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The Nature and Structure of Jewish Law

Every legal system must grapple with a fundamental meta-legal question: Why should any person feel bound to obey its laws? This question is more commonly addressed in a graduate school philosophy seminar than in a class in law school. Law schools not only take notice of the existence of a system of laws but also presume that it is legitimate and that it commands obedience. The philosopher wants to know why *any* system of law should command obedience. Over millennia multiple answers have been formulated in response to this crucial meta-legal question.

Perhaps the most down-to-earth answer is the one Plato places in the mouth of Thrasymachus in the *Republic*, namely, that "might makes right."[1] Certainly, the only motive that prompts obedience to the law on the part of a citizen who lacks a commitment to a value system is that failure to obey will result in a significant financial penalty, incarceration or perhaps even more severe punishment. Such a person faces no moral dilemmas; he must simply choose between obeying the law and accepting the penalty for non-obedience: "You did the crime, you do the time." If one does not want "to do the time," then one must be scrupulous in avoiding the crime in the first place. The major flaw in terms of gaining acceptance of a legal system on that basis is that a person who believes that he is clever enough to avoid detection and consequent punishment really has very little reason to be law-abiding.

Immanuel Kant dealt with the problem by formulating the notion of the categorical imperative.[2] In effect, he argued, even a person who behaves immorally does not want others to emulate his conduct. Such a person

[1] Plato, *Republic*, book 3.

[2] Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, trans. by Thomas Kingsmill Abbott (Seaside, OR, 1969); *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics*, 6th ed., trans. by Thomas Kingsmill Abbott (London, 1909), pp. 32–42.

recognizes full well that were everyone to behave in a similar way life would be untenable. Therefore, he argues, a person must eschew any form of conduct that he would not be prepared to endorse as a universal norm. The flaw in that theory is quite similar to that inherent in the notion that "might makes right." Suppose a person could convince himself that others will remain ignorant of, or unaffected by, his conduct; all other people would remain law-abiding and moral. If that person could indeed flout the law without his conduct becoming universalized, why should he not do so?

Utilitarians would assert that acceptance of the rule of law is the only way to assure the greatest happiness of the greatest number of people. If the state maintains law and order, then a greater number of people are happier than if it does not. If the state does not maintain law and order, then some may indeed be able to secure disproportionate benefits and hence greater happiness but only at the expense, suffering and disproportionate unhappiness of others. Such a theory assumes that a person ought to be no less concerned for the happiness of others than for his own happiness. That proposition is far from self-evident.

Philosophers of natural law claim that notions of right and wrong, the moral and the immoral, are ingrained in the human psyche. It is noteworthy that the common law definition of insanity is an inability to comprehend the categories of right and wrong and to distinguish between them. Common law did not posit the ability to perceive particular acts or modes of conduct as moral and other acts or modes of conduct as immoral as the criteria of mental competence but it did equate failure to recognize the morally dichotomous nature of right and wrong as constituting a mental deficiency sufficient to preclude meting out penal sanctions for deviant behavior. Clearly, the ability to distinguish between right and wrong was regarded as innate in the normal human intellect just as the axioms of logic are grasped as *a priori* truths.

Natural law theorists go beyond that position in maintaining that not only is the perception of the existence of dichotomous categories of right and wrong innate but also that the content of each category can be grasped by the light of reason alone. In effect, these theorists believe that a person can intuitively recognize that X is good and Y is evil just as he or she can recognize that a rose is red and the sky is blue. Man is "programmed" to distinguish between good and evil just as he is programmed to distinguish between colors. But natural law goes far beyond positing a natural awareness of moral principles comparable to recognition of simple qualities such as X is red and Y is blue. Recognizing that X is red and Y is blue does not command the selection or the preference of X over Y or of Y over X; choosing between X and Y remains a matter of unconstrained individual choice. Proponents of natural

law, however, maintain that the psyche does more than recognize that X is good and Y is evil; it transforms the "is" into an "ought" in legislating that I must choose X and eschew Y. The human intellect not only knows *a priori* that X is good and Y is evil but it also intuitively recognizes that a person *ought* to choose X and renounce Y. Accordingly, a person who disobeys the command of the intellect and makes the wrong moral choice deserves punishment. He or she has been forewarned and put on notice by his or her own moral consciousness.

Opponents of natural law respond by saying that they have examined their consciences and fail to discern any compelling intellectual force commanding them to recognize specific actions as good or bad or as commanding them to behave one way rather than another. Opponents of natural law reject the notion that the human conscience has binding legislative authority.

