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HILKHOT MEDINAH —
 HALAKHA AND THE MODERN STATE OF ISRAEL

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Thesis submitted in partial fulfillment
 of the requirements for Ordination

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DIGEST

In the 1950s, R. Eliezer Waldenberg of Jerusalem published a three-volume work titled, *Hilkhot Medinah*. In it, he tried to create a type of halakhic constitution for the modern state of Israel. In Waldenberg's eyes, as well as in the eyes of many in the Orthodox Zionist (Mizrachi) camp, the creation of Israel was possible only *h'eizat hashem* and a proper modern state could be considered legitimate only if *medinat yisrael* was governed by *torat yisrael*. *Hilkhot Medinah* is Waldenberg's attempt at framing the modern outcome of Israel in Jewish history, how to use Torah in the state.

Waldenberg argued against those secular and religious Zionists who felt that by giving religion a governmental status, religion was weakened. He felt that anyone who comes to separate the body politic of Israel from Torah comes to restrict the soul. Torah, for Waldenberg, provides *tikkun ha-nefesh* — fulfillment of the soul, through knowledge and belief, and *tikkun ha-goof* — fulfillment of the body, through societal structure. When Torah is the guidebook for the state, Jews live in a society which allows for personal growth and prosperity. Torah, Talmud, the Codes, and *t'shuvot* provide the basis for determining the proper path for the modern state and are used extensively with each issue considered in *Hilkhot Medinah*. Modern political theory and foreign governmental systems were of no interest for Waldenberg. He considered those who followed foreign ideologies and subscribed to non-Jewish political theory to be like idol worshippers. Waldenberg's treatise was a theoretical approach to fuse the *halakha* with the state, thus making the two compatible. He was not alone in his attempt. From the late 1940s to the early 1960s, articles and documents discussing the possibility and necessity of creating a state based on *halakha* circulated among the religious and secular communities. Waldenberg and others engaged in such writing as a way to explain what Jewish statehood would look like if based upon *halakha*.

This thesis strives to present the work of one of the great halakhic scholars of this

century who outlined the historical and halakhic context for the relevant issues surrounding the legal structures necessary for a Jewish state.

Chapter One provides a few introductory remarks. *Chapter Two* presents the historical context in which Waldenberg wrote *Hilkhot Medinah*. *Chapter Three* analyzes the individual introductions to each individual volume of *Hilkhot Medinah*. A translation of each introduction follows. *Chapter Four* takes each of the nine sections from *Hilkhot Medinah* Volume One, Chapter One — Judges and Officers — and introduces each section by way of analysis. Following the analysis is a translation of the respective section. *Chapter Five*, using the same format as Chapter Four, deals with the four sections of *Hilkhot Medinah* Volume Three, Chapter One — Toraitic-Political Rule in Israel. *Chapter Six* contains some concluding remarks.

ACKNOWLEDGMENTS

We read in *Pirkei Avot* 1:6, *aseh l'kha rav* — "get yourself a teacher," which is a lesson in the value of education. I have taken this lesson to heart and have been blessed to stand as a student of some of the finest teachers for which a pupil could ask. I began my thesis project knowing that I wanted to work with text, so my first thank you goes to Dr. Mark Washofsky who has served as my advisor. His guidance, depth of knowledge, facility with text, and humor have served as a great inspiration for me and literally have made this thesis possible. Working on a thesis which involved Eliezer Yehudah Waldenberg was an idea implanted in my brain by the first rabbi I ever knew: Eliezer Waldenberg's nephew, Shelley Waldenberg. Thank you Shelley for your support and ideas. I began working on this text with a few teachers in Israel: Rabbi Dov Berkovits, Yotam Shoham, and Ada Shpitzer helped me tremendously in approaching the text and seeing into what initially seemed an unconquerable wealth of words. My family deserves a great deal of appreciation for listening to me and loving me through this entire process. It is on account of the merit of my ancestors — recent and ancient — that I have had the great honor to discover, explore, and connect with the sacred texts of our people.

I dedicate this work to my wife, Marsha, who is my everything, and my son, Eitan, who is the greatest thing ever.

May God's light shine over Zion and all the people Israel.

Chapter One Introduction

"For the religious Jew, therefore, the question of the significance of the State of Israel, is no mere academic exercise. Faced by the most unusual and exciting events to have occurred to our people in close to two millennia, we feel in our bones that these events are revelatory of something, that the God of History is trying to tell us something."¹

During the first half of the twentieth century, a fervor grew among the Jewish community as the reality of a Jewish state, or state of Jews drew near. Diverse points of view existed among diverse segments of the community. Even among specific groups, there were varying ideas about what the return to and reestablishment of a large Jewish community in *Eretz Yisrael* meant. For many in the religiously observant community, the establishment of the state of Israel was seen as nothing short of *atchalta d'geulah* — *the beginning of the Redemption*. By speaking in these terms, those engaged in the debate surrounding the legal structure of the modern state of Israel could turn in only one direction: to Torah.

Religious Zionists considered the need to use Torah in crafting the legal system for the modern state as quintessential to their playing a role in living as Jews in a Jewish state. Twentieth century Jews could find precedent in the Hebrew Bible where the example of the ancient Hebrews demonstrates the creation of political law and justice as preceding the Jewish state. Shlomo Goren wrote, "the Torah preceded nationhood, both conceptually and in chronological order. For our nationhood was forged on the spiritual and ethical foundations of the Torah, and in the light of its goals and vision. Thus, any separation between religion and state detracts from the nation's completeness and oneness and deprives

¹Shubert Spero, "The Religious Meaning of the State of Israel," in *Religious Zionism: After 40 Years of Statehood*, edited by Shubert Spero and Yitzchak Pessin (Jerusalem: Mesilot, Society for the Advancement of Religious Zionism, 1989), 41.

the state of its special meaning.² He wrote further that "if we have merited the first three basic manifestations of redemption — conquest of the land, restoration of the kingdom of Israel, and the ingathering of the exiles — we are, then, obligated by the *halakha* and the rules of logic to employ all the means of the state in order to ensure the observance of the Torah."³

By causing the discussion of the significance of the modern state of Israel and its legal, social, and political structures to be based upon redemption and Torah (*halakha*), Goren and many key religious figures who preceded him, elevated the actions of the Zionists to the realm of the sacred. They placed the events surrounding the creation of the state of Israel on a level which created a debate with no easy solution and remains unresolved even today.

Rabbi Eliezer Yehudah Waldenberg was a member of the rabbinic community who felt the grandeur and holiness of the moment in 1948. He saw the formation of the modern state as a moment which called upon the rabbinic community to heed the call of Torah which commanded the Israelites to abide by the Torah *throughout your generations*. The time was ripe for uniting the newly gained sovereignty of the Jewish homeland with a new exploration of Jewish text to apply to the daily life of every Jew living in the land of Israel. Waldenberg drafted a three volume treatise, *Hilkhot Medinah — the Laws of the State* — to demonstrate the historical and halakhic basis for the partnership of the religion and state. His first volume appeared in 1952, the second in 1953, and the third in 1956. *Hilkhot Medinah* was an attempt by Waldenberg to utilize the *halakha* in order to shape Jewish law in the modern state. During the late 1940s and into the early 1960s, a small band of dedicated religious Zionists made every effort to present the issues surrounding and ways of creating a modern *halakha* for Israel.

²Shlomo Goren, "Problems of a Religious State," in *Religious Zionism: An Anthology*, edited by Yosef Tirosh (Jerusalem: WZO, 1975), 184.

³Goren, pg. 186-7

Eliezer Yehudah Waldenberg, was born in 1912.⁴ His father, Jacob Gedaliah Waldenberg, was born in Lithuania. The elder Waldenberg made *aliyah* to Jerusalem where he married Rachel Rivlin of Jerusalem, and connected himself with a family who dates itself over fifteen generations in the holy city. Jacob and Rachel Waldenberg had five children. Eliezer is the second youngest and the sole surviving child of his parents' union.

Eliezer Waldenberg is one of the great halakhic minds of this century and is counted among the *acharonim*. He is perhaps best known for his eighteen-volume compendium, *Tzitz Eliezer* which answers questions that deal with the range of issues life presents. He has served on both the Tel Aviv and the Jerusalem District Rabbinical Courts, most recently as the Chief Justice of the Jerusalem District Rabbinical Court. Although prolific on halakhic issues ranging from Shabbat laws to tithing, labor strikes to the holiness of the *Kotel*, Waldenberg is perhaps most distinguished in his writing on medical matters. He holds a long-standing relationship with Sha'arei Tzedek Hospital in Jerusalem, teaching classes and davening in their *beit k'nesset*. In 1975, he received the Rabbi Maimon prize and in 1976 the Israel Prize for rabbinical scholarship. During the early years of the state, he was a leader in applying *taimud torah* to the religious Zionist fervor which sought to unite *halakha* and the modern state.

This thesis strives to present the work of one of the great halakhic scholars of this century who outlined the historical and halakhic context for the relevant issues surrounding the legal structures necessary for a Jewish state. He sought to develop a means by which Torah (written and oral) could be the solution for the debate surrounding religion and the modern state of Israel. Chapter Two presents the historical context in which Waldenberg wrote *Hilkhot Medinah*. An analysis and translation of selected portions from *Hilkhot Medinah* follows in Chapters Three, Four, and Five. Chapter Three contains an essay

⁴Some sources say 1916.

discussing the introductions to each of the three volumes, followed by the translation of the three introductions. Chapter Four takes each of the nine sections from Volume One, Chapter One — Judges and Officers — and introduces each section by way of analysis. Following the analysis is a translation of the respective section. Chapter Five, using the same format as Chapter Four, deals with the four sections of Volume Three, Chapter One — Toratic-Political Rule in Israel. Chapter Six contains a few concluding remarks.

Many vital aids were used in translating the selected portions of *Hilkhot Medinah*. Where Waldenberg cited previously translated works, the following sources were consulted and are quoted: *Tanakh* (Koren and the New Jewish Publication Society translations), Talmud (Soncino and Jacob Neusner), Rambam (Yale translation of *Mishneh Torah*, Pines translation of the *Guide to the Perplexed*, and Chavel's translation of *Sefer Ha-Mitzvot*), Ramban (Chavel's translation of Torah commentary), *Or HaChayim* and *Aqaydat Yits'haq* (Eliyahu Munk), *Sefer Hahinukh* (Charles Wengrov), *Midrash Rabba* (Soncino Press), and *Sifre* (Reuven Hammer).

Chapter Two: Historical Perspective

In the first half of the twentieth century, as Zionism brought Jews together in the creation of the modern Jewish homeland, religious Jews joined their brethren in helping build the state. The religious contribution was in part to be one of legal justification and structure for the people living in the land of Israel. However, upon assessing the task itself, the idea was not easily translated into action.

Some among the religious community envisioned the creation of a theocracy for the modern state of Israel. In a theocracy, God is effectively the governor of the state and rules by way of divine legislation. God's law dominates over anything proposed by man. The priests (or rabbis) of this holy community serve as the administrators and determine the practice and enforcement of the law based on their understanding of it. The idea of a theocracy can be traced to the time of Ezra and the period after the Babylonian exile, which marks the transition of the Hebrew nation from being a political entity into a holy nation. The combined efforts of spiritual leaders and foreign overlords led to "the authority of the Torah (being) substituted for the destroyed political authority, and this meant, in historical effect, the authority of the *halakha*."¹ Ezra, by means of the king's decree, received authority to administer justice: *And whoever will not do the law of thy God, and the law of the king, let judgment be with diligence executed upon him* (Ezra 7:26). Gershon Weiler, in his book *Jewish Theocracy*, uses this moment in Israelite history to demonstrate the beginning of a project to convert the Hebrew nation into the Jewish community. The "project" began with King Artaxerxes and was completed by the Roman general Titus. Without political sovereignty, the Jewish people could be Jewish and not worry over political issues.²

¹Gershon Weiler, *Jewish Theocracy*, (Netherlands: E.J. Brill, 1988), 114.

²*Ibid.*, 122.

Following the destruction of the Second Temple, the rise of halakhic activity came about as creators of the oral Torah deemed their own words more authoritative than the very Torah itself. No longer having either a state or even a fixed place of worship, "*halakha* came into being as the code of anti-politics."³

As the Jewish community spread out from the land of Israel, the community maintained a belief in *halakha* and a life based on Torah. In order to sustain and enforce a life regulated by Torah, each individual had to agree to follow the laws and decrees administered by the community. Moshe Silberg points out in his book, *Talmudic Law and the Modern State*, a quality of talmudic law "which is uniquely its own: its major epoch of development occurred at the time when an autonomous Jewish state had ceased to exist and it had to operate without the recourse to force in order to gain conformity to its demands. It based its authority on religious and moral grounds. It had to rely on consent."⁴

Eliezer Berkovits defines *halakha* as "the application of the Torah to life. But since there is no such thing as life in general. Torah application means application to a specific time in a specific situation. The result is a process called Halakhic Judaism."⁵ At times in Jewish history, *halakha* has adapted itself in order to save itself. On account of *Emigdar milta* — to fence off a threat to the existence of the Jewish people, or because of *ho'ra'at sha'ah* — the urgency of the hour, sages of various generations have had to apply the *halakha* in ways which would ultimately preserve Torah. Also at issue is the possible limitations of *halakha* vis à vis unforeseen problems. Joseph Albo wrote in his *Ikkarim*, "The Torah could not be complete in such a manner that it should be adequate for all times. God revealed to Moses orally some general principles, only briefly alluded to [i.e., in

³Ibid., 130.

⁴Moshe Silberg, *Talmudic Law and the Modern State*, translated by Ben Zion Bokser, edited by Marvin S. Wiener (New York: Burning Bush Press, 1973; original publication, 1961), vii.

⁵Eliezer Berkovits, *The Nature and Function of Halakha* (New York: KTAV, 1983), 1-2.

the Written Torah], so that, with their help, the sages in each generation may deduce the new particulars."⁶ Through further interpretation, *halakha* remains a way of life and enables the teachings from Sinai to be transmitted to the Jewish people throughout the ages.

Prior to 1948 and soon after the formation of the modern state of Israel, many scholars and researchers were unable to use the *halakha* for guidance in drafting a legal structure and basis for the state since the *halakha* grew out of an assumption that those who were following the *halakha* lived under another nation's rule. The rise "of the Jewish national movement and its culmination in the founding of the state of Israel presented fundamental challenges to *halakha*, the system of traditional religious observance and rabbinic law."⁷ For, *halakha* operates best in a Gentile world where there is limited Jewish self-government. In the case of "limited autonomy there is, in the hands of the rabbinic judges as much power as they need to enforce *halakha*, without having to seek that power from their own people. Their powers are conferred from the outside and, as such, they cannot be challenged by members of the community."⁸ In order to take that power, which had been in the hands of the Gentile-host government, and transfer the power to the Jewish (non-religious) legislators of the modern state of Israel, that "secular" legislator necessarily sublimates the state's own legal creation to the halakhic system, which "claims to speak on behalf of the Master superior to all."⁹

Under foreign governance, the halakhic system exists side-by-side with foreign laws based on the principle of *dina de-malkhuta dina* — the law(edict) of the kingdom is law. Jews live under the jurisdiction of both foreign and Jewish law with the acceptance of the

⁶Quoted in Berkovits, 71.

⁷Mark Washofsky, "Halakhah and Political Theory: A Study in Jewish Legal Response to Modernity," *Modern Judaism* (October 1989), 289.

⁸Weiler, 145-6.

⁹Ibid., 313.

malkut of Gentiles as a "brute fact." The halakhic system sets the "limits within which obedience is due to the state."¹⁰ During the period from the destruction of the Second Temple until 1948, and still to this day for Jews outside the land of Israel, the *dina de-malkhuta dina* principle is consciously a case of bowing to superior force. In a word, "the principle is invalid if the Gentile law is in conflict with the Torah but valid when it is not... the *dina de-malkhuta dina* principle is valid where the Torah is silent. And as we have seen, it is mostly silent about the state."¹¹ Herein lies the great difficulty for the sages and Torah scholars of the twentieth century: how does one deal with the reality of the state of Israel and a *halakha* which is unable to internalize the Jewish state? The *halakha* assumes no Jewish government and is unable to "accept the state positively for this would entail change in the whole conceptual basis of itself. And it cannot accept the Jewish state with the same acquiescence with which it accepts the Gentile state for that would involve accepting the validity of the *dina de-malkhuta dina* principle for the Jewish state, this in turn would entail that the government of the Jewish state is exempt from the authority of *halakha* and is entitled to issue rulings and make rulings contrary to, or at least independent of *halakha*."¹² Some Mizrahi rabbis were willing to use the *dina de-malkhuta dina* principle as a theoretical basis for a Jewish state. While all Jews enjoy a shared ownership of the land of Israel, they may enter into a contractual relationship with their "king" or Jewish regime. The king enjoys sovereignty and the people have a governmental structure which can be understood halakhically. As long as the people agree to the format, the king has power to levy taxes and enact ordinances which promote the public welfare. This type of an arrangement parallels the *dina de-malkhuta dina* principle whereby the Gentile government

is now represented by a Jewish sovereign.¹³

Reconfiguring the *halakha* to adapt to the modern reality exposes how unnatural the juxtaposition of a Jewish state and a state of halakhically observant Jews ironically is. The leading halakhists in the first half of the twentieth century did not expect to witness a modern state in their day and most did not even attempt to transfer *dina de-malkhuta* to a Jewish setting. Explaining the impossibility of the *dina de-malkhuta dina* principle in the land of Israel, Ya'akov Blidstein wrote in an essay, "The State of Israel in Halachic Thought" that "the principle of *dina de-malkhuta dina* therefore cannot apply where the regime is Jewish and the land is Israel. Eretz Yisrael is the property of Jew, who need not have the approval of the regime in order to live there. In the wider sense, the relationship between Jew and Jewish monarch is not based on the negative relationship where the inhabitants surrender themselves to the power of the authorities."¹⁴ Thus, an alternative route would need to be found to justify the creation of a Jewish government in the land of Israel.

Upon examining the *Tanakh*, "the only form of central national government that can be found... and is halachically confirmed is monarchy."¹⁵ The appointment of the king, as it appears in the *Tanakh* and in later halakhic codes "signifies the existence of a political system combining administrative and spiritual functions in accordance with the principles of the Torah, as expounded by our rabbis (*Sanhedrin* 20a). From Maimonides' point of view, the Israelite kingdom never came to an end, though political factors and exile did put an end to it, in fact. In principle, however, Judaism never accepted the legitimacy of foreign

¹⁰ Washofsky, 294-5.

¹¹ Ya'akov Blidstein, "The State of Israel in Halachic Thought," in *Religious Zionism: After 40 Years of Statehood*, edited by Shubert Spero and Yitzchak Pessin (Jerusalem: Mesilot, Society for the Advancement of Religious Zionism, 1989), 263.

¹² Joseph Grunblatt, "Halacha and Democracy," in Spero and Pessin, 312.

¹³ Ibid., 164.

¹⁴ Ibid., 167.

¹⁵ Ibid., 217.

oppression and Diaspora existence.¹⁴ The law of sovereignty (*mishpat ha-melukhah*) which developed from the Israelite monarchy contains the administrative and coercive powers necessary for a sovereign governmental body — a critical point during the later debates waged by religious Zionists on the nature of a constitution. Rabbi Shaul Yisraeli, one of the leading religious figures in the discussion surrounding the nature of a Jewish government based on *halakha*, brought forward in the late 1940s "a suggestion made in 1916 by R. Avraham Yitschak Ha-Kohen Kook, the 'rabbi' *par excellence* of Orthodox Zionism, that in the absence of a Davidic King the powers normally invested in the crown revert to the nation as a whole."¹⁵ The nature of "Rabbi Kook's contribution, which was expounded upon by Rabbi Yisraeli, perceives *malchut* in the original sense of monarchy to be the political expression of the 'nation,' and as the authority which originates from the people. In the absence of such *malchut*, the people reserve the right to administer such authority. Returning the political authority to the people gives halachic legitimacy to the Israeli government. The position taken by Rabbi Kook replaces the specific content and historic concept of *malchut* with a new form where 'legitimate authority' is a new label for *malchut*, when authority is anchored in the will of the entire people."¹⁶

Kook's comment was one of the earliest recorded regarding the creation of a halakhically-valid means of explaining the creation of a new Jewish sovereignty in the land of Israel. Individual rabbis, like Kook, helped to lay the ideological foundations for religious Zionism. Yehudah Alkalai, Zvi Hirsch Kalisher, Samuel Mohilever were among a group of rabbis and lay leaders who took the banner "*Eretz Yisrael, Am Yisrael, Al-pi Torat Yisrael* — the Land of Israel, the People Israel, according to the Law of Israel" and created the Mizrahi

party as a means to give a formal voice to the religious Zionists. Their platform, drafted in 1904, stated that

1. The Mizrahi (sic) is an organization of Zionists standing on the basis of the Basel program aiming for the survival of the Jewish people. The Mizrahi sees the possibility for the survival of the Jewish people in the observance of the Torah and the Commandments and in the return to the land of our fathers.

2. The Mizrahi stays within the Zionist Organization, fighting for its views within the organization, but it is creating a separate organization to attend to its religious and educational work.¹⁷

The Merkaz Olami, a grouping of Mizrahi and Hapoel HaMizrahi, reiterated the Mizrahi's earlier points and drafted a platform in 1938 as they tried to create a coalition with the more right-wing Agudat Yisrael. The 1938 document stated

1. The constitution (of the new state) shall be based on Torah Law. With this object in view there shall be set up a Council of experts in Jewish law, who recognize the sanctity and moral values of Jewish jurisprudence.

2. A Chief Rabbinate with local rabbinical courts, financed from the government budget, will determine all religious issues and decide on matters of personal status, appertaining to the Jewish citizens.¹⁸

While Mizrahi advocated Sabbath observance and Jewish jurisprudence, "disappointment with the development of the religious character of the Yishuv led some

¹⁴Yeshayahu Ayad (Wolfsberg), "Reflections on a Jewish State," in *Religious Zionism: An Anthology*, edited by Yosef Tirosh (Jerusalem: WZO, 1975), 135.

¹⁵Washofsky, 295-6.

¹⁶Blidstein, 261.

¹⁷Gary Schiff, *Tradition in Politics: The Religious Parties of Israel* (Detroit: Wayne State University Press, 1977), 39.

¹⁸Moshe Ussis, *Separate Ways: In the Religious Parties' Confrontation of Renascent Israel*, translated by Barry Mindel (Israel: WZO, 1987), 70.

Mizrachists toward greater unity with Agudat Yisrael.²¹ The switch to Agudat Yisrael was a result of the influence of rabbis who believed orthodox Jews should remain loyal to other orthodox Jews and not to the radical non-religious Zionists. The Agudah "viewed the state with mixed emotions. Like Mizrahi and ha'Poel ha-Mizrahi it desired a reconstituted Jewish state run by Torah law,"²² but it went further than the Mizrachis by calling for a "Council of Torah Sages" which would stand as the ultimate authority in the land. By placing the clerical authority above all else, Agudat Yisrael made clear its opposition to "the secular bases of the quasi-government of the Yishuv, and later, of the State of Israel."²³

In 1938, the Council of Torah Sages declared "the People of Israel is tied to eternity with its breath and soul to this land. The existence of a Jewish state is only conceivable if the Law of the Torah is recognized as the fundamental constitution, and the rule of the Torah is recognized in its direction. A Jewish State, which does not rest on the foundation of the Torah and its laws, is perfidious to Israel's sources, denying its very essence and authentic character, and undermines the basis of our people. Such a state cannot be designated a Jewish state!"²⁴ Similar to the proposals put forward by Mizrahi, two leading figures in Agudat Yisrael advanced proposals regarding a constitution for a Jewish state. Dr. Yitzhak Breuer suggested the idea of a Torah Ministry, which would be headed by an observant Jew. Breuer wrote that the Torah law is the law of the Jewish people and is valid as such. The Torah's validity "is not dependent on the approval of the state's citizens,"²⁵ and the Torah

must govern all aspects of life, including the form of government and its judicial system.²⁶ Rabbi Moshe Blau, agreeing with Breuer, stressed the immutability of the Torah's authority over public life. He proposed parallel courts: rabbinical and general. The rabbinical courts would deal with personal status and civil matters (if the parties agreed). The general courts were to deal with civil matters but "would be obligated to conform to 'the basic rules of Torah law' such as rules governing the competence of witnesses."²⁷

Although the Mizrahi and Agudah tried to forge a coalition in 1938, their proposal was ultimately rejected by extreme Agudists. Moshe Unna sees the effort put forward by the Agudists as half-hearted and writes that the authors of the Agudah position never really considered the possibility that their proposals would be accepted. Unna goes on to point out, in his discussion of the division between religious parties, that the failure of the Agudists and Mizrahi to come together in 1938 was "one of the major causes of the weakened religious influence on major developments. The Jewish Agency took advantage of the conflict between the Mizrahi and the Agudah to disregard the traditional approach to national problems."²⁸

While the issues of statehood and religion were clear for the Agudists, the Mizrachis felt torn. From the very outset, "the Mizrahi had to engage in a two-fold struggle: against Zionists who had forsaken the banner of Torah, and against Orthodox elements that opposed the Zionist endeavor."²⁹ Understanding the reality of modernity and the forging of a modern Jewish state, Mizrahi wanted to work with non-religious Jews, even though they disagreed with secularists who had abandoned Torah. Mizrahi knew that if they abandoned the debate

²¹Schiff, 48.

²²Ibid., 80.

²³Ibid., 70.

²⁴Unna, 69-70.

²⁵Ibid., 77.

²⁶Menachem Elon, *Jewish Law: History, Sources, Principles*, volume 4: *Jewish Law in the State of Israel*, translated by Bernard Auerbach and Melvin J. Sykes (Philadelphia: JPS, 1994), 1613.

²⁷Ibid., 1614.

²⁸Unna, 71.

²⁹Aviad, 131.

altogether, they would lose any influence. At the same time, they knew that by engaging in the legal discussions, they could save the state and people from total assimilation and degeneration.³⁰ The Mizrachis also fit well into the Zionist arena which strove for the unity of Israel. The Religious Zionist leadership also "insisted on an all-encompassing united Jewish people as a necessary condition in the work of national upbuilding."³¹

In the late 1930s, as the reality of the Jewish state drew near, the religious community failed to respond accordingly. When the issue of whether or not to draft a constitution was raised, the Mizrachi abstained as they neither wanted to leave the religious community nor show support for the secular community by accepting a non-Torah based constitution. However, in abstaining on the constitution issue, the religious Zionists "displayed their inability to foresee the future and a disregard of public opinion."³² Moshe Unna's father, R. Isaac Unna, wrote a letter to then Chief Rabbi Herzog calling upon the religious community to act given the imminent arrival of a Jewish state. If the religious community failed to act, Unna feared that the leftists would control everything. Unna called on Herzog to assemble a commission to deal with issues ranging from the Sabbath to *kashrut*, Jewish jurisprudence to public works. Any delay would allow the secularists to "engage secular lawyers, who will prepare a constitution, as they see fit, based on English, Turkish, and Roman law, with complete disregard of Torah and Jewish tradition."³³ Moshe Unna reports no "tangible results," given the outbreak of the Second World War and the lack of any spiritual or political leadership which had the foresight and competency to draft a serious halakha for a modern state. Unna wrote at the time "of the prevailing mood, 'All in all, we are not prepared to digest the psychological significance of the radical changes the

³⁰Unna, 30.

³¹Yosef Tirosh, "The Essence of Religious Zionism," in Tirosh, 30-31.

³²Unna, 208.

³³Ibid., 73.

establishment of the State and our independence will have on us. We have hardly begun to consider the halakhic aspect, the spiritual content of the State-to-be, and, above all, what obligations will be imposed on us, on our return to the comity of nations. Our response seems to be: Let us cross that bridge when we reach it. This may be temporarily mollifying, but it blocks our minds to planning our future."³⁴

The total lack of preparedness, on the part of the religious community, proved detrimental to the religious Zionist's influence on the structure of the government and its laws. Regrettably, only a small number of halakhists were willing to look into the source of *halakha* to create a legal justification and structure for the modern state. Writing on the legal response to modernity in the pre- and early state days, Mark Washofsky writes, "the proper response (in the eyes of the Mizrachi halakhists) to the events of 1948 was not the creation of a 'new' *halakhah* or halakhic process but rather the extension of the existing legal corpus into the arena of national sovereignty through the traditional techniques of rabbinic reasoning and textual analysis."³⁵

The revival of Jewish culture in the land of Israel had multiple meanings for the Jews who were actively engaged in creating the new state. For the religious community, the "revival does not mean the rise of a new people with a new culture, but the rebirth of an ancient people with a time-honored culture — the Torah, untouched by the hands of reformers and expurgators."³⁶ As opposed to other Zionist groups which looked to Western culture and European thinkers for influence, the religious Zionists were wholly concerned with using Torah as the guide and source of all inspiration. Yosef Tirosh writes, "it is unthinkable that we should tamper in any way with our unique Jewish way of life."³⁷

³⁴Ibid., 74.

³⁵Washofsky, 290.

³⁶Tirosh in Tirosh, 15.

³⁷Ibid., 15.

One of the earliest attempts to apply Jewish law to practical life was the organization of *Mishpat Ha-Shalom Ha-Ivri* (the Jewish court of Arbitration) in 1909-10 in Jaffa. Although failing to represent an adequate continuation of the Jewish legal tradition, the *Mishpat Ha-Shalom Ha-Ivri* does serve as an example of the result of a group of individuals who felt that a Jewish state should have a Jewish legal system.³⁸ Also interested in the growth of a Jewish legal corpus which would find active use in a modern state, Rabbi Meir Bar-Ilan wrote, in 1927, "we must aim at a state of affairs in which the growing number of persons living in *Eretz Yisrael* who are actively concerned with the basic problems of our community and its political, social and cultural aspirations are at the same time eminent scholars with a firm Torah basis and with a firm intellectual basis."³⁹ Rabbi Yehudah Leib Maimon was one of a few religious Zionists who believed the best Jewish legal institution for the modern era was the Sanhedrin. Maimon called upon his generation to rise to the challenge which had not confronted the rabbis nearly 2,000 years. He believed the Sanhedrin was the sole institution which could adequately integrate state and religion. Maimon felt it was "encumbant (sic) upon them (the current generation) 'to rise to a height which they have not attained for many centuries.' This task could not be accomplished by any rabbi or group of rabbis, but rather by a supreme and authoritative Halakhic institution. The time for a revival of a Sanhedrin had therefore arrived, he concluded."⁴⁰ After the creation of the state, Maimon organized a conference in 1950 in Tiberias and called the rabbis in Israel to attend. His ideas regarding the Sanhedrin were met with silence as they were considered too revolutionary. The great majority in the rabbinic community were unwilling to step as far as Maimon suggested with his ideas of the Sanhedrin.

³⁸Eilon, 1592-96.

³⁹Rabbi Meir Bar-Ilan, "Achievements and Aspirations," in Tirosh, 107.

⁴⁰S. Zalman Abramov, *Perpetual Dilemma: Jewish Religion in the Jewish State* (New Jersey: Associated University Presses, 1976), 131.

Maimon, as editor of the journal, *Sinai*, was able to give voice to his beliefs — regarding Torah and the modern state. He presented his words and found others who were willing to share their vision of Torah and the modern state in this journal. Notably, one finds such figures as Yisraeli, Uziel, Waldenberg, Bar-Ilan, Kook, Shragai, Urbach, Wolfsberg, Reines and other key thinkers in the Mizrahi circle. In his Dec. 1947-Jan. 1948 edition, which appeared immediately following the U.N. approved Partition Plan, Maimon dedicated the entire volume to the issue of religion and the state. The time was critical for amassing a following for creating a state based on Torah. While precious years had been lost with no formal toraitic constitution or rejuvenated *halakha* being presented by the religious parties, the winter of 1948 seemed as good a time as any for finally launching a serious attempt to merge the Torah and the State. His leading editorial contained a vision summarized by the word: "the Jewish state must be established upon the foundation of the Jewish religion, that is, upon the Torah of Israel."⁴¹ He speaks of the Torah encompassing the values and obligations in the relationship man has with not only his Maker but also his neighbor — in terms of the state. The Torah, Maimon explains, is designed to set the nation of Israel apart by bringing religion and the state together. He writes, "the house of Israel is not as all the nations," and if among the other nations religion and state are two spheres, two separate forces each deriving sustenance from its own field, among us, the Jewish people, the two are intimately connected with one another, and whoever wishes to sever them threatens to destroy the very soul and spirit of the nation. Religion and the state both derive their sustenance from a single source — the Law of the living God, which is also the Law of Life that speaks of religious goals.⁴² Seeming to respond to Theodor Herzl's *Der Judenstaat*, Maimon writes, "we need not merely a 'state of Jews' but a 'Jewish state' — a state which

⁴¹Yehuda Leib Maimon (Fishman), "*Ha-dat v'ha-medinah*," *Sinai* 11:4-5 (December 1947-January 1948), 114.

⁴²Yehuda Leib Maimon (Fishman), "Religion and the State," in Tirosh, 162-3. Tirosh reprinted the opening essay of *Sinai*, 11:4-5 (December 1947-January 1948).

will be completely Jewish, Hebrew, Israelite, in its origins and its roots, and just as a Hebrew state is impossible without the Hebrew language, so the Jewish state will not prove viable without the Sabbath and Jewish law."⁴³

Rabbi Ben-Zion Meir Chai Uziel contributed to the Dec. 1947-Jan. 1948 edition of *Sinai* by writing an article, "The Torah and the State." In the article, Uziel joins Maimon in calling for state legislation which is based upon the foundations of toraitic law. Uziel writes that "the Torah and the State have been and will be in Israel united as a special body. They are inseparable for each one comes to be established alongside the other; for if not this, the other would not stand" (*Shabbat* 14a). So too, the kingdom is established alongside the Torah. *Let it remain with him and let him read it in all his life, so that he may learn to revere the Lord his God, to observe faithfully every word of this Teaching as well as these laws... to the end that he and his descendants may reign long in the midst of Israel* (Deut. 17:19-20). Uziel uses the example of Ezra and Nehemiah as having operated according to the laws of Torah, which provides the model for a type of theocratic arrangement for modern Israel.⁴⁴

Other contributors to this special volume, which gave voice to the merging of Torah and the imminent state, were Rabbis Ya'akov Moshe Harlap, Shlomo Zalman Auerbach, and Sancha Bunim Urbach, Dr. S.B. Feldman, Yeshayahu Wolfsberg, Dr. H.Z. Reines, Hanoch Yalon, and perhaps most important for this report, Eliezer Yehudah Waldenberg. Waldenberg wrote an article, "Judges and Officers in the Jewish State in the Light of Torah." This article clearly was the basis for his first chapter of *Hilkhot Medinah*. "Judges and Officers." One of the greatest differences between what appeared in the winter of 1948 in *Sinai* and 1952 in *Hilkhot Medinah* was his conclusion to the article in 1948. In his

summation to the article, he outlines a twenty-six point plan which is designed for how to go about establishing a judicial, legal system. Such a distinct plan did not appear in the 1952 text. While there are similar points mentioned in both texts, his voice in 1948 is more assertive, as if he is anxious to stress the urgency of the moment. He concludes his words in a similar vein to what he writes in his book: "May it be the will of God that soon we may merit to see with the establishment of the state the kingdom of Israel in its fullness with judges and advisors as in the beginning. May He remove from among us sorrow and grief. May the Divine Presence come to dwell in fullness in all Her glory and beauty in all the dwellings of Israel, Amen."⁴⁵

The publication, *Yavneh*, also contained writings by significant religious Zionists who implored the religious community to act by committing itself toward pursuing the goal of toraitic governance for every aspect in the modern life of the state of Israel. Chief Rabbi Herzog wrote in 1949 that (in 1948) "the Rabbinical Council had charged him with the task of preparing a programme for a constitution and legislation, based on Torah."⁴⁶ In his article, he addressed issues such as appointment of judges, granting authority to Rabbinical courts to try lawsuits on damages. On matters related to marriage and divorce, "Rabbi Herzog puts forward some 'daring' ideas, suggesting the acceptance of halakhically disqualified witnesses and penalties for criminal offences, not based on Jewish law."⁴⁷ In the end of every issue raised, Herzog qualified the statement by suggesting that it needed "further consideration." Previously, in an article titled, "Legislation and Law in the Jewish State,"

⁴³Eliezer Yehudah Waldenberg, "Shofetim v' shotrim b' medinah ha-yehudit l'or ha-Torah," *Sinai* 11:4-5 (December 1947-January 1948), 178. In *Hilkhot Medinah*, volume I, chapter 1, section 9 Waldenberg writes, "May it be the will of our Father in Heaven, that speedily we will merit to see, in the foundation of the state of the kingdom of Israel, her completeness with judges and counselors as in the beginning, and may He remove from among us lament and sadness, so that the Divine Presence may dwell in fullness in all Her glory and beauty in all the dwellings of Israel."

⁴⁴Unna, 75.

⁴⁵Ibid., 75.

⁴⁶Ibid. 165.

⁴⁷Ben-Zion Meir Chai Uziel, "Ha-Torah v' ha-medinah," *Sinai* 11:4-5 (December 1947-January 1948), 119-121.

which appeared in 1947, Herzog called for a constitution based on Torah law, understanding that the make-up of the state would be democratic. For the religious community to live fully in both the modern State and abide by *halakha*, Herzog advocated the enactment of "a series of takkanot to deal with new social and economic developments." For adjudication, he suggested giving the defendant in any given case the right to choose which court (general or rabbinical) should try the case.

P. Dykan (Dikstein), called "a veteran in the campaign for restoring Jewish law to daily life," by Menachem Elon, wrote a series of articles prior to the founding of the state in which he called for Jews in Israel to take urgent steps in preparing a declaration which would have called for Jewish law to have played an active part in the legal system. Dykan offered as a possible declaration "wherever the existing law does not deal with any particular issue or is ambiguous or inconsistent, the courts and other governmental agencies shall be governed by the rules of Jewish law, in accordance with the needs of the time."⁴⁸ Elon explains what the impact of Dykan's proposal would have been, if it were accepted: it would have eliminated the dependence on any foreign system of law; it would have linked Jewish sovereignty and Jewish law; it would have led interested parties to pursue necessary paths to preparing Jewish law for the modern state. A strong candidate, A.H. Freimann, was named as the chair of the Supreme National Institutions of the Yishuv in order to set up a legal system. Freimann may well have incorporated Jewish law into a final document, but he met a tragic death in a massacre of a caravan to Mt. Scopus. Following his death, the committee failed to achieve any practical result.⁴⁹

After the establishment of the state of Israel, Rabbi Shaul Yisraeli began to publish

⁴⁸Elon, 1617. This program was ultimately enacted in the Foundations of Law Act by the Knesset in 1980 and is discussed in a full chapter of Elon's *Jewish Law*, pp. 1827ff. Elon writes that this particular act of the Knesset both "severed the Israeli legal system from the binding force of English common law and equity, and created a binding link with Jewish law, to which it gave official status as a complementary legal source, making Jewish law a part of Israeli positive law."

⁴⁹Ibid., 1618.

the journal *Ha-Torah ve-Ha-Medinah*. The goal of the journal was to explore and develop the idea of *halakha* and the modern state. In the journal's first issue, Yisraeli called upon the religious community to draft a constitution for the state as well as a comprehensive statute book. He implored the people to act given the greatness of the hour and not worry about making mistakes. The greatest mistake, he proposes, is inaction itself. "We must test the Torah given the issues of the day: failure to act immediately would lead to another *churban* for the people Israel."⁵⁰ Through his journal, Yisraeli and his associates strove "to derive, from this traditional and partially outdated material a persuasive constitutional theory for modern Israel. They sought to demonstrate that the halakhic approaches to government are both relevant and sufficient: *relevant*, in that they speak to the situation of a secular national state; *sufficient* in that they allow the government the broad range of powers it needs to function successfully."⁵¹ Yisraeli concludes his first editorial allowing Isaiah to speak his own thoughts: *then your Guide (i.e., Torah) will no longer be ignored, but your eyes will watch your Guide; your ears will heed the command from behind you: 'this is the road; follow it!'* (Isa. 30:20-21).

In 1950, one year after Yisraeli's first volume of *Ha-Torah ve-Ha-Medinah*, the Mizrahi and Hapoel HaMizrahi held their tenth conference. One of the keynote speeches in the conference report is that of S.Z. Shragai. He echoes Yisraeli's call by asking the Torah sages of the day to deal with the many new issues of modernity — science, technology and statehood, among others — in a halakhic way. "Renew the laws of the state from the Torah, for they too were given to Moses at Sinai," Shragai said.⁵² Speaking in terms reminiscent of Waldenberg, Yisraeli and other Mizrahi rabbis, Shragai writes, "great is the hour; much is

⁵⁰*Ha-Torah ve-Ha-Medinah* I (1949), 11-13.

⁵¹Washofsky, 291.

⁵²S.Z. Shragai, "The Lecture of S.Z. Shragai on Emphasizing Torah in the Life of the State," *Din v'Cheshbon* (Jerusalem: Mizrahi-Hapoel HaMizrahi, 1950), 51.

the responsibility, the task is difficult. Perhaps with the length of all the hardship, the time will come when we will overcome it all and merit to see the day which will be awesome and mighty — the day which will elevate all the souls of the generations of Israel on whose behalf we are able to endure the suffering. Great will be that day on which the Divine Presence of Israel will dwell side-by-side all creation for *it will come to pass on that day God will be one and His name shall be one*. As we approach this mighty day, we will all be delivered so we must be prepared. We will cleanse our lives with work.⁵⁴ We will make our lives holy through Torah and thus merit that *from Zion the Torah shall go forth and the word of God from Jerusalem*.⁵⁵

The language used by Shragai is of biblical proportions. The quotes from *Tanakh*, the vehemence in expression, and the references to redemption are reflective of the mindset of this group of religious Zionists. Yet, in looking at *Ha-Torah ve-Ha-Medinah* in its subsequent years of publication the hopes and dreams from the first edition and the speeches from the Mizrahi-HaPoel HaMizrachi convention remain unfulfilled. Despite the effort of the early *Mishpat Ha-Shalom Ha-Ivri*, Bar-Ilan, Maimon, Warhaftig, Yisraeli, and others, the general religious community and its leaders (especially those of the right-wing) were unwilling to draft and accept a constitution representing *halakha* and modernity.

Revitalizing Jewish national law proved elusive. Although orthodox rabbis and scholars were committed to the principle of *halakha* governing the Jewish state, they failed to evolve guidelines for the application of the traditional Jewish law to a concrete and viable state.⁵⁶ By not creating background material in the 1930s and 1940s, the religious Zionists were unable to make significant contributions in the early state. This situation of unpreparedness fostered a mood and mentality which contained an element of apathy and

⁵⁴The translation could also render: Worship since the Hebrew is *avodah*.

⁵⁵Shragai, *Din v' cheshbon*, 55.

⁵⁶Abramov, 128.

reservation toward the state, that was true even of those who saw in the establishment of the state the ushering in of the 'beginning of the Redemption'.⁵⁶ An incredible opportunity was missed by the religious community to unite the Jewish home with Jewish law. While many hoped the Chief Rabbinate would have led the course, it "did not make a significant religious impact. It was an institution rather than a spiritual force."⁵⁷ Subsequently, as such it proved a source of dissension rather than discussion. Religious leaders, who had advocated merging Jewish law with the state began to voice their frustration. Warhaftig, in 1949, delivered an address attacking the religious community for not working on the field of Jewish jurisprudence. Bar-Ilan "went so far as to admit the inadequacy of Halakha for modern life, and suggested that this be remedied by enacting Takanot in many fields of law."⁵⁸ In a quote, which appears in Elon's *Jewish Law* but not in his own published papers, Bar-Ilan said, immediately after the founding of the state: "Had we been more fortunate, the leaders, rabbis and scholars of observant Jewry (we) would many years ago have prepared a code of law for the state of Israel for the time when we would be privileged to see it established. But because we lack faith, the State of Israel caught us unaware, without having adequately prepared a civil and criminal legal system for it. We cannot, therefore, criticize those legislators for using Mandatory Law as their guideline in setting up courts accordingly. What they can be criticized for, however, is that they did not declare that that system was only a temporary expedient for an emergency situation."⁵⁹

Moshe Unna decries the failure on the part of the religious community as having cleared the way "for those who had no interest whatever in bestowing a semblance of Jewish

⁵⁶Unna, 87.

⁵⁷Abramov, 124.

⁵⁸Ibid., 131.

⁵⁹Elon, 1606.

Tradition on the rejuvenated Jewish state, let alone basing its legislation on it.¹⁶⁰ Ham Cohn, appointed Head of the Legislative Department of the Ministry of Justice (1948) and Government Legal Advisor (1952) wrote about the problems surrounding uniting halakha and the modern state: "the root of the trouble is, that in order to free Jewish Law from its sacrosanct stance, you need the cooperation of those qualified to treat issues of sanctity. This calls for courage and strength, but there has not risen yet in this our impoverished generation one courageous enough to apply a lenient interpretation to a severe restriction, while any outsider, not of the 'inner sanctum' who approached the subject was assailed with contempt."¹⁶¹

By the 1950s, a split in the religious parties was evident. Mizrahi leaders like Moshe Shapira were aggravated and despondent over the reality that they had to struggle not only with secularists but also with fellow sectors of Religious Jewry. The National Service Bill, regarding conscription of women, became the benchmark by which the Agudists determined who truly favored a completely toraitic state. The determination of the Agudists as well as the secularists led to a statement by HaPoel Hamizrachi in 1953 which read: "HaPoel Hamizrachi notes with deep regret that the aim to divorce Religion from the state is supported by the Agudah, on the one hand, and the secularists, on the other. Both extremes wish to create a religious ghetto in Israel, without torah having any influence over, and link with, the state as a whole and its image."¹⁶² Ever striving to unite the Jewish people, the document continued, "Viewing the unity of the Jewish People the mainstay of the Torah of Moses, and the state of Israel as the ushering in of the Redemption, HaPoel Hamizrachi considers this development dangerous. This approach impels the Agudah to "save" their daughters from an imaginary peril, even if this "saving" is fraught with graver dangers of

¹⁶⁰Uma, 88.

¹⁶¹Ibid., 83-84.

national character."¹⁶²

The debate of Torah and the state by the mid-1950s became nearly impossible as it became clear that the state would not be governed entirely by Jewish law. For the religious community, following Jewish law in a Jewish state not governed by that very same Jewish law means living in an equivocal status and under two judicial systems. Rabbinic courts operate with enforcement powers granted by the government. Thus, while they (the rabbinic courts) do not accept secular courts and laws *de jure*, they *de facto* acknowledge legitimacy of the government by receiving finance and the support of "the 'secular arm' in the supply of sanctions."¹⁶³ The religious courts operate by means of a state to whom they hold an "illegal, though halakhically correct, assumption that they are subject to no one."¹⁶⁴ In the world of *halakha* and the modern state, "the secular state must enforce *halakha* but it is not entitled to any recognition in return. Thus, the relation of halakhic and secular courts resembles the relations between two jurisdictions that are foreign to each other."¹⁶⁵ In Gittin 9:8, we read: "a *letter of divorce* under duress is licit if in Israel, but invalid if in a non-Jewish court, but if the non-Jewish court persecute him and say to him, 'Do whatsoever the Jewish Court bids thee,' then it is legal." Under the arrangement outlined in this *mishnah*, the *halakha* has always recognized the validity of non-Jewish enforcement of *heit din* decrees. So too, as discussed earlier, under the *dina de-malkhuta* principle, Jewish communities have recognized the validity of sovereign (Gentile) law. Although the non-Jewish law is not a valid replacement for traditional Jewish law, it does seem that the modern rabbinic attitude toward the secular government of Israel has upheld a similar relationship. As long as the secular government of the state of Israel is not in violation of toraitic laws, the observant

¹⁶²Ibid., 290.

¹⁶³Weiler, 229.

¹⁶⁴Ibid., 219.

¹⁶⁵Ibid., 219.

community will follow the law of the land

The initial Mizrahi vision of the modern state did not foresee two parallel legal systems, operating occasionally together. The common denominator of religious observance among religious Zionists "proved itself too slender a platform for a joint stand and jumping off ground for coordinated action to face contemporary challenges."⁶⁶ Elon explains the failure of the religious Zionists to act quickly in applying Jewish law to daily life as a result of "the historical circumstance that, after the Emancipation, Jewish civil and criminal law were no longer applied in practice. From the beginning of the nineteenth century, religious Jews in the diaspora limited their efforts to education and the observance of religious law (shabbat, kashrut, marriage, divorce)."⁶⁷ Applying Jewish law on a daily basis was no longer a part of the reality for most Jews. Elon notes with sadness, "this failure has proved to be one of the gravest errors in the history of the national-religious movement."⁶⁸ The poor relations within the religious community combined with "the diminishing stature of the Chief Rabbis as authoritative halakhic decisors in the eyes of the observant community as a whole"⁶⁹ led to a failure of halakhic nerve. Shragai, Yisraeli, Maimon and their associates had fervently tried to create an enthusiasm and concerted effort toward developing the *halakha* for the modern state but the Council of Torah Sages, heads of leading *yeshivot* and Hasidic rebbes figured more prominently in directing the actions of the religious community — mainly through Agudat Yisrael and not through the Chief Rabbinate.⁷⁰

⁶⁶Umma, 299.

⁶⁷Elon, 1605.

⁶⁸Ibid., 1605.

⁶⁹Washofsky, 303.

⁷⁰Ibid., 304.

