Mishpat Ivri: Past, Present and Future
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Conference Abstracts & Short Biographies

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Konstantin Andreev

Limitations on Jewish Religious Practices in Modern Russia Jurisprudence

In the summer of the year of 2016 in the Russian Parliament the so-called «Yarovaya Law» was adopted due to which in the Profile Law on Religion the definition of missionary activity emerged.

Law enforcement practice has taken the path in which any religious activity started to be regarded as missionary activity. Any person doing «something religious» in the presence of a third party commits missionary activity, according to the opinion of a law enforcement agent, and, therefore, if not being authorized for this activity, is regarded as a law violator.

As it is known, Judaism is not considered as a missionary religion. However, according to the Yarovaya Law it becomes as such, because any religious activity, committed in the presence of either of a non-observant Jew or not even a Jew can be regarded as missionary activity.

On the one hand, Judaism is recognized in Russia as a traditional religion, but, on the other hand, in practice there comes a conflict between the requirements of the imperfect Russian Legislation in the field of religion and frequent ridiculous requirements of the law enforcement agencies and traditional religious practice. For example, it is impossible to determinate where the religious rites, ceremonies and the everyday life of a Jew ends, regulated in every aspect of Halacha (the Jewish Law).

The report cites judicial repressive practices in respect of persons confessing Judaism, as well as cases of deportation of rabbis in recent years. It is also concluded that the Russian Profile Legislation on Religion requires revision, taking into account the peculiarities of the Jewish religion, declared by this Legislation as «traditional».

Konstantin Mikhailovich Andreev – Advocate, Candidate of Legal Sciences, Assistant Professor of the Institute of Law and National Security in the Russian Presidential Academy of National Economy. Leader of the Go Jewish Law Project of the Jewish Campus of the Moscow Community of Orthodox Judaism.

Daphne Barak-Erez

Jewish Texts and Legal Discourse

The lecture will discuss the potential contribution of Jewish texts to current legal discourse. More specifically, the lecture will propose transcending the classic debate regarding the role of Jewish law in Israeli law – between the view that supports reference to specific doctrines and the view that supports only broad reference to universal and humanistic values ingrained in Jewish law. More specifically, the lecture will present an alternative view, which does not look to doctrines but rather utilizes the broad corpus of Jewish texts, without necessarily prioritizing Halachic sources or conclusions, as a way to enrich debates and understandings. The lecture will then utilize references to Biblical narratives to exemplify this approach.

Daphne Barak-Erez is a Justice of the Supreme Court of Israel since 2012. Justice Barak-Erez was the Dean of the Faculty of Law at Tel-Aviv University and the Stewart and Judy Colton Professor in Law and Security before her appointment to the court. She also served as the Director of the Minerva Center for Human Rights and the Director of the Cegla Center for Interdisciplinary Research of Law at Tel Aviv University. She holds a JSD, LL.M, and LL. B. from the Tel Aviv University. Justice Barak-Erez has taught as Visiting Professor at various universities, including the University of Toronto, Columbia Law School and Stanford Law School. She also held various public positions, including as the chairperson of the Israeli Association of Public Law, a member of the Council of Higher Education in Israel, and the President of the Israeli Law and Society Association. She was awarded several prizes, including the Rector's Prize for Excellence in Teaching (three times), the Zeltner Prize, the Heshin Prize, the Woman of the City Award (by the City of Tel-Aviv) and the Women in Law Award (by the Israeli Bar). She is the author and editor of several books and of many articles in Israel, England, Canada and the United States.

Michael Baris

'Up in the Air': Shifts in Maimonides' Conceptualization of Doubt

Grappling with factual doubt is of major concern for any normative system – not the least law and religion. Jewish Law offers its own set of decision rules – some universal, some unique – governing instances of factual doubt. The intersection of legal and ritual norms Judaism's system offers special insights. One of these is the status of doubtful sin, and its impact on the status of such decision rules, and on the conceptualization of doubt.

In a famous passage of his Code, Maimonides explicates the Talmudic rule that mandates stringency in cases of doubt that involve biblical injunctions, whereas doubt in cases that involve rabbinic legislation can be treated leniently. For Maimonides, stringency is not inherent in factual doubt. Stringency itself is of rabbinic origin. But here is the conundrum: Torah prescribes sacrificial atonement for specific cases of unwitting, doubtful sin – the *Asham Talui*; lit. the "hanging" offering). But if doubtful sin is not a transgression, in biblical terms, how does it generate ritual (and legal) obligation? Here conceptual paths diverge. A key issue is the interpretation of what is it that "hangs", in the sacrifice. Medieval commentators, representative of the Maimonidean school of thought, present various readings of the purpose of the "hanging" offering. Might there be some impact of unwitting sin, even where decision rules do not mandate wariness? Does Maimonides subscribe, at any stage, to the idea that sin bears metaphysical danger, and necessitates protection – even where there it has no legal impact? Or is there a normative fault in not setting up safeguards against unwitting sin?

I argue that the textual variants and editing of Maimonides' key passage, reveal the master's own vacillation as to the status of doubt. Maimonides' shift is thus reflected later in the writings of his followers. Beyond the immediate issues of ritual and atonement, the Maimonidean treatment of doubt resonates with contemporary debates as to the status of rules, and strategies for grappling with imperfect knowledge.

Dr. Michael Baris is a senior lecturer in Jewish Law, Philosophy of Law and Labour Law at the Shaa'rei Mishpat Academic Center in Hod Hasharon, Israel. Dr. Baris' academic work centers on uncertainty in law - addressing key question at the intersection of epistemology and legal theory. He is currently working on a monograph that develops the underpinnings of Maimonides' strategies in both halakha and theology, and has expanded his research to include aggada as well as halakha.

Hila Ben-Eliyahu

The Study of Jewish Law in an Age of the Vanishing Trial

The legal system in Israel, but not only in Israel, is coping with a phenomenon that, although not new, has taken on dimensions that must be addressed by the research community: the phenomenon of the "Vanishing Trial". The legal system with which we are familiar, in which judges adjudicate based on laws, and the question of whether they should stray from those laws or reinterpret them, is steadily disappearing. Conflict resolution movements, along with therapeutic jurisprudence and multicultural perspectives on law which actively object to the advancement of a single, unified legal narrative, only add to the impossible load placed on judges' shoulders and to the public's dissatisfaction with the long, exhausting legal processes that leave the sides injured and angry for years. All of this influences and reflects one simple phenomenon: Courts no longer uphold the law. Without distinguishing between the different courts and types of cases, the raw numbers are astonishing: some say 88 percent of cases, some 90, and in the United States there are those who say that more than 95 percent of cases do not conclude with a classic legal decision by the Judge. Various types of alternative procedures take the place of traditional court decisions, leading to decisions that cannot be appealed or are not subject to judicial review, do not continue the production of new law, and whose relation to positive law must yet be defined and researched.

The Age of the Vanishing Trial challenges the entire world of law as we have known it: How will such a system function over time? Will it have any legal guidelines in the event that it ceases to produce its own legal precedents? What sort of relationship will be built between an academy that researches law and a legal system that does not perform law? What types of lawyers will such a system require, and what training will suffice for its judges? Will traffic officers enforce laws, and if so, which? And which legal fields will remain beyond the scope of compromise and mediation, and will not vanish?

Both historical and halakhic materials reveal that courts of Jewish Law frequently preferred compromise over other legal solutions. This was perhaps the result of an active preference for compromise based on the aspiration for a law of peace and involving, in some sources, therapeutic jurisprudence. Alternatively, the preference came from lack of other options, stemming from concern over negative effects that may arise from adjudicating based on Torah law in a culture of dispute and multiple voices, or from external pressures stemming from the courts' standing as a not-always-legitimate alternative to the sovereign legal system. Such a system, which foregoes stability and certainty for the sake of other values, places the judge and his actions, not the law, in the center, and challenges the world of research from several directions. Some of these challenges have been partially examined by Jewish law scholars, yet I seek to present them in this lecture as a whole and will categorize them into four new-old directions of research.

I would like to suggest that Jewish Law can provide a historical precedent for the Vanishing Trial phenomenon, promote legal thinking, and suggest solutions that are relevant beyond its own specific cases. The use of Jewish law could lead legal scholarship to rethink the legal system, its relation to the law, and its approach to legal research in general and the training of lawyers and judges in particular.

Dr. Hila Ben-Eliyahu wrote her dissertation about the way Conflict of Law matters inflicted in Rabbi David ibn Abi Zimra (Radbaz) and his contemporary 16th century scholars' Responsa.

Her main interests are Jewish Law, Jurisprudence and Legal Thinking, Private International Law, and their intersections.

Dr. Ben-Eliyahu teaches Jewish Law at the Faculty of Law at Bar-Ilan University and Hebrew University. She is the academic manager of the Center for Jewish and Democratic Law, Bar-Ilan.

Donkey's Burial

This paper is the second chapter of a larger study on Shame Punishment in Jewish Law, of which the first chapter on being locked in the pillory (kune; kuna) has already been published. (J.L.A. vol. 19) In this paper some preliminary observations regarding the punishment of Donkey's burial will be presented.

In the Bible, 'donkey's burial' was a divinely-imposed punishment of ignominious burial, whereby the body, rather than being duly buried, was dragged until it fell apart. Responsa by eminent halakhic authorities and *takkanot* attest to the fact that the punishment of 'donkey's burial' was invoked by rabbinical authorities as a punitive measure to be imposed by the court, alongside other measures, on miscreants.

It is important to note that the punishment of 'donkey's burial' differs from corporal punishment and social shunning in that it is anticipatory: obviously, it cannot be carried out upon sentencing, as the defendant is still alive. Donkey's burial is, therefore, more in the nature of a threat than an immediately-imposed penalty. But the very fact that this threat existed had very real societal impact, frightening people to keep them in line. Yet sentencing transgressors to 'donkey's burial' was by no means mere rhetoric; such sentences were actually carried out.

The punishment of Donkey's burial raises similar questions as does the Kuna punishment, and specifically the question of consistency, namely, how is the punishment of Donkey's burial related to other elements of the legal system? Is Donkey's burial compatible with human dignity and human rights? Or is it a manifestation of an internal tension that exists in a legal system as a result of contradictory values being endorsed simultaneously?

Hanina Ben Menahem is a Professor of Law (emeritus) at the Faculty of Law, The Hebrew university of Jerusalem.

Ben-Menahem's fields of research are: Talmudic law, the philosophy of Jewish law, Maimonides' legal thought, Nietzsche on law.

Itzhak Brand

The Separation Between "religious" and "legal" in Jewish Law: A Study in the Poskim Literature

In presenting the goals of the Jewish Law Society (Moscow, 1918), two of its leaders, Shmuel Eisenstadt and Paltiel Dikstein, determined that we should be free of the "religious seal" of Jewish culture in order to adapt the halakha to a secular society or state.

As a result, rabbinic literature, especially the late literature (Achronim), was excluded from the field of study because it was perceived exilic and non-relevant.

The religious Zionists at the time - rabbis, thinkers and jurists - rejected decisively the attempts to secularize Jewish law. In their view, religion and law are intertwined, and can not be separated.

In this lecture we will examine the intra-halachic perspective on the question of secularization of halakha. Since the question is very broad, we will limit the discussion twice: first, to rabbinical literature, and especially to the Poskim literature. Later, in that literature, we will relate only to the discussions, in which the relationship between "Commandments between man and God" and "Commandments between man and his Fellow", are explicitly discussed.

In the following, we will claim that in the Poskim literature there is a prevalent position, which constantly seeks to separate the two kinds of commandments, with the characterization of the former as divine-religious norms, and of the latter as human-secular norms. In order to prove this argument, we will present the attitude of the rabbinical literature in three aspects: ethical, jurisprudencial and theological. In short, we will use a few examples, out of dozens of those we found.

(A) The ethical aspect: Ethics examines the proper action, according to two basic approaches: the deontological approach holds that the proper action derives from the "good will" on its own, regardless of its outcome or purpose. In contrast, the utilitarian approach examines the result. The proper action is judged according to the benefit or damage it causes to all concerned.

In rabbinical literature, it is conventional to observe God's commandments as deontological, while in contrast fellow's commandments are seen as utilitarian. The question that should be examined, on the background of this distinction, is whether there is value to the fulfilment of a mitzva in circumstances in which the person is exempt from it, because of concessions or because he is prevented from fulfilling it.

According to Rabbi Joseph Engel, the answer to this question varies between the types of mitzvot: God's commandments are deontological and their value depends on their obligation. Thus exemptions nullify the mitzvah. On the other hand, fellow's commandments are utilitarian. Even in the absence of duty, if the act is beneficial to others, it is valuable, and therefore it should be fulfilled.

(B) The jurisprudencial aspect: The theory of law offers two points of view on legal systems. "Positivism" assumes that the law is created by a sovereign, and is subject to the relationship between norms, authorities and the public. In contrast to institutional positivism, natural law establishes the law on principles and norms, originating in the natural order of the world, and alternatively in the moral nature of man.

The Poskim tended to identify God's commandments as positivists, and fellow's commandments as natural. It was against this background that they explained why blessings were only prescribed for God's mitzvot: these mitzvot derived from the sovereign, and the blessing announces this: " אתה ה' אשר קדשנו במצוותיו וצוונו...". On the other hand, the social commandments are natural, and therefore it is not appropriate to use for them a blessing, which declares the dependence of the mitzva on God.

)C) The theological aspect: The central dilemma here is how to relate, from a religious perspective, to the mitzvot between man and his fellow. Are these social norms, that seek to inspire kindness and to preserve human dignity, or perhaps they are God's commandments, which were meant to cultivate God's glory?

Rabbinic literature tends to present the fellow's commandments as social norms that strive for human dignity. Therefore, if observing these commandments is liable to harm the honor of person himself, he is exempt from carrying out that act.(זקן ואינה לפי כבודו – פטור מהשבת אבדה). On the other hand, a person must observe God's commandment even if he is ashamed as a result.

The combination of these three aspects teaches that the fellow's commandments are utilitarian, natural, and strive for human dignity. On the other hand, God's commandments are deontological, positivist and directed towards the glory of heaven. In other words, God's commandments are religious, as opposed to the fellow's commandments that are human and earthly.

The Poskim literature therefore tends to separate the halakhic system, and thus, in effect, secularizes the social-legal part of halakha. The secular approach of the Jewish Law Society thus receives unexpected support from its bitter rival - the rabbinical literature. On the other hand, the Poskim literature opposes the religious position in relation to the law, as expressed by the spokesmen of religious Zionism.

Prof. Itzhak Brand / Faculty of Law, Bar Ilan University

Research fields: relations between religion and law in Jewish law; obligation and property; medical halachic ethics.

His book "Out of Nothing" – Transactions in Icorporeal Estate in Talmudic Law was published in 2017

Yehuda Brandes

Communist Russia in Halakhic Discourse

Following the Communist Revolution in Russia, Jewish law had to respond to the change in the regime and the resulting change in the country's culture, and to grapple with the significance of those changes from a halakhic perspective.

The main issue where the change in attitude of halakhic authorities to Communist Russia, is in its reaction to atheism as a core value of the new regime and Soviet culture. As far as the Jewish religious leadership was concerned, this meant the need to fight for the ability to retain religious values and fulfill religious commandments. In terms of Jewish law, the question was to determine the significance of Russia's shift from Christian state to atheist state. Until that time, halakhic authorities recognized the age-old phenomenon: a state that operated under the religious influence, and the modern state that had begun to be liberated from religion, which allowed some degree of separation between religion and state together with religious freedom for its citizens.

The establishment of an atheist state was a new phenomenon which influenced Jewish law in several ways.

In my lecture, I would examine how decisors of Jewish law approached the Russia's new atheist government through the perspective of their attitudes towards civil marriage.

The point of departure for the discussion will be the ruling of Rabbi Moshe Feinstein, whose first rabbinic post was in Soviet Russia. Rabbi Feinstein rejected any religious value to civil marriage in Communist Russia. Rabbi Feinstein's rulings had a strong influence on the attitude of the rabbinic authorities in Israel and around the world to the personal status of Jews in Communist countries, immigrants to Israel, and emigrants to the Western world.

I would like to examine Rabbi Feinstein's ruling from four different perspectives:

A. Communist Russia vs. pre-revolutionary Russia.

B. Communist Russia vs. the surrounding world: Christian, post-Christian, Muslim and democratic.

C. Rabbi Feinstein, in contrast to other decisors of Jewish law, both in Russia and abroad.

D. The significance of the communist-atheistic world in other areas of Jewish law.

The focus of the lecture is not civil marriage, but the halakhic-legal attitude toward the Soviet regime.

Yehuda Brandes is president of Herzog College in Gush Etzion and Jerusalem. He is the former head of the Beit Midrash at Beit Morasha in Jerusalem and the author of many books and articles on Talmud, Jewish law, education and Jewish philosophy. In his books "Agada Lema'aseh" and "Mada Toratekha" and many articals he examines the connection between the Talmudic law and legend. Exposing both the philosophical aspects of religious law and the practical aspect of the Talmudic legend.

Benjamin Brown

The Contribution of Jewish Thought to the Study of Halakhah

The Talmudic tradition divided the corpus of Torah knowledge to two: Halakhah and Aggadah. Aggadah was often defined residually as "whatever is not Halakhah". In modern scholarly research the offshoots of Aggadah (Jewish philosophy, Kabbalah, Musar and the like) received their own discipline – Jewish Thought – while the study of Halakhah was scattered between four disciplines, each employing a different methodology: Talmud, law, history, and Jewish Thought.

If, however, Jewish Thought deals with non-halakhic texts, how can it contribute to the study of Halakhah? A few directions can be given:

1) Analyzing the descriptive strata ((i.e. the facts) underlying the law;

2) Analyzing the deeper normative strata (i.e. principles) of the Law;

3) Analyzing the normative elements within allegedly-descriptive systems, i.e. the principles and rules that philosophical or kabbalistic works entail.

The apllication of the methodology based on the study of Jewish Thought does not intend to exclude the other three, but to join with them. Indeed, in recent years the four disciplines work together in fruitful and sometimes impressive collaboration. In this tendency continues, the quadrangle created by them may bring us closer to the "natural" and "normal" condition that ought to exist in the first place – the existence of a unified and multi-faceted discipline of the study of Halakhah.

Benjamin Brown is a professor of Jewish Thought at the Hebrew University of Jerusalem and a researcher at the Israel Democracy Institute. His main focus is Orthodox Judaism, which he studies in variety of aspects: Jewish Law (Halakhah), Hasidism, Musar and Haredi ideology (Hashkafah). He is the author of Hazon Ish: Halakhist, Believer and Leader of the Haredi Revolution (2011); Lithuanian Musar Movement: Personalities and Ideas (2014); Thoughts and Ways of Thinking (2017); The Haredim: A Guide to Their Beliefs and Sectors (2017); As a Ship in A Stormy Sea: The Story of Karlin Hasidism (2018). He is a co-author of Hasidism: A New History (2017), a first comprehensive work on the history of the movement from its inception to date.

Iris Brown

Shaming Under the Auspices of the Court: Community Law vs. State Law

According to Jewish law, when one person shames another he has committed an offense according to Jewish law – *halbanat panim* – public embarrassment. What is the status of embarrassment that is decreed by the court as a sanction against someone who defies its rulings? We are not familiar with the use of such sanctions in ancient times, but they do appear in medieval Ashkenaz in the bans established by Rabbenu Tam. The issue has recently come up for discussion, as various rabbinical courts have chosen to impose shaming sanctions on individuals who refuse to grant their spouses a get. The social media posts publicized by the Rabbinical Courts has included, among other things, prohibitions against engaging in commerce with them, not to host them, not to include them in a prayer quorum, and not to allow them to read the Torah or lead prayer services. The source for these sanctions is found in the bans of Rabbenu Tam which pertained to a wide range of legal, social, and religious activities. In the State of Israel, however, only some of these have been given legal sanction in the Rabbinical Courts Law (Support of Divorce Decisions), 1995. Among the powers granted to the Rabbinical Courts are the ability to constrain the individual from leaving the country, to hold his passport, to declare him a limited client regarding opening of bank accounts, etc. In our case, however, the Rabbinical Court preferred to apply social and religious sanctions that are not mentioned in the law against divorce refusers. Two such individuals appealed to the Supreme Court, claiming that the Rabbinical Courts did not have the authority to apply these sanctions. While the Supreme Court rejected their petition, it also expressed reservations about the Rabbinical Court ruling and its use of shaming.

The use of shaming as a legal sanction in 21st Century Israel raises two main problems: First, the types of shaming that were available to Rabbenu Tam are insignificant compared to the possibilities that exist in modern society. Second, Rabbenu Tam used social sanctions that worked within the framework of his community. Are such sanctions appropriate in the framework of a sovereign state?

Regarding the first problem, some argue that for the first time, social networks allow ordinary people who are not professional journalists, to expose injustices and correct social flaws. Many others are more concerned that social networks have the unprecedented potential to destroy the good names and lives of ordinary people who have difficulty defending themselves from a public onslaught. At the same time, some argue that the practice of shaming by the Rabbinical Court is not a problem at all. It constitutes an appropriate solution to prevent unnecessary and disproportionate shaming, since the sanction is issued by a competent and responsible court, which ensures its use in appropriate cases.