Is there or is there not an *a priori* moral awareness? A twentieth-century philosopher, William Frankena, categorized the natural law debate as one in which natural law theorists effectively depict their detractors, who assert that despite having plumbed their psyches they cannot discover the moral propositions posited by natural law theorists, as suffering from moral blindness, while philosophers who reject such *a priori* notions claim that natural law theorists suffer from moral hallucination.[3]

Perhaps the simplest answer advanced in response to the question, why one should obey the law, is theological: human beings ought to be law-abiding because it is divine will that humans obey the law. God has commanded man to obey the law. The sole remaining question is what law God has commanded us to obey. God has certainly commanded us to obey any law revealed by Him. The notion of the divine right of kings endows the king's law with the same status as divine law. In effect, the divine right of kings confers untrammeled legislative authority upon the monarch by divine authority. A more moderate version of divine right would limit the king's authority to measures designed to promote the welfare of society.

Of course, invoking obedience to the will of God to explain obedience to the law simply pushes the question back one step. Instead of asking, "Why should I obey the law?" one must ask, "Why should I obey God?" The answer likely to be forthcoming is simply a different form of one or another of the answers formulated as a response to the original question: God is all-powerful; God rewards and punishes. Moreover, there is no possibility for concealment and hence no escape from divine retribution. In effect, divine might gives rise to divine right. Alternatively, it might be suggested that human beings are endowed

[3] William K. Frankena, "The Naturalistic Fallacy," *Mind*, vol. 48, no. 192 (October 1939), pp. 474–76.

with an *a priori* awareness that they ought to obey the commands of the Deity. An eleventh-century Jewish philosopher, Baḥya ibn Pakuda, asserted that children recognize and appreciate the benefits that parents shower upon them and should reciprocate by endeavoring to please their parents. According to Baḥya, *a fortiori*, people should recognize that they are the beneficiaries of extraordinary divine largesse and intuitively apprehend a reciprocal obligation to please God by obeying His laws.[4]

Any attempt to understand the nature and content of the corpus of Jewish law – known in Hebrew as "Halakhah" – must begin with the awareness that it is a self-contained system predicated upon the axiological assumption that both its contents and canons of interpretation are the product of divine revelation. Thus it follows that man has no legal or moral right to manipulate the system in order to support predetermined conclusions, no matter how appealing or desirable they may seem. To be sure, human intellect may, and indeed must, be employed in order to apply Halakhah to novel or previously unexamined situations. But that process must be both intellectually honest and rigorous. In applying theory to practice the decisor must pursue the law to its logical conclusion. The underlying nature of the legal system is modified only by the narrowly defined and severely circumscribed legislative powers of properly constituted rabbinic bodies to create "fences" around the law, to promulgate social welfare legislation and to issue emergency *ad hoc* rulings.

In analyzing and applying any system of law, a scholar need not necessarily accept the basic principles of the system as wise or prudent. Thus, for example, an American constitutional law scholar need not accept the doctrine of separation of powers as either socially beneficial or politically pragmatic. But intellectual honesty compels him to analyze the legal status of an executive order or of a congressional enactment against the backdrop of that principle.

"You don't have to be Jewish to love Levy's Real Jewish Rye," read a New York subway advertisement of the 1960's and 70's. Similarly, one does not have to be Jewish to study or appreciate Halakhah. One need not necessarily be a professing Jew or accept the phenomenon of revelation at Sinai as a historical fact in order to engage in an analysis of Halakhah. But one must recognize that divine revelation at Sinai is the *grundnorm* of Halakhah. Perhaps more importantly, the student must recognize that, most assuredly, the scholars who over millennia served as exponents of Halakhah were men of intellectual honesty as well as moral probity and that their halakhic determinations were based upon the sincerely held assumption that the law was theirs to interpret only objectively, rather than subjectively, and certainly that they were powerless to

[4] See Baḥya ibn Pakuda, *Ḥovot ha-Levavot*, *Sha'ar Avodat Elokim*, introduction.

modify the law other than in accordance with the very limited power conferred upon them.