Chapter Three: *Comparative Analysis of Individual Introductions for the Three Volumes of Hilkhot Medinah, Followed by Translation*

Introduction and Analysis

For each volume of *Hilkhot Medinah*, Waldenberg wrote an introduction. He composed a few pages of text which he placed in the front of each volume to convey a message and deliver a prayer. The words contained in the introductions provide a wonderful window into the thinking of one religious Zionist. Waldenberg presents himself in these pages as a humble, God-fearing, Torah-observant Jew who is awed by the miraculous events of his day. Although the introductions are somewhat similar in speaking to the glory of the day, anticipated redemption of the Jewish people, and centrality of Torah for the new nation, they do hold a few distinguishing characteristics.

The first volume, published in 1952, deals with the great issues of Jewish legal history, such as Judges and officers, ordination, *malkhut Yisrael*, and *dina de-malkhuta dina*. In his introduction, Waldenberg states how the new state is the dream of a lifetime, the answer to 2,000 years of prayers which miraculously his generation had the privilege of witnessing. The tremendous challenge facing Waldenberg, and other Mizrahi rabbis who hoped to see a Jewish state based on Jewish law, was demonstrating a means by which the modern state could operate according to the oral and written Torah. Since all that seemed to be missing was the holy Temple, the time had come for a complete reaffirmation and renewal of Jewish laws which had not been fully implemented since the days prior to the destruction of the Second Temple. Therefore, Waldenberg urged the people to begin to fulfill the role of the Jewish nation to be a *light unto the nations*. The great tragedy, in Waldenberg's eyes, which prevented the Jewish nation from being that light, was the influence of "idolatry" (foreign laws) on the people and the people's having left the well of *mayim hayim* — the Torah. Thus, he bemoans Israel's lack of emphasis on Torah. Of equal significance, echoing a theme by many Mizrahi rabbis, Waldenberg holds the attachment to foreign legal systems as equivalent to idolatry. He calls on the people to abandon foreign ways and see the Torah as the true and only foundation for the state of Israel. This theme, holding onto Torah alone as the source of law, weaves its way through many of his sections. As if going to battle, Waldenberg quotes from the Scripture and makes reference to *girding his loins for battle*. It was as if he saw his attempt to search and interpret the words of Torah legislation regarding the state as a *milkhemet Adonai*. With great humility, Waldenberg presents himself and his effort. He invokes messianic imagery and draws from key scriptural citations to amplify the greatness of the moment and its everlasting implications.

He also cites the Rambam and calls upon the nation to reestablish the laws of *shmitah*, *yovel*, and when appropriate, *korbanot*. Then will complete redemption come. Thus, we learn in the opening words of volume one, this project is not just about establishing and understanding the laws of the state, in terms of Torah, but it is also a tool for understanding or perhaps even achieving redemption.

The second volume of *Hilkhot Medinah* is devoted entirely to army-related issues. Waldenberg often draws on the lessons of the Rambam and this second volume is no different. Speaking on kings and wars, the Rambam holds Abraham as the pillar of the world. When Abraham went to battle, speaking out on behalf of God, he had God at his side. Consequently, his battles were waged in order to "uplift the true religion, fill the world with righteousness, break the arm of the wicked, and fight the battles of the Lord" (*Hilkhot Melakhim* 4:10). Rambam explains that Joshua ben Nun taught the Israelites vital lessons of fighting on behalf of God. He taught the Israelites to rely upon God's, miraculous intervention and upon ordinary (human) military strategy. For Waldenberg, wisdom begins in recognizing that only by God's name have we been victorious. Any victory without God is illusory. David is the crown jewel of such a God-infused leadership. Waldenberg, publishing this second volume in 1954, recounts the great miracle of the day which lies in the mere fact that the people mented to raise up an army, a navy, and an air force. He calls upon those directing the country to remember Israel's chosenness. All Jews must accept the yoke of the Torah and of Heaven. Only when the nation, as a whole, lives by Torah will peace come. Torah is required as a daily portion and must work its way into all matters of life. Thus, if it serves as the foundation of the governmental and societal structures, peace will come *and they will study war no more*.

The third volume, published in 1956, is perhaps the most aggadic and least halakhic of the treatise. Governmental rule is the overall issue. Discussing toratic rule over the state is Waldenberg's goal. The Torah is the source of Jewish life and serves as the means by which we understand creation and our role therein. The Torah, Waldenberg writes, contains absolute authority and holy rule. It serves as the law of the land of Israel and contains the spirit of God which is vital for the well-being and survival of the Jewish nation. *For not by might alone will Israel succeed*. While Israel must realize the centrality of Torah, it must also find a ruler who acts for the sake of Heaven. A ruler who acts on his own behalf will bring no good to the community. The leader of Israel can serve only by the merit of the ancestors and may walk only along the paths outlined by Torah. Waldenberg concludes his introduction with a beautiful prayer for the leaders of the new nation, so longed for and dreamt about. He prays that they have the wisdom to lead the people in the light of Torah.

Initially, in volume one, Waldenberg calls upon the people to fulfill their role as a light unto the nations. Yet by the end of his three volumes, he seems to shift his focus toward stressing that the people follow the light of Torah. In doing the latter, they may do the former.

Translation of Hilkhoh Medinah Volume One: INTRODUCTION

God has delivered a word through Jacob and it has fallen upon Israel. The kindness of God overcame us and we have merited after 2,000 years of exile to return as in the beginning to the inheritance of our ancestors to live as a free people in its own land — however, still only in a part of the land, missing the crown of our glory — our Holy Temple, king of Jerusalem, the hill of Talpiyot which all our *pyyutam* are directed towards.¹

Would we but merit to understand the essence of the significance of this turning point of the generations, we would be overcome with great efforts to do our part together with the Strong One who has begun to do his part. To begin to fulfill our destiny which awaits us — to be redeemed and saved! To lift up a banner to the nations, our torch of great light — the light of Sinai — to illumine the land world and all who dwell in it and before us would stand alive the prophetic vision: *And it shall be at the end of days, that the mountain of the Lord's house shall be firmly established at the top of the mountains, and it shall be raised above the hills, and all the nations shall stream to it. And many peoples shall go, and they shall say, 'Come let us go up to the Lord's mount, to the house of the God of Jacob, and let Him teach us of His ways, and we shall go in His paths; for out of Zion shall the Torah come forth, and the word of the Lord from Jerusalem. And He shall judge between the nations and reprove many peoples, and they shall beat their swords into plowshares and their spears into pruning hooks: nation shall not lift the sword against nation, neither shall they learn war anymore.* (Isaiah 2 2-4) The fulfillment of this vision would be at hand.

Now it is our sorrow that we have not merited to rise up at this great hour to walk together — all of us — in the light of God. For we have not cast aside our gods of silver and our gods of gold which cling to us from of old — and declare with vigor: *Remove the foreign*

¹Reference to *Brachot* 30a

gods which are in our midst (1 Samuel 7:3) — all of the prejudices taken from foreign places, *Cleanse and change your clothes*, (Genesis 35:3) with clothes of glory of the nation and to give them a *garland instead of ashes*, (Isaiah 61:3). Even still, we have added additional sin on top of sin by leaving the well of living water (Torah) which princes dug, and the nobles of the people chiseled out with laws and with staffs/supports, by going and digging new holes and pits — pits which cannot contain the water of life, by imitating foreign laws and creating new laws in opposition to the Eternal Law. A divine voice roars like a dove and screams like a crane, *woe to those who engrave engravings² of injustice and missives of perverseness they write*, (Isaiah 10:1) *He looked for justice but behold, violence*, (Isaiah 5:7), how can this turn from a people of Adonai, our God, [PAGE vi] to go and worship the gods of the nations, *lest there shall be among you a root bearing wormwood and poison-wood*, (Deuteronomy 29:17) *Remember the Torah of Moses my servant which I commanded at Horev upon all Israel — laws and judgements*, (Malachi 3:22), the ways of your lives surrounded it, for everything will surround it, from inside and from outside, *even the goings of my God, my King in holiness* (Psalm 68:25). For it is a Torah of eternity and in its treasury is hidden and stored away the highest teachings of ethical perfection. It is a Torah of completeness — the highest of all — not on my behalf but if on your behalf — goodness for you all of your days *for God will return to rejoice with you as he rejoiced with you ancestors*, (Deuteronomy 30:3).

Jealous — *I have been very jealous* (1 Kings 19:10) — a great jealousy of the laws of our living Torah of Sinai, on behalf of God's great name, who is blessed, great, and holy through making Torah's judgments of righteousness and in His being the King who loves righteousness and justice as it is written, *and the Lord of Hosts will be exalted in judgement and the Holy God shall be hallowed with equity*, (Isaiah 5:16). Like a man going to war, I

²Note the double meaning: *ppm* to legislate as well as engrave.

girded my loins and I gathered together strength to be like a rock in order to approach the inner sanctuary in order to draft a composition which includes the Torah law concerning the state — the state of the people of God, and to show before the people and the leaders to the extent that my weak hand can accomplish the laws of God and that His written and oral Torah are the two of them really one as inculcated by *one thing God has spoken, two things have I heard: that might belongs to God.* (Ps. 62:12) The words of Torah include within themselves a perspective of life that is filled and can encircle this great nation — from now and onward living a sovereign life in its treasured land and can be one that solves all of its governmental problems and administrative issues — to give it a prosperous and successful basis for its government, as David commanded Shlomo his son, *and keep the charge of the Lord your God to walk in His ways, to keep His statutes and commandments, and judgements, and testimonies as it is written in the law of Moses that you may prosper in all that you do and wherever you turn.* (I Kings 2:3) And according to the word of God upon Solomon's concluding the building the Temple, *As for you, if you go before me, as David your father went whole heartedly and with uprightness to do in accordance with all that I have commanded you (and) you will keep my statutes and laws, I will establish the throne of your kingdom over Israel forever as I have spoken to David your father, saying, A man will not fail you upon the throne of Israel.* (I Kings 9:4-5) For the ways of Torah are always before us to serve us — pillars of clouds and of fire to lead us in the way — the way of Jewish sovereignty.

And I begin in the first section by discussing mainly judges and judgment, the king and the kingdom, and by the will of God our path will continue with his help in drafting and publishing more volumes in the future according to their order.

I have faith in the strength of the Rock, my Creator and my Redeemer — for just as He has helped me up to now with the publication of the books of *D'var Eliezer* and the three volumes of responsa *Tzitz Eliezer* and *Shvuat haYam*, so too may He have mercy and

compassion upon me to give me strength and courage to continue in my work of holiness for the sake of holiness of His great name for the many, and may He keep me so that I will not stumble in my language and so I will not fall into repetition even though I am not worthy to do this. As the Sages say [PAGE vii], *"and I will be gracious to whom I will be gracious, although he may not deserve it, and I will show mercy on whom I will show mercy, although he may not deserve it"* (*B'rachot* 7a).

May it be the will of our Father in heaven that speedily our eyes will see the planting of the horn for David His servant and the placing of the candle for His Messiah, then shall the spiritual glory of Israel return to its place, and they will fill with knowledge like water to the sea. They will begin to understand that this is the Torah which Moses gave to the children of Israel by the mouth of God. And the children of Israel carried it as a banner thousands of years after in the time that all the people of the world were still savages and idol worshippers to their sorrows and their handiwork. The Torah is the Torah of truth with laws of holiness which are eternal which will never change, like the promise of holiness, *my covenant I shall not profane, and I shall not alter that which my lips have uttered. One thing have I sworn in my sanctuary: I will not deceive David. His name shall endure forever and his throne shall stand as the sun before Me. As the moon shall be established forever, he shall remain a faithful witness in the sky.* *Selah.* (Ps. 89:35-38) We will merit that our laws will be established as before. The year of symbolic *shmitah* of the sovereignty of God of all His purity in the world will return not just in name to its completeness. As our teacher, Rambam instructs, "the king the Messiah will stand and return the kingdom of the House of David of fame to the rule of old, and build the Holy Temple and gather the exile of Israel, and return all the laws as they were in the past, re-establish the sacrifice, and perform *shmitah* and *yovel* as with all the *mitzvot* spoken in the Torah." (*Hilkhot Melakhim* 11:1)

And we shall establish the vision of the future which God gave to us by means of the great prophecy saying, *And a shoot shall spring forth from the stem of Jesse, and a twig*

shall sprout from his roots. And the spirit of the Lord shall rest upon him, a spirit of wisdom and understanding, a spirit of counsel and heroism, a spirit of knowledge and a fear of the Lord. His delight shall be in the fear of the Lord and neither with the sight of his eyes shall he judge, nor with the hearing of his ears shall he chastise. And he shall judge the poor justly, and he shall chastise with equity the humble of the earth, and he shall smite the earth with the rod of his mouth and with the breath of his lips he shall put the wicked to death. And righteousness shall be the girdle of his loins and faith the girdle of his reins (Isaiah 11:1-5)

And the throne shall be established through loving-kindness and there shall sit thereon in truth in the tent of David, one who judges and demands justice and performs righteousness (Isaiah 16:5)

With the merit of keeping God's commandments, may we live to see and inherit goodness and blessing for the years of the days of the Messiah and in the world to come

Awaiting the redemption of God, Eliezer Yehudah Waldenberg

IIIb

Translation of Hilkhot Medinah, Volume Two: INTRODUCTION

The great Creator of the world made man as the crown of creation, with the purpose to be honest in deed doing righteousness and walking in His paths, *the processions of my God, my King, in the sanctuary* (Ps. 68:25) All the obstacles to the unification of the spiritual world, as in *every valley shall be exalted, and every mountain and hill shall be made low, and the crooked shall be made straight, and the rough places plain* (Isaiah 40:4) To bring the world which was created in line with the complete and finished state which was initially considered at the outset in God's revealing to them the glory of God in a divine eternal light

It is revealed and known before the throne of glory of the One who knows all the secrets and hidden mysteries of the world of every living being that it is not good for man to be alone; therefore, God made for him a helpmate so they could be eternal lovers, in the form of an everlasting structure³ in keeping with the designated and lofty goal, "*and he brought her to Adam* (Gen. 2:22), this teaches that the Holy One, blessed be He, served as the groomsman for the first man" (*Eruvin* 18b) And He blessed them with the special wedding blessings that they may multiply and increase and fill the world and rule over its treasures of creation within its complete and unique harmony with a complete preservation of the illumined paths which divide between the light and the darkness.

Had they been faithful to their task, it would not be necessary to hide the wondrous light, for human beings would be able to benefit from an enlightened perspective which would enable one to see from one end of the world to the other, and they would see and know by the brightness which was before them that as their sparks got larger like the air we breathe, their influence and the glory of their almighty nobility would fill the land, *for all the earth*

³Woman

shall be full of the knowledge of the Lord, as the waters cover the sea (Isa. 11:9)

But man does not understand honor, (Ps. 49:21) and the heart is deceitful above all things, and grievously weak: who can know it? (Jer. 17:9) The evil inclinations of his heart, overcame him and caused him to seek profit after what lay hidden from him so that each person caused the other to sin, misusing the wondrous powers which they were endowed and came to the point of murder [PAGE 6] in rebelling against someone who would receive his authority and to be to him as a helper, *Lo, this only have I found, that God has made man upright, but they have sought out many inventions.* (Ecc. 7:29) Man was upright, it reads: *that God has made man become like one of us,* (Gen. 3:22), like one of the ministering angels, and since there were two made, they requested "many inventions" (*Kohélet Rabba*). Because of this, they were removed from the track and they corrupted the idea that "man did not come to be evil but rather righteous, for thus it says, *Lo, this only have I found, that God has made man upright, but they have sought out many inventions.* (Ecc. 7:29)" (*Sifre parashat Ha'azinu*) He was expelled from the fortified world, and the fences and the fortifications were pierced so that all the evil winds came in to settle in on him: "The inventions, they are the evil things which they brought in." (*Guide to the Perplexed* 3:12) Eve turned into the serpent of sin, and his evilness overtook him. She forced Adam to transgress the word of God, and the two of them brought chaos into the world — light and darkness, good and bad they became mixed in a temperamental composition as human beings began to make mistakes and lie about the truth and place darkness in light and light in darkness and say that evil was good and good was evil.

He that increases knowledge increases sorrow, (Ecc. 1:18) to want to be, if it were even remotely possible, like God, to know the difference between goodness and evil, and to be able to utilize his great divine fortitude to rule over other men and to cause them evil which was the beginning of strife between Cain and Abel, and this continues to be the case among the trouble-makers who do not want to listen to the voice of the blood of those who

were murdered. "[The accused's] blood and the blood of all those who were destined to be born from him" (*Sanhedrin* 37a) who cry out from the earth (hearkening back to the story of Cain and Abel and Abel's blood crying out), and to deceive God with ideas of lying built up by stones of violence and chaos and to continue with the further murder of innocent ones and the destruction of worlds which were established by the evil which ensued from their mouths, "therefore man was created alone, to teach you that whoever destroys a single Israelite soul is deemed by Scripture as if he had destroyed a whole world." (*Sanhedrin* 37a) He begins to call in the name of God, but the name of God is made we will do something profane, the world sinks to a level of darkness. In the profanation of the world, he coins the slogan "let us make a name for ourselves," and the glory was to be like Nimrod, a master hunter before God.

"In this fashion did the world go on and on until the birth of the pillar of the world, Abraham our Father" (*Hilkhot Avodah Zarah* 1:2)

Abraham was unique in his righteousness and ability to illuminate the world like a star of light in the dark night sky. From within the darkness of the burning fires and from within the great light which was inflamed and burning wildly in the castle of the world ~~from~~ fire, "R. Isaac told the parable of a man who was travelling from place to place when he saw a mansion in flames. He wondered: Is it possible that the mansion is without someone to look after it? At that moment the owner of the mansion peered out at him and said: I am the owner of this mansion! So, too, as Abraham was wondering, Is it possible that the world should be without someone to look after it? The Holy One peered down at him and said: I am the world's owner." (*Bereshit Rabba* 39:1) And "when he recognized and knew Him, he began to formulate replies to the inhabitants of Ur Kasdim and debate with them, telling them that they were not following a proper path. There he began to call in a loud voice to all people and inform them that there is one God in the entire world and it is proper to serve Him, he would go out and call to the people, gathering them in city after city and country

after country, [PAGE 7] until he came to the land of Canaan — proclaiming [God's existence the entire time] — as Genesis 21:33 states: *And he called there in the name of the Lord, the eternal God.* When the people would gather around him and ask him about his statements, he would explain [there] to each one of them according to their understanding, until they turned to the path of truth. Ultimately, thousands and myriads gathered around him. These are the men of Abraham's home. He planted in their hearts this great fundamental principle composed texts about it. " (*Hilkhot Avodah Zarah* 1:3)

In the opportunity which presented itself in the war of four kings against five (Gen. 14:9), Abraham our father, peace unto him, in his going out and saving himself from being oppressed, used the opportunity to teach the true religion with regard to war, and he lifted his triumphant hand to God and called him the Almighty who rules the heavens and the earth to teach those who claim understanding that it is not by strength that a man lives but rather in the name of God, who makes known the battles of the Great, Mighty, Wonderous, Victorious and Awesome God, and only in His name *will we tread those under who rise up against us.* (Ps. 44:6) Therefore when a man goes out to war or a war is thrust on him, he must consider the ways he would want to proceed and which ways he would want to avoid if going out to a battle. If he is going from a holy place, he will go with God to a place of security which Adonai, his God, is walking with him in the battle and his encampment to teach his arms and his fingers for war, and to gird his loins beneath him, "but whatever he does should be done by him for the sake of Heaven. His sole aim and thought should be to uplift the true religion, to fill the world with righteousness, to break the arm of the wicked, and to fight battles of the Lord." (*Hilkhot Melakhim* 4:10)

This way of truth is to be a teaching and a possession to his sons after him: "this concept proceeded and gathered strength among the descendants of Jacob and those who collected around them, until there became a nation within the world which knew God." (*Hilkhot Avodah Kochavim* 1:3) And they should know that their sword and shield which

saved them and enabled them to possess the land, is prayer and petition from the innermost parts of the heart and soul to the One, that He go out before us and fight our wars, and he shouts and screams to our enemies — over his enemies he shall arise, such is what Jacob in particular taught to his son Joseph, in saying, *Moreover I have given to you one portion more than your brothers, which I took out of the hand of the Emori with my sword and with my bow.* (Gen. 48:22) which is translated in Onkelos as "with his prayers and his psalms." His sons and all the people of his household went out to this great battle of faith and they came to possess them for their offspring, which is our nation, as is expressed in wonderous devotion by the sons of Korach in their speaking in the Psalms, *how thou didst drive out nations with thy hand, and didst plant them, how thou didst batter the peoples, and cast them out. For they did not get the land in possession by their own sword, nor did their own arm save them; but thy right hand, and thy arm, and the light of thy countenance, because thou didst favourably accept them. Thou art my King, O God: command deliverances for Jacob. Though thee will we push down our enemies; though thy name will we tread those under who rise up against us. For I trust not in my bow, nor shall my sword save me, But thou hast saved us from our enemies, and hast put to shame those who hated us.* (Ps. 44:3-8)

As God loves us and keeps the promise which was sworn to Abraham our father, He is revealed to us in his cloud of glory on Mt. Sinai and taught us the Torah and commandments which man and the people will do in order that they may live in them. He commanded us in a special portion of the Torah with a serious warning [PAGE 8] to guard against every evil thing in attacking our enemies, justified by an argument that penetrates the core of our being, accompanied by the most serious of punishments, *for the Lord thy God walks in the midst of thy camp, to deliver thee, and to give up thy enemies before thee; therefore shall thy camp be holy: that He see no unclean thing in thee, and turn away from thee.* (Deut. 23:15)

Moses, our teacher, who stood between us and God imparted to us this Torah by the

mouth of God as a way for us to behave and to put our trust in God during war. He would walk among us in the battle, as is told in the story of the war of Joshua with Amalek. Moses did not deviate from the natural law: he commanded Joshua to choose for himself men who would fight against Amalek in an ordinary war, i.e., human combat. But along with this, he would stand on the top of the hill with the rod of God in his hand and his hands of faith spread out to the heavens in faithful prayer until the sun would come (see *Mekhila* and *Rashi*). See also in *Sha'ar Hashem*, chapter 8. The Scripture relates to us, *and it came to pass, when Moses held up his hand, that Israel prevailed: and when he let down his hand, Amalek prevailed.* (Ex. 17:11) Our Rabbis explained, "now did the hands of Moses wage war or crush the enemy?" Not so, only the text signifies that so long as Israel turned their thoughts above and subjected their hearts to their Father in heaven they prevailed but otherwise they fell." (*Rosh Hashana* 29a, see also in the *Mekhila*.)

When the Israelites proceeded in this fashion of Moses, they were successful in the war against Midyan with a pure intention, they went *to avenge the Lord on Midyan*. (Num. 31:3) Not one man had fallen from among them as it is written, *and they said to Moses, thy servants have taken the sum of the men of war who are under our charge, and not one man of us is missing.* (Num. 31:49)

The faithful student of Moses, our teacher Joshua ben Nun, did not leave his tent, and made this principle the guiding line in his approach toward conquering of the land: rely upon God's miraculous intervention and upon ordinary (human) military strategy.

Then what shook Joshua with a great shock was when the thirty-six Israelites fell at the beginning of the battle with Ay. Joshua tore his garments and fell on his face before the ark of God and the elders of Israel joined him and cast ashes upon their heads until it was known to them that *Israel sinned* (Joshua 7:10) for found among them was devoted property and God made known clearly to them that *He would no longer be with them unless they destroyed those things from their midst*. (Joshua 7:12)

Because of this, they and Joshua merited on that great day to say *in the sight of Israel, Sun, stand still upon Giv'on; and moon, in the valley of Ayyalon*, (Joshua 10:12) and behold they listened to his voice. A day like this which the Scripture [PAGE 9] witnesses, *and there was no day like that before it or after it, that the Lord hearkened to the voice of a man for the Lord fought for Yisrael*. (Joshua 10:14)

The beginning of wisdom is to recognize that only by God have we been victorious in our wars and every aberration from this path causes us problems, sooner or later. It passes through like a scarlet thread through all twenty-four holy books and if you want to determine their truth, go and learn, from beginning to end, and you will recognize it.

The crown jewel of this wonderful leadership was David, who combined the exultation of God [spiritual leadership] and military skill. His heart played on a pipe and shined like a sapphire brick and in essence purified the heavens, and they would sing the psalms of God without ceasing and the two of them together operated like the two tablets of the covenant enslaved to the existence of the Master of the Universe, who dwells in the heavens of ancient days. *Of David, blessed be the Lord my rock, who teaches my hands to war and my fingers to fight: my gracious one, and my fortress; my high tower, and my deliverer; my shield, and he in whom I trust; who subdues my people under me.* (Ps. 144:1-2) When King David would go out to war, and was victorious he would say: "not by my strength did I succeed but rather did God help me and cause me to succeed, therefore I won because God created me to fight," for thus he wrote, *though hast girded me for battle*. (Ps. 18:40) Thus it says, *"blessed be the Lord my rock... and I do not know war rather only the name of the Holy One, blessed be He, may he be blessed who has instructed me..."* (*Midrash T'hilim*) It is an axiom that for the one who has no fear of God, in front of his eyes, his end shall be to fall in battle, for he is left defenseless and God does not stand by his side in battle. "David looked at Goliath and wondered who could possibly fight him given his strength and armor. But when he saw that he insulted and blasphemed (God), David said, 'I

can take him since he has no fear of the Holy One, blessed be He, 'for thus it says, *thy own wickedness shall correct thee, and thy backslidings shall reprove thee. know therefore and see that it is an evil and a bitter thing, that thou hast forsaken the Lord thy God, and that my fear is not in thee, says the Lord God of hosts.* (Jer. 2:19) Therefore it says that there is no fear of God against his eyes." (Yalkut Shimoni T'hilim 247:725)

Happy is the people that is in such a case (Ps. 144:35) to be the people of Adonai their God, who causes fear to fall upon His enemies and who can make nations submit beneath Him and stamp peoples under His feet, and who has chosen them as a possession by the glory of Jacob whom He loved. Selah

* * *

What a miraculous time we live in that God has returned our exiles as in the beginning to live in the land that is an inheritance from our ancestors. We have merited to raise up an army of our own, on land, sea, and air, which will give honor to the state as our glorious government clothes itself in pride and strength for all Israel to see. [PAGE 10] We do this with the help of God and expect that our evil neighbors will come to fear what is happening! The heart is proud and the mouth is full of joy!

Coupled with the heart's pride is that of the fear which resides in those who are faithful and who are awaiting God's redemption. There comes an internal shaking which is terrifying for the soul and seems to test the limits of *your heart will throb and thrill* (Isaiah 60:5). Yet there seems to be a select group of privileged individuals in society which are sooner to exalt themselves rather than help to fill the breaches in the walls which need support. We must remember the words from Deuteronomy 23:15, *for the Lord thy God walks in the midst of thy camp, to deliver thee, and to give up thy enemies before thee; therefore shall thy camp be holy: that he see no unclean thing in thee, and turn away from thee. Also, the lion has roared who will not fear? The Lord God has spoken who can but*

prophesy? (Amos 3:98)

Those who are directing the political affairs of the country must remember the unique history of the people Israel, which teaches us that we are unlike any other nation. God set us apart and made us distinct, as he made the night and day different, so too are the Jews and the rest of the nations. A quote from Ezekiel which reads, *And that which comes into your mind shall never come about, that you say, we will be like the nations, like the families of the countries, to serve wood and stone. As I live, says the Lord God, surely with a mighty hands, and with a stretched out arm, and with anger poured out, will I be king over you.* (Ezekiel 20:32-33)

How glorious is our fortune, how splendid our inheritance if we are wise enough to accept the yoke of the kingship of heaven by keeping God's commandments, laws, and judgments! Therefore, we won't even need a sword but can rather lie in peace and security in our land, with no one being afraid! "R. Eleazar of Modi'in says: A scroll and a sword tied together descended from heaven. God said to them, 'if you observe the Torah written in the one, you will be saved from the other, if not, you will be smitten by it.' Where is this set forth? in the verse, *so He drove out the man, and He placed at the east of the Garden of Eden the cherubim, and the flaming sword which turned every way, to keep the way to the tree of life* (Gen. 3:24)." (Sifre parashat Ekev, piska 40)

* * *

The obligation for those who are observant in Torah is to study the *halakhot* which emanate from our holy Torah and to give spirit to the spiritual and political lives of the people as a whole, by finding in it the solutions for the many confusing and different problems which face our new state. For as the Gaon R. Yitzhak Abromsky, may his years be lengthened for goodness, writes in his book the *Pardes Jubilee* volume, page 528, that the Torah of Moses is a daily requirement of our lives. From the greatest to the smallest [PAGE

III] affairs, we can find laws and regulations in the Torah to guide us. The written and the oral Torah should both be taught but only a select group will be able to learn about the positive and the negative commands, for anyone who takes the matter too lightly, they cannot be relied upon to make the practical decisions of leadership

At the same time that we are being resettled, it is necessary to return to our holy Torah in order to follow her judgments which form the foundation of the structure of our nation. It must be placed in the most important public place, where everyone can hear it and pay close attention to her so all the members and figure-heads will listen and heed the truth and righteousness

I am thankful to God that I merited the chance to provide a second volume to the *Hilkhot Medinah* during this special year, and this volume will deal with issues surrounding the Israeli army

While I am offering my thanks, I pray that I may have the opportunity to continue this work — and there is nothing better than Torah — and that I may merit the chance to further my study to publish more volumes on the laws of the state. May the Torah never leave from before us, our children, or any future generation for all time

I have placed at the beginning of this work the fine scholarship from the wonderful and great of this generation, R. Tzvi Pesach Frank, may his days be lengthened for goodness, amen, that he has given his time, despite his busy schedule, to offer some insight to the issues discussed in this volume

May it be the will of our Father in heaven to look over us with blessing and to provide us with our redemption and redeem our souls completely and rebuild our holy Temple and our glory that the redeemed and eternal joy may come to Zion

Awaiting the redemption of God, Eliezer Yehuda Waldenberg

IIIc

Translation of Hilkhot Medinah Volume Three: INTRODUCTION

Blessed is Adonai the God of Israel who is praised and exalted beyond all blessing who has chosen us from among all the people and drawn us near to serve Him to worship and glorify Him and has not moved from loving us nor has He removed His light — the light of Torah — from before us. He has wrapped and surrounded us with the crown of kingship without ends, based on the laws of Torah which serve to guide the kings in their rule and the princes in their adjudicating righteousness. Before us we can see developed paths and ways of life which seemingly come from developments of divine wisdom which provide solutions of truth for all the questions of life for "it has been stated that the relation of nature to the Torah is that of a servant to his master. The forces of nature in the universe operate in harmony with the teaching of the Torah, as it is written, *and you shall serve the Lord your God, and he shall bless thy bread, and thy water, and I will take sickness away from the midst of thee.* (Ex. 23:25) Elsewhere it says, *if thou wilt diligently hearken to the voice of the Lord thy God, and wilt do that which is right in His sight, and wilt give ear to His commandments, and keep His statutes, I will put none of these diseases upon thee, which I have brought upon Mitzrayim: for I am the Lord that heals thee.* Many other passages in the Bible are of similar import."⁴ God planted within us eternal life to find the principle reasons and foundation to make the connection between temporal and eternal life and to understand the reason for the creation and determine the basis of living, to deepen the wisdom of the living being in various landscapes, which is "the seventh mark of wisdom exhibited in the appointment of the Torah and its statutes, to teach us how to serve the Creator and secure for one who consistently lives according to their dictates, immediate happiness, here and recompense in the life to come hereafter, as it is said, (Is. 55:2-3) *Hearken diligently unto*

⁴*Duties of the Heart* by Bachya ben Joseph ibn Paquda, trans. by Jehuda ibn Tibbon, trans. by Moses Hyamson (New York: Bloch, 1941), 12-13.

me, and eat ye that which is good and let your soul delight itself in fatness. Incline your ear and come unto Me; Hear and your soul shall live. To this should be added the customs by which the government of other nations is regulated together with their useful features. For those nations, those customs take place of the Torah — but only in secular matters.”⁴

The Torah stands between us and God in an indivisible light which brings us the blessing of God, giving us this holy land as an inheritance from God so that our dwelling place can be in the holy land of Zion: *arise shine for thy light is come and the glory of the Lord is risen upon thee* (Is. 60:1) “The Holy One, blessed be He, said to Israel, ‘my children, since my light is your light, and your light is my light, come: let you and I walk together and illumine Zion.’” (Pesikta de Rav Kahana 21, Yalkut Shimoni, Yeshuyahu.)

[PAGE 6] Elsewhere, Scripture states, *for the Lord's portion is His people. Jacob is the lot of His inheritance.* (Deut. 32:9) When God bequeathed land to each nation, He chose *Eretz Yisrael* as His portion and gave it to Israel. As it is said, “whoever dwells outside the Land, it is as though he has no God. But the land of Israel is not governed by the *sarim* (the guardian angels of the other nations) so that even the non-Jews are responsible for fulfilling the commandments as in the case of the Samaritans.” Since Jacob is the lot of God’s inheritance, then so too, are his children. (Aderet Eliyahu of the GR”A)

Together with this most special and unique of gifts which God has bestowed upon His people is the privilege to appoint in every generation leaders who will work for the good of the people in the name of the heavens and will guide the people in a clear and distinct fashion such that they will be found in grace before God. Those leaders will need to be

⁴*Ibid.* : 12. Interestingly, these two quotes come from the same section in Bahya’s book but Waldenberg has inverted their order.

⁵Waldenberg cites the Gaon of Vilna in order to demonstrate that indeed the residents of the land of Israel are to follow the laws of Torah. A reference to *Baba Batra* 130b is given where we learn that “people derive the decided law neither on the basis of a theoretical process of reasoning nor on the basis of a concrete decision, unless they tell you, ‘it is a decided law for concrete practice.’” which seems to imply that the Torah is the law of the land in Israel until further notice.

individuals who can act decisively and in accord with the will of God and will not incite God’s anger. They shall be sure-footed and will fill the requests of the people without turning their backs on them. *Truly He loves the peoples; all His holy ones are in thy hand.* (Deut. 33:3) “This shows that God loved Israel in a way different from the way He loved any other nation or kingdom. *All His holy ones, they are in Thy hand*” this refers to the leaders of Israel, who give their lives for Israel. Thus it is written that Moses said, *Yet now, if Thou wilt forgive their sin, and if not, blot me. I pray thee out of Thy book, which Thou hast written* (Ex. 32:32). And about David, Scripture says, *and David spoke to the Lord when he saw the angel that smote the people, and said, Lo, I have sinned, and I have done perversely; but these sheep, what have they done? let thy hand, I pray thee, be against me and my father’s house.*” (Sifre parashat V’zot Habracha, piska 344)

Moses and Aaron serve as exalted examples of leaders of holiness in Israel. They symbolize, in their own actions, the unity of social leadership with Torah leadership. Their actions reveal a Torah-true Jewish life and succeeded in their internal searching to bridge a type of personal Jewish behavior with that of [PAGE 7] the entire Jewish communal soul. For those who bring together their individual social souls with their toratic souls are like an over-flowing stream from the Holy of Holies. Taken from *Siddur Olat R’ayah*: when the individual sections and the whole can get together in a protracted form, with distinct boundaries, they glorify the holiness of God. The more that holiness expands and the light of Torah can shine through, the Jewish essence, rooted in experience shines its light on all. The Israelite perspective on the world is one which is deep and has a type of redemptive expectation to it which is linked inextricably to the world-to-come which awaits all Israel.

Like a precious shining jewel, the verse *Moses commanded us a Torah, the inheritance of the congregation of Ya’akov* (Deut. 33:4) along with *all his holy ones are in his hands* and *and he was king in Yeshurun*, instruct us that first and foremost the beginning of wisdom is to subject political leadership to the commandment of *Moses commanded us a*

Torah The Torah was given in a two-fold fashion: first, it contains the absolute authority from God which provides a means of governmental rule which allows a type of holy rule which brings a holy fire into the community, and secondly, there is the fire burning by the independence of the people which is represented by the victorious menorah which remains a central Jewish symbol which speaks to what God said to Zerubbavel: *not by might and not by power, but by my spirit alone, said the Lord of Hosts* (Zech. 4:6).

In our discussion of the special characteristics of Jewish leaders, it is beyond a doubt that they are to perform their duties in the name of Heaven — to guide and to adjust their feelings and emotions such that they sublimate their wills to that of God, who created the world and fills it daily. They must realize the difference between the personal “I” and the communal “I” which was of great concern to our Sages who wrote that there are unique needs for those who in charge of the needs of the public. The Sages write, “and all those who labor in public affairs, let them labor for the sake of Heaven, for the merit of their fathers aids them and their righteousness endures forever.” (*Avot* 2:2) [PAGE 8] This means to say that “since in the gathering of the people there is a benefit to the one who rules them, this text says that those who engage in political activity should see to it that only the Blessed One rules over them, which is what “for the sake of Heaven” means. We find this in the *midrash* as well, where we learn that at the moment when Moses was instructed to “go down from your greatness, for I gave you nothing unless for Israel,” immediately he lost his powers and was unable to pray for them. God forbid we should say that he feared losing his greatness and prestige. But since he understood that his greatness was dependant upon their existence, lest it seem he was concerned primarily for his own prestige, until the Holy One, blessed be he, gave him a permit to pray for them.” (*Sefer Hat’hayim*, the brother of the Maharal of Prague 5:2).

The one indispensable condition involved with working as the leader of the community is that the work be done in the name of Heaven. For someone to work on behalf

of the community but fails to do so is not worthy of the name by which he is called. As the *Derekh Hayim* writes on the Maharal of Prague on *Avot*, if someone works in the name of Heaven, then his work is for the betterment of the community and he does not seek a great reward. But if he works for his own behalf, he does not help the community in any way. The community’s affairs, when done in the name of Heaven, can even be done on Shabbat, if it is for the good of the community and are even considered on the same level as the affairs of Heaven.

The *Derekh Hayim* goes on to comment on the nature of the wording from *Pirkei Avot* “for the merit of their fathers aids them and their righteousness endures forever.” He explains that the merit of our ancestors, namely Abraham, Isaac, and Jacob serves to help those who act as public officials for the general community. Although the individuals of the community are ever changing, as are their leaders, the aid from our communal ancestors forever aids them and their righteousness endures forever. The privilege to serve the community began long ago and the merit is granted to whomever comes to lead but its origins lie with our ancestors. With the realization that the merit stems from our ancestors from the beginning of time to the end of time, the leaders of Israel will come to understand that their power derives from Heaven and is in the name of Heaven and not for their own benefit. [PAGE 9 began in the middle of this paragraph which I summarized

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This third volume of my book *Hilkhot Medinah* contains much research on the legal issues surrounding proper governance of the political state. For the one who is involved with such things, they will have awakened in them an exalted spirit to begin finally a serious spiritual journey which will cause them to consider ways in which to bring the light (of Torah) into a true and lasting solution in order to solve the intense and fundamental problems of the world. The leaders will need to place their whole hearts on the matter in

order to arrive at a solution which is already found among "the people whom I created"

Within this, to go up to the path of the King of kings and to be bound to follow the people along their faithful and righteous path, and to shine a light along the way, so that others may learn to follow the complete Torah of God which "he commanded us" the blessing of life as long as we follow His laws, statutes, and judgments and join our heart and our soul to arrive ultimately at the longed-for purpose, the purpose lamented over for so many years by Jewish hearts — to renew our state in the image of the people of Israel in the holy land, in the very image which had once fallen in the land and which will draw us back into life in the house of God, which was the source of much fear on the part of the other nations of the world when they saw the pure marble stones, but to them we have no evil thoughts, rather, we pray that they will bring light to the holy people, and that all the people will learn from the laws and traditions which God spoke through his faithful prophets. May we merit to fill our task with the praises of God and that he will be among all the lands of the earth to the point that righteousness and the kingdom of God will fill the world.

I pray before the one who sits on an exalted throne, who gave the Torah to His people Israel, in holiness, that He may grant and have compassion to enlighten my eyes to the light of His holy Torah to understand and to comprehend her words and to merit a way to renew truthful interpretations and to continue in the holy work of interpreters and researchers in the renewal of *halakhot* on a daily basis, months and mornings, in every profession of life. And that I may merit to come to publish and scatter among Israel (this work) so that great will be the Torah and her instructions, and that the Torah may never depart from among us, our children, and their children, forever and ever.

Awaiting the redemption of God, Eliezer Yehudah Waldenberg

Chapter Four:
Introduction, Analysis, and Translation of
Hilkhot Medinah, Volume One, Chapter One: Judges and Officers

IVa

Volume One, Chapter One, Section One: THE COMMANDMENT FOR
APPOINTING JUDGES ACCORDING TO THE NOACHIDE LAW

Introduction and Analysis

Waldenberg's first chapter of *Hilkhot Medinah* discusses the role of judges and officers. The title, as well as sections of the chapter, come as a direct result of the commandment from Torah, *Judges and officers shalt thou make thee in all thy gates, which the Lord thy God gives thee, throughout thy tribes: and they shall judge the people with righteous judgment.* (Deut. 16:18) It is noteworthy that Waldenberg begins his book with this commandment. Subsequent chapters of the volume deal with *smichat z'kaynim* and *malkhut yisrael*. "Where there is no law, there is no judge" [Ramban on Numbers 16:1] Waldenberg wants to start "as in the beginning" with restored judges who will be able to administer toraitic justice. The notion of toraitic law as important for the governance of the modern state has been explained in the previous chapter on the era in which *Hilkhot Medinah* was written. Waldenberg underscores that sentiment by presenting how a judicial system can be established without the institution of *smikha* (properly ordained judges). He is not interested in establishing a new *halakha* but rather in using the glory of the already existing corpus of Jewish law to direct the institution of Jewish law in the modern state.

In his first section of the chapter "Judges and Officers," Waldenberg begins with *Adam ha-Rishon* and a legal dispute between R. Yohanan and R. Yitzhak over the commandment of judges. Waldenberg brings in this talmudic dispute as a way of introducing how the B'nei Noach adjudicated their cases and whether or not they were held to any legal standing. Waldenberg stresses the position of R. Yitzhak who understands the word *elohim* to refer to judges bases on a *g'zeirah shavah* between *And the Lord God (elohim) commanded the man saying...* (Gen. 2:16) and *the master of the house shall be brought to the judges (elohim)...* (Ex. 22:7) Whether or not they should be judged by Jewish law is unclear. Two matters are clear: they are subject to the seven commandments and they should set up courts. Rambam sides with R. Yitzhak and stresses the need to set up courts, but does not carry the issue into whether the *B'nei Noach* are to follow toraitic law. Ramban disagrees with Rambam and concludes that the

B'nei Noach received not only the seven commandments but also laws of monetary matters, torts, fines, and the like. Waldenberg explores the responsa of Isserles and Chatam Sofer who disagree in part with the Ramban. The words of the *Lechem Mishneh* and Meiri are of great interest to Waldenberg who follows their reasoning of the verse *don't commit injustice in making judgment* (Lev 19:15). This verse serves to warn the Jewish community not to allow another party to fail to provide justice. By avoiding to do justice, one commits injustice and therefore must seek a means to provide justice. Thus, using the example of Shimon and Levi who killed the men of Shechem for violating their sister, Chatam Sofer explains that they acted "extra-judicially" but were not themselves sentenced to death since they were merely carrying out justice which otherwise would have not been performed. Ultimately, what Waldenberg wants to establish in this first section is the notion that Israel (the sovereign ruler of the land) has the right to establish courts and appoint judges over the *B'nei Noach* who live under their jurisdiction.

The status of the *B'nei Noach* is important for our study as they remain a model for the current status of non-Jews today. If they received the commandment for judges — more importantly as becomes clear later in the section — or if they had their trials adjudicated by Jewish courts, then by inference, non-Jews living in the state of Israel can be governed by the Noahide laws, and potentially by extension toraitic law and have their cases heard in a Jewish court.

Translation of Volume One, Chapter One, Section One: THE COMMANDMENT FOR APPOINTING JUDGES ACCORDING TO THE NOACHIDE LAW

The law is well known:¹ — for it is as fundamental as a *mitzva* — that the return of our judges as in the beginning and our advisors as at the start² with strength of complete toraitic governance, cannot be imagined unless the law of *smicha* is renewed for us, once that is accomplished, what will follow on its heels will be the crown of Israeli(ite) justice upon the head of the judge — in full radiance and power for "judges can only be called *elohim* if the *Beit din* receives *smicha* in the land of Israel" (Rambam, *Hilkhot Sanhedrin* 4:4). On account of this, we find that from time to time, an era emerges upon us with a feeling of divine awakening which commands us with the task of redemption and mercy — the great ones of our generation have been awakened in our midst by an earthly awakening and being taken with waves of spirit for performing an act. Many long for the return of the glory of *smicha* in Israel, and even I, in my humility, will add, with God's help, in the second chapter on the words of our predecessors, to capture the humility of their words to clarify the matter of renewing ordination on account of the great historical turning point that we have encountered — with establishment of the state of Israel — in our holy land.³

We will first clarify, with God's help, in this section, according to general toraitic principles, the commandment of appointing the court judges — ministers according to the Torah of Israel — even before renewing *smicha* (without speaking of the measure of their wisdom, their relation, their standing, and their superior intentions, which would need a special treatment) we must explore the possibility of establishing judges and officials in the Jewish state who will teach to the people the way of directing the state according to the laws of our holy Torah — which is not to be substituted by another Torah — to the glory of the

¹Waldenberg begins the section by using an acrostic of the *שם המפורש* at the beginning, just as Rambam does at the beginning of *Mishneh Torah*.

²Reference to Isaiah i:26.

³I.e., at times the Messianic fervor leads our sages to seek ways of restoring *smicha*.

people and to exemplify before all the peoples, as it says: *Behold, I have taught you statutes and judgements, even as the Lord my God commanded me, that you should act accordingly in the land where you go to possess. Keep them therefore and do them, [PAGE 2] for this is your wisdom and your understanding in the sight of the nations, who shall hear all these statutes and say surely this great nation is a wise and understanding people and what nation is there so great, that has statutes and judgements so righteous as all this Torah which I set before you this day*" (Deut. 4:5,6,8)

A) The command of God to the creatures of the world regarding appointing judges over them, who would judge them in their disputations, is as old as the creation of humanity as our sages taught in *Sanhedrin* 56b. *Adam ha-Rishon* was commanded thus from God and immediately upon his creation was entrusted with the Garden of Eden to tend and keep it. In interpreting the verse *And the Lord God commanded the man saying, of every tree of the Garden you may freely eat*, (Gen. 2:16) R. Yohanan and R. Yitzhak are divided regarding from which word of the verse we learn the commandment of judges. R. Yohanan learns from the word *And the Lord God commanded* — these are the judgements (social laws) and thus it is written, *for I know him that he will command his children and his household after him, and they shall keep the way of the Lord, to do justice and judgements*. (Gen. 18:19) But R. Yitzhak learns from the word 'אלהים' "Now God (אלהים) might rightly refer to social laws, as it is written, *and the Master of the House shall be brought unto the judges* (אלהים) (Ex. 22:7)." And thus Rambam decides the *halakha* (*Hilkhot Melakhim* 9:1), "six precepts were given to Adam: prohibition of idolatry and the command to establish courts of justice. Although there is a tradition to this effect — a tradition dating back to Moses, our teacher, and human reason approves of these precepts — it is evident from the general terms of the Scriptures that he (Adam) was bidden to observe these commandments," and even though Rambam writes using the language "it is evident from the general tenor of the Scriptures that

he was bidden to observe the commandments," nonetheless this belief is correct for were it not for this, the *B'nei Noach* would be unable to keep the seven commandments in order to be called among the righteous nations of the world, which gives them a place in the world to come. As Rambam argues (*Hilkhot Melakhim* 8:11), "A heathen who accepts the seven commandments and observes them scrupulously is a 'righteous heathen,' and will have a portion in the world to come, provided he accepts them and performs them because the Holy One, blessed be He, commanded them in the Law and made them known through Moses our Teacher that the observance thereof had been enjoined upon the descendants of Noah even though the Law was given. But if his observance thereof is based upon a reasoned conclusion he is not deemed a resident alien, or one of the pious of the Gentiles, but one of their wise men."

B) And thus we find in the responsa of Isserles #10 that he explains that the difference between the ideas of R. Yohanan to that of R. Yitzhak is as clear as the noon-time sun because R. Yohanan learns judges from *And the Lord God commanded* which means that the *B'nei Noach* were commanded only to keep the local (state) customs and to judge between a man and his brother and his neighbor with an honest judgement — but that is not the way with the laws of Israel which were delivered to us by Moses at Sinai — it is just a customary law, and therefore he learns judges from the verse *And the Lord God commanded* and he learns the *g'zeirah shavah* from what is written [PAGE 3] *for I know him...* for still the Torah was not given. Even to Abraham these laws were not present which were given to us at Sinai, even though we have explained (see *Yoma* 28b and *Kiddushin* 82a) *Because Abraham listened to my voice and kept my charge, my commandments, my statutes, my laws*. (Gen. 26:5) teaches that Abraham even kept *Eruv Tavshilin*⁴. If so, learn from this that he

⁴A kind of *eruv* which permits cooking of food on *yom tov* to be kept over *Shabbat* when *Shabbat* falls the next day. It's a rabbinic law, which explains the significance of the claim that Abraham observed it.

would behave according to the Torah and commandments — even the “commandments” of the Rabbis. In any event, we can say that if he kept the commandments, did the members of his household keep them? They kept only the laws that were transmitted to them, the seven *Noachide* commandments. R. Yitzhak is of another impression, by learning judges from *אלהים* with a *g'zeirah shavah* from *and the master of the house shall be brought to the judges* (אלהים), which is to say that he thinks that the judges of *B'nei Noach* are the same judges which were commanded to Israel at Sinai and therefore we learn from the very same verse that was said at Sinai and the two systems are the same. And even though Rambam decides in *Hilkhot Melakhim* that they (pre-Torah) were not commanded to judge other than based on the seven commandments, nonetheless with those commandments they are obliged to judge as Israel judges (i.e., administer and interpret them as we do). Accordingly, Isserles goes on to prove and to decide according to R. Yitzhak and concludes based on this that when we have dominion over Gentiles, they must apply our system of law. And he adds support to this conclusion that the *B'nei Noach* judged according to the laws of Israel as it says in *g'mara*: “Where a suit arises between an Israelite and a heathen if you can acquit the former according to the laws of Israel, do so and say: ‘this is our law.’” (*BA* 113a) and that is what is commanded them.