Regarding the second problem, some argue – and the justices of the Supreme Court raised this, as well – that a sovereign state should apply the legal sanctions available to it by law and should not turn to the public for assistance. Calling on the public offers no honor to the state, and, moreover, poses a concern given the lack of governmental control. Critics believe that the use public pressure may have been appropriate for a Diaspora community with no sovereignty and no means of enforcement, but is wholly inappropriate in a modern state. In response, some argue that this is a necessary solution to the problem of individuals who refuse to grant divorces where severe state-sponsored sanctions cannot be applied, and only the use of massive, nonviolent social pressure can advance the goal.

This lecture will examine the differences between Jewish law and civil law regarding the use of shaming applied by a judicial body, by reviewing the arguments raised in the court and other legal sources, as well as by analyzing the rulings of contemporary authorities of Jewish law. The question will also be asked why the Rabbinical Courts, which apply Jewish law, saw the use of shaming as an optimal solution in this case, while the Supreme Court, which is responsible for secular law, disapproved of the use of shaming by the Rabbinical Court, even as it rejected the appeal of the individuals who petitioned against the shaming. Through this discussion, we will analyze the various elements and values that serve as foundations in each of the legal systems regarding this complex issue.

Dr. Iris Brown is a senior lecturer at the Department for Jewish studies at the Ono Academic College. Her research is focused on Orthodoxy and Halakhah in the modern era. She wrote articles on the interrelation between Halakhah and Hasidism, Halakhah and gender, and Halakhah and ideology. She also studied the ideological justifications for the change in the status of haredi women as well as other aspects of the haredi society in Israel.

Michael J. Broyde

Understanding the Last Great Posek of the Russian Empire: The Methodology & Jurisprudence of the Aruch Hashulchan

Understanding the methodology employed by Rabbi Yechiel Michel Epstein in his writing of the Aruch haShulchan is a monumental task. Rabbi Epstein was the last great posek of the Russian Empire and the Aruch HaShulchan is the last (nearly) full restatement of Jewish law written.

This paper is an attempt to explain the workings of the Aruch HaShulchan in Orach Chaim only. Hopefully, over time, all four divisions of the Aruch Hashulchan will eventually be completely analyzed.

Based upon this review and analysis of all of Rabbi Epstein's rulings in the *Orach Chayyim* section of his Arukh Hashulhan, this work reconstructs the secondary rules of decision that drive Rabbi Epstein's *halakhic* choices and conclusions. Reasoning inductively from the data points provided by Rabbi Epstein's *halakhic* determinations, this work maintains that Rabbi Epstein's rulings can be understood by reference to ten methodological principles which drive his *halakhic* conclusions.

1. Rabbi Epstein follows his own independent understanding of the correct meaning of the relevant Talmudic sources, even against the precedential rulings of important authorities of previous generations. Often, Rabbi Epstein's independent judgment involves innovating creative explanations of Talmudic sources, novel reasons for particular laws, and entirely new rules of halakhic conduct. This independent judgment incorporates an impressive command of the Talmud Yerushalmi, which Rabbi Epstein often deploys as an important source of halakhah.
2. Rabbi Epstein declines to follow his independent judgment of the correct understanding of the relevant Talmudic sources when his own view is incompatible with the established rule of a broad consensus of past authorities, as well as when the views of major pillars of halakhic jurisprudence, such as the Rambam, Shulhan Arukh, or Arbah Turim adopt a rule more stringent than his own.
3. When considering the views of past authorities in the absence of a clear independent understanding of the Talmudic sources or a strong halakhic consensus, Rabbi Epstein tends to give primary weight to the views of the Rambam, and then to the rulings of the Shulhan Arukh.
4. In cases where Rabbi Epstein is himself unsure of the correct Talmudic rule, and past rabbinic consensus and major authorities do not provide clear guidance on the issue, Rabbi Epstein follows the standard halakhic rule that in cases of doubt regarding biblical laws, one should act strictly, while in cases of doubt regarding rabbinic rules, one should act leniently.
5. Rabbi Epstein insists that halakhic issues need to be decided in the present time and place. Thus, he holds that when the underlying reasons for established halakhic stringencies or leniencies no longer apply, the practical rules once produced by those reasons change in response to present circumstances.
6. Rabbi Epstein generally does not rule that one should act strictly in order to satisfy particular halakhic opinions that have been rejected in accordance with the ordinary rules of halakhic decision making, but does make use of such rejected opinions to resolve complex halakhic questions or disputes among past authorities, to justify common practices that are at odds with standard halakhic norms, and to permit non-normative behavior in extenuation circumstances.
7. Rabbi Epstein generally encourages – but does not mandate – superogatory behavior that goes beyond the minimal requirements of the halakha, but only when there is a genuine benefit to such conduct in terms of Torah values and observance.

8. Rabbi Epstein upholds the halakhic normativity of what he sees as *minhag* – the customary practices of his own time and place – even when such customary practices are inconsistent with precedential halakhic rulings or Rabbi Epstein's own preferred understanding of the Talmudic sources, provided that the *minhag* is not unavoidably incompatible with basic halakhic norms or based on mistaken premises.
9. Rabbi Epstein recognizes that halakha must be practiced by real people in the real world, and is therefore willing to adapt seemingly impracticable halakhic norms to better account for the real world practical challenges attendant to trying to actually uphold such standards.
10. Rabbi Epstein tries whenever possible to rectify the mystical prescriptions of the *Zohar* with standard halakhic norms, though he affirmatively rejects the halakhic relevance of mystical practices that are incompatible with Talmudic sources. Moreover, Rabbi Epstein generally permits or even recommends the adoption of mystical practices innovated by the *Zohar* as long that they do not contradict halakhic requirements.

In sum, *Aruch Hashulchan* significantly diverges from many of the halachic attitudes exemplified by his most prominent contemporary, the author of *Mishna Berura.*

Michael Broyde is a law professor at Emory University. He was for many years a dayan in the Beth Din of America and a shul rabbi in Atlanta. He is on a Fulbright sabbatical for the upcoming year at Hebrew University and is writing a book on the Aruch Hashulchan.

Levi Cooper

Russian Clothing Decrees: Fashioning the Hasidic Haberdashery

Distinct garb is one of the most visible markers of hasidic Jews from Russia and Eastern Europe. Hasidic Jews continue to be depicted wearing distinctive garments, in particular fur headwear of different types: *shtrayml*, *spodik*, and *kolpik*. Indeed, when hasidic Jews are the subject of ethnographic studies, museum exhibitions, or art installations, the fur headwear is likely to feature. Despite their contemporary ubiquity, hasidic fur hats were not always "hasidic."

This paper will begin by mining legal literature in order to demonstrate that fur hats were standard attire for both men and women, for Jews and non-Jews, before the advent of Hasidism. Surviving communal ordinances from the seventeenth-century, eighteenth-century prenuptial agreements, as well as memoires and visual evidence, indicate that different types of headwear indicated social status within the community. This raises the question: When did fur hats become markers of hasidic identity?

I will argue that the *shtrayml* as a signifier of hasidic identity evolved in the wake of the mid-nineteenth-century clothing decrees in Imperial Russia that were part of broader social engineering initiatives of Czar Nikolai. The Russian legislation peaked in the middle of the century, and explicitly prohibited, inter alia, fur headdress.

In response to the Russian legislation, Jewish jurists debated whether *halakha* required that people give their lives rather than change their garb. Rabbis living in Russia agreed that sacrificing one's life was not necessary, while rabbis living outside Russia took a harsher stance. This suggests a Realist paradigm where the geo-political location of the jurist is a determining factor in fashioning his legal opinion.

Moreover, this paper will demonstrate how Russian legislation designed to erase sartorial particularity had the opposite effect: Fashioning distinct hasidic garb that survives to this day.

Levi Cooper is a Post-doctoral fellow, Ben-Gurion University of the Negev, Israel

Jordanna Cope-Yossef

The Proposed "Jewish Law" Article in the "Jewish State" Bill: Demon or Genie?

One of the most debated components of the controversial proposed Basic Law: Israel as the Nation-State of the Jewish People, colloquially referred to as the "Jewish State" Bill, is an article which sets out to give special status to Jewish law in the State of Israel, akin to the special status the law intends to confer on the Hebrew language.

Leaving aside for the most part the debate about the wisdom of adopting this law per se, we will present the merits and drawbacks of different versions of the proposed article on Jewish Law. Jewish law proponents maintain that as part of the nation's heritage, "Jewish Law" should be designated by name in the "Jewish State" bill and that it need not be referred to euphemistically or demonized. Detractors claim that Jewish law should not be incorporated into the "Jewish State" Bill at all, and if forced to do so for political reasons, the wording should not make explicit mention of the term "Jewish Law". We will address some of the concerns raised by detractors, prominent among them, the danger the article might pose to the value of equality and other liberal values and the potential for coercion of obsolete rules and beliefs.

These concerns will be weighed in light of the data on incorporation of principles of Jewish law by the courts in areas where Jewish law is not an inherent component of the personal law of the parties. We will note whether the justification for use of Jewish law was by way of reference to the Foundations of Law Act, 5740-1980 or to the Basic Law: Human Dignity and Liberty or whether it was incorporated without any formal justification whatsoever. It will be especially telling to see how often and in what contexts Jewish law was incorporated via article 1 of the Foundations of Law Act, the wording of which forms the basis for the article under debate.

Our claim is that the fears are indeed unfounded. Given the record of implementation of Jewish law by the courts we have an excellent tool to evaluate whether Jewish law has acted as a "demon" or a "genie" and whether the courts introduced rules and values foreign to a liberal democracy. It seems, based on the data that the influence of Jewish law is not of the pernicious nature feared by its detractors; indeed it is often the basis for decisions that uphold human rights and further equality.

Yet, current use of Jewish law falls short of the promise envisioned by members of the 1917 Hebrew Law Society. That is cause for lament. It would be folly for proponents of Jewish law to point to this as additional proof that there is no cause to fear a Jewish Law clause, since its incorporation in the Jewish State bill is but a symbolic gesture given that in practice the courts rarely turn to Jewish law. Rather, due to the solid nature of Israel's judiciary and its dedication to the vision of the State of Israel as a Jewish AND democratic state, there is fertile ground for furthering the 1917 vision and its variations while at the same time insuring a version of the Jewish law clause that will safeguard concerns for human rights and equality.

Advocate Yardena Cope-Joseph, serves as Assistant Legal Adviser in the Jewish law department at the Israeli Ministry of Justice. She specializes in Jewish Law, family law, bioethics and assisted reproductive technologies (ART) and has been a senior lecturer in these fields for over 25 years. She holds an MA in public and international law from Tel Aviv and Northwestern Universities and is a *Nishmat*-certified "Halakhic Adviser for Family Law and Women's Health". In 1992-2012 Cope-Joseph was assistant director at Matan, Jerusalem and held a position as senior lecturer in Talmud and Jewish Law. As a private attorney and past director of the assistance center at the NGO "ITIM" Cope-Joseph counseled individuals and advocated before the rabbinate courts and state institutions on marriage and divorce, personal status and conversion, specializing in Get refusal prevention and assistance to families using ART and Surrogacy.

Gayane Davidyan

Professor Gayane Davidyan (PhD) is an Associate Professor at the Law School of Moscow State University. She joined Moscow State University in 1995 where she teaches Introduction to the Legal Profession; History of the State and Law of Russia; Professional Ethics, Human rights.

Professor Davidyan has an extensive experience teaching globally. She taught at Regensburg University, Germany; San Diego State University (2004 – 2008); Russian-Armenian Slavic University, Yerevan, Armenia (2005 – 2010); Moscow State University Center for the Study of International Law, Geneva, Switzerland (2006 – 2016); College of Law, Loyola University, New Orleans, (2010), Cornell University Law School (2011), Sturm College of Law and Denver University (2012), College of law West Virginia University (2012).

Professor Davidyan's scholarship includes a number of articles and textbooks on Fundamentals of Russian Law and Legislation of Catherine II; Fundamentals of Russian Law (for foreign students), Legal ethics.

Before becoming an academic, she practiced as head of the legal department of a corporation and counsel for the Journalist Union of Russia.

Olga A. Dyuzheva

Olga A. Dyuzheva teaches Family and Civil Law at her alma mater Lomonosov Moscow State University, Russia. She has an LL.M. degree from Columbia University School of Law (USA) and lectures regularly at leading law schools abroad.

Author of publications on Russian family and civil law.

She has participated in drafting and amending Russian legislation relating to the rights of children and parents. After the fall of the Iron Curtain, she was one of the early proponents of intercountry adoption in Russia and lobbied for changes to Russian adoption legislation.

She is a permanent expert for the Committee on Women, Children and Family of the Russian Parliament (the State Duma) and for the Commission on re-drafting of the Russian Family Code (the Federation Council).

Participates in the EU Common Core project an marital property since 2009 to date.

Since 1991 she is serving as a member of the Executive Council of the International Society of Family Law (ISFL) and in 2005 – 2014 was its Vice President. Since 2012 she ias a member of the Board of Directors of the International Academy for the Study of the Jurisprudence of the Family (IASJF).

Arye Edrei

Can *Mishpat Ivri* be Jewish Law?

The *Mishpat Ivri* project is generally understood as a project that views the Talmudic and halachic literature as a cultural asset of the Jewish people, and therefore aspires to integrate it within Israeli law. I will suggest an alternative understanding of the project in the work of Justice Menachem Elon on the Supreme Court. I believe that some of his verdicts have an additional and important dimension. My argument is that he not only cited *halakhic* sources as they relate to Israeli law, but also worked internally within them, and through his rulings, to exert influence and shape the *halakhah*. In essence, my claim is that Elon desired to break the barriers between the two approaches and to make the Israeli courts to some degree part of the sphere of *Mishpat Ivri*. I believe that he did so consciously in an attempt to effect change in the world of *halakhah*, but his degree of awareness and intent, although important, is not the central issue of my talk. The main question is from a conceptual standpoint, whether it can be substantiated from the perspectives of legal theory and halkahic thought that Israeli court be part of the continuum of halakhic development throughout the ages. Can *Mishpat Ivri* serve two goals, become part of the chain of halakhic decision-making, and on the other hand, Israeli law would search for its roots in the halakhic past.

Arye Edrei is a professor of Law at Tel-Aviv University. He teaches a variety of courses on the history and philosophy of Jewish Law. His main fields of interest are Talmudic jurisprudence and Jewish Law in the 20th century. Together with Professor Suzanne Last Stone, Edrei is the co-editor in chief of "Dinei Israel", a Journal of Jewish Law, published jointly by the Tel-Aviv University Law Faculty and the Cardozo Law School of Yeshiva University.

David J. Fine

The Value of Life as Political Polemic in Ancient Jewish Law

The universal value of human life is considered axiomatic in Jewish criminal law. The evidentiary standards, the procedures of deliberation, and the execution regulations are such that capital punishment could hardly ever be enforced. The discussion in Mishnah Makkot 1:10 on whether a rabbinic court ever administered capital punishment makes clear the Rabbinic discomfort with the punishment, even though it is regularly mandated by the Torah, the primary source of Jewish law. Mishnah Sanhedrin 4:5 provides the instructions of the judge to witnesses in a criminal case, including a powerful sermon on the value of each and every life. This codified perspective and the almost impractical procedures for conviction are often cited as evidence of the Rabbinic view that the universal value of Jewish life supersedes the Torah's prescription of capital punishment for legal transgressions. However, a clear case can be made based on external and internal evidence that the rabbinic courts of late antiquity functioned primarily as arbitration courts dealing with civil disputes and family law. The body of rabbinic criminal law, unlike civil law, represents a theoretical rather than practical tradition that functions essentially as a polemic against Roman criminal justice rather than as a guide to Jewish autonomous criminal jurisprudence. Jewish law had the liberty to take an "enlightened" view against capital punishment because it was not a sovereign system. Ironically, the only specific Rabbinic capital case recorded is the trial of Jesus, and that only by Christian sources. Later Talmudic accounts of the trial of Jesus indicate the polemics of that particular memory and the general polemical approach of Jewish law to capital punishment. The opportunity for polemic in the legal code signifies a fundamental difference between governing and voluntary legal systems.

Rabbi Dr. David J. Fine is adjunct professor of Jewish law and the Abraham Geiger College in Berlin. He serves as a congregational rabbi in Ridgewood, New Jersey, USA, where is president of the New Jersey Rabbinical Assembly. Dr. Fine earned his PhD in history at the City University of New York in 2010, and his rabbinic ordination from the Jewish Theological Seminary in New York in 1999.

Shlomo E. Gliksberg

Treatment of Get Refusal in the Rabbinical Court of Johannesburg

The Beth Din (Jewish ecclesiastical Court) of Johannesburg began its activities at the beginning of the twentieth century as a result of the massive emigration of tens of thousands of Jews from Lithuania to South Africa after the establishment of Johannesburg in 1886. The Lithuanian Jewry was suddenly forced to contend with a new cultural reality, with new languages (Afrikaans, English and local African languages) and accelerated secularization and assimilation.

Since then, this has been the only Jewish court in South Africa, and is responsible for all matters of Jewish law: *Gitin*, conversion, kashrut, *mikvahs, Eruvin*, marriage registration, and disputes. The court is responsible for all the communities in South Africa, and has an active branch in Cape Town.

According to the *Beth Din* and the women's organizations in South Africa, there are currently two *Mesoravot* get in the country. Obviously each case is tragic and must be attended to, but for a country where there is a combination of civil divorce and accelerated secularization and assimilation, this is a very low number.

What is the source of success?

It seems that two legal initiatives have led to the fact that in South Africa there are almost no refused divorces today.

1) In 1989, the Court and Chief Rabbi at the time, Rabbi Cyril Harris, initiated a law according to which a family court judge who is responsible for the civil divorce procedure will not finalize a civil divorce without ensuring that the husband has previously given a religious get to his wife.

The Justice Ministry supported the bill and established a committee that included the head of the court [Rosh Beth Din] Rabbi Moshe Kurtztag, the Dayan and court secretary Dr. Dennis Isaac, chief rabbi Harris and other people involved in Jewish Halacha and the law, includinga representative for the Reform community. The committee created a 138 page long document describing the problem and the suggested solution that was accepted by Jewish women's organizations and most of the Jewish organizations (except for the Reform community which opposed the granting of precedence to the Orthodox court) After six years of public and legal activity, on November 22, 1996, after the approval of the parlament, President Mandela signed the law, Africa, and in effect the problem has been almost entirely eliminated. In the archives of the Beth din I found letters of congratulation and support from all over the Jewish world.

2) In 2003, the rabbinical court declared a Jew who did not agree to accept the ruling of the Court in the matter of alimony and the custody of the children as a refuser of divorce and issued a statement of ostracism. He appealed to the District Court on the grounds that the court is not allowed to boycott him. In August 2004, a court of five judges issued a ruling evaluating the activity of the court on the issue of refusal of divorce and permitted it to use the tool of a boycott. The court became famous through this ruling as one that takes care of the well-being of those who are refused a divorce and in cases where the court threatens the refuser. After a short while, the refuser cooperated with the court and gave a Get to his wife. I found some fascinating archival material in the court archives regarding this judgment.

Alongside these two legal initiatives, it should also be noted that this community is mostly a traditional community and the support of the rabbis and communities in the activities of the Beit Din is of decisive importance. The close cooperation between the Beth Din and the Go-Getters Women organization is greatly supportive.

In my lecture, I would like to briefly review the history of the court and then relate to the phenomenon of women refused divorces in South Africa and to the two events that I have described as crucial to solving the problem.

טיפול בסרבנות גט בבית הדין הרבני של יוהנסבורג

בית הדין של יוהנסבורג והמדינה, החל את פעילותו בתחילת המאה העשרים כתוצאה מההגירה המאסיבית של רבבות יהודית מליטא אל דרום אפריקה, לאחר הקמתה של יוהנסבורג בשנת 1886.

מסורת ותרבות יהדות ליטא נאלצו לפתע להתמודד עם מציאות תרבותית חדשה, עם שפות חדשות (אפריקאנס, אנגלית ושפות אפריקאיות מקומיות) ועם הליכי חילון והתבוללות מואצים.

מאז ועד היום פעיל בית דין זה כבית דין יחיד בדרום אפריקה, והוא אחראי על כל ענייני ההלכה של הקהילה: גיטין, גיור, כשרות, מקוואות, עירובין, רישום נישואין, ובית דין לממונות. בית הדין אחראי על כל הקהילות בדרום אפריקה, ומעין שלוחה שלו פעילה בקייפ טאון .

על פי קביעת בית הדין וארגוני הנשים בדרום אפריקה, יש כרגע בגבולות המדינה שתי מסורבות גט. כל מקרה הוא כמובן עגום בפני עצמו אולם ביחס לכל מדינה בה קיים השילוב של גירושין אזרחיים ותהליכי חילון והתבוללות מואצים, זה מספר נמוך בהחלט.

מה מקור ההצלחה?

דומני ששתי יוזמות משפטיות הביאו לכך שבדרום אפריקה כמעט ואין כיום מסורבות גט.

(1בשנת 1989 יזמו בית הדין והרב הראשי בשעתו הרב סיריל האריס יוזמת חוק ולפיה שופט בית המשפט למשפחה, האחראי על הליך הגירושין האזרחי, לא יחליט על גירושין אזרחיים מבלי לוודא שהבעל נתן קודם לכן גט דתי לאשתו.