Consistent with the notion that the ultimate source of Halakhah is revelation at Sinai is the recognition that the Pentateuch – the first five books of the Hebrew Bible – is primarily a legal document encapsulating that corpus of law. Rabbi Shlomoh Yitzchaki (1040–1105), better known as Rashi, and undoubtedly the foremost and most popular biblical commentator, makes the point quite eloquently. In his very first comment upon the Book of Genesis, Rashi observes that the Bible should properly have commenced with the commandments announced in Exodus 12, which is the beginning of the substantive legal material included in the Pentateuch. His point is cogent only in light of the assumption that the Pentateuch is a legal work. If so, it follows that the narratives and the historical information presented in the Book of Genesis and in the opening sections of Exodus are incongruous.

Rashi's response is perhaps even more striking. He informs us that ascription of the creation of the universe to God and the recounting of early human history is necessary to make the point that the entire world we inhabit belongs to the Deity. Those early sections of the Bible inform us how God apportioned the geographical areas of the known world among the nations of antiquity and established the Promised Land as the inheritance of the people of Israel. Thus, the early chapters of the Pentateuch are also a legal document but of a nature quite different from the ensuing text. Unlike the bulk of the Pentateuch, which is a record of divine legislation, those introductory sections constitute Israel's deed to the Land of Israel.

From recognition of the Pentateuch as a legal document it follows that every phrase and every word has legal significance. Students of law know that a word used in a statute sometimes has a meaning that is not synonymous with the meaning one would find in a dictionary. Thus, for example, everyone knows the difference in common parlance between a hospital and a nursing care facility. Nevertheless, for the purpose of some public health statutes, nursing care facilities are categorized as hospitals. Those statutes incorporate a preamble that is, in effect, a short glossary declaring that, for the purposes of that particular statute, a "hospital" is defined as including, *inter alia*, nursing care facilities. Accordingly, when endeavoring to understand any word in the Bible, it is necessary to appreciate the precise legal meaning of the word. When the contents of the Pentateuch were revealed to Moses he was, in effect, also given a glossary that would enable him to define each and every word. Those definitions were passed on together with the written text as part of the Oral Law.

An obvious example is explication of the meaning of Exodus 20:13. A common fundamentalist argument for abolishing the death penalty is that

the Bible commands "Thou shalt not kill" (Exodus 20:13). In point of fact, such a verse does not exist. The Hebrew text reads "*lo taharog*." The verse should be translated as "Thou shalt not commit an act of homicide." Not every act of killing is an act of homicide; homicide is carefully defined by statute. Self-defense is not homicide; the taking of human life in the course of legitimate warfare is not homicide; execution of a person convicted of a capital crime is not homicide. Quite obviously, a homicide statute must contain a precise definition of the nature of the action decreed to be a capital offense and, indeed, in Halakhah all such matters are defined very precisely.

This point may also be illustrated by examining Halakhah's definition of death. As is the case with every word used in human discourse, people may agree to use a word any way they wish. Different societies may use the same word in different ways; the same people may assign different meanings to a single word in different contexts. Thus, for example, there is a classical common law definition of death and a more recent neurological definition of death, while Rastafarians recognize only putrefaction as a criterion of death.

A precise formulation of the halakhic definition of death occurs for the first time in a nineteenth-century responsum by Rabbi Moses Sofer,[5] one of the most prominent rabbinic scholars of the day. Rabbi Sofer spells out in a clear and precise way the criteria of death as culled from much earlier halakhic sources. He then turns to the question of associating those criteria with the term "death" as used in the Bible. Essentially, his problem is how did the Sages of the Talmud arrive at their definition? Generally, such definitions are part of the Oral Law tradition. But one of the theories Rabbi Sofer advances is that the criteria of death reflect the received wisdom of the scientists of the biblical era. In effect, Rabbi Sofer says that the word "death" as it occurs in the Bible means what the physicians of antiquity would have understood by the term at that time in history. The meaning associated with the word then becomes enshrined in the biblical system of law, which uses the term in an immutable manner. The word retains that meaning for halakhic purposes for posterity even though its connotation in common parlance may have changed. It retains that meaning simply because that meaning was enshrined in the relevant statutes.

Recognition that biblical terms have a precise technical meaning points to the intrinsic link that exists between the Written Law and the Oral Law. Obviously, Moses had to be told how particular words should be understood and that information was conveyed to him at Sinai. In that sense, the Oral Law

[5] R. Moses Sofer, *Teshuvot Ḥatam Sofer*, *Yoreh De'ah*, no. 338.

serves as the preamble to the written text but was not committed to writing at Sinai.

