim that he had secretly betrothed her. Or he would give a gift to a maiden and in the presence of two witnesses would announce: "Thou are betrothed to me *etc.*" Technically she is betrothed to him unless she protested immediately upon receipt of the gift according to Biblical law. To sever her ties with the wanted suitor a maiden needs a *get* since a betrothal conducted in private is binding. The Talmud specifically states that "people are liable to perform their betrothals privately" (*Ketuvot* 23a).

To avoid the above hardships, R. Judah Gaon, Head of the Academy at Pumbedita, ordained that each betrothal ceremony was required to take place in public in the presence of at least

ten witnesses, accompanied by the betrothal blessing. The bridegroom was required to write a *Ketubah* and have the witnesses sign it. A special sanction attached to this ordinance declared that if a person did not abide by this ruling, his betrothal was null and void. Rav Judah Gaon based his authority to enact such an ordinance on the Talmudic ruling:

> When a man betroths a woman, he does so under the conditions laid down by the Rabbis.[17]

In special cases, the Geonim referred to this ruling to solve ddifficult problems involving a levirate marriage and *chalitzah*. Converted Jews who left the fold of their religion caused serious halakhic problems. Since the apostate (*meshummad*) is considered to be a full-fledged Jew as far as the law of personal status is concerned, his betrothal and his *get* are both valid.[18] Thus the problem of women who required a levirate marriage from an apostate became a burning issue, since most of these apostates refused to grant *Chalitzah*. Consequently there was a serious threat that the woman would assume the status of an *agunah*.

Rav Nachshon Gaon, Head of the Academy at Sura during the ninth century, as well as other Gaonic authorities ruled that if the husband's brother-in-law had been an apostate at the time of his brother's marriage, the wife was exempt from levirate marriage and *chalitzah*. Rabbenu Channanel, the North-African mentor of the eleventh century, extended this ruling even further by stating that the exemption was valid even if the apostasy of the brother-in-law occurred after his brother's marriage.

R. Isaac B. Moses of Vienna (thirteenth century) in his Code, *Or Zaruah,* I:605 and R. Israel Isserlein (fifteenth century) in his collection of Responsa, *Terumat ha'Deshen,* No. 253 both explained this instruction in the following argumentative fashion:

> . . . since the Bible stated: "If brethren dwell together, and one of them die, and have no child . . . her husband's brother shall go in unto her, and take her to him to wife . . ." (Deuteronomy 25:5). Did the Bible stipulate "take her to him to wife" even if he were an

apostate? Is it not written: "Her ways (of the Torah) are ways of pleasantness" (Proverbs 3:17)?

An analogy is thus drawn between the dwelling of the brothers and the death of one of them. Just as the brothers dwell together as Jews, so too his going unto her talks about Jews only.

And since anybody betrothing a wife does so according to the conditions laid down by the Rabbis, would it be logical to assume that the Rabbis ordained a measure which would necessarily lead to a very serious difficulty? . . . Is it not apparent that the situation of the woman is disastrous and that she is in danger of being abandoned forever?[19]

The reasoning of the rabbis was that it was unlikely that the Torah, whose pathways are opposed to violence, would force a woman to marry an apostate levirate brother-in-law. Since one who betroths a woman does so under the conditions laid down by the Rabbis, once it became apparent that such a situation had developed, the Rabbis nullified the betrothal and the woman did not require either levirate marriage or *chalitzah*.[20]

In later generations there was an occasional objection to the above-mentioned Gaonic ordinances. Some of the early commentators, such as Rashba, argued that the post-talmudic Rabbis possess the power to nullify betrothal merely in those instances specifically recorded in the Talmud, and no additional cases are to be added.[21] On the other hand, there is evidence to the contrary and such leading luminaries as R. Moses b. Nachman, (Ramban),[22] Rabbenu Asher (Rosh)[23] *et al*[24] utilized the ruling "when a man betroths a woman, he does so under the conditions laid down by the Rabbis" even in those cases not recorded in the Talmud.

