

***Mishpat Ivri* – Code of Jewish Law (Part I)**

by Adv. A. Amos Fried

At the end of his life, Moses entreats the Children of Israel to cherish the laws he has taught them as commanded by G-d: “And you shall guard them and you shall obey them for this is your wisdom and your understanding in the eyes of the nations who shall hear all of these laws and say: such a wise and discerning people is this great nation!” (Deuteronomy 4:6). In his insightful commentary on the Torah, the 13th-century rabbinic luminary known as the Ramban (Rabbi Moshe ben Nachman) explains this verse as meaning “that these laws and legalities contain great benefits, since they are the glory of their adherents amongst men, and even those that hate them [Israel] will extol them by virtue [of these laws].” It would seem that the laws of the Torah are so manifestly just and correct, the nations of the world will be helpless but to recognize their greatness, and by extension – the greatness of Israel itself.

Throughout the Five Books of Moses, we find a plethora of laws, injunctions and legal declarations of all sorts, oftentimes with only an elusive connection between them. According to the rabbinic tradition, the Torah is comprised of 613 commandments (mitzvot) of which 248 are stated in the positive (mandatory) and 365 in the negative (prohibitive). The rabbis further teach us that together with the written law, Moses was also given the oral Torah which not only embellishes, elaborates and explains the Pentateuch, but provides many thousands of supplementary statutes, norms, edicts and decrees, developed, explicated and revealed as the oral tradition progressed throughout history (i.e. Mishnah, Talmud, early and later commentaries, responsa, etc.).

Modern scholarship attempts to divide this enormous corpus of teaching into two distinct groups: “religious law” regulating the practice of Judaism as a religion, and what has been classified as “*Mishpat Ivri*” (lit. “Hebrew law”) which, for want of a more eloquent phrase, essentially refers to a Jewish secular legal code, addressing matters of civil, criminal, administrative and even constitutional law. On the other hand, there are those who would argue that such distinctions are artificial and merely a contemporary grafting of categories and acuties foreign to the original intentions of both the written and oral Torahs. Take for example the somewhat enigmatic episode recounted in the book of Numbers (15:32-36) concerning a man found gathering wood in violation of the holy Sabbath. Desecration of Shabbat is surely a religious infraction, but the Torah immediately introduces a discussion as to what type of punishment the perpetrator is liable, to wit – matters of criminal law as administered under the justice system. Hence, the “religious” and the “legal” foundations of the law would seem to be inextricably intertwined.

In this regard, Hebrew law should not be confused with what has been recognized throughout the ages as *Halacha* (which includes rules of ritual conduct), “*Din Torah*” (literally, Torah law), or Hebraic law, all of which encompass the entirety of Jewish life as regulated in accordance with the precepts of the Torah. Rather, *Mishpat Ivri* concerns itself singularly with designing a codifiable legal system to serve Jewish communities as independent social collectives. It is no wonder therefore that with the advent of modern Zionism, this effort was bestowed with a nationalistic impetus to serve as an integral facet of Israel’s rebirth amongst the community of nations. Just as the Hebrew language was revived, rejuvenated and modernized, from early in the 20th century a fledgling movement set about to formulate an indigenous system of law to govern an eagerly envisioned Jewish state.

For the most part, the establishment of Hebrew law as the law of the land was originally undertaken as a secular project, often evincing a blunt ambivalence to “historic Hebrew law.” The adjudications by what was perceived as an unenlightened non-Zionist rabbinic authority of the previous generations were to be replaced in favor of a “new and renewed Hebrew law.” And yet with time, and in retrospect rather unsurprisingly, the prospect of restoring a particularly Jewish system of law for the Jewish national polity was whole-heartedly adopted by the Religious Zionist movement as nothing less than an essential component of Israel’s messianic redemption.