It cannot be overemphasized that the Oral Law is in no way secondary to the Written Law. The Oral Law is no less valid, no less significant and no less authoritative than the Written Law. Together they constitute twin fonts of revelation. Indeed it may be said that the Oral Law is paramount because the Written Law means only what the Oral Law says it means. The notion that the Constitution of the United States means what the Supreme Court says it means is roughly analogous. The crucial difference is that the Written Law is not subject to untrammeled, subjective interpretation but is understood in light of a received tradition.

The Oral Law explains, amplifies and even modifies the plain meaning of the Written Law. Indeed, in many instances, it is virtually impossible to understand the Written Law without Oral Law interpretation. Take for example the verse "and they shall be for *totafot* between your eyes" (Deuteronomy 6:8). The King James translation of "*totafot*" as "frontlets" has no relationship to the Hebrew. In fact, the term "*totafot*" has no known Hebrew meaning; it appears in no other context. The Oral Law tradition declares the word to be a combination of two foreign words, each of which has the meaning "two" in different exotic languages. Two plus two equals four. Accordingly, the verse is interpreted as meaning that a four-chambered box must be placed upon the scalp above the eyes. Absent that explanation the verse would be devoid of meaning.

In some cases the Oral Law serves to define. In other cases it applies various principles of hermeneutic interpretation to uncover meanings not evident upon a literal reading. The principles to be utilized in interpreting a text are themselves part of the Oral Law tradition. Proper application of those canons of interpretation yields additional rules and principles. And, of course, both deductive reasoning and common sense are involved in the process of halakhic dialectic.

Not infrequently the contributors to the Talmud disagreed about how those principles should he applied and consequently they differed about the rules and regulations to be derived on their basis. Each scholar was certainly convinced that his position was correct and that of his colleagues untenable. Is there any way to adjudicate between such competing opinions?

The halakhic attitude to such controversies is encapsulated in the maxim "*Elu va-elu divrei Elokim ḥayyim* – These and those are the words of the living God" (*Eruvin* 13b and *Gittin* 6b). That notion reflects recognition that reasoning processes differ from person to person. Different persons can accept a

single set of propositions, agree on the general canons of interpretation and yet reach mutually exclusive conclusions for the simple reason that "Just as their countenances are not alike so are their thought processes not alike" (Palestinian Talmud, *Berakhot* 9:5). When interpretive reasoning is entered into in a *bona fide* manner the human intellect cannot be "wrong." Different minds may reach different conclusions. The conclusions reached by the inquiring mind of a qualified scholar are, in a fundamental sense, infallible.

But how can two individuals reach contradictory conclusions and both be infallible? There is an apocryphal story of a rabbi who heard a dispute between two litigants. The plaintiff presented his case and the rabbi turned to him and said, "You are right." Thereupon the defendant presented his case and the rabbi turned to him and said, "You are right." At that point the rabbi's wife, who had been eavesdropping behind the door, entered the room and exclaimed, "But how can they both be right?" The rabbi turned to her and said, "You too are right!"

Paradoxical as it may seem, each of two conflicting views may be correct. The very nature of ambiguity is that it allows differing interpretations. In plumbing the meaning of a text, it must be recognized that if the text admits of a given interpretation that interpretation cannot be "wrong." By the same token if the text admits of a different interpretation that interpretation cannot be wrong either. Both interpretations are correct.

At times, human texts are drafted with deliberate ambiguity. During the events leading to adoption of Resolution 242 of the United Nations General Assembly concerning the return of territories controlled by Israel pursuant to the Six-Day War there was a debate about whether the resolution should call for return of all the territories or whether it should require return only of some of them. The compromise was to refer simply to "territories" without a modifier. Does the resolution, as drafted, call for return of all territories or only some? If some territories, does the resolution mean the lion's share of the territories or only limited areas? At times, such texts are purposely left ambiguous in order to achieve timely agreement among the parties while allowing disputed matters to be cloaked in ambiguities to be resolved at a later date. For the same reason, statutes are often drafted ambiguously because the legislature does not want to address certain issues. The legislator is perfectly willing to leave such issues for adjudication by the courts or to be resolved in some other way. At times, ambiguities that later arise in application of a statute may simply never have occurred to the draftsmen.

Similarly, many issues in American constitutional law hinge upon the interpretation of a phrase or clause in the Constitution. In at least some cases it is clear that the Framers purposely created ambiguity because protracted debate

over every issue would have defeated all attempts to reach a consensus. As a result, many issues had to be resolved at a later time through either legislation or judicial interpretation.