According to my humble opinion, Isserles' proof for his conclusion, the *g'mara* of *Baba Kamma*, has its refutation readily apparent based on what Rambam says in *Hilkhot Melakhim* 10:11 which adds to this argument of the *g'mara* in *Baba Kamma* by saying, “and it seems to me that you don't judge a resident alien this way but only judge them according to their laws.” And if according to Isserles' opinion, they can acquit him with the laws of Israel and say: “this is our law,” because the *B'nei Noach* were commanded according to the laws of Israel, why then does Rambam decide that you don't do the same for the resident alien? Does this mean that since they received the seven commandments and are warned to perform them, they are permitted not to follow Jewish law? (i.e., if a goy is subject to

Jewish law in a lawsuit [Isserles' own proof], why would this change when he accepts the seven *mitzvot* and becomes a *ger toshav*? And if we are commanded to see to it that Gentiles observe the seven *mitzvot*, when does the *ger toshav* get off easier than all other Gentiles? As Rambam says, (*Hilkhot Melakhim* 8:10) “Moreover, Moses, our Teacher, was commanded by God, to compel all human beings to accept the commandments enjoined upon the descendants of Noah.” And if they are obligated in judgement as Israel what breaks our obligation to the resident alien? What also is hard for me to understand about Isserles in light of Rambam is at the beginning of the *halakha*, it states, “two non-Jews who come before you to be judged according to the laws of Israel, and both want the laws of Torah to apply to them, thus you shall judge them. If one wants it and the other does not, you are not to coerce them to be judged according to Torah rather they must only seek judgement by their laws.” (*Hilkhot Melakhim* 10:12). According to Isserles, the words of Rambam are contradictory in two ways. First, according to the language of Rambam, we learn that if a non-Jew comes to indict us, from here we have permission that if both parties agree to be judged according to Torah, do so — but according to Isserles, they are obliged and coerced to do so. Second, why has Rambam decided that if the one does not want a Jewish trial, don't coerce him to be judged according to our judgements? Yet according to Isserles, they are obliged and it is obligatory upon us, to coerce them in this time when our hands are strong (when we have governmental sovereignty) [PAGE 4] If Rambam speaks in the language of “Don't coerce him” there is proof that he speaks in a time when our hands are strong. If so, why don't we coerce the one who doesn't want a toraitic trial?

On this difficulty, regarding the two non-Jews, we could push ourselves (to a forced resolution) and say that from here the text speaks about a case when they come to court not over laws which were commanded, but rather it is with a customary law which they accept upon themselves and that is also in our law. With this Isserles brings the opinion of Rambam that one is commanded to judge only by their seven commandments, even though the

meaning of Rambam's opinion definitely does not mean this! Rather, the meaning of his opinion clearly says that one speaks of the judgements which they were commanded. But the first difficulty still remains, the "it appears to me" of Rambam leaves not the slightest room to wiggle ("not even an eye of a needle through which to squeeze the elephant") and to claim that there, too, we are speaking of the laws of Israel as Isserles thinks.

C) Likewise, we learn from the explanation of Isserles, mentioned above with regard to the *g'mara* of *Sanhedrin* that he explained the intention of the ones commanded regarding judgements which included both the judging process and its implementation, that if it is said in this way behold suddenly his explanation comes down on the side of R. Yohanan and R. Yitzhak. And it might be reasoned that the *halakha* is as the conclusion of his words which we brought forward. Truly though, this matter is expounded upon by the sages.

Rambam reasons that included in this is only the commandment for establishing courts to judge them but not for fulfilling their judgments (that is, they should establish courts, but the *mitzvah* does not include the particulars of the law that these judges should minister), for he explains clearly, (*Hilkhot Melakhim* 9:14), "as regards the commandments laid upon the *B'nei Noach* to establish courts of justice, the duty is enjoined upon them to set up judges — each district to deal with these six commandments and to caution the people." [In the *g'mara* of *Sanhedrin* 56b it is mentioned as well regarding each city and in the Rambam, *parashat Vayyishlach*, we learn that he pays no attention to the distinction between *מִשְׁפָּט* — district — and *עִיר* — city], assuming that in Rambam these mean one and the same thing. In the beginning, Rambam shifts the words of Rambam that require positioning judges in every district, then after that, without emphasizing any disputation on this point regarding Rambam, Rambam writes in his own words, "in my opinion, the judgements which count for the *B'nei Noach* for their seven commandments, they need not place judges in every district alone — not at all — because of this commandment they should seat judges in every city, like

Israel." And he doesn't mention at all that there is any disagreement between him and Rambam on this point. Whereas Rambam says every district he says every city. ["To judge with these six commandments and caution the people — therefore all the inhabitants of Shechem were condemned to death by beheading because Shechem had been guilty of robbery. They saw it, knew it, and failed to impose sentence upon him." Note that Rambam explains clearly that the intention of the command regarding judgements is just on the process of making the judgement which is obligatory, to appoint judges who will hear the case and try the transgressor on the six commandments they were commanded — not included in this is the fulfillment of the judgement if it is in accordance with laws of the state and customary law.

Rambam's Torah commentary (Gen 34:13) disagrees with Rambam by reasoning that "the meaning of 'laws' which the Rabbis have counted among their seven Noachide commandments is not just that they are to appoint judges in each and every district, but He commanded them concerning the laws of theft, overcharge, wronging, and a hired man's wages, the laws of guardians of property, [PAGE 5] forceful violation of a woman, seduction, principles of damage and wounding a fellow man, laws of creditors and debtors, and laws of buying and selling, and their like, similar in scope to the laws with which Israel was charged, and involving the death-penalty for stealing, wronging or violating or seducing the daughter of his fellow man, or kindling his stack, or wounding him, and their like. And it is also included in this commandment that they appoint judges for each and every city, just as Israel was commanded to do, but if they failed to do so they are free of the death-penalty since this is a positive precept of theirs [and failing to fulfill a positive precept does not incur the death-penalty]. The Rabbis have only said 'For violation of their admonishments (negative commandment) there is the death penalty,' and only a prohibition against doing something is called an 'admonishment'."

Note that the words of Isserles concur with the opinion of Rambam and not Rambam.

D) Perhaps the whole point of Isserles' ruling that the *B'nei Noach* are commanded to judge according to the laws of Israel (see there in his responsum which affixed this supposition to his verdict in the discussion which is asked there) is based primarily because he reasons that his thinking is in line with Rambam's interpretation of the commandment concerning "laws," and because of this, perhaps he does not think to decide according to the decision of Rambam mentioned above with regard to the two non-Jews who came to be judged and the resident alien. Perhaps Isserles agrees with Rambam all the way, so that he sees all of Rambam's rulings as based upon the (rejected) notion that the commandment of judges, that the *B'nei Noach* must establish a legal system, includes only the courts and not the particular laws themselves. Isserles seems to agree with Rambam that Gentiles are obliged under this *mitzvah* to follow the laws of Israel to a much greater extent.

E) But I saw in the responsa of the Chatam Sofer 6:14 who wrote to explain that the doubt of Isserles whether the commandment requires that every king on his own legislates on all sorts of issues according to his desire and thus that very law/right with which the king rules is equivalent to the law of Torah and thus the Holy One, blessed be He, established that they should legislate for them law and etiquette for fraud and transgressing a neighbor's property boundary (Deut. 19:14) and how much to fine a robber or a similar situation. Or whether because they are obligated to judge according to our law for bailiffs (custodians of property) and for theft and all that is written, we won't enter the debate between Rambam and Ramban, for there is a debate, that Ramban thinks that all these are included under the meaning of the commandment of theft, and the intention is theft and all its additional elements, and what remains is the commandment of laws to seat judges who will judge each man and his neighbor. Ramban sees theft on its own but laws are included with the rest of the laws, wages, and so forth, and he includes the seating of judges. And according to this, if we go along with Chatam Sofer that there is no connection in the debate between Rambam

and Ramban our difficulty is even greater, which we mentioned earlier about Isserles judging from Rambam which we brought earlier.

F) Likewise, I considered that even though there is no necessity that Isserles explains the intention of the *g'mara* which includes both judges and the particulars of the law — both their judging and enforcement as we wrote in letter 'C', for he may well reason like the Rambam who included only judges, in the debate between R. Yohanan and R. Yitzhak, according to Isserles in some way that the judges are obligated to judge the six commandments which they were commanded — either by the laws of Israel or by their customary laws — and thus we can resolve the difficulty against Isserles based on Rambam's ruling of the two non-Jews who came to be judged and he follows the opinion that the commandments about laws include only the appointing of judges. If that is so, according to his words, the *B'nei Noach* [PAGE 6] were not commanded at all with regard to laws of fraud, guardians of property, and other such laws [i.e., *dinei mamon*]; therefore, Rambam rules correctly that we cannot coerce them on this because we're talking about a case when they come to us for judgment, which is similar to what was written in letter 'B', but the problem against Isserles still remains from Rambam's "and it appears to me." Because however you reason, the result is the same. If the one who is speaking with these laws which were not commanded, then so too Isserles' proof falls away; if with the laws which were commanded, then our question becomes even harder to understand why there is no law, according to Isserles, for the resident alien and so too we cannot correct all this according to Chatam Sofer, which even Rambam believes is commanded: theft, property and other such things.

G) I saw likewise in the responsum of Chatam Sofer according to the words of the *Lechem Mishneh* (*Hilkhot Melakhim* 9:14) who explained Ramban's problem with Rambam

by saying that the laws for the *B'nei Noach* are positive commands if they were warned. But their death would follow if they did not speak the positive command. For one could say (*Lechem Mishneh* says) that within the laws themselves, it is a positive command to judge the people and "sit and do nothing," i.e., a negative commandment.³ Thus they should be warned so as not to perform injustice. Chatam Sofer objects by finding that the *Lechem* does not derive benefit from his explanation, granted that laws include now two things (positive and negative): 1) establishing and placing judges who will follow the command *and don't commit injustice in making judgment*, (Lev. 19:15) and be guilty of murder in performing injustice. In any event, he does not make use of how the people of Shechem were culpable of death because their judges did not judge their leaders — it is not because they committed injustice but that they did not appoint judges to consider their cases. And in my humble opinion, it seems to me that the intention of the *Lechem Mishneh* in his explanation is that the words *don't commit injustice* refer not just to justice but it means to say at the TIME of justice — which is to say that they shall not commit injustice even at the time when they neglect the laws. As Rashi says in *Sanhedrin* 59a "and the negative commandment *don't commit injustice* applies even if there is no command to perform justice and so he sits and rescinds and is warned that he should not do injustice. And the warning *don't commit injustice* is not a positive commandment to perform justice rather it stands alone and has nothing to do with the command *don't commit injustice*." The commandment not to do injustice includes the duty to prevent others from doing injustice, and if one does *not* prevent others from doing injustice one has violated the *mitzvah*.

If we are right in these words of ours regarding what the *Lechem Mishneh* intends, behold in our day which we merit the light of the *Meiri*⁴, we find that the *Lechem Mishneh*

³That is, even according to Rambam the commandment to *B'nei Noach* to establish courts includes a negative commandment and thus a capital offense for them if they don't do it.

⁴i.e., now that we have discovered the texts of the *Meiri*, which was not discovered until the 18th, 19th, 20th centuries.

intended this, as *Meiri* points out. For so *Meiri* writes to explain the *Sanhedrin* passage: "I have seen that a few of the great sages who argue whether or not the placement of judges for the *B'nei Noach* is a positive commandment, but in my opinion, the placement of judges is certainly included in the *mitzvah* of judges. The 'laws' are the prevention of injustice⁵ and violence and 'warning, etc.' and the proof of my words is in what they say below regarding a 'Gentile who keeps Shabbat is culpable of death' and it is difficult to believe that these judges are to be appointed and acting, yet, he explains establish and do and sit as judges meaning *don't do* (injustice), referring to the prevention of injustice and as it says, *don't do injustice* that is every reason to do it in the name of the one who does it." So you see that already the *Meiri* begins to explain it like this, that this law contains a positive and a negative commandment. And thus he concludes and writes, "and as it is a reason to do it, in the name of the one who does it" [PAGE 7] These words have similar intention to what we wrote earlier saying that in his avoidance from preventing others from committing injustice we will think that it is as if he himself were doing injustice, and this warning of *don't commit injustice*, is for him.

H) Chatam Sofer explains there the difficulty of the Rambam regarding the failure to observe a positive commandment. That is, while the *B'nei Noach* are culpable for death for not fulfilling this positive *mitzvah* (as opposed to Jewish law, where the death penalty is never imposed for violating a positive commandment), he isn't executed in court for it. Therefore, Shimon and Levi did not act "extra-judicially" in carrying out the death sentence against the failure of the Shechemites to establish courts. It seems to me that I can bring a proof for the new perspective of Chatam Sofer that the Gentile deserves death but is not executed by the legal process, for in the Ran's commentary on *Sanhedrin*, written to expound on Rambam, he writes, "but for those city people that dwell there and do not

⁵With the implication being that the punishment for violating any of these is death.

appoint judges in every city and district there is no requirement to execute them for it is a positive commandment for them." And the Ran emphasizes the point by saying "this does not require death to execute them." We realize that he believes that because this is a positive command for them, it is not required for them to kill them, and the *beit din* does not execute them, but the culpability itself to die does rest on them. This is exactly how Chatam Sofer reasons above concerning Rambam, that the death penalty is required in any event, there is no guilt for Shimon and Levi who killed people who required death anyway. In any event, since the *beit din* is not required to take care of killing them, Jacob got angry at them that they put themselves in danger for a commandment which was not expected of them. See there.

And for the words of the *Lechem Mishneh* which is written there to expound on the Rambam on the section of *g'mara* in *Sanhedrin* see what is written in *Ha'amek She'alah*⁸ on 23. See also what is written in Isserles, see also what is written in *Eitz Hadar* of our teacher R. Abraham Isaac Kook 40-42.

1) In my humble opinion, it is possible to prove the words of Rambam as in line with the Sages in their saying that the commandment of laws, which all agree is incumbent upon the *B'nei Noach*, refers only to the establishment of courts, based on what appears in the *Tosefta* (*Avodah Zarah* 9:4) which begins with a law about the seven commandments given to the *B'nei Noach*. To say that they are commanded regarding the laws means that they are required to establish courts (or in Rambam's view that they are required to apply the laws of Israel in their courts) — and after that the *Tosefta* clarifies, "regarding judges, how?" Just as Israel is commanded to establish law courts in their cities so too are the *B'nei Noach* commanded to seat law courts in their cities.⁹ Thus clearly does the *Tosefta* establish an

⁸*Ha'amek She'alah* is a commentary by R. Naftali Zvi Yehudah Berlin (the "Netziv") on the *She'iltot*, a collection of geonic *derashot* compiled by Acha of Shabbecha, 8th century.

interpretation of "על הדין" that they are commanded to establish law courts and thus we understand the words of Rambam.

J) Even though we have raised difficulties against Isserles from the rulings of Rambam, we could apparently bring proof to his words from those of Rashi in Gittin 9b, s.v. "except for letters of divorce," where he writes, "other than matters of divorce, for they are not subject to the laws of Jewish divorce, and are not applicable to the laws of divorce and holy marriage, but to the laws commanded to the *B'nei Noach*." We are on good ground if we say that Rashi reasons like Isserles above that the "laws" of the *B'nei Noach* are the same "laws" which were commanded Israel at Sinai.⁹ [PAGE 8] Rashi's opinion is understood clearly in matters of divorce which are not subject to excommunication and therefore the legal documentation is made unfit for the non-Jew, and between the rest of the promissory papers which are made kosher, because the *B'nei Noach* were commanded these laws like the community of Israel, but if we were to say that also the laws which the *B'nei Noach* were commanded are not like the laws of Israel in that they just erect a customary law — if we say what is fixed for this is a general principle, for what is commanded, for the laws since there is no fence around the laws which we were commanded and if so, then they are not subject to laws like us.

See in my book, *D'var Eliezer* (#20) in which I explain Rashi's intention on what he wrote in the preceding passage that therefore they consider kosher all the papers which are brought up as legal documents by the non-Jew because the law of the land is law and Rashi believes that the concept of *dina de-malkhuta dina* is applicable particularly to the seven

⁹The *Gittin* passage refers to the idea of *dina de-malkhuta dina*, according to which Jewish courts can accept the validity of certain actions of Gentile legal authorities. Thus, while Gentile divorce documents are unacceptable at Jewish law, because "Gentile are not subject to the (Toraitic) laws of divorce (כדיניות), their other documents are acceptable because Gentiles are commanded with respect to "laws" (דינים) in general. But if this is so, then we have an argument in favor of Isserles' position, namely that Gentiles are obligated to adjudicate according to "the laws of Israel."

commandments since they were commanded them, therefore the laws which they do shall be law in place of the law of the land. For the laws which they were not commanded to do, and do not apply to them, then we do not follow the law of the land. Regarding letters of divorce, since they were not commanded this and it does not apply to them, therefore, they are exempt. See there. And for that matter, it is possible to resolve the difficulty in the *Tosaphot* (which they raised against Rashi) in *Baba Kamma* 88a in the opening words of "יהא עבד" where they expound on the Rashi in *Gittin*. [See also the *Hagahot* of Maharav Rensberg on Rashi's *Gittin* 9b, passage which begins בסרין דרבנן פסולא דרבנן where they reason that non-Jews are eligible witnesses according to Torah law. According to our words, Rashi does not necessarily believe this. He says that they are unfit from the Torah and one who makes them kosher does so on account of *dina de-malkhuta dina* as Rashi wrote in the previous passage. [Note that even the *Tosaphot* in *Gittin* wrote in the passage beginning with פ"ע"ט, the *takana* of the rabbis is to declare them kosher, but according to Rashi, declare them kosher on account of *dina de-malkhuta dina*.] And the one who explains that the "laws" are different because of "for the laws which were commanded the *B'nei Noach*" it is really a matter of because they were commanded, then it is applicable to this to say — *dina de-malkhuta dina*. And as we reasoned above, also in the opening phrase פסולא דרבנן, the reason hinges on the legal document (of the non-Jew) being unfit based on toraitic law and their witnessing is not kosher, "because they do not have a Torah of divorces and holy marriage." We believe for this reason — that because they have no Torah of divorces and holy marriages that the documents are unfit. The one who believes that we should not say this on account of *dina de-malkhuta dina* just as we say with the rest of the legal documents, and that is, as mentioned earlier, since they were not commanded these things and they do not apply to them, we do not use *dina de-malkhuta dina* for this. But this explanation is better understood if they were commanded according to the laws like Israel [even if it is in general law and not in each individual section. See also *Ha'amek Shealah* and *Eitz Hadar*.]

K) Be that as it may, all opinions agree that the commandment of "laws" includes the establishment of courts. [PAGE 9] If in states and places where their villages are found to be governed on their own with their own judges, then if they are residents and dwellers at our outlying areas, under our government, we are within our rights to place judges over them — if he ruled us or if we ruled them according to that which was best in our eyes, as Rambam decides (*Hilkhot Melakhim* 10:11) "the Jewish court is in duty bound to provide the resident aliens with judges who should render decisions in consonance with the laws enjoined upon them, so that the moral order be not destroyed. It rests with the court to appoint heathen or Jewish judges." As Rambam wrote, "in consonance with these laws," it seems that his intention is clear according to the laws that previously were clarified that all the commandments of the *B'nei Noach*, and which are not as I saw in the words of a noted contemporary rabbi who explained that Rambam means, "for the residents who reside in the land of Israel, it is necessary to hear their cases exclusively according to the fixed laws of Torah," — which is not the meaning of Rambam, as one who reads him carefully will see. But the Rambam here in this *halakha* does not try to tell us the difference between the laws for resident aliens and other *B'nei Noach*, rather he wants to say that we are obliged for both the strangers and the residents to appoint for them judges. And when he writes "in consonance with these laws" his intent, as mentioned above, means in consonance with the laws of the *B'nei Noach* which preceded earlier. But for these laws, there is really no division between strangers and residents to other *B'nei Noach*.

But from the Radbaz we learn that the obligation upon us to appoint them is only after we see that they have not appointed them or that they have no one suitable to do so. But so long as we haven't seen this, we are not required to intervene in their affairs, to position judges over them, as he writes, "if they do not appoint for themselves a *beit din* or if they don't have someone suitable to do so, then a *beit din* of Israel is obligated to serve as judges over them. But know that in an alternative version, it says, there is no obligation for a *beit*

din in Israel to position judges over them.

IVb

**Volume One, Chapter One, Section Two: JETHRO'S ADVICE ON
APPOINTING JUDGES**

Introduction and Analysis

With the affirmation of Israel's right to establish courts and hear cases of Jews and non-Jews, Waldenberg takes an aggadic digression into the nature of how we learn the commandment to appoint judges. We need look no further than *parashat Yitro*. Moses, the judge of judges, toiled in hearing cases from dawn until sunset which Jethro called "not good." He called on Moses to appoint judges over the thousands, hundreds, fifties and tens. Those "captains" would handle all the small cases and the bigger issues would be brought to Moses. Moses' workload would be significantly reduced and more people would be involved in the judicial process. There is a sense of concern on the part of the commentators whom Waldenberg presents. Who was Jethro, a non-Israelite, to determine the judicial structure of the Israelite community — let alone, before the giving of the Torah? Ultimately, the commentators are able to avoid the possibility that Jethro acted alone in his advice before the time of the giving of the Torah. Jethro merited to provide advice which was already sanctioned by God and according to some, did so after the giving of the Torah. One commentator even suggests that Moses already knew that the Torah was coming and simply placated his father-in-law into believing his advice was the impetus for the restructuring of the judicial system.

This section comes as an opportunity to witness Waldenberg engage in aggadic matters to present the reader with an alternative to straightforward *halakha*. The use of Jethro as a legal source, even if only as the mouthpiece of God, is interesting since the advice remains of use to the Israelites and inspirational to the modern generation. If Jethro can advise his son-in-law on Torah and legal matters, then this generation can certainly turn to its own Jewish sources written since *zman matan Torah* as a means for creating a legal system.

Translation of Volume One, Chapter One, Section Two: JETHRO'S ADVICE ON APPOINTING JUDGES

A) Before the text was conveyed and repeated¹ to Moses at Sinai on how to handle the appointment of judges, Moses our Teacher sat and judged Israel in accordance with the initial command based on the extension of social legislation from Marah: *there he made for them a statute and an ordinance.* (Ex. 15:25)² God gave Jethro, Moses' father-in-law, special merit that he should make God's intentions his own and thereby advise Moses on how to act as an authority on making rulings and administering justice based on a division of judicial tasks for laws of differing levels as we read his advice in the Torah portion which carries his name. [PAGE 10] *Moreover you shall provide out of all the people able men, such as fear God, men of truth, hating unjust gain, and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens; and let them judge the people at all seasons, and it shall be that every great matter they shall bring to you, but every small matter thy shall judge: so shall it be easier for you and they shall bear the burden with you.* (Ex. 18:21-22) And Moses heard his father-in-law's advice and followed his advice as we read further on, *So Moses hearkened to the voice of his father-in-law and did all that he said. And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. And they judged the people at all times: the hard cases they brought to Moses, but every small matter they judged themselves.* (Ex. 18:24-25) From Jethro onward, there have been established sanhedrins [law courts] by Israel.

We find in this proposal advice for creating four categories of judges: 1) ministers

¹The commandment concerning judges was also a Noachide *mitzvah*, it was repeated at Sinai (Deut. 16), making it a special Jewish obligation.

²[For what Jethro wrote before the giving of Torah, see *Zevachim* 116a, *Avodah Zarah* 24b, *Tosaphot* "התורה" "התורה" "התורה", Bartinoro, *Sanhedrin* 56b, which discuss the timing of Jethro's sacrifice and the establishment of courts as coming from the social laws extended at Marah.]

over thousands; 2) ministers over hundreds; 3) ministers over fifties; 4) ministers over tens. See in Ibn Ezra what he says about the intent behind the ministers over thousands. He explains contrary to what is in the *Mekhilta ad loc.* and the *g'mara* of *Sanhedrin* 18a, where it indicates how many numbers (judges) are indicated for judgment from what is written in Torah, for we learn there, "there were 600 judges of 1,000, 6,000 judges over 100, 12,000 judges over fifty, and 60,000 judges over ten, thus we see that there were 78,600 judges over Israel [See *Tosaphot*, Chezkoni on the Torah, דעת וקנים בעל החוס, Bartinoro]. Also a citation in the *Yerulshalmi Sanhedrin* 1:4, "the number of judges for Israel was 78,600 — judges over thousands. (and see *Akeidat Yitzhak* the end of chapter 43 what he has written to understand the essence of Ibn Ezra's approach.)"

B) A precondition to going out and working out the proposal was, *and God commanded you so, then you shall be able to endure* (Ex. 18:23) and according to the *Mekhilta's* interpretation, "go and rule in might. If he thanks you, then you will be able to endure. If not, then you won't endure." And on account of that, so too in explaining the suggestion, the *Mekhilta* says, "certainly Moses listened to the voice of his father-in-law, and did all that his father-in-law said, these are the words of R. Yehoshua. R. Elazar HaMoadayi said, *Moses heard all that his father-in-law said and he did all that God spoke to him*, and if here R. Yehoshua and R. Elazar are divided at the interpretation of his words, *and he did all he said* then we can look in *Sifre* Deuteronomy and find the verse *and I spoke to you at that time saying I cannot bear you myself*, (Deut. 1:9) explained simply without debate: *Moses said to them, not on my own do I speak to you, rather, from the mouth of the Mighty One do I speak.*

In Deuteronomy we read that he consulted with the people and only after their

³Ibn Ezra presents a variety of numbers which can be derived from Jethro's formula: 1,160, 87,600, 876,000 and 11,120. *Akeidat Yitzhak* explains that having so many judges would bring about a decrease in crime since litigation would be readily available.

agreement did he carry out this measure. For it is written, *and you answered me, and said, the thing which you have spoken is good for us to do. So I took the chief of your tribes, wise men and known, and made them heads over you, captains over thousands, hundreds, fifties, and tens, and officers among your tribes* (Deut. 1:14) [PAGE 11]

But it is surprising there is no recollection of this in the Torah [Deuteronomy] that all this came about as a result of Jethro's advice; and Rabbeinu Bahya saw a problem with that so he explained that the intention of what is said in the first portion of Deuteronomy is: "*and he spoke to you at that time*" meaning by way of Jethro who spoke to me and the Holy One, blessed be He, agreed with the whole matter for it is written *thus God has commanded you so you will endure*." Ramban has also spoken on this matter in Deut. 1:18: "Moses did not mention Jethro's advice here and did not say that the word came to him in the name of Jethro, it seems to me that he did not want to mention him while standing before all Israel in his humility, or that he didn't want to praise him thus reminding this generation that he took for himself a Kushite woman, but really he intended to show that the reason for his doing this was because he consulted with the divine presence of God on this matter (i.e., Moses did this because God agreed with the suggestion and not because Jethro suggested it)." In my humble opinion I would like to add an explanation to this latter explanation of Ramban: this matter comes to teach us that since God agreed with this position therefore we could only say today that we were commanded by way of the Mighty One and it is revealed to us after the fact. Since God agreed with this idea, Moses accepted it and for *that* reason, it was determined and Moses could endure. Therefore it would have made sense for Moses to write directly from the Almighty, as he did with the rest of the Torah even though Jethro emerged as one who could reveal God's word.

C) And how is it that Jethro merited that this *parasha* in particular would be written on his account, which might look, God forbid, like a deficiency of knowledge among the

people of God and that Moses lacked the understanding to realize that if he appointed multiple judges over the people that his workload would be lighter? I saw a wonderful reason for this in *Or Ha-chayim*, "I believe the reason for all this is that God wanted to show the Jewish people already at that time and for all future generations that there were great and intelligent men to be found amongst the nations of the world. Jethro was an example of an enlightened Gentile who demonstrated this point beyond question. It is to teach us that if God chose the Jewish people as His people, this is not because they possess superior intellectual qualities. God chose the Jewish people as a reward for the loyalty the patriarchs had shown Him and as an act of love towards this people. There is a discussion in *Zevachim* 116 as to whether Jethro arrived in the desert prior to the revelation at Mt. Sinai or after. According to the view that he arrived prior to the revelation, the point we just made that God did not choose the Jewish people because of their intellectual superiority is reinforced. Although the Gentiles number more wise men than the Jews, God still decided to make us His pilot project. This imposes an additional duty on us to praise Him for having chosen us as an act of love. Even according to the opinion that Jethro arrived in the desert only after *z'man matan torah*, the reason that the Torah reports his arrival before it reports the revelation indicates that the Torah wishes us to learn this lesson."

If the *Or Ha-chayim*'s reason is wrapped up in our being chosen as the people of the Giver of the Torah, then we find in the *Akeidat Yitzhak* (chap. 43) a more logical understanding based on a legal perspective. These are his words which apply to us: "however, the reason why the people were standing from morning until night and the need for Jethro's advice was because this was before the giving of the Torah and still the structure of administering justice had not been given to them. therefore it was necessary for Moses, in the beginning to judge everybody with [PAGE 12] all their dealings and in all their problems and he would think cases over and weigh the matter and reason a conclusion like a king or a judge of other nations. and such was the reason for all the problems and trouble in the

dealings. He acted as a judge — ruling according to his own considered opinion and reasoning — and was unable to appoint judges beneath him because he could not trust that they would rule as correctly as he, or if they would rule in accordance with some non-legal impulse (money, sympathy...). The problem is that when a judge issues a ruling based upon his own understanding (as opposed to the accepted law), the public might think that he was influenced by personal (rather than strictly legal) predilections. So, this would require the judge to spend the whole day explaining the reasoning behind his rulings (so that they don't misunderstand his motives). This would leave time for very few rulings to be issued, and the people would indeed have to wait upon Moses from morning until evening. To spare themselves such trouble, the nation's all agreed to establish laws, issued by their kings and nobles, which would be the exclusive basis for judicial action. The judge's job is now to interpret those laws, thus allowing no one to complain about his rulings. This also permitted the ruler to appoint judges in every city — since these judges could more easily function by applying the known laws (rather than making decisions based upon their own reasoning). When Jethro saw what was happening, he knew how to lighten the burden that was on Moses, as it says, *and when Moses' father-in-law saw all that he was doing for the people* for this he said *it is not good what you do for them*. God wants you to take this burden off yourself to direct them on a better path. For behold, it is not going to happen with you judging them in this manner — now take my wonderful advice and they will remove all the confusion, the advice is grounded in the words, *and God is with you as you are with the people*. (Ex. 18:19) The idea here is that he should not judge the people light-heartedly or without equal time which is what he was doing up to now but that he should let God participate in the act of justice, by applying His *mitzvot* rather than your own legal wisdom, so he will not be their judge but he will guide their words before God and will bring their judgements — and you can appoint right-minded people over them to judge them after the judgements and laws have been ordered for them.

In Malbim's *Hatorah v'hamitzvah*, without mentioning the *Akeidat Yitzhak*, he expounds on the matter using totally different reasoning, by saying that Moses did not choose the judges because *parashat Mishpatim* and the giving of Torah had not yet occurred. So too the laws at Marah which were sworn to be given had not been laid out with the exception of a few laws and commandments regarding judgment for robbery. For they still did not know the scales of justice and if he had appointed judges and they were to judge according to what they thought was right the litigants would not accept their verdicts and everyone who had lost would have to [PAGE 13] return and go through the process again with Moses. Jethro thought that Moses was judging according to his own reason and knowledge and not according to the fixed laws of God therefore he said, *the thing which you do for the people* for this could be done by others and based on this we understand what is written, *and Moses hearkened to the voice of his father-in-law...* which means he paid attention but he was not able to do anything about it since *parashat Mishpatim* had not yet been given. Moses did not want them to judge according to their own will and intelligence until after *parashat Mishpatim* had been given. *So then he did all he spoke, see there.* And according to this, we understand better what was written in Deuteronomy, *and I spoke to you at that time saying...* where the intent of the phrase *that time* is really after God spoke with them at Horev, for only then did Jethro's advice have an impact on them. And thus Moses went up on his own and renewed the suggestion to appoint officers over the people from their tribes and he was better able to do this once they had learned the laws from *parashat Mishpatim*. So it is therefore that Jethro is not mentioned here for really it only appeared in a vision to Moses our teacher who had the spirit of God in him and only Jethro had merited to know the Almighty.

D) It is interesting and important to note what Abravanel in *parashat Yitro* writes contributing to the *Akeidat Yitzhak* and also supports the words of Malbim: Since Jethro

came before the giving of Torah, Moses was sitting and judging the people from morning until night and he did not appoint any judges since the Torah had not yet been given, in a way that they could judge with it, for what had been given were some principle laws so Moses could do what he needed to but still God had not yet commanded the people and given Israel the laws of *parashat Mishpatim*, and therefore in the beginning Moses had to sit before everyone and act as judge on his own, since no person was yet aware of divine law. Also Moses did not want judges to judge simply based on their own ideas of law because he knew how they would quarrel and incessantly undermine and contest each other's rulings and surely the guilty ones would say — show me where you got this ruling — because of this Moses, our teacher, knew that in a few days they would be receiving the Torah as God had testified to him, *when you have brought the people out of Egypt, you will serve God by this mountain*, (Ex. 3:12) and God commanded the judgments which he set before them and he believed that once these laws and judgments were set before them it would be like a prepared table — the judges would be appointed to judge them not according to what they knew but rather according to the laws and ordinances which God had set before them. But Jethro did not realize the importance of the thing that Moses was waiting on so therefore he said, *you will surely wear away* (Ex. 18:18). Therefore, Moses our Teacher, in order to honor his father-in-law and to preserve God's secrets before those who feared him, he did not tell him about the Torah for it was yet to be received and he did not argue with him about his practice of judging if it was good or bad but he listened to his words and replied that yes he would do that. And for us, that is why Moses, in Deuteronomy, does not mention the appointing of judges as a result of Jethro's advice. It was only Jethro who merited having the portion named after him as we are reminded above and it is similar to what appears in *BB* 119a and *Sanhedrin* 8a. [Page 14] "The section relating to the laws of inheritance could well have been written at the instance of Moses our Teacher. The daughters of Zelophehad,

however were found worthy to have a section recorded on their account."¹⁴

¹⁴Like Jethro in several of these commentaries, the daughters of Zelophehad didn't "know" or discover anything that Moses himself could not have derived. They just merited that the *parasha* be written on their account. And this solves the problem of why Jethro — a non-Jew — was the one who established our system of justice.

Volume One, Chapter One, Section Three: THE COMMANDMENT FOR APPOINTING JUDGES FOR THE PEOPLE ISRAEL

Introduction and Analysis

In the end, for the halakhists, there is no question as to whether or not the verse from Deuteronomy, *Judges and officers you shall make for yourself* calls for the appointing of judges. However, arriving at that conclusion requires a twisting and turning path through the halakhic and aggadic literature.

Waldenberg begins with the Ramban who proclaims that the first issue to resolve is whether or not the commandment refers only to the land of Israel or wherever Jews reside. *Makkot* 7a provides an answer by replying that inside and outside of the land of Israel, the community needs to appoint judges. While the Ramban declares that the Rambam agrees with his position speaking affirmatively for judges inside and outside of the land of Israel, later writers are unsure that Rambam truly meant what he wrote. Rambam agrees to judges outside the land of Israel, as long as the judges are ordained judges. There is a chance, argue some, that he had a different version of the text than Ramban or our generation. Most agree that *Judges and officers you shall make for yourself* opens the door to appointing judges everywhere Jews reside.

Shifting from a debate surrounding the legitimacy of appointing judges outside the land of Israel, Waldenberg explores the sources on the issue of appointing courts of three. He begins with Rambam who finds it impossible to appoint any court without intelligent, learned sages. Secondly, Bahya ben Asher emphasizes an earlier issue that without a town of 120 souls, there is no commandment for a court of three. Other *rishonim* disagree, arguing that a court of three is possible everywhere based on the foundational quote, *Judges and officers you shall make for yourself*. Ramban believes that for monetary cases alone, rabbinical courts are necessary.

In order to advance the debate further, Waldenberg revisits the issue of Jethro's advice to Moses. Waldenberg concludes that IF Jethro gave the advice after the Torah, which the sources and commentaries he uses advocate, then Jethro merely advised how to create a series of sanhedrins. Furthermore, IF Jethro gave the advice after the Torah, Jethro merely advised Moses how to structure and go about appointing the Sanhedrin *vis a vis* responsibilities. The commandment for the Sanhedrin came from the Almighty and Jethro just helped Moses accomplish what he would have done anyway.

The question remains: can we derive the command for a court of three from *Judges and officers you shall make for yourself*? Yes, and we do not need a

Great Sanhedrin in order to appoint lesser courts. Based on the literature, Waldenberg shows that Moses, the equivalent of a court of seventy-one, appointed courts of twenty-three, who could make courts of three. Implied in this answer for the modern Jewish state is the implication that Israel can form a court system even though ordination has disappeared and the Sanhedrin no longer exists. Yet at the heart of this conclusion is where Waldenberg closes the section. If appointing judges is possible and if cases can be heard in the land of Israel, who will do the appointing? Who is worthy enough and unbiased enough to determine the junsts?

Translation of Volume One, Chapter One, Section Three: THE COMMANDMENT FOR APPOINTING JUDGES FOR THE PEOPLE ISRAEL

We learn the commandment for the appointing judges over Israel and its tribes from what is written in *parashat Shofetim*, *Judges and officers shalt thou make thee in all thy gates, which the Lord thy God gives thee, throughout thy tribes: and they shall judge the people fairly, honestly*.

A) Apparently, the simple meaning of the passage teaches that the commandment is related specifically to the land of Israel, for it is written: *...shalt thou make thee in all thy gates, which the Lord thy God gives thee*. And thus Ramban wrote in his commentary on the Torah, "He has commanded in the Torah *the word of both parties shall come before ha'elohim* (the judges) (Ex 22:8). If so, God commanded [by implication] that Israel is to have judges, and here he [Moses] explained that they are to appoint judges in all their cities when God will give them the Land. For outside of the Land they are not required to appoint a court for themselves, rather, when an aggrieved party complains, people qualified to judge are to arise for him *according to their ordinances shall they judge it*. (Ex. 7:27) Or the parties are to go up to the Land in the proper time [i.e., when there are courts of ordained judges functioning in the Land of Israel], and there, they will adjudicate it where the court sits. He added here [that it is obligatory to appoint] *shotrim*, who are the ones that execute the judgment. Accordingly, Israelites living outside of the Land are not commanded to appoint for themselves judges in the cities. And so wrote Harav Moshe Ben Maimon."

But this is not how our Rabbis reasoned, as we find in tractate *Makkot*, and as Ramban continues in his writing, "But in Tractate *Makkot* (7a) the Rabbis have taught, *And these things shall be for a statute of judgment unto you throughout your generations in all your dwellings*. (Num. 35:29) This teaches that the laws of Sanhedrin are binding both within and without the Land. If so, why is it stated *Judges and officers shalt thou make thee*

in all thy gates? In the Land you are to appoint [judges] in every district and in every city, outside the Land you are to appoint [judges] in every district, but you are not obligated to do so in every city. From this text it would appear that we are required to appoint a Sanhedrin outside the Land — not in every city as in the Land of Israel, but in every district. If so, this commandment is binding at all times in civil cases and in matters that may be adjudicated outside the Land."

B) Regarding what Ramban says "that Rambam agrees" that outside of Israel, Jews are not commanded to appoint judges in their cities: Rambam explains, (*Hilkhot Sanhedrin* 1:2) "The duty to set up courts in every district and every city is limited to the land of Israel, outside of the land of Israel it is not obligatory to set up courts in every district, as it is said: *Judges... shalt thou make thee in all thy gates which the Lord gives thee, throughout thy tribes*." So it seems from the Ramban's words, that he explains Rambam as follows: since it is written that outside of Israel, there is no obligation to appoint a court in every district, and therefore *kal v'chomer* so too there is no obligation to appoint a court in every city, so that there should be no difficulty to the difficulty against Rambam from *Makkot*. So, we must conclude that the Rambam had a different version of the *g'mara* text. [Page 15] As I have seen in the Meiri who reads, "but outside of the land of Israel, you are not required to appoint judges in every district and every city," and explains "that is to say you are not required to do so but if you were to appoint, then it would be as if they had the law of Sanhedrin," and he rejects the text "but outside the Land of Israel you are to appoint judges in every district and not in every city." And he writes "that it does not appear this way [that we have judges] because everywhere we are outside the Land, we don't have judges. (*Makkot* 34) See there. And this is what is written in the *mishnah*, "the Sanhedrin has jurisdiction/competence in the land of Israel and outside." (*Makkot* 7a) In the Meiri's view, the only way to understand this concept of appointing the Sanhedrin is to see it in the light of

rabbis being ordained and appointed, in Israel, to consider cases inside of Israel and then going out into the Diaspora to judge cases based on the merit of their having been ordained. As Rambam writes, "We have already explained in the first section of Sanhedrin that since the ordination took place in the land of Israel, they have the right to judge cases inside and outside the land of Israel — both fine-related and capital cases." And so he decided (*Hilkhot Sanhedrin* 14:14), "As long as capital cases are tried in the land of Israel, they are also tried outside Israel, provided that the members of the Sanhedrin were ordained in Israel, for the Sanhedrin has competence within and without Israel, as was stated before."

C) This is according to Rambam's interpretation of Rambam. But really, for the Rambam there is no real proof that he thought that outside Israel there is no commandment for appointing judges. For it can be said that Rambam seeks to negate the idea that outside of Israel there is an obligation to appoint judges in every district, where they are not obligated to create district court houses in every district as they are in the land of Israel but rather to appoint local courts in every city. It can be said that Rambam believes that we are indeed obliged to appoint judges outside of Israel and even if the *Lechem Mishneh* has a difficulty with this explanation, we still find in the commentary of the Radbaz on Rambam who reasons that you can understand Rambam this way that the obligation applies to local courts and not to district courts. And regarding our version of the *g'mara* from *Makkot*, he explains it so that it coheres with Rambam as well. The Radbaz writes, "But what remains unclear is if Rambam's version is like our version, then we must give it a forced reading, that he means that within every gate you are to appoint judges in every district and every city but outside of Israel, you choose to appoint either in every city or in every district. And Rambam chose that they should appoint a court in every city and not every district so that the litigants should not

¹ That is, if we accept the Meiri's understanding, then the *mishnah's* words *sanhedrin noheget* do not imply a *mitzvah* to appoint judges outside of Israel, but rather that if ordained judges (i.e., a Sanhedrin) exist, they may exercise their full legal function anywhere in the world.

be overly burdened. For we can learn from here that *within your gates* comes to tell us every city and *throughout your tribes* means every district. For outside of Israel, tribes tend not to dwell alone, but rather together and in smaller proportions to Israel." Note that Radbaz explains Rambam's direct intention to limit the obligation and point out that there is no obligation to appoint judges in every district outside Israel but rather in every city. And so too, he thinks that excluding appointment of district judges outside of Israel makes more sense than excluding city judges. Where the Radbaz writes "we must reason in a forced way" this applies only if Rambam's version of the *g'mara* is like our version. Therefore, it becomes an issue of interpreting the *g'mara* to make it cohere with Rambam's opinion. But if he had another version [and like we have already seen where Meiri brought another version of the *g'mara*] it would be reasonable to say that the real distinction is that outside of Israel there is no obligation to appoint judges in every district [PAGE 16] but there is an obligation for appointing local judges in every city.²

D) The explanation of this matter that even outside the land of Israel there is an obligation to appoint judges, either in every district as our version of *g'mara* in *Makkot* explains, or in every city according to Rambam's opinion described above, is based on the words of the text, *Judges and officers you shall make yourself in all your gates, which the Lord your God gives you, throughout your tribes.* (Deut. 16:18) where it is clearly explained that the basis of the obligation of appointing judges applies only in the land of Israel. An explanation of this is in *Sanhedrin* 16b, "Our rabbis have taught on tannaitic authority: How

² Note: there is a debate between the commentaries on whether or not Rambam really intended to say that there is no obligation to appoint judges outside of Israel. The Radbaz says: maybe Rambam disagrees with the Talmud and thinks that judges in every district is inappropriate and should be appointed for every city — where Jews live. The *Kesef Mishneh* says: maybe Rambam had a different version of the *g'mara* from *Makkot*. The *Lechem Mishneh* says: maybe we have a different version of Rambam and the original has the same meaning of the Talmud. Interestingly, the Yale translation of Rambam sides with the *Lechem Mishneh* who reads that the Rambam meant to add the word *eleh* meaning, that we only appoint district courts outside the land of Israel.

on the basis of Scripture do we know that judges are to be appointed for Israel? It is on the basis of the verse, *Judges you shall make for yourself*. As to officers [to carry out the court's decrees]? Scripture says, *Officers you shall appoint*. Judges for each tribe? From the statement, *Judges...for your tribes*. Officers for each tribe? *Officers...for your tribe*. Judges for each town? *Judges in all your gates*. R. Yehudah says, 'One person is appointed above all the rest of them, as it is said, *You will make for yourself*'.¹ Rabban Shimon b. Gamaliel says, *For your tribes and they shall judge* means that it is a religious duty for a tribe to judge cases involving its own tribe.² We see from the words in this baraita in Sanhedrin that the Scripture can be divided into three sections: 1) *Judges and officers you shall make for yourself*, 2) *within all your gates which Adonai your God is giving you*, 3) *throughout your tribes*. So according to this, it could be said that the first section of *Judges and officers you are to make* contains within it a general command to all Israel to appoint judges in every place and for all time, and only the other two — *within all your gates* and *throughout your tribes* are specifically related to the land of Israel. This tells us that in the land of Israel the general commandment comes at the beginning of the more specific commandments to show us the uniqueness and importance of appointing judges in every city, which is only made all the more important in *Sifrei parashat Shofetim* by the language, "from where do we learn that we are to appoint a *beit din* over all Israel? Scripture states, *Judges...you are to make for yourself*, which is to say to all Israel — in every place which you are, even outside of the land of Israel.

So too, related to this, we learn in the first chapter of Rambam *Hilkhot Sanhedrin*, in the first *halakha*, where he begins with the general commandment of "it is a positive biblical command to appoint judges and executive officials in every city and district, as it is said, *Judges and officers shalt thou make thee in all thy gates*," without mentioning that this is only in the land of Israel. Only in the second *halakha* does Rambam explain, "the duty to set up courts in every district and every city is limited to Palestine; outside Palestine, it is not

obligatory to set up courts in every district," which is to say that since the general commandments applies both in the land of Israel and outside of it, and according to this understanding from Rambam leads to Radbaz who comments on the first *halakha*, "Rambam wrote this because it is possible to say that it is a positive biblical command to appoint judges in the land of Israel but outside the land of Israel it is not a positive biblical command, rather, it is from the rabbis. Therefore, he wrote that the appointing of judges is a positive biblical command in every place, but that there is a distinction between them as is explained below."

E) In what way do we explain the idea of *judges in every tribe*? The *Tosaphot* in *Sanhedrin* 16b explain that if in one city there are two tribes, then there should be two sanhedrins. To expound on this Ran adds that judges are appointed, even if there is one tribe [PAGE 17] in two cities, then they are obligated to appoint over them a small sanhedrin. So too, in Ramban's commentary to the Torah, he says in *parashat Shofetim*, that perhaps the text was written this way to say that if there is one city with two tribes, like Jerusalem, which was divided between Benjamin and Yehudah, then there would be two courts. Abravanel, in *parashat Shofetim*, explains in his commentary, "therefore in Jerusalem, there were two courts of 23 each. One of them sat at the opening to the Temple Mount and one sat at the opening to the Temple Court, since in Jerusalem the tribes of Benjamin and Yehudah both dwelled."

But Ramban adds a new interpretation *judges for each and every tribe*. He writes: "and it is possible to explain that Scripture obligated [the nation] to appoint a court [exercising authority] over the whole tribe and it is to judge all [its people], and then we are to appoint a court for each and every city that is to judge that [particular] city. Now, although all these courts were alike in number of judges, consisting of twenty-three in criminal cases and three in civil cases, [people] most superior in wisdom among them were appointed over

the whole tribe, while those inferior to them [were designated for the courts] of each and every city. Parties to a suit could force one another to adjudicate only before the court in their city, not before the court of another city. Even if both parties happened to be in another city one could still say, 'Let us go before the court of our own city.' But the [supreme] court of the tribe could force any of the people of that tribe to stand trial before it. And even if the litigants are in their own city one can still say, 'I want to go to the Great Court of the tribe and request [its decision]. Thus just as a Great Sanhedrin [of seventy-one judges] was appointed over all courts of all Israel, so one [supreme] court was to be appointed over each and every tribe.⁴ And if [the judges of that court] found it necessary to ordain or decree any matter for their own tribe, they were empowered to so decree and ordain and, to that tribe, their word was equivalent to the decree of the Great Sanhedrin over all Israel. This is 'the court' mentioned in tractate *Horayot* wherein we are taught, 'if the court of one of the tribes rendered a decision [that was unwittingly contrary to a negative commandment, punishable by excision] and that tribe acted according to their word, that tribe is obligated [to bring the prescribed offering], the rest of the tribes are not liable.'

