

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

by Adv. A. Amos Fried

In the previous installment, we reviewed the origins of “*Mishpat Ivri*” (lit. “Hebrew Law”), referring to it as a kind of Jewish secular legal code, addressing matters of civil, criminal, administrative, and even constitutional law. Founded upon Jewish legal sources from antiquity onwards and much like the modern revival of the Hebrew language, Hebrew Law was adopted by early Zionists to formulate an indigenous legal system to govern the nascent Jewish State. Thus, but a few years after Israel’s founding, Supreme Court Justice Shimon Agranat (originally from Louisville, Kentucky and eventually appointed Chief Justice) emphatically declared that “the Jewish nation has treasured Hebrew Law, throughout all eras and diasporas, as its special property - a fundamental part of its iron-clad assets. Indeed, Hebrew Law served in the past as the national law of the Jews, and even today bears a national character with respect to Jews wherever they are.” C.A. 191/51 *Skornik v. Skornik*.

Over the years, various efforts were undertaken to instill Hebrew Law as an essential component of the decision making process throughout Israel’s judicial branch. Foremost among these was the establishment of an independent Hebrew Law Department within Israel’s Ministry of Justice, whose declared purpose remains to this day as codifying Torah Law, surveying ongoing legislation in the light of “original Hebrew Law,” preparing systematic proposals based on the “foundations of the tradition,” and more. Above all, this Hebrew Law Department is entrusted with the application of Israel’s Foundations of Law Statute of 1980.

As discussed previously, when courts encounter a *lacuna* in the law, the Foundations of Law Statute instructs that such instances shall be decided according to “*the principles of freedom, justice, equity and peace of Israel’s heritage.*” Eventually, this directive was amended so as to mention specifically “*Mishpat Ivri,*” i.e. when faced with legal questions where no answer is found in the statutes, caselaw 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.*”

What kind of role does Hebrew Law play in practice? Here are some interesting examples:

1) In H.C.J. 1892/14 *The Association for Civil Rights in Israel et al. v. Minister of Public Security et al.*, Israel’s Supreme Court (in its capacity as the High Court of Justice), heard a petition concerning alleged overcrowding in Israeli prisons. In rendering the majority opinion in favor of the petitioners, Deputy Chief Justice Elyakim Rubinstein took the liberty of addressing at length the topic of treatment of prisoners “in the Jewish heritage” in general and under Hebrew Law in particular. Noting that prison per se was not considered as a legitimate punishment under the Torah, nor for the most part in the eyes of the Talmudic sages, it nevertheless has been accepted as “a necessary evil” and thus is subject to the precepts of the Halacha (Jewish religious law), including the duty to safeguard prisoners’ dignity and provide for their elementary needs. “But most importantly for the present case, it seeks to protect the dignity of the vulnerable prisoner who requires rehabilitation. Hebrew Law would certainly support easing the conditions of prisoners to the extent that it does not undermine the purposes of punishment.”

2) In H.C.J. 5016/96 *Horev et al. v. Minister of Transportation et al.*, Israel’s Minister of Transportation was called to task for ordering the closure of a major thoroughfare traversing within a number of Jerusalem’s Haredi (ultra-orthodox) neighborhoods on Sabbaths and Jewish holidays during hours of prayer. Secular residents of the area claimed an infringement of their right to freedom of movement. The High Court of Justice roundly negated the Minister’s decree, ruling that he did not sufficiently take into consideration the interests of the local secular population. Indeed, the 6-1 majority held that, with all due respect to the sanctity of the Shabbat, freedom of movement is a basic right which under these circumstances cannot be denied.

The sole dissenting opinion, however, issued by Justice Zvi Tal argued that while freedom of movement is indeed amongst the most important of liberties, it is nevertheless relative and not absolute. “The Shabbat, on the other hand, in the eyes of the “People who sanctify the Seventh” [an allusion to Jewish liturgy] is an almost absolute value, and it is overruled only for the sake of saving lives, or even the prospect of saving lives.”

Interestingly enough, one of the judges from the majority, Justice Mishel Cheshin, also relied on Hebrew Law to *reach the opposite conclusion altogether*. In his opinion, the relevant correlation is to a discussion in the Talmud regarding a public passageway that crosses through a privately owned field. Should the field’s owner attempt to close off the corridor and provide for the public an alternate route, he not only is denied such a closure, he also forfeits his rights to the additional pathway he hoped would substitute for the former. So, too, the Transportation Minister is prohibited from restricting access to a public road, *a fortiori* when even the alternative route already belongs to the public!