This ruling has also been applied in later times. R. Shalom Mordechai Schwadron, the Rabbi of Berezin in Galicia suggested using it to legitimize a most tragic case of bastardism which was referred to him. A woman whose husband traveled abroad did not hear from him during the extended period of twelve years. Suddenly, word reached her that he was dead and eligible witnesses testified to this. Their testimony was accepted by the Rabbinical Court and by the secular authorities. The childless woman received *chalitzah* and was given the right to remarry. She remarried and gave birth to a child. Later it was discovered

that her husband was alive. It was learned that the first husband's passport had been in the hands of another person who died, and thus the husband was mistakenly declared dead. In such a case the Halakhah specifically declares that the woman is forced to leave both husbands who each give her a *get* and the child is automatically declared a bastard.[25]

Concerning this particular problem, Maharsham (R. Shalom Mordechai) wrote in his collection of Responsa I:9, that if the Rabbi who referred the question to him had made previous consultation, he would have been able to provide

> A sagacious word of advice which could have solved the problem theoretically but could not be practically adopted, according to the opinion of the Tosaphists in their gloss to *Gittin* 33a.

What the Rabbi had in mind to suggest was that the first husband would send the wife a *get* via an agent and nullify it without the agent's knowledge, which is contrary to the ordinance of Rabban Gamliel, the Elder. As a result, the talmudic ruling "when a man betroths a woman, he does so under the conditions laid down by the Rabbis" would thereby be enforced. Since the betrothal of the first husband had been annulled retroactively, the child would not be a bastard.

It is true that Maharsham stressed that his solution was theoretical and could not be practically adopted. However, this provision was a result of the fact that when the question was referred to him, the first husband, acting upon the instructions of the Rabbi forwarding the query to Maharsham, had already divorced his wife.[26] It should be noted that R. Isaac Halevy Herzog, Chief Rabbi of Israel recommended a similar solution in answer to a question referred to him during the period of the "Magic Carpet" immigration from Yemen two decades ago,[27] Rabbi Herzog also based his solution on the Responsum of Maharsham.

Incidentally, the Tosaphists in *Gittin* 33a, *s.v.*, raised the question: Bastards will always be able to be legitimized since the husband could send a *get* to his wife and nullify it without notifying the agent, which according to the opinion of R. Simeon

b. Gamliel renders betrothal retroactively. The answer provided by the Tosaphists is that since the usage of this dispensation might lead Jewish women to lewd behavior, it is most advisable to refrain from using it. On the other hand, an entirely different answer to this question[28] is quoted in the name of Nachmanides:

> We are not bothered by the fact that bastards are able to be legitimized, and it is our earnest hope that this will be their lot.

V

Earlier it was stated that the Rabbis sometimes made their prohibitions more lenient as a result of socio-political considerations. This phenomenon is very clearly seen from a comparison of the social and economic relations between Jew and Gentile as described in the tractate *Avodah Zarah,* compared to those relations which were in actual practice during the Middle Ages. At the very same time that this tractate includes numerous limitations, both on the time for transacting business matters with Gentiles and the type of matters that one was permitted to conduct with them, many of these prohibitions, restrictions and ordinances were lifted during the medieval period.[29]

VI

Socio-political considerations played a role in the field of the laws of ritual cleanliness which was important in Jewish life during the Second Temple Period. Matters reached such a point that in the standard of values of various circles, the laws of ritual cleanliness assumed the highest rank and were even considered more serious than the laws of incest and murder.[30] The reason for this deep sensitivity was that an unclean person alienates himself from the Holy Temple because he cannot enter its portals while unclean. In those days the Temple and all that was connected with it served as the symbol of the sanctity of life. For this reason, the better people aimed to introduce the purification practices of the priests and the Temple into their

private lives.[31]

In connection with these laws, we read in an ancient Mishnah:[32]

> The clothes of an *am-haaretz* count as suffering *midras* — uncleanliness for Pharisees; the clothes of Pharisees count as suffering *midras* — uncleanliness for those that eat heave-offering; the clothes of those who eat of heave-offering count as suffering *midras* — uncleanliness for those who eat of hallowed things (*Hagigah* 2:7).

The expression, *am-haaretz,* in this Mishnah as well as in other early talmudic passages actually refers to those Jews who failed to observe the rules of cleanliness and uncleanliness.[33]

According to the above-quoted Mishnah, contact with the clothes of an *am-haaretz* causes *midras* — uncleanliness which being a "father of uncleanliness" is a most severe impurity for the Pharisees. Moreover, the clothes of the Pharisees, who were most cautious to eat even their daily victuals in a state of purity are also considered to cause *midras* — uncleanliness to the priests and their families who partake of the heave-offering.