משרד המשפטים תמך בהצעת החוק והקים וועדה אשר בה היו חברים ראש בית הדין הרב משה קורצטג, הדיין ומזכיר בית הדין ד"ר דניס אייזיק, הרב הראשי האריס, אנשי אקדמיה ומשפט, ונציג הקהילה הרפורמית. הוועדה הגישה מסמך בן 138 עמודים, שקיבל את הסכמת ארגוני הנשים היהודיות ומרבית הארגונים היהודיים (למעט הקהילה הרפורמית שהתנגדה למתן בכורה לבית הדין הארתודוקסי). לאחר שש שנים של פעילות ציבורית ומשפטית, בתאריך 22.11.96 לאחר אישור הרפלמנט, חתם הנשיא מנדלה על החוק ובכך הוא התפרסם באופן רשמי בספר החוקים של הרפובליקה של דרום אפריקה. ובכך למעשה הבעיה מוגרה כמעט כליל. בארכיון בית הדין מצאתי מכתבי ברכה ותמיכה מכל העולם היהודי.

(2בשנת 2003 בת הדין הכריז על יהודי שלא הסכים לקבל את פסיקת בית הדין בעניין מזונות והסדרי המשמורת על הילדים כסרבן גט והוציאו על כתב נידוי. הוא פנה לבית המשפט המחוזי בטענה שבית הדין אינו רשאי לנדות אותו. בית הדין הסתייע בטובי עורכי הדין היהודיים במדינה שהועסקו על ידו בהתנדבות, ולאחר עבודה משפטית קשה, באוגוסט 2004 בית המשפט בהרכב של חמישה שופטים הנפיק פסק דין שמעריך את פעילות בית הדין בנושא של מסורבות גט ומתיר לו לעשות שימוש בכלי של חרם. בית הדין התפרסם באמצעות פסק הדין הזה כמי שדואג לרווחת מסורבות הגט ובמרבית המצבים כשבית הדין מאיים על סרבן החרם, לאחר זמן קצר הסרבן משתף פעולה עם בית הדין ונותן גט לאשתו. חומר ארכיוני רב ומעניין מצאתי בארכיון בית הדין גם לגבי פסק הדין הזה.

בצד שתי יוזמות משפטיות אלו, יש לציין גם את העובדה שקהילה זו הנה קהילה מסורתית ברובה ולתמיכת הרבנים והקהילות בפעילות בית הדין נודעת תרומה מכרעת. גם שיתוף הפעולה הדוק בין בית הדין לבין ארגון הנשים "Go-Getters" תרם רבות.

בהרצאתי אבקש לסקור בקצרה את תולדותיו של בית הדין ולאחר מכן אתייחס לתופעת מסורבות הגט בדרום אפריקה ולשני האירועים שתיארתי ככאלה שתרמו במידה מכרעת לפיתרון הבעיה.

Dr. Shlomo Glicksberg taught Jewish law and Jewish history at the Faculty of Law at Bar-Ilan University, Efrata College, the Lander Institute and Beit Morasha in Jerusalem. He headed the Centre for Aggadic Education and headed the master's programs at Efrata College. He was the rabbi of the Nitzanim community in Jerusalem and of Efrata College.

He serves as Rosh Kollel and as Rabbi of the Mizrachi Organization in South Africa and was appointed Dayan and a member of the rabbinical court of Johannesburg.

He has published dozens of articles in academic journals and six academic and halachic books.

Areas of research and academic publications: Multi-disciplinary research on the interaction between Halacha and the changing reality: the environment (Jewish law from its different perspectives: Talmud, Halacha, decrees and philosophy); the philosophy of Halacha; customs of the communities of Italy at the beginning of the Enlightenment period; the Rabbinic leadership and Halachic approach of the Mediterranean Rabbis and their response to modern life; Halachic rulings on topical questions.

Yaacov Habba

Can Jewish Criminal Law Apply in Israel

The punishments recognized in the Torah, including death and flagellation, are almost impracticable because of the strict conditions required to carry it out, such as the demand for two qualified witnesses, the inadmissibility of confession and circumstantial evidence, the composition of the court and the required majority for the verdict, the requirement for advance warning (*hatraa*), and more.

This difficulty has led to the establishment of additional halakhic systems of punishment: the temporary rabbinic court order and the king's court. Much has been written about this issue—sources, scope, and more—and I do not elaborate on the matter. The shared feature of these systems of punishment, to the extent that they exist, is their ability to deviate from the strict precepts of Torah law, in substantive, procedural, evidentiary law, and more. At the same time, these punitive systems appear not to be entirely disconnected from the principles of Torah law, even if they are not subject to them. Although not binding, the principles of Torah law may be said to still guide these punitive systems as well.

Shortly before the establishment of the State of Israel, the *poskim* discussed the possibility that the legal approach of Jewish law would constitute the basis for the legal system of the future state. Despite differences in approaches, they all agreed that in the criminal domain it would not be possible to adhere to Torah law, either in substantive or in procedural law. There were different opinions regarding the nature of the desired relation between Torah law and the criminal law of the state. Experts in Jewish law who began their activities in Moscow and continued it in the Land of Israel sought to create a legal system that would have a national connection to traditional Jewish law, albeit not a binding one. They believed that halakhic principles should be borne in mind by the drafters of the system and influence them in places where it seemed right and compatible with current needs, without considering themselves obligated to it. One of the leading thinkers, Paltiel Daikan (born, Peitel Dickstein), wrote a six-volume study on the penal law, in which he presented this combination.

Although the points of departure are different and there are also differences in details, in the context of criminal law there is certain similarity between what experts in Jewish law wanted to create and the perception of halakhic *poskim* who grappled with the problem of penal law in a modern state. In practice, the Israeli legal system can be considered a type of king's law, if we adopt the most expansive approach to the concept. If this is the case, even in the halakhic view this system need not be completely contingent on Torah law but can deviate from it, and at the same time derive guidance from it. Therefore, specifically in the criminal domain, the use of Jewish law as an inspiration and a source of principles can be consistent with the traditional halakhic view, and need not be regarded as a deviation from it.

In the lecture, I provide a few examples of such possible use. One example is in the area of self-defense and the difference between the scope of the right to self-defense of an attacked person and the scope of the right to self-defense against a third party. Another example has to do with the factors that affect the level of criminal responsibility, showing that not only the degree of risk and expectation must be considered, but also the circumstances in which the risk is created. Additionally, I examine the status of the confession and whether it is acceptable to rely on it as the only evidence for convicting a defendant. Yet another issue concerns the relationship between the perpetrator and the person who solicits him, and the degree of criminal responsibility to be attributed to the solicitor. If time permits, I will address considerations in imposing punishment and in matters of appeal.

Dr. Ya'acov Habba, Vice Dean, Faculty of Law, Bar-Ilan University.

Research interests: Jewish Criminal Law, Jewish Evidence Law, Jewish Torts Law.

Amos Israel-Vleeschhouwer

The Need for (a Richer) *Mishpat Ivri*

The Project of *Mishpat Ivri* - distilling a coherent, comprehensive, usable and agreed upon law for the Jewish state – based on (or continuing) the Jewish legal tradition and culture – started In Moscow in 1918 as an academic and Zionist social action endeavor, without any stress or urgency. This led to the historical accident in 1948, when no proposal was available even though the political will to accept it, was probably there.

The MI project has been abandoned and its remains are fragmented. Early Zionist-Religious *Mishpat Ivri* projects, arguably formulated in the context of the *Mishpat Ivri* challenge, were abandoned or neglected. Other projects, like "law for israel" under prof. Rakover, religious research centers, proposals for a constitution, and alternative *batei din*, are not seen as part of a comprehensive solution. The rich multifaceted cultural debate from the last century was reduced to a simplistic choice between a Halacha based Jewish state and a democratic one.

Recent research (Beni Porat, 2016) has shown the relative irrelevance of Jewish legal scholars and research to the contemporary debate. Instead of being leading figures at the cutting edge of legal debates in law faculties, highly regarded legal innovators at law commissions and outspoken public intellectuals, Jewish law scholars tend to regard themselves as an endangered species. Depleted and impoverished, sidetracked, and with narrow aspirations - "Jewish law" needs invigoration to shape up to the challenge.

The emerging political will to increase the role of MI in Israeli law seems to be growing, but it seems that researchers and practitioners haven't learned from past mistakes – the field is complacent. Promising Institutional changes and projects, like the *Tsuba* conference and inter-institutional co-operation, changes in faculty, slowly increasing research budgets and even this conference – are emerging, but their structure and tempo aren't geared towards responding to the actual challenge in the socio-political arena. The legislation is largely based on a religious-national conception of Jewish law, and takes the fragmentary reality of the field of MI into account, maybe ignoring the perils of the fragmentation

With the Israeli state at 70, multiculturalism at 40, the apparent crisis of the liberal state and political discourse, the political-cultural divide threatening the fabric of Israeli society (and worldwide) and the rise of research institutes and voices within civil society – the paradigm of *Mishpat Ivri* needs to adapt itself – in defining the subject matter, the challenges and the methodologies.

Never has the need for MI been so great, and with a potential for impact. But so are the needs of our community to meet this need. Multiple, rich and varied MI should enrich the single Zionist secular MI; Convincing unique options should replace the arguments of truth and tradition; evidence based and community tried options should convey relevance; The "Jewishness" should not depend only on the source of the norms, but on its connections to people, communities and culture; Jewish law should serve to challenge, develop and get law and society out if its comfort zone. The needs are to develop not one, but multiple competing research centers of MI, while creating a reflective, inclusive and diverse community which will cultivate leading jurists who have a public voice in academia and society.

1. We need constitutional and jurisprudential theories which account for the contemporary social conditions and challenges. E.g. regarding the question of a self-limited Jewish law.

2. Instead of striving to formulate a (one, best, true) Jewish-based law for the state of israel, the project of Jewish law should create and promote a rich field of legitimate Jewish legal options; Analyze, formulate, create and explain the pro and cons of the options in Jewish, Israeli and global terms. For Jewish law abroad – the goal should be adapted accordingly.

3. Research and the project at large should be informed by real life problems, Fact-based and evidence based legal arguments, imbedded in deep understanding of theory, policy, social science and human nature. Scholars involved in social action and engaged at the frontiers of political and social debates are important.

4. Incorporating multiple views and ways of life into the definition of facts, available and legitimate legal solutions and arguments. Promoting diversity and plurality without losing the ability to set limits, offer critique and analyze policy (while enabling a second-level debate regarding these limits and the assumptions behind the critique and policy options).

5. "Law and" – scholars and projects shold be conscious of, and conversant with, multiple approaches to the study of law and consider their applicability to the study of Jewish law.

6. The scope and scale of the challenges, of the data and the literature raise the need to learn to work in research teams, labs and co-operations.

הצורך ב "משפט עברי" (עשיר יותר)

פרויקט המשפט העברי – גיבוש חקיקה ומשפט לא דתית למדינה יהודית, המבוססת על התרבות היהודית התחילה ב 1918 במוסקבה כעיסוק אקדמי וכפרויקט ציוני-חברתי, ללא כל לחץ או תחושת דחיפות. זה הוביל ל"תאונה ההיסטורית" ב 1948, בה היה רצון פוליטי (או לפחות נכונות) לכונן חוק עברי מקורי, אבל לא היתה הצעה מוכנה לחקיקה כזו. 100 שנה לאחר מכן הפרויקט המקורי כמעט ונזנח ושאריותיו נפוצו לכל עבר. מפעל המשפט עברי הציוני-דתי של ראשית המדינה (התורה והמדינה, הרבנים הרצוג, גורן, הלוי, ישראלי וההצעות של קיבוץ הדתי וישעיהו ליבוביץ) הופסקו הלכה למעשה. פרויקטים אחרים, כגון "חוק לישראל" של פרופ' רקובר, מכוני מחקר, המחלקה למשפט עברי במשרד המשפטים בתי דין ממשלתיים ופרטיים – מתמודדים עם האתגר באופן חלקי ומצומצם. הדיון המעמיק והעשיר על "שאלת התרבות, החינוך והמשפט" של הקונגרס הציוני התדלדל למחלוקת שטוחה על מדינת הלכה יהודית לעומת מדינה דמוקרטית.

נדמה כי מחקרו של בני פורת הראה כי המחקר וההוראה של המשפט העברי באוניברסיטאות תפס בעיקרו עמדה של חוסר השפעה על הדיון הציבורי העכשווי. במקום להיות מובילי דעה מרכזיים בדיונים משפטיים בפקולטות למשפטים, מציעי הצעות מקוריות בוועדות חקיקה ודוברים ציבוריים רצויים – חוקרות וחוקרי נוטים לראות עצמם כזן נכחד, או לפחות בסיכון. הצעת החוק לקידום מעמד המשפט העברי, כמו גם העלייה ברצון הפוליטי להגדיל את מעמדו – מציב לפני התחום אתגר מחודש. אך נדמה כי לא נלמד הלקח והשאננות נפוצה. צירוף נסיבות -חילופי דורות, כניסת מימון חדש, רה-אורגניזציה מוסדית ובעיקר שיתוף פעולה בינ-אוניברסיטאי ושינוי תפישה הבאים לידי ביטוי בכנסי צובה ובכנסי ה ,JLA הביא אמנם פרץ עשיה, אך זה אינו מכוון במונחי זמן, היקף וגישה – לאתגר המוצב. במקום זאת, מתאימה הצעת החקיקה את עצמה לגישה אחת, דתית מסוימת, ולמצב הפרגמנטרי, רסיסי, של התחום – מבלי לקיים דיון מהותי על הבעייתיות שטמונה בכך, אולי .

70שנה למדינה, 40 שנה ורב תרבותיות, המשבר בשיח הפוליטי ציבורי, וזה הליברלי בפרט, השסעים בחברה הישראלית לשבטיה (ובעולם), ריבוי הקולות ומכוני המחקר העוסקים באתגר זה – על המשפט העברי להתאים את עצמו לאתגרים, לסוגיות, ולכללי השיח והמחקר העדכניים .

אחרי 100 שנות התמודדות עם האתגר, נראה שאף פעם לא היה הצורך במשפט עברי גדול כל כך, ועם כזו יכולת להשפיע. יש לחזור למשפט עברי ציוני-לא-דתי, אבל בעיקר לפתח מפט עברי מגוון ומרובה פנים; המשפט והטיעון בעדו חייבים להתבסס על ייחודיות, שכנוע ורללונטיות למי שאינו בקהילת המאמינים; עבריות המשפט חייב להתבטא לא רק במקור הנורמה אלא בחיבור שלו למקורות, אנשים וקהילות; ועל המשפט העברי להוציא מאזור הנוחות ולהיות מאתגר. באותה מידה בה יש צורך גדול בפרויקט המשפט העברי, כך גדולים צרכיה של קהילה כזו אם היא רוצה להיענות לאתגר. מעשית – ישנה חובה לפתח מרכזים מרובים ומגווני לחקר המשפט העברי, יחד עם טיפוח קהילה מגוונת, מכילה, רלפקטיבית וביקורתית שתוכל לטפח את המשפטנים/יות שקולם.ן יישמע בפקולטות ובחברה

א. אנו צריכים לפתח תורת המשפט ומשפט חוקתי שרלוונטיים לחברה העכשווית, על המבנה והאתגרים שלה. זה כולל בחינה רצינית של משפט ציבורי ומשפט עברי שמגביל את עצמו מול מוסדות אחרים.

ב. במקום לחתור להלכה אחת נכונה ואמיתית, פרויקט המשפט העברי צריך לחתור למצוא, לנסח ולייצר שדה של אפשרויות משפטיות לגיטימיות מבחינה הלכתית. לנתח ולהסביר את היתרונות והחסרונות של הפשרויות במונחי ההלכה, החברה הישראלית או בניסוח גלובלי.

ג. המחקר צריך להיות מועשר על ידי בעיות הלכה למעשה, עובדות מהמציאות וטיעונים מבוססי מציאות וראיות, ומבוסס על הבנה עמוקה של תיאוריות, מדיניות, מדע (מדעי החברה) ותובנות על הטבע האנושי והחברתי. מעורבות של א.נשי משפט עברי לחיי המעשה (קליניקות, פרקטיקה, עשיה ציבורית, רבנות קהילה ומעלה) חיוניים.

ד. הכנסת דרכי גישה ונקודות מבט מרובות על החיים לניתוח העובדות, החברה והמשפט המובילות לבחינת האופציות ההלכתיות. קידום אקטיבי של ריבוי וגיוון ללא אבדן היכולת להגבלה והכרעה, יצירת אפשרות ניתוח וביקורת ולבסוף – יצירת מדיניות מנומקת. חייב להתקיים דיון מסדר שני על גבלות הדיון ההלכתי, מגוון האופציות ודרכי הפעולה של התפתחות ההלכה והמדיניות.

ה. "משפט ו...". מודעות לממצאי הגישות העכשוויות למשפט ויישומם למשפט עברי חייב להיות לחם חוק. החיבור לקהילות משפט בשפות ודתות שונות חיני.

ו. היקף האתגר והיקף המקורות והספרות מחייבים התאמה של דרכי המחקר –עבודה בצוותי ומעבדות מחקר, ניצול כלי מחקר מתקדמים, והגברת שיתופי הפעולה.

Amos holds an MA (Social Psychology) and LLM, PhD in Law from Tel Aviv University. Serving as Co-Chair of the JLA, deputy editor of the Journal of Law, Religion and Satte (Brill), and serves as Board Member of the Public committee against Torture in Israel, and as Volunteer at the rape crisis Center. Amos Teaches Jewish law, International law, Law and Social sciences, Psychology and Property law. He is interested in the methodology of Jewish legal research and promotes digital legal studies. His article (co-authored with Geo-political researcher Tamar Arielli) on Borders and bordering in Jewish law will appear in the forthcoming Mehkarei Mishpat

Evgeniya Kalinina & Vera Romanovskaya

Conceptual Ideas of Jewish Theory and their Impact on International and Internal Political and Legal Thought

Currently, despite the topical nature of the issue of the position of a religion and religious law in modern society and of their impact on the concept of social and international security, it is not customary to refer to religious provisions as a problem-solving approach for a system of public administration, a head of state's profile, interaction between authorities and population, regulation of private relations and international cooperation. The tendency is fairly accountable in the context of religious tolerance policy in multicultural and multi-religious communities – at the state level and international as well. Obviously, religious legal theories provide various solutions for political and social challenges, even for modern ones. However, the essential principles of law – both national and international – are reflected in religious thought. Notably, all the values, or most thereof, that any society ever prided itself as a proof of its belonging to the category of "civilized nations", could be found in Torah. Among them are: the concept of a contract, preceding foundation of a society or a state; of the responsibility of a ruler; the idea of separation of powers; the concept of human rights protection and the theory of war and peace.

The course of developing of theories of International Law and International Relations makes obvious that not only a state can provide security and welfare for individuals. More importantly, if ancient and medieval legal and political thought and ideas of Enlightenment as well justify existence of a state by guaranteeing, in the least, minimal safety protection, in the benefit of which people were willing to accept invasion of their freedoms and their rights infringement, constitution of world community allows affect policy of any state-member for purposes of maintenance and protection of human rights. While analyzing origins and nature of the concept of world community we can discover enough of common features with Jewish model of "contractual society" (Suzanne Last Stone).

There is a possibility to substantiate the connection of certain universally acknowledged principles of internal and international law to ancient jewish legal ideas and to elicit some consistent patterns that allow anticipate an effective realization of these principles and tendencies. Consider the case of scientists, that study the history of international relations - they state war as an ancient efficient means for fulfilment of interests and purposes of states and nations. Historical, comparative legal studies and dogmatic method as well, allowed to develop a conviction that the research of ancient Jewish ideas of international law, which rose through the ranks from justification of violence up to ways of non-hostile settlement of international differences, and the authority of religious teachings are supposed to consolidate the modern tendencies of secular doctrines of international law towards resolution of conflicts by peaceful means.

Copious variety of scientific works consecrated to International Law topics, particularly to the studies on history of theory of International Law focus rather a modest attention on the role of religious doctrines in formation of concepts of international and – more specifically – intergovernmental relations. Therefore, to render justice to the impact of spiritual institutions, it deserves mentioning about moral bearings of religious law for prolonged period serving as a universal system of norms that regulated international relations as well. Let alone rather obvious manifestations of a similar influence: symbolic applied to international communication originates from ancient religions' mythologies.

During Medieval Ages, for the lack of any consummate theory of International Law, canonic religious and legal standards took control of that vacant niche, being a supranational legal system enabled to regulate relations between miscellaneous, on their nature traditions, culture, states to reduce the risk and mitigate the

threat of war; in quest for a compromise and peaceful resolution of international disputes by adjustment of their inherent differences.

Religious law remains a tool for manipulative techniques in international relations – Jewish Commanded War, Crusades in Middle Ages, Jihad and the issue of committed religious terrorism preserving its applicability and assuming nowadays transnational and transboundary features – are pictorial evidence hereof. Currently religious commitment of selected assemblages is being used by external smooth operators to create flashpoints of danger. This also convenient for national and international authorities for justification of measures of control abridging freedom of movement and right for privacy of individuals for the benefit of general welfare and security.

The above-mentioned reasons substantiate timeliness and urgent imperative of comparative studies of essential religious legal doctrines confined to coexist in such a complex and fast-paced world, to adjust themselves to the effects of globalization erasing the boundaries of national identity.