The examination of issues in constitutional law with a view to determining whether one or another constitutional interpretation is correct leads to a conclusion that is not terribly different from examination of similar problems in Halakhah. Does provision of separate but equal educational facilities satisfy the requirement of the Equal Protection clause of the Fourteenth Amendment or is "separate" inherently unequal? There was a time before *Brown v. Board of Education* when the accepted doctrine was that the Equal Protection clause does not preclude racial segregation. Separate but equal satisfied the equal protection requirement because, after all, everybody was treated equally. The Supreme Court's decision in *Brown v. Board of Education* declares that separate is in its very nature unequal and, accordingly, that separate can never be equal. Does this now mean that the earlier decision in *Plessy v. Ferguson* was wrong, but earlier courts simply were not sagacious enough to realize that racial segregation is *ipso facto* antithetical to equality? Perhaps. If it can be demonstrated that the psychological burden of segregation necessarily creates inequality then, of course, the earlier doctrine was incorrect. If, on the other hand, the question whether separation inherently constitutes inequality is a matter of judgment, we then have a situation in which different people have made different judgment calls and there is no way to say who is right and who is wrong. We then have a legitimate disagreement between those who espoused the original doctrine and the court that issued the later decision.

To consider a mundane parallel, were one to be mistakenly convinced that there is some sort of transcendental truth embodied in the text of the Constitution, it would become necessary to formulate a doctrine to the effect that "*elu va-elu*– 'these and those' are the words of the Framers," i.e., "these and those" are both correct in the sense that each is consistent with the meaning imbedded in the Constitution by its authors. Indeed, if the framers of the Fourteenth Amendment had contemplated a dispute of the nature later addressed in *Plessy v. Ferguson* but could not agree upon whether separate was, or was not, inherently unequal, it is quite conceivable that they might have intended the ambiguity and purposely left the issue unresolved. Whether they did or did not is irrelevant; the text acquires a life and meaning or meanings of its own.

Jewish tradition is based upon the premise that the divinely dictated text of the Pentateuch was designed to be ambiguous and subject to multiple interpretations. This too reflects a fundamental principle of Halakhah and was recognized as such by the Sages. *Midrash Shoḥar Tov* 12:4 reports:

> Rabbi Yan'ai declared, "The words of the Torah were not given in final form (*ḥatukhin*). Rather, with regard to every single matter that the Holy One, blessed be He, told Moses, He enunciated forty-nine considerations [to render it] pure and forty-nine considerations [to render it] impure. Moses exclaimed before Him, 'Sovereign of the Universe, when shall we arrive at a clarification of Halakhah?' God said to him, 'According to the majority shall you decide (Exodus 23:2). If those who declare it impure are more numerous, it is impure; if those who declare it pure are more numerous, it is pure.'"

Clearly, the "matters" to which the Midrash refers are not those presented to Moses in an unequivocal manner in the context of the corpus of either the Written or the Oral Law. They are, then, matters with regard to which human intelligence must seek answers by grappling with principles and precedents firmly established within the system of Halakhah. Such endeavors constitute a dynamic and ongoing process.

Conflicting results were clearly the divine intention. The very fact that God allowed the text to be ambiguous means that He intended it to be so. But why should divine language be anything but unequivocal? That is not a legal question; it is a metaphysical or theological question.

The only cogent answer to that question is that God intended man to be His partner in the interpretation and development of Halakhah. Striking as it may seem, this is not a terribly novel theological notion – at least not in the Jewish tradition. Jewish tradition embraces the notion that the universe is not complete; rather, it is a work in progress. There is a well-known aggadic statement[6] to the effect that in the eschatological era the earth will produce baked foods and linen clothing. Putting aside the obvious prognostication inherent in the statement, that prediction reflects a profound theological insight: There was nothing to prevent God from creating a universe in which it would not be necessary to harvest wheat, thresh the grain, grind the kernels into flour and then knead the dough and bake the bread in an oven. God could have created a universe in which climate conditions cause winds to blow when kernels of wheat have developed to maturity. Such winds might be endowed with velocity sufficient to pulverize grain. That phenomenon might, in turn, be followed by rains capable of transforming the powder into a kind of dough whereupon the sun might emerge and shine so brightly that the dough would become baked into bread – all without human intervention. Instead of going out into the field and harvesting kernels of wheat man would harvest breadfruit ready for the table. God could have done the same thing with the flax plant. Instead of producing flax, the plant might have produced tiny strands of fabric capable

[6] *Shabbat* 60b.