It is thus quite clear from these halakhic rulings that scrupulous care must be taken of the Temple and everything connected with it to prevent any contact whatsoever with the *am-haaretz.* To our great surprise we find the following statement in a later Mishnah of that very same tractate:

> Greater stringency may apply to heave-offering [than to hallowed things], for in Judea they are deemed trustworthy throughout the year in what concerns the cleanliness of wine and oil . . . (*Hagigah* 3:4).

The implication of this Mishnah is that the *am-haaretz* bringing wine or oil to the Holy Temple, who claimed that he had preserved the liquid in ritual purity since he wished to bring it to the Temple for libations or meal-offerings, was trusted throughout the year, which is not the case when heave-offering or ordinary food were concerned since he is not trusted in relation to the latter. Even though the ritual cleanliness of *Kodashim* is much more severe than that of heave-offering, the Rabbis believed the *am-haaretz* as far as *Kodashim* and the

Temple are concerned, but did not rely on his testimony if heave-offering and ordinary food were involved.

What is the reason for this Halakhah? The answer is provided by the Tanna, R. Jose b. Halafta:

> It is in order that every one may not go and build a high place for himself and burn a red heifer for himself (*Hagigah* 22a).

It is thus evident that the lenient attitude of the Rabbis was based on the presumption that if they would refuse to accept the wine or oil offerings of the *am-haaretz,* the latter would seek a different outlet for their spiritual needs: the building of high-places which would necessarily invoke estrangement from the Jewish people.[34] This reason is defined by the Talmud as "out of enmity." Actually, it is as socio-communal motive which took the possibilities of the continuation of ordinary communal relation between all segments of the Jewish people into full consideration. To implement this lofty ideal, the Rabbis were prepared to forego a large segment of their prohibitions concerning the sanctity of the Temple.

Similarly, according to the early halakhic ruling, an *am-haaretz* is not to be attached to a quorum of three for Grace after Meals (*Berakhot* 47b) and no evidence at a trial is admissible from him (*Pesachim* 49b). However, later halakhah during the Amoraic period ignored these rulings. Rav Papa commented rhetorically:

> According to which authority do we nowadays accept testimony from the *am-haaretz?* According to R. Jose: (*Hagigah ibid*). Rabbenu Asher in his code to *Pesahim,* chap. III (end) offered the following explanation for this development: If we alienate (the *am-haaretz*) they would found their own religion and appoint judges from among their ranks.

CONCLUSION

The above survey teaches us a great deal concerning the dynamic qualities of the halakhah and its response to the conditions of each generation which was effectuated by two different methods. The first was that of legislation, *i.e.,* the enactment

of ordinances which offered a solution to contemporary problems. In the process of formulating these ordinances, the Rabbis did not always refrain themselves from limiting or abrogating a positive Biblical law even for future generations, if they saw the need for such action. However, the Rabbis never completely abolished a precept *in toto.*

The second method which one may classify as "interpretation" is based on exegesis, *i.e.,* utilization of the accepted halakhah in a manner in which certain conclusions are reached concerning new questions which arise. This method permitted the Rabbis to make great strides. In the wake of the changing situation in Jewish life the authority of the existing halakhot, even those which were considered Biblical prohibitions, were inspected from time to time. In many instances the Rabbis, basing themselves on Biblical exegesis, reached the conclusion that these laws are actually of rabbinical origin. In this manner, the gate was opened wide for lenient rulings necessary without swerving from the basic tenets upon which the talmudic and post-talmudic halakhah are based.[35]

As already mentioned above, the halakhah recognizes special instances where leniency is to be employed: an abandoned woman, emergency, because "out of enmity," the saving of life, etc. In all these cases, the halakhah permits a large measure of leniency. However, these expressions were sometimes given a limited interpretation in accordance with the conditions that prevailed at the time that the terminology was fixed and defined.[36]

On the other hand, problems having important communal repercussions in our time, have yet to receive the legitimate official standing which the halakhah should take into account when deciding its stand. Questions which involve the interests of the State, or subjects which are liable to establish the status of religion in the State, are judged by certain Torah authorities without recognizing the historical implications of their halakhic rulings.