Perhaps that was Yehoshophat's intention when he placed judges, *in the land throughout all the fortified cities of Yehuda, city by city* (II Chronicles 19:5). He took particular care in Jerusalem, appointing judges *from certain Levites, and priests, and heads of fathers' houses of Israel, for the judgment of the Lord, and for controversies* (II Chronicles 19:8). And he commanded them to do this *in the fear of the Lord, faithfully, and with a perfect heart* (II Chronicles 19:9) for every dispute which came before them from among their brethren, the inhabitants of the city, *between blood and blood, concerning Torah and commandment, and statutes and judgments* (II Chronicles 19:10). But it is not mentioned here that Yehoshophat set up a Sanhedrin of seventy-one. And why did he take

⁴If one of the lower courts was in doubt as to a legal question, it could send the matter to the tribal supreme court, just as the Great Sanhedrin served this purpose for all Israel.

from among the Levites, priests, and heads of fathers' houses? Granted that it is considered a commandment to do so as Rambam says (*Hilkhot Sanhedrin* 2:2), "it is desirable that the Great Sanhedrin should have among its members priests and levites." But so why did Yehoshophat pick especially the heads of clans' houses? Indeed, we are not told that he organized one large court, but rather that he appointed judges *for the judgment of the Lord, and for controversies*. And so we can imagine that he appointed a special series of courts. This is well explained according to Ramban, mentioned above: one could say that he [Yehoshophat] did so in Jerusalem because there were many seats of judgment which required a strong court to enforce their will over the tribes and their fathers' houses, in order that they would have the strength of a tribal court to coerce the heads of the fathers' houses to come and be judged before them, [PAGE 18] and to come for every dispute which arose and needed judgment, so that it was possible to enforce a warning or a decree based on Torah, commandments, laws and judgments.

F) In explaining the meaning behind "one is appointed over all," [*Sanhedrin* 12a] Rashi explains this to be the Great Sanhedrin. The Ran explains the phrasing of "appointed over all" to be the Great Sanhedrin as having power to appoint smaller sanhedrins in all the cities and tribes, as it is written, *Judges and officers you shall make for yourself...* From this we should learn that a court of seventy-one is authorized to do this. In the *Tosaphot*, they write that this is not the view of the *Sifre*, in which the beginning of the *baraita* follows R. Yehudah's opinion that one is appointed over all before any mentioning of establishing courts in every tribe and city.⁴ And there is an additional proof which leads to supporting the identification of the head of the court, which is in *Sifre*, where they discuss that one is appointed over the rest, based on what is written in II Chronicles 19. This is what they say.

⁴Which seems to refer to the *nasi* or the chief judge, and not to the Sanhedrin itself, as the "one who is appointed."

[And behold, Amaryahu the chief priest is over you in all matters of the Lord] the Levites shall be officers before you (II Chron. 19:11). And the proof must really come from *And behold, Amaryahu the chief priest is over you*, for who mentioned "officers" in the previous reference in *Sifre*, which only speaks of judges. If that is the case, then this text (from Chronicles) refers to the head judge, similar to Amaryahu who was the head over them. Thus, we read in *Sanhedrin*, "How on the basis of Scripture do we know that judges are to be appointed for Israel?" The *Sifre*, on the other hand, uses the language of "from where do we know in Scripture that we are to appoint a *beit din* over all Israel?" which enables us to understand that text as referring to the appointment of the Great Sanhedrin, which is the general court for all Israel [see above in letter C where we arrived at this conclusion based on the obligation of appointing judges also outside the land of Israel]. In addition to this, R. Yehudah adds, "from where do we learn that one is appointed over the rest?" which tells us that one high judge is supreme over all the Sanhedrin.¹

See in the *Meiri* who writes that according to the *halakha* both opinions are correct. The Sanhedrin really was appointed to rule over the rest. If one of the judges would say to another, "let's go try this case before the Great Court," the case would be judged there and they could coerce the other party to do so. So, too, if they needed to ask something, they would write the question out and send it to be discussed there and wait for a response in writing [On this the *Meiri* is not of the same mind as the *Ran* who was discussed earlier in his opinion regarding the appointing of judges]. Even in the Great Sanhedrin there was one who was appointed as the head of the group, and he was called "*Nasi*." The person second in wisdom to the *Nasi*, sat to the *Nasi*'s right and they called him "*Av Beit Din*."

G) In the *Sefer Ha-mitzvot Ha-gadol* (Positive Commandment #97), I read *in all*

¹The question is whether the *בית דין* is the Sanhedrin itself or a single official, whether the *Nasi* or the chief judge (*דבית דין*).

your gates meaning in every city and so too in every tribe you shall appoint courts as in every city, for as it says, *throughout your tribes*. Clearly we see from this that the SM"G does not understand the commandment as does the *Tosaphot* or Ramban, which was mentioned above in letter 'E' that *throughout your tribes*, comes to add the court of the tribe. He interprets *throughout your tribes* as adding a court, even when there is already a court for the tribe, to the city because of where it says *in your gates*. We take from this that every tribe needs to appoint a court to the city, even though everyone [PAGE 19] is already included in the general warning of *in your gates* meaning in your city, and therefore we say the SM"G is in line with what the *Sifre* says in using the wording, "from where do we learn that we appoint judges in every tribe? Scripture states, *and judges over your tribes*." The idea of this verse is to include the courts over the tribes, that is to say, over every city, which can be done since the *throughout your tribes* includes the *within your gates*. That is to say, that wherever we see that you are to appoint judges over your tribes, so too, we learn that you are to do so in your cities.

And as for the tribal court which is told to us in tractate *Morayot* — it must be said that the SM"G learns this from *Judges and officers you are to make for yourself*, that the *make for yourself* implies every tribe is required to appoint judges and officers and the idea behind *throughout your tribes* and *within your gates* teaches that it means for every tribe and in every city.

Thus he explains the words of the *Makkot* 7a, which was mentioned above in letter "A," "If so, why is it stated *Judges and officers shalt thou make thee in all thy gates*? In the land of Israel you are to appoint [judges] in every district and in every city, *outside the land* you are to appoint [judges] in every district, but you are not obligated to do so in every city." If we are to limit *within your gates* to mean that we are not obligated to set judges over us in every city outside the land of Israel, then so too we should limit *throughout your tribes* to mean that outside the land of Israel, there is no obligation to require judges in every district,

since the tribe's court is like a court of the district. On this matter, see the Radbaz on *Hilkhot Sanhedrin* 1:2 (where he emphasizes the obligation to appoint district courts), and the *Lechem Mishneh* on *Hilkhot Sanhedrin* 1:1 (where he states that a reference to a tribe is equivalent to a reference to a district, and a district is equivalent to a state) and in the *Arukh Ha-shulkhan Choshen Mishpat* 1:16 (where there is a mini-history lesson on the development of the *halakha*. He explains that during the days of the First Temple, when every tribe lived together, there was little need for regional courts. During the Second Temple period, when tribes co-mingled, regional courts — which he also calls state courts — became more appropriate for the inhabitants of the region.) Already we have brought evidence in letter 'B' that the Meiri claims truth from the issue in *g'mara* where we read "but outside the Land of Israel you are not required to appoint judges in every district or in every city" (seems he had a different version). There is no obligation, but if they do seat judges, then they have the effect of the law of the Sanhedrin, but we have a difficulty that arises out of the *g'mara* that is before us in the Yerushalmi (*Makkot* 1:8), "but in the cities of Israel, they seat judges in every city and outside of Israel, they seat judges in every district." And so it appears in the *Tosefta Sanhedrin* 3:5, which makes a difficulty for what appeared above.

But according to our understanding of the SM"G's explanation, which appears above, where he understands *within your gates* and *throughout your tribes*, to include every city, therefore outside of Israel, the obligation to appoint judges in every city is lifted. Only in every district do we need to appoint judges, as we have learned above that the court of a tribe is equivalent to a district court from what is written, *Judges and officers you are to make for yourself*. But it does not come from the words *within your gates* therefore the obligation to do so can extend outside the land of Israel. This understanding borders the understanding which was mentioned above in the *g'mara*, referred to in letter D.

H) We can also interpret the SM"G's teaching in light of what we mentioned earlier, in letters C and D regarding Rambam. From *within all your gates* we take that the meaning implies even outside of the land of Israel, Jews are obligated to appoint judges in every city and in the land *which Adonai your God is giving you, to your tribes*, including in particular the land of Israel, where they already have their own tribal courts; nonetheless, the obligation still rests on every tribe to appoint magistrates in every city. [PAGE 20] And it is written, *Judges and officers you are to make for yourself*, which includes the obligation to appoint judges for every tribe, which we have already discussed in previous sections. *Within all your gates* includes the obligation to appoint judges within every city, whether in the Land of Israel or outside of it, and *which Adonai your God is giving you, to your tribes*, comes to instruct that not only does each tribe need to appoint a tribal court, but in every city where the tribe is found, they need to appoint judges. We see then that the SM"G's interpretation fits neatly with that of Rambam, that outside of the land of Israel, there is an obligation to appoint judges in every city but not in every district, which goes against what we learned above in letters C and D (when we discussed the *Makkot* and *Sanhedrin* passages along with Rambam *Hilkhot Sanhedrin* which all appear to emphasize district courts only). And I saw in a book *Dinei D'chayyot* a different interpretation of the SM"G, "but I have written as I see it, according to my humble opinion." The *Dinei D'chayyot* is not right.

I) In Sforno's Torah commentary, *parashat Shofetim*, he writes, "*He is giving to you to your tribes — in your gates* meaning that which you will divide among your tribes, but for that area of land which you conquer outside the Land of Israel, which you do not divide among the tribes, as our Sages taught, you are not obligated to appoint judges in every city or in every district, as in Syria and other areas like it. Furthermore, according to Sforno's theory about what to do in the case of land which is conquered outside of Israel, land that is not divided among the tribes is not subject to having judges appointed in every district or city,

which is what the Sages intended when they said, "outside the land you are not required to appoint judges." Yet, if an Israelite king conquers a new area, with the concurrence of the nation, that land will be included as part of Israel's land. Rambam states (*Hilkhot Terumot* 1:2), "Whenever the term *land of Israel* is mentioned, it refers to the lands conquered by an Israelite king or by a prophet with the consent of the majority of Israel. This is the so-called national conquest." If that is the case, then how can one say that it is included but so too it is outside of the land of Israel and therefore you need not appoint any judges? Then we cannot say that Sforno's intent lay solely with Syria which was conquered by an individual (David), for it is also written, *zulatah*, but of equally great importance is the idea that you do not divide the area among the tribes, which is applicable to all that which an Israelite king were to conquer, see Rambam (*Hilkhot Shmitah and Yovel* 13:1), where he explains that anything conquered by one of the kings of Israel is open to having all Israel share in the spoils. Given that, it seems that they might have preferred to intend that regarding all of Syria, it might have been good to appoint judges outside of Israel since Syria is not included as is stated in Rambam's *Hilkhot Terumot* 1:3 where Rambam says that any land conquered by David outside of Israel, fall outside of the impact of the *mitzvot* because he was had not conquered all of Canaan upto its limits.

Yet the discussion over Sforno's words must continue because according to his line of reasoning, the appointing of judges is dependent upon dividing the land between tribes. If that is the case, then what about Jerusalem, which was not divided, does that mean that it has no judges? Herein lies the essence of the result of judgment from the Great and Small Sanhedrin. I have seen in the interpretation of *Divrei David* on Rashi's Torah commentary from the Ba'al haTaz who interprets the words of Rashi, who writes, "*throughout your tribes* is to be connected to *you shall make for yourself*, thus: *Judges and officers you are to make for yourself, over your tribes in all your gates which Adonai your God is giving you.*" Rashi's intent here is to the exclusion of saying that *throughout your tribes* is naturally

associated with the phrase *within all your gates which Adonai your God is giving you, to your tribes*, the gates which God gives to the tribes, and this is in order that you won't wonder why the "*T'cha*" is located in the text. If that were the case, then does this mean that Jerusalem does not need judges, since it was not divided among the tribes? [PAGE 21] (For as it says in *Baba Kamma* 82b, "Jerusalem is not divided among the tribes.") According to one of the two opinions discussed in *BA* 82b, after all, the root of the Sanhedrin was in Jerusalem, which only strengthens my amazement that Sforno would rely on the dividing up of the land as proof for appointing judges.

J) It is known that the obligation for appointing judges is divided into several categories in accordance with their tasks. They are: 1) appointing the Great Sanhedrins, and appointing the seventy-one, which is the Great Assembly that sits in Chamber of Hewn Stones, 2) appointing the Small Sanhedrins, which are courts of twenty-three, 3) appointing courts of three. See all of this in the first chapter of tractate *Sanhedrin* and Chapter one of Rambam, *Hilkhot Sanhedrin*.

In Bahya's commentary to the Torah, *parashat Shofetim*, he writes: "Know that the judges are divided into three segments — there are tribunals of seventy-one judges, tribunals of twenty-three judges, and tribunals of three. The court of three is by rabbinic ordinance appointed to serve in cities which do not even have 120 Jews." We learn something new with Bahya's words. He reasons that it is the commandment from Torah regarding judges applied only to the creation of the Great and Small Sanhedrins in every city, but regarding the courts of three, there was no commandment in Torah. It was only a *takkanah* established by the Sages to appoint a tribunal of three in cities which had less than 120 Jews and therefore were not required by the Torah to create a Sanhedrin, as we learn in the first *mishnah* of *Sanhedrin* 16b, "it will take more than 120 Jews in a city for it to be suitable to establish a Sanhedrin." Thus according to R. Bahya, there is no commandment for

establishing a court of three, because in a city of 120 Jews, there is a commandment for establishing a court of twenty-three, from among them will come judges to handle monetary cases where three is sufficient. And in a town with less than 120 Jews, the Torah does not require them to appoint a court. In matters requiring litigation, they will simply turn to the adjoining (larger) town. Yet according to this, we find that even in a large city, there is no requirement to appoint a court. We read in Sanhedrin 17b, "A Sanhedrin must not be established in a city which does not contain at least two who can speak [the seventy languages] and one who understands them [two who speak the seventy languages of the world and one who can understand them even though he cannot speak them, Rashi]. A Sanhedrin that has three [able to speak the seventy languages] is wise; if four, it is of the highest standard possible." So too, Rambam decides (*Hilkhot Sanhedrin* 1:5), "No city, even if its population reaches into the thousands, can qualify for a Sanhedrin unless it has two great scholars—one competent to teach the whole Torah and to decide questions within its entire domain, and the other who understands [the whole Torah] and is able to discuss learnedly [all legal questions]." See also, Raybad, Radbaz, *Kesef Mishneh*, and *Lechem Mishneh*.⁸ So we see, based on these sources and what Bahya mentioned above, in a city that does not have three or even two great sages like these, even if there are 1,000 Jews, there is no obligation, from Torah, to appoint a court. And this is something of a surprise (to say that no court is required in such communities).

But really, this approach is not seen in the rest of the works of the *rishonim*. They see appointing judges, even for a court of three, as a commandment from the Torah. For notice

⁸The Raybad says that having only two wise men on the court gives the court a type of "intermediate" status. The Radbaz holds that a court needs three, despite what Rambam has written. The *Kesef Mishneh* thinks that both Rambam and Raybad had different versions of Sanhedrin 17b, since they only speak of two great scholars. The *Kesef Mishneh* wonders how anyone—presumably the third person—could be allowed on the court if he was intellectually unfit. The Talmud says that we need three people for a court: two who can speak and one who can understand, which Rashi says refers to understanding the 70 languages of the world. Rambam may indeed have had a different text, since he only refers to needing two knowledgeable people and emphasizes the intelligence-factor along with the wisdom in making Torah-based decisions.

in Rambam, *Sefer Ha-Mitzvot* (#176), where he says, "it is among the conditions of this commandment that these judges should be of the very highest calibre [PAGE 22] when they are appointed in every city to a small Sanhedrin of twenty-three judges. They gather together at a suitable place, like the entrance to the city. The Great Court will be appointed in Jerusalem and will be made up of seventy judges who will appoint one to lead them... for a city which is small and does not need a tribunal of twenty-three, they shall appoint a court of three to handle lesser cases but when a hard matter comes before them, they will bring it to a higher court in a larger city to judge the case. The commandment for these courts comes from the verse, *Judges and officers you shall make for yourself, within all your gates*... So it becomes quite clear that Rambam counts among his commandments the appointing of judges for a court of three. So too, further on, he states that the issue of appointing is necessarily contingent upon the judges having been ordained in the land of Israel. He writes, "and know that these who are appointed, all of them, are like the Great and Small Sanhedrin or a court of three." So too, he states in 1:4 of *Hilkhot Sanhedrin*, that when appointing, the community fulfills a positive commandment of Torah, "if a town has a population of less than one hundred and twenty, a court of three is set up there." For anyone who does not see this as an edict issued by our Sages, should really see it as a positive commandment from Torah. We notice that also in the *Sefer Ha-Mitzvot*, he states so clearly. The *Kesef Mishneh* writes that Rambam "learned this from the end of the first chapter [of Sanhedrin] how many should be in a city in order for it to be suitable for a Sanhedrin. A court necessitates 120, but you can't allow the town to be without at least a court of three." According to my humble opinion, it seems to me that he learned this from the *Sifre*'s understanding of the verse, *Judges and officers, you are to make for yourself*... Rambam says in his conclusion on the condition of the commandment, "based on the language of the *Sifre*, from where do we learn that you appoint judges? Scripture states, *Judges and officers*. And from where do we learn that you are to appoint one over the rest? Scripture states, *you are to make over yourself*."

And from where do we learn that we are to appoint a tribal court to rule over the entire tribe? Scripture states, *throughout your tribes*, they will judge the people according to their needs. It seems from this that Rambam based himself in his chapter on his previous reading of *Sifre* by considering the appointment of a court of three a *mitzvah*. Perhaps he explained this in order to understand, "from where do we learn to appoint judges?" Scripture states, *Judges*. Included in this is any kind of judge-appointment, even if the court is made up of three judges. And the *you shall make for yourself* comes to include the Great Sanhedrin. The commandment for appointing judges over the tribe includes appointing a court of twenty-three.

Like Rambam, who wrote above that the conditions of the commandment include appointing a court of three, so too does the *Sefer Ha-Hinukh* [49], where he relies heavily upon Rambam's and *Sifre*'s understanding; see there. So too, Rambam on the Torah (Deut. 16:18), counts that appointing judges, even for a court of three, is an obligation for monetary cases. He makes a particular case to argue that even in a city of 120 Jews where there is a small Sanhedrin, it remains a commandment to appoint a court of three to handle monetary cases. He writes, "and it is possible to explain that Scripture obligated [the nation] to appoint a court [exercising authority] over the whole tribe and it is to judge all [its people], and then we are to appoint a court for each and every city that is to judge that [particular] city. Now, although all these courts were alike in number of judges, consisting of twenty-three in criminal cases and three in civil cases." From the simplicity in his language, [PAGE 23] we see clearly that the appointing of a court in every city is to take place, for it says, "twenty-three in criminal cases and three in civil cases." We learn that Rambam reasons that it is a commandment to appoint judges in every city — for a tribunal of three judges to handle monetary cases even when there already is a twenty-three judge tribunal to handle criminal cases.

K) The author of the book *Ma'ayan Ha-hochmah*, on the 613 commandments, who writes, "So wrote Rambam, of blessed memory, in *Sefer ha-Mitzvot*, #176, that the Great and Small Sanhedrins as well as the court of three are all included in this commandment. So too, proof is found in the *Sifre* and the *Tosaphot* of *Sanhedrin* 15b, s.v. "*shur sinai*," "for no one questions that a trial is held. While the verse *then the congregation shall judge... then the congregation shall deliver* (Num. 35:24-5) from which we deduce that a criminal court must consist of twenty-three members, had not yet been written at Sinai, it stands to reason that Jethro's *takanah*, which involved 'Sanhedrins,' must have included these small Sanhedrins in order to handle capital cases." These words of theirs seem to contradict what is written in *Tosaphot* on *Avodah Zarah* 24b, beginning with the word, "Jethro." That even if you were to say that Jethro came before the giving of Torah, this applies only at the beginning of the *parasha*, when he comes to join Israel, but at the end of the *parasha*, where we find the establishment of the Sanhedrin — everyone agrees this takes place *after* the giving of Torah. But, this is the opposite of what was said above in the *Tosaphot* of *Sanhedrin* 15b (which found that the Small Sanhedrin was established with Jethro's appearance, or help anyway — before Sinai). But since this *mitzvah* of *Judges and officers* is a positive commandment which brings with it the instruction to create the Great and Small Sanhedrins, then the *Tosaphot* have proof for what they said in *Sanhedrin* (that the Sanhedrin was set up with the advice by Jethro) that every positive and negative biblical commandment which is said in Deuteronomy was told to Moses on Mt. Sinai, that if the establishment of the Sanhedrin which was done with Jethro's advice to Moses, after Sinai, as the *Tosaphot* say in the name of Rashi, "and it was on the next day," meaning the day after Yom Kippur, then was not Jethro's advice already given to him by the Almighty? For what then did Jethro say to him after the giving of the Torah? Therefore, he breaks with the *baraita* which is in the *Sifre*, by reasoning that the commandment for appointing the Sanhedrin does not mention courts handling monetary matters. Furthermore, the *baraita* of *Sifre* implies that he came before the

giving of Torah. See in the *Tosaphot* of *Menachot* 19b on "Shmuel taught that you do not derive an eternal law from a temporary injunction." Shmuel tries to explain their difficulty from "a man at Sinai" in another matter and he bases himself on their teaching in *Avodah Zarah* that the creation of the Sanhedrin was after the giving of the Torah, and thus it is necessary to look into their hidden meanings.⁷

We learn from the words of *Ma'ayan Ha-hochmah*, who includes the positive command of appointing judges and officers, with the appointing of courts for handling monetary cases, as discussed in the two quotes and ultimately being contingent upon whether or not Jethro preceded the giving of Torah or not. For if he came before the giving of Torah, then it is easy to include in his words the commandment for appointing judges to handle monetary cases. But if he came after the giving of Torah, then do not include in his words the commandment for appointing judges to handle monetary cases.

According to my humble opinion, there is no proof for this, because the *baraita* that appeared in *Sifre* which included (Jethro's appearance at Sinai before the giving of Torah) the commandment for appointing judges to handle monetary cases can just as well be interpreted according to the opinion that Jethro came after the giving of Torah. The difficulty then for the *Ma'ayan Ha-hochmah* what is the point of Jethro's advice if it came already from the Mighty One? In my own humble opinion, it can be explained in two ways: **first**, since the *Ma'ayan Ha-hochmah* asked whether Jethro gave his advice after the giving of Torah, it could be asked of Moses that if the act was after the giving of Torah, which was already commanded to Moses, then the establishment of the Sanhedrins, also existed, which means, Moses continued to sit and judge the people so that he could continue to suffer and hear their cases, by their will, because they wanted him to judge them since who could

⁷Shmuel makes the statement in *Menachot* 19b that you cannot derive a permanent law from a temporary injunction, which seems to be a theme in this paragraph. Did Jethro advise Moses to create the judges so that he could manage until God commanded the Sanhedrin, through the verse, *Judges and officers*, because if he did, then the problem is conceivably lifted. Jethro's advice simply can be seen as a temporary stopgap measure.

possibly serve as great an expert as Moses in judicial affairs? How could Moses have sat and judged these cases alone after he heard Deuteronomy 16? [PAGE 24] For he was equivalent to seventy-one judges. See Rashi's commentary to Sanhedrin 16b. He writes, "Moses was a judge and judged according to the word (of God) and was equivalent to the Great Sanhedrin of Jerusalem." See also *Sanhedrin* 5b, where we read, "A disciple may not give a decision on a matter of religious prohibition in the locale of his master unless he is at least three *parsaot* away from him, a distance equivalent of the breadth of the camp of Israel." Rashi writes that we learn this from Moses, that everyone who wanted a judicial ruling came before him, for it is written, *all who sought God*, (Ex. 33:7). See also in *Yoreh Deah* 242:4 and *Sifte Kohen* 104 — and this is not the place to go into great depth on this point. Be that as it may, Moses knew and understood that he was the judge and arbiter by the word of God and Israel had yet to scatter into their cities, rather they were grouped together in the wilderness. Therefore, Moses was not really required to appoint the Sanhedrins, which is most clearly understood by Israel's response to him, *the thing which thou hast spoken is good for us to do*, (Deut. 1:14). As *Sifre* explains "and ye answered me, and said, *the thing which thou hast spoken is good for us to do*. Moses said, "You should have said, "Moses, our teacher, from whom is it best to learn Torah? From you, or from your students or from your students' students? Is it not from you, who have suffered for it?" as it is said, *And he was there with the Lord forty days and forty nights*... But I know that behind my back you said, 'Now he will appoint over us some eighty thousand judges less a few, and it will be I, or else my son, or else my grandson, and then we can bring him a gift in order to induce him to favor our case.' Hence it is said, *ye answered me*, (that is to say,) when I was slow about it, you would say 'Do it right away.' See also Rashi on this (Rashi reprints part of the *Sifre*). So it is that even according to the law, after the command of *judges and officers you are to make* [from what Jethro said after the giving of the Torah, and all the debate which came after the command], nonetheless, because of his authority, Moses could have been the one to

judge the people alone, without being obligated to appoint judges over them [and therefore he had arguments with them over how they answered them [with *this thing that you do is good* when they should have replied 'who is better to teach us than you?']]. Therefore Jethro advised him that even though he didn't need to create a system of judges, it would ultimately be better for both Moses and the people if a series of Sanhedrins were appointed. For it is written, *Thou wilt surely wear away, both thou, and this people that is with thee, for this thing is too heavy for thee: thou art not able to perform it thyself alone.* (Ex. 18:18) A **second** way to say that Jethro gave his advice after the giving of Torah is by seeing that the Israelites were already commanded to create Sanhedrins. He was not actually commanding them to create Sanhedrins, rather, Jethro is merely giving advice on how to go about structuring and appointing, in a way that would make it easier for him. See in the Malbim on Deut. 1:9. Malbim writes in his interpretation that the Sanhedrin and other courts over every tribe already existed — even when they stood at Horev. As it is written at the end of *parashat Mishpatim*, and he said to the elders, wait here for us, until we come back to you. (Ex. 24:14) The elders already existed, Moses just had yet to appoint the judges over the thousands, hundreds, fifties, and tens, as Jethro advised. While the Israelites were camped at Horev, most of the monetary cases came before Moses, since he was an expert on the matter. Abravanel clears this matter up even more, by saying that Jethro's advice was really in order to divide the tasks among the judges. Some of the judges would deal with capital cases, others with monetary cases. Some judges worked on real estate cases while others on personal property matters. Some of them handled cases which resulted in punishment by lashing, others with punishment to limbs [i.e., eye-for-an-eye], some decided on cases subject to the four types of killing, [PAGE 25] some had minor, others major fines, and for matters which needed consultation [they would go to Moses] — see there. If that is the case, then Jethro's advice had no impact on the commandment for appointing a Sanhedrin or courts, even for monetary cases. Such an interpretation fits well with the *Sifre* which

assumes that Jethro's advice came after the giving of the Torah. The difficulty posed by the *Ma'ayan Ha-hochmah*, based on the contradiction of the *Tosaphot* [difference of opinions as presented in *Tosaphot* "Yitro" *Avodah Zarah* 24b and "*Shur Sinai*" *Sanhedrin* 15b, the former says that Jethro came after the giving of the Torah and the latter says that Jethro helped establish the Sanhedrins — before giving of the Torah] which does not really amount to anything, especially since they are from two different tractates. There were many writers of *Tosaphot* and in one place it could be Rabbenu Tam and in another R. Yitzhak ha-Zakein and R. Yitzhak ben Asher and other masters. As *HaYad Malachi* said in his collection of the *Tosaphot*, paragraph 20.

L) But the question to which we return is that according to this (the debate in *Sifre* as well as Talmud) can we consider the commandment of appointing judges to include the need to create courts of three? If that is the case, then we need to consider that the court of three is to be appointed by the court of seventy-one, just as it appoints the court of twenty-three. For we learn in *Sanhedrin* 16b that the courts over the tribes are established only by the court of seventy-one. We find in the *mishnah* there, "as we find with Moses who established Sanhedrins and Moses is equal to seventy-one." And if we say that included in the commandment is the establishment of courts of three, then Moses also established these. If so, then the court of seventy-one needs to appoint the court of three as well. With regard to this, *Ma'ayan Ha-hochmah's* explanation is of no use to us that Jethro's advice comes after the giving of Torah. For a discrepancy arises between this and the *baraita* which *Sifre* refers to regarding the appointing of judges for a Sanhedrin, which says that the creation of a Sanhedrin is not equivalent to the creation of a court to handle monetary matters. For Rashi explains the *mishnah* found in *Sanhedrin* regarding, "as we find with Moses who established Sanhedrins." Rashi says, "established on the advice of Jethro." The *Ma'ayan Ha-hochmah*, mentioned above, said that Jethro's advice applied to the creation of courts to handle

monetary matters. What is added then is that it was Jethro's advice which lead Moses to appointing judges to handling monetary cases. Then what is made difficult is that we need to establish a court system in order to create a court to handle monetary cases — that is to say, a court of three established by a court of seventy-one, which is equal to Moses. Were it not written above that the *Ma'ayan Ha-hochmah* fashioned his argument based on the idea that the commandment for judges and officers does not include the creation of courts to handle money matters, even though Jethro's advice seems to signify such a meaning, and Moses received his advice from God, nonetheless, the commandment was not established this way. The commandment for creating a court of three comes only from the rabbis, as R. Bahya has told us above. But the difficulty remains from the *Sifre* and from those who say that Jethro gave his advice before the giving of Torah, and from all the authorities who rule that the commandment of judges includes the commandment for courts of three, why should such a court not be appointed by a court of seventy-one, like Moses, as mentioned earlier?

We can answer that the one who says that Jethro preceded the giving of Torah reasons as the *Ma'ayan Ha-hochmah* which explains the view of the one who says that he came after the giving of the Torah, that is to say that Jethro's advice had only to do with the appointing of Sanhedrins, which is courts of seventy-one and twenty-three, but not for courts of three. The commandment for judges and officers came after that and included in that commandment was the appointment of courts of three for hearing monetary cases. [PAGE 26] Thus, with the appointment of Sanhedrins coming as a result of Jethro's advice, we find that Moses himself appointed the judges, as it is written in Exodus, *and Moses chose able men from among all Israel and made them heads over all the people...* (Ex. 18:25) and so too in Deuteronomy, *So I took the chief of your tribes, wise men, and known, and made them heads over you...* (Deut. 1:15)⁸ We and all future generations learn from this that one needs

⁸Herein lies perhaps the point of this whole section: we do not need a Great Sanhedrin in order to appoint lower courts which possess full Toratic authority in our day. Therefore, a court system in a Jewish state can be a form of 'judges' even though the institution of ordination has

to be equivalent to Moses (in order to appoint these judges alone).⁹ But with regard to the commandment for judges and officers, which includes the appointment of courts of three, it is not mentioned there that Moses on his own appointed courts of three; therefore, since we do not see that Moses appointed judges on his own, we cannot expect that in the future, appointing of courts of three must be done by courts of seventy-one.

I considered that even according to the opinion that Jethro came after the giving of Torah so too it can be said that therefore the appointment of a court of three does not need a court of seventy-one, equivalent to Moses, since there is proof from the verse that Moses only appointed a court of twenty-three, and the creation of the court of three was left for them to choose alone. We come to this from the verse at the beginning of Deuteronomy which emphasizes, *and I will take the heads of your tribes...* In the choosing the heads of the tribes, we find the creation of the Sanhedrin of twenty-three. Note that Scripture emphasizes *I will take the heads of your tribes...* when it could have merely said "I will take from you wise men..." as it is written in Jethro, *Moses took wise men...* This text from Deuteronomy comes to reveal that Moses, by his own initiative, went out and found suitable individuals for the great and responsible positions of judges in order to appoint Sanhedrins over the tribes, that is to say, courts of twenty-three, which engaged in cases of life-and-death. He did not create courts of three to handle monetary cases. Regarding the appointment, for the matter of appointing judges of twenty-three, learn for future generations that "tribal courts can only be appointed by a court of seventy-one," (see Rashi at the beginning of *Sanhedrin* and Rambam *Hilkhos Sanhedrin* 5:1) which are equivalent to Moses. For the appointment of a court of three, which is debated in the verse above, Moses on his own left the appointing of courts of three to the larger courts, therefore later generations should know that a court of

disappeared and the Sanhedrin is no longer in existence.

⁹ [see in *Tosaphos Sanhedrin* 16b s.v. "et tavnit" and the Maharsha, where the issue of expanding the city of Jerusalem is discussed. Only a king, a prophet, or a court of seventy-one could engage in expanding the city limits.]

seventy-one is not necessary for appointing a court of three.

M) The essence of this debate I saw in the interpretation of the Gaon R. Yerocham Fischel Perla (to the *Sefer HaMitzvot* of R. Saadyah Gaon), may his memory be a blessing, in the list of the Torah portions (*parasha* 1) where he brings something he found in one of the *acharonim*, may their memories be for a blessing, which relies on this difficulty: did Rambam intend to include the courts of three as needing the approval of the court of seventy-one? R. Yerocham Fischel Perla bases the thrust of his answer upon the Gaon of Vilna's text of the *Sifre* (*parashat Shofetim*), "*they shall judge the people* — referring to appointing the Sanhedrin." If that is the case, then the appointing of a court of three is a commandment in its own right, and therefore the appointment of (smaller) Sanhedrins comes out of the verse, *Judges and officers, you are to make yourself*. We are required to make sure that they are appointed by a court of seventy-one, like Moses had established. But for a court of three, in a place where a Sanhedrin is inappropriate (i.e., less than 120 Jews), we learn the need to appoint a court from *they will judge the people*. Where we do not find that Moses set up a Sanhedrin, there is no need to establish a Great Court. And the GR"J Perla, may his memory be for a blessing, sharply refutes this explanation by writing, "these words cancel each other and add nothing. Either way: if we find that Moses only established courts of three by way of a Sanhedrin, then [PAGE 27] even if there is no commandment in its own right for a court of three, it is included in the positive commandment of *Judges and officers, you are to make for yourself*. There is no need for the court of three to be appointed by a Great Sanhedrin. Note that the small Sanhedrin requires appointment by the larger Sanhedrin simply on account of 'as we find that Moses established.' Thus, we do *not* find a requirement that a court of three must be appointed by a larger court. If we do find that Moses appointed a court of three, then even if this is a separate commandment, it would still require a great Sanhedrin for the appointment."

Here I will expose a secret which one of the *acharonim* discussed. It is a secret of the mighty Gaon Ba'al Imrei Binah, may his memory be for a blessing, in section *Choshen Mishpat* (Paragraph 1), and Heaven forbid that a great scholar like him could speak words of nonsense which add nothing. The one who studies the essence of his teaching finds that in reality, the response of the Ba'al Imrei Binah is spoken with good reason, in a way which can be absorbed with pleasure, so that it is impenetrable to the difficulty mentioned above by R. Perla. The Ba'al Imrei Binah placed great importance on his argument that indeed it does depend largely on whether or not Moses established a court of three. He writes, "perhaps they did not need to establish Sanhedrins for all of Israel was together. Based on the caseload, they were able to judge with three. As for the commandment of appointing judges, where it says, *in all your gates* then for a city where there was not 120 people, they only needed to create a court of three." But after this, he rejects his earlier statement by writing, "in any event, there is a commandment for appointing a court of three by way of a great Sanhedrin," that is to say: since this commandment of appointing a court of three is included in the general commandment for appointing judges and officers, which includes the appointing of a court of twenty-three and a court of seventy-one, then the court of twenty-three is appointed by the court of seventy-one which is done with the same strength that Moses, on his own, had (see in Rambam *Hilkhos Sanhedrin* 4:11). Since the appointment of the court of twenty-three is done by the court of seventy-one, it is impossible to divide the commandment in half and say that when God said to appoint a court of seventy-one and of twenty-three, the strength of the larger court lies in being able to appoint the court of twenty-three, rather, the whole commandment is included in the command, *make for yourself*. The meaning of *make for yourself* comes to form a fixed and special body either of seventy-one or of a public body and not a court of seventy-one. But since we already knew about the appointing of Sanhedrins from Moses based on Jethro's advice regarding the appointing of a court of twenty-three by way of a court of seventy-one, we learn as well that the intention of

the commandment *Judges and officers* referred to the creation of a court of seventy-one. Included in this command is the command for appointing a court of three as well as the command for appointing a court of seventy-one. Therefore, it does not sit well with the Ba'al Imrei Binah in his reply that Moses established a court of three, which is to say that even if the court of three was established by the court of seventy-one, and they are both included in the same command, Moses established the court of seventy-one and gave them the strength to create a court of three, indirectly establishing the court of three.

[PAGE 28] Thus, the Gaon Ba'al Imrei Binah shrewdly sought to find a solution according to the words of *Sifre* and according to the version of the GR" A, that there is a special commandment for the court of three which we learn in the verse *they will judge the people*. Since there is a special command for this, then there is again the possibility that Moses did not establish a court of three. If he did not establish a court of three, then we have not had revealed to us the precedent of needing a court of seventy-one (to create a court of three). If that is the case, then we can easily say that the intention of this special command is not included in the general command for Sanhedrins. Rather, it is a specific command for all Israel and is not directed to the court of seventy-one like the command for Sanhedrins. And this is clearly intentional in the words of the Ba'al Imrei Binah who writes, "behold, it is clear that except for the command, *you shall make for yourself in all your gates*, to which we add the command, *judge the people* which speaks specifically about appointing judges and is not included in the larger command *Judges and officers you are to make yourself*, that there we are warned about the large Sanhedrin and the small Sanhedrin, which is appointed by the large Sanhedrin, as it was established by Moses our Teacher, peace unto him. Except for these places, the Torah warns *they shall judge the people* which is the command to appoint judges, that is in a city which does not have 120 Jews, which does not fall under the command, *within your gates* to appoint a court of three. Thus there is no need to appoint the court of three only by a larger court, rather, it is enough that they be ordained judges. And as

for those 'three,' we do not find that Moses established courts of three by way of a Sanhedrin, therefore there is no need to appoint and create a Great Sanhedrin simply because it is a specific commandment for all Israel, which is to say as we mentioned above, that the commandment for appointing a court of three is not included in the general command of judges and officers — which warns about creating a large and a small Sanhedrin. Whereas the intention of the commandment is for a large court of seventy-one, there is a special command from this based on *they will judge the people*. Again it is possible to say reasonably that since we do not see Moses establish a court of three, that the intention of this special command for the creation of a court of three is a particular commandment for all Israel and there is no need to appoint the court of three through a Great Sanhedrin necessarily. And the words of Imrei Binah are thus well explained.

The GR" I Farla finds difficulty in the words of Imrei Binah based on what the *Sifre* said that this has to do with the appointment of judges. When the Torah speaks of *Judges and officers you are to make for yourself*... it is speaking of appointing judges. And when the Torah speaks of appointing judges, we learn in the following verse that the judges which I commanded you are to be judges which will judge the people with *righteous judgement*. See Rashi there (in which he says "appoint expert and righteous judges to judge a righteous judgment," based on *Sifre*.) See also R. Eliyahu Mizrahi on the Torah, *parashat Shofetim*, who argues that the interpretation of the *Sifre* is not as Rashi presents it by saying, "appoint judges who will judge the people with a righteous judgement" rather the intention of the *Sifre* is so that a righteous judgment includes the ones who make the appointments and not the judges themselves, for already we have the special command for them, *thou shalt not wrest judgment*, which is a commandment for the judges to judge with justice. What he finds difficult is to understand why both commands are not for the judges, since we could see *they shall judge* is a positive command and *thou shalt not wrest* as a negative command. For this difficulty, the words of *Sifre* spell out an answer clearly: "*with righteous judgment*. Does not

Scripture say further on, *thou shalt not wrest judgement*? why then does Scripture say here, *righteous judgement*? Here it refers to the appointment of judges.¹ We see then that *righteous judgement* which is written here does not include the judges but rather the ones who appoint the judges.

Volume One, Chapter One, Section Four: THE COMMANDMENT FOR APPOINTING JUDGES IN THIS ERA

Introduction and Analysis

In this fourth section, the quote of *Judges and officers* remains central, however, more important for proving that judges can operate in this era is the quote *so these things shall be a statute for you throughout your generations in all your dwellings* (Num. 35:29).

Waldenberg begins by exploring Ramban's initial reaction to the verse from Numbers. Ramban concludes that we are not bound by Torah to appoint judges today, rather, we are to judge as needed by hearing monetary cases, as they arise and never to judge a capital case. In a back-handed way, Ramban clears the path for Waldenberg to find other sources which go further by finding a means to appoint judges at all times (except capital cases). Waldenberg finds a way to appoint judges at all times based on a) the laws of indebtedness and loans which do not require experts and b) the idea that judges today operate as agents for earlier judges. Therefore, anyone, acting as an agent, can judge everyone. Given the inevitable need to hear cases which will arise, Waldenberg draws the conclusion that there is an obligation by every generation to appoint judges.

After a review of the legalistic debates between the Sages, *rishonim*, and *acharonim*, Waldenberg shows how Ramban himself concludes that judges are indeed necessary based on Scripture, *so these things shall be a statute of judgement to you throughout your generations*.

In a rare moment of direct advocacy, Waldenberg closes the section by saying, "From all these opinions, we have a great foundation to say that even in this time where there is no ordination, there is a commandment from the Torah to appoint fixed judges who will judge toratic law, and there is even a basis by which to say that the judges have been given permission to judge based on Torah."¹

¹*Hilchos Medinah, Volume 1, Chapter 1, Section 4, page 36*

*Translation of Volume One, Chapter One, Section Four: THE COMMANDMENT
FOR APPOINTING JUDGES IN THIS ERA*

A) Ramban, in his Torah commentary (Deut. 16:18) after having proved that outside the land of Israel there is an obligation to appoint a Sanhedrin, concludes and writes, "nowadays, however, that ordination has ceased, since, according to Torah-law, all judicial functions are void — for it is written, *[And these are the ordinances which thou shalt set] before them* (Ex. 21:1) and not before commoners² and we [not being ordained] are commoners, and would not be empowered to adjudicate outside the land except for the Rabbinical ordinance that we 'carry out the commission of the former ones [who had received ordination]' — we are not at all bound, according to Torah-law, by the commandment to appoint judges."

We learn from the Ramban that he reasons that nowadays we are not obligated by the commandment for appointing judges, and his intention is as he stated at the beginning of his interpretation on the matter of judges outside of Israel, that "they are not required to appoint a court for themselves; rather, when an aggrieved party complains, people qualified to judge are to arise for him and *according to their ordinances shall they judge it*." We need to say in accordance with this, what Ramban says on Numbers 35:29, which reads *so these things shall be for you a statute of judgment to you throughout your generations in all your dwellings*. Ramban writes, "Perhaps the rabbis interpreted the words [in our verse here] *And these things shall be for a statute of judgment* [as referring not to the criminal cases mentioned in this section, but] to [the general law of] the Sanhedrin mentioned continually in this section, as it is said, *[until he stand] before the congregation for judgment; then the congregation shall judge*, and Scripture is thus saying that we should always have,

²Gittin 88b

³Ibid

throughout all generations, and even after the destruction [of the Sanctuary], *a congregation of judges* [i.e., a Sanhedrin, or court] in order to adjudicate upon the laws of fines, robberies, personal injury, and all monetary matters, and to deal with the law of forty stripes."

Ramban's intention is to include that even after the destruction of the Second Temple, even though there were ordained judges, no longer did they judge on capital cases. Nonetheless, the obligation remained that the community would need to judge cases which carried a fine and so forth. Since the Torah includes the word, *l'doroteichem* — *throughout your generations*, it reveals to us that the commandment is not restricted in time, but rather it is applicable in every time where there is ordination. However, once ordination ceased, so too did all its related laws in Torah and since then there has been no obligation to restore the appointment of judges as was mentioned above. This issue is clearly indicated in the essence of Ramban's teaching in *parashat Masei* when he says that they will judge in cases that have fines and so forth and those that have to deal with the law of forty stripes. But the laws of fines and lashes are not adjudicated as everybody agrees except with ordination. And since we did not do so, in sending out judges, you will have to agree that Ramban refers to do so after the Second Temple period while there is still ordination. And when Ramban says, "we should always have, throughout all generations, and even after the destruction [of the Sanctuary], *a congregation of judges*," you must agree that his intention is on account of the *throughout your generations* which does not refer directly to the laws in this *parasha* which deal with capital cases, but rather deals with the judges who are mentioned in the *parasha*, who need to be appointed for all generations, even after the destruction of the Second Temple — judges who will have fixed appointments to judge the people in every season. Ramban's intention is not to imply that the community would literally judge, in the form of a Sanhedrin, but rather a court of three is sufficient [see the *mishtnah* at the beginning of *Sanhedrin* and in *Makkot* as the first *tanna* speaks about judging with three. See also in *Rambam Hilkhos Sanhedrin* 5:4]. But since the *throughout your generations* **[PAGE 30]**

does not include just that which is said in the *parasha*, in any case there is no intention also to speak of how many judges are needed in order to judge that which is spoken of in this *parasha*, which is to say capital cases, rather the intention is to create a general command which needs to stress that there be appointed judges ready at every time who can stand up and provide justice before the people. This commandment shares with its specifics in accordance with influencing the laws of that same generation, at the time when they judge capital cases, that they need a Sanhedrin of twenty-three, and in a time when there is no court to hear capital cases, a court of three is sufficient.

B) Similarly, that in our time, we are not obligated from the Torah regarding the commandment of appointing judges, can be learned from Rambam in *Sefer Ha-Mitzvot* (I#176) where he writes, "you must know that the appointment of all these courts, namely the Greater and the Lesser Sanhedrin, the Court of Three [Judges], and the rest, can take place only in the Land of Israel, outside which there is no ordination. But judges ordained in the Land of Israel can render judgment both in and outside it - this is the effect of the saying [of the Sages] 'the Sanhedrin has jurisdiction within the Land and outside it.' They cannot, however, judge capital cases either in the Land or outside except when the Temple is in existence." This means, apparently that Rambam believes the commandment for appointing judges is restricted specifically to a time when there is ordination.

But when we look closely at Rambam, we see that there is no proof for this (waiting for the Temple to stand in order for there to be judges appointed). Rambam writes only that all the appointments need to be made in the land of Israel. We have from the commandment, *Judges and officers you are to make for yourself in all your gates which Adonai your God is giving you, throughout your tribes*, where the practical difference is the strength of ordination, since when ordination exists in the land of Israel, then the ability to judge outside the land of Israel is allowed. And here he writes, "then they will judge as all those who have

ordination are able to judge." But there is no proof for his words that there is no commandment for appointing judges in a time when there is no ordination. We can easily say that there is a commandment for those without ordination to judge all the cases which do not require ordination. However, as for the commandment from Scripture of *Judges and officers you are to make for yourself*, these non-ordained judges are not called judges, because only an ordained court can be called judges (*elohim*).

C) It is not only that there is no proof of Rambam's opinion that he holds that we are not obligated in this time regarding the commandment for appointing judges, but on the contrary it is possible to bring multiple proofs that say there is an obligation even in this time for the commandment of appointing judges. For here, the Rambam (*Hilkhot Sanhedrin* 5:8) states "But cases that do not involve action in tort, such as admission of indebtedness and transaction of loans, do not require for their adjudication three well-qualified judges. Three laymen or even one well-qualified judge may try them. Therefore cases of admission and transaction of loans and the like may be tried even outside the land of Israel, for although no tribunal outside Israel can be designated '*elohim*,' it acts merely as agent for the court of Israel." See in the *Kesef Mishneh* who makes a difficulty in the name of the Ramakh who finds the Rambam's ruling puzzling: "why is it necessary to say with cases of indebtedness and loans we are to send judges. We operate without agents because the wise men of Bavel, who do not have ordination to judge, can render judgments on indebtedness and loans so long as they (the judges) are learned and competent."⁴ And many explanations are based on this comment, and see in the *Kitzot Ha-Choshen*, on *Choshen Mishpat* (paragraph 3, letter A) where he replies to this that we need, in terms of indebtedness and loans, agents to hear the cases and be present so that they can enforce the verdict. So too, see in the book, *Nachal*

⁴Why does Rambam need to state the "agents" reason in order to permit us outside Israel to judge cases of monetary claim? Even if we weren't the "agents" of the judges of Israel, we would be able to do so.

Yitzhak [PAGE 31] on *Choshen Mishpat* of the Gaon R. Yitzhak Elchanan Spektor from Kovno (3 2) who writes to reply that this requires us, in relation to cases of indebtedness and loans to have agents who will serve us, not for the court case alone, but more for receiving testimony. For according to this method [which is the method of the Rambam], that even for monetary cases, we are required that any acceptable testimony must be capable of being confuted [The issue is that of *eidim zommin* — Deut. 19:19: witnesses who testify that "he did it" are confuted by other witnesses who say "you witnesses can't testify to that fact because you were with us on the day in question."] And since the whole institution of *eidim zommin* is an issue of fines (not in the nature of compensation), it requires ordained judges (or here, the *agents* of ordained judges) in order to administer it. So our non-ordained judges have to be doing "agency" in order to collect testimony that is truly *eidut*. We are required to use a court of ordained judges and therefore we need the ability to accept testimony in Bavel with their acceptable agents who can serve us. See there in the length of their discussions of the *Kitot Ha-Choshen* and the *Nachal Yitzhak* and how the *Nachal Yitzhak* replies in a second way that we need their agents on account of accepting the testimony.

It seems that from these responses of the sages to the Rambam, which are mentioned above, that the essence of the laws surrounding indebtedness and loans can be used for judgement even today, which does not come about as a result of the presence of their agents. We need their agents merely for the coercion factor and for testimony purposes, which we have already demonstrated and proven in the previous section, letter "J" that it is the Rambam's opinion that the appointing of a court of three is included in the commandment from Torah regarding *Judges and officers*. If that is the case, since the essence of the laws of indebtedness and loans do not require experts, then the commandment regarding legislating these laws about appointing courts of three is for all generations, including at this time.⁶

⁶Rambam, according to Waldenberg, holds that the commandment to appoint judges applies even when ordination is not practiced.