Prof. Kalinina Evgenia Valerievna is a Professor of the Chair of European and International Law at the Lobachevsky State University of Nizhny Novgorod Faculty of Law

Her fields of scientific interest: history of legal thought, philosophy of law, history of law, religion and law, religious philosophy of law, international public law, international security law, international cybersecurity law.

Prof. Romanovskaya Vera Borisovna is a Chief of the Chair of Theory and History of State and Law at the Lobachevsky State University of Nizhny Novgorod Faculty of Law

Her fields of scientific interest: history of law, religion and law, religious philosophy of law

Anton Mordechai Kanevskiy

The Place of Halakha in the Legal System of the Russian Empire

Jewish law was a part of the official legal system of the Russian Empire, very much like it is now a part of Israeli positive law, governing family law issues of multi-million Jewish population. Historically from the legal autonomy Jews enjoyed in pre-Russian Poland up to late 18 century, through the period of attempts to annihilate Jewish legal culture in the first half of 19 century, a full-fledged legal framework emerged that permitted to protect Jewish values, and coordinate Jewish practices with general legal order.

By the end of 19th century on the vast territory of the Empire different ways of integrating Jewish norms in the general legal order coexisted. The main difference can be drawn between the Kingdom of Poland and the rest of the Pale of Settlement. In Poland secular judges were in charge of divorces, while rabbis were expected to give experts' opinions only. A part of Yore Deah section of *Shulchan Arukh* was translated into Polish but still use of this text remained extremely problematic for non-Jewish judges. Rabbinical courts legally had no standing from the point of view of the state. This is an example of "weak" legal pluralism from the point of view of the state – where religious norms were formally integrated into general legal order - and "strong" legal pluralism from the point of view of Jews who suffered from parallel coexistence of two legal systems. At the same time in the main part of Russia officially appointed state rabbis themselves effectuated divorces, somehow representing *batei-din* before the government. However, the status of rabbinical courts remained ambiguous. Inability of state rabbis to deal with difficult cases forced the state to recognize at least *ex post facto* the authority of spiritual rabbis and rabbinical courts. While Poland exemplified absence of dialogue between legal systems, in other parts of the Empire space was left for interaction.

The fact that Jewish law functions on its own disregarding of the consent of the state, was in a sense acknowledged by the government which recognized the need to examine relevant halachic provisions and even engage in formal dialogue with prominent rabbis. For these reasons regional governors as well as the Ministry of Interior in the capital established permanent positions of "Learned Jews" – civil servants who had to provide the ministry with explanations regarding Jewish religion and customs. This role resembles in many ways the function of the Department of Jewish law in the modern Israeli Ministry of Justice. In addition the Ministry of Interior of the Russian Empire summoned approximately once in a decade the Rabbinic commission – collective body consisting mainly of rabbis, who would answer difficult questions - mainly regarding interaction of Jewish and Russian laws. This was an example of institutionalized dialogue between legal systems. Mutual recognition of legal systems engaging in search of compromise can be called "flexible legal pluralism" (compare G. Davies' "pluralism of authorities"). This pre-revolutionary heritage can still be a source of inspiration for harmonization of legal order with its own religious elements not only in modern Russia but also and even more so in the State of Israel.

Anton Mordechai Kanevskiy, Jewish University (Moscow), professor, Chair of Jewish studies Department; Lecturer at the Department of Jewish Studies, Institute of Asian and African Studies of Lomonosov Moscow State University. Before that Junior Research Fellow, Institute of State and Law of the Russian Academy of Sciences (RAS)

Degree in Jurisprudence from the Law Faculty of Lomonosov Moscow State University; LL.M. from Benjamin N. Cardozo Law School; Doctorate in Law from the RAS Institute of State and Law (2015). TAU David Berg Institute for Law and History Visiting Scholar (2016).

Malka Katz

Mishpat Ivri - Ashkenazic or also Sephardic?

The Roles of Ashkenazic and Sephardic Halachic Literature in Shaping *Mishpat Ivri*

The revival of *Mishpat Ivri*, like the project to resuscitate the Hebrew language, sought to restore the Jewish people to an autonomous national life. It is no coincidence that the *Mishpat Ivri* Society was founded 100 years ago in Moscow, in close proximity to the Balfour Declaration. The society aimed to prepare a legal infrastructure for the future modern Jewish state.

The notion of *Mishpat Ivri*, like the modern national idea of the Zionist movement, arose from the confrontation of European Jewry with threats to its physical and cultural national existence. The founders of this revival, like those of the Zionist movement, came largely from the intellectual world of the Ashkenazic talmud scholar.

Prof. Menachem Elon, in his book "HaMishpat HaIvri," noted that from the 18th century halakhic activity in the Ashkenazic and Sephardic Diaspora was damaged by the absence of ties between the communities. In addition, Sephardic and Ottoman Jewish centers enjoyed conditions of broad legal autonomy, allowing the development of unique judicial systems and tools. This freedom did not exist in European Jewish communities.

In contrast to most nationalist societies, whose heritage was based on a unified identity, Jewish nationalism, as a "scattered nationalism" should have led to a process of national cohesion of European and non-European heritage on an equal basis.

Was *Mishpat Ivri* created largely on the basis of its European sources? Or did this movement draw its principles and precedents from the entire Jewish Diaspora?

In this lecture I will examine the roles of Mizrahi and Sephardic sources, including the teachings of contemporary Sephardi and Mizrahi rabbis in shaping *Mishpat Ivri* in Israel. I will also discuss the extent to which it was influenced by Orientalist approaches to the world of Sephardic and Mizrah Halakha.

Dr. Malka Katz is a Lecturer at David Yellin College, Jerusalem and Herzog College, Alon Shvut

Research interests: The Israeli encounter of Sephardic, Mizrahi and Ashkenazic Jews in the context of national ideology in general and in the religious community in particular between Integration and Segregation Tendencies.

Menachem Katz

Categorizing Types of Theft in Jewish law and their Moral and Legal Significance

Maimonides incorporated the laws of theft into Sefer Neziqim (the Book of Injuries) of his Mishneh Torah. However, he examines the issue of *Gneivat da'at* (literally, "stealing a person's mind") - purposeful misrepresentation or deception elsewhere in the Mishneh Torah, in Hilkhot De'ot (2: 6) and in Hilkhot Mechirah (19:1).

In contrast, the Tannaitic sources discuss misrepresentation together with the other types of theft. In the Tannaitic literature, there is a discussion with the title "Seven Kinds of Thief" (Tosefta, Bava Kamma 7: 8-13; Mekhilta Nezikin, 13, pp. 294). This is a detailed examination of the various types of theft and a ranking based on their severity:

There are seven types of thief:
First – one who misleads others, one who insincerely invites another to their home, one who plies another with gifts they know they will not accept, one who impresses their guest by opening a barrel of wine already sold to a vendor…
Ranking above these are: One who steals things forbidden to be used. Such a one is not obliged to make restitution. One who steals documents, land only pays the principle. One who steals domestic animals … and garments and fruit … Such a one has to pay double. One who steals an ox, slaughters it and sells it, pays fivefold, one who steals a lamb pays fourfold …
Ranking above these is: One who steal or kidnaps a human, for he forfeits his life.
But he who steals away from his friend and goes and studies [the words of the Torah], although he might be called a thief, in the end he will be appointed a leader of the community… and pays all that he has, as it says… men do not despise a thief if he steals to satisfy his soul (Proverbs 6:31)
(Tosefta, Bava Kamma 7: 8–13)

The Tosefta distinguishes between different ways of taking property without permission including misrepresentation, both in business transactions and in social relations.

Misrepresentation does not harm the property of the other person, and it is difficult to regard it as real theft; one who steals property dedicated to the temple pays only the value of what he consumed, while one who steals a domestic animal, etc. pays double restitutions; one who steals and slaughters and sells pays four - and fivefold. One who kidnaps a human is sentenced to death.

The first six types of theft in this passage are ranked from the minor to the most severe. The severity of each type of theft is determined here by its punishment. The last theft mentioned at the end of this list breaks the progression of the ranking by presenting stealing away from a friend to study the Torah as a positive act, in contrast to all the types of theft. As with all the preceding categories of thieves, here too, the Tosefta mentions the judgment of the thief: "In the end he will be appointed a leader of the community…and he pays all that he has."

This is a highly complex discussion, and there is no equivocal decision as to where it ends. The commentators were very hesitant about identifying the seven types of theft mentioned in the title. Prof. Saul Lieberman, too, was unsure on this question and changed his opinion over time. (*Tosefeth Rishonim*, 1938 and *Tosefta Ki-Fshutah*, 1988).

From the many possible readings of this passage, I conclude that at least four parallel structures can be seen, all based on a typological number: two lists of seven types of theft, a structure of 3 + 1 and a structure of 10 types of theft.

Careful examination, including literary analysis, allows us to see the uniqueness and legal and moral import of this passage. Alongside the types of theft for which damages must be paid, those where restitution is not required are also listed. For example the theft of something that is forbidden to be used, where there is no element of causing loss or preventing the owner from enjoying the object, and therefore the thief is exempt from paying restitution. Furthermore as we mentioned above, misrepresentation is highlighted in the passage, both at the beginning and end.

We have here a clear example of the integration of morality into *Mishpat Ivri*, as Justice Moshe Silberg pointed out: "And indeed there is no legal system in the world, ancient or modern, where the principles of morality and law are as intertwined as they are in our *Mishpat Ivri*." (M. Silberg, *The Way of Talmud*, Jerusalem, 1961, p. 88).

מיון סוגי הגניבות במשפט העברי ומשמעותן הערכית והמשפטית

הרמב"ם שילב את הלכות גניבה בספר נזקים, ואילו לגניבת דעת מתייחס הרמב"ם במקומות אחרים במשנה תורה: הלכות דעות ב, ו שבספר המדע, והלכות מכירה יח, א שבספר קניין.

אך במקורות התנאיים, מתייחסים לגניבת דעת יחד עם סוגי הגניבות האחרים. בספרות התנאים נמצא קובץ הפותח בכותרת "שבעה גנבים הן" (תוספתא בבא קמא פ"ז ה"ח – הי"ג; מכילתא נזיקין פי"ג, עמ' 294 ואילך). מדובר בקובץ מרוכז הדן בסוגים שונים של גנבים ומדרג אותם לפי חומרתם, החל מ"גונב דעת הבריות" ועד "הגונב את בן חורין, שנידון עליו בנפשו":

שבעה גנבין הן:

הראשון שבכולם גונב דעת הבריות, והמסרב בחבירו לאורחו, ואין בלבו לקרותו, והמרבה לו בתקרובת, ויודע לו שאינו מקבל, והמפתח לו החביות שמכורות לחנוני [...]

למעלה מהן, גונב את האסורין בהנייה - שפטור מלשלם, את השטרות ואת הקרקעות... - אין משלם אלא קרן, את הבהמה... ואת הכסות ואת הפירות... - משלם תשלומי כפל, הגונב את השור, טבחו ומכרו - משלם חמשה, שה - משלם ארבעה...

למעלה מהן, הגונב את בן חורין, שנידון עליו בנפשו...

אבל המתגנב מאחר חברו והולך ושונה פרקו, אע"פ שנקרא גנב... סוף שמתמנה פרנס על הצבור ומזכה את הרבים וזוכה לעצמו ומשלם כל מה שבידו, שנאמר "וְנִמְצָא יְשַׁלֵּם שִׁבְעָתָיִם" וגו' (משלי ו לא).

(תוספתא בבא קמא פ"ז ה"ח – הי"ג, מהד' ליברמן, עמ' 33-31)

התוספתא מבחינה בין פעולות שונות של לקיחת דבר מה ללא רשות בהתאם לסוגי הגניבה השונים, כולל גניבת דעת, הן במשא ומתן והן בקשרים חברתיים.

התוספתא מציגה מדרג של שבעה גנבים. ששת הגנבים הראשונים מופיעים מן הקל לחמור: גניבת דעת הבריות אין בה פגיעה ברכושו של האחר, ולמעשה קשה לראות בה גניבה של ממש; גניבת דבר שאסור בהנאה היא אמנם גניבה, אך אין בה ממד של גרימת חסרון ומניעת הנאה של הבעלים מן החפץ, ועל כן הגנב פטור מלשלם; הגונב את ההקדשות וכו' משלם קרן בלבד, ואילו הגונב את הבהמה וכו' משלם תשלומי כפל; הגונב וטובח ומוכר משלם ארבעה וחמישה; והגונב בן חורין נידון בנפשו. מידת החומרה של כל גנב נקבעת כאן לפי עונשו של הגנב. הגנב האחרון המוזכר בסוף רשימה זו שובר את רצף המדרג, בהציגו גניבה שמהווה מעשה חיובי, בניגוד לכל הגניבות והגנבים שהובאו לפניה. כפי שנהגה התוספתא בכל הגנבים הקודמים, גם במעשה הגניבה האחרון מציינת התוספתא את דין הגנב: "סוף שמתמנה פרנס על הצבור ומזכה את הרבים וזוכה לעצמו ומשלם כל מה שבידו".

מדובר בקובץ מורכב, ואף ההכרעה בשאלה היכן הקובץ מסתיים אינה חד משמעית. המפרשים התלבטו מאד בזיהוי שבעה הגנבים המוזכרים בכותרת. גם פרופ' שאול ליברמן, התלבט מאד בשאלה הזו (והביא את הדעות השונות בנידון), החל בספרו "תוספת ראשונים" (ירושלים תרח"ץ 1938, עמ' 94-92), וכלה בחיבורו הגדול "תוספתא כפשוטה" (בבא קמא, עמ' 73-67, ניו יורק תשמ"ח). ב"תוספתא כפשוטה" שינה את דעתו, כפי שהוא מעיר בצורה מפורשת: "ואני מבטל בזה הכרעתי בתס"ר [= תוספת ראשונים], עמ' 93.

לדעתי מדובר בקובץ עם תיחכום רב. בין השאר מתברר שבנוסף למדרג הקלאסי של סוגי הגנבים מן הקל לחמור קיים גם מדרג שונה, אותו אפרט בהרצאה.

מתוך ריבוי אפשרויות הקריאה אני מסיק כי עורך הקובץ שיקע בקובץ מספר רשימות מקבילות לשבעת הגנבים. לדעתי ניתן לראות לפחות ארבעה מבנים מקבילים במבנה הקובץ, המבוססים כולם על יסוד מספר טיפולוגי: שתי רשימות של שבעה גנבים, מבנה של 1+3, וכן מבנה של עשרה גנבים. לדידי, ארבע רשימות אלו קיימות בחטיבה במקביל,

ניתוח מדוקדק של מבנה הקובץ, כולל ניתוח הספרותי שלו, מאפשר לנו לראות את ייחודו וחשיבותו המשפטית והערכית.

לפנינו דוגמה מובהקת לשילוב מוסר במשפט העברי, אותו הבליט השופט משה זילברג: "ואמנם אין לך שיטת משפט בעולם, העתיק והמודרני כאחד, אשר בה יהיו עקרונות המוסר והמשפט כה שלובים זה בזה, כה מעורים זה בזה, כמו במשפט העברי שלנו." (מ' זילברג, כך דרכו של תלמוד, ירושלים 1961, עמ' 88). ולכן במסגרת סוגי הגנבים כולל הקובץ גם סוגים שונים של גונבי דעת הבריות, למרות שלגונב דעת הבריות אין חיוב משפטי והוא אינו משלם על גניבתו. ולא עוד אלא שגונב דעת הבריות הוא המובלט בקובץ, הן בתחילת הקובץ והן בסופו.

גם בנוגע לגונב דעת הבריות קיימת בקובץ הבחנה משפטית בין מה שאסור לבין מה שמותר. לכן הקובץ מסתיים בגונב דעת הבריות החיובי: "אבל המתגנב מאחר חברו והולך ושונה פרקו", כלומר, אדם המתחמק מחברו והולך לבית המדרש ללמוד ועוסק בתורה. אך גם הוא "משלם" על גנבתו – "סוף שמתמנה פרנס [= מנהיג, דיין, שופט] על הצבור ומזכה את הרבים וזוכה לעצמו ומשלם כל מה שבידו".

Dr. Menachem Katz is Academic Director Emeritus of the Friedberg Manuscripts Project. He lectures at the Open University of Israel and at Hemdat Hadarom College. Dr. Katz has published widely on the Jerusalem & Babylonian Talmud, Aggadic literature, and the field of Digital Humanities. His latest book is *A Critical Edition and a Short Explanation of Talmud Yerusalmi's Tractate Qiddushin*, (Yad Izhak Ben-Zvi & Schechter Institute of Jewish Studies, Jerusalem 2016). He was born in Bratislava, Slovakia

Nir Kedar

Hebrew Law and the Jewishness of the Law in Israel

The problems of integrating Hebrew Law (*Mishpat Ivri*) in Israeli law were thoroughly discussed, and so was the history of the attempts to do so. In my paper I wish to investigate the history of Hebrew law from the broader context of Jewish and Israeli identity. Judaism is an essential part of Israeli identity. Yet it is difficult to outline what a Jewish state means and what is "Jewish" in the laws of the Jewish state. The establishment of the state of Israel in 1948 and the creation of Israeli law forced the Israelis to deal with the Jewishness of their laws, and inter alia to discuss the nature of Hebrew Law, and its absorption in Israeli law. They had to decide what makes Israeli law Israeli? Is it the specific content of the law? Is it the particular form of legal norms and institutions? That is, is there an Israeli template of norms and cultural assumptions that necessarily molds the particular legal content of Israeli society? Or is it Israeli law simply because it is created and used by free and sovereign Israelis, who shape their laws in accordance with their culture and needs? Could Israeli law ever be "un-Israeli"?

The central issue in this regard has been the content of the law. While questions of the language, form, and source of authority have been debated, most of those involved believed that Israeli law needs to have specific and identifiable Israeli content. But what should that special Israeli content be? That question is very difficult to answer, for two reasons. First, it is difficult to define a national culture and hard to express this culture in legal norms. Second, the law is not the proper arena for cultural debate and for elucidating questions of identity.

Given the passion and turbulence characteristic of debates over Jewish identity and culture, the question inevitably arose as to whether such culture wars were advantageous or detrimental to the realization of Zionism's goal, the establishment of a Jewish national home. To avoid a Kulturkampf Israeli political and legal leadership decided to stress the common and consensual elements of national culture, such as the Hebrew language and the Land of Israel, and at the same time stifle the religious, cultural and identity differences over the definition of Jewish law (and later of Israel's law), and block their entry into the Zionist movement's official documents and projects. However, Since the 1980s, the Knesset has chosen to pursue another path – formal (albeit vague) legal declarations that assert Israel to be a "Jewish and democratic state," whose judges must rule according to ethical principles taken from "Jewish heritage" and "Hebrew law."

Perhaps thanks to this approach, Israel has avoided a culture war. Nevertheless, it has produced a remarkable volume of legislation, rulings, and legal literature, remarkable in its depth and intellectual acumen. Israeli law is Israeli because it is the law of sovereign Israelis who enact it for themselves in their native language according to their needs, interests and values. Legislation, rulings, legal opinions, and academic studies of the law are suffused with Jewish language, concepts, symbols, and values drawn from a literature, both legal and not, stretching from the Bible to the present day.

The paper will have three parts:

1. In the first part I will shortly introduce the modern debate over the exact definition of Hebrew law and over its appropriate role in social life in Israel.

2. In the second part I will demonstrate the complex ways in which Israeli law has dealt with Hebrew law – rejecting it in principle, but symbolically embracing some of its arrangements. I will then discuss the growing legal debate about Judaism, the Jewish state and Hebrew law since the 1980s.

3. In the third part I will try to explain this dualism of remembering and forgetting Hebrew law, and show how this legal bewilderment corresponds to a broader cultural confusion that puzzles Israeli and modern Jewish society in the last two hundred years.

Nir Kedar is a professor of law and history at Bar-Ilan University Faculty of Law, and the former Dean of Sapir Academic College School of Law in Israel. He graduated from Tel-Aviv University (history and law) magna cum laude, clerked for the President of the Israeli Supreme Court Prof. Aharon Barak, and received his S.J.D. from Harvard. His main fields of interest are Israeli, modern European and American legal history, comparative law, and legal and political theory. In these fields he has published numerous articles and five books in Hebrew and English.

Menachem (Mario) Klein

Applying Jewish Law in the Ruling of Modern Israeli Courts from the Viewpoint of a Trial Court Judge

Under the Foundations of Law Act – 1980 and The Basic Law: Human Dignity and Freedom, Jewish law is viewed as a source of inspiration for the shaping of the Israeli legal system. The basic values of the Jewish law are shaping us as a nation. The question of whether to apply the principles and values of Jewish law in the modern Israeli law system has been debated since the establishment of the State of Israel. This question is more a question of nationalism than of religion. The nationalistic perception is that the legal system, like the language, is a national characteristic. If this is so, why is the Jewish nation distancing itself from Jewish Law?

I think that a certain phobia exists among the Israeli secular population which leads them to ignore the fact that Jewish law is an integral part of Jewish historical culture and is the "genome" of the Jewish people worldwide. The Halacha is the most authentic and original literary work written by the Jewish people, for the Jewish people, and in the common language of the Jewish people.

The Torah is a part of life. Applying it can be done by interpreting a law through the lens of Jewish law, or by adopting a socio-legal ethos stemming from the Halacha into our way of living as a nation.