A large segment of current halakhic problems possessing public and communal overtones, which arise every so often, should be dealt with according to the open-hearted approach found in talmudic and post-talmudic sources, especially those concerned

with the release of an abandoned woman. This approach may be summed up by the words of R. Abraham Ha'Levy, the Chief Rabbi of Egypt during the eighteenth century, in his work *Ginat Veradim*:

> If we were to investigate and examine the writings of the luminaries of the previous generations . . . as practiced by us in all branches of Torah law . . . in order to follow the majority opinion . . . we would never be able to release an abandoned woman . . . and the daughters of our father Abraham would remain widows living in bondage with nobody having compassion for them . . . It is therefore our task to follow the path adopted by the early authorities, *i.e.*, to tend towards a logical presumption even though it does not entirely agree with the opinions of the masters, whose teachings we imbibe.

NOTES

1. Cf. Siphra *Behar*, par. 1:1; *Behookotai* 8:12; *Berakhot* 5a; *Megilla* 19b; Yer. *Peah* 2:4 (4a); *Hagiga* 1:8 (76b); *Seder Eliyahu Zutta* 2, ed. *M. Ish'Shalom*, p. 171; *Lekah Tov*, Exodus, ed. S. Suber, p. 174 *et al.*

2. A listing of the halakhot designated as הלכה למשה מסיני has been compiled by various scholars. For the most recent of these *Vid*, J. Levinger, Maimonides Techniques of Codification (Heb.), Jerusalem 1962, p. 190 ff.

3. Cf. also *Yer. Ketubot* 10:2 (33d): "When you are able to fulfill the commandments of the Rabbis and the commandments of the Torah, you fulfill both . . . When you cannot fulfill both, you should revoke the commandment of the Rabbis and fulfill the commandment of the Torah." Cf. *Shabbat* 4a.

4. A person intentionally transgressing a Biblical prohibition is punishable by death or by the 39 lashes. On the other hand, the punishment meted out to the transgresser of a rabbinical prohibition is usually disciplinary flogging (מכת מרדות) or a ban. Concerning the difference between the later two cf. Rabbenu Nissim to Pesahim chap. IV, fol. 52, *s.v.* ואיכא למידק and *Keseph Mishna* to Maimonides *Hilkhot Talmud Torah* 6:14 *et al.*

5. *Vid. Avodah Zarah* 6b; 26a; *Baba Mezia* 26b; Yer. A.Z. 1:8 (39b); Tosaphot *ibid.* 2a, *s.v.* אסור; Or Zarua, Vol. IV, *Piskei Avodah Zarah* 1:96; Rabbenu Asher (Rosh) *ibid.* 1:1; Ramban, Novellae to A.Z. 13a; *Tur—Shulkhan Arukh, Yoreh Deah* 148 end; *Shulkhan Arukh ibid.* and gloss of R. Moses Isserles *ibid.*

6. *Vid. Berakhot* 9a and parallels; R. Shabbetai Cohen (Shakh), A Shortened Version of the Laws of *Issur Ve'Heter*, par. 2 (printed in *Shulkhan Arukh, Yoreh Deah* at the end of section 242).

7. Ed. Lemberg 1896 (photocopy Jerusalem 1968), p. 102.

8. The quotation is according to the version in the Babylonian Talmud. Cf. Yer. *Yevamot* 15:3 (14d); *Ketubot* 4:8 (28d end). During the talmudic period there was a long interval, usually a whole year, between the betrothal (the engagement) and the marriage (entering the bridal canopy). A similar practice is still observed by the Yemenites and other Jewish communities.

9. *Vid.* A. Büchler, "Das Jüdische Verlöbnis," Festshrift Israel Levy, Breslau 1911, p. XIV, n. 2; A. Gulak, "The Betrothal Document and Things Acquired by Speech," Tarbiz, III (1932), p. 365.

10. The reading in the *Yerushalmi* is: "When thou enter *my house* thou shalt be my wife according to the law of Moses and Israel." The Tosephta contains a similar reading.