D) We find more of this in Rambam (*Hilkhos Sanhedrin* 5:17): "It has been the practice of the academies outside of the land of Israel, in lands where no fines are imposed, to place the offender under ban, which lasts until he has satisfied his opponent or has gone with him for trial to Israel." Apparently, based on this wording of "or has gone with him for trial to Israel" Rambam reasons that even in this time period, in which there is no ordination, courts in the land of Israel are suitable for handling cases with fines. I saw in the *Yam Shel Shelomo* [*Baba Kamma* (1:43)] of R. Shelomo Luria, that he engages in this matter. Since the Rif did not mention the matter of going to the land of Israel, learn from this that by the time of the *gaonim* (right before Alfasi), the law of using expert judges had already died out, even in the land of Israel. But the Rambam was writing in order to add to and interpret the law based on its talmudic roots, thus he writes laws like these as though this law had not died out. According to my humble opinion, it is difficult to interpret the Rambam this way, since the Rambam wrote explicitly that this was the custom of the yeshivot. So too, if Rambam's intention were to interpret the law according to its talmudic roots, for what reason would he mention "the custom of the (i.e., *gaonic*) yeshivot?" Behold, *Baba Kamma* 15b says explicitly: "so also were the plaintiff to plead, 'fix me a definite time for bringing my case to be heard in the Land of Israel,' we would have to fix it for him; were the other party to refuse to obey that order, we should have to excommunicate him." In relation to what the Rif says, see the SM"G (positive commandment #97) who writes explicitly in the name of the Rif that the latter agrees with the Rambam: "it has been the practice of the academies outside the land of Israel, in lands where no fines are imposed, to place the offender under ban, which lasts until he has satisfied his opponent or has gone with him for trial to the land of Israel."

So too, from the Rosh who is mentioned there in the *Yam Shel Shelomo* (Chapter I of *Baba Kamma* note 20), we learn [PAGE 32] "but now there is no ordination in the land of Israel so we cannot fix for him a time there" *for bringing his case before a tribunal*. Since he

does not write "they do not judge there as well" he allows us to declare that they cannot affix a time for him there to take the case since there are no experts, but in fact, in the land of Israel, indeed, they do judge cases. Also see that the Rosh refutes himself in *Baba Metzia* 3:2. The Rosh writes that the practical difference is that nowadays, with questions of the *g'mara*, even though they (outside Israel) cannot judge cases with fines, "if (the plaintiff) seizes (the money due by way of a fine), we (the court) do not confiscate it from him, alternatively, we may summon him to *eretz yisrael* for authoritative judgment." Note that the Rosh reasons that also in this time, it is possible to arrange a case to be heard in the land of Israel. Thus it turns out in the explanation of the words of the Rosh in *Baba Metzia* that there in the land of Israel, in this time, they judge cases with fines.

E) We wrote, as was mentioned above, that according to the opinion of Rambam in the matter of cases with fines, the role of judges outside the land of Israel is proven by his words in *Hilkhos Sanhedrin* 5:13 (where we read, "in the case of theft or robbery, judges outside the land of Israel collect the principal but not the additional amount"). But still, we must consider that Rambam decides (*Hilkhos Sanhedrin* 5:8) explicitly for cases involving fines, there must be a panel of three ordained, well-qualified individuals in the land of Israel. This indicates that only **ordained** individuals can hear cases involving fines.

Indeed, there is room to explain that Rambam follows his general reply according to his method. In *Hilkhos Sanhedrin* (4:11, where Rambam speaks to the appointing of judges, even if there was just one ordained individual left in all Israel or if all the sages could agree to appoint judges and ordain them) he reasons that even in this time, ordination could be imagined in the land of Israel as long as everyone agreed. Therefore this is what he means when he says, "or has gone with him for trial to Israel." If we find that the *Beit Yosef* in *Choshen Mishpat* (#295) writes to prove as the Rosh, as was mentioned above, in the third chapter of *Baba Metzia* that he thinks as the Rambam that now it is possible to restart

ordination, also see in *Urim v'Tumim* (Chapter 1 in *Tumim* paragraph 102) who writes in accordance to Rambam in several places: "judges outside the land of Israel," and does not specify "in this time period where there is not ordination," and follows the general opinion that even in this time if all the sages of Israel agreed on one individual to appoint as the ordinee and expert, then he could ordain them.

But according to my humble opinion, it is forced to interpret the Rambam in this manner, for he writes clearly and succinctly that "this is the *minhag* of the *yeshivot*." Similarly, why doesn't the Rambam prove his "it seems to me" statement on the basis of that *minhag*? Likewise, Rambam in his commentary to the *mishnah*, in *Sanhedrin*, chapter one, writes that renewing ordination would happen when the Creator, who is blessed, prepares the hearts of mankind before the Messiah comes. And we do not notice that there was any kind of spiritual awakening like this at the time of the *gaonim* to renew ordination (like there was at the time of R. Ya'akov Berav and the *Beit Yosef*) so how could they adopt a rule to ban somebody unless they took the case for judgment in the land of Israel?

F) In my humble opinion, we can resolve the words of the Rambam, with what I saw in the book *Kiryat Sefer* by Moshe Trani (at the end of *Hilkhos Sanhedrin* ch. 5) where he writes, "all who are ordained in the land of Israel can judge cases involving fines both inside and outside the land of Israel, for the Sanhedrin has jurisdiction outside the land of Israel, as it is taught there (*Makkot* 7a). And even without ordination, it seems that based on the Torah, it is possible to judge cases outside the land of Israel even for a case that does not fall under laws of the land of Israel. In a time without ordination, all are equal and all is based on the individual's personal level of wisdom." We learn from the *Mabit* a profound interpretation of the law. According to him, the distinction drawn by Talmud scholars between (jurisdiction) in the land of Israel and outside the land of Israel applies only when ordination is practiced. [PAGE 33] When there is ordination, then people outside the land of Israel say,

"we need 'judges' and we have none" It is then that we need the rationale of agency (שליחותיות — that we outside of Israel perform the agency of the ordained judges) and it is then that the limitations of "frequent" and "money-loss" cases apply (we outside the land of Israel can adjudicate only those cases which fall under both categories). But in a time when there is no ordination, then everyone is equal to judge everyone, because of the commandment from Torah, *Judges and officers you are to make for yourself that they will judge the people with a righteous judgment*, in all matters which is said as an eternal law, for all generations and for all times, even outside the land of Israel [with the exception of capital cases which are heard by a small special group of judges who judge only when the Sanhedrin sits at the Chamber of Hewn Stone when the Temple is standing], therefore, since there are no "judges" and it is impossible to establish *the cause of both parties shall come before the judges* (Ex 22:8), everyone stands on equal ground to judge.

When the Mabit emphasizes in his writing, "it seems that based on the Torah, it is possible to judge cases outside the land of Israel,"⁶ learn from this that even though the rabbis say we don't judge outside of Israel in a period when there is no ordination [despite the fact that it seems that the Mabit's intention is to say that we can judge cases outside of Israel, which is not only proven by the edict of the rabbis of accepting agents, but if it does come from the Torah, then it proves itself]. But in order for it to be interpreted in this way, then it means going against Rambam's understanding and the interpretation by all the codes. Therefore we will interpret it as was done above], which is to say that we interpret that the rabbis enacted the edict at a time when there was no ordination with an eye towards the Torah when there was ordination. For when it comes to a matter which they cannot find (in Torah), they will judge according to the laws of the land of Israel [and we found similar to this that the power of the court of Israel was discussed in Rambam's *Sefer Ha-Mitzvot*

⁶Since the Mabit says that judges outside the land of Israel are *toraitically* empowered to judge today, we learn from this that they are *rabbinically forbidden* to do so.

(#153) where he indicates that the Great Court is no longer standing, so there is no one to declare the new moon based on seeing it see the *Hashgot Ramban* and the *Lev Sameach*].

So according to this, we resolve the Rambam who brings the custom of the academies to ban someone until they appease him or go with him for a trial in the land of Israel, because at this time, since there is no ordination, we judge in cases even though we have no ordination. Based on the Torah, we can even judge outside of Israel, except the rabbis enacted a law similar to the Torah which allowed for such judging only by judges in the land of Israel, as was mentioned above. Perhaps from what the Rambam had to say, the Mabit deduced his opinion [and see in the book of *Imrei Binah, Choshen Mishpat*, 1, and what the Mabit has to say and the rest of the difficulty to which wrote earlier as it appeared to my humble opinion].

From all that is written, it is clear that not only is there no proof from the words of Rambam that he reasons that there is no obligation in this time from the Torah to appoint judges, but that we could bring proofs and proof texts which are able to show the opposite and reason that there is an obligation (in this period to appoint judges).

G) Now the *Sefer Ha-hinukh* writes, "this precept, i.e. [to have] a large and a small *sanhedrin* and a *beth din* of three, is in effect in the land of Israel, since ordainment is [existed] there, but not outside the land, as there is no ordination outside the land." Based on this wording of the *Hinukh* it is possible to see that apparently the commandment of appointing judges is just during the time of ordination. However, we could also reject this and say that the intention of the *Hinukh* is merely to teach us that the commandment for ordination works only in the land of Israel, but not about the actual commandment for appointing judges, or that his intention regarding appointing judges is only spoken for a place where there is ordination, which is the land of Israel [and as the Ramban explains in [PAGE 34] his commentary to the Torah, *parashat Shofetim*, where he is of the same

opinion as the Rambam, except where he takes issue with Rambam based on what is written in *Makkot* 7a, "so these things shall be for a statute of judgement to you throughout your generations (Num. 35:29) which comes to teach us that the Sanhedrin operates both in the land of Israel and outside the land of Israel." The *Hinnukh* replies to this by adding "nonetheless, anyone who is ordained in the land of Israel is suitable to judge even outside the land of Israel which is what the Sages meant when they said, 'the Sanhedrin operates both in the land of Israel and outside the land of Israel.'" Therefore what is meant by judging outside the land of Israel is those who are ordained have jurisdiction there, outside Israel, to judge cases. The Ramban adds by finding a difficulty to what was written next (in *Makkot*), "outside the land of Israel, you are to appoint judges in every district and not in every city," making it appear that the *Hinnukh* based his understanding on a version of the text similar to that of the Mem which reads, "but outside of the Land of Israel, you are not required to appoint judges in every district and every city," and see what written above on page 27, in section 3, letters B-D regarding the Rambam's method], but from the same place where they say that the judges operate in the land of Israel, we learn that it is an eternal law which applies even in a time where there is no ordination.

Like my first explanation which said that the *Hinnukh*'s intention lay with the commandment for ordination and not for the actual appointing of judges, you can see that he reasons that it applies for all times and in every place. Notice what he says in the following, "this [appointing judges] is one of the precepts (commandments) which is imposed on the entire community that [exists] in any and every location. If the members of a community are suitable to establish a *beth din* among themselves, as clarified in *Sanhedrin* 2b and 17b, and they have not established [it] for themselves, they have disobeyed this positive precept, and their punishment [will be] very great, for this precept is a mighty pillar in the maintenance of the religious system of law. Now it is for us to learn this that even though today, on account our sins, we do not have ordained men of authority, every community everywhere ought to

appoint within it a few of the good men in its midst, that they should have power [authority] over all, to compel them by every kind of coercion that seems right in their eyes, through goods and possessions or even by physical means, to the observance of the Torah's precepts, and to prevent from their midst anything repulsive or its like." Learn from the clarity of this statement by the *Hinnukh* where he reasons that this very commandment on the appointing of judges applies in every place, and even at this time when there is no ordination.

So too see in *Sefer Haredim* in the commandment of oaths where he writes, "in every time, appoint judges," which is to say that the commandment applies even in this time. And see in the explanation of the *Kesef Ha-kodashim*, *Choshen Mishpat* (siman 8).

H) According to the method of the Ramban, which we brought forward in letter A, that he reasons that we are not obligated in this time, from the Torah, to appoint judges; likewise, the Tur in *Choshen Mishpat* (siman 8) reasons, "now that there is not ordination, all of the judges are canceled from the Torah, as it is written, *before them* (Ex. 21 — *v'eleh ha-mishpatim asher lasim lifneihem*), which means before the judges, and which for the *parasha*, that means ordained judges. Thus we interpret *before them* to mean not before ordinary people (i.e., non-ordained judges). Since we would be considered 'ordinary people,' we are not judges from the Torah but rather we serve in their place (doing their agency)." Nonetheless, other than what we mentioned, the intention is that there is no obligation to appoint fixed judges. But when the aggrieved party complains, it is well to appoint judges who will be able to judge based on the laws of the Torah, which is included in the commandment of *and he shall pay as the judges determine* (Ex. 21:22) see there in the Ramban [where he understands *p'lilim* as always to mean judges], with that exception, we remain obligated to appoint judges in every city in the land of Israel, as the *Urim v'Tumim* write (in *Urim*, 101) "be that as it may, even for us, it is an obligation to appoint judges in every city in the land of Israel, and outside of Israel, in every district. For all that our Sages

have decreed, [PAGE 35] they have kept an eye to the Torah in their making decisions." For this precept is a mighty pillar in the maintenance of the religious system of law (a quote from the *Hinukh*).

In addition, see in the *N'tivot Ha-mishpat* on (*hashen Mishpat* (1:1), where he understands the appointing of judges in a new way by saying that we serve as agents of the judges based on Torah. Only when someone is sent to the Sages, and they do not do the same to them as they do to messengers — only in a place where they slam the door in their face in order to help them, as with the accepting of converts in this time, and in cases of divorce, see there. Rather, he concludes with the language: however, the Rambam and the Rashba wrote that it was only so because of the rabbis, but for matters of forced divorce, the reason is for the breaking of the *kiddushin*."

Like the words of the *N'tivot Ha-Mishpat* so too *Sefer Rabid Ha-Zahav* writes in *parashat Mishpatim*, following the words to the judges, "Interpreters of Torah conclude that we serve as agents in matters involving financial loss. They understand our role as officers of the court in order to fulfill the words of the ordained judges. Be that as it may, it would be hard to accept the notion that we act as agents in every single matter. See also in the Rani, in

⁸According to the *N'tivot*, the concept that we (judges today) are empowered to do the agency of the ordained judges of the past is a toratic (rather than rabbinic) concept. Its "rabbinic" aspect is merely that the determination of which areas of judgment we are empowered to administer is left by the Torah in the hands of the sages, and they determined that we can exercise the power that rightfully belongs to *smichin* only in those cases where our failure to do so would be an instance of *ne'ila d'rat*, where someone would otherwise be prevented from doing something that we think s/he should be able to do. An example of this is the acceptance of proselytes. See *Yehamot* 46b: three judges are required for conversion, because the word *smichin* is used with respect to the *ger*. Yet the root *sm* implies ordained judges, so that technically no conversions should be allowed in the absence of *smichin*. See *Tosaphot*, *Yehamot* 47a, three lines from top (part of the *dirbur* *sefer* which begins on 46b): we perform the agency of the ordained judges, who allow us to accept proselytes on the grounds that to do otherwise is a case of "closing the door" to converts. Another example of doing "agency" is coercion (*me'at*, *me'at*) of divorces. The Rambam and the Rashba, however, say that the power to coerce divorce is based in rabbinic law, not in toratic law, and it rests upon the power of the rabbis to annul marriages (*hafka'at k'du'in*), i.e., by declaring the *k'du'in* *nek'ot* to have been ownerless at the time of the wedding.

the chapter "*ha-m'gareish*," *Gittin* ch. 9 page 153. It seems that the Torah teaches us that the laws and judgments will not depart (from among us) at any time based on what is written in *parashat Shofetim*, you shall come to the priests the Levites, and to the judge that shall be in those days (Deut. 17:9) Behold, it was revealed before the Blessed One that they would be exiled and ordination would be abolished. The Scripture was given on condition that it would be interpreted by the Sages according to the conditions of time and place, and it is for them to decide the issues on which we shall act as agents of those who are ordained. We find in *Keritot* 9a, a second source of interpreting *throughout your generations* to mean at all times. In a section regarding receiving proselytes, based on *parashat Shelach-Lecha*, we read *and if a stranger sojourn with you or whosoever may be among you throughout your generations* (Num. 15:14) — *throughout your generations* meaning at all times, as in the case with the commandment for *tzitzit*, see there.⁹

Truly, there is a foundation to what the *N'tivot Ha-mishpat* and the *Rabid Ha-zahav* say in their commentaries. The Ramban himself, in his *chiddushim* to *Yehamot* 46b engages this difficulty surrounding our legal capacity to receive proselytes in this time states in his second exploration, "it is possible that even ordinary individuals can judge as agents for experts," which is to say that according to that which was stated earlier that we serve as agents of the ordained judges based on Toratic law.

Thus, according to this, I think that perhaps Ramban agrees, in *parashat Masei*, which was mentioned earlier in letter A, when he said, "Perhaps the Rabbis interpreted the words [in our verse here] *and these things shall be for a statute of judgment* [as referring not to the criminal cases mentioned in this section, but] to [the general law of] the Sanhedrin mentioned continually in this section, as it is said, [until he stands] before 'the congregation'

⁹[See also in the *Imrei Binah* what he says in relation to finding a difficulty with what the *Rabid Ha-Zahav* brought forward in the proof-text *and you shall bring the case to the priest*. In the Talmud we discover the opposite because in the time when there were priests, there were judges outside the land of Israel. A proof comes from Torah, *a statute of judgments throughout your generations* (Num. 35:29) See there.]

for judgment; then 'the congregation' shall judge, and Scripture is thus saying that we should always have, throughout all generations, and even after the destruction [of the Sanctuary], a congregation of judges [i.e., a Sanhedrin, or court] in order to adjudicate upon the laws of fines, robberies, personal injury, and all monetary matters, and to deal with the law of forty stripes." His intention here is in a time when there is no ordination, which means that our serving as agents of the judges does come from the Torah, and it is reinforced as a commandment from the Torah from what is written in the line, *a statute of judgments throughout your generations*, which applies also to cases involving fines. Which is to say that because the issue of our serving as agents comes from the Torah, it applies in matters of fines as well. But the Torah gives the discretion to the Sages, for them to decide using good insight how to go about [PAGE 36] working the administration of the agency. The Sages determined to restrict the agency of non-ordained to matters involving the concern of "closing the door" to converts.

We learn from this that Ramban, in his second reply to *Techamot* retracts what he said in *parashat Shofetim* that in this time, there is not a commandment for the appointment of judges. Since from the Torah we learn that agents serve for the judges, therefore, there is as well an obligation to appoint judges in the capacity as agents, which is understood best in light of Ramban's commentary in *parashat Masei*, mentioned above, which brings out an obligation based on Torah, from what is written, *so these things shall be for you a statute of judgment to you throughout your generations*.

[It already occurred to me to interpret the verse in this manner based on the words of the Mabit which was mentioned above in letter "F," where his understanding lay in the agents being commanded based on Torah, even in a matter which is not explicitly found but is only decreed by the rabbis. But, the matter is made difficult because the whole thing hinges on ordination. For otherwise, it does not matter if there is ordination or not because even in the time when there was ordination, the law corresponded to the situation in Bavel

where there was no ordination. The Mabit makes his language express the difficulty by saying, "in the time when there is no ordination, everyone is equal." In using the words, "everyone is equal," learn that the general principle does not arise from the agents but rather from the side of their essential power].

I also found in the responsa of the Rivash (228) where he explains another concept surrounding the decree of serving as agents for the judges. For we said in matters of indebtedness and loans we serve as agents, but it is not as a complete agent that we serve but rather to fill a certain purpose, which involves a financial burden which we handle on our own as we serve as if we were their agents, and as if we were like the Great Assembly in the land of Israel which was appointed over all Israel from the days of Moses, peace on him, and which was able to serve outside the land of Israel without ordination. See there and we could go on.

FROM ALL THESE OPINIONS, WE HAVE A GREAT FOUNDATION TO SAY THAT EVEN IN THIS TIME WHERE THERE IS NO ORDINATION, THERE IS A COMMANDMENT FROM THE TORAH TO APPOINT FIXED JUDGES WHO WILL JUDGE TORAITIC LAW, AND THERE IS EVEN A BASIS BY WHICH TO SAY THAT THE JUDGES HAVE BEEN GIVEN PERMISSION TO JUDGE BASED ON TORAH.

**Volume One, Chapter One, Section Five: THE ABILITY TO ADJUDICATE
FINE-RELATED CASES AND CAPITAL CASES IN THIS ERA**

Introduction and Analysis

The *halakha* is decided, throughout the ages, that capital cases can only be heard during the time when the Temple is standing. At such a time, when the priests and judges serve together, cases of any nature were, or could be, heard. However, by looking through the responsa literature, as well as the codes, Waldenberg is able to find examples in the history of various Jewish communities when capital cases and cases involving fines were heard — since the destruction of the Second Temple.

Due to necessary circumstances, Jews in many ages have been forced into hearing cases, which according to *halakha*, they could not adjudicate. The requirements of the hour have enabled halakhists to rule in favor of performing deeds which typically could not be accomplished. Waldenberg makes mention in this section of the possibility of enacting a series of *takanot* in order to accomplish that which is necessary for our era. By so doing, we would do that which our predecessors had done for their age. Such an approach was indeed advocated by then Chief Rabbi Herzog and other leading rabbis of the early state. It seems a fairly progressive notion that the rabbis and *gaonim* formed edicts which were appropriate for their time and set aside those teachings or *halakhot* which were obsolete. Waldenberg is making a case here of the rabbinic power to restore the laws of fines and of capital-case jurisdiction, just as sages in all periods have done what is necessary for the good order of the community. Outside Israel, Waldenberg would not declare that the needs of the hour allow for such an extension of the halakhic enterprise but within the land of Israel, as long as the litigants agree, then they should be able to accept a judge over them to hear their case — whatever the nature of the matter. The Rosh and Ribash have responsa which indicate that capital cases were heard in times which necessitated them being heard by Jewish courts.

The argument of the "requirements of the hour" rest on *Sanhedrin* 46b and *Yebamot* 90b where we read R. Eliezer b. Ya'akov's position that a court may administer floggings and penalties not in accord with the Torah. R. Eliezer's position is not to violate the Torah but rather to set up a fence around the Torah. The Rif later agrees with R. Eliezer and we are reminded by a responsum of the Maharam of Lublin not to over utilize this rationale regarding corporal punishment. He brings an example of a Jew who was over-punished and the entire community later suffered by this individual's disdain for his own

community.

Waldenberg finds support in the responsum of the Rashba as well as in *Choshen Mishpat* where we learn to act as the hour requires. The Meiri states that communal agreement is the key. If the local government allows the Jewish community to establish courts and the community is open to trying their cases, then by reasoning of lesser to greater, certainly where non-Jews agree to Jewish courts, in non-Jewish lands, so much the more so should the Jewish state allow for Jewish courts. Waldenberg extends the reasoning of *dina de-malkhuta dina* to the Jewish *malkhut*.

In later responsa of the Gaon Abraham Joshua Heschel and the *Siftei Kohen*, as long as verdicts and punishments were issued by God-fearing people with sufficient toratic knowledge and sufficient suspicion of any given case, then anytime is necessary for corporal punishment. When asked what is necessary, they reply that all time is necessary or else there is no reason for people to abide by the law.

Waldenberg ultimately draws upon the words of Deuteronomy 17:12, *the man that will act presumptuously, and will not hearken to the priest that stands to minister there before the Lord thy God, or to the judge, that man shall die, and thou shalt put away the evil from Israel*. While the general law may seem to preclude capital and fine-related cases from being heard in our day, individual eras and cases go beyond that supposition.

A) We have already mentioned the *halakha* [decided in *Choshen Mishpat* 1] that according to the law, only a court of ordained judges in the land of Israel will hear a case involving fines [and we do not at this time have such a court]. So too in Rambam's *Sefer Ha-Mitzvot* (176), we read that even a court of ordained judges cannot judge capital cases either in the land of Israel or outside the land of Israel, except when the Holy Temple is standing.

The rest of the explanation, comes from Rambam's list of fourteen general rules (roots) and thus [PAGE 37] capital cases can be judged only in a time when the Temple is standing. The *Mekhilta* asks, from where do we know that they only executed (the guilty party) during the days of the Temple? Scripture states, "[but if a man comes presumptuously upon his neighbor, to slay him with guile] thou shalt take him from my altar, that he may die" (Ex. 21:14). Thus, in the time of the Temple, you may administer the death penalty, otherwise you may not. So too, there it states, from where do you know that you only have an ordained Sanhedrin when there is an altar? Scripture states, *from my altar*. Rambam provides an explanation in his *Yad Ha-hazakah* (*Hilkhot Sanhedrin* 14:11) which interestingly does not come from this interpretation of the *Mekhilta* based on the scriptural source of *from my altar* but he brings a different comment: "Capital charges are tried only while the Temple is in existence, provided that the Supreme Court meets in the Hall of Hewn Stones in the sanctuary, as it is said concerning the defiant elder *in not hearkening unto the priest that standeth to minister there before the Lord thy God* (Deut. 17:12). By tradition it has been learned that capital offenses are tried only when the priests bring offerings on the altar, provided that the Supreme Court is in its right place." The source of this lesson comes from the *g'mara* of *Sanhedrin* 52b where it reads: "Imrata, daughter of Teli, was the daughter of a priest who committed an act of adultery. R. Hama bar Tuvia had

her surrounded by twigs and burned. Said R. Joseph, 'You erred in two matters. You erred in the matter of R. Mattenah [on how the execution through burning was to be done]. And you erred in that which has been taught on Tannaite authority: *And you shall come to the priests the Levites, and judge that shall be in those days* (Deut. 17:9). This verse teaches that when there is a priest [at the altar], there is judgment [of capital cases in the Jewish courts, including inflicting capital punishment], but when there is no priest, there is no such judgment.'" See there in the *Radbaz* and *Kesef Mishneh*. See also in *Avodah Zarah* 8b where it says, "forty years prior to the destruction of the Temple the Sanhedrin went out into exile from the Temple and held its sessions in a stall [on the Temple mount]. For what practical law does such information serve? - which is to say, it was trying capital cases that came to an end. What is the reason? When they realized that murderers had become many, so that they could not be judged properly, they said, 'It is better for us to go into exile from place to place than to declare them guilty, for it is written, *and you shall do according to the sentence which they of that place which the Lord shall choose shall tell you* (Deut. 17:10), which is to say, it is the location in which the trial takes place that is determinative.'" See there in *Rashi* and *Tosaphot*, and also *Tosaphot Shabbat* 15a, "*eleh sheh-lo*"¹.

It is possible to say that Rambam made his ruling here by interpreting *in not hearkening unto the priest that standeth to minister* because he adds the Tannaite rule of "provided that the Supreme Court is in its right place," which comes to teach us more than what we learned with the defiant elder, where it is written, *and you shall come before the priests, the Levites and the judge*, or from what is written *in not hearkening unto the priest that standeth to minister there before the Lord thy God or to the judge*. From this we learn

¹Rashi explains that the murderers got the death penalty only when the Sanhedrin sat in its special location. He also mentions that cases were only obligatory (to be heard) when the court existed. The *Tosaphot* learn a tradition from R. Menachem, who learned it from R. Yonatan that forty years prior to the destruction of the Temple and even after the destruction, cases were still tried by the Sanhedrin, even though all four death penalties had been cancelled. Waldenberg seems to refer us to the *Tosaphot* on *Shabbat* 15a in order to demonstrate that cases involving fines were still heard as long as court trials were held, regardless of location.

that the judge needs to be in the same place as the priest who stands in serving God

I have seen in the SM" G (*asin* 120) that he agrees with the interpretation of *when any legal-matter is too extraordinary for you, you are to arise and go up to the place* (Deut. 17:8) by stating that the place has a determinative impact (see *Tosaphot in Sanhedrin* "h'zman" — where they state that the place is determinative in agreement with the *g'mara* of where there is no priest, there is no judge.) He writes, and it is written, "the defiant elder in not hearkening unto the priest that standeth to minister there before the Lord thy God or to the judge, in the time when there was a priest serving, there was also a judge who served alongside the priest. Even the Scripture juxtaposes these figures in *parashat Mishpatim* by placing it alongside [issues surrounding] the altar. Thus it becomes clear to us that according to what was explained earlier from the verse, *in not hearkening*, it is necessary that the judge be present with the priest.

B) Therefore, according to law, it is not possible in our day to try cases involving fines or capital cases, but from the decree of the rabbis and from the perceived need, we have found it is possible to try such cases. Thus we have found great laws and precedents — [PAGE 38] in which fines and capital cases were judged in actual cases, not just in theory during various time periods. The only disputes have been whether *any beit din* can judge these cases. Or is it possible to apply the exact law of the Torah (as to forms of execution, for example), on which I will expound shortly.

As an introduction to our discussion, I will bring Meiri's words at the end of chapter five of *Sanhedrin* on which he writes in somewhat exaggerated language, they (the rabbis) said that you could only seat on the Sanhedrin a Sage (*talmud hacham*) who is so wise he knows how to make a crawling-critter (*sheretz*) kosher according to the Torah. What this means, says the Meiri, is not that they *should* find ways to declare *sheratzim* kosher, but rather that they should be able — by way of such powerful talents of interpretation — to

reason their way around any problem that might arise as a result of the Torah's own laws and to justify their conclusions as though they are the law of the Torah itself. Similarly, the *gaonim*, in their interpretations of Talmud have written that it is within the realm of the rabbis and the *gaonim* to create edicts and decrees as a general or a specific rule to remove any foul matter according to how they judged it during their period, requiring little in the way of textual justification in order to do so. On similar matters, the great interpreters wrote that the Talmud was only given to those expert halakhists or knowledgeable interpreters who have good, clear minds who know how to remove, add, or interpret the legal system, yet the door is locked to most people and the only people suitable to make such decisions are those who are distinct in their generation by being knowledgeable, acute, intense-learners and of settled opinion — so speaks the Meiri. From here we learn the basis for decrees and edicts which we find the greats of the generations decreed in every age — all done with good reason, expert opinions in debates, and settled disputations amidst clear and sharp minds, similar to our time and issues.²

First, I would mention that it is possible to judge cases involving fines according to the law. Even the technical *halakha* permits us to adjudicate these cases today (which we need not justify our doing so as an emergency measure). [we already mentioned in the preceding section, letter F, the Mabit, who claimed that it is possible to judge cases involving fines as a general rule in this time, according to law], based on what I found in the *Arukh Ha-Shulchan, Choshen Mishpat* (1:13): "even though cases involving fines are not heard in this time if the litigants accepted judges who would try cases involving a fine, then it is like accepting a relative or a person who is unfit for hearing cases even though one

²It seems a fairly progressive notion that the rabbis and *gaonim* formed edicts which were appropriate for their time and got rid of/ set aside those teachings/*halakhot* which were obsolete — other than the obvious laws of sacrifice. Perhaps Waldenberg is making a case here of the rabbinic power to restore the laws of fines and of capital-case jurisdiction, just as sages in all periods have done what is necessary for the good order of the community. There were voices in the religious Zionist community who called for a series of *takanot* to deal with modern issues.

authority doubts this, nonetheless it seems to me that this is the correct interpretation of the matter: for accepting an unordained judge is no worse than accepting a relative or an unfit judge.¹¹

I saw in the *Imrei Binah* on *Choshen Mishpat* (#2) who brings a discussion, in the name of the *Sha'ar Mishpat* who doubts that "acceptance" allows ordinary judges to hear cases involving fines. The *Imrei Binah* disagrees based on what Rambam writes in *Hilkhot Sanhedrin* 4:14, "any competent judge who has obtained authorization from the court in the land of Israel may exercise his mandate throughout the land of Israel and the cities situated on the border, even if the litigants are unwilling to accept him. But outside Palestine the authorization does not confer upon him the right to compel litigants (to submit their cases to him). Though he is empowered to adjudicate outside the land of Israel cases involving fines, he is denied the right to coerce parties to a suit to appear before him for trial, unless he has been invested with authority by the exilarch." Learn from what the Rambam says that only someone who is ordained and has permission to judge cases involving fines can judge. Nonetheless, outside the land of Israel, someone who wants to judge on his own, and is not ordained, cannot judge in cases involving fines [PAGE 39] even if a litigant is willing to accept him as a judge, he may not do so for cases involving fines — see there what he wrote on this matter.

According to my humble opinion, Rambam does not contradict the conclusion that ordinary people can be accepted for hearing cases involving fines, because it is up to the one who gives permission to judge in the land of Israel and not outside the land of Israel. The whole matter of which Rambam speaks refers not just to *kenas* but to all legal issues: he cannot adjudicate them by means of coercion outside the land of Israel. We find a relevant

¹¹This acceptance confers the actual power to do so. The *Aruch Hashulchan* argues that if the litigants can agree to accept a judge who is halakically disqualified to rule in their particular case, they (and all of us) can similarly empower any contemporary judge, who is technically disqualified from hearing cases involving fines, to adjudicate such cases.

passage in *Sanhedrin* 5a, which mentions receiving authorization from the exilarch for hearing cases in Bavel or in the land of Israel. But do we learn from this that on every single matter of law the acceptance of a judge by the litigants should be of no effect unless that judge is ordained? Rather, it must be that when Rambam writes, "Though he is empowered to adjudicate outside the land of Israel cases involving fines," he comes to teach us a larger point, that even though the power of the ordained judge in the land of Israel is greater than the power of the one who receives authority from the exilarch, the power of the one who receives authority from the exilarch does not extend to cases involving fines, while the ordained judge can hear cases involving fines both inside and outside the land of Israel. In other words, the ordination (power) of the judge from Israel holds even outside the borders of Israel — nonetheless, the authority/power of the one who can judge outside the land of Israel is of no benefit, in any matter of law, unless the litigants agree to his authority in their case. The "he cannot judge" of Rambam does not have any impact on the "cases involving fines" as it is for any judge, for no judge can intervene in a case without the permission granted by the litigants, which is mentioned at the beginning of Rambam's discussion of this matter regarding who can receive authority from the exilarch. Rambam writes, "Therefore any competent judge, who has been authorized by the exilarch to exercise judicial functions, may act as judge everywhere, in or outside the land of Israel, even if the litigants are unwilling to accept him (as judge), though he is denied the right to adjudicate cases involving fines," which is to say that even though he cannot judge in cases involving fines, nonetheless he has the permission to judge everywhere in all remaining cases even though the litigants do not want him as judge. If that is the case, then here Rambam teaches us the opposite — that even though the competence of the ordained judge from the land of Israel is greater (than one who is given permission to judge by the exilarch) in that he can hear cases involving fines even outside the land of Israel, nonetheless he cannot hear any cases outside the land of Israel without the agreement of the litigants to have him as judge. From this there

is no proof that they cannot accept an unordained judge to hear cases involving fines.⁴

I found an explicit source for the *Arukh Ha-Shulchan* in the words of the *rishonim*. The *Shitah M'kubetzet Baba Kamma* (84b) discusses the argument surrounding *eye-for-an-eye* as meaning monetary compensation. The argument is brought in the name of the Meiri. There are those who explain every act which is mentioned in the Talmud, which was judged in Bavel — as a matter which came before us to be judged and which received a judgment. Everything which came before us, we heard. Clearly these judges were not ordained, yet they heard cases which involved fines.

The Meiri adds, "but whenever there is a case where both litigants do not come forward, there can be no judging just the one side, even though the other party complains against him on the basis of the law or from the power of a newly issued edict. In any event, the *gaonim* agree to judge now in all matters related to robbery, theft, and personal injury as an eternal law. The great *posekim* wrote as well that even for cases involving fines, even though they were not tried in Bavel, they can be adjudicated so that the other party will be placated. The great ones of the *gaonim* wrote that they could even levy fines or punish with lashes as necessary for the case."

In our discussion of the power of the edict, we come upon the responsum of the Rashba that it is possible [PAGE 40] to judge even with witnesses who are relatives, or a woman or in the absence of clear testimony, for it is written in the responsum of the Rashba, volume 4 (311) who was asked concerning the matter of the community which agreed to appoint courts of arbitration who could remove the ills of the community and they swore to do this and it was written in the specifications of the agreement that they (the judges) would have the power to punish both physically and monetarily according to what they saw as

⁴The issue of accepting a judge is crucial to Waldenberg's argument. Although a disqualified judge — say, a relative of one of the litigants — ordinarily cannot hear their case, "acceptance" is the process by which, under the *halakha*, such a judge can be empowered by the litigants to do so.

appropriate, even if the witnesses were relatives or a wife or a child who spoke inadvertently but revealed the truth. Likewise, if they have the permission to judge according to the witnesses who have a plausible reason for telling the truth, even though there is no certain testimony, he (Rashba) replied: these matters appear to me as simple. You are permitted to do as you see fit, because everything that you have mentioned you said in the context of having a court judge according to the laws of Torah in a Sanhedrin or something like that. If it wasn't that way, then they could not administer corporeal punishment and not fine the guilty party since there are no judgments of fines in Bavel and not in matters which are not found since we do not judge today — even in cases of indebtedness which is based on toraitic law which require us to have judges, who are the experts and we are merely ordinary folk. As agents for those judges we can serve. If we serve as agents of the original judges, as in cases of indebtedness and loans, but not in the case of robbery, personal injury and the remaining transgressions, then there is no punishment with lashes. Someone cannot punish themselves since no man can find himself guilty by the court, and even if there are kosher witnesses, there will not be any lashes, unless, they will lash him after a warning. With all these cases, they are all under the auspices of a court which operates according to toraitic law. Do we not find with David that he killed a resident Amalekite on his own? And they say, "I heard that a court may inflict floggings and penalties not in accord with the law of the Torah. But this is not so as to violate the teachings of the Torah, but so as to establish a fence around the Torah. And there is the precedent concerning one who rode a horse on the Sabbath in the time of the Greeks, and they brought him to a court and stoned him, not because it was appropriate, but because the times required it," which is brought in the section, "*Ha-ishah Ravah*" in *Yebamot* 90b. [Emergency jurisdiction.] So much the more so for your agreement is simply to do that which is right in your eyes as in the written letter of the edict which you mentioned, and so this matter is quite simple between us and all the places which have similar edicts — to there the wording of the Rashba. It is clarified for us

in this responsum of the Rashba that there is no obligation to judge based on the written laws of the Torah, rather, it is according to how we understand the needs of the hour, (that we create an obligation to appoint a court) and therefore even testimony from relatives, women, and children, given inadvertently is considered permissible. And even though there is no clear testimony, which is part of the question, and which is part of the answer, it becomes clear that you can do what you feel is necessary in your eyes.

Likewise the Ramban replied in shorter form in the *Teshuvot Ha-M'yuchasot* (279) in another community that set out to appoint courts of arbitration to remove the transgressions of the community, it is written in the specifications of the agreement that they could punish with fines according to what was suitable in their eyes, and they have witnesses who are relatives or hearsay evidence, or any kind of testimony which seems truthful. They could try the case and fine the guilty party without [PAGE 41] real ('kosher') witnesses, except in the Torah's legal system. But anyone who transgresses the edicts of the land will do as necessary for the time, and if you don't agree, then they will not fine in cases involving fines and they will not engage in matters where we are not to serve as agents of judges, as in robbery and personal injury, and thus will require a warning. So they say, "I heard that a court may inflict floggings and penalties not in accord with the law of the Torah. But this is not so as to violate the teachings of the Torah, but so as to establish a fence around the Torah." These rulings were judged in a shorter fashion in *Choshen Mishpat* 2. Every court which, even if non-ordained and in the land of Israel, if they see that the people are constantly engaging in transgressions, and it is necessary to judge them with capital punishment, fines, or some other type of punishment, then they should do so even without clear testimony.

D) The Meiri adds there: the places which were permitted by their governments to judge in cases concerning Jews, according to the laws of Israel, it was done with the

agreement of all the people. We must presume that the concerned parties were judged according to the laws of Israel. They even tried capital cases according to Jewish law based on the power of their agreement, when the times required it.⁵

We learn two things from what the Meiri says: 1) that the communal agreement is equal to acceptance by the concerned parties, and in accordance with their agreement, they were able to try cases involving fines as well, as long as their local government allowed them to judge according to the laws of Israel. So much the more so, if the permission comes from the government or the state of Israel itself, and not from some foreign government, then the agreement will come for a chosen foundation upon which the community agrees to choose a court which most certainly would benefit everyone and which could judge according to law the cases involving fines. 2) that the agreement even can be useful for trying capital cases as they arise.⁶

Thus we find in the writings of the *rishonim*⁷ which present contemporary accounts of how Jewish judges judged in different places according to Jewish law with the permission of the government. For example, I would mention a responsum of the Rosh (R. Asher b. Yechiel 17:8) where we find that the questioners assumed that we judge one who has blasphemed God.⁸ The Rosh answers as follows: You have surprised me by asking me about a capital case because in none of the lands of which I have heard, not even here in the land of

⁵When the entire community agrees to adjudicate according to Jewish law (as opposed to *dina de-malkhuta*), their status is precisely the same as when two litigants agree to do so.

⁶Should the authorization to adjudicate according to Jewish law come from the institutions chosen by the people, then their election of judges and courts is all the authorization we need to adjudicate *all* Jewish law, including capital cases, should the times require such a scenario (since such was the legal situation of the Jews in Diaspora countries). KEY: Waldenberg applies the *dina de-malkhuta* principle to a Jewish מלכות.

⁷The *rishonim* were the talmudic commentators and *poskim* who lived between ca. 1000-1500.

⁸Which carries a corporal punishment.

Sefarad, do they judge capital cases. I am extremely shocked to even think how anyone could come to judge a capital case without a Sanhedrin. They told me that the king granted them permission, and the community has the opportunity to save lives by judging because if these cases were to go to the non-Jews, the defendants would be more likely to be killed. So I left them to their current practices, but generally, I do not agree with them concerning the execution of a soul [I will return to discuss the essence of this responsum of the Rosh later in our discussion, with God's help.] The Rosh, even though he left them to their practices, was shocked by their ways, and continued to disagree with their practices of killing. But in the responsum of the Rivash (R. Yitzchak b. Sheshet #234), he mentions this custom of judging capital cases as a matter of course, and he says: "but nowadays, there is no way for a court to handle capital cases unless by royal permission granted" [see further on where we will speak of the teaching of the Rivash], and so too in #451 he writes to the questioner at the end of his responsum: "this is what appears to me as one one who is guessing, because as you know in this land [PAGE 42] we are not accustomed to trying capital cases, even if it means not being happy with the situation, for it is the law of the king. However, you are the one who sits on the court and knows the custom of the law of the land and its judges and how to go about judging in accordance with the time and place for these matters. Do what is necessary and don't abandon the Torah from among you." So we see that there were places which judged capital cases with the permission of the local government because of contemporary needs and they relied upon the presumption mentioned above which is referenced in the Meiri that it can be beneficial as long as it is done with the permission of the government and the entire community.

E) Aside from what is mentioned above, regarding capital cases, and so much the more so cases involving fines, the concept of "the needs of the hour" is mentioned. In all the books of the *posekim*, as in a source like this, they bring from the *g'mara* of *Sanhedrin* 46b

and *Yebamot* 90b, "R. Eliezer b. Jacob says, 'I heard that a court may inflict floggings and penalties not in accord with the law of the Torah. But this is not so as to violate the teachings of the Torah, but so as to establish a fence around the Torah. And there is the precedent concerning one who rode a horse on the Sabbath in the time of the Greeks, and they brought him to a court and stoned him, not because it was appropriate, but because the times required it. And there was another precedent concerning a man who had sexual relations with his wife under a date tree, and they brought him to court and flogged him, not because it was appropriate, but because the times required it'."

Yet it seems that there is no proof from this *g'mara* which is mentioned above, unless for a court which is ordained and is in a time that handles capital cases but a serious punishment is not appropriate for this man.³ In regard to this they say that it is in the realm of the court, given the times, to judge with a serious punishment. But from where do we learn that with a court of non-ordained judges, and in a time when capital cases are not heard, that they are able not only to judge the case but to use a capital punishment given the needs of the time?

We find in *Sanhedrin* 27a: "it is in the case of Bar Hama, who killed someone. The exilarch said to R. Abba bar Jacob, 'Go, look into the matter. If beyond doubt he has committed murder, put out his eyes.'" Notice that also in Bavel, in a time when the hearing of capital cases had ended, it was possible that a court inflicted punishment even if there was no need in its time.

But its refutation is right there in the text because it only says, "put out his eyes," and not "they shall kill him," which teaches us that even according to the needs of the time, a court of non-ordained judges, at a time when capital cases were no longer tried, was not able to provide the death penalty.

³The problem with this *g'mara* as a source for the permit to adjudicate capital cases is that it seems to apply only to ordained judges, in a situation where the accused does not deserve death according to the *halakha* but the court determines that "this is the need of the hour."

For more on this, see Rashi, who says: "put out his eyes." They will gouge his eyes because the death penalty has fallen into disuse. The fine we serve on him is by a court which can punish, not based on Torah." Rashi explains that this passage reads "put out his eyes" and not "kill him" on account of the power of "capital punishment having been eliminated from the court." Learn from this that clearly he thinks even though a court is empowered to "administer corporal and other punishment in cases where the Torah does not require these," it still does not enjoy power of execution.

What we have said above has its foundation in other sources from the *rishonim*. For example, here in *Sanhedrin* 52b, that it was Rav Hama bar Tuvya who was responsible for burning with bundles of twigs the daughter of Tali, the daughter of a priest who committed adultery. For the *g'mara* says, "you erred in two matters." The Maharshah writes, [PAGE 43] in the *Hochmat Shleimah*, that "the actions of Rav Hama could be explained that he did not make a mistake, on account of the needs of the time, and therefore burning according to the laws of Israel was not done with a string of lead, that they might say that they cannot judge even in this time, rather burning is to be done according to the time and the needs of the time for that very generation."

But from the *g'mara*, you cannot reply that way, for the *g'mara* clearly reasons, as seen above, that only a court of ordained judges, in a time that capital cases are heard, may order punishments beyond that which the law usually allows, to meet the needs of the hour.

The *Nimukei Yosef* actually precedes the Maharshah with his interpretation of this matter in the *g'mara*, regarding a court that orders corporal or monetary punishment not according to the law, as in the case of the man who rode on the back of a horse on Shabbat and they brought him in and stoned him, to which he replies: there are some who say that in this case of the man on the horse it was with the Great Sanhedrin that operated with all its members, but an ordinary court cannot do this. Despite what is said in *Niddah* 13, "cut the hand" from a man who was accustomed to doing so to his neighbor, and like we said above

with regard to "If beyond doubt he has committed murder, put out his eyes." That is, we are obligated to punish him in just a small part of what the Torah says, as in the case where the man's eyes are gouged in lieu of death, which is what the Torah demands, but to give the entire punishment as required by Torah, it is not possible.¹⁰ Clearly, the law to kill as necessary in a given time refers specifically to the Great Sanhedrin and its members, and see in the *Sefer Yad Malachi* (*Klalet Ha-Dinim* #415) where he writes that the words of the *Nimukei Yosef* can be consistent with the Rambam in *Hilkhot Sanhedrin* 24:4-5.

It seems that this is the same opinion which we found in the Rosh's responsum. We are not empowered in this time to follow completely the Torah's law regarding punishment. First we learn from his responsum 17:8, regarding the matter of the one who blasphemed God in public and caused a desecration of God's name. The questioners wanted to sentence him to death in order to make an example of him. The Rosh, in his response to them showed his shock that in this time, they intended to judge a capital case. Even though he wrote to them, "do as you see fit in your eyes," he added the following words: "If I was a part of your agreement, I would lean toward taking out his tongue from his mouth and cutting out most of the things he could say, making him a mute and in that way making his punishment fit his actions, which could make the case a famous one and would remind people everytime they saw him." Notice that the Rosh decided that the death penalty is not enforceable in this time. So too in 18:13, in the discussion of a widow who became promiscuous and became pregnant from a non-Jew and thus committed a great desecration of God's name among the nations, the questioner suggested by way of the general principle that a court may exceed the Torah's punishment if necessary, in order to meet the needs of the hour and cut off her nose in order to ruin her face which made her beautiful to her lover. They asked the Rosh if they could do this or if it seemed so severe. He replied, you have judged properly, cut off her nose.

¹⁰This quote from the *Nimukei Yosef* is not in the *Nimukei Yosef*, at least in connection with the relevant passage from Talmud.

to ruin her appearance and make her appear repulsive and as an adulterer, and do this immediately to stop her from doing evil

So too the L'vush reasons in *Choshen Mishpat* 2, that even though according to law, it is possible to judge capital cases as is necessary, in order to prevent people from erring and believing that these laws can be used for judging in this time, the guilty party should not be sentenced with the punishment which is prescribed by the Torah, rather with an alternative punishment. For example, consider one who willfully kills someone — an act [PAGE 44] which requires the death penalty in the Torah. Today we will not kill him but rather gouge out his eyes, and in that matter or its equivalent, cut off a limb even without warning, and not administer the precise penalty prescribed by the Torah. He also brings up the case of the widow which we mentioned earlier. See how the *Sefer B'nei Shmuel* reasons similarly.

I have found more on this in the Ran on *Sanhedrin* 27, who reasons that even other toraitic punishments, and not just those which require death, cannot be administered by a court which is made up of non-ordained judges. He finds the difficulty out of what is said in "gouge out his eyes." [from *Sanhedrin* 27a] In Rashi's interpretation it is on account of the fine of a court which administers floggings and punishments beyond those allowed by the law. This is what he says: "This is surprising, because the law of 'floggings and punishments not from the Torah' is more serious than the actual law of the Torah, and thus even more so requires great judges and experts. How was it possible to do this in Bavel which did not have the authority to rule in capital cases, even though it was a toraitic law?" Rav David, may his memory be for a blessing, explains that accordingly, the exilarch did not have his power from Jewish law but rather from the local government, for it is the law of the government to eliminate evil people, and it was for the government to give permission to the exilarch to do what he felt was appropriate. Thus the Ran reasons that a court of non-ordained judges does not have the power to judge even for cases which are subject to punishments other than death.