Judges I am in contact with from outside of Israel, have been surprised, and even disappointed, to learn that in Israeli law, Torts is based on the English Common Law, Contract Law is based on the Romano-German legal system, and freedom of the press is based on the American legal system. The impression I am left with is that the entire world expects us to fulfill what we were assign to do with the State of Israel becoming a beacon of law and justice, based upon the Bible.

How should the question of motivating a judge to use Jewish law be considered? On the basis of religion? Culture? Nationality? Utilitarianism? How can a judge know when it is appropriate to apply the principles of Jewish law to a legal lacuna? Which sources should he use? Should the limit themselves to general principles or rule according to the Shulchan Aruch, and contemporary Rabbis?

How can the use of the Jewish law serve not only the principles of Judaism, but also the principles of democracy? Should the judge, when protecting minorities and the downtrodden, apply only liberal principles, or can he also rely on the words of the prophets of Israel? And what type of influence should these have when deciding a case containing distributive justice concerns?

How should a religious judge deal with a litigant who requests that he be disqualified because of his religious lifestyle, and his constant need to use Jewish law? How does his proclamation and commitment to be faithful to the State of Israel and its laws relate to his religious beliefs and his commitment to the Halacha and Jewish principles? How can he deal with Rabbis who consider Israeli courts to be "courts of pagans"? How and when should he use Jewish law when the parties of a case are gentiles?

This lecture is about answering the questions raised above, among others – with caution and sincererity – drawing on my experience as a court judge in Tel-Aviv, handing down verdicts since 2002.

The main arguments against the application of Jewish law in the Modern Israeli legal system are based on the perception that the core of Jewish law is religious, and is therefore irrelevant for a secular/liberal legal system. In addition, it is outdated and inappropriate for modern principles, it has not evolved, and, therefore, it cannot be used. Finally, the judges who use it are narrow-minded and possess a very limited legal and general education.

Throughout the years, while handing down hundreds of verdicts, I have tried to dispel these myths one by one, and have demonstrated to litigants that the Israeli legacy contains solutions that work well in any time or place.

As I was a child raised abroad, my identity was shaped by the experiences I faced. Military revolution, human rights violations, socio-economic gaps, and corruption in my country of birth have left me marked for life. My judicial agenda is one of protecting human rights, of equality in the law, of preventing corruption, racism and discrimination while ruling on the basis of the principles of distributive justice.

In the past fifteen years, I have shown that my rulings are based by the essence of justice, integrity, freedom, good faith, and fairness of Jewish legacy. I think that beyond religious, cultural, or national reasons, the main advantage in utilizing the principles of Jewish law is that it increases the public`s trust in the Judicial system. It is important that implementation of Jewish law should start in the trial courts, where the bulk of cases are tried.

יישום המשפט העברי בפסיקת בתי המשפט בארץ מנקודת מבט של שופט בערכאה דיונית

המשפט העברי, הינו מקור השראה לעיצוב פניו של המשפט הישראלי, מכוח חוק יסודות המשפט, תש"ם – 1980 וחוק יסוד: כבוד האדם וחירותו. ערכי היסוד של המשפט העברי מעצבים את דמותנו כעם. נושא הכללת ערכים ועקרונות המשפט העברי במשפט הישראלי המודרני של מדינת ישראל הריבונית נתון לוויכוח רב בשנים עוד מימי קום המדינה. שאלה זו היא שאלה ערכית במהותה ולטעמי היא יותר שאלה לאומית מאשר דתית. התפישה הלאומית טוענת שמערכת משפט כמו השפה היא ממאפייניו של הלאום, אם כן, מדוע הלאום היהודי מתרחק מהמשפט העברי ?

התרחקות זו לדידי נעוצה במפוביה מסוימת בחברה הישראלית החילונית מפני המשפט העברי והזיהוי שלו עם כפייה דתית, תוך התעלמות מהעובדה שהמשפט העברי הוא ערש תרבותנו ההיסטורית ומרכיב בלתי נפרד מה"גנום" הקולקטיבי כיהודים. ההלכה היא היצירה היהודית האותנטית והמקורית ביותר שנכתבה על ידי יהודים, על מנת שתיקרא ותיושם על ידי יהודים, בשפה ולשון יהודיים .

תורת ישראל היא תורת חיים. אימוצה יכול שייעשה בפרשנות של חוק בהתאם למקורות המשפט העברי או באימוץ אתוס חברתי-משפטי העולה מן ההלכה ולעצב את דרכנו לפיו .

שופטים בחו"ל עימם אני בקשר שוטף הופתעו מאוד ואף התאכזבו כשהסברתי להם שדיני הנזיקין של מדינת ישראל מבוססים על המשפט האנגלי, דיני החוזים על המשפט הרומנו-גרמני וחופש העיתונות על הדין האמריקאי. תחושתי הייתה שגם עמי העולם מצפים שאנו נמלא את ייעודנו ההיסטורי וכי "מציון תצא תורה ודבר ה' מירושלים" בתחום המשפט והצדק .

אך ראוי לדון בשאלת מה המוטיבציה של שופט בהשתמשו במשפט העברי? דתית? תרבותית? לאומית? תועלתנית? כיצד שופט בוחן האם תיק מתאים ל"מילוי לאקונה" ע"י יישום עקרונות המשפט העברי? מה הם מקורותיו? האם יישום עקרונות אלו מצטמצם לערכים כללים או גם לפסיקת ההלכה לפי השולחן ערוך, נושאי כליו ופוסקי זמנינו?

כיצד השימוש במשפט העברי מיישם לא רק את ערכי היהדות, אלא גם את ערכי הדמוקרטיה של המדינה? האם בהגנו על מיעוטים והחלשים בחברה על השופט להסתמך רק על ערכים ליברלים או גם על דברי נביאי ישראל וכיצד אלו משפיעים עליו בעת הכרעה בתיקים עם דילמות של צדק חלוקתי ?

כיצד שופט דתי מתמודד עם צד לתיק המבקש לפסול אותו מלדון בגלל אורח חייו הדתי וההיזקקות התמידית מצדו במשפט העברי? כיצד הצהרתו והתחייבותו לשמור אמונים למדינת ישראל ולחוקיה עומדות בכפיפה אחת עם אמונתו הדתית ומחויבותו להלכה ולערכי היהדות? כיצד שופט שכזה מתמודד עם הפוסקים הסבורים שבתי משפט במדינת ישראל הם בבחינת "ערכאות עכו"ם"? האם וכיצד להשתמש במשפט העברי כשהמתדיינים הם בני מיעוטים ?

הרצאתי זו מנסה לתת תשובות לשאלות אלו ואחרות - במשנה הזהירות המתבקשת, אך בגילוי לב – תוך התבססות על ניסיוני כשופט בבית משפט בתל אביב-יפו ועל החלטות ופסקי דין שניתנו על ידי החל משנת 2002 ועד לימים אלו ממש.

הטענות העיקריות כנגד שילובו של המשפט העברי בדין הנוהג במדינת ישראל הן שהמשפט העברי הוא במקורו דתי ושאין כל אפשרות להיעזר בו במערכת משפט ליברלית חילונית, שמדובר במשפט מיושן המחזיק בעקרונות ארכאיים שאינם מתאימים לחשיבה

המודרנית, שזהו משפט שלא התפתח בתחומים חדשניים רבים עד שלא ניתן לעשות בו שימוש מעשי ושהעוסקים במשפט העברי הינם צרי אופקים ובעלי חינוך משפטי וכללי מוגבל .

במהלך השנים, במאות פסקי דין שיצאו תחת ידי ניסיתי להפריך מיתוסים אלו אחד אחד ולהראות למתדיינים בבתי המשפט הסקולריים של מדינת ישראל, שלמורשת ישראל פתרונות טובים לדילמות החוצות זמן ומרחב .

חוויות ילדותי בחו"ל השפיעו על גיבוש זהותי ועל פסיקתי. הפיכה צבאית, שלילת זכויות אדם, פערים חברתיים ושחיתות בארץ הולדתי הותירו בי חותם לכל החיים. אימצתי "אג'נדה" שיפוטית של הגנה על זכויות אדם ועל עקרון השוויון בפני החוק, לוחמה בתופעות שחיתות, גזענות והפלייה ופסיקה המושפעת מעקרונות הצדק החלוקתי.

הראיתי במשך חמש עשרה השנים האחרונות שפסיקתי זו מושפעת לא רק מעקרונות וערכים ליברליים, אלא גם מדברי נביאי ישראל ומיסודות הצדק, היושר, החירות, תום הלב וההגינות שבמורשת ישראל תוך הסכמה עם הטענות התומכות בשימוש במשפט העברי הקשורות לתרבות יהודית וזהות ישראלית כיוון שההלכה היא היצירה היהודית האותנטית והמקורית ביותר. סבורני שמעבר לסיבות דתיות, תרבותיות, או לאומיות, היתרון הבולט שבאימוץ ערכי המשפט העברי המתבטא בין היתר ב"מתן קול" למתדיין ויחס מכבד, טומן בחובו חיזוק אמון הציבור במערכת המשפט, כשאין מקום לסמוך על כך שנותיר לבית המשפט העליון את המלאכה הבלעדית ליישום המשפט העברי וזה כבר "יחלחל" מטה, אלא יש לעשות מאמץ ליישמו גם בערכאות הדיוניות בהן נדונות "מסות" של תביעות .

ציון במשפט תפדה ושביה בצדקה

Dr. Menachem (Mario) Klein, Senior Judge, was born in Brazil, In 1982 made aliyah. In 1986, successfully finished law studies at the University of Bar – Ilan. Served in the IDF, in the Air Force.
In 1996 received his Master's degree in Law, with honors, from the University of Tel Aviv.
In 2002, was elected to be a judge in the Magistrate's Court in the District Tel Aviv.
In 2015 completed the Ph.D. Studies at Tel Aviv University .He is a lecturer at the University of Bar Ilan in Disciplinary Law.

Ron S. Kleinman

Adjudication According to Civil Laws – How Much Room for Discretion Do Rabbinical Judges Have?

Rabbinic judges (dayyanim) and halakhic authorities who deal with financial laws often adopt civil laws in their rulings, combining them with halakhic rules, such as: dina de-malkhuta dina; community enactments (takanot ha-kahal); custom (minhag); explicit or implied consent of the parties and the like.

Over the generations, mechanisms have been created – which I would suggest we call "merger mechanisms" or "filtering mechanisms" –which the medieval and later rabbinic authorities used to decide whether or not to grant validity to a particular civil law. These mechanisms enabled them to merge common laws and commercial practices into Jewish law on the one hand, and on the other hand, to filter out those which should not be adopted in their opinion.

A review of judgments and halakhic rulings given both in the past and in our time reveals that when considering whether a particular civil law should be merged into their rulings, the dayyanim examine and analyze a number of fundamental questions, including: 1). Does the law contradict Torah law? 2). Was the law enacted in favor of the residents of the state (le-takanat benei ha-medina)? 3). Is this a bad custom (minhag garu'ah)? 4). Would they themselves enact a similar law? 5). Is the law contrary to the principles of justice and morality according to the view of the Torah and halakhic sages? 6). Does the law cause injustice in this case?

All of the mechanisms mentioned are super principles, often called meta-halakhic principles. These principles allow the dayyanim broad legal discretion in determining whether to grant halakhic validity to a particular civil law.

Sometimes the dayyanim reach the conclusion that the entire law is inappropriate for some reason and therefore is not to be ruled on. Thus, for example, Rabbi Uziel ruled (Resp. Mishpetei Uziel HM 28) that there is no validity to the Statute of Limitations, according to which it is impossible to claim debt after seven years, because this law contradicts the justice of the Torah, and dayyanim must always rule according to the truth.

A more difficult question is, in a case that the dayyan believes that the law is appropriate, is he entitled to adopt it partially and selectively, at his discretion according to the circumstances. There were different positions on this issue. Some argued that if a law is adopted it must be fully adopted, even if in the case in question it will lead to an unjust result. On the other hand, there are those who ruled that the dayyan may exercise discretion in adopting laws, and if he believes that the application of a particular law to the case in question will cause injustice, he must rule contrary to this law. The second opinion was based on various halakhic reasons.

This dispute will be demonstrated by two issues. The first is the rulings relating to tenant protection laws in Eastern Europe, the United States and Israel, laws which sometimes caused the landlords to be mistreated. The second issue is the rulings of dayyanim in our time regarding the section in the Real Estate Brokers Act (enacted in Israel in 1996), according to which a real estate broker is not entitled to brokerage fees if there is no written agreement. On both issues, dayyanim differed as to whether a dayyan should give validity to a specific section of a law, even if this section would cause injustice in the case in question.

פסיקה לפי חוקים אזרחיים – מה מרחב שיקול הדעת שיש לדיינים?

דיינים ופוסקי הלכה העוסקים בדיני ממונות מאמצים בפסיקתם לעתים חוקים אזרחיים, והם משלבים אותם באמצעות כללים של המשפט העברי, כגון: דינא דמלכותא דינא; תקנות קהל; מנהג; הסכמה מפורשת או מכללא של הצדדים וכדומה.

במשך הדורות נוצרו מנגנונים – שאציע לכנותם "מנגנוני מיזוג" או "מנגנוני סינון" – אשר באמצעותם הכריעו הפוסקים הראשונים והאחרונים, האם לתת תוקף לחוק אזרחי מסוים או לא. מנגנונים אלו אפשרו להם מצד אחד למזג לתוך המשפט העברי חוקים ומנהגי מסחר מקובלים, אך מצד שני "לסנן" את אלו שלא ראוי היה לאמץ לדעתם.

בדיקת פסקי דין ופסקי הלכה שניתנו בעבר וגם בזמננו מגלה, כי בבואם לשקול האם ראוי למזג חוק אזרחי מסוים בפסיקתם, בוחנים הדיינים מספר שאלות יסוד, וביניהן: 1). האם החוק מנוגד ל"דין תורה"? 2). האם החוק הנידון נחקק לטובת תושבי המדינה ("לתקנת בני המדינה")? 3). האם החוק הוא "מנהג גרוע"? 4). האם הם עצמם היו מחוקקים חוק דומה? 5). האם החוק מנוגד לעקרונות של צדק ומוסר לפי השקפת התורה וחז"ל? 6). האם החוק גורם עוול בנסיבות המקרה הנידון?

המנגנונים הנזכרים כולם הם עקרונות-על, המכונים לעתים גם עקרונות מטא-הלכתיים. עקרונות אלו מאפשרים לדיין שיקול דעת רחב בבואו לפסוק האם להעניק תוקף הלכתי לחוק אזרחי מסוים .

לעתים מגיע הדיין למסקנה שהחוק כולו אינו ראוי מסיבה כלשהי ולכן אין לפסוק על פיו. כך למשל פסק הרב עוזיאל (שו"ת משפטי עוזיאל, חושן משפט, סימן כח) שאין תוקף לחוק ההתיישנות, ולפיו אי אפשר לתבוע חוב לאחר שבע שנים, כי הוא סותר את הצדק של התורה, ודיין חייב תמיד לפסוק לפי האמת.

שאלה קשה יותר היא, במקרה שהדיין סבור כי החוק הוא ראוי, האם הוא רשאי לאמץ אותו באופן חלקי וברירני, לפי שיקול דעתו בהתאם לנסיבות. בעניין זה היו עמדות שונות. יש שסברו, כי אם מאמצים חוק יש לאמץ אותו במלואו, גם אם במקרה הנידון הוא יביא לתוצאה בלתי צודקת. לעומתם, יש שפסקו כי הדיין רשאי להפעיל שיקול דעת באימוץ חוקים, וכי אם לדעתו יישום של חוק מסוים על המקרה שלפניו יגרום עוול, עליו לפסוק שלא לפי חוק זה. בעלי הדעה השנייה התבססו על נימוקים הלכתיים שונים.

מחלוקת זו תודגם באמצעות שני נושאים. הראשון הן פסיקות שניתנו בנוגע לחוקי הגנת הדייר במזרח אירופה, בארצות הברית ובישראל, חוקים אשר גרמו לעתים לעוול לבעלי הדירות. הנושא השני הן פסיקות דיינים בזמננו בנוגע לסעיף בחוק המתווכים במקרקעין (שנחקק בישראל בשנת 1996), ולפיו מתווך מקרקעין אינו זכאי לדמי תיווך אם אין הסכם בכתב. בשני הנושאים נחלקו דיינים בשאלה, האם על דיין לתת תוקף לסעיף בחוק גם כאשר ייגרם עוול בנסיבות המקרה.

Prof. Ron S. Kleinman is a full time faculty member of the Ono Academic College (OAC) School of Law in Israel, where he teaches Jewish Law and Torts (since 2002). He is the Chairman of the Israeli Committee of the Jewish Law Association (since 2008.(

His recent research includes:

- The relationship between customs pertaining to monetary laws (dinei mamonot), Halakha and civil law, mostly in Israel.
- Merchant customs relating to methods of acquisition (kinyan situmta), e.g. the Halakhic validity of e-commerce and credit card.
- Selling Aliyas and honors in the synagogue: the custom and its evolution and legal, social and Halakhic problems that it has produced.

Gideon Libson

Common Roots, Diverging Branches: Dynamism in Islamic and Jewish Law

A contemporary perspective on the Jewish and Islamic legal systems reveals a significant gulf between the two in many domains. However, a closer historical examination of their sources reveals that in the distant past they shared a core of common principles in several fields of law, with clear similarities between them. It was only over the years that the two systems diverged, primarily as a result of Jewish law's dynamic ability to adapt to the challenges and constraints of changing circumstances by supplementing the initial core with additional normative layers. These changes were possible due to a series of legal sources that Jewish law (*halakhah*) recognized—primarily customs and rabbinic enactments, but also hermeneutical methods that were sometimes hidden from view. All these made their mark on the character of Jewish law and paved the way for halakhic innovation in order to meet contemporary challenges. On the other hand, primarily on theological grounds—the loyalty to the Quran and Sunna—and the impossibility of deviating from their stipulations Islamic law did not develop tools for legal creativity or add innovations. Instead it generally remained very close to the basic principles as expressed in the Quran, and in the Sunna (Islamic oral traditions). This fixed its static character, which remains in place today. This difference in the two systems' ways of responding to changing circumstances increased the differences between them. As a result of the significant disparity that emerged between them, their initial common basis has become completely invisible. The similarity between the two systems has all but vanished, while the differences have increased.

I will offer seven examples (if time allows) to demonstrate my argument, six from the realm of family and personal status law, and the other from criminal law. Few of them have ramifications on the current Israeli legal system.

Gideon Libson is Professor Emeritus of Jewish and Islamic Law and Comparative Jewish and Islamic Law in the Faculty of Law at the Hebrew University in Jerusalem and was the holder of the Frieda and Solomon B. Rosenzweig Chair in Law. He earned his LL.M. and Doctor of Law degrees (both summa cum laude) at the Hebrew University. As a post-doctorate Fellow, he continued his research in comparative Jewish-Islamic Law at Princeton University where he spent three years developing the methodological guidelines for recognizing mutual influences between Jewish and Islamic law in the Middle Ages.

He was the recipient of the Herzog Prize in Jewish Law, the Warburg Prize, Lady Davis Fellowship and the Goitein Prize in Geniza Research.

His book on Jewish and Islamic Law - A Comparative Study of Custom During the Geonic Period was published by Harvard University Press 2003.

Shahar Lifshitz

The liberal Case for integrating Jewish law into state law

Since the last decades of the 20th century, the debate over the place of Jewish law in state law, and recently also in legal education, has increasingly become an argument between those who emphasize the national Jewish identity of the state and those who emphasize the fact its Western liberal character.

Those who support for the integration of Jewish law into state law, the courts, politics, and academia regard it as a political/cultural/identity move intended to strengthen the Jewish character of the state. By contrast, opponents of the move generally argue against it on two main counts: (a) fear that despite the cultural/national arguments of the supporters, the integration of Jewish law will make Israeli law more religious; and (b) opposition in principle to strengthening the Jewish national and cultural characteristics of the state at the expense of its Western liberal identity.

In many respects, the dispute over Jewish law overlaps other disputes between these two groups regarding the place of Jewish texts and symbols in the public sphere and in the state education system. In my lecture, I argue in favor of strengthening the influence of Jewish law on the law of the state, specifically from the liberal point of view.

In my opinion, Jewish national identity, Jewish texts, and Jewish legal sources will in any case have a significant influence on a growing group of people in Israeli society who are not satisfied with their Israeli identity and aspire to deepen their Jewish identity. Judaism, however, similarly to other cultures and traditions, is not static but dynamic and subject to influence. The result of excluding traditional Jewish texts, among them Jewish law, from Israeli institutions in general, and from Israeli law in particular, will be that the main actors involved in identifying, interpreting, and developing Jewish law will be religious communities and private courts, most of which are not committed to the liberal democratic ethos. Such a move would exclude from non-Orthodox texts the Jewish space, and weaken the possibility of developing a liberal Jewish discourse.

By contrast, the integration of traditional Jewish texts, including Jewish law, as a binding canonical source, will enable state institutions, such as academia and the Supreme Court, to be among the actors influencing the development of Jewish law and Jewish culture as a whole. Such a move will increase the chances of expanding the Jewish canon and of a more meaningful interaction between it and the liberal democratic Western world.