11. Cf. *Shitta Mekubezet* to *Baba Mezia* 104a, ed. Tel-Aviv 1955, p. 1,040.

12. Cf. Leviticus Rabba 33:5, ed. Margulies, p. 754-755.

13. In the printed editions the reading is: Daniel, the tailor.

14. Cf. *Gittin* 4:2; *Tosephta ibid.* 4(3):1; *Yerushalimi ibid.* 4:2 (48c).

15. Cf. Yer. *Terumot* 1:2 (40d).

16. Cf. my article "A Rabbinical Court May Decree the Abrogation of a Law of the Torah," Bar-Ilan, VII-VIII (1970), p. 117 ff.; "The Authority of the Court," *Shemacatin,* V (1971), p. 24 ff.

17. Such mishaps were common in the vicinity of Chorasan and in other outlying areas which were distant from the major centers of Torah study in Babylon. Cf. *Otzar Ha'Geonim, Ketubot,* Responsa, No. 9, p. 18; *ibid. Kiddushin,* No. 301-302, p. 133. Concerning the later period cf. L. Ginzberg, *Ginze Shechter,* II, pp. 121-122; A. H. Freimann, *Seder Kiddushin Ve'Nissuin,* Jerusalem 1945, pp. 45; 68 *et al.*

18. *Yevamot* 47b; Maimonides, *Hilkhot Issurei Bia* 13:17.

19. This methodological reasoning is also found in the treatise, *Basar 'Al Gabei Gehalim,* and in Gaonic Responsa: "The question was raised before the Academy of Mata Mehasya and they answered it according to the following manner . . .," cf. *Otzar Ha'Geonim, Yevamot,* Responsa, pp. 33-37; *Ginze Shechter,* II, 168; 172. R. Isaac of Vienna (Or Zarua) adds: "Their Responsa are correct and upright and should be relied upon, since by virtue of their instruction the Torah is disseminated to all of Israel, and we too are deemed worthy to fulfill the passage: "That the wise man may hear and increase in learning" (Proverbs 1:5).

It is generally accepted that post-talmudic authorities are denied the right to formulate new *derashot* from the Biblical text, *vid.* Novellae of R. Aaron Ha'levy to *Ketubot* 60a; R. Malakhi Ha'kohen, *Yad Malakhi,* section 144. The exegetical formula containing a *hekesh* concerning the law of the levirate marriage quoted above does not appear to have a talmudic antecedent.

Concerning additional *derashot* of early and later authorities for which no basis is found in the sources of talmudic literature, *vid.* Maimonides, *Hilkhot Arakhim Ve'haramim* 6:31-33 and *Keseph Mishna* and R. David b. Zimra (Ridbaz) *ibid.;* Nachmonides, *Torat Ha'Adam,* Concerning the Priests, ed. Chavel, vol. II, p. 133; R. Shlomo Ha'Cohen, additions to *Mar'eh Cohen,* Pesachim 116b; R. Meir Simcha of Devinsk, *Meshekh Chokhmah,* Deuteronomy

21:10-11 *et al.*

20. It is quoted in the name of Rav Yehudai (Judah) Gaon that even if the husband who had no progeny was an apostate till his dying day, his wife is exempted from levirate marriage and *halitzah*, cf. the Novellae of Rashba and Ritba to *Yevamot* BBa, *s.v.* מי שיש לי אח; R. Menahem Ha'Meirei, *Beit Ha'Bechira* to *Yevamot*, ed. Albeck, p. 75; Mordechai *ibid.*, chap. VIII, section 107; R. Arye Leib Heller, *'Avnei Millu'im* to *Shulkhan Arukh, 'Even Ha'Ezer, section* 157. However, there are also dissenting opinions, cf. Maimonides, *Hilkhot Yibbum Ve'Halitzah* 1:6 and *Teshuvot Maimoniyyot ibid.* no. 29. *Vid.* also the Responsa listed by R. Joel Sirkis in his glosses (הגהות הב"ח) to Mordechai *ibid.*, n. 3.

In *Terumat Ha'Deshen*, section 253, R. Israel Isserlein mentions the custom whereby a condition made at the betrothal would stipulate that if the bride were in need of *halitzah* from an apostate levir, she would be exempt from same. He expressed his amazement at this condition in the light of *Yerushalmi Baba Mezia* 7:7, 11c (Tosephata Kiddushin 3:7). However, *vid.* R. Moses Isserles to *Shulkhan Arukh, Even Ha'Ezer*, section 157, par. 4 who rendered the halakhic ruling that a person whose brother was an apostate, could betroth a woman and make a double condition that if she fell before the apostate levir, her betrothal would be invalidated. Cf. also *Pithei Teshuva ibid.*

In our times (1936), it was still customary among Curdistan Jewry to insert the following clause in the *Ketubas* "And if, God forbid, I shall not be an Israelite and leave the Jewish fold by becoming an apostate, this betrothal and the conditions of this *Ketuba* are completely null and void, and you are permitted to marry whomever you wish" (A. J. Brawer, *Avaq Derachim*, Book II, p. 124).