Furthermore, it is necessary to investigate the words of the Ran that if the exilarch received his authority from the government, then the question resurfaces: why couldn't he judge capital cases? why does the text specifically say, "gouge out his eyes?" Here the Ran himself (*Sanhedrin* 46) says in returning to the matter that if the court which punishes by using the death penalty for someone whose crime does not merit the death penalty, as a way of creating a fence around the Torah, then it will be important for the court to be comprised of experts and ordained judges like Shimon ben Shetach and his fellow judges, which explains that when capital cases are judged outside of the land of Israel, they are done by way of royal authority. And if according to royal authority capital cases are heard, then why didn't the exilarch judge the case as a capital case if he had royal permission?

Perhaps you could say that the foreign government in that scenario used gouging of eyes instead of killing as punishment. Therefore, the exilarch was unable to receive permission to try a capital case using death as a punishment. As the Ran explains in *Sanhedrin* 46, if it were the case that part of the royal authority given for trying capital cases meant following their pattern of using the death penalty and so too our laws required the death penalty for the same offenses, then we could try capital cases and use the death penalty as a result of the royal authority given. But in the case where their laws exempt the death penalty and our laws require it, then in that matter it certainly would be forbidden for us to administer the death penalty, for we would require a court of experts and ordained judges to do so.

This comes to comment on even those opinions which have reasoned that there is no authority for courts in this time to punish outside of what the law permits. The *Yad Malachi* says that the Rambam holds that in the matters concerning murder even when they do not have royal permission, the Jewish court has authority and an obligation to punish the murderer with all sorts of punishments, which is similar to what the Rambam says in *Hilchos Rotzeach u' Shmirat Nefesh* 2:5, "if the king does not kill them, and the needs of the time do

not demand their death as a preventive measure. It is nevertheless the duty of the court to flog them almost to the point of death, to imprison them in a fortress or a prison for many years, and to inflict severe punishment on them [PAGE 45] in order to frighten and terrify other wicked persons, lest such a case become a pitfall and a snare, enticing one to say, 'I will arrange to kill my enemy in a round-about way, as did So-and-So, then I will be acquitted.' Thus even when the time does not require it, then there is no authority for the court of ordained judges to punish the guilty party with extra-legal punishments, even so in the case of the murderer, the court is obligated to punish as they see fit, as mentioned above.

F) Up to now we have spoken about what appears straight-forward from the *g'mara* and what serves as a foundation for some of the *rishonim*.

But many of the *rishonim* and the *posekim*, among them the Tur and the *Shulkhan Arukh*, do not reason this way but rather believe that as the times dictate, a Jewish court, even in this time is empowered to administer punishments and even the death penalty. There are diverse opinions on this matter in regard to court administered punishment which we will see, with God's help, soon.

The Rif in *Baba Kamma* 96b comments on the story of R. Nachman, who fined a party in reference to a case of a stolen yoke. He writes: from here we learn that fines may be levied in cases such as this even outside the land of Israel, for Rav Nachman in Bavel punished with a fine, for it is taught us in *Sanhedrin* 46a that "R. Eliezer b. Jacob says, 'I heard that a court may inflict floggings and penalties not in accord with the law of the Torah. But this is not so as to violate the teachings of the Torah, but so as to establish a fence around the Torah.'" Where the Rif helps us understand the words from the *g'mara* of *Sanhedrin* mentioned above is by teaching that R. Eliezer ben Ya'akov says that the cases can be determined by a court of non-ordained judges, not so for every court, but that a court can flog and punish, not as found in Torah, but according to the needs of the time, and

obviously it can be learned from this that it applies also to the death penalty. Note that R. Eliezer ben Ya'akov, upon whom the Rif relies, suggests from the story that they judged to death, and that they say simply "flogging and punishment which does not come from the Torah" [is permitted], and learn from this that any punishment is allowed.

So I have found with the responsa of the Maharik (R. Yosef Colon) (*shoresh* #185) who brings the words of the Rif and adds his own thoughts. You should not say that he is specifically referring to monetary fines, for Rav Alfasi responds to the version of *Sanhedrin* where R. Eliezer says "I heard that a court may inflict floggings and penalties not in accord with the law of the Torah..." and there he concludes with the story of one who was riding on the back of a horse on Shabbat and the story tells of how the court brought him in and stoned him. Learn from this that even in a case which requires the death penalty, a fine can be assessed in these cases. Clearly, as the matters which were mentioned above, so too are they expressed in the intention of the Rif, blessed be his name in *Baba Kamma* (89:7) and the responsum of the Maharam Lublin (138) and the *Birkhei Yosef* on *Choshen Mishpat* (2). Surprisingly, none of these many sources really help any more than that of the Maharik which was mentioned above and clearly explains the intention of the Rif.

So too, the Tur in *Choshen Mishpat* (2) explains the words of the Rif, and decides that the *halakha* is that even though they cannot administer capital punishment or fines outside the land of Israel, if the court sees that given the needs of the day, where the people are running amuck in licentiousness, then they can apply these punishments — either death, money, [PAGE 46] or some other type of punishment. Even if there is probable cause, but not actual proof, to suspect something or a rumor that cannot be put to rest. Again, this is grounds for suspicion, but a standard that falls short of actual proof. Thus the *Shulkhan Arukh* determines there in chapter 1.

From the Tur there, it seems that he also says that Rambam agrees that even a court in this time can judge in accordance with the needs of today even if that includes capital

cases, see there in *Bayit Hadash*, and *Derishah* and also in *Birkhei Yosef* on *Choshen Mishpat* (2) who brings in the name of the Rav Mahari Zayin and the Maharam ha-Levi who scrutinize the words of the Rambam of *Hilkhot Sanhedrin* 24, where he reasons like the *Nimukei Yosef* in what is in *halakha* 5, regarding punishment and lashes where he writes, "in every place and every time." In *halakha* 4, regarding punishment with the death penalty, that he writes, "the court has the power" to administer the death penalty, that is the Great Assembly [and it seems that these were the specifics which the *Yad Malachi* intended above in letter D]. He goes on to refute this opinion (of the Rambam) and to prove that Rambam's intention is to understand "floggings and punishment" like the Tur in terms of what is necessary for this time, even in the case of the death penalty and so he decides in a like manner as the great among the *posekim* in line with the Tur and our master who said that they judge cases of death in accordance with what is necessary for the time, see there and what he wrote on the story of Rav Hama who said, "you erred on two accounts" and also the *Hagahot HaBach* on the *Nimukei Yosef* for *Sanhedrin* there.

So too, see in the responsa of the Rivash (251) who believes as well that there is authority in this time to judge the death penalty in cases as is necessary. As far as the exilarch saying to merely "gouge out his eyes," we learn that he saw the needs of the time and determined that this penalty was sufficient. Stop there and see in the *Darkhei Moshe* in the Tur.

So too, see in the responsum of the Maharam Lublin (138) and how he discusses the *g'mara* from *Sanhedrin* which is mentioned above, and how he explains the foundation upon which the great *posekim* built their argument that in this time it is possible to prescribe the death penalty or one of the bodily punishments. He goes farther to explain that the *Nimukei Yosef* thinks as well that every court has the power to judge in favor of death or a bodily punishment as they see fit to create a fence around the Torah given the needs of the hour. He concludes that it is obvious that this is the *halakha* in practice. A court has the authority,

even in this time, to punish using death, as is necessary for the time, even for the remaining transgressions, but certainly for murder in which it is fitting to be more serious and to punish according to the time. Thus, every court needs to reflect on the matter and use their intelligence if the needs of the hour require them to punish with the death penalty. His opinion is not inclined to punish by removing limbs since it is possible that from this will come future embitterment of the guilty party's mind (and soul), in that he will come to be hurt and be among those who hate Israel. The Maharam Lublin brings a story which occurred in the days of the Gaon Maharar Shikha, may his memory be for a blessing, that it was during his days that there was a man who was wicked and doing evil. The gaon ordered the man's eyes to be gouged out and his tongue to be cut. After they did this to the evil-doer, his feelings toward Israel changed and he married a non-Jew. They had children (who were not Jewish) and he and his children were wicked all their days, which made for a severe punishment upon Israel.

G) Two points which the Maharam Lublin brings need clarification: 1) In what he said about "A court has the authority, even in this time," [PAGE 47] could be understood as every court at any time, 2) when the Maharam Lublin says that a contemporary court has the power to administer capital punishment even for other transgressions, does this include transgressions for which the Torah itself does not prescribe death and which even the ordained judges of old never sentenced anyone to die?

In going back to the first point, this interpretation appears opposed to the opinions of the early and late *posekim*, for see in the Rosh in *Baba Kamma* ch. 9, siman 5 where he concludes the words of Rav Alfás as follows: only the leading scholar of the generation like Rav Nachman (bar Jacob) who was the son-in-law of the exilarch and was appointed to judge by the *Nasi* (exilarch), or the judge whom the representatives of the town nominate to rule over them is permitted to exercise this power, but not ordinary eternal judges. So it

seems that the Rosh had this version of the Rif. The *Hagahot Ha-Bach* on the Rif in *Baba Kamma* 96b has this version as an "alternative version" but he writes that it is the better reading. So too we find with responsa of the Maharik (*shoresh* 184) who also had this version of the Rif, and he writes "if one were to say that a court 'commits floggings and punishes, not based on the Torah in order to create a fence around the Torah,' did not Rav Alfasi write that 'only the leading scholar of the generation like Rav Nachman (bar Jacob) who was the son-in-law of the exilarch and was appointed to judge by the *Nasi* (exilarch), or the judge whom the representatives of the town nominate to rule over them is permitted to exercise this power, but not ordinary eternal judges.'" Clearly then the Maharik has this version of the Rif, and so it is also explained by the Tur.

However, the Maharik writes about those who disagree with what the Rif says and hold that the law allows this same power to a court of three ordinary individuals [see in the *prisha u'drishah* in the Tur, *Choshen Mishpat* 2 how R. Yehoshua Falk Katz distinguishes between two cases: when the Torah itself allows for this punishment (על פי דין) — even three ordinary judges may administer it. Where Torah law does not prescribe death (ולא על פי דין), then we require the outstanding judge of the day — see there. The *prisha* seems to say that a court of three ordinary individuals is acceptable and R. Nachman is permissible as a judge as long as they agree on his appointment.] So too we find in the Rashba in his responsum in Volume four (*siman* 264) who explains that the Rif says that we do not need "experts" to administer penalties. He replies that in every generation, permission is given to chastise and punish with lashes and floggings anyone who behaves in an improper way — and all who do this (administer the punishment) will receive blessing. In tractate *Mashkin* (sic) (*Moed Katan* 16a), they say "from where do we know that we pronounce *herem*? (From the text "curse ye a cursing.") Whence do we derive that [it falls on anyone who] eats and drinks with the offender or stands within four cubits of him... or that we may pull out his hair... and fetter, arrest, prosecute them?" And all these certainly show

that we prosecute these matters even in a place where an important court is not found. Rav Alfasi, of blessed memory, wrote this in his *halakhot*. And even for cutting one of his limbs, permission is found from Rav Huna who cut his hand as we find in the first section of "every hand" in *Niddah* 13b — see there. But for the legal judgment, we find in the Tur and in the *Shulkhan Arukh Choshen Mishpat* 2, who decide like the Rif and the Rosh which is mentioned above that such can be the case only when the representatives of the city agree on the selected judge's authority but it is not to be a permanent appointment [so too does R" A Mizrahi reason in his responsum #46]. So too the L'vush reasons that all the judges do not receive this kind of permission only those who are great in their generation or are recognized by the representatives of the cities as authorities [see in the *Hagahot Chokhmah Shleimah* from the Grash Klogar, of blessed memory on *Choshen Mishpat* there that in order for there to be a death sentence, in this time, we require need and a court of twenty-three. See also in the *Bayit Chadash* in the Tur who does not agree.]

It is possible to match up the words of the Maharam of Lublin with those of the Rif, the Rosh, the Tur [PAGE 48], and the *Shulkhan Arukh* which were mentioned above according to what I saw in the responsa of *Beit Yehuda* of the Mahari Ayish, of blessed memory, on *Choshen Mishpat* 1, who clarifies them by saying that the Tur and the Rosh, of blessed memory, do not deny permanent judges, rather only judges who have no connection to a matter which effects the entire community except to direct and to judge between two parties. Judges like these who will be called on occasionally, given the need of the hour, to correct that which is not according to law, are not permitted to rule on all laws at all times, because they were not selected for that position, rather, the community need not accept them except for hearing cases involving monetary loss and cases of what is permitted and forbidden in the Torah. They cannot engage in governing the community or punishing someone who is not guilty for they were not given that kind of authority. Only to a leading sage is such authority given, one who was appointed by the representatives of the city to

serve over them, which is to say that they accept his rulings over them for matters of the state and its regulations. According to the *Shulchan Arukh* which wrote that "the people appointed a court (*beit din*) over them" which means to say in the case of a court which people agreed to choose for themselves and to be for them as the elected ones, their choosing them does not mean that the selected ones could serve as judges (permanently), for it is not done with the opinion of the judges. See there, the issue in its length. And according to this, it is possible to say that the Maharam's intention is to explain that it is within the power and duty of the court to punish in order to enforce its decision, in the best interest of the community, even though at first glance at his teaching, it seems that he means to say that this applies to any court.

Regarding the second point to administer the death penalty, even for the other transgressions, which do not require the death penalty, even during the time when there were experts who could judge on the matter, it is clearly discussed in the Rambam, *Hilkhot Sanhedrin* 24:4, in the Tur *Choshen Mishpat*, in the SM" A (*Sefer M'irat Aynayim*) *Choshen Mishpat* 2:4, and on what the *Shulchan Arukh* wrote regarding death penalty for one who a transgression which does not require it, see the *Be'er Ha-Golah* 5.

See in *Urim v' Tumim* (siman 2 in *Urim* 2) who brings the teachings of the *B'nei Shmuel* who write that we should consider the impact of judging capital cases and the ensuing killing among Israel, the *Urim v' Tumim* concludes that in cases of murder, the death penalty can be done by the avenger but only in extreme cases, for even in this time there is the law of the avenger, and everything is done for the avenger, but with the remaining transgressions it is hard to permit the death penalty. He advises looking at the Rambam (*Hilkhot Rotzeakh u' Shmirat Nefesh* 4:9) who distinguishes between murder and the rest of the transgressions and the laws regarding them. See also in the *Kitzot Ha-Choshen* (101) on the matter of the blood avenger in this time. This is not the place to go on at length.

H) For all that is said about a court administering punishments of floggings or penalties with all types of punishments, even in this time according to the needs of the hour and extraordinary cases, it is not just when the people act in a particularly licentious way, or because there is murder, sexual transgressions, and bodily injuries being committed. Rather, all this applies to monetary cases as well if the time requires it. For thus we find in the responsa of the *Panim M'erot* part 2 (155) who responds in his discussion that this rule, that the court may administer extraordinary punishments, not based on Torah, in order to create a fence around the Torah, applies without distinction to monetary cases as well as to cases of sexual immorality, bodily injuries, etc. Even in cases of financial matters [PAGE 49] so too will the court administer punishments — even from the Torah if the guilty party does not want to return or restore that which was stolen from the property. In which case, the judge(s) follows (rules according to) an estimate (of what was stolen) even without clear testimony. It is a *mitzvah* for the judge to punish him with lashes or other means according to his evaluation which tries to be accurate. After his lengthy discussion of this, with proofs from the Talmud and the *posekim*, he concludes with an actual precedent: I learned a story from a friend which took place during the time of the Gaon Heschel (Abraham Joshua Heschel of the 17th century). The Gaon Ha-Shach (*Siftei Kohan*) entrusted into the hand of the Gaon a gold chain which was stolen by a servant of the Gaon Heschel. They agreed to punish the servant and they placed his finger on a burning ring of fire which they call *bukas* but he did not acknowledge his guilt. After three years, they found the chain in the thief's bag. From this we learn to follow the ways of our predecessors. If a case is clear, according to an investigation done by God-fearing people, and there is enough suspicion of evil-doers to punish them, then go with the acceptable estimate of an expert and determine a punishment — to there. From here we determine bodily punishments and can arrest in monetary cases like theft, or another case like that, if a court sees a need given extraordinary circumstances.

1) Under what type of circumstances would we call the time "necessary" to permit lashes or floggings or fines, which are not in accordance with the law? Note what Rashi states on the *g'mara* of Sanhedrin 46a where it says, "concerning one who rode a horse on the Sabbath in the time of the Greeks, and they brought him to a court and stoned him, not because it was appropriate, but because the times required it." Rashi writes: "riding on a horse was a rabbinic prohibition. The times required a stern response since people were acting without restraint. The oppressors of Israel, the Greeks, saw this and they were enacting edicts all around them. Thus it was actually a degrading commandment that they had to observe this." We learn from this that the hour may require us to do certain things, when the general Israelite community erupts into transgression like this, for thus we find in the Rambam, the Tur, and the *Shulkhan Arukh* discussion on how a court deals with a community that becomes unlawful.

See where the *Urim v'Tumim* (*Urim* ch 2) finds a difficulty in what the SM"A says and tries to prove that only when the majority is transgressing, an "emergency situation" exists. He explains that the SM"A's intention is that we see that when the entire generation is not transgressing, if they leave the sinner to act out alone without any firm legal response, the ignorant will learn what they please from his actions and show no attention to the Torah, God forbid. This matter is also explained in the responsa of the Maharam from Lublin (138) that even in the past, it was not that the people were so licentious but rather that the court saw that if they did not punish people with penalties, like death, they figured that the people would begin to transgress the laws and behave in a less-controlled way, which could be called a necessary time — see there.

[PAGE 50] But from the literal sense of the SM"A's words, we learn that his intention is to teach that even if the whole community is not transgressing, nonetheless, it is possible to punish an individual for his own wrong-doing. Thus does the *P'tichei T'shuvah* bring in note 2 in the name of the responsa of the *Shvut Ya'akov* Part I no. 445 what he

writes in his book *Mishpatei Ya'akov*. The *Shvut Ya'akov* concludes when there is one individual who is accustomed to transgressing, or has performed a transgression in public (or which has become famous), an extraordinary circumstance exists which allows the court to fine him. The *Shvut Ya'akov* adds (in no. 130) that it is permissible to punish with a serious punishment even in this time for anyone under extraordinary circumstances, for example in a particularly evil generation or even if there is an individual who regularly transgresses or has done an evil deed in public, like that which is explained by the SM"A and the *Shakh* in the responsa of the Maharam of Lublin, paragraph 138 and in the responsum of the *Beit Ya'akov*, paragraph 120, and a little of it appears in the responsum of *Sha'ar Ephrayim*, paragraph 72, that certainly when we learn about a case, we are required (to punish), which is different from the previous understandings.

The book, *D'var Moshe* (Part II), includes a source for the SM"A. There are two stories from *g'mara*: the one about the man who rode a horse on Shabbat and the other about the man who had sexual relations with his wife beneath a date tree. Both men were stoned by the court and the reason which is given is "because the time necessitated the punishment." But then there is the story of Rav Huna who ordered a man's hand cut off for hitting an Israelite (*Sanhedrin* 58b) with no mention of "the hour necessitating the punishment." Why does Rashi, of blessed memory, insist on adding for that story the comment that you should cut the hand of the man, "who is used to striking his fellow man?" And with this type of explanation, what about the man who had sexual relations with his wife beneath the date tree? It seems that with these two other cases, they did not usually commit these offences, only one time did it happen and not several times. Nonetheless, they were judged for death in order to make a fence around the Torah. Perhaps Rashi, of blessed memory, explains that it is done for a good reason and this is how he answers the question. His eyes see that there, in the case of the stories of the horse and the date tree, they rule in the *g'mara* that the reason for administering the death penalty is because of the need of the hour, which means to say

that they were transgressors on these particular matters and therefore the judges decided to punish them and judged in favor of the death penalty even though they were neither continually performing the transgressions nor were they regarded as particularly evil. If that is the case, then what about the man who had his hand cut by Rav Huna? There were not many people committing transgressions. This man was regularly doing evil and therefore he was fined, not based on Torah, so the judges could create a fence around the Torah. Therefore we have a new interpretation from the SM" A, z"l, (who says that the person can be punished as an example to the community) which is continued by the Rav in *Kesef Hak'dushim*, z"l, and the Rav Siftet Kohen, z"l, see there. Also, to be added there is the words of the Meiri who writes, "in the story of the one who regularly hurt people with his physical power, they judged the man and decided to cut off his hand and would do so to all who did accordingly." He adds to this, "in financial cases, there are some who interpret 'cut off his hand' as referring to punishing a person with the monetary value of the hand." [of the person he injured — i.e., not a case of corporal punishment.]

I will add to all this the words of the *Mishpat Shmuel* (102) who says that without a doubt, in this time it is permissible to punish extralegally given that every hour requires punishment. See there. So, too, see the words of the *Hashiv Moshe* (80) who writes that the representatives of the city can judge in cases involving fines to punish according to what they see as appropriate given the proof. There is no need explore this further and it is explained in *Choshen Mishpat* 2 [PAGE 51] that such is the custom in the lands outside of Israel, which makes for the foundation of the religion that were it not so, we would live in a lawless world, God forbid. It is a matter of profit for some and of loss for others which is shown in Isserles' emendations to *Choshen Mishpat*, where he says that this has nothing to do with punishing the transgressor for toraitic principles, rather only for matters which were ordered by the rabbis, whether for profit or for loss, which is simple and there is no need to go any further on this. See there [Isserles seems to be saying that the community can punish

if they are in agreement or if it is their custom to do so. So too, in the case of a necessary time, they may punish.]

J) For the summation of this section, let's bring the wonderful explanation and definition of the *Ba'al Ha-Akeidah* [*Akeidah Yitzhak*] (*Shmot Shu'ar* 43) on this issue of "flogging and punishments not from the law but based on the needs of the hour." He says, "and God commanded that they should not turn from all that they were instructed neither to the left or the right." For it is that very law which they were told even though they deviated from a strict general law, which now is the individual truth for each side,¹¹ and this is what our sages said (*Sifre parashat Shofetim*) even though one might say to you right is left or left is right, and even when they say that they mean to say right is right and left is left, they will rely on the common roots you share, but he should fear that in the beginning, they said right is left and left is right. Behold, according to the particular thing that they said, they may have meant to say right is right and left is left and in order to make their strength even better, it is best to remove from them every evil influence and claim from the written law, what it said (in *parashat Shofetim*) that *the man that will act presumptuously, and will not hearken to the priest that stands to minister there before the Lord thy God, or to the judge, that man shall die, and thou shalt put away the evil from Israel.* (Deut. 17:12) It is from this that a court is permitted in every generation to judge, sentence and to punish according to the law or not according to the law. For the intention for them is to judge according to even just part of the law for the one side and not according to the law for the general public. And as is said (*Yehamot* 90), "it is not that the law is this way but the times required it," which is to say that the the general law may not say such-and-such but for the individual case, it is necessary to do something.

¹¹The issue here is the difference between the need for *generality* in the law (דין הכללי) and the requirement that justice be done in the individual case (הענין הפרטי). Thus the legal truth (left, right) in a general sense may not be "true" in the particular case.

It is worthwhile to mention that in this example when matters reach the fence (around the Torah) like *the man that will act presumptuously, and will not hearken*, then things begin to stray from the decided laws among the community of Israel in terms of distortions and false teachings [even those which appear to be more *stringent* than otherwise]. We found in the case brought before the Rosh, which appeared above in letter "D," that he was surprised by his questioners who simply took it upon themselves to handle capital cases, even though this uprooted certain principles of Torah and placed a stumbling-block in front of many, nonetheless, he hinted that they could go on and judge capital cases. This teaching from the Rosh can be found in his responsa, *Klal* 21, *simanim* 8 & 9. In the essence of his words, the great fear of removing certain lessons which Rav Ashi ordered is reflected. His opinion is that of the Torah to behave with transgressors with every seriousness found in the law and with all the strength which is in the hands of the ministers of Torah. We will look at his words here. This is what he says in #8 since he did not want to respond out of his foolishness on the matter of the *eruv*, to you R. Ya'akov son of R. Moshe of Valencia, I have written on the matter of the *eruv*, which everyone in the community of Israel obeys, to permit open alleys into the non-Jewish section (of town) with openings but you have forbidden to the community of P'rish and you wrote to me with your proofs but I have told you that they have no substance and I have warned you that [PAGE 52] you should go back and tell the community that they should re-fix their alleys as their sages have been accustomed. I have been told that you remain in your state of rebellion and thereby create a stumbling-block for everybody in making a desecration of the Shabbat. Therefore I order you to re-fix the open alleys, with witnesses, to open into the public thoroughfare with door openings — within two weeks of receiving this letter. And if you do not re-fix the alleys as I have told you, I will excommunicate you. Know that if you were living in the days of the Sanhedrin, they would have killed you for you have come to uproot that which Rav Ashi has affixed for us and to divide yourself from all the greats who have lived up until this day, may

their memory be for a blessing, and those who live today. Therefore, go back and re-do what needs to be done and do not abandon the Torah of Moses our Teacher, peace unto him.

In the responsum which follows this last one, in #9, the Rosh lifts his hand with even more force and writes: may there be peace unto you forever, wise one R. Ya'akov (*sefaradi tavor*) son of R. Yitzhak. The letter which I sent to that brainless one, you shall tell him that if he does not do as I have instructed, I am warning you and the entire community which follows him, that excommunication will follow for that crazy fellow Ya'akov, in the name of R. Moshe. The people should therefore distance themselves from him and separate him from the community of Israel. All of this requires persistence so that some fool with no intelligence will not destroy the Torah of Moses our Teacher, peace unto him. If he stays in his rebellion and does not obey the law of the outcast on his own, I will ordain for him the commandment of our Lord, the King, may God have compassion, that he should pay 1,000 zuz to the ruler of the city. I ask you, R. Yitzhak, to take this letter to the ruler of the city and ask him to administer the collection of said fine. If all of this has no impact upon him, then I ordain you to tell me and I shall excommunicate him from the entire community of *Sefarad* and they will judge him to death using the law of the defiant elder. For we are obligated to give our souls for the sake of the Torah of God and to remove from among us one who does evil.

We see that even in the preceding responsum, the Rosh followed strict law and did not invoke the rule of the defiant elder. As he writes, "and if you were living in the days of the Sanhedrin, they would have killed you," nonetheless in his second responsum, where he sees that his opponent does not retract. In his position of broad-mindedness and understanding of the great needs of the hour to enforce the matter of "so that some fool with no intelligence will not destroy the Torah of Moses our Teacher, peace unto him," he prepares himself like a man getting ready for war by stepping out of the context of toraitic law and turns to a temporary provision to judge him as a final resort under the law of the

defiant elder. He relies upon the teaching of "for we are obligated to give our souls for the sake of the Torah of God and to remove from among us one who does evil." And there is not in any event any wonder if the Rosh went on to require payment of 1,000 zuz to the ruler of the city, even though we found (in responsum 8:24) that he did not reply on the response of his student who feared for what the fine would be. Elsewhere, we read that the Rosh does not dispute that it is a bad thing to become indebted for the payment of a fine to a Gentile government. הותרה הרצועה — everything becomes permitted. That is, in ordinary cases the Rosh opposes the payment of such fines. But this is no ordinary case. For here there is something greater required, and if (in chapter 8) there was a fear that they did not already permit lashes, they would find themselves with an obstacle and in a position unlike anything before. For Rosh has a greater worry than this, "so that some fool with no intelligence won't destroy the Torah of Moses our Teacher, peace unto him." Who overrides who? In searching for an example, they say from the explanation of [PAGE 53] the *Akeidat Yitzhak* mentioned above that said "it is not that the law includes this, rather that this is a part of what is required for the inquiry."

The essence of this rule for a court to stand in the breach and act with all seriousness of the law, even not based on Torah, when the issue before them threatens the foundation of faith, "in God, Israel, and Torah," we have found in the Rambam in his commentary to the *Mishnah* in the first chapter of *Chullin* where he writes, "Know that the tradition that is in our hands from our sages, in accepting the many teachings for our current time of dispersion, in which capital cases are not heard, is based on what occurred in the ancient days in the land of Israel, when the Epicureans, the Saducees, and the Boethusians, according to the majority of their neighbors, were killed so that they would not cause Israel to lose the war and destroy the faith. From this the law comes for many of the people living in the Middle East."¹² And

¹²Rambam says that the "no capital punishment" rule applies today only to Jews who transgress the Torah. It does *not* apply to dangerous heretics, whom we *do* execute of the good of the community!

so does Rambam write in the *Yad (Hilkhot Hoveil u'Meizik 8:10-11)*, "(10) An informer may be killed anywhere, even at the present time when we do not try cases involving capital punishment, and it is permissible to kill him before he has informed. As soon as one says that he is about to inform against So-and-So's person or property, even a trivial amount of property, he surrenders himself to death. He must be warned and told, 'Do not inform,' and then if he is impudent and replies, 'Not so! I shall inform' against So-and-So, it is a religious duty to kill him, and he who hastens to kill him acquires merit. (11) If the infomer has carried out his intention and given information, it is my opinion that we are not allowed to kill him unless he is a confirmed informer, in which case he must be killed lest he inform against others. There are frequently cases in the cities of the Maghrib where informers who are known to reveal people's money are killed or are handed over to the heathen authorities to be executed, beaten, or imprisoned, as befits their crime. Similarly, if one oppresses the community and troubles them, it is permissible to hand him over to the heathen authorities to be beaten, imprisoned, and fined. But if one merely distresses an individual, he must not be handed over. Although the punishment of an informer is permitted, it is forbidden to destroy his property, for it belongs to his heirs." We also learn from this the *halakha* regarding a spy who is caught performing his evil-doing either before or after the delivery of the goods, even if it is simply matters of wheat and chaff. For certainly, when it is considered what he has done to the general community of Israel, and caused trouble to be brought upon them by being one who delivers information about the state of Israel, too great is his transgression for meriting pardon. See in the *Shtetl M'kubetz of Baba Kamma 117b* and in the Meiri in what he wrote, "lest all that is in the public is the law" — see there. The Rambam mentions that we need to warn him (that he could be killed), which only applies if there is spare-time but not if there is no spare-time, in which case it is permitted to kill him even without having warned him as the *Magid Mishneh* explains. So too, in the responsa of the Rivash, #238, where it is mentioned in the emendation of *mishneh lamelekh*, and according to the view

which the Rivash puts forward there in saying that it is possible that the one who is pursued and tries to save himself from the one who pursues is not obligated to warn the one who pursues since he seems to be in a hurry to save himself and they are not obligated to warn him — see there. If so, then in the case of the spy, there is no need to warn him, since he is viewed as "the one who pursues" and the population of the state can be called "the one who is pursued."

In general, we have already mentioned above in letter "C" that on account of the needs of the hour, a comprehensive testimony is not required. For thus wrote the Rivash in #235, that he reasoned that in this period, what is judged in capital cases is done given the necessity of the hour since technically, hearing capital cases was stopped. Nonetheless, a court still flogs [PAGE 54] and punishes extra-legally given the needs of the hour, even without a complete testimony, for sometimes there are plausible reasons that the transgression occurred — see there. See also in the Tashbetz Part III (#168) where he replied in his discussion that "it is known that the one who steals does not steal in the presence of witnesses. So if we came to judge with witnesses, or some equivalent, we would find justice to be reduced, and permission is given to the judges in every generation to set up fences. I have already imprisoned the defendant in a Jewish jailhouse from here by claiming that he has the ways of a *nafusi* who has really stolen something. In the hands of non-Jews, they consider my having imprisoned him as meritorious and no minister or ruler would exempt him from serving his sentence and after that, when the stolen property was found in his hand, the entire community praised me for my zeal in this matter — see there.

After all that has been said in our discussion in this section, we will conclude with the words of the Meiri, *Baba Kamma* 117 where he warns, "And in every place where they do not judge according to the laws of Israel, no one will be in danger because God does not worry about killing the evil ones at the time when the deaths of the righteous follows after theirs." And he advises that generally, "never will anyone hurry to do these things until all

the world cries out enough!" And the words of the *Shitah M'kubetzet* on *Baba Kamma* adds by writing in the name of the Meiri, "these matters all require more evaluation and should be investigated by the great sages and those of intensive learning, and may it never be easy for a person to race toward killing another." The sage keeps his wits about him.

Volume One, Chapter One, Section Six: HOW TO APPOINT THE JUDGES

Introduction and Analysis

One way which the Rabbis never accept as a means to appoint a potential jurist is by way of bribery. The Rabbis of the Talmud cite the example of Yehoshua ben Gamla. There is a story told of him which relates that he received his position because of a bribe. Waldenberg shows that while he may have been a competent jurist, he had a *kesher / reshaim* — a connection to evil-doers. Due to allegations alone, he is not suitable.

The great commentator Abravanel explains in his commentary that in some lands a king appoints the judges. More appropriate however is a situation, according to Abravanel, where the people appoint their judicial court. A third possibility, which Waldenberg develops in this section, is the idea that sitting judges will appoint other judges. The larger issue surrounding HOW to appoint judges is WHO will do the actual appointing? Having the "people" appoint the judges may sound most fair but what if the people appoint an ignoramus — ignorant in the ways of Torah? Waldenberg presents commentators and *posekim* who favor appointing individuals who are important in the community and knowledgeable in Torah. If nothing else, the ones who appoint should be knowledgeable in Torah.

Ultimately, in order to appoint judges, there must be a king, a *Nasi*, or a toratic institution. The Rambam and the Talmud point toward the Sanhedrin appointing judges. Later sources encourage the use of a king or an exilarch. The idea of a king appointing judges finds the greatest favor throughout the ages and is grounded in the *Tanakh*. In II Chronicles 1:7-11, we read of Yehoshaphat, he *strengthened himself against Israel*. The commentary asks: How did he strengthen himself? By appointing judges. If the modern state of Israel can be justified or interpreted along the lines of being the modern *malkhut Yisrael*, then it will have the ability — as long as it seeks Torah-true and Torah-wise jurists — to appoint judges.

Translation of Volume One, Chapter One, Section Six: HOW TO APPOINT THE JUDGES

[PAGE 54] A) The commandment for appointing judges is a general obligation imposed upon all Israel. As the *Sefer Ha-hinukh* writes (*Mitzvah* #491), "this is one of commandments imposed upon the entirety of Israel, in every place. A community should appoint a court. The one that does not do so has canceled the commandment and they will receive a great punishment, for this commandment is a great one which helps in the fulfillment of religion." Therefore, it is the right of the public that they can appoint judges for themselves and the sages criticize those who secure appointment by outside force or influence, Jewish or Gentile government authority. As is known from *cherem* of the ancient sages: "a man is not permitted to act arbitrarily over his neighbor — not by the king nor by a minister nor a judge in order to punish, fine, or coerce his neighbor — neither over trivial nor religious matters. For some present themselves as pious but are not even modest and humble — unless the majority of the community appoints them because of their importance," as is printed at the end of R. Meir of Rothenberg's responsa, see also in Tashbetz (1:158-162). Also see *Urim v' Tumim* (3 in *Urim* 100:13), and also see the responsa of Chatam Sofer *Choshen Mishpat* #21, who writes, "all of this is even for the one who works with a king of Israel." For even Yehoshua ben Gamla was completely righteous as is shown in *Baba Batra* 21a [PAGE 55] and in the *Tosaphot* there on "*zachor*" [where he is remembered for saving Torah among the children of Israel]. Since he received his priesthood by appointment of Yannai the king. He was called *kesher r'shaim* in *Yebamot* 61a and see *Yoma* 9a. The righteous of the Second Temple appointed and heard cases as the High Priest placed him into service and said *the years of the wicked shall be shortened* but you don't count the years of Yehoshua ben Gamla among the righteous once you realize how great his transgression was (it is recounted that Martha the daughter of Boethus brought to King Yannai a measure of *denari* to appoint Yehoshua ben Gamla among the High Priests). If

that is the case, then he reached his fame at the expense of the king of Israel and he is a transgressor also of *and these are the judgments which you are to make before them* (Ex. 21:1)

So too does Abravanel discuss in *parashat Shofetim* that the intention of what is written *Judges and officers you are to make for yourself within all your gates which Adonai your God is giving to you, throughout your tribes*, means that every tribe will appoint the wisest and most God-fearing judges, who will be for every tribe in every city, which was unlike in Moses' generation, when as an emergency decree Moses appointed the judges. Abravanel adds: "and the second intention is so that you will see that in the appointment of judges, there are edicts, signed by the hand of the king, where he commands that in a certain city of a certain year, the judges X and Y will serve, for the king serves as the top judge and he organizes every part of the judicial system beneath him. Such was the law and custom in the kingdoms of Castille, Aragon and Naples. There are lands where the appointing of judges is done by the people, who pick the judges and the officers, for it appears more logical in their eyes to do so every year, and the king has no say in the matter, and such is the custom in some lands (Spain, France, and Arabic countries). Here the master of the prophets declared that for the judges in Israel, it is not appropriate for the king to appoint them, rather that the people shall appoint them, which is to say that every tribe will appoint the suitable judges in every city among them, and as far as that is concerned, we see in Scripture, *which Adonai is giving you, throughout your tribes*, which means to say that Adonai your God is giving your tribes the right to appoint judges, that they should appoint them within their gates, and not the king."

Abravanel believes that only the appointment of the Great Sanhedrin lies in the hands of either the king or the highest judge and not in the hands of the people. For as he writes further on in *parashat Shofetim*, on the verse, *if there arise for thee a matter too hard in judgment*, (Deut. 17:8) "this parasha will speak from the second step, from a popular

leadership perspective, which refers to the Great Court in Jerusalem called the Sanhedrin, and however they are appointed if it was by tribe as the first appointments I mentioned, or if by a special king or prophet, note that this is not explained by the Scripture, then I would think that in the time when there was a king, he was responsible for appointing them, and when there was no king, then the highest judge would appoint the next judge. If one of the judges died, then the high judge would appoint a new one, with the approval of everyone else. If the high judge died, then the whole court would decide on a replacement to preside over them."

B) But in order to make the choice (of judges), there has to be a special feeling or inclination to know who [PAGE 56] to choose for this important position. As Chatam Sofer writes in reference to the issue of *cherem* — unless the majority of the community did not appoint them because of their importance. On account of that, they were careful in their decision and they stipulated that the appointment is made by the majority of the community and because of their "importance" — since sometimes the majority of the community would appoint an ignoramus or someone who promises to be less stringent on legal matters, one who would say to a tree, in front of them *you are my father*. Therefore we require "importance" as a critical factor, for *do not follow after a majority to do evil*." Therefore, it would work best if in order that the result was a double benefit of having the appointed one be someone important in stature and someone whom they desire — as long as the election process is done by those who are suitable for the process of selecting judges and therefore the process should not be like other matters which come before the community. If anything, the election should be done by the *Nasi*, who is learned in Torah and fears God, or by the masters of Torah, who are praised in this and were therefore elected to serve and choose for the community, or by a high court/establishment who was chosen by the community, which serves (in name and purpose) in the ways of Torah and the laws and judgments of Torah to

know to choose for the future from among men of Torah, or that the entire community will choose from among a list of names who were pre-determined, or that the higher court/institution will choose from among those chosen by the community as the most appropriate.¹

We can bring proof texts which will show that the king or the Nasi, simply in their power granted them by inheritance or by ordination allows them to appoint judges over Israel. Other than what we find in the first chapter of Sanhedrin, Rambam Sanhedrin 4, Tur *Choshen Mishpat* 3, that an appointment by the Reish Galutah allows a judge to adjudicate a case without the consent of the parties involved. See also in the Ribash responsa #271 Chatam Sofer brings in the example of Yehoshua ben Gamla, who was called *keshet* r'*sham*, since he was appointed by the king. That case is different since he was appointed by way of money (having been given), where it says there in the gemara, "Said R. Joseph, 'I see here some sort of conspiracy, for said R. Assi a huge basket of denars did Marta, daughter of Boethus, present to King Yannai, before he appointed Yehoshua ben Gamla among the high priests.'" Rashi writes, "I see here a connection of evil-doers here because he was not suitable for the post but was only appointed because money was given." So too, see in the *Tosaphot* of Baba Batra 21a, where it begins "*zachor*." The *Tosaphot* write that there (in *Yehamot* 61a) it says "I see here some sort of conspiracy" which is written because there were other important figures before him (who were worthy of the position). See too in the *Bayit Hadash* of the Tur, *Choshen Mishpat* 5, where he brings from this story of Yehoshua ben Gamla evidence that if money was given in order to have him appointed, even though he was great among the rest of the great sages in wisdom, it is forbidden to stand before him as there is no doubt that Yehoshua ben Gamla was suitable for to be the High Priest from the side of knowledge in worship and he was one who feared God and it is possible that he

¹The issue is whether we can trust and allow a simple majority to choose judges when we recognize the intellectual and moral qualifications necessary for that office.

merited his importance and his greatness and was therefore appointed a priest among other great ones like him. Even still, as R. Joseph said, he has a connection to evil-doers, which is where I see (the problem lying) because money was given in order to have him appointed — see there. [There is no room here to continue with what Rashi said about his not being suitable. What the *Bayit Hadash* says is opposite what Rashi sees and even against the *Tosaphot* who write that there were other important people before him, (PAGE 57) and see in *Tosaphot* Yom Tov who writes that he was neither wise nor suitable for the position as priest because of the bribery of the king and in the legends of the Maharsha in *Sanhedrin* 7b, beginning with where it says "for silver and gold." There is more in the responsa of the Chatam Sofer *Orach Chayim* 206 but there is no room here to go any further.]

C) This matter that the appointing of judges rests with the king or the Nasi, or on a toraitic institution, we learn from the Torah, the *midrashim* of our Sages, z"l, and the commentators.

In the written Torah — behold, this is what is interpreted on *parashat Yitro* (Ex. 18:21-25) that Yitro's advice to Moses on the appointment of judges was that he should appoint them and not the people. *You shall provide out of all the people...and place such over them...and let them judge the people at all seasons...* and when the Scripture relates after that how Moses hearkened to the voice of his father-in-law regarding the appointing of judges, it teaches us that he also followed his suggestion that he should be the one who chooses and appoints. *and Moses chose and made them heads over all the people...* And so too, in Deuteronomy (1:13-15) in Moses' reproof to the people and in his recounting to them of their developments, again it is told that he was the one who made the appointments, *Take wise men...and I will make them rulers over you...So I took the chiefs of your tribes...and made them heads over you...*

In the *midrash* of our Sages and their interpretations — in *Sifre* Deuteronomy: "and I

will make them heads over you One might think that Moses meant, 'If you appoint them, their appointment is effective, if not, it is not effective.' Hence Scripture says, *I will make them heads over you* — if I appoint them, they are effectively appointed, if not, they are not." Note that the *Sifre* explains the verse of *I will make them heads* not so much to expose that the *Nasi* can appoint, but more to show that if the people appoint, their appointment would not be considered valid.

And in the *Mekhilta* "You shall provide out of all the people, you shall look for them with your prophetic power. R. Eleazar of Modi'im says: You shall provide out of all the people, you shall look for them with the *specularia*, with the glass through which kings try to see" [The GR "A says in the place of 'kings' — sages.] Note that appointing judges depends on prophetic powers and wisdom. In any case, the choice is not made by the masses.

However, all that is spoken of in the *Sifre* and in the *Mekhilta* has simply to do with the matter of appointing sanhedrins of twenty-three, and from this we learn that sanhedrins for the tribes were only done by courts of seventy-one, for Moses was the equivalent of seventy-one. Nonetheless, it seems that this comes to teach that in general judges need to be chosen by masters of Torah who are endowed with a perspective like that of the sages. Although the first *mishnah* of *Sanhedrin*, where it mentions that only a court of seventy-one can appoint a court of twenty-three, but not for the appointment of a court of three [see in section 3, letters K-M]. Yet, it seems that for appointing a court of three, the Sanhedrin (of seventy-one) did not need to leave its place to go appoint the court of three as in the case of a court of twenty-three. And as Rashi explains in his commentary to the first *mishnah* of *Sanhedrin* regarding appointing a small sanhedrin, "the great court needed to go out from the Hall of Hewn Stones and seat the smaller court." [PAGE 58] Nonetheless, also for a court of three, and for the appointment of every judge in his city, it was done with the supervision of the governing body and by its powers.

It is taught in *Sanhedrin* 88b "from there (from the Sanhedrin in the Hall of Hewn

Stones) they send for and examine everyone who is wise, prudent, fearful of sin, and of good reputation, in whom people found pleasure. They make him a judge in his town." Learn from the vagueness of the language which is spoken here regarding the appointment of any judge, even in the case of a court of three. However, in the *Yerushalmi* (at the end of the first chapter of *Sanhedrin*) the version of "they placed him on the court on the Temple Mount," but in the version of our *g'mara*, mentioned above, the language used is, "they make him a judge in his town." The Rambam decides (*Hilkhot Sanhedrin* 2.8), "it is stated by the Rabbis that the Great Sanhedrin used to send messengers throughout the Land of Israel to examine (candidates) for the office of judge. Whoever was found to be wise, sin-fearing, humble and contrite, of unblemished character, and enjoying the esteem of his fellow men was installed as local judge." Note that every type of judicial appointment was done under the supervision of the Great Sanhedrin, and the Rambam specifies precisely by not using the language of "he will be" which leaves room for interpretation and seeing that he might serve in the capacity of giving general guidance and instruction, but rather he writes saying, "he will be made/was installed," which is to say that they appointed the judges whom they saw as particularly appropriate for the job.

Elsewhere, that the essence of appointing judges depends upon a higher, toraitic foundation or upon the *Nasi* of the people is evident. First, in the words of the *Sifre* of Deuteronomy (1:17) it writes, "*You shall not respect persons in judgment*." This refers to the one who appoints judges." Yet, it does not mention who makes the appointments. But the Rambam writes (*Hilkhot Sanhedrin* 3.8): "A Sanhedrin, or king, or exilarch, who appoints to the office of judge one who is unfit for it (on moral grounds), or one whose knowledge of the Torah is inadequate to entitle him to the office, though the latter is otherwise a lovable person, possessing admirable qualities — whoever makes such an appointment transgresses a negative commandment, for it is said, *you shall not respect persons in judgment*." Here it is explained that one of the following three can appoint a judge: the Sanhedrin, the king, or

the exilarch.

The explicit source for the Rambam regarding the appointment of judges being done by the king, we find in II Chronicles (19:5) where it states explicitly what Yehoshafat king of Yehuda did, *and he set judges in the land throughout all the fortified cities of Yehuda, city by city*. [see above in section 3, letter E] We find in the literature of the sages that they praised him for doing this. In the *Yalkut Shimoni*, "you find that the leaders of Israel were only praised by the law, and even Yehoshafat since he was emboldened by the kingship, he involved himself only in matters of the law, as it is written, *and he strengthened himself against Israel*" [II Chron. 17:1]. What is meant by *and he strengthened himself*? He strengthened himself and appointed judges. "The Tur brings in *Choshen Mishpat* I, "and Yehoshafat, who walked in the ways of his father and lifted up his heart in the ways of God, was emboldened in the matters of the law and appointed judges in every city." So too, we see in the responsa of the Ribash (271), where it begins "a fourth were appointed with permission of the government," and in the *Urim v'Tumim* 3:6 in the Tumim, where there are lengthy matters.

D) In the *Torah u'Mitzvah* of the Malbim, I saw that he explains beautifully and logically [PAGE 59] the verses from Exodus and Deuteronomy which were mentioned above. Regarding *and you shall place over them* he writes which means to say that also the selection of the judges will not be done by the people or else those who wished to be judges would constantly be flattering those among the people who were choosing them; rather, you shall be the one to choose for them. [Also interesting is the interpretation by the Or Ha-chayim on the verse, *Judges and officers you shall make for yourself*, and this is what he says, this is an appeal to the people who appoint the judges and enforcers not to think that seeing they have appointed them they are themselves not subject to their authority. The meaning of *l'cha* then is equivalent to *aleicha, over yourself*."] On the verses, *take wise men*

of understanding and I will take the chiefs of your tribes, he writes: there is no contradiction in these matters (that earlier it was written that he said to them that they would choose and after that it is written that he would choose), to Israel God commanded that they would summon for him wise and known people to judicial candidacy for they (the people) know who was wise and understanding and who was foolish; but as for the other necessary qualities, that those being considered also be God-fearing, truth-loving, and haters of injustice. This much, the people could not know. Only Moses could know the mind of God as it is written, *you shall provide* [see]. Therefore, from among the wise and known people whom the people assembled, Moses chose those who had the spirit of God in them and who had the sublime characteristics hidden from man, for only Moses could look for the spirit of God. Thus, the key part of the choosing was Moses making the choice as Yitro had said to him that he would choose — to there. From these words which appear above, we have a lesson to learn the protocol regarding judges for future generations, that even when the highest governing toraitic body wants to appoint judges in distant places, away from its border settlements, it needs to ask other places to present a list of candidates from which that place will take and choose from among those candidates making a fair and balanced decision using a perspective which tries to find the wisest and most suitable individuals. From among the ones which they choose, they will appoint one to serve over them as their prince/officer.