Prof. Lifshitz is professor of law at the Bar-Illan University Law School, where he served as a dean between 2012-2017. Lifshitz is the founder and the chair of the Bat-Illan Institute for Jewish and Democratic Law. He is an expert in the fields of family law, human rights and Judaism, multiculturalism, Jewish law, and contract law. Lifshitz served as co-chair of the Forum for Cooperation between the Israeli Supreme Court and Israeli Legal Academia, an organization he founded together with Prof. Yaffa Zilbershats and former Israeli Supreme Court President, Dorit Beinisch. In addition to his work at Bar-Ilan University, he co-directs the Israel Human Rights and

Judaism project at the Israeli Democracy Institute. He served as Gruss Professor for Talmudic Law at the Law School of the University of Pennsylvania in the fall semesters of 2014 and 2015, and as a visiting professor at Emory Law School, in 2017, and at Columbia Law School, in the fall of 2009, where he taught an advanced course in family law. Additionally, he was a visiting scholar and Berkowitz Fellow at New York University Law School in 2005-2006, and visiting Professor of Law and Distinguished Fellow of Jewish Law and Interdisciplinary Studies at Cardozo Law School, in 2006-2007, and again in the spring of 2009.

Assaf Likhovski

Looking Back at One Hundred Years of Jewish Law Scholarship

In my talk, I survey one hundred years of Jewish law scholarship. I do so by focusing on four important milestones: Moscow 1917, Tel Aviv 1948, Jerusalem 1980, and the present – our meeting in Moscow in 2018. I begin my talk by telling the story of the establishment of the Jewish Law Society (Hevrat ha-Mishpat ha-'Ivri, literally "the Hebrew Law Society") in Moscow in the winter of 1917, discussing the intellectual context out of which this Society, which sought to study and revive Jewish law, emerged, and its subsequent impact of legal scholarship and practice in Mandatory Palestine in the 1920s and 1930. I then discuss the failure of the movement for Jewish legal revival to influence the actual content of Israeli law in the period immediately following Israeli independence in 1948. My third milestone is the enactment of the Israeli Foundations of Law Act of 1980, which represented a second failed attempt to tie Israeli law more closely to Jewish law. I end my lecture with the present moment, mentioning both the current legal status of Jewish law in Israel (including the recent May 2018 amendment to the Foundations of Law Act), and also the current state of Jewish law scholarship, in Israel and elsewhere. One hundred years after 1917, I conclude, the project espoused by the Moscow Society is both a success and a (relative) failure: Success as a scholarly pursuit, and failure as a practical attempt to influence the law of the State of Israel.

Assaf Likhovski is a professor of law and legal history at Tel Aviv University Faculty of Law. He is the author of two books, Law and Identity in Mandate Palestine, and Tax, Law, and Social Norms in Mandatory Palestine and Israel, as well as articles on Jewish, Israeli, English and American legal history. He was one of the co-founder of the Israeli Legal History Association, and served as the director of the Cegla Center for Interdisciplinary Research of the Law, the director of the David Berg Foundation Institute for Law and History, and the Associate Dean for Research at the Tel Aviv University Faculty of Law.

Itay Lipschutz

Majority Principle in Jewish Law: Majority and Probability (*Rov vs. Histabrut*)

Jewish Law has been defined more than a century ago as a collection of norms from Jewish HALACHA, in such branches of the law that have a parallel in modern law. This definition of Jewish Law forced a complicated and complex surgical operation that produced a broad body of norms and principles that were used in what has been until now called Jewish HALACHA. What remained in the "Jewish Law" is only a small part of all the norms of Jewish HALACHA. In general, it may be said that the "cutting" operation applied to the set of norms of Jewish HALACHA had left the general body of norms of the Jewish religious HALACHA outside the realm of Jewish law.

In this lecture, which shall deal with the majority principle in Jewish Law and in Jewish HALACHA, I would like to demonstrate the results of the surgical operation described above.

The Torah refers to the power of the majority in one explicit verse in which it is said (Shemot 23: 2) לא תהיה אחרי רבים לרעות... אחרי רבים להטות.

This verse, in its simple interpretation (על פי הפשט) refers to the manner in which a decision is to be taken where a disagreement arises among the judges who sit on trial, and establishes a decision-making-mechanism that is usually based on an ordinary majority and in special cases on a special majority. There is no doubt that the majority rule has been adopted by the Jewish Law. It certainly meets the definition of Jewish Law with which we have opened, i.e., it constitutes one of the norms that may be found in modern law. I think I may safely maintain that today you cannot find a modern and enlightened state in which a disagreement among judges is not decided based on the majority rule.

Anyone who Studies the majority rule in Jewish HALACHA (as opposed to Jewish Law) will find that the majority rule applies to a wide range of cases in and outside the court. [1] A review and classification of the majority instances in the primary sources of Jewish Law clearly shows that we do not have any other explicit source for the majority rule in the written Torah, except for the verse cited above. This verse is the source for the majority rule for all cases in and outside the court. Thus, the Talmud (Tractate Chulin 11a) deals with, a case of meat found in the street, where it is unclear whether it is kosher or not. It may be assumed that it had come from one of the stores in the city, some of which only sell kosher meat and the others non-kosher (TREIFA). One must follow the majority rule and deduce that the meat came from one of the stores belonging to the majority. The Talmud, here, relies on the verse (אחרי רבים להטות) "After many to tilt".

Although this case has nothing to do with the majority for disagreeing judges, the Talmud uses the same verse as a source for the majority principle in the "meat stores-case".

In other primary sources, in the Tannaim and Amoraim literature, we find various additional cases based on the majority rule, but in which the Talmud does not bother to state the source thereof in the Torah. [2] However, in the RISHONIM literature one can again find the reference to the verse "after many to tilt" as the exclusive source of the majority rule, even in cases where the Talmud or other ancient sources did not bring any source. [3]

It seems that there are at least two possible approaches to explain the application of the principle of majority to various cases. The first approach distinguishes between the majority principle when applied to the majority of dayanim in a court decision as opposed to the appliance of the majority principle outside the court, in the case of mixtures, for example.

The other approach, which I wish to present here, is the homogeneous approach according to which the principle of majority is one and the same in all its applications.

In order to fully understand the majority rule, the jurist must deal with the majority rule in all the Tanaic and Talmudic cases, i.e., in all the instances of the majority rule in the Jewish HALACHA, and not only in the cases that meet the definition of majority in "Jewish Law." The general conclusion I wish to promote is that Jewish HALACHA cannot agree with the "surgical treatment" that Jewish law secular scholars commited to it. The surgery failed.

In my lecture I wish to show that the majority principle, even when applied on judges in court, is understood differently in Jewish law vs. Jewish HALACHA.

Dr. Itay Lipschutz is an Associate Professor of Law (senior lecturer). He has graduated from the Bar-Iilan University Faculty of Law where he was the Editor-in-Chief of “Mechkarey-Mishpat” Bar-Ilan University Law Journal. Itay wrote his thesis on “The Compromise in Jewish Law”. Dr. Lipschutz’ main research and teaching areas are Jewish Law, Civil Procedure and the Judicial Process. Itay is the vice Chairman of the Israeli Committee - The Jewish Law Association

Yair Lorberbaum

Rules and Reasons in the Jurisprudence of the Israeli Supreme Court and in Modern Jewish Law

In the seventy years of its existence there were dramatic changes in the Jurisprudence of the Israeli Supreme Court (hereafter: ISC). From its inception in 1948 till the late 1970s, ISC subscribed to what scholars describe as formalistic, rule-oriented ways of legal reasoning. Yet, from the early 1980s, under the aegis of Justice Aharon Barak, the ISC turned to legal reasoning based not on applying rules, but on weighing reasons and justifications. One scholar called this shift: "The decline of formalism and the rise of values in Israeli law." Jewish Law, on the other hand, underwent in the modern era an opposite process: its legal (halakhic) reasoning increasingly became entrenched in formalism, conceptualism and rulism. The lecture will describe these two opposite processes, depict their background, and comment on some of their causes.

Yair Lorberbaum is a member of the Law Faculty at Bar Ilan University, where he lectures on the Philosophy of Law, Jewish Law and Jewish Thought.

Professor Lorberbaum's scholarly works include: The Image of God: Halakhah and Aggadah, [Hebrew] by Schoken Press (2004). This book appeared in English in 2015 by Cambridge UP, titled: In God's Image: Myth, Theology and Law in Classical Judaism. He is co-author of the first volume of The Jewish Political Tradition, published by Yale University Press (2000); Melekh Evion – Kingship in Classical Judaism (2010) [=Disempowered King, Kingship in Classical Judaism, Continuum: London 2012]. His forthcoming books are: Gezerat Ha-Katuv (Decree of Scripture) – On Rules and Reasons, Halakhah and Theology, and: Apples of Gold in Silver Settings: Maimonides on Parables, Philosophy and Law, and: Rashba and the Rise of Halakhic Religiosity of Mystery and Transcendence.

Prof. Lorbebraum has been a guest lecturer at: Yale University, Cardozo Law School, Princeton University, and NYU Law School. He served as the Gruss Professor of Talmudic Law, in the University of Pennsylvania Law School, and he was a Starr fellow at The Center for Jewish Studies at Harvard University.

Leib Moscovitz

Hypotheticals in the Halakhic Thought of R. Chaim Soloveitchik

Hypotheticals ("what if," "suppose that") are commonly used as a tool for legal analysis in both secular and Jewish law, both in ancient legal systems, such as Roman law and talmudic law, and in modern law. By definition, hypotheticals always address theoretical cases, although the likelihood of such cases actually occurring varies from case to case: some hypotheticals seem reasonably plausible, while others are extremely improbable – for example, the famous talmudic discussion regarding someone born with two heads (e.g., on which head must such a person put Tefillin).

Not surprisingly, halakhic hypotheticals are frequently discussed in the writings of R. Chaim Soloveitchik of Brisk, and indeed R. Chaim often uses a special term when referring to such cases – אם אך, "if only" (much like the expression לו יצויר, "if it could be imagined / conceived of," utilized by other rabbinic scholars). What is noteworthy about R. Chaim's use of halakhic hypotheticals, and apparently unattested prior to this sage, is that he sometimes discusses cases which are not just empirically improbable or contrary to fact (counterfactuals), but which are impossible by definition, whether for physical, logical or legal reasons. R. Chaim's use of such counterpossible conditionals or counterpossibles, as they are termed in the general philosophical literature, raises several questions which we attempt to answer in this paper, albeit in preliminary and partial fashion, to wit: What prompted the use of such statements? Likewise, how is it possible to reason logically and coherently about impossible cases of this sort?

This paper considers two types of counterpossibles discussed by R. Chaim. The first entails the discussion of impossible cases for didactic or explanatory purposes. Such contrapossibles help to clarify what might otherwise seem to be an excessively abstract or difficult to understand distinction. Thus, R. Chaim's resort to such counterpossibles serves essentially as a literary technique – a mode of formulation – but does not reflect a halakhically, conceptually or metaphysically unique perspective about the matters discussed. Indeed, in such instances omission of the counterpossible would not invalidate the substance of R. Chaim's argumentation, although that argumentation would presumably be less comprehensible without the counterpossible. Thus, such use of counterpossibles reflects primarily on R. Chaim's approach to legal formulation and not on the actual substance of his thought or his approach to legal analysis. Even so, use of this technique is still highly noteworthy, as R. Chaim's willingness to discuss the impossible and not just the unlikely or counterfactual reflects a high degree of creativity and originality not characteristic of other halakhists.

The second type of counterpossible considered here entails attributing a legally impossible status to a case in which the assumption of such a status serves substantively and not just literarily as part of the halakhic thesis which R. Chaim presents. Contrapossibles of this sort, in contrast to the type discussed previously, serve not merely as literary or explanatory devices, but reflect a unique sort of halakhic metaphysics: in at least some sense the impossible case or status is deemed to actually exist for halakhic purposes. The significance of such counterpossibles lies not just in the conceptual creativity they manifest, but in the extreme expression of halakhic nonrealism they reflect, whereby not just the abstract, but also the inconceivable and unimaginable play an essential role in R. Chaim's halakhic analysis. Indeed, this "nonrealistic" approach to halakhic thought is apparently one of the principal elements that distinguish R. Chaim from other halakhic interpreters.

Leib Moscovitz: My research deals with both philological and conceptual/jurisprudential aspects of rabbinic literature. The primary focus of my philological research has been the Talmud Yerushalmi and its terminology in particular, while I have addressed conceptual and jurisprudential issues primarily in my book-length study of conceptualization in rabbinic literature, as well as in a number of lectures dealing with this phenomenon in the writings of various members of the so-called "Brisker school" of rabbinics.

Denis Primakov

Jewish Identity in Israel law: from Rejection to Acceptance

Legal draft of the Basic Law on "Israel as the Nation-State of the Jewish people" (the last one has been prepared by Member of Knesset Avi Dichter) revitalized again question on Israeli / Jewish identity. During my speech I would like to scrutinize legal concept on Jewish legacy and Jewish law in Israeli legal system.

Perception on Jewishness in Israel may divide into three stages: from full rejection and efforts to rebuild *Mishpat Ivri* exempted and purged from religion context through a debate between Justices Aaron Barak and Menahem Elon over the Jewish legal principles with an introduction Act "Foundations of Law"(חוק יסודות המשפט) in 1980 and the last period which has been characterized by a new wave of attempts to revise Israel in new terms of nation. During 2011-2014 Israel law-makers has proposed several legal drafts which have been dedicated to לאום – nationality. A special report of professor Ruth Gavinzon and different law drafts demonstrate a wide number of diverse views. Four legal drafts of Basic Law have been prepared for 4 years.

In 2011 Member of Knesset Avi Dichter with another 39 Israeli lawmakers proposed a Basic Law "Israel as the Nation-State of the Jewish People". The law proposal caused a lot of controversy in the Israeli public and media. An editorial in the Haaretz newspaper claimed that this law proposal would severely harm the Israeli democracy and the rights of the minorities. Another draft of the Basic Law was proposed by Member of Knesset Ruth Kalderon in 2013 with the name "Declaration of Independence and Jewish and Democratic State".

In 2014, Elkin reformed the old version of the Basic Law bill and proposed it for new Knesset cadency. An alternative, broader version, of the original bill has been written and submitted by MKs Ayelet Shaked, Yariv Levin and Robert Ilatov. Finally Prime-Minister also proposed a new version of legal bill. In July 2017 Israeli Prime-Minister points the Member of Knesset Amir Ohana as a head of the special Knesset Commission for preparing Legal draft "Israel as the Nation-State of the Jewish people" reforming version of the legal bill of Member of Knesset Avi Dichter. 1-th of May 2018 this legal draft has passed the first reading in the Knesset .

Israel's proposed constitutional legislation to confirm its status as the "nation state" of the Jewish people has not only generated controversy within Israel, where it has helped bring down the current parliamentary coalition, but has also drawn criticism from the U.S. and Europe. The draft legislation has been decried as extreme and undemocratic.

A comparative study of proposed versions shows a struggle for ideology that includes 3 main components: Jewishness, democracy and human rights. However one of the main problems that legal bills have arisen, was the question whether these components are constitutional norms or not and why it should be postulated in this time. Ruth Gavinzon points out "questions of vision are not legal questions, and should not be decided by law or in courts. A separate anchoring of the vision would transfer the locus of discussion about disagreements on interpretations of the vision from the public and political arenas to the courts".

However Jewish character of the state, democracy and human rights are all very vague and contested. The richer the meaning given to any of these components, the more it is likely that there will be a disagreement about whether a specific arrangement meets the demands of the vision, and the greater the likelihood of tension and even contradiction between the components of the vision. Thus, if a Jewish state means a Jewish

theocracy, it may not accept the sovereignty of the people, or the rights of individuals and groups to freedom of religion and freedom from religion. A Jewish state seen as a rigid ethnocracy may indeed legitimate discrimination against all non- Jews. It thus may not protect the rights of individuals and minorities to equality, liberty and culture. A civic, neutral democracy may not facilitate the promotion of the rights of Jews to self-determination (and the rights of minorities to culture), and might lead to an underestimation of the importance of non-civic identities to individuals and groups (minorities and majorities alike). An expansive interpretation of the human rights discourse, combined with a broadly-interpreted power of the courts to invalidate legislation allegedly violating such rights, might weaken the power of individuals and groups living in the country to determine the arrangements and practices prevailing in it.

Denis Primakov, PhD in Law, Associate Professor of the Russian Foreign Trade Academy, Moscow, author "History of Jewish and Israeli Law" (2015), Law in Modern Egypt (end XIX- beginning XXI), creator an academic course "History of Jewish and Israeli Law" which he taught in 2011 at Moscow State University, Institute of African and Asian studies, then 2013-2014 in framework of MLA program in the Law Department at High School of Economics, Moscow. Research fellow at Berg Institute of Buchmann Law Faculty 2015-2016. Currently he is an International anti-corruption expert for OSCE and the Council of Europe. Academic interests: Israeli law, Legislation in the Middle Eastern Countries, Business integrity and combatting corruption.

Amihai Radzyner

From Moscow to Jerusalem: The Rise and Decline of Hevrat ha-Mishpat ha-Ivri

In 1916, in Moscow, Samuel Eisenstadt called for the establishment of a "Scientific Society to Investigate Jewish Law." Indeed, on December 29th, 1917, the "Jewish Law Society" *[Hevrat ha-Mishpat ha-Ivri*] was founded in Moscow, under the leadership of Eisenstadt and Paltiel Dickstein.

It was no accident that the founding conference of the Jewish Law Society took place less than two months after the Balfour Declaration. According to all the researchers of Jewish law who were active in the formative stages of its research, one of the salient characteristics of a state and a people is its national law. They contended, therefore, that the legal system of the nascent Jewish state should be predicated on the national law of the Jewish people, i.e. '*Mishpat Ivri*,' a system of law that would be adapted and prepared by its researchers for its application as a system suited to the needs of a modern state like the Jewish state that was to be established.

The declarations of the Society indicate that one of its main goals was the secularization of *Halakhah*, that is, the separation of its legal parts from the religious ones, and the interpretation of the legal parts without the religious element inherent in them. The secular trend of the Society had other aspects as well, which I address in the lecture, for example the demand that the authority for the renewal of Jewish law be transferred from religious decisors to jurists with general legal education, who are not necessarily religiously committed.

Because of the difficulties in conducting Jewish activities under the Soviet regime, the Moscow Society did not survive for long. Most of its members immigrated to the Land of Israel and joined the 'Jewish Law Society' operating in Jerusalem, unrelated to the Society established in Moscow. The position of the Jerusalem Society was much more conservative, and did not stress the need to secularize Jewish law. For example, the founders of the Jerusalem Society believed that rabbis should participate in activities aimed at the revival of Jewish law.

The lecture discusses the differences and tensions between the various ideologies of the founders of the two societies regarding the proper way to study Jewish law and revive it as a national Jewish law, and as a basis for the legal system of the future Jewish state. It examines the overt and covert debates between the two approaches, and suggests that the disintegration of the Jewish Law Society should be understood, among others, against the backdrop of the religious-secular debate that took place within society at large. This claim is supported by archival findings that illustrate the great tension that existed beneath the surface in the 'Jewish Law Society'.

Amihai Radzyner is a Professor of Jewish Law and Legal History in the Faculty of Law of Bar-Ilan University.

His researches deal with Talmudic Law, history of Jewish law and its research, the history of Israeli law and current Halakhic family law in Israel. He is also the Chief Editor of "HaDin veHaDayan (The Law and its Decisor): Rabbinical Court Decisions in Family Matters".

Avinoam Rosenak

Thoughts about the Limits of Integration and Translation:
Intermarriage as a Test Case for Universal Values in Jewish Law

In my talk I would like to examine the nature of familiar axioms employed in the study of *Halakhah* and Jewish thought and demonstrate how they influence contemporary halakhic decision-making. (I will focus on the liberal currents, though there are repercussions for Modern Orthodoxy as well.)

I will note several practices that typify the mode of research into Jewish thought and *Mishpat Ivri*, which run counter to the yeshiva mode of learning, as scholars have sought to describe them:

(1) The translation of the particular into the universal: The research's assumption is that every text must be understood against the background of the influences that shaped it. I.e to link the particularistic levels of content with universal ideas and patterns of thought.

(2) Academic vs. religious study (following Menachem Kehana): This means removing the talmudic text from the harmonizing and blurring reading of the yeshiva world and placing it in the bright light of polyphonic and objective critical scholarship, highlighting its sociological, positivistic, and historical sources.

(3) The philosophy of *Halakhah* and hermeneutics (Moshe Halbertal): The philosophy of *Halakhah* stands on the hermeneutic perspective (Not as the yeshiva learning and academic study of the Talmud). It rejects the possibility of "objective reading" and emphasizes the subjective, cultural, and philosophical dimensions and uncovers the meaning of the text.

(4) The fundamental questions of the field of philosophical halakhic research: the fundamental questions look at the authority of the halakhic framework and halakhic decision-making. What are the sources of authority?

(5) On translation and its limits: Academic scholarship conducts cultural translation, in which a particular system is translated into the cognitive and analytical tools of a different system external to it, ostensibly universal or Western. What are the omits of the appropriate translation? At what point does the translation alter the basic elements of the object translated?

(6) An intra-halakhic expression of "translation": the meta-halakhic discourse.

(7) Academic research and halakhic decision-making: To what extent can those who engage in academic study of *Halakhah* and conduct the philosophical and scholarly meta-halakhic discourse serve themselves as molders of *Halakhah*?