21. *Vid.* Responsa of Rashba, I: 1, 185; *ibid.*, attributed to Nachmanides, No. 125: "Not in every case do we say so ['when a man betrothes a woman he does so under the conditions laid down by the Rabbis, etc.'), but in those instances where they said, it is said. In those instances where they did not say it is not said." On the other hand, R. Salomon b. Adret conceded that the various communities were permitted to enact *ipso facto* nullification of the betrothal in order to prevent various mishaps, cf. Rashba, Responsa I:551. *Vid.* also R. Hayyim David Hazzan, Responsa *Nediv Lev, 'Even Ha'Ezer*, No. 8 who attempted to reconcile the seeming contradiction in the writings of Rashba (this source was first alluded to by A. H. Freimann *ibid.* (*supra* n. 20, p. 70).

22. *Vid.* Rashba, Responsa I:1000; R. Simeon b. Zemah Duran, *Tashbez*, II:5.

23. *Vid.* R. Asher b. R. Yehiel, Responsa rule 35:1 and cf. *ibid.* rule 43:8, whereby the Gaonic ordinance concerning the husband's duty to divorce the rebellious wife is also based on the talmudic ruling "when a man betroths a woman, etc.".

24. Numerous sources are quoted in the article of the most learned Rabbi Ovadya Yoseph, chief Rabbi of Israel published in *Torah She'Be-Al Peh*, III, Jerusalem 1961, p. 97 ff. and in the above-quoted work of A. H.

Freimann (*supra* n. 26).

25. *Vid. Mishnah Yevamot* 10:2.

26. *Vid.* the article of Rabbi Prof. L. I. Rabinowitz, formerly chief Rabbi of South Africa, published in *TRADITION,* vol. II, No. 4 (1971), p. 13. The expression להלכה ולא למעשה is frequently employed by the *poskim* in order to indicate that one may not rely on their opinion without the supporting opinion of one or two scholarly authorities.

27. *Vid.* Rabbi Isaac Halevy Herzog's *Heichal Yitzchak,* Vol. 2, *Even Ha'Ezer,* no. 17, pp. 74-75: While in Asmara, a Yemenite father accepted a betrothal for his minor daughter who was at that time in Yemen, in the presence of two trustworthy witnesses. The daughter had no knowledge of the betrothal and she eventually married somebody else and bore him a son. Later on, when the parties concerned reached the State of Israel, the situation became known to all. Rabbi Herzog (*ibid.* no. 19:8, p. 82) suggested that the first husband write a *get* and nullify it, etc. He adds that afterwards he also found this suggestion in the above-mentioned Responsum of Maharsham. Rabbi Herzog was aware that the solution could not be practically adopted, but nevertheless stated: "It is quite possible that Maharsham had in mind that another prominent authority or even two such authorities should bolster his opinion. But on the other hand, if this was his opinion, why didn't he specifically say so? (however, *vid.* my remarks above, on this aspect of the problem—Y.D.G.). As far as the current problem is concerned, it is my humble opinion that the situation commands such a solution much more than in the case brought before him."

28. *Vid. Shitta Mekubezet* to *Ketubot* 3a, ed. Tel-Aviv 1956, p. 49.

29. Cf. the Mishnaic ruling: "For three days before the festivals of Gentiles, it is forbidden to have business dealings with them, to lend them or to borrow from them, to lend them money or to borrow money from them, to repay them or to be repaid by them, etc." (*Avodah Zarah* 1:1) with the statement of R. Menahem Ha'Meiri in *Beit Ha'Bechira* to *Avodah Zarah ibid.*: "In these times no person heeds these warnings at all, even during their festival days, not even a rabbi, a scholar, a disciple, a pious or an hypocrite. And some of the commentators wrote the reason . . . since the community cannot endure it and there is a loss for the Jews who prevent themselves [from business dealings] *e.g.* on the market day when the bazaars are held, and if not now when? And this should most certainly be compared to the entailing of a loss due to a postponed activity (דבר האבד) . . . and whatever unaccomplished action involves a loss has nothing whatsoever to do with an admission [of idolatry]" (ed. Jerusalem 1962, pp. 3-4). Cf. also Nachmanides, *Novellae ibid.* 13a *s.v.* דתניא והולכין (end): "For it is impossible for the community to withstand this prohibitions in our times, etc." . . . and Ritba *ibid.* 6b *s.v.* מיהו מינתה: ". . . for we have to conduct business dealings with them, because of our livelihood."