3) How does Hebrew Law address admissibility of unlawfully obtained evidence? We’ve cited in the past a case decided by Israel’s Supreme Court regarding the cellphones of two of former Prime Minister Binyamin Netanyahu’s top advisors, suspected of harassing

a state's witness in the bribery cases being brought against their employer. V.C.M. 1758/20 *Erlich et al. v. State of Israel*. The police extracted information from the two aides' cell phones without a court order, which was only issued after the fact.

In his decision affirming the lower court's injunction to allow the disputed evidence, Supreme Court Justice Noam Solberg referred to the Halachic principle of "a Mitzvah achieved by way of a transgression – is not a Mitzvah," which means that the performance of a commandment is disqualified if it entails the violation of another commandment. The classic example discussed in the Talmud is a person who steals a lulav in order to perform the ritual of the four species on Succot.

Nevertheless, Justice Solberg found that, under the circumstances, it was possible that the presiding judge would have consented to issue the search warrant in the first place on the basis of evidence the police alleged to have in their possession previously.

In a dissenting opinion, Deputy Chief Justice Hanan Meltzer relies specifically on the Foundations of the Law Statute in order to invoke another Talmudic principle whereby "when a person can achieve a result by permitted means, he will not prefer a prohibited way." All the more so does this apply to state authorities, and the fact that the police in this case chose an illegal path should be held against them. Hence, Justice Meltzer recommended disqualifying the evidence both to protect the defendants' rights and "to educate and deter" law enforcement agencies from breaching the relevant laws and regulations.

4) In a decision from September 2021, Israel's Supreme Court ruled on the question of whether or not it is possible to award compensation for "impairment of fetal autonomy." L.C.A 1081/21 *Plonit et al. v. Clalit Health Services et al.* The petitioner was wrongly diagnosed with a serious prenatal defect, leading her parents to attempt aborting her as a fetus. In fact, "Plonit" (the Israeli equivalent to "Jane Doe") was born prematurely and, as a result, suffered from severe disabilities. Only afterwards was it revealed that the original diagnosis was significantly incorrect, to the extent that the parents would not have attempted the abortion in the first place. Did Plonit, while still only a fetus, have an independent cause of action for medical negligence on account of the mistaken diagnosis? Underlying that question was the fundamental issue of the rights of a fetus; put otherwise – is a fetus a legal entity eligible for compensation?

Supreme Court Justice David Mintz examined the matter in light of Hebrew Law and found that the answer is not sufficiently free of doubt. Under the *Halacha*, there exists a distinction between when the embryo is ingrained with a soul (immediately) and at what point an abortion becomes prohibited, or in more legal terms – when exactly an unborn merits protection under the Torah (about which there remain several disputes). Referring to various Talmudic texts, Justice Mintz quotes Rabbinic opinions ranging from the moment of conception, to only after 40 days of pregnancy, and finally, up until actual delivery. (To be sure, the *Halacha* treats the complex issue of abortion with utmost gravity, condoning it only in particular circumstances.) Accordingly, a valid cause of action on behalf of the embryo in this case could not be founded upon Hebrew Law.

What do these instances of referencing Hebrew Law have in common? Well, most notably Justices Rubinstein, Tal, Solberg and Mintz mentioned above, are all identified as "religious," i.e. yarmulke-wearing, Torah-observant Jews. It would not be unreasonable to propose therefore that this fact might explain their propensity to allude to Hebrew Law when the opportunity presents itself. More telling, however, is that most of the opinions discussed above analyzed the pertinence of Hebrew Law as an additional support to conclusions the judges evidently had already reached. Almost, it would seem, as a sort of ornamentation adorning the mainstay of their decisions. The exceptions appear at the extremes – Justice Solberg ruled against the Hebrew Law's prohibition of admitting tainted evidence, whereas Justice Tal relied solely on the sanctity of the Shabbat to deprive citizens access to a public thoroughfare.

In the next and final installment on this topic, I hope to discuss the fundamental and contentious issue of what status the modern Israeli court system obtains under Hebrew Law and the variety of alternative venues available to parties preferring to adjudicate their disputes in strict accordance with the *Halacha*.

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 29 years. He specializes in civil litigation, criminal representation and commercial law. His private law firm is located at 5 Ramban St. in Rehavia, Jerusalem, and he can be reached at 011-972-544-931359, or aafried@aafriedlaw.com.