(8) Intermarriage as a test case of the application of the (universal) academic method to halakhic decision-making (which is particularistic)

I will endeavor to show how these principles have evolved into elements that shape *Halakhah* today. The process I will trace seeks to find grounds for permitting intermarriage (its authors' assumption is that even what seems to be quite impossible is in fact possible; so it has been in the past [rabbinic ordination of women, single-sex marriage] and so it will continue to be in the future [intermarriage]).

The text I am reading is the 2017 publication by Rabbi Amichai Lau-Lavie, Joy, A Proposal, which envisions such a possibility. Lau-Lavie is one of the leaders of a prominent cultural stream in liberal Judaism in New York.

Lau-Lavie would ground this new halakhic interpretation on (1) Classic halakhic terms such as ger toshav, "resident alien" and yir'ei hashem, "those who revere the Lord"; (2) The use of familiar meta-halakhic tools; (3) Recognition of rabbis' obligation to deal with the real world; (4) The concept of love as an important meta-halakhic theme; and (5) Recognition that if *Halakhah* has been able to respond to the needs of gay men and lesbians, it can also resolve the challenge of intermarriage.

Prof. Avinoam Rosenak, a lecturer at the Melton Center for Jewish Education and the Dep. for Jewish Thought at The Hebrew University in Jerusalem; he is a research fellow at the Van Leer Institute in Jerusalem.

Prof. Rosenak's field of research is Modern Jewish Philosophy, Philosophy of the *Halakhah* (Jewish Law) and Philosophy of Jewish Education. He edited 7 academic books in his field and published several books as The Prophetic *Halakhah*, (Magnes 2007); Rabbi Kook (Zalman Shazar 2006); *Halakhah* as an Agent of Change: Critical Studies in Philosophy of *Halakhah*, (Magnes, 2009) and Cracks: Rabbi Kook, his Disciples and their critics, (Resling press 2013).

Mordecai Sabato

Concerning the Change Introduced by Rabbi Akiva in the List of Relatives who are Disqualified to Give Testimony

According to Jewish law, a person's relatives are disqualified from offering testimony in his regard, whether favorable or damaging, both in civil and in criminal cases. In the Tannaitic sources we find three different lists of relatives who are disqualified from offering testimony. In the Mishna, *Sanhedrin* 3:4, there is a list of relatives who are disqualified from offering testimony. Rabbi Yose comments about this list that it is the text of Rabbi Akiva's Mishna, but the first Mishna had a different list. A third list is found in *Sifre Zuta* on Deuteronomy.

In 2013, I published an article in *Dine Israel*, vol. 29, entitled: "A New Look at the Talmudic Lists of Relatives who are Disqualified for Testimony." Among other things, I dealt there with the question why Rabbi Akiva changed the list of relatives that was taught in the first Mishna. I cited the views of various scholars on this issue, and explained why their proposals are unsatisfactory. I left this question open for further examination.

In my present lecture, I wish to answer this question based on a study of two expositions, one in *Sifre* on Numbers and one in *Sifre* on Deuteronomy. Each of these two expositions derives the disqualification of relatives from a different verse. I wish to argue that the exposition in *Sifre* on Deuteronomy, which is from the school of Rabbi Akiva, reflects the view of Rabbi Akiva, whereas the exposition in *Sifre* on Numbers, which is from the school of Rabbi Yishmael, reflects the view of the first Mishna. An examination of these two expositions and the difference between them reveals an essential difference between two perceptions of why relatives are disqualified to offer testimony. It is this difference that caused Rabbi Akiva to change the list of relatives. I will also explain the reason for the difference between the view of Rabbi Akiva in the Mishna and the view in *Sifre Zuta* on Deuteronomy which is also from the school of Rabbi Akiva.

Dr. Mordecai Sabato studied at the Hebrew University of Jerusalem and teaches at Bar-Ilan University. His research focuses on the Literature of the Sages, in particular on the Babylonian Talmud. His latest book has recently been published, under the following title:

Talmud Bavli, Sanhedrin Chapter 3, Critical Edition and Commentary (Heb.) Jerusalem: Bialik Institute 2018

Haim Shapira

Israeli Law and Jewish Law: Human Dignity

Since the enactment of the Basic law: Human Dignity and Liberty (1992), human dignity became the central concept of Israeli constitutional discourse. Alongside this concept and indeed before it was recognized by Israeli law, the concept of human dignity was recognized by Jewish law and found its expression in the term of *Kevod Ha-Briyot*. Judges in Israeli courts, especially in the Supreme Court, were aware of the Jewish concept and turned to Jewish law, before the enactment of the basic law, to draw from it the idea of human dignity. Following the enactment of the basic law the Supreme Court developed a whole jurisprudence of human dignity. Yet, some judges kept turning to the concept of *Kevod ha-Briyot* to find answers to various questions that came up in cases related to human dignity.

This lecture seeks to analyze the relations between Israeli and Jewish law in the context of human dignity. First, on the conceptual level, are these two concepts, which were evolved in two different legal traditions, similar or close enough that can be compared or enrich each other? Second, on the jurisprudential level, in what cases judges turn to Jewish law and for what purposes they do so? What they can learn from Jewish law that they could not learn without it? Finally, what can we learn from the context of human dignity to the broader question of the desirable interrelations between Israeli and Jewish law?

Dr. Haim Shapira is a member of the faculty of law at Bar-Ilan University. His main areas of teaching and research are: Jewish law, rabbinic literature, legal theory and law and religion. He received his Ph.D. and his other degrees in law and in Jewish studies from the Hebrew University of Jerusalem. His articles were published in Israeli, American and European leading journals. He was a research fellow and a visiting professor at various American and European universities including NYU School of Law, Milan University, School of Law and the Institute for Advanced Study at Princeton.

Yaacov Shapira

Jewish Law and the critique of the rabbinic establishment

The Movement for the Revitalization of Jewish Law aspired to establish in the future State of Israel a national law based on the sources of Jewish law while adapting them to the time and place of their implementation. Prof. Moshe Silberg, who was a member of this movement, stated that its motives were not religious; it did not intend to uphold a religious obligation to implement halachic sources as is. Its aim was national-cultural - to preserve the legal heritage of the Jewish people through a secular approach to the sources, taking into account the needs of both time and place. These are his words:

The role will be to separate the wheat, to bring closer and sustain the connection to life and to distance and reject the dry plantations that have shrunk and dwindled over the generations. In somewhat picturesque words: pour out the wine which has gone sour, and save the barrel, in order to fill it with new wine, so that it will absorb the ingrained smell, and the new wine will smell and taste like the old.

The content and the style of these words are not compatible with the religious outlook of the rabbinical world which holds sacred accepted halachic norms and does not necessarily recognize the challenge of change and adaptation. It certainly does not accept the legitimacy of filtering, excluding or rejecting any part of the accepted corpus of Jewish law. The very assertion of a "missed opportunity", or claim of depletion or shrinkage of the world of Jewish law is foreign to the rabbinical establishment and is not legitimate in its eyes.

Various judges in the Supreme Court saw themselves as affiliated with the movement to revive Jewish law. Did this identification influence their criticism of decisions of the rabbinical establishment, which they saw as "old wine"?

In my lecture, I will consider this question, while comparing the positions of several Supreme Court justices in this matter. In this context, I would like to examine the roots and the nuances of the various positions while giving attention to the question of whether the identity of the justices influenced their positions.

המשפט העברי וביקורת הממסד הרבני

התנועה להחייאת המשפט העברי שנוסדה לפני כמאה שנים שאפה לכונן במדינת ישראל העתידית משפט לאומי המיוסד ומושתת על מקורות ההלכה היהודית תוך התאמתם לצרכי הזמן והמקום. פרופ' משה זילברג אשר נמנה על תנועה זו הטעים כי מניעיה לא היו דתיים, הם לא כללו מחויבות דתית ליישום המקורות ההלכתיים כפי שהם. מגמתה הייתה לאומית-תרבותית - קימום המורשת המשפטית של העם היהודי באמצעות גישה חילונית כלפי המקורות, תוך התחשבות בצרכי הזמן והמקום. ואלו הם דבריו:

התפקיד יהיה: לבור את הבר, לקרב ולקיים את המחובר לחיים, ולרחק ולדחות את הנטיעות היבשות שנצטמקו ונדלדלו במשך הדורות. לשון אחר, ציורי במקצת: לשפוך את היין שהחמיץ, ולשמור את החבית, על מנת למלאותה יין חדש, שיתבשם מריחה הספוג, ויהא ריחו וטעמו כריחו וטעמו של היין הישן .

תוכן דברים אלה וסגנונם אינם תואמים את התפיסה הדתית של העולם הרבני אשר נותן תוקף לנורמות ההלכתיות המקובלות ואינו נושא על דגלו בהכרח אתגר של שינוי והתאמה, ובוודאי לא משימה של סינון, הרחקה ודחיה. עצם הקביעה הנוקבת בדבר החמצה, דלדול והצטמקות של עולם ההלכה היהודית אינה מקובלת על הממסד הרבני ואף אינה לגיטימית לפי תפישת עולמו.

שופטים שונים בבית המשפט העליון ראו עצמם מזוהים עם התנועה להחייאת המשפט העברי. האם הזדהותם זו השפיעה על ביקורתם את החלטות הממסד הרבני אשר אינן בגדר 'יין חדש ?'

בהרצאתי אתן את הדעת על כך, וזאת תוך השוואה בין עמדות שונות של שופטי בית המשפט העליון בעניין זה. אבקש לעמוד על שורשן ומגמתן של העמדות השונות תוך נתינת הדעת לזהות מגבשן .

Dr. Yaacov Shapira is a Director in the Jewish Law Department in the Ministry of Justice. He received his P.H.D at the Hebrew University of Jerusalem and served as the senior assistant to the attorney General of the state of Israel Mr. Elyakim Rubinstein. Dr. Shapira was a Visiting Fellow at the Oxford Center for Hebrew and Jewish studies in 2015. Among his articles: "Conversion (giyur) - Between the Land of Israel and Babylon", Jewish Law Annual (2013); Literary Means as a Tool for Halakhic Expression, The Halakha as Event, (Magnes, 2016); "Conversion in Israeli Law", Conversion in Israel, The Israel Democracy Institute (2018).

Benjamin Shmueli

Law and Religion in the Disintegrating Family Unit: Civil Strategies to Combat the Worldwide Phenomenon of Refusal to Divorce in the Jewish Sector

A consequence of religious Jewish marriage is the problem of divorce (get) refusal in order to extort money from the spouse refused a get. This is a worldwide phenomenon. Rabbinical courts—either private, acting as an arbitrator, which is the situation in most countries, or governmental, acting by virtue of state authority in a small number of countries in the world, including Israel—use their power sparingly, for fear that a get granted as a result of a pressure will be considered coerced and thus invalid. Solutions require thinking beyond religious family law. This is a test case for cases in which a person performs an action vis-à-vis another and causes a negative externality. Society, and the law as an agent of society, are interested in stopping him from performing this negative action.

Several private law strategies may offer solutions. Both sticks and carrots can theoretically incentivize refusers to give a get. The existing solutions are in reality sticks, as the refuser is threatened with various sanctions that affect his pocket/liberty. The aim of civil (tort/contract) suits against the refuser is to trade a proportion of compensation awarded for the granting the get in the rabbinical court. But both tort and contract lawsuits have many problems, some of these are inherent and some result from this type of solution sometimes being contrary to the Jewish law. In several jurisdictions (such as New York State), in which there is civil marriage, special get laws have been enacted. However, this solution cannot work in jurisdictions in which there is no civil marriage, such as in Israel; and even in most states in which there is civil marriage, no such law has been enacted; moreover, such a solution can be invoked only where the court has discretion as to the division of marital property. Accordingly, this situation requires the consideration of additional channels that are more inclusive, quicker and cheaper.

Ostensibly there is room for carrot solutions, which grant the refuser some financial return for giving the get; however, this gives rise to issues such as the morality of awarding a prize for negative behavior or moral hazard. Appropriate answers exist to some of these problems. Nevertheless, the reality is that neither stick nor carrot solutions are capable of solving the problem; each of them has advantages and disadvantages.

This situation gives rise to the creation of combinations of sticks and carrots that may be able to solve the problem. These combinations exploit the advantages of the sticks and the carrots and sift out most of their disadvantages, and also distribute the loss more equally. These combinations, which are partially based on Israeli local, limited solutions, exploit the advantages of the sticks and the carrots and sift out most of their disadvantages, and also distribute the loss more equally, and thus may constitute a worldwide solution to the problem. The main argument will be that the use of a multi-part vertical incentives mechanism, which is partially based on the Israeli solutions, increases efficiency at minimal additional cost; it overcomes a moral problem of "rewarding the sinner" by giving him a carrot and combines in optimal fashion the advantages entailed by activating the sticks and the carrots, and at the same time – insofar as possible – nullifies most of the disadvantages of each of them.

The proposed mechanism will be built primarily on the basis of a few theories from the field of law and economics. A dialogue will thus be created with theories of law and economics in arenas in which they are not applied frequently: that of law and religion in general, and the disintegrating family unit in particular. The conclusion will be also general, i.e., it will be relevant to examining effective incentives to cause a person to desist from an activity that creates negative externalities, and refusal to divorce will serve merely as a test case. The Article strengthens the connection between law and religion, law and economics, and family law – a connection that is not considered to be natural.

Prof. Benjamin Shmueli is an Associate Professor at Bar-Ilan University law school, Israel, formerly a Senior Research Scholar at Yale Law School (2013-15) and a Visiting Professor at Duke Law School (2006-08). He earned his PhD, as well as his other two degrees, at Bar-Ilan University. His research interests are tort law, the intersection between tort law and family law, domestic violence, parent-child relations, comparative law, and Jewish Law. His book, MAIMONIDES AND CONTEMPORARY TORT THEORY: LAW, RELIGION, ECONOMICS, AND MORALITY, co-authored with Prof. Yuval Sinai, is forthcoming in Cambridge University Press. He won a few grants and prizes, among them: ISF—Israel Science Foundation, The Memorial Foundation for Jewish Culture, Israel Institute Research Grant, Schusterman Foundation, and Riklis Prize for studies in Jewish law. Prof. Shmueli has published over 45 articles in the US, Canada, UK, and Israel.

Yuval Sinai

The Modern Research of Jewish Tort Theory as a Story of "Self-Mirroring"

Jurisprudential thought in ancient times was much less abstract in nature then in modern times. Attempts were indeed made to base tort liability in *halakhah* on a uniform principle of *peshiah* (negligence/fault), but these attempts encountered difficulties and drew criticism from many scholars. The talmudic legal tradition, in that it is based on the interpretation of the biblical laws which themselves are casuistic in nature, did not seek a single, abstract principle for all cases of tort liability. Hence, the Talmud was untroubled by the fact that there were different reasons and justifications in relation to the specific cases of liability. Awareness of the differences in thinking between the modern and pre-modern periods, we argue, is important for examining Talmudic and Post-Talmudic sources in light of modern jurisprudential theory, without falling into the trap of "self-mirroring".

An examination of modern 20th century Jewish law scholarship who sought to determine the basis for liability for damages under Jewish law will reveal that they often presented the Jewish law tort theory in a somewhat similar fashion to the prevalent tort theories in the Western world. And to a large extent it may be said that these scholars look at Jewish law tort theory and define it through the prism of the common tort theories in their time in modern Western jurisprudence (the Common law, Roman law and European Continental law). This phenomenon manifests itself clearly in the emphatic position of most scholars of Jewish law, particularly those who were active a century ago, when scientific research of Jewish law was becoming established, but also more modern scholars, who claimed that Jewish law recognizes a *peshiah* fault-based theory only. Identification of Jewish law tort theory with the doctrine of *peshiah* rendered it extremely close to the traditional legal view (in both Roman and Common law), according to which liability was based on the fault of the person who caused the damage – fault-based tort theory. Indeed, some scholars were even explicit in their use of the tort-related expression from the Common law – *negligence*, by virtue of which the liability of the person who caused the damage lies in the fact that he had a duty to guard, or a duty of care, and to the extent that a breach of this duty of care caused the damage, liability is that of the tortfeasor. The views of these modern scholars who sought to base the element of tort liability in Jewish law on the element of *peshiah* alone drew criticism both from several learned modern rabbis, and from other scholars of Jewish law who took issue mainly with the approach of Shalom Albeck. In light of the rabbinic views of the preceding one hundred and fifty years (the *yeshivah* reading) several of these scholars identified a different element as an alternative to the element of *peshiah*, i.e., the element of ownership, and some say ownership and strict liability, by virtue of which liability is imposed for damages caused by a person's property. In our paper, we will first briefly discuss the theory of *peshiah* vs. the alternative theory – the theory of ownership – as presented by the rabbis of the Lithuanian *yeshivot* and some modern scholars. We will then discuss at length the conceptual-exegetical difficulties of the theory of ownership.

Professor Sinai is widely recognized for his expertise in Jewish Law, Tort Law and Civil Procedure. Prior to his recent appointment as President of Orot Israel College, he served as an Associate Professor of Jewish Law, and as the Director of the Center of the Application of Jewish Law (ISMA) at the School of Law at Netanya Academic College. Prof. Sinai has served as a Visiting Professor of Law at a number of universities, including Yale and McGill, as well as Bar Ilan and the Hebrew University in Israel, Prof. Sinai has published three books: Maimonides and Contemporary Tort Theories (Cambridge University Press, 2019), THE JUDGE AND THE JUDICIAL PROCESS IN JEWISH LAW (Hebrew University of Jerusalem Press, 2009) (Heb.); APPLICATIONS OF JEWISH LAW IN THE ISRAELI COURTS (The Israel Bar-Publishing House, Tel Aviv, 2009) (Heb.) and over 25 articles in these areas. His research interests are Jewish law, comparative law, Law and Religion.

Ari Marcelo Solon

Jewish Law and Socialism in Hans Kelsen

In the following paper I look forward to discuss both the influence of the Jewish law and Socialism in Hans Kelsen's thought. Regarding the former we intend to visit the direct and indirect influence of Judaism (Tora and Halacha; Jewish Law), in his thought.Direct influence is assumed by Kelsen in a memorandum written in 1967 by Professor Levontin, which Kelsen answers to some speculations about direct influences of Judaism on his works and on his thoughts himself. Otherwise, indirect influence is postulated by us in the assumption that there is a structural analogy between Jewish Law and Reine Rechtslehre in the later realist phase of Kelsen. Concerning the later, we intend to disclose revolutionary dimension of Kelsen's thought by exposing the dualisms that he attacks in his works, such as: Law and State; Public and Private; Law and Decree and others. Furthermore, we intend toexpose how these critics are tailored with a democratic and social ideology and how its linked with his philosophical method, which has neo-kantian roots but also platonic and aristotelian, as we will demonstrate. In conclusion we seek to demonstrate that Kelsen seems to rely on the same concept of justice that was developed in the Axial Age by the democrats in Greece and the prophets in Jerusalem, to criticise the oppressions performed by the rulers against the people. Key Words: Jewish Law, Hans Kelsen, Socialism, Dualism.

Ari Marcelo Solon is a Professor of Philosophy and General Theory of Law from the Faculty of Law of the University of São Paulo (FADUSP), an institution of which he is currently associate professor. Author with books and articles published in philosophy of law, general theory of law, state theory and semiotics of the old systems of law. He is a member of the Brazilian Bar Association, São Paulo branch, the São Paulo Lawyers Association, the Jewish Law Association and the Brazilian Institute of Philosophy.

Zvi Stampfer

The Concept of Affirmative Action in Jewish Law as a Source of Inspiration for Israeli Law

The democratic legal system has recognized the right of the "negative", formal, equality. However, as reality shows, this right is not an effective legal tool for achieving equal opportunity for all members of the society. For members of groups characterized by unequal opportunities, this negative right is an "empty right". It protects those who have the ability, in a given social structure, to realize their rights alone. Hence the idea of Affirmative Action, which originated in the United States in the mid-1960s, which seeks to complete what the "ordinary" individual right to equality had: to realize justice and equality for the members of these groups as well.

In this paper we will demonstrate that concepts of affirmative action actually began at least hundreds of years earlier. Affirmative action already can be seen in the Jewish legal system of the Mishna and the Talmud. We will focus on women and orphans in the late antiquities and middle ages as a case study. At the age of patriarchal society, economic, cultural and legal life was conducted by men, while women were under the authority of the man - her father or her husband - and received his protection. As a result, the divorcee's or widow's condition was usually bad, but even worse was the status of young orphans. These were easy prey to the teeth of crooks who set their eyes on their money. The idea of "affirmative action" in Jewish law, like the law of modern democracies, is not derived from a voluntary act of kindness, which, according to Maimonides in his Guide to the Perplexed (III:53) "is practiced in two ways: first, we show kindness to those who have no claim whatever upon us; secondly, we are kind to those to whom it is due, in a greater measure than is due to them." It is derived from the right and the legal obligation to make a just and honest law, in order to prevent the exploitation and harm of young orphans, whose purpose is to realize justice and equality.

By studying the attitude towards these groups, we compare the approach of different judicial systems towards affirmative action. Of unique interest is the developed approach towards affirmative action of the Jewish Judicial system. We will then move on to see how the Roman judicial system grappled with the moral value of treating weaker groups within society. Following this we will see how the USA incorporated affirmative action. Our next and final focus will be on the Israeli judicial system, investigating the development of affirmative action in the fledgling new state.

Based on this analysis, we will suggest that Israeli law should base its approach to affirmative action on the early and groundbreaking approach of its predecessors in Jewish law. By doing so, we recommend expanding affirmative action outside of the government and into all areas of society.