30. Evidence for this viewpoint is found in talmudic literature, *vid. Siphrei Mas'ei,* par. 161, ed. Horovitz, p. 222 and parallels in *Tosephta Yoma* 1:12 *et al.*

31. *Vid.* G. Alon, "The Scope of the Laws of Ritual Cleanliness," *Mehqarim Be'Toldot Yisrael,* I, p. 148 ff.; S. Lieberman, "The discipline in the so-called Dead Sea Manual of Discipline," Journal of Biblical Literature, 71 (1952), pp. 199-206; J. Licht, *Megillat Ha'Serakhim,* p. 294 ff. *et al.*

32. *Vid.* J. N. Epstein, *Mevo'ot Le'Siphrut Ha'Tannaim,* p. 50.

33. "Who is considered an *am-ha'aretz*? He who does not insist on eating ordinary food in a ritually clean condition" (*Tosephta Avodah Zarah* 3 (4):10; *Berakhot* 47a; *Gittin* 61a). Concerning the late interpretations of this term, cf. *Berakhot loc cit; Sotah* 22a; S. Asaf, Gaonic Responsa, Jerusalem, p. 181.

34. Cf. also the positive attitude towards the *amei ha'aratzot* during the holiday pilgrimages to Jerusalem during the Second Temple Period in *Hagigah* 3:6-7 and in the Talmud *ibid.* 26a: "Whence is this deduced? R. Joshua b. Levi said: It is written in Scripture: "So all the men of Israel were gathered against the city associated as one man (Judges 20:11) — Scripture made them all associates."

35. *Vid.* my articles: "Regarding the Antiquity of Several Sabbath Prohibitions," *Bar-Ilan,* I (1963), p. 106 ff; "From Biblical Severity to Rabbinic Injunction," *Benjamin De Vries Memorial Volume,* 1968, p. 84 ff; "The Influence of Reality on Halakhic Differentiations," *Molad,* 3 (26), 1970, p. 285 ff.

36. E.g. R. Shabbetai Cohen in his remarks to *Shulkhan Arukh, Yoreh Deah,* section 242, small par. 2-3 in the shortened version of the laws of *Issur Ve'Heter,* defines the concept שעת הדחק (emergency) in the following manner: . . . this expression is in the case of serious loss or a minor loss of something of import to a poor person or to a rich person when connected with honoring the Sabbath and Jewish Holidays or in honor of guests. There is no doubt that, in our times, this expression should be redefined in a more inclusive fashion differing considerably from the definition offered by Shakh.

In a similar vein, one may adduce the question of permitting autopsies if the person whose benefit is involved "is before us" (לפנינו), *i.e.,* the patient whose sickness will be relieved by the autopsy on a dead body is in our presence or the autopsy is to be performed for the benefit of other patients whose identity is known, cf. R. Ezekiol Landau, *Noda bi'Yehudah,* Second Edition, *Yoreh Deah,* no. 210; R. Moses (*Chatam*) Sopher, Responsa, *ibid.,* no. 336.

In our times when methods of transportation and communication have made gigantic progress, and what was formally considered "distant" is now actually quite "close," the concept of לפנינו has assumed immense proportions both as far as time and place are concerned, *vid.* I. Arieli, *No'am,* 6 (1963), pp. 97 and I. Jacobovits, *Torah She'Be'al Peh* 6 (1964), pp. 62-64, concerning the need for autopsies in order to overcome numerous malignant diseases which have ravaged human life.

It is stressed that even the most simple autopsy bears the potentiality of contributing towards the saving of life, much more than the patient "before us" during the time of R. Ezekiel Landau, when the status of the medical profession was most primitive. Many additional examples could also be adduced in order to prove the above point.