E) As far as the time of tenure for the judges, it is not explicitly stated in the Torah, but in terms of what is written elsewhere regarding the commandment of the king (judge), *to the end that he may prolong his days in his kingdom, he and his children, in the midst of Israel*. (Deut. 17:20) We learn that the authority continues for all the days of his life and even passes on as a possession for his sons if they are suitable for the job. [There is no room

here to continue on with the law of possession with respect to the rabbinate.² See in the responsum of the Raybush #271, and of the Chatam Sofer, *Orach Hayim* 12. There is a lengthy discussion in the *posekim*, for here is the principle matter of our proof's intention regarding one's authority lasting all the days of his life, unless they stipulated explicitly that there would be special circumstances which needed discussion, for thus wrote the Abravanel in *parashat Shofetim*, "however, these judges that were within the gates, if they were appointed for a year or three years, or if a person was appointed to serve as judge, he fulfills his appointment for life, which is not stated in the Scripture. Our sages make a general law out of this in the opening chapter of *Kritot* and *Horayot* and *Ketubot* (103), where the subject is explained that all the appointments in Israel are intended as life-long appointments and they shall serve as inheritances to his sons if they are good and suitable for the position." Also see in the responsa of Chatam Sofer *Orach Hayim* 205-207, and other lengthy discussions.

²I.e., if a community's rabbi must be given life tenure and if his appointment is to be inherited by his son.

Volume One, Chapter One, Section Seven: JUDGMENT USING THE GENERAL LAWS OF THE TORAH

Introduction and Analysis

In case the reader missed the idea in a previous section, Waldenberg begins this section by emphasizing again the impossibility of appointing a judge through bribery. Knowledge in Torah remains the sole key for determining the merit of a potential judicial candidate. Waldenberg makes an aggadic detour by exploring a *midrash* which draws a parallel between the appointing of improper judges and planting an *asherah* tree next to the altar, erecting an altar for worship, or making a sacrifice with a blemished animal. The *midrash* is based on the proximity of the words in Deuteronomy 16:21, *You shall not set up a sacred post — any kind of pole beside the altar of the Lord your God that you may make — or erect a stone pillar; for such the Lord your God detests*, to the words of verse 18, *Judges and officers you shall make*, verse 19, *You shall not judge unfairly — you shall not take bribes*. Based on the principle of *simukhim* — juxtaposition, the Rabbis understand these verses in light of creating a judicial system which is fair. A judicial system which was not based on the standards of Torah would be a desecration of God and God's creation — an equal disgrace before God to that of idolatry.

There is a possible danger in the *halakha* as presented in *Choshen Mishpat*. Communities may erroneously believe that they can appoint anyone whom they all agree upon. However, such is not the case except when circumstances allow.

Of greater offense than appointing ignorant judges is basing a legal system on Jewish and non-Jewish law. Waldenberg cites the work of Simcha Asaf who presented a historical view of Jewish legal life throughout the ages. Asaf concludes that there has never been a time during which Jews have sought to combine foreign law with their own. Although certain periods necessitated adapting Jewish law to local custom, Jewish jurisprudence has consistently sought to live within the bounds of Torah. Only in the modern era have Jews, like those involved with the *Mishpat ha-Shalom* courts of the proto-state, attempted to combine foreign and toraitic law.

Waldenberg states that it is "as clear as the noon-day sun" it is never appropriate to combine Jewish law with the legal systems or structures of the Gentile nations. There is no way a Jewish community could possibly justify placing non-Jewish laws in their courts. One who does such an evil deed is comparable to one who plants an *asherah* tree next to the altar or erects an idol.

Such acts all profane God's holy name. As it says in Deuteronomy 32:31, *for their rock is not our Rock*. Waldenberg and the *posekam* are concerned with the appearance of Jews pursuing their legal affairs in non-Jewish courts. If Jews seek legal guidance outside of the laws of Torah, the Gentile laws appear superior to our own legal system. Furthermore, to build a patchwork system of non-Jewish laws alongside Torah and Talmud would send the Torah "to wrap itself in sackcloth." In *Sanhedrin* 29a, the Rabbis said, "the one who adds, diminishes." The Torah alone is fit to stand as a legal source.

Ultimately, Waldenberg sees the judicial program as one which fulfills God's creation. Judges work as partner's to God's creation. Man by his nature is political and is in a state of constant creation and re-creation. Communities must have a judicial system to handle the inevitable caseload which any individuals will require. For Waldenberg and other religious Zionists, nothing short of redemption is at stake for the Jewish community. With successful adjudication, according to the laws of Torah (alone), God will bring Redemption to the people Israel.

Translation of Volume One, Chapter One, Section Seven: JUDGMENT USING THE GENERAL LAWS OF THE TORAH

[PAGE 60]

In this section of ours, we will not come to speak about the specifics of the obligation of appointing a knowledgeable expert in the law of Torah, who fears God, hates bribery... For it seems that there is no need to widen the discussion regarding things which are explicit and as clear as a dress¹ already in the written Torah, in the oral Torah, and in all of toraitic literature. So too, if we go on to discuss these matters, there will not be sufficient room. We will touch on general principles associated with the law, issues surrounding the appointment of unfit judges, and affixing legislation for judging according to foreign laws.

A) In *Sanhedrin* 7b: "The administration of the patriarchate appointed a judge who had not studied the law. They said to Judah bar Nahmani, the spokesman for R. Simeon b. Laqish, 'Stand at his side as the spokesman [Rashi: who repeats in a loud voice what the master wishes to say to the assembled throng].'" He arose and bent down to him [to hear what he wished to say], but the unqualified man said nothing. He [Judah] commenced, saying, *Woe to him who says to wood, Awake! and to the dumb stone, Arise! Can this teach? Behold it is overlaid with gold and silver, and there is no breath at all in the midst of it.* (Hab. 2:19) The Holy One, blessed be He, is going to exact punishment from those who set them up, as it is written, *But the Lord is in His holy Temple, let all the earth keep silent before Him* (Hab. 2:19). [Rashi: The words, *But the Lord is in His holy Temple* are connected to the words, *Woe to him who says to wood, Awake! and to the dumb stone, Arise! Can it teach? Behold it is overlaid...* It is written, *let all the earth keep silence before him*, meaning that for this transgression, all the earth should tremble.] Reish Laqish said, *

¹Figure of speech referring to the *simlah* held up after the first night of marriage to prove a woman's virginity. See Deut. 22:17 and Rashi *ad. loc.*

"Whoever appoints a judge who is unworthy, it is as if he plants an *asherah* in Israel. For it is said, *Judges and officers you shall appoint* (Deut. 16:18) and nearby, *you shall not plant an Asherah of any kind of tree* (Deut. 16:21)." [Rashi: Every tree (*asherah*) means a judge, as it says, *for is the tree of the field human?* (Deut. 20:19) Is then man the tree of the field? This can only be explained if we connect the verse with the words immediately before it (Tazmit 7a)] Said R. Ashi, "And if one does so in a place in which there are disciples of sages, it is as if he planted it right next to the altar, for it is said, *Beside the altar of the Lord your God* (Deut. 16:19)." [Rashi: At the place of the altar, the disciples of sages atone and defend like the altar.] It is written, *You shall not make with me gods of silver or gods of gold* (Ex. 20:23). Gods of silver and gods of gold are what one may not make, but is it permitted to make ones of wood? Said R. Ashi, "the verse refers to a judge who comes on account of silver or a judge who comes on account of gold." [Rashi: A judge who comes on account of silver, is a judge who is appointed because money was given to the king so he could be a judge.]

Rambam (*Hilkhot Sanhedrin* 3:8) writes: "A Sanhedrin, or king, or exilarch, who appoints to the office of judge one who is unfit for it (on moral grounds), or one whose knowledge of the Torah is inadequate to entitle him to the office, though the latter is otherwise a lovable person, possessing admirable qualities — whoever makes such an appointment transgresses a negative commandment, for it is said, *you shall not respect persons in judgment*. (Deut. 1:17) It is learned by tradition that this exhortation is addressed to one who is empowered to appoint judges. Said the Rabbis: "Say not, So-and-so is a handsome man, I will make him a judge, So-and-so is related to me, I will make him a judge; So-and-so is a linguist, I will make him a judge." If you do it, he will acquit the guilty and condemn the innocent, not because he is wicked, [PAGE 61] but because he is lacking in knowledge. Therefore Scripture says *Ye shall not respect persons in judgment*. The Rabbis said, furthermore, that he who appoints a judge who is unfit for his vocation is as

though he had set up a pillar, for it is said: *Neither shall thou set thee up a pillar, which the Lord thy God hateth* (Deut. 16:22). And if such an appointment is made in a place where scholars are available, it is as though he had planted an *asherah*, for it is said: *Thou shalt not plant thee an asherah of any kind of tree beside the altar of the Lord thy God* (Deut. 16:21). Moreover, the injunction *Thou shalt not make with Me gods of silver or gods of gold* (Ex. 20:23) has been interpreted by the Sages to mean: gods who come into being through the influence of silver or gold, that is, a judge who owes his appointment to his wealth only." To there his wording. So too writes the Tur in *Choshen Mishpat* 8.

From these words of the Rambam mentioned above in *Sanhedrin*, we learn explicitly all that is meant by the expression, "a judge who is not worthy," which does not mean that he is not decent in his acts, even if he is entirely charming, but rather that he is not worthy in terms of his knowledge of the study of Torah — because he would be likely to acquit the guilty and condemn the innocent and not because he is evil, but simply because he does not know (how to judge). So writes the Meiri on *Sanhedrin*, "the public which appoints the judge who is not learned enough for what is required, even if he is refined in his ways, that community will be punished in the future."

According to the intention of the Rambam, regarding one who is not knowledgeable enough in terms of the study of Torah, the Maharik writes (in *shoresh* 117) to reconcile the words of the Rambam who says that by appointing one who is not learned in Torah it is as if one set up a pillar (or idol), but does not write as it is says in Tractate *Sanhedrin* that it is as if you have planted an *asherah* tree in Israel. Maharik writes that Rambam sees that both scriptural citations: *do not plant* and *do not stand* can be interpreted as forbidding the appointment of judges who are not learned in Torah. So too there is the verse, *thou shalt not sacrifice to the Lord thy God any bullock, or sheep, in which there is a blemish...* (Deut. 17:1). In Deuteronomy, every matter can be interpreted using *simukhim* (looking at the previous mitzvah and addressing the significance of two mitzvot placed together). As is

brought in *Yebamot* 4a [where there is a discussion about one who usually does not interpret Torah using the principle of the exegesis of passages based on juxtapositions — *simuchim* — will use that principle for the book of Deuteronomy]. it is proven well for this case of the three passages: *do not plant, do not stand, do not sacrifice*, all having to do with the Sanhedrin. Therefore it appears to Maimonides to interpret these as having to do with appointing judges. The verse *do not plant* warns us not to appoint a judge who is not decent but is evil and would accept bribes and pursue payments. We are warned against appointing as a judge even a wise person like Doeg or Ahitophel [advisers to David, who were self-interested but very wise], which comes to mean to the exclusion of using the language of the *asherah*, which refers to planting (a tree). We understand the implied imagery to mean that this could refer to one who feels the inclination to implant ideas or to consider thoughts in interpreting the *halakha*, lest he commit an injustice or take a bribe since he lacks decent ways and does not fear God, therefore it says, *do not stand* to warn us not to appoint a judge who is not learned and is similar to one who speaks to a *dumb stone*. As it says in *Sanhedrin* 7b, "the administration of the patriarchate appointed a judge who had not studied the law. The spokesman for R. Laquish said, *Woe to him who say to wood, 'Awake!' and to the dumb stone, 'Arise.'* On account of this, Scripture says, *do not stand a pillar before you*." Maimonides comes to teach us from this that even if the candidate fears God, nonetheless if he is not learned in Torah, then the negative command *do not plant* no longer applies to him. It is explained that even the one may transgress by appointing a judge, using the verse *do not stand* as I have explained. In understanding the juxtaposition of the verse *do not sacrifice* it appears in my humble opinion that Maimonides believed that it has come to teach us that if the one who appoints transgresses (makes a mistake), as in the case of the exilarch or [PAGE 62] a court who appointed a judge who was unfit for some reason, whether that reason is the wickedness or the ignorance of the judge, his appointment is invalid. He is unable to judge cases involving fines outside the land of Israel and cannot force a person to be judged

against his will, a power which belongs to one who receives permission (to judge) from a court or from the exilarch. This is what Rambam writes in *Hilkhot Sanhedrin*: "if a man who is not qualified to discharge judicial duties, either because of lack of adequate knowledge or because of unseemly conduct, has been clothed by the exilarch with authority to act as judge, in disregard of the would-be incumbent's unfitness, or has obtained authorization from the court, the latter having been ignorant of his unfitness, the authority vested in him is of no avail. It is as though one would dedicate to the altar a blemished animal, in which case no sacredness attaches to it." Rambam teaches that just as it is not possible to set aside a blemished beast for the altar, for if a person transgressed and did set aside a blemished beast for the altar there would be no sacredness of the body attached to it, similarly, you cannot appoint a judge who has a blemished soul, which means one who is lacking in knowledge (toraitic knowledge) which is the greatest of flaws. As it says, *every evil thing is an abomination before Adonai your God* (Deut. 17:1) which is to say that even if the potential judge has no blemish of lacking knowledge and he is an expert, like Doeg and Ahitophel, but he has in him an *evil thing*, for example he is willing to accept financial benefits or he takes a bribe, thus he cannot be appointed because it is an abomination before Adonai your God, which is to say that a judge who takes financial benefits or who is not an expert distorts the law and acquits the guilty and condemns the innocent. Such results are abominations to Adonai your God as it is written, *for all that do unrighteously, it is an abomination to the Lord thy God* (Deut. 25:16). I found a great proof in the *midrash* of R. Tanhuma, who writes: "R. Achi came and saw six steps to the throne of Shlomo, as it is written, *the throne had six steps* (1 Kings 10:19) and in this parasha there are six teachings: *do not pervert justice, do not respect persons, do not take a bribe, do not plant thee, do not stand, and do not sacrifice*. The (court) announcer would say before the throne of Shlomo, as he would ascend one step at a time, *do not pervert justice*, as he was on the first step, *do not respect persons*, as he was on the second step, *do not take a bribe*, as he was on the third

step, and so it was for the rest — to there his wording. However, as I found this *midrash* in one of the books of *Tanhuma*, I was unable to find the *midrash* of R. Tanhuma in another related book. These six things were set down on one platter, and written in juxtaposition to them were the six steps to the throne of Shlomo. When the king sat down on his throne of judgment, they would announce only one statement for each step. Learn that clearly each of these six things are related to the matter of the law which we interpreted, and which was discussed in its entirety by the Maharik. Even though the *Beit Yosef* in the *Tur Choshen Mishpat* 8 says that he disagrees with the words of the Maharik, he does not refer to the intention of the Maharik on the essence of those six matters, but rather that he attributes a "creative *midrash*" to the Rambam. As the *Kesef Mishneh* says in chapter three of *Sanhedrin* on the Maharik, "I would see that his words are good and straight-forward, if it was the way of our teacher (Rambam) to interpret these verses on his own and to abandon the explicit *midrash* from the *g'mara*. But it is not his way to do it that way, since there is no other place that he interprets the verse, *do not stand a pillar*. So too see in the *Lechem Mishneh* there that he relies on the interpretation of the Maharik, and in the *D'risha* in the *Tur*, there it is mentioned about the words of the Maharik as pleasing yet confused, so he adds to them the reason of praise from the *midrash* about the throne of Shlomo. [PAGE 63] And according to what appears, the *D'risha* does not think that the Maharik brought this *midrash* to help himself. See also in the *Shnei Luchot Ha-Brit* in the introduction of the son of the author, *amud ha-din*, chapter 17, where he brings these words of the Maharik into the discussion. And he also adds the objection of his comparison to not find a difficulty in the Rambam from the *g'mara* — see there. Also see in *Sforno* and in the *Klei Yakar* on the Torah what they also have to say about these verses which were mentioned in terms of judges — to there.

I would like to comment on what the *Kesef Mishneh* had to say, that indeed there is a hint that this prohibition is indeed derived (by the rabbis and not merely by Rambam) from

do not stand a pillar. In the targum of Yonatan ben Uziel, in *parashat Shofetim*, we find on the verse, *do not stand*, that he writes: "just as you are not to erect an idol, so too are you not to appoint a judge who is arrogant, for god will reject him." Yonatan ben Uziel apparently explains this not as an issue regarding a judge but as relating to a public leader because he changes his language from his language in the previous verse about *do not plant thee*. There he uses the word "judge" and here he uses the word "leader." So too, Yonatan ben Uziel explains the opposite from the words of the Maharik which were mentioned above. For the Maharik uses the verse, *do not stand* as being related to an ignorant judge and the verse *do not plant* as related to an evil judge. But it seems that Yonatan ben Uziel interprets the verses in an opposite way by stating that the verse *do not stand* has to do with an evil judge, as shown by his language "arrogant man" and the verse *do not plant* has to do with the judge who does not know as he writes, "just as you are not to plant an *asherah* next to God's altar, so too are you not to join an ignorant man with wise judges to teach you what you are able to do."

B) All that has been said is sufficient to establish the prohibition of appointing a judge who is not learned in the wisdom of Torah, and the more severe consequences which occur when the community appoints an unlearned person in a place where there are capable people who are knowledgeable in the laws of Torah, or in the case of appointing one who is unfit because of his evilness, and of the lack of validity in these appointments.

For I have heard claims that if an entire community can agree, then they will allow — in accordance with the *halakha* of *Shulchan Arukh Choshen Mishpat* (22) — litigants to accept a judge over them who is a relative or who is unfit. Thus, runs the theory, it is law that if these two litigants can accept the judge, then so too can the entire community. If that is the case, then it is possible to allow the litigants or the community to judge using foreign laws. They add as well, using an explicit proof, that the community can accept a judge who

is not suitable based on Torah, and who does not know the Torah's laws, based on what the Rama decides in *Choshen Mishpat* 8:1, that the entire community can accept a court over them which is not suitable, according to Torah law.

But truly, this is not a good parallel because it is clear that what they have said regarding the community being able to accept an unfit judge from the Torah is really for a unique individual case [in both cases, communities were allowed to accept unfit judges because they had no alternative]. Likewise, the comment that the community can accept, as in the case mentioned by the Rama in the same paragraph, refers to places where there are no acceptable judges, and the community needs judges [PAGE 64] to judge between them. In that case, it is better to get a non-expert to act as a judge and thus keep a Jew from going to a non-Jewish court. The halakhic permit to accept "unfit judges," cannot be read as a permanent fixed rule. It can refer only to exceptional and local circumstances. It is clear that this would not be effective (as a permanent appointment), for they would transgress continually on the serious prohibition that individuals who are not fair and wise in the ways of Torah cannot be appointed as judges as mentioned by Rambam, the Tur, and *Shulkhan Arukh*. Note that even for ignorant judges whom the disciples of sages teach laws related to the community, Mar Zutra says in *Shabbat* 139a that the verse *the Lord has broken the staff of the wicked, the scepter of the rulers* (Isa. 14:5) refers to disciples of sages who teach public law to ignorant judges. Rashu explains that the disciples of sages were appointing ignorant judges because they assumed that if the lay judges had questions, they would come to them to find out the answers. So much the more so in the case of judges who are ignorant in the laws of Torah, but it is clear from the outset that this would not work in the case of judges who know the ways of Torah. And here is the language of the *Beit Yosef*, citing a responsum of the Rashba, which is the source of the law mentioned above by the Rama who allowed the public to appoint unfit judges. The Rashba writes in his book *Toledot Adam* #290, where he is asked about cities where there is not even one person who knows so much

as one letter of the law but we need to appoint for them judges to hear and arbitrate cases against the will of the litigants. If we do not appoint judges, the litigants will have their cases heard in non-Jewish courts which will lead to Gentile control over our communal affairs. He replied that the strict law forbids us to appoint judges who are not experts without the agreement of the litigants. However, the experts of the (non-Jewish) court in the city can force the litigants to appear before them — with the Jewish judges even though they are not greater than the non-Jewish judges in wisdom. Therefore, you need to appoint them with the knowledge of the people in the city. Even though they are not experts in the law, everything is done given the necessity of the hour and that all your deeds are in the name of heaven. If the people of the city accept over them these judges, the court is permitted (to do its duties) and no one can rule them unfit, as for example a court at the beginning of the chapter *zeh boreir* (*Sanhedrin* 23a, where there is a discussion about acceptable judges). Nonetheless, it is necessary to investigate acceptable candidates to make sure they are God-fearing, haters of bribery, and people who are knowledgeable in Torah — to there his language. In another responsum, he wrote that the public can appoint for themselves a court even though it is not acceptable from the law of the Torah, as in the case of courts in Syria² — to there the language of the *Beit Yosef*. According to these two responsa of the Rashba, the Rama stated in *siman* 8 (of *Choshen Mishpat*), "cities which have no wise ones suitable to be judges or that everyone are average folk, and they need judges so that they won't have to appear before a non-Jewish court, appoint for them good and wise ones from among them (with the knowledge of the people in the city) even though they are not suitable to be judges. Since they accept over them individuals from the city, they cannot find them unfit. Therefore the entire community can accept over them a court which is not suitable by toraitic standards." Thus, the Rashba in his first responsum explained the permit to appoint judges who are not

²We read in *Sanhedrin* 23a: "Does a litigant have the power to invalidate a judge? Said R. Yohanan, 'The rule pertains to Syrian courts, but not to court-authorized expert judges.'"

knowledgeable, with the understanding of the community, is done "according to the needs of the hour," because the hour demands such an action since they did not have anyone who knew (the law) and if they didn't appoint judges, the people would have to go to non-Jewish courts, as was emphasized by the question, therefore, given the needs of the hour, in order to prevent people from going to non-Jewish courts, he permitted them to act accordingly. Nonetheless, even though he permitted the questioner, he still wrote, "and all your deeds will be in the name of heaven." Likewise, he encouraged him by saying, "nonetheless, it is necessary to investigate acceptable candidates to make sure they are God-fearing, haters of bribery, and people who are knowledgeable in Torah." The discussion of appointing is also in another responsum [PAGE 65] of the Rashba where he writes, "that the public can appoint for themselves a court even though it is not acceptable from the law of the Torah, as in the case of courts in Syria." This refers to when the hour necessitates such action. If not, even if it is said, "no one among them can find them to be unfit as a court" and as the Rashba says in the first responsum [even though it is spoken that the community can accept *unfit* judges given the needs of the hour] nonetheless, those who appoint as well as those who accept (unfit judges) transgress on the prohibition regarding accepting judges like these. Appointing one like this is also the intention of the Rama who decided as did the Rashba, as was mentioned earlier. One thing in particular becomes clear in the Rama because he first says in his emendation that "it is forbidden to appoint an average person as a judge on the basis that he asks each time (he has a legal question)." Then afterwards he continues on with the law and says, "cities which have no wise ones in them." Which is to say, as was mentioned earlier, that usually it is forbidden to appoint average people as judges, even though it is based on the notion that they (the ignorant judges) would ask a question to a sage anytime they were unsure about a law but even still, the acceptance of the litigants still does not override the prohibition of appointing unfit judges. Only given the necessity of the hour, as with cities which have no wise ones, is it permissible for the heads of the city, with the

knowledge of the people of the city, to appoint the good and wise among them, even though they are not acceptable as judges. Thus I saw it written explicitly in the L'vush (8:1) that what has been written is certainly for every community in an hour of need, "as long as they are directed in doing it in the name of heaven."

See in the *Chidushim* of the Ran to *Sanhedrin* 23a where he explains explicitly that the Jewish court system in Syria, which is spoken of there, had a system whereby they appointed judges in places where there were no great scholars of Torah. Since this had to do with places where they were not great students of Torah, the whole community accepted on their own those who had been appointed to serve as judges and they could not call anyone of them unfit. From the Torah, our Sages taught that no one individual could declare a judge unfit who was given authority by the community to judge over them, even though they were not learned in the law of the Torah because they were like the three shepherds who had not learned Torah but were considered acceptable when the community accepted them — see there. Note that what is said about the courts in Syria, has simply to do with places where the residents are not students of Torah. I know that it is possible according to law to say that the Ran intends to refer specifically to places where they are not students of Torah but nonetheless, if the people of the city are willing to accept them (unlearned ones) as judges, it still holds that in places where Torah is studied, they would not accept those people as judges. The Ran says simply, "but those who are appointed in places where they do not study Torah," teaches that in places where Torah is studied, so much the more so those (ignorant) judges would not be appointed or accepted. So too writes the Mabit in 1:280 that they (those not studied in Torah) can be appointed as judges only in those places where there is no one learned in Torah.

Indeed one who studies the *chidushim* of the Ramban in *Sanhedrin* on this topic, in the beginning of chapter three, *zeh boreir*, will see that this matter of the courts in Syria, was because they were accustomed to sitting and hearing cases and it is not possible that they

were not experts in law (since they had experience) They are the ones the Talmud refers to as "lay judges" who are still suitable for hearing monetary cases since it is not possible that among them there was one who was not learned, which is to say, one who knew enough to ask before making any kind of concluded judgment — see there. There is no conclusive proof from the court system in Syria [PAGE 66] that they appointed judges who were not judging according to the general principles of the Torah, and especially at the beginning of the appointment or that the communal acceptance of the judges was done given the knowledge that they were not judging according to the laws of Torah

C) It has been beautifully explained by Rav Simcha Asaf in the introduction to his book, *Courts and their Order after the Completion of the Talmud*, where he writes on these matters, "Those supporters of the *Mishpat ha-Shalom*³ will want to be supported by the material gathered in this composition and place their stakes in it. They will claim that other times were like our days where there were two parallel court systems in which there were different patterns established and in known places where monetary laws were adjudicated by civil authorities using civil decrees. But when we look at this matter, it seems that there is no proof for their assertion. For our secular courts in the Middle Ages did not display a tendency to oppose the traditional, ancient (i.e., rabbinic) legal system. On the contrary, there was an effort to get closer to it and frequently they would ask the advice of a rabbi or the expert judges. While they did not always make their decisions in accordance with the law of Torah, there was not a systematic effort to strive to create a new law or to cancel the fixed courts of expert judges. Their actions were especially restricted in places where there were no ordered courts and sages. The members of *Mishpat ha-Shalom* founded that movement in an effort to create a new legal system, "in tune with the times." A *chiddush* — new legal

³The *Mishpat ha-Shalom* was an early twentieth century movement which supported a secular system (i.e., non-rabbinic) of Jewish law in the land of Israel.

interpretation⁴ — is made with purposeful intention from the outset by individuals who will survey *Choshen ha-mishpat* and choose that which is good and appropriate in their eyes and say: this law suits me and this law does not. And there are included in this group, those who wish to distance themselves even more and reason that it is upon us to give up the ancient Jewish law and to begin everything over again... in the last two hundred years, nothing of these matters came out of anyone from Israel." It would be wonderful to be able to establish these things in our day with the founding of our Jewish state, with the help of God, and not to give any hand to any inclination which proposes to go against the tradition of the ancient law — the law that is new every day, as if it was new. Better we should work within a systematic enterprise and with an ambition to create a new law and to cancel the fixed courts of expert judges and even with an pre-conceived intention to transgress on *choshen mishpat* and to begin from the beginning. Nothing like this has ever happened in history, which can be done by the minds of Israel."

Go and see how the great *posekim* oppose the rulings of the lay courts who do not have any intention to cancel Jewish law.⁵ We will bring as an example the words of the *Chemdat ha-Yamim* (D'rushet Yom Tov 2:4) whose pure spirit is wrapped in his words, "they also say there (*Shabbat* 33a) 'for the transgressions of the delay of judgment, perversion of judgment, spoiling judgment, and neglect of the Torah, sword and spoil increase, pestilence and famine come, people eat and are not satisfied, and they measure out the bread that they eat by weight. And I will bring a sword upon you, that will execute the vengeance of the covenant' (Lev. 26:25).⁶ Covenant refers only to the Torah, as it is written, [PAGE 67] But for my covenant of day and night, I had not appointed the ordinances of

⁴Like the *Mishpat ha-Shalom* intended.

⁵So much the more so would they oppose the out-and-out secularists who looked to foreign laws.

⁶Waldenberg inserts here the quote from Lev. 26:26, when I break your staff... which follows in the Talmud text.

heaven and earth (Jer. 33:25) and when I break your staff of bread, ten women shall bake your bread in one oven and they shall deliver your bread again by weight (Lev. 26:26). Because, even because they rejected my judgments (Lev. 26:43) Here, given the need of the hour, our sages said, "a court may inflict floggings and penalties not in accord with the law of the Torah. But this is not so as to violate the teachings of the Torah, but so as to establish a fence around the Torah." From this decision, in many lands of the Diaspora, the custom of appointing local leaders and authorities as judges has been introduced. They judge according to their own laws and reasoning, which are called the rulings of the lay leaders. For thus wrote the *posekim*, z"l, "cities which have no suitable sages to be judges, so that the people will not go to courts of non-Jews, it is permissible for them to appoint a court of Jews, even though they are not learned in the law." Therefore, brought into the mix, in generation after generation, that even if there was someone who was learned, they would appoint unfit individuals who were not learned in Torah and who judged based upon their perception and not according to the law or to rabbinic edicts. Sometimes, they judged for their own self-interests and sometimes for their love or relations, and sometimes out of fear: "One transgression leads to another transgression." For this matter has caused a division among Israel, as everyone wants to act as a leader and rule his neighbor and not that his neighbor shall rule him. My teacher wrote in his decisions and complained about the judgments made by lay leaders and this is what he said: in my eyes, they are worse than the judgments of the non-Jews because at least for their laws, they (the non-Jews) have an order but for the lay leaders, there is no consistency — one time they judge for acquittal and another to convict, one time they mean this — to there his wording. Therefore, what is suitable for him is that the great ones of the generation would oversee the whole operation (if there were unfit judges being appointed) that they could then issue edicts so that the leaders would not deviate from the law of Torah or in a place where they need to make a fence around the Torah, they will act in accordance with the rabbinic measure and they will not judge without

reason according to their own perception or, God forbid, contrary to the words of Torah, and in the *Ra'aya Mhemana* (*Zohar*), *parashat Naso* 125:4, this issue is expounded upon and this is what it says: the wisdom of the scribes is corrupted... behold all the words of God are like coals of fire for judges of lay leaders who judge Israel as a flock from its blessed shepherd, in perverted judgement. They are called thieves and takers of bribes. For the land is filled with violence because of them. They are not learned in the law and they judge according to their perception and neither according to the law nor the edicts which the early ones, the original leaders/judges over the thousands affixed for them. They humiliate the angels of God. Also on the judges of these lay leaders, (see) what is said in the chapter "*kol kitvei*" where it is taught that R. Yosi ben Alisha said: if you see a generation which is afflicted with great misfortune, go and check with the judges of Israel (for any punishment that comes into the world comes only on account of the judges of Israel)... (*Shabbat* 139a). This comment to the heads of the holy people is sufficient for the leaders and rulers among Israel to know that their judges must judge with law according to Torah. According to the earliest edicts, they should not set in order any matter lest the blood of innocent souls will not be found beneath their wings. For behold, in the times of the oppressors, when there was no relief, the sages of the generation convicted in order to be courageous in this matter. As it says in *Zohar Ruth*, page 6: "the judge would have to go to the place to investigate the matter." Therefore, the sages of Israel were obligated to go and check the judgments made by the lay leaders and the (local) rulers to make sure they did not make crooked the straight. They would make known to them the punishment for (various) acts as they and the God-fearing among them would have adapted explicit conditions at a time when they appointed him to the head of the community to oversee all acts of the city and without him, no man would lift his hand to judge a law according to his own opinion which was not in accord with the will of the Sages and because of that, a blessing of goodness came to them." To there the words of the *Chemdat Yamim*. See also in the *Tochachat Moseir* on [PAGE 68] this

and related matters in the *Shnei Lukhot ha-Brit* and in the author's son, *Amud ha-din* at the end of chapter 21. Also in the *Klei Yakar* on the Torah, *parashat shofetim* on the verse, *do not plant*. And there is much to say about the story of Marah in contrast to this. See what is said, what is spoken, and what is justified when the subject of appointing judges like these arises. These are judges with an intention from the outset not to judge according to the Torah which Moses wrote, according to the words of God. Such judges only add sin onto the wound, and leave the source of living water, by digging broken wells with foreign laws which will not contain the water."

We will conclude this part of the discussion with the words of the *Urim v'Tumim* (*siman* 22 in *Urim* 100-15) who writes about the law which was discussed by the Rama regarding a majority who appoints over themselves judges who are not learned in Torah. In such a case, the litigants are unable to prevent the judges from hearing the case. He writes: it seems that this refers to a city which has no great students of Torah, yet they appointed judges over them so that they would not have to go to non-Jewish courts. As the Rashba said in a responsum brought above at the beginning of paragraph 8, in a place where there are students of Torah and Jewish law and the city is suitable for appointing judges, God forbid that they would appoint individuals who are lacking in knowledge, it would be as if they planted an *asherah* on the altar of God by not appointing good judges. One who does this is liable for reprimanding and banishment for he has wounded the glory of the Torah and made the law crooked. It is clear that even if there was only one who wanted to lodge a complaint against the judgment, it is clear that it could be done.

D) In the responsa of the Rashbash (*simanum* 611-612) we find a long debate between the him and R. Aba M'ari Ibn Kaspi whether or not a community can appoint lay

³Waldenberg makes an editorial comment against the *chasidei mishpat ha-shalom* and anyone else who might have other desires to use Torah in a mixed situation with other laws in the creation of *hilkhot medinah* for the current era.

judges who are not learned in Torah, or those who are evil and unfit. R. Aba M'ari believes that the power of the litigants is stronger than that of the community since the litigants can appoint three shepherds as judges for it is their property which is under litigation. However, it is not the case that the community can appoint three judges devoid of knowledge for monetary cases even though surely one of them would have some knowledge. The heart of this matter lies in the inability of the community to appoint unfit or evil judges over them, and he writes: I cannot imagine in my mind that a community could appoint over themselves judges who are unfit and evil. But from the opinion of the Rashbash, which states that three individuals who are not learned in Torah could appoint unfit judges, it is clear that the community can appoint as easily as could two litigants. For the matter of agreeing on appointing evil ones, he writes: are we dealing with fools here, that the community would appoint over themselves evil ones? This would never happen! How could we even think such a thing? Rather, in theory, it is possible that if the community wanted to appoint evil ones, they could. So too, then it is possible as law even though it makes little sense in terms of intelligent and moral communal leadership. Nonetheless, they are on firm toraitic ground.

It seems clear from what is mentioned above that even the Rashbash does not mean to say that it is legally proper to appoint these people except on a one-time basis or in a place where there are no individuals who are suitable, wise, knowledgeable and observant in Torah. But surely, he does not refer to fixed appointments or in places where they involve themselves with the instruction of Torah and the study of religion and justice (could you appoint a nonsuitable person to the position of judge). So much the more so would this be the case in a Jewish state, in that matter there is no division of opinion: the pillars of justice must be established on the firm bedrock of the written and traditional Torah from Moses, by those of worldly wisdom who fulfill and observe the Torah's commandments.⁴

⁴...and not a system of "secular" Jewish law.

E) Moreover that which has been presented refers only to litigants or the community in matters of accepting judges like these who adjudicate according to the laws of equity or according to a form of arbitration. However, to decide to institute a fixed legal system based on foreign laws, it is as clear as the noon-day sun that there is no possible way for there to be a legitimate agreement or acceptance of non-Jewish legal systems by anybody, because there is no precedent for doing such a thing. Any legal judgment or decision based upon foreign laws "will be canceled and nullified immediately and is neither fit nor established"¹⁹ Anyone who gives a hand to such an atrocious crime is considered as "one who scorns to obey his mother," or is like one who goes to non-Jewish courts to have his case tried. About him, it is said, "he profanes the Divine Name and honors the name of the idol to praise it, as it is written, *for their rock is not our Rock, even our enemies themselves being judges* (Deut 32:31) i.e., when our enemies are judges it is a testimony to the superiority of their idols" (Rashi on *Mishpatim* Deut. 21:1). His judgment is discussed in Rambam (*Hilkhot Sanhedrin* 26:7) and in the Tur, *Choshen Mishpat* 26, that (the one who uses non-Jewish courts) "is a wicked man. It is as though he reviled, blasphemed, and rebelled against the Law of Moses, our teacher." Regarding this matter it says in the *Midrash Tanhuma*, at the beginning of the chapter on *Mishpatim* that anyone who shuns Israel's judges and testifies before an idolatrous judge renounces the Holy One, blessed be He, first, and later renounces Israel's law, as it is said, *for their rock is not our Rock, even our enemies themselves being judges*. To what may this be compared? To a patient examined by a doctor. He tells the members of (the patient's) household: "Give him whatever food he desires, withhold nothing from him." (Later) he visits another patient and advises his household: "Be careful that he does not eat or drink certain things." They remonstrate with him saying, "One patient you permit to eat whatever he wishes, while the other you advise not to eat certain things." Thereupon he

¹⁹From the *Kol Nidre* of the *Yom Kippur* liturgy.

replied: "The first patient will not survive, and that is why I told them not to deny him anything, for whether he eats or not, he will die. However, the other patient will live, and so I advised him to eat only certain things lest his illness be aggravated." So too, are the ordinances of the idolaters, as it is said: *For the statutes of the people were vanity* (Jer. 10:3), and it is written elsewhere: *Wherefore I gave them also statutes that were not good, and ordinances whereby they should not live* (Ezek. 20:25). However, to Israel I gave commandments and desirable statutes, as it is said: *Ye shall therefore keep My statutes, and My ordinances, which if a man do, he shall live by them* (Lev. 18:5). Also written on this matter, (if Jews use non-Jewish courts), "it seems that it is as if the Torah of Moses was not true, God forbid, and it does not contain enough material to resolve any legal matter clearly and therefore he is going to a non-Jewish court who are better experts in the nature of the laws of the kingdom legislated by natural law and according to personal understanding" (*Urim v'Tumim* 26, in the *Urim* 104), as if I were to go before the non-Jews to show honor to their laws and then who am I to go and appoint judges over Israel like these who are the experts in the nature of the laws of the non-Jews according to my personal understanding. In such an instance, it would seem that the Torah of Moses is not true, God forbid, and there is not enough material in it to cast light on the law.

Go and see to learn from the wondrous and intense responsum of the Rashba, which is mentioned in the *Beit Yosef* in the Tur *Choshen Mishpat* 26, who was asked about a case where a man's daughter died and he summoned his son-in-law into a non-Jewish court, so that he would return to him all of the dowry with the claim that even though according to the laws of Israel, the husband inherits his wife, as is known. But, since they went before a non-Jewish court, behold any man who marries a woman, he agrees to conditions, as is said (*Ketubot* 67a): "Arabian camels — a woman may seize them from the husband's estate in settlement of her marriage contract, since they rely on them [for that purpose]." So he replied that for every monetary matter, the conditions are fulfilled. For such a matter, they

said that we excommunicate. But to behave in such a way because that is what the non-Jewish law advocates, [it is mentioned to us above that it is forbidden to imitate the laws of the non-Jews and that is why the Torah warns us with the phrase *before them* (Ex. 21:1) and not before the non-Jews] even though both parties agree and want to handle the matter, monetary as it is, [PAGE 70] the Torah does not leave the people (to search for laws from other peoples) because it belongs to *them* so they should not search out laws and judgments from the non-Jews. A Jew should not even have to stand before them for judgment, even in a case where their law is the same as the laws of Israel. The one who brings the case of the Arabian camels as a proof makes a mistake, for the ketubah based on the law was meant to be collected from movable property and even from the cloak on her husband's shoulder, but the rabbis ruled that really, the woman cannot come to rely upon them, even over an extended period of time, since her husband's entire life is based upon the camels. God forbid that a holy people should learn from this that (it is possible) to follow the ways and laws of non-Jews, or to behave in this way, as it was said, if *now they sin* (Hosea 13:2) uproots the possession. The one who relies on this straw crutch crushes and breaks down the walls of Torah and uproots the roots and breaks the branches. The Torah demands justice from him. I say that all who rely upon this and say that it is permissible from the standpoint of following the local law are mistaken and thieves. Even if the robber pays back what he stole, he is still wicked. As it is discussed in the section *ha-koneis* (*Baba Kamma* 60b), in general, the one who uproots all the laws of the complete Torah, and for us those books of the holy of holies, which were compiled for us by Rabbi and after him Ravina and Rav Ashi, they will teach their children the laws of the non-Jews and they will build for them patched platforms in the study houses of the non-Jews. God forbid that it should be that way among Israel, if it were the Torah would wrap itself in sackcloth among them — there is language

Like these words of the Rashba, the Rama writes in *Choshen Mishpat* (369:11) and concludes that "we accept the validity of Gentile law only in limited, specific cases — we do

not follow *dina de-malkuta dina* as a rule or a fixed system. We generally stay away from judging by using the laws of the non-Jews, for in that instance, you will have nullified all the laws of Israel."

Based on what the Rama states in 248:1, as the Ribash, that if someone made a will in a place where they have their cases judged in non-Jewish courts, but then came to a Jewish court after having gone to the non-Jewish court, we do not say that the inheritance has no end (limit). See here in the *Sefer M'irat Anayim* 120, and in the Taz and the *Kitzot Ha-choshen* 103. Also see in the responsum of the Chatam Sofer, *Choshen Mishpat* 142 where he writes: "moreover, it seems to me that even the Ribash only said that in his case, the fact that the meaning of the language of "gift" is not an inheritance except in the Torah for one who is suitable to inherit, in which case a gift is an inheritance, but if it was clear to us that the intention of the dying person was not for an inheritance in the language of the Torah, then it is also the law of the Torah that it can mean gift, and not inheritance which has an end (limit). Since the intention and the language of the dying person was from among people who were unfamiliar with the language of the Torah because they were accustomed to going to non-Jewish courts, then the law based on Torah can also be that the gift is not an inheritance. But God forbid that they would knowingly uproot the laws and judgments of the Torah even by a hairsbreadth which is what the *Sefer M'irat Anayim* is close to saying in 349:102. So they agreed to judge as the Rashba mentioned above and R. Menachem Azariah from Pono in his responsa at the end of 89, and the *Knesset Ha-Gedolah* on *Choshen Mishpat* 26, and he explains that it is also the opinion of the one who is composing the *halakha*, and see more in on this in the adjoining material in the responsa of the Bayei Chayai to the *Knesset Ha-Gedolah* in 1:16 and in 2:79, see there and other lengthy discussions. In any event, in assembling the *halakha*, everyone is of one opinion that there is no way [PAGE 71] at all to change any element and God forbid that anyone would agree to uproot so much as the dot on top of a *yud* from the laws of our holy Torah.

To add to this discussion is something from the Maharik in *shoresh* 8 where he is asked by someone who wants to cancel the inheritance of the first-born by saying that the custom (of doing so) cancels the *halakha* as they do in that land where they equalize (put on the same level) every child and equally divide the property among them. He replied that this matter is easier than the case of the egg that fell into *katakh* (*Ketubot* 60b) For there is nothing to this custom, and there is no reason to follow after it, God forbid, and there is nothing which could uproot the laws of Torah more. After this, further judgment is made in the responsa of R"l Adrabl 174 and the Maharashdam in *Choshen Mishpat* (304). The Maharashdam concludes saying, "It is simple — a custom like this which runs contrary to the Torah really has nothing to it. How could it possibly have entered the minds of sages to affix a custom like this as a (halakhic) custom when it is nothing other than an act of evil doers which should not be followed." If that is the case, *the posts of the door moved* (at the voice of him that cried) (Isa. 6:4) for the great *posekim*, of blessed memory, in terms of personal law and judgment, then so much the more so when the discussion is in regards to legislating general and fundamental laws for the entire community of Israel — which is called a *kahal* — as the foundation of the Jewish state — and it is not at all possible to bring up in the mind of the community the possibility of legislating laws based on foreign concepts, and those things which are decided and discussed by the Rashba are an immovable wedge, since the Torah does not leave the people in a way that makes it their possession to do with what they please, such that they could use non-Jewish laws and judgments — God forbid that a holy people could behave in such a way — and to cause by this the walls of Torah to collapse and to uproot the roots and break the branches (of the Tree of Life).

F) Following the laws of Torah and its jurisdiction, it is a fundamental principle of our Torah, from the very beginning of time to return our judges as in the beginning, *these are the judgments*, as it is written, *oh mighty King who loves justice* (Psalm 99:4). Moses

said to Israel, behold, the Holy One, blessed be He, gave you His Torah. If you do not follow its laws, He will take it from you. Why? Because the Holy One, blessed be He, gave you the Torah on the condition that you would perform its laws as it is written, *oh mighty king who loves justice*, and if you follow the judgments in the future, the Holy One, blessed be He, will return your courts to you, as it is said, *I will restore your judges as at the first. Zion shall be redeemed with judgment.* (Isa. 1:26-27) What is written after that? *Zion shall be saved in judgment. And the prophet cried, 'Hear this, I pray you, you heads of the house of Jacob, and rulers of the house of Israel, that abhor justice, and pervert all equity; that build up Zion with blood and Jerusalem with iniquity.* (Micah 3:9-10) *Zion shall be redeemed with judgment.* In this time when the burden of the diaspora goes on, the Holy One, blessed be He, looks to redeem them, while we push the redemption further away in our evil acts and our deeds which are not good. For there is no law and there is no justice. And Scripture wonders, *rulers of the house of Israel that abhor justice, and pervert all equity; that build up Zion with blood and Jerusalem with iniquity.* (Micah 3:9-10). Thus you might reason that where it says *Zion shall be redeemed with judgment*, the Scripture really refers to the legal decisions of the lay leaders where the majority of their decisions are for some interest, bribe, blood, or another purpose. In saying, *that abhor justice* we understand this to refer to the law of the Torah which they abhor entirely [PAGE 72] and they say that it canceled their importance that they would be bound to the laws of Torah." (*Drushei Hatzlach* 8:10)

What does all this mean? Why is it true that redemption will only come with *mishpat*? Because it is revealed and known before the Creator of creation, the One who give the Torah, *Great in counsel, mighty in performance, thy eyes are open to all the ways of the sons of men*, (Jer. 32:19) that by laws which were legislated by human beings with their own wisdom neither a people nor a state can be saved, "for who can understand the truth of justice — no salvation can come from the laws created out of human reason. Except in the case of the Creator, who is blessed and who knows all, as it is said, *He who fashions their*

hearts alike, who considers all their deeds, (Psalm 33:15) or as the prophet says, *Great in counsel, mighty in performance, thy eyes are open to all the ways of the sons of men, to give everyone according to his ways and according to the fruits of his doings* (Jer 32:19). This teaches that it is not possible to order religion and custom in this life, or "to give everyone according to his ways" truly according to the nature of the acts. Only He can do so, the One who is *wondrous in purpose and mighty in deed*, by whose strength the world and all that is contained in it was created. He can judge according to natural truth without resorting to "estimation" (*Akedat Yitzhak* 43). It is revealed and known before the throne of His glory that without a court it is impossible for man or for a people to survive for so much as an hour, for, "man by nature is political," and it is the root of roots that the foundation upon which stands the building of political behavior and upon which man lives with his fellow-man is his political life. For thus the Sages, of blessed memory, say (*Shabbat* 10a) "whosoever judges truly, is a partner to the Holy One, blessed be He, in the works of creation of the heavens and the earth." For by that same manner (justice) in which God created the world, people establish society using what they have within themselves, and therefore they participate (in the creation) and judges are called *elohim*, (*Akedat Yitzhak* 43). Therefore, it is the Blessed One's will to provide benefit for the people whom He created — and in particular the people Israel whom He chose and gave to them good laws and judgments which would serve them well and which would provide for them in all of their days. They are laws which mesh successfully with true human nature, for "the religious judgments can be efficient on a natural level by limiting certain human qualities and straightening out other human characteristics. So too the laws will help create and establish the body politic as stronger and more powerful in a way which no other religion could do — all of this from a criteria which must be found in human beings on account of the wisdom of the one who placed it in them, the Holy One. (*Akedat Yitzhak*, 43).

G) All of this pleasure is but for the good and benefit of the religious laws which the eye sees and the ear hears in the behavior of the natural life of man, among the family of humankind on the face of the earth during man's limited days. But the eye does not see without man preparing his heart to feel the soulful experience and to see from a perspective of understanding *for my heart has seen much of wisdom and knowledge* (*Ecclesiastes* 1:16). The enormous, excellent, and unequivocal benefit, in terms of divine payment and reward comes in the eternal world of souls, for man to walk among them and to fulfill among them the divine commandments, "for the religious section which surrounds the laws, it is suitable that it should give more attention to spiritual/soulful completion [PAGE 73] than what the legal section alone gives to the customs. For, when fairness or the law goes to direct a courteous individual in some manner, the intended object will issue from him, which is directed to order the body politic. He will complete the task as necessary but there is no additional benefit. But with regard to religious judgments, if there is a fulfillment which will reward the greater community in doing it, then when intention is joined to its performance, there will be an additional benefit which is greater than the first. Whereas the teeth, the tongue, and the lips are necessary for an animal to eat, in man, they have the added benefit of being used as tools for the purpose of language and creating expressions for praising God and singing His praises. So too, with religious laws, they have a higher goal than just ordering the body politic, even though they may not initially appear to be that way. The object is that in directing oneself to do these judgments, one follows what the One whose name shall be blessed has commanded. When this intention is joined to the actual doing of the commandment, it will give completeness of the soul to the one who performs the commandment. After having completed the task, it is no longer simply for fulfilling a social role, but rather it is in love for the one whose name shall be blessed. What I mean to say: in order to complete the commandments which God commanded" (R. Yosef Albo, *Halkkarim*, 3:28).