Zvi Stampfer is the head of the research authority of Orot Israel college, The editor of Ginzei-Qedem, as well as researcher at the Genizah Research Unit in Cambridge University, and a lecturer at the Hebrew University of Jerusalem.

Suzanne Stone

Suzanne Last Stone is University Professor of Jewish Law and Contemporary Civilization at Yeshiva University, Professor of Law, and Director of the Center for Jewish Law and Contemporary Civilization and the Israel Supreme Court Translation Project at Cardozo Law School. She is also Visiting Affiliated Professor at Tel Aviv University Law School. Professor Stone writes on the intersection of Jewish law and American legal theory. She has held the Gruss Visiting Chair in Talmudic Civil Law at both the Harvard and University of Pennsylvania Law Schools, and also has visited at Princeton, Columbia Law, and Hebrew University Law. Stone is the co-editor-in-chief of Diné Israel, a Journal of Jewish Law co-edited with Tel Aviv Law School. Her work has been translated into German, French, Italian, Hebrew, and Arabic. In Fall 2010, she delivered the Franz Rosenzweig Lectures at Yale University.

Alim Ulbashev

Jewish law and the principle of equality: is compromise possible?

(Reflecting on the Israeli experience)

For almost two millennia Jewish law developed under the conditions when Jews, not having their own statehood, were forced to live in the dispersion. Such situation was not very typical for "traditional" Western legal systems, in which it is considered that the law is an attribute of the state. On the contrary, Jewish law for a long time remained a non-state, communal law, regulating only local relations that arise within a certain, limited part of society, namely among Jews.

Significant changes occurred with the revival of the Jewish statehood in 1948 on the historical Land of Israel. The question arose about the possibility of recognition of halakha as the official source of the Israeli national law. Despite all the discussion of this issue, the current official position of the Israeli Supreme Court, known for its mainly "left" political views, grounds on the fact that halakhic rules are applicable only insofar as they do not contradict legislation adopted by the secular institutions of state power (Knesset, government, etc.). At the same time, this principle is based on the acknowledgment of human rights and their primacy.

The problem of finding a balance between religious and secular law is not scholastic, because it has very clear practical and partly political consequences. Today, Israel is normatively defined as a "Jewish democratic state", and that is why the task is to determine the extent of "Jewishness" and "democracy" of the Israel.

Even supporters of the full application of Jewish (religious) law in Israeli law are faced with the need to resolve one serious problem. It is well known that today in Israel live not only halakhic Jews (e.g., a large Russian-speaking aliya of the 1990's brought to Israel a large number of non-Jews.) In addition, the "blue darkons" today are held by Arabs, Druze, Tatars, etc. Is it possible in such conditions to say that Jewish law is applicable to disputes involving all these citizens? If so, does this mean that Jewish law "ceases to be" Jewish and turns into the "Israeli" one? If not, does this approach violate the principle of equality? How to resolve disputes arising between representatives of different faiths and ethnic groups? Can one talk about the birth of a "new" Jewish law that takes into account the doctrine of human rights?

The author will attempt to answer these and other questions in his presentation.

Alim Ulbasehv is a postgraduate in law at Moscow State University, where he also teaches Russian private law. His Ph.D dissertation deals with the codification of civil law in Israel. He was a visiting student at the Hebrew University of Jerusalem where he studied international and private law. Alim is also a practicing lawyer in Moscow.

Lilac Torgeman

Lilac Torgeman is currently engaged in writing her doctoral dissertation on the writings of Rabbi Nathan Amram under the supervision of Professor Aharon Gaimani. She holds a B.A. in computer sciences and an M.A. in Jewish thought and history. Currently a lecturer at the David Yellin Academic College of Education and a high school teacher, she is also the coordinator of a joint research workshop at the Ben Zvi Institute and the Van Leer Jerusalem Institute, directed by Professor Amnon Raz-Krakotzkin; a member of the 'Kedmata' committee at the Ben Zvi Institute's Center for the Study of Jewish Communities in the East and Spain, and of the Jews of Islamic Countries Archiving Project at the Humanities Faculty of Tel-Aviv University headed by Professor Yaron Tsur. Her research has received recognition in the form of many awards and scholarships.

Yaron Unger

"The Holy One, Blessed Be He, Desires Only Faithfulness"
The Riddle of Fiduciary Duties in Jewish Law

Trust is the cornerstone of the ability of the society to establish social and commercial connections. According to the American sociologist, Talcott Parsons, the fiduciary is vital to the survival and stability of any society.

Indeed, the value of trust well recognized in Jewish literature. According to Rabbi Moshe Hayyim Luzzatto (Italy, 18th century), "The Holy One, Blessed be He, desires only faithfulness" (*Mesillat Yesharim*, Chap. 11).

Modern fiduciary law is designed to promote this value, by imposing fiduciary duties on fiduciaries:

The fiduciary has a duty of loyalty, which requires him to refrain from using the power that was given to him to promote his own interests. The fiduciary must not place himself in a situation of conflict of interest. The prohibited personal interest can be economic, emotional, familial, or even any other matter that the fiduciary is required to represent. In addition, the fiduciary may not obtain any profit or benefit of any kind from his position, whether directly or indirectly, for his personal benefit or for his relatives, friends or partners.

Another duty that modern law impose upon fiduciaries is the duty of disclosure, which requires them to give the beneficiary clear information about his affairs, and to provide him with periodic reports.

In addition, Fiduciaries have a duty of care, which requires them to devote their strength, powers, and professional skills to promote the beneficiary's interests.

The comparison between these restrictions to those imposed upon fiduciaries by the Jewish law reveals a significant disparity.

Indeed, the Tannaitic *Halakhah* prohibited self-dealing, but it appears that the prohibition was meant to prevent harm to the reputation of the fiduciary, rather than to prevent abuse of power. Accordingly, the prohibition applies only to personal acquisition, but the fiduciary may have dealings with family members, friends and business partners.

The duty of disclosure almost did not exist in Jewish law until the 13th century. Starting in the 13th century, probably due to the loss of public trust in fiduciaries, there have been halakhic developments, imposing upon public fiduciaries some of the duties, similar to those imposed on them by modern fiduciary law.

The duty of care did exist in early Jewish law, but it seems that this duty was based on common commercial practices, which later received halakhic recognition by the sages.

What can be the explanation to this disparity? Were the sages naïve? Didn't they recognize the agent problem and the need to protect the beneficiary?

An in-depth examination of Jewish sources reveals that the unique approach of Jewish law is based on different philosophic conceptions about human nature and the role of the law, than those accepted in modern fiduciary law.

Modern fiduciary law adopted the philosophical view, that any human being is Homo economicus, a utilitarian creature who is motivated by one single aspiration – to maximize his personal welfare. According to this view, we should assume that whenever a person is required to represent the interests of another, he

would exploit his position for his personal benefit. Hence, the fiduciary duties are designed to prevent him from doing so.

By contrast, Jewish sources reveal a more complex approach to human nature. Indeed, any human being has a tendency to act for his own benefit, disregarding the interests of others, but as a creature that was created in the image of God, he is also Homo generosus, willing to bear a cost to help others. According to this view, the fiduciary can exploit his position in order to promote his own interests, but he is not forced to do so by his nature.

In accordance with this view, the fiduciary duties were fashioned, not as a means to restrain the fiduciary, but as a means to establish and preserve a culture of trust by the creation of a public atmosphere of trust in fiduciaries.

In the recent years, many Economists argued, that imposing a legal regime that suppresses opportunism upon non-opportunists can be interpreted by them us an insulting message, that in the eyes of the law, they are hidden opportunists. According to those economists, that message can make non-opportunists think that the society expects them to be selfish, and subsequently become selfish, in order to fulfill that expectation (the "crowding out" phenomenon). It can be assumed, that the fear of the "crowding out" phenomenon also contributed to the reluctance of the Jewish law to impose restrictions on the fiduciary which are accepted in modern law.

Dr. Unger Serves as a consultant in Jewish Law and comparative law in the legal department of the Israeli parliament, the Knesset. He is also a senior researcher at the Jewish legal heritage society.

He has a rabbinical Ordination (Semikha) from the Chief Rabbinate of Israel since 1999, He is an Israeli Attorney, registered in the Israeli Bar Association since 2006, and a Ph.D. since 2015.

Dr. Unger was the Director of the research department at the Mishpetay Eretz Institute – The Higher Academy of Halacha and Law, and a senior researcher at the Centre for practical application of Jewish Law at the Netanya Academic Centre.

One of his main Research Interests is trust law and fiduciary law in Jewish and Israeli law. His book, `Trust` (the library of jewish law, 2010, 754 p.) was published in 2010, under the Jewish law for Israel series, edited by prof. Nachum Rakover.

His M.A Thesis was on "The Functional Ownership of The Jewish Law as a Theoretical Basis to Trust Law" (Bar Ilan university, 2010), and his Ph.D. Thesis was on "Fiduciary Duties in Jewish and Israeli Law" (Bar Ilan university, 2015).

Dr. Unger published many assays and opinion papers in Jewish law and comparative law for Knesset members, Knesset Committees and Israeli courts, and edited many Jewish law books.

Stephan Wendehorst

Jewish law and Jewish courts in the Holy Roman Empire. An example of collaborative and contested legal pluralism?

The purpose of this paper is a) to show that Jewish law and Jewish courts operated as one of many facets of the legal pluriverse which constituted the legal order of the Holy Roman Empire of the Gernan Nation in the early modern period and b) to suggest a methodological framework to analyze this constellation. The paper is, thus, devided into two parts. The first part provides empirical examples, court cases, responsa and legal treatises which demonstrate to which extent Jewish law functioned as one of the many particular laws of Roman-German law, the German variant of the Ius Comme valid throughout most parts of Europe until the age of codifcation. The second part tries to explain, what this meant by employing a modified version of the concept of „collaborative legal pluralism“, introduced by the Belgium legal historian Wim Decock to make sense of the legal pluralism that characterized the early modern European order and applying it to the relationship between Jewish law and the legal pluriverse of the Ius Commune comprising Roman Law, Canon Law in Catholic and Protestant variants and a host of particular laws.

The most important empirical evidence for this paper is provided for by two ongoing research projects of the Institute for Legal and Constitutional History at Vienna University: 1) *The Jewish Cases of the Imperial Aulic Council* and 2) *Jewish Law as a Particular Law in the Ius Commune*. The Imperial Aulic Council was one of the two supreme courts of the Holy Roman Empire as well as the main advisory council and executive organ of the Emperors of the Holy Roman Empire pertaining to the office of Emperor. In Vienna there is archival evidence of at least 80.000 court cases dealt with by the Imperial Aulic Council, which makes it one, if not the most important law court of the early modern Ius Commune. At least some 3000 of them may be classified as „Jewish cases“. They comprise a) civil law cases, mostly involving Jewish creditors, but also b) cases pertaining to what modern Continental lawyerws would call public law, e.g. litigation of Jewish communities with corporate status against the half-sovereign territorial states (*Reichsstände*) that made up the Empire and, more frequently the right to protect Jews as a bone of contention between territorial states, and c) a small number of cases, adjudicated by the Imperial Aulic Councillors according to Jewish law.

Stephan Wendehorst coordinates the research cluster “The Jewish Holy Roman Empire – History of the Jews in the Holy Roman Empire and its Successor States“ and teaches early modern history at the Justus-Liebig-University of Gießen as well as legal history at Vienna University. His main areas of research are: Comparative imperial history, university history, history of the British Isles, the spa, the law of nations, public ecclesiastical law, the Ius Commune and humanitarian intervention. He is currently putting together a collection of sources of the early modern positive law of nations and completing a book on the history of the Holy Roman Empire of the German Nation as history of international law.

Steven Wilf

Embodiment, Genre, and Appropriation in the Longue Durée of Jewish Law

Jewish law has often been considered a law without an army or a navy. It fits within the vexed category of what has been called "law without nations" where there is no coercive apparatus to enforce norms. Robert Cover's Nomos and Narrative famously celebrates the absence of coercion through prison and corporal punishment in diasporic Jewish law, and instead—in his mythic reading of the past—claimed that social cohesion created its normative sinews. In contrast, proponents of deploying Jewish law as the normative grounding for a modern Jewish state, such as the late Israel Supreme Court Justice Menachem Elon, have argued that throughout the diaspora until the eighteenth century Jewish courts with significant policing power operated in Christian and Islamic lands. While these two historiographic narratives are clearly at odds, they share one fundamental presumption. Jewish law is identified as autonomous. This paper takes the opposite approach. It argues that Jewish law's distinctive nature is constructed from the ancient to the modern period in the midst of a complex, competing world of plural legalism. It will focus on how the choice of genre—code, Jurist debates, responsa, treatise, glossator commentaries, governance designed like *Mishpat Ivri* for a modern state, and dialectic jurisprudence expressed in religious idiom appropriated, resisted, and oddly conserved, often while claiming as its own, other forms of legalism—Greek, Roman, and modern law—to create the impression of being a legal other. Jewish law is a complex legal system, spanning millennia from its Biblical origins to the present, emerging from creative centers across the globe, punctuated by a vast corpus juris including monumental compilations and codes, and including over three hundred thousand known responsa (legal decisions). It is nearly impossible to characterize such a diverse legal tradition. Nevertheless, this paper seeks to trace a longue durée narrative to underscore the significance of interrogating Jewish law's material embodiment to apprehend its modes of appropriation.

Steven Wilf received both his J.D. and Ph.D. from Yale University. His books include The Law Before the Law, Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America, and Fashioning Global Patent Cultures: Diversity and Harmonization in Historical Perspective (forthcoming with Cambridge University Press). He has been a visiting scholar at Yale Law School, Princeton's Program in Law & Public Affairs, and Harvard's Radcliffe Institute.

Shai Wozner

Legal Theory in the Lithuanian *Yeshivoth*

The last quarter of the 19th century marked an intellectual revolution in Talmud study methods at Lithuanian *Yeshivoth*. The selected students who filled up the study halls invested their time and energy in studying the Talmud and its interpretations in a new way, which redefined the scope of study material and focused on the legal parts of the Talmud. At the same time the new approach advocated the development of an analytical and conceptual method, and the refinement of analytical instruments, which facilitated precise definitions of legal norms and the concepts and institutions of Jewish law. The primary effort of the new approach was no longer devoted to the interpretation of the textual level of the Talmudic dialog, but rather to the understanding of Talmudic legal thinking, to the clarification of legal concepts, and to revealing the legal theory underlying the legal doctrines. The new method did not intend to change or develop the law, but to postulate theories of law. The leaders of the movement were not legislators nor judges or practitioners, but legal theoreticians. They endeavored to analyze and define the positive law and to construct models and legal theories to explain its doctrines.

The new method produced a vast amount of literature, mainly based on the lectures given by the Heads of the *Yeshivoth*. Each lecture was related to a specific Talmudic legal topic, but it didn't stop at the definition of the legal doctrines; rather, it proceeded to reveal the legal infrastructure and to construct theoretical models and theories in order to explain the legal doctrines. This literature includes many original insights and novel theoretical models concerning various issues of Talmudic law, which due to their conceptual nature may enrich western academic legal discourse, suggesting alternative conceptions and theories that could challenge common notions in contemporary legal thought.

In my talk I would like to focus on two topics:

A. Analysis of monetary obligations – Payments is a central institution of civil law. Contracts, torts, and unjust enrichment establish monetary obligations on one party to pay money to the other. These monetary obligations are usually regarded as a conduct obligation to behave in a certain way – to deliver the money to the other party. But Rabbi S. Shkop offers a different opinion, according to which monetary obligations in and of themselves impose no obligations on the debtor to do anything (such as to discharge the debt). They only create a legal status characterized by the subordination of the debtor to the actions of the court or the other party to collect the debt from his assets. In most cases however, there is another obligation to settle debts. Thus there are two different independent obligations concerning debts. The first involves the status of the debtor, which in itself only subjects the assets to seizure, and the second imposes on the debtor a duty to act and settle the debt. In most cases both obligations exist, but there are legal situations in which only the first obligation is applied. This novel analysis is useful to explain some problems of the nature of monetary obligations.

B. The nature of ownership – Ownership is usually regarded as a legal status designating the owner's title, i.e. his bundle of rights of property (which establish a corresponding set of obligations on third parties not to infringe on the right of property by theft or causing damages). The Lithuanian *Yeshivoth* literature proposes a different ontological model that distinguishes between the ontological ownership and the rights of property. According to this view, ownership is a sort of ontological state of affairs characterized by a relationship of union between the owner and the property. This legal status by itself does not depend on the existence of rights of property that the legal system may or may not award. Thus, one can be the owner of a property even if he had no rights of ownership, which seems to be an oxymoron in western legal thought.

Shai Wozner is a senior lecturer in Tel Aviv university faculty of law. He studied many years in Hebron Yeshiva in Jerusalem, received his B.A. in Talmud from Bar-Ilan University, and LL.B, LL.M, and LL.D From the Hebrew University of Jerusalem. His research interests include Jewish law and Halakhic jurisprudence, Talmudic and Rabbinical literature, philosophy of law and criminal law. His book Legal Thinking in the Lithuanian *Yeshivoth* was published by Magnes Press in 2016.

Michael Wygoda

The Recent Supreme Court Ruling on Child Support

Section 3(a) of the Family Law Amendment (Maintenance), 5719-1959, states:

A person is liable for the maintenance of his minor children and the minor children of his spouse in accordance with the provisions of the personal law applying to him, and the provisions of this law shall not apply to that maintenance.

This is one of the rare sections that imports religious norms into the secular Israeli legal system. Accordingly, regarding child support, the court enforces the personal status law that relates to each individual, based on his religion.

This paper discusses the question; to whom does the obligation of child support apply in Jewish law? Does the obligation apply to the father alone, or primarily to the father, or equally to the father and mother?

The background for the following discussion is a precedential ruling issued on July 2017 by the Supreme Court relating to child support for children over six years of age, where the court adopted the third possibility. This was a rejection of a previous ruling by the Central District Court, according to which Jewish law places a heavier obligation on the father than on the mother to provide child support, and accordingly, charged the father with full child support for when the children are with him, and with half the support for the time they are with their mother.

As we will demonstrate, Jewish law sources do seemingly indicate that child support applies only to the father, or at the very least, according to some halakhists, primarily to the father; therefore, on the face of it, both courts were wrong when they did not require alimony from the father alone. As we shall see however, some halakhists believe the mother is also obligated to provide for her children over the age of six, and that this obligation applies to both parents equally.

We will claim that in light of the ongoing dispute on this issue, and in light of the dramatic change in the status of women the Court was justified in adopting the latter position, which correlates with a sense of justice and with the value of equality, from which the court should not deviate without substantive cause.

Dr. Michael Wygoda was born in France 1959, and studied in the "Etz Haim" Yeshiva in Montreux, Switzerland. He immigrated to Israel in 1978 where he studied at Yeshivat Har-Etzion and did his military service. He received a doctorate in Law from the Hebrew University of Jerusalem. To date he has published three books: "Restoration of Lost Property"; "Hire and Loan"; "Agency", all of them being comparative studies of Israeli law and Jewish Law, as well as many articles. Since the year 2000 Dr. Wygoda has headed the Department of Jewish Law at the Ministry of Justice in Jerusalem.

Motti Zalkin

The Emergence of Hebraic Public and Professional Discourse in early 20th century Russian Empire

At the end of the nineteenth century, and not without connection to the founding of the Zionist movement, the Jewish Workers movement and the mass emigration of Jews from eastern Europe to the "New World", there was a revival of Hebrew-nationalist trends among various social and intellectual Jewish circles in the Russian Empire. These trends were part of a wider phenomenon of the spread of national ideology among different local ethnic groups. However, contrary to popular opinion, the concept of nationalism was not necessarily linked to the idea of a nation-state, but also to the possibility of a national-cultural autonomy within the framework of a multinational empire. In the local Jewish context, these trends were expressed, primarily, in the fields of the Hebrew language, literature and education. Thus, already in the first decade of the twentieth century the association "Hovevei Sfat Ever" was founded, which a few years later was transformed into the "Tarbut" education network. This cultural momentum gained further expression with the establishment of the Hebrew Law Society in late 1917, some of whose founders were also among the founders of the "Tarbut" education network.

In my lecture, I will discuss the background of this phenomenon, in its various social, cultural and political aspects. Who were the people behind this trend? Can we point to a common denominator regarding their socio-economic background? What was their connection to the local Jewish enlightenment circles and its ideology? Did they share a similar political, religious and cultural worldview? Why did this phenomenon take place mainly in the empires' big cities, such as Odessa, Moscow and St. Peterburg, but not in the major Jewish demographic centers located in the empires' Northwest regions? The answers to these questions, which I tend to present in my lecture, enable a better understanding of both the phenomenon of "New Hebrewness" in the Russian empire during this period of time, as well as the motives and the processes behind the establishment of the Hebrew Law Society.

Mordechai (Motti) Zalkin is a professor of modern Jewish history in the Jewish History department at Ben-Gurion University of the Negev in Israel. His special field of interest is the cultural and social history of East European Jewry until World War II. Among his publications: The Jewish Enlightenment in the Russian Empire – Social Aspects; Modernizing Jewish Education in Nineteenth Century Eastern Europe; Rabbi and Community in the Pale; "The concept of "East European Jewry", and "Childhood in traditional East European Jewish society".