At the forefront of this endeavor stood the eminent legal scholar Menachem Elon, a professor of law at Hebrew University and Israel Prize Laureate, who eventually was appointed to Israel’s Supreme Court and served there as Deputy President. In 1973, Elon published his monumental opus under the title *Jewish Law: History, Sources, Principles – HaMishpat Halvri*, a comprehensive overview of the entire field of Jewish law as traced from the giving of the Torah at Mt. Sinai until the present. Here was the culminative handbook for the practical adoption of specifically Jewish legal

norms unabashedly aimed at fulfilling Israel's prophetic destiny as a true "light unto the nations." As a scholarly treatise, Elon's oeuvre enjoyed tremendous influence and appeal. As a program for the reinstatement of Hebrew law as Israel's formal legal code however, the result was far less impressive. Not only did critics take issue with Elon's depiction of *Mishpat Ivri* as a monolithic continuum, enduringly faithful to the Torah and the rabbinic tradition, but the substantive application of Hebrew law was largely rejected by the Israeli judiciary. While some judges were fond of quoting Jewish sources in their rulings and verdicts, it was rare if not unheard of that a court would base its decision solely on Torah and rabbinic principles.

As a natural consequence of historical and political circumstances, by the time of Israel's founding in 1948 its legal system was an amalgamation of numerous influences, codes and customs adopted primarily from the Ottoman and British legal regimes, along with a growing body of pre-State rulings issued by the local judiciary. Article 46 of the Palestine Order in Council, 1922, decreed under the King's seal during the British Mandate, stated that the "jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and ... shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England." Amongst other applications, this enactment effectively meant that lacunae in the law were to be determined in accordance with English common law.

This state of affairs remained in place for nearly 60 years until that Article 46 was abolished by a seminal piece of Israeli legislation entitled the Foundations of Law Statute of 1980. Article 1 of the Statute, labeled "Supplementary Sources of Law," declared that instead of relying on English sources, "where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage." To be sure, the statute's phrasing did not vary excessively from the text of Israel's Declaration of Independence, which stated that "the State of Israel ... shall be founded upon freedom, justice and peace as envisaged by the prophets of Israel." So too, Israel's Basic Law: Human Dignity and Liberty of 1992 declares as its purpose "to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." The fact that "Jewish" preceded "democratic" would seem to indicate the dominance of the earlier over the latter.

While some saw the enactment of the Foundations of Law Statute as a prime opportunity to introduce the provisions of Hebrew law into Israel's legal system officially and unapologetically, others held that the "principles ... of Israel's heritage" refer to much more universally accepted doctrines derived from both the Bible as well as the rich intellectual legacy that the Jewish people have cultivated over the millennia.

This dispute found vehement expression in a number of Supreme Court cases that pitted the aforementioned Deputy Chief Justice Menachem Elon against the future Chief Justice Aharon Barak. The two sparred over almost every aspect of the Foundations of Law Statute and its function, including questions of interpretation, application and primacy. Suffice it to say that although the debate has yet to be conclusively settled, in practical terms the adoption of Hebrew law per se, even in the event of a lacuna, has remained a rather uncommon occurrence amongst the Israeli judiciary.

Such a persistent statistic did not go unnoticed by Israel's legislature, and thus in 2018 the Knesset amended the Foundations of Law Statute to specifically mention "*Mishpat Ivri*," i.e. when faced with legal questions where no answer is found in the statutes, case law or by analogy, the courts shall rule "in the light of the principles of freedom, justice, equity and peace of the Hebrew law and Israel's heritage."

In future installments I hope to discuss to what extent the above amendment has had an effect on the judicial system in Israel, and to address as well as the various challenges, complications, and ramifications the adoption of *Mishpat Ivri* raises for the Jewish state.

Adv. A. Amos Fried, a native of Chicago, is a licensed member of both the Israel and New York State Bar Associations and has been practicing law in Jerusalem for over 28 years. He specializes in civil litigation, criminal representation and commercial law. His private law firm is located at 5 Ramban Street in Rehavia, Jerusalem, and he can be reached at 011-972-544-931359, or aafried@aafriedlaw.com.