From this, we understand the statement of R. Tarfon, "in every place where you find assemblies of non-Jews, even though their laws are like the laws of Israel, you are not permitted to legislate laws like them, as it is written, *these are the judgments which you shall place before them*, 'before them' and not before non-Jews." (*Gittin* 88b) Rambam (*Hilkhot Sanhedrin* 26:7) writes, "(the one who uses non-Jewish courts) is a wicked man. It is as though he reviled, blasphemed, and rebelled against the Law of Moses, our teacher," so too it is decided in *Choshen Mishpat* (26:1). For, if a man were to follow those laws on the basis of his own reason, it would be like sucking the marrow out of his inner spiritual bones, then so much the more so would he direct his making their laws into his laws. "And if he were to compare them in law, then they could exchange laws. But they are not children of the covenant with our God and they did not enter under his commandments, nor did they accept upon themselves the reward. For the one who does according to their word, it is not enough that they don't accept the reward but he commits a transgression, for like the meat slaughtered by a Samaritan is unfit (*Hullin* 13a)¹⁰ even though he has made the ritually correct cuts in slaughtering the animal and made no mistakes, nonetheless, the slaughter is invalid, so too, one who decides the law according to Samaritan (i.e., non-Jewish) practice, even though they incorporate the same Israelite laws, they are unfit among Israel, unless he were to (exclude) all other laws from other nations." (*Akeidat Yitzhak*, 43) To what is this similar? To a king who had many children, and he loved the youngest the most among them all. He also had an orchard which he loved the most among all his possessions. The king said, "I am going to give this orchard, which I love more than anything I own, to my youngest child, whom I love the most among my children." Thus said the Holy One, blessed be He, "from all the nations whom I created, I only love Israel, as it is written, *when Israel was a child, I loved him*, (Hosea 11:1) from all that I created, I only love law, as it is written, *for I the Lord love judgment*, (Isa. 61:8)." The Holy One, blessed be He, said, "I shall give

¹⁰Not clear that this reference to *Hullin* 13a is correct.

what I love to the people whom [PAGE 74] I love" — these are the judges and officers. Said the Holy One, blessed be He, to Israel, my children, your life is based on your following the law I have lifted up, *for the Lord of Hosts shall be exalted in judgment*, (Isa. 5:16) For as long as you exalt me with judgment, thus I will do justice and I will place my holiness among you. As it says, *the holy God shall be sanctified in righteousness*, (Isa. 5:16) If you keep both things — righteousness and judgment, I will redeem you with a complete redemption, as it is written, *thus says the Lord, keep judgment and do justice: for my salvation is near to come, and my righteousness to be revealed*, (Isa. 56:1)." [Deuteronomy Rabba 5]

H) Moreover, it is forbidden to even be assisted from foreign laws when working with laws from the holy Torah. As it is spoken of in the responsum of *Chukat Chayim* from the Maharakh Plagi, of blessed memory, (*siman* 1) within his responsa, "even if we were to be made stronger by the law of our holy Torah by some version or an interpretation of the words of the laws of the rest of the nations, it is expressly forbidden as explained in the *Zohar*, *parashat Mishpatim*, as it says "R. Hiya said 'The name of other gods' signifies profane books which do not issue from the side of the Torah, and hence we are forbidden to study them: *neither let it be heard out of thy mouth*, that is we may not even mention them nor receive teaching from them, especially concerning the Torah." [*The Zohar*, III 124a] Thus the intention is that even if we need to learn from their legal books any matter in understanding our holy Torah, regardless, it is forbidden. Therefore, I brought a proof and supporting evidence for the words of the Rosh in his responsum *K'lal* 55:9 where he responded to the opinion of Rav Rabi Yisrael who wished to learn a proof for the law of our Torah through outside literature, and he wrote that it is forbidden — let it be seen there." For it is forbidden as custom for an innkeeper to help the priest's wife and it is a tragedy when a maiden succeeds her mistress (Prov. 30:23). Likewise is it a tragedy, when all the laws

which emanate from the laws of our holy Torah were given to us at Sinai by Moses testified to the truth and righteousness and one feels the need for additional proof (or source of law — namely non-Jewish). Therefore, one who tries to add to it from nothing tests the limits of “the one who adds, diminishes.” (*Sanhedrin* 29a) So whether or not he intends, he causes by this a degradation of the law of our holy Torah. May he keep his soul far from doing so.

Volume One, Chapter One, Section Eight: Discussion Concerning the Legislative Enactments of the Tanaim and Amoraim

Introduction and Analysis

The question of how to relate in the modern era to the *halakha*, as determined by previous generations, originates in the Talmud. The Sages added layers of ordinances to the Torah in an effort to protect the Torah and its laws. As the early Sages of the Sanhedrin, prior to the Talmud's redaction, enacted decrees, their verdicts were held by later generations to carry equal weight to the Torah itself. The Talmud explains the rationale behind upholding earlier generations' decrees based on the words *You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left* (Deut. 17:11). Thus, in subsequent generations, earlier edicts are held in high esteem. Rambam discusses in *Hilkhot Mamrim* that *takanot* and *minhagim* from the Sanhedrin carry an equal status to the Torah. Thus we learn that we in our day cannot transgress the edicts of those who followed the Sanhedrin: the *Tanaim* and the *Amoraim*.

Waldenberg presents lengthy quotes in this section which provide a type of historical lesson toward understanding the role of the *Tanaim* and *Amoraim*. He draws from the *Sefer Ha-Zichronot* of the Gaon R. Shmuel Aboab and the *Mishnat Chachamim* of the Gaon R. Moshe Hagiz.¹

In determining whether or not a later court can annul an earlier court's decision, we learn first from this material (based upon Rambam's *Hilkhot Mamrim* 2) that a later court may annul an earlier court's decision based on the quote from Deuteronomy 17:11, *You shall act in accordance with the instructions given you and the ruling handed down to you* — in that day, emphasizing the *you*. Rambam stresses that the judges of a particular time are not able to say that one particular *halakha*, which they determine, is to be the *halakha* for all time. Rather, they may merely make temporary injunctions — or *takanot* — given the needs of the day. Secondly, we learn that a later court greater in wisdom and in number may uproot an earlier court's decision, as long as the ordinance was not a protective measure, which was enacted in order to serve as a fence around the Torah. Third, we learn that a court, even if it is greater in wisdom and in number, cannot overturn an earlier court if the decree in question was set to serve as a fence around the Torah.

¹The quote from Hagiz draws largely from the Aboab material.

Regardless of a current court's ability to overturn an earlier court's decision, Aboab cites (and Hagiz echoes) the belief that there is no way we, in the post-*Tanaim* and *Amoraim* generations could possibly merit the right to overturn something ruled on by the great *Tanaim* and *Amoraim*.

Based on the words of the Gaon R. Israel David Margalit, Waldenberg concludes the section with the sentiment that we, in this day, are in no position to change the words of the Talmud, which was written by the Sages, of blessed memory, who were ordained when we are not. Therefore, we leave the text of *chazal* in tact.

*Translation of Volume One, Chapter One, Section Eight: DISCUSSION
CONCERNING THE LEGISLATIVE ENACTMENTS OF THE TANAIM AND
AMORAIM*

A) The Rambam in his introduction to the Commentary to the Mishnah, in the order of *Zeraim*, in his division of fundamental laws in the Torah into five parts, numbers the fourth part as follows: the edicts which the prophets and the sages ordered in every generation in order to set a fence around the Torah, which the Holy One, blessed be He, commanded for them to do, is from what is said in the general command *therefore you shall keep my ordinance* (Leviticus 18:30) and that which follows "add a layer of ordinance to my ordinance" (*Yebamot* 21a). The sages call them *g'zeirot* — edicts. As for the fifth section: the laws made by way of investigation and agreement upon adopted customs followed among human beings [PAGE 75], which are neither additions to nor subtractions from the commandments, things which are a benefit for people in terms of the Torah, they are called *takkanot* and *minhagim* — decrees and customs and it is forbidden to transgress one of them. Shlomo, peace unto him, wrote about the one who transgresses them, *whoever breaks through a hedge, a snake shall bite him* (Pec. 10:8). There are many decrees which are mentioned in the Talmud and Mishnah, among them positive and negative injunctions, some of which deal with monetary issues, and some among them were decrees which the prophets ordered, as in the case of Moses, Joshua and Ezra.

Likewise Rambam wrote in his *Yad* (*Hilkhot Mamrim* 1:1-2), "The Great Sanhedrin of Jerusalem is the root of the Oral Law. The members thereof are the pillars of instruction; out of them go forth statutes and judgments to all Israel. Scripture bids us repose confidence in them, as it is said *according to the law which they shall teach thee* (Deut. 17:11). This is a positive command. Whoever believes in Moses, our teacher, and his Law is bound to follow their guidance in the practice of religion and to lean upon them." Continuing in his making a judgment, "whoever does not act in accordance with their instruction transgresses a negative

command, as it is said: *thou shalt not turn aside from the sentence which they shall declare unto thee, to the right hand, nor to the left* (Deut. 17:11). The infraction of this negative command does not entail the penalty of flagellation, because this negative command was intended as a warning that the breach thereof involves a death sentence by the court, for any sage who defies their rulings is liable to death by strangulation, as it is said: *and the man that doeth presumptuously, in not hearkening, even that man shall die* (Deut. 17:12). Whether the direction given by them is with regard to matters that they learned by tradition — matters that form the contents of the Oral Law — or with regard to rulings deduced by any of the hermeneutical rules by which the Torah is interpreted — rulings which they approved — or with regard to measures devised by them to serve as a fence about the Law — measures designed to meet the needs of the times, comprising decrees, ordinances, and customs — with regard to any of these three categories, obedience to the direction given by them is a positive command. Whoever disregards any of these transgresses a negative command. For Scripture says: *according to the law which they shall teach thee* (Deut. 17:11), this refers to the ordinances, decrees, and customs, which they promulgate in public, in order to strengthen religion and stabilize the social order. *And according to the judgment which they shall tell thee* (Deut. 17:11), this refers to the rulings derived by means of any of the exegetical principles by which the Scripture is expounded. *From the sentence which they shall declare unto thee* (Deut. 17:11), this refers to traditional matters, transmitted to them by preceding generations in unbroken succession.

B) Behold, it is not in our purview to discuss in this section the specifics of the power of a court to affix ordinances, decrees or customs at any time, which are universal for all Israel, or those which are specific for a particular state or city, and how a court might have the power to cancel the edict of a fellow court. For in order to address this, it would take extensive work, and perhaps we will do this, with God's help, given the amount of work

ahead of us, we will study it in one of the chapters to come. In this section, it is our goal to map out, in clear and concise lines, what was already begun in the preceding section; just as there is no way that we have the authority to uproot or change any law from among the laws of our holy, written, traditional Torah, so too there is no power in any court in our day to cancel or change any ordinance, decree, or custom which our holy rabbis, *Tanaim*, or *Amoraim* ordained, decreed or enacted with their holy spirit.

We shall content ourselves, due to the great simplicity of this matter by citing two of our great rabbis who are among the first of the *acharonim*, of blessed memory, who are divided by nearly a century between the two of them — [PAGE 76] and who write on this material in a clear way. They are able to discuss the issues in a wondrous way, like two prophets who prophesize practically in the same manner and who testify that the matter is so famous it needs no proof. The first is the Gaon R. Shmuel Aboab, of blessed memory, in his book *Sefer Ha-Zichronot* (regarding the obligation to obey the judges of Israel, ch. 3) and the second is the Gaon R. Moshe Hagiz, of blessed memory, in his book *Mishnat Hachamim* (sections 23:612-622). I will present their words one opposite the other.

Sefer Mishnat Chakhamim —

(After he speaks also on the three divisions based on Rambam *Hilkhot Mamrim*, chapter 2.) It is necessary to announce what is known and understood that all these things were only mentioned concerning the early generations of the *Tanaim* and the *Amoraim*, in which the spirit of God rested in them. However the succeeding generations do not have the power to violate either a small or a great matter compared to how our great, holy rabbis of old judged, decreed, ordained, and introduced as they established and accepted upon themselves all that they did and judged as they did, on their own. If, by way of *kai v'khomer* we conclude that we cannot compare ourselves to our ancestors in learning, then we certainly have no right to annul their decrees. God forbid, which emanate from the mouths of sages and scribes who spent their entire lives steeped in *halakha*. The spirit of holiness dwelled in their study houses and by the aid of God do blessings remain for us after them by their having written books so that Israel will know how to act.

For the well-known *halakhot* there is no need for proof or stories, and I will write what is in the book what the

Sefer HaZichronot —

Behold, the power of a court to cancel the decision of a fellow court is divided into three aspects — each with its own rules. First, a lesser court may annul the decree. Second, only a greater court may annul the decree. Third, even a greater court cannot annul the decree.

The first section is when "the Great Sanhedrin, by employing one of the hermeneutical principles, deduced a ruling which in its judgment was in consonance with the Law and rendered a decision to that effect, and a later Supreme Court finds a reason for setting aside the ruling, it may do so and act in accordance with its own opinion, as it is said, *and to the judge that shall be in those days* (Deut. 17:9)" (from *Hilkhot Mamrim* 2:1). Thus if they ordain an ordinance, even for the purpose of establishing a fence around the Torah, even if it spreads to all Israel, the lesser court can uproot the law as necessary for the hour. These ordinances will not be more stringent than the law of Torah itself, which even laws from the Torah can be uprooted by a court, based upon a temporary order being issued by a court which sees a particular situation and judges it necessary to establish a fence around the Torah so that the people do not

Rambam, of blessed memory, wrote in the introduction of his writing, that Ravina and Rav Ashi [PAGE 77] and their colleagues are considered at the end of the great sages of Israel, who were copying the Oral Torah and they made ordinances, enacted decrees and introduced customs, and their ordinances, decrees, and customs spread throughout all Israel, in all their dwellings. But after the court of Rav Ashi, who edited the *g'mara* in the days of his son and they finished (the task), Israel scattered to the many lands of the world, to far away places, to islands and strife increased in the world. Brigands ruled the roads, so communication between communities ceased and the study of Torah lessened. People no longer studied Torah in their *yeshivot* by the myriads as it once was earlier, rather *the remnant those whom the Lord shall call* (Joel 3:5) in every city and in every state, where they engaged in Torah and learned the works of all the sages so that they would know the ways of justice and every court which was formed after the (redaction of) the *g'mara* in every state and made ordinances, enacted decrees or introduced customs for the residents of the state or far away lands, but the acts did not spread throughout all Israel because people were so spread out

transgress on the law of Torah. The court may inflict "floggings and punishments" which is not according to the law, but the *halakha* is not thus fixed for all generations such that one could say definitively, "this is the *halakha*." For example, if they say that given the times, it was necessary to cancel certain positive or negative commandments in order to bring people back or save them from leaving Judaism and getting tripped up in outside influences, the court must do as is necessary. Such an arrangement is predicated on the idea that it is an emergency situation only and not an interpretation of the law as it should be. As a doctor removes a patient's arm or leg in order to save the whole body, so too [PAGE 77] a court can rule that in a given time it is permissible to transgress on a few commandments given the hour in a similar fashion to how our sages ruled that it is permissible for a person to profane one Sabbath, so that he will be able to keep future Sabbaths. Moreover, if they ordained ordinances and it appeared that the ordinances had spread throughout Israel and the act stood for many years, and in a much later time, another court came along and looked into the matter and found that Israel no longer did such a

and they no longer kept in contact with one another. Thus a court of a specific land was alone and the Great Court of seventy-one was broken up many years before the redaction of the *g'mara* and accordingly, there was no way to coerce the people of one state to behave in accordance with the customs of another state. There was no way to tell one court to enact a decree in line with a decree that had been enacted by a separate court. If a court learned (a *halakha*) from one of the *gaonim* that the law was a certain way but another court had the *halakha* explained to them in a different way from another *gaon*, then follow what it says in the *g'mara*: listen to neither the first [PAGE 78] or the second source but rather to what makes sense — either the first or the second.

For these matters — laws, decrees, ordinances, customs — which were created anew after the redaction of the *g'mara*, but for all the matters which are in the Babylonian Talmud which are obligatory for the community of Israel to follow, and they coerce every city and every state to introduce all the customs which the sages of the Talmud performed and to enact decrees and to follow in their ordinances since all the things which

thing, then the court has the right to cancel the ordinance, even if it is less than the first court in wisdom and number (Certain phrases were taken liberally from Rambam's *Hilkhot Mamrim*).

The second section deals with a court which instituted a decree, enacted an ordinance, or introduced a custom, which was not really created to serve as a fence around the Torah but was spread throughout Israel. If there comes later another court which wishes to enact a separate ordinance, if it is superior to the former in wisdom and in number, it has permission to do so. If it is greater in wisdom and not in number, in number and not in wisdom, "it cannot abrogate the measure adopted by its predecessor, even if the reason which prompted the latter to enact the decree or ordinance has lost all its force," (*Hilkhot Mamrim* 2:2) the later court cannot change the decree until they are greater than the earlier one.

The third section deals with the case that a court, even if it is greater than an earlier court, never has permission, "to abrogate or permit decrees and prohibitions designed by the court to serve as a protective fence to the Law, if they have been universally accepted in Israel... even if the reason which prompted

appear in the *g'mara* all Israel agreed upon them and the very sages who made decrees, enacted ordinances, introduced customs, or made laws, and taught that justice is a certain way, they are (combined) the Sages of Israel and those who accepted the chain of tradition — the principles of Torah — can place themselves into a successive line of generations which trace their roots back to Moses, our Teacher, peace unto him — to there.

This is the language of the Raybad, of blessed memory, in his book *Sefer Ha-Kabbalah* in the section on the *Amoraim* of blessed memory. The seventh generation M'remar and Mar, the son of Rav Ashi, and their colleagues, they finished the Babylonian Talmud and put a seal of completion on it in the year 4265 after the creation. It spread throughout Israel and they accepted it upon themselves and the sages of every generation learned from it in great numbers and all Israel agreed upon it (as a definitive source of law) and they all agreed that there was no need to eliminate anything from it. So too the Rosh, of blessed memory, wrote similarly regarding the issue of adding blessings. He said that there is no need to make something new

the latter to enact the decree or ordinance has lost all its force," (*Hilkhot Mamrim* 2). This is just a summary of the teachings of Rambam in the section mentioned to us. The Raybad is stringent as the *Kesef Mishneh* explains. In his estimation, there is no difference between a decree which was ordained in order to create a fence around the Torah and one which was not intended to create a fence around the Torah. Everything depends upon the acceptance or non-acceptance of the prohibition by the community of Israel — see there.

[PAGE 78] It is necessary to make known what is known and understood that these things were only mentioned concerning the early generations of the *Tanaim* and of the *Amoraim*, in which the spirit of God rested in them. However, the succeeding generations, do not have the power to violate either a small or a great matter compared to how our great, holy rabbis of old judged, decreed, ordained, and introduced as they established and accepted upon themselves all that they did and judged as they did, on their own. If, by way of *kal v'khomer* we conclude that we cannot compare ourselves to our ancestors in learning, then we certainly have no right to annul their

or add any blessing to those which our sages enumerated in the Talmud

decrees, God forbid, which emanate from the mouths of sages and scribes who spent their entire lives steeped in *halakha*. Although for the well-known *halakhot* there is no need for proof or stories, which prove themselves

every day, nonetheless, it is not for us to trouble ourselves or to burden the reading of these matters which come by the hand of sages who possessed wisdom and fear of God

These are them. Rambam, of blessed memory, wrote in the introduction of his writing, that Ravina and Rav Ashi and their colleagues are considered at the end of the great sages of Israel, who were copying the Oral Torah and they made ordinances, enacted decrees and introduced customs, and their ordinances, decrees, and customs spread throughout all Israel, in all their dwellings. But after the court of Rav Ashi, who edited the *g'mara* in the days of his son and they finished (the task), Israel scattered to the many lands of the world, to far away places, to islands and strife increased in the world. Brigands ruled the roads, so communication between communities ceased and the study of Torah lessened. People no longer studied Torah in their *yeshivot* by the myriads as it once was earlier, rather *the remnant those whom the Lord shall call* (Joel 3:5) in every city and in every state, where they engaged in Torah and learned the works of all the sages so that they would know

[PAGE 79] the ways of justice and every court which was formed after the (redaction of) the *g'mara* in every state and made ordinances, enacted decrees or introduced customs for the residents of the state or far away lands, but the acts did not spread throughout all Israel because people were so spread out and they no longer kept in contact with one another. Thus a court of a specific land was alone and the Great Court of seventy-one was broken up many years before the redaction of the *g'mara* and accordingly, there was no way to coerce the people of one state to behave in accordance with the customs of another state. There was no

way to tell one court to enact a decree in line with a decree that had been enacted by a separate court. If a court learned (a *halakha*) from one of the *gaonim* that the law was a certain way but another court had the *halakha* explained to them in a different way from another *gaon*, then follow what it says in the *g'mara*: listen to neither the first or the second source but rather to what makes sense — either the first or the second. For these matters — laws, decrees, ordinances, customs — which were created anew after the redaction of the *g'mara*, but for all the matters which are in the Babylonian Talmud which are obligatory for the community of Israel to follow, and they coerce every city and every state to introduce all the customs which the sages of the Talmud performed and to enact decrees and to follow in their ordinances since all the things which appear in the *g'mara* all Israel agreed upon them and the very sages who made decrees, enacted ordinances, introduced customs, or made laws, and taught that justice is a certain way, they are (combined) the Sages of Israel and those who accepted the chain of tradition — the principles of Torah — can place themselves into a successive line of generations which trace their roots back to Moses, our Teacher, peace unto him — to there.

This is the language of the Raybad, of blessed memory, in his book of the *Sefer Ha-Kabbalah* in the section on the *Amoraim* of blessed memory. The seventh generation M'remar and Mar, the son of Rav Ashi, and their colleagues, they finished the Babylonian Talmud and put a seal of completion on it in the year 4265 after the creation. It spread throughout Israel and they accepted it upon themselves and the sages of every generation learned from it in great numbers and all Israel agreed upon it (as a definitive source of law) and they all agreed that there was no need to eliminate anything from it. So too the Rosh, of blessed memory, wrote similarly regarding the issue of adding blessings. He said that there is no need to make something new or add any blessing to those which our sages enumerated in the Talmud.

The Rav in the *Kesef Mishneh*, in chapter two of *Hilkhot Mamrim*, which we have

engaged with already, writes: if you say, why don't the *Amoraim* and the *Tanaim* disagree? For in every place where an *Amora* has a problem with something from a *mishnah* or a *baraita*, he says "my opinion follows that of such-and-such *Tanna*." If he did not say that, then it would be a difficulty for him. Yet according to the words of our sages, permission is given to them to disagree with the words of the *Tanaim*. But, it is possible to say that from the day the *Mishnah* was completed, it was established and accepted that later generations would not disagree with earlier ones. So too was it done with the completion of the *g'mara*, that from the day it was completed, permission was not given to any man to disagree with it — to there. For the length of this matter is permissible for it is an accepted and agreed upon issue in Israel — to there his language.

[resuming Waldenberg, bottom of page 78]

Perhaps the Maharam Hagiz had a copy of *Sefer Zichronot* in front of him when he wrote the words which appear in conjunction to what appears in the introduction to his book, "that all his words are nothing other than collection of the entry-ways into the literature of our holy Sages." Only by mere chance from mentioning this there, or by their simple way of explaining the Rambam, there is no sense of urgency to mention that this is what the *Sefer Zichronot* writes.

[PAGE 80] Nonetheless, these matters are as clear and understood as a garment² that no court has the power to dissent from or change any matter — great or small — which *Tanaim* or *Amoraim* enacted, made, or introduced. As it is written in the *Sefer Zichronot* and in the *Kesef Mishneh* (*Hilkhot Mamrim* 2:1) on what the Rambam rules, "the Great Court which interprets one of the commandments as they see according to their understanding" — that the law is this way and they judge the law. And another court comes after and it seems

to them that there is a reason to refute the law (of the earlier court) so they may reject it and judge accordingly for as it says, *to the judge who is in those days*. (Deut. 17:9) You only have an obligation to follow the ways of a court which is in your generation. You may learn from this that it is possible to cancel what an earlier court has decided even if the current court is not as great in wisdom or in number. The *Kesef Mishneh* finds a difficulty in this and writes, "if you say, why don't the *Amoraim* and the *Tanaim* disagree more readily in every place where an *Amora* has a problem with something from a *mishnah* or a *baraita*? Wouldn't he need to say, "I say this but the *Tanna* says that." If he did not say that, then it would be a difficulty for him. For according to the words of our sages, permission is given to them to disagree with the words of the *Tanaim*." And he rejects, "but, it is possible to say that from the day the *Mishnah* was completed, it was established and accepted that later generations would not disagree with earlier ones. So too was it done with the completion of the *g'mara*, that from the day it was completed, permission was not given to any man to disagree with it."

I saw in the responsa of *M'kholat HaMakhanayim* (Katan Hakamot) of the Gaon R. Israel David Margalit, of blessed memory, (2&3) that he also goes on to add that there is no power in our hands to uproot any decree, ordinance, or custom which is mentioned in the Talmud, see there in his fiery words, however, there is much to say from the essence of his words. For example, the root of his words is that it is not in our power to uproot (the laws of our Sages) because they were ordained and we are not. For behold, the Sages of Babylonia in the time of the Talmud were not ordained and there was ordination for the *gaonim* up to the time of the masters of the Talmud. It is said that ordination ceased because there was no one suitable for ordination, all of this is highly doubtful as is known, and there is no room to go on further. See also in the responsa of the Maharam Shik, *Yoreh Deah* in *Derekh Yamah* (1) and the responsa of Imrei Eish, *Yoreh Deah* (100). There are lengthy matters to discuss.

²Refers to the *simlah* held up to prove a woman's virginity. See Deut. 22:17 and Rashi *ad loc*.

Volume One, Chapter One, Section Nine: THE COMMANDMENT FOR APPOINTING OFFICERS AND THEIR TASKS

Introduction and Analysis

In *parashat D'varim*, Moses recounts establishing officers over the thousands, hundreds, fifties, and tens. Although Moses never mentions Jethro as the source for the act of appointing "judges," we will recall that Jethro does play a role in helping Moses at least structure, according to the Rabbis, the judicial system. In *D'varim*, when Moses is recounting his acts, he links the words *ministers over the tens* with the word *shotrim* — officers (Deut. 1:15). In Deuteronomy 16, the command for *Judges and officers* is given which provides the Rabbis and later commentators the opportunity to connect the principle of officers to Sinai and to assign the role of officers to the *ministers over the tens*.

Given the linking of *Judges and officers* in Deuteronomy, later generations assume the importance of connecting these two offices. The Meiri explains that wherever a community must appoint judges, so too, must they appoint officers. Justice can only be carried out by a staff of officers who will enforce verdicts and the law. Ultimately, in order for any judge to be effective, there must be a law-enforcement agency in place. Waldenberg takes what is learned earlier, in section four regarding the need to appoint judges, and extends the lesson to officers. Where we are able to determine the necessity of judges, we must appoint officers.

There is a debate among the commentators of Torah as to whether or not the officers have any governing power. The general opinion presented by Waldenberg concludes that while officers do rule by means of instituting verdicts and enforcing the law, they do not stand as the chief lawmakers or supreme governing body. In *Shabbat 139a*, the Rabbis draw a connection between the *counselors*, mentioned in Isaiah 1 and officers. As it is said, *I will restore your judges as at the first and your counselors as at the beginning* (Isa. 1:26). *Judges and counselors* are likened to *Judges and officers*.

Waldenberg presents the role of the officers as the final section of this first chapter in volume one of *Hilkhot Medinah*. In some regards, the section appears as a cursory look at what seems to be an obvious need: law enforcement to assure the carrying out of verdicts and law. Yet, what proves unique about instituting Jewish law in the modern Jewish state is that while officers in a non-Jewish state would also enforce verdicts and laws, officers in a Jewish state are responsible, according to Rambam, for steering people toward performing the commandments of God. By elevating the task of the officer to one of Divine

service, the judicial structure as a whole becomes holy.

Waldenberg concludes this chapter with the laws related to appointing officers. Subsequently, he effectively says to the reader: not only are we justified in creating a judicial legal system based on the *halakha* but we will have a means of enforcement as well. This first chapter, "Judges and Officers" of this halakhic treatise, has revolved around the unmentioned idea that a modern Jewish state calls for a renewal of *halakha vis a vis* political rule. In the opening chapter of his third volume, he will begin to integrate notions of toratic rule and the modern state based on the history of the Jewish people. But for now, for this first volume, he has laid the foundation of establishing a judicial system from which the Jewish state can govern its inhabitants. From that foundation, he can explore the range of issues which arise in the modern state.¹

¹This chapter appears to be based on an earlier work which Waldenberg published in the December 1947-January 1948 edition of the journal *Sinai*. In that volume, which was designated entirely to the question of religion and the state, Waldenberg concluded the article, titled "Judges and Officers in the Jewish State in Light of the Torah," with a step-by-step summary of how the government should proceed with their attempt to set up a judicial system. Such a direct approach is noticeably absent here.

A) Inseparable from the commandment of appointing judges is the commandment for appointing officers. Although, in Jethro's advice to Moses, there is nothing mentioned about appointing officers, Moses adds to this on his opinion to appoint officers at the side of the judges. As it is written in Deuteronomy 1:15, *So I took the chief of your tribes, wise men and known and [PAGE 81] made them heads over you, captains over thousands, and captains over hundreds, and captains over fifties, and captains over tens, and officers among your tribes.* And as Ramban writes in Exodus, "now it is known that Moses had officers in charge of the people [It was the duty of these officers] to bring before him the persons against whom claims had been made and to force them to comply with the verdict of the judges. He assigned many of these officers as these judges. This is why Moses said in Deuteronomy, *and I will make them heads over you, captains of thousands...and officers, tribe by tribe.* There was no need to mention them here since their appointment was not part of Jethro's counsel." And thus wrote Ibn Ezra there, (on Ex. 18:24) "the meaning of the words, *and he obeyed*, is to mention Jethro's advice. It doesn't mention Moses' own idea to add to it, but it was he who placed officers so that they would enforce what the judges commanded." And here Moses' opinion agreed with that of the Almighty. For after that, the commandment for judges is joined together with that of the officers. As it is written, *Judges and officers you are to make for yourself in all your gates which Adonai your God is giving to you, to your tribes. You shall judge the people in righteousness.* (Deut. 16:18)

However, I saw in Malbim, to *parashat Yitro*, that he writes that the "ministers over the tens are the officers as it is written in *parashat D'varim* and ministers over tens and officers where the *var* implies *and they shall be*, which is to say that the ministers over the tens will be officers." Again, returning to *parashat D'varim*, "where it says *ministers over tens and officers*, comes to teach us that the ministers over tens will be officers." Similarly, according to the advice of Jethro, he includes the appointment of officers, which is simply

not readily apparent in the written text, as mentioned in the name of the Ramban and Ibn Ezra.²

B) From the apparent sense of Scripture — *officers for your tribes* — there is room to interpret that the appointment of judges was really just in a general sense, meaning a reduced number to cover every tribe. So indeed, I find in Abravanel, *parashat D'varim*, where he comments on the words, *officers for your tribes*. He envisioned the officers as the ones who administered the lashes. It says *for your tribes* in order to tell us that there were not many officers among the people, like the number of judges, but there were enough, such that there was one officer for every tribe. He would work for every minister of the tribe and assure the fulfillment of their decisions.

Even more persuasive is the second interpretation offered by Abravanel where he writes, "and it is more suitable that it says, *for your tribes*, which does not refer back to the officers. It means that the *officers* and *ministers* mentioned were appointed in each tribe. From the command *Judges and officers* we learn that the appointment of officers is in accordance with the category of the number of judges in every tribe and in every city. As it says in *Sifre*, "from where do we learn that we appoint officers for all Israel? Scripture states, *officers you shall make*. from where do we learn that we appoint officers in every city? Scripture states, *and officers in all your gates*. from where do we learn that we appoint officers for all your tribes? Scripture states, *officers for all your tribes*." So too it appears in *Sanhedrin* 16b. See also in the Meiri where he writes: just as it is a commandment to appoint judges in every city of the land of Israel, the Great Sanhedrin on the Temple Mount, and lesser sanhedrins in every city [PAGE 82] of more than 120 people, and a court in every city less than 120 people, so too is it a commandment to appoint with them officers in every place.

²I.e., Jethro's suggestion did include officers.

C) It is logical that it be this way, that at the same time as appointing judges comes the commandment for appointing officers, for apart from this if there were not someone to carry out the justice (ordered by the judge), the system of justice would be of no benefit to us. As it says in *Midrash Tanhuma, parashat Shofetim*, "R. Eliezer says that if there is no officer, there is no judge. How? Since a man is obligated in a court to his friend but if there is no officer, when he leaves from the court, and is away from under the guidance of the judge, there is no doubt in the mind of the judge that he (the guilty party) will do nothing. Therefore, they deliver him into the hand of the officer, and the officer is responsible for him. R. Eliezer ben P'dat said, 'but for the executive office of Joab, David could not have executed justice' for thus it says, *and David reigned over all Israel; and David executed judgment and justice to all his people and Yoav the son of Zeruia was over the army.* (II Samuel 8:16-17) David and Yoav were judges as one. For anyone who did not heed the judgment, they would send him out by the hand of Yoav and take him out against his will.

See in the *Or Ha-Chayim* on the Torah (*parashat Shofetim*) who brings something similar in the name of the *Pesikta* (the same is found in the *Sifre*), "R. Eliezer ben Shamua explains that once you have officers you will have effective judges; if there are no officers the law to appoint judges is not operative." He adds to this by saying, "Whenever the Israelites realize that the common people ignore the rulings of the judges, and the judges in turn are unable to enforce their decisions there is no point in making such decisions. On the other hand, when the common people accept law-enforcement the law to appoint judges is applicable." Thus when we call on a judge, we are referring to a judge and a (law-enforcement) officer.

D) As we explained in the fourth section regarding judges — there is an obligation in this time regarding appointment, at least as a rabbinic *mitzvah* following the model of a toraitic command — so too are we obligated regarding the appointment of officers, of

course, because Scripture commands simultaneously concerning *Judges AND officers*, for thus it is written in the section *Kesef Ha-k'doshim* in *Choshen Mishpat* (1:1) that also in this time, just as there is a rabbinic *mitzvah* of appointing judges, even though there is no ordination, as though it came from the Torah, so too in the case of officers, it is a *mitzvah* to appoint them and it is as if it is a Toraitic commandment.

E) Who are the officers, and what kind of intention and power does the Torah give them? Do they have a special governing power that the judges can pass their decisions to them to be implemented or are they beneath the judges and have no special ruling power such that their abilities and purpose come only from the power of the judges and they therefore serve simply as a type of enforcement for the judges — the wrath of the judges?

Ibn Ezra (*parashat Shofetim* 16:18) explains that they are the ones who govern — the decree of the officer who protects and who rules, and thus they have *dominion over the land*, (Job 38:33) and the reason is that the judge will judge and the officer will make straight the crooked. So too I saw in the *Yad Ramah* on *Sanhedrin* 15b who also explains that the officers are great and important and rule by the staff based on what the judges decide and enforce the law upon those who do not follow it. Thus does the RA"m comment in *parashat Shofetim*, "there are those who say that the officers [PAGE 83] are the governors, from the edict of they shall govern in the land³, and they have in their hands both the power and the government to enforce the judgment of the court for in essence, judges have no power and the only thing the lawyers can engage in is teaching the law. After their instruction of the law, it is up to the officers to use their power and their means in the government to punish and enforce the obligation upon the people. But it is explained that they do not have the power to command rather they only can instruct and demonstrate how

³ שטר = rulership, political authority is not just police power. This concept of having sovereignty/dominion over the land finds its biblical root in Job 38:33, *Can you establish thereof the dominion in the earth* — מַשְׁטֵרוֹ בָּאָרֶץ.

things are to be

Similarly, it is also explained in the *Midrash Tanchuma* (parashat Shofetim) that the officers are the leaders who direct the community

It seems fitting that we should bring at this point proof for their words from *Shabbat* 139a, "and the Holy One, blessed be He, will bring His Presence to rest on Israel only when the wicked judges and rulers will come to an end in Israel, as it is said, *and I will turn my hand upon you and thoroughly purge away your dross and will take away all your tin, and I will restore your judges as at the first and your counselors as at the beginning.* (Isa. 1:25-26)" Where, we might ask, do we find a hint in the Scripture on the officers? But if we are to take into account what was said earlier, it is possible to say that the officers are your *counselors at the beginning*, for based on what was said earlier, the officers are the rulers, great and important, leaders and directors of the community, which is to say the counselors

But Rashi says in *Sanhedrin* 16b and in his commentary on the Torah (Deut. 1:15) that the officers are those soldiers (i.e., police) who bound and punish with lashes according to the order of the judges to all who do not obey the law. Learn from how he interprets their role that they have no governing powers but rather they stand beneath the judges and serve them, so too does Rambam explain (*Hilkhot Sanhedrin* 1:2), the Ramban where mentioned above in letter A, Bahya on the Torah, the Ra'bag, Abravanel, the Tur in *Choshen Mishpat* 1, the *Lechem Mishneh* (*Hilkhot Sanhedrin* 1:1), and there in *midrash Pesikta*. So writes the RA" M there: for thus writes the Rambam, "Officers refers to those who wield the rod and the lash. They stand before the judges, they make their rounds to the markets, squares, and shops, fixing prices, regulating weights, and correcting abuses. Their work is directed by the judges. Any person they find guilty of a misdemeanor is taken by them to court, and punishment corresponding to his offense is inflicted upon him." So writes the Tur in *Choshen Mishpat* 1, "Officers are those who wield the rod and lash and stand before the judges and carry out their judgments." Learn from this that the officers are servants of the

court who stand before the judges and are commanded by them to punish and correct abuses according to the words of the judges. All the governing power and strength lie in the hands of the judges and the officers have no power or governing abilities — except what is given them by the judges. Officers are called (members of) the government even though they have no governing abilities, as it says, *and the officers of the children of Israel, whom Pharaoh set taskmasters over them, were beaten.* (Ex. 5:14), which is explained to mean the officers over Israel. Even here, they are called officers on account of the government, for they have over themselves a government that obligated them to punish and to subjugate them until they accepted the law. Thus for the rest of the people, they determine the measure/number of lashes to be ordered by the judges, which is clear from Rashi's commentary where he says that the ones who punish after their command and it did not say after their instruction. Note what it clearly states in the section *m'shavelakh milchama* (*Sotah* 42b), "just as an officer is one above whom another is appointed," and the Rashi commentary reads, "the judge appoints the officer [PAGE 84] and the officer performs the punishment or the coercing as the judge commands." See in the *Dinei D'chayei*, by the author of *Knesset Hag'dolah* on the SM" G (97), who agrees with what has been mentioned thus far, and he concludes that the words of *Midrash Tanchuma* which we discussed above in letter C, are understood according to the version of the Rambam. For, he brings a proof from David and Yoav and most certainly Yoav did not do anything unless David had commanded him to do so. If he ordered him to punish, lash and rebuke someone, Yoav would do as he was commanded by David. And if nothing else, he did not do any act without his permission. For just as David acted as a judge, and Yoav as an officer, it appears that the judge is greater than the officer and the judge appoints the officer as Rashi explains in his wording in chapter eight of *Sotah* — see there.

F) It is the task of the judges "to enforce the observance of the Commandments of the

Torah, to compel such as have strayed from the path of truth to return to it, to command the performance of what is good and the avoidance of that which is evil, and to inflict the penalties on the transgressors, so that the Commandments and prohibitions of the Torah shall not be dependent on the will of the individual " (Rambam's *Sefer Ha-Mitzvot, Mitzvat Aseh #176*) "To judge the people, to command them and to guide them on the proper course of justice, and to return them from evil ways to the ways of God, to follow the ways of Abraham our father, to do righteousness and justice " (See the Tur, *Choshen Mishpat* 1) "For with this method we can establish our religious system of law, while fear of our officers and judges is cast over the mass population, then, as a result of being accustomed to goodness and decency out of fear, the people will educate their nature to do justice and righteousness out of love, as they recognize the path of truth. It is in keeping with what the wise scholars say, that a strong, ingrained habit is what comes after human nature, in other words, just as human nature impels a man toward what it seeks, so does a major [strong] habit return, similar to an active nature, and impel him to go in the way of the habit permanently. As the people then walk in the ways of decency, honesty and faith, choosing the good, good fortune will cling to them, and the Lord will be happy with His handiworks " (*Sefer ha-Hinukh, mitzvah #495*)

Therefore, it is also the role of the officers to stand always at the right of the judges, to come to their help in the fulfillment of their exalted task: to make their rounds to the markets, squares, and shops, fixing prices, regulating weights, and correcting abuses, to administer punishment corresponding to an offense (*Hilkhot Sanhedrin* 1:1) so that he will not perform an injustice in even a minor matter (*Sefer Ha-Mitzvot #176*). All their acts will be done according to the judges, "Any person they find guilty of a misdemeanor is taken by them to court, and punishment corresponding to his offense is inflicted upon him." (*Hilkhot Sanhedrin* 1:1 and also see in the Meiri in *Sanhedrin*) It is an obligation for a court to stand officers in the court in every city and district (see in *Baba Batra* 89a, Rambam *Hilkhot*

G'rivah 8:20, *Choshen Mishpat* 231:20). So too, a court is obligated to send out officers on foot to make rounds and look in the gardens and the orchards, and along the rivers in order to make sure men and women are not eating and drinking and transgressing the commandments (Rambam *Hilkhot Yom Tov* 6:21, *Shulchan Arukh Orach Hayim* 529:4). So too, we find in Joshua 3 that the task of the officers is to warn the people to keep the commandment of God.

The essence of the appointing of officers is so that they will punish the people in accordance with the sentences delivered by the courts in every city [PAGE 85] (see there in Rambam's *Sefer Ha-Mitzvot*, #176) or as requested by the governor, as we find in the Torah (Deut. 1:16), that Moses also appointed officers.

Regarding the role of the officers during a time of war, this is not the place to enter into the discussion, but if God pleases, we will dedicate a special section in one of the coming chapters to the issue of Israel engaging in a war against enemies.

The role of the officers is very important. Therefore, "in the beginning, the only officers appointed were Levites, as it is written, *also the Levites shall be officers before you.* (II Chron. 19:11)" (*Yehamot* 86b). For a great responsibility is placed upon them to stand in strength to the right of their judges, to enforce the judgment of the Torah, the laws of its commandments as they are properly observed, and to cause peace and justice to dwell among the house of Israel; therefore does it say, "and the Holy One, blessed be He, will bring His Presence to rest on Israel only when the wicked judges and rulers will come to an end in Israel." (*Shabbat* 139a) When the officer fulfills his role with faith and completeness, behold he causes a great thing to happen as the Divine Presence will dwell among Israel.

May it be the will of our Father in Heaven, that speedily we will merit to see, in the foundation of the state of the kingdom of Israel, her completeness with judges and counselors as in the beginning, and may He remove from among us lament and sadness, so that the Divine Presence may dwell in fullness in all her glory and beauty in all the dwellings

Chapter Five:
*Introduction, Analysis, and Translation of
Hilkhot Medinah, Volume Three, Chapter One:
Toraitic-Political Rule in Israel*

Va.

Volume Three, Chapter One, Introduction: Toraitic-Political Rule in Israel

Introduction and Analysis

Before discussing the matters of governmental rule, Waldenberg provides a lengthy introduction concerning toraitic-political rule in Israel. For the religious community, the modern state, if it is to operate as a Jewish state, must be based on the Torah. Given the unique role given to the Jewish people by God, there is no other law which can rule them other than Torah. The Torah was given to the Jews so that they could serve God and carry His word to the world. As a holy people, and a nation of priests, it is only natural that the political rule should be based upon God's word. R. Saadia Gaon writes, "our nation is not a nation without its *Torot* (written and oral). Since our Creator said that our nation will stand eternally like the heavens and earth, by necessity the *Torot*, which give us life, will give us permanency" (*Emmot v'Deot*, *ma'amar* 3). This definition serves as a model for Waldenberg. Separating Israel from the Torah would be like breaking a cask in order to save the wine. Israel cannot be without its *Torot* (both written and oral).

Waldenberg launches into an attack on the secular community who sought to separate religious law from the modern state. He draws on the words of the Rambam who explains in his *Guide to the Perplexed* that religion and the state have long been inextricably bound together. The Torah provides welfare for the body and the soul and the sovereign authority cannot exist without the spiritual support provided by Torah. Waldenberg provides ample proof through the ages which demonstrates the usage of Torah in conjunction with expert counsel for the governing of the state. He proposes centralizing the toraitic and the national power into the hands of one central individual such that there will be two higher institutions: a legislative body composed of Torah scholars who can legislate laws based on laws of the state, and a second body composed of political and military counselors who are knowledgeable in foreign and domestic affairs and can advise on strategy.

A history lesson follows. From Joshua, we learn that he combined political leadership with teaching Israel the laws of God and His Torah. He

showed them the ways of Torah and taught them the commandments so that they would do them and live by them. As for David, Waldenberg writes that "the extent to which the Torah served as his constant guide in matters both 'ethical' and 'religious,' domestic as well as foreign can be understood if you go and learn well the book of Psalms which he assembled with a holy spirit from start to finish." He cites the verse, *Happy are those whose way is blameless, who walk in the Torah of the Lord* (Ps. 119:1) as emblematic of David's commitment to upholding the law of Torah before the people. After David, his son Solomon ruled by the words of Torah and served as the wisest of the kings. Solomon's first axiom as king was that the highest wisdom is to know how to judge equitably between two individuals. Waldenberg writes of Solomon, "King Solomon was able to govern as effectively as he did because he had a wise and enlightened perspective, for no wisdom is like that of the Torah. He necessarily gave supremacy to the Torah of God — to its commandments and laws more than to any other source of wisdom in the world. He dedicated himself in body and soul to erect a fence around the Torah. He made strong fences around the Torah¹ so that no man could come up and chop off one of the branches of Torah." The rabbinic literature also recounts the transgressions of the great leader Solomon, but ultimately excuses him for his errant ways, exclaiming that in the end, he had not acted with malicious intent. He simply did not know what he had done. While Solomon helped the king's position grow in wisdom, Yehoshaphat helped the kingdom itself attain greater power.

Yehoshaphat provides a good example, according to Waldenberg, because "as he was making his kingdom stronger, so too was he giving his heart to understand that the foundation of all this strength (literally, the two pillars of the Temple) lies exclusively in trust in God and in religious conduct, which can only be accomplished through persistent study of the holy Torah and by following its laws and judgments as the laws of the land; therefore, his heart was elevated by the ways of God and spoke a message to his people: *believe in the Lord your God, so shall you be established, believe in His prophets, so shall you prosper* (II Chron. 20:20). Thus he placed all his energy into lifting up the light of the crown of God's Torah and to turn the heart of the people to the Torah and to the commandments." He appointed ministers to go out into the land and teach Torah to the citizens. Hezekiah carried on in the work of Yehoshaphat by teaching Torah and working together with the priests to assure proper functioning of religious matters. Despite the earnest efforts of earlier kings and religious instructors, idolatry and neglect of Torah led to Yoshiyyahu entering the kingship with a goal to return the people to Torah. The great find of the

sacred scroll led to Yoshiyyahu's desire to recommit the people Israel to a life of Torah. He held fast to the idea that the king shall rule with a *sefer Torah* by his side at all times.

Waldenberg supplies this history lesson in order to demonstrate the importance of Torah for the success of the kingdom as well as the inherent sense of renewing Jewish law given the renewal of the Jewish state. The ultimate example of theocracy, which the religious Zionists used in order to show the precedent of a harmonious relationship between religion and state, was that of Ezra and Nehemiah. During the days following the return of the exiles to the land of Israel, the tasks of the leaders (political and religious) were divided into two, on the basis of their essence. One task involved a spiritual function and the other task was a political function. Waldenberg demonstrates how Ezra and Nehemiah, religious and political leaders, were able to work well together because they operated under the shared code of Torah. What accounted for the success of that generation, as compared to later generations, namely the Hasmoneans? Nehemiah came to use the Torah and involve himself in religious matters while Ezra did not corrupt himself by engaging in politics. During the days of the Hasmoneans, the priests defiled the sanctity of the priesthood by delving into political matters. Waldenberg uses the example of the Hasmoneans as an exception in order to explain that such a situation is unnecessary as long as the religious leaders conduct themselves appropriately. Not that religious leaders cannot handle political affairs but rather, they should remain involved in the holy matters of their realm.

In summing up this introduction to the matter of Torah and the modern state, Waldenberg writes, "the concept of using the law of Torah requires us to use the broadest available political terms. It will serve as a candle for the legs of the state at every dark corner to which it turns. The authority of the state must look to the Torah as a guide which it can use as a central point in the shapeless abyss into which it travels." There can be no other source for the government than the holy Torah. Only when leaders misunderstood their role, was the joining of Torah and the state problematic. Regardless of the time period, the sages of our people have always used the Torah as a compass for the Jewish people. As Waldenberg wrote, this time was to be no different.

A

We are the chosen and beloved people Israel, one unique unit in the world, whom God has selected as a *unique nation on earth* (II Sam 7:23) God, who is the Creator of the universe and can see from one end of time to the other, has selected us from among the peoples of the earth to be a kingdom of priests and a holy nation. A nation who knows God and whose exalted ideal is to spread awareness of God throughout the world and to fill the world with righteousness.

For this, God has imparted the Torah and its commandments to Israel by way of His prophet, as it says, *Moses commanded us a Torah, the inheritance of the congregation of Jacob*, (Deut 33:4) so that through them they would achieve the truth and understand the path of righteousness, fixing in their heart great faith — "The foundation of all foundations and the pillar of wisdom is to know that there is a Primary Being who brought into being all existence. All the beings of the heavens, the earth, and what is between them came into existence only from the truth of His being." (*Hilkhot Yesodei HaTorah*, 1:1) And since Israel has in its hands the keys of faith of the true religion, it announces like a shofar, with a "loud voice to all the people and informed them that there is one God in the entire world and it is proper to serve him," God makes the world go around and created everything and there is no other God other than Him. (See *Hilkhot Avodah Zarah* 1:3)

B

If all the oceans were ink, all the reeds were pens, the heavens were parchments, and all the humans were scribes, it would not be enough to write all the decisive proofs from the heavens above to the valleys below that this [PAGE 2] Torah which is found in our hands —

both the oral and the written — is the true Torah from God which was given to us out of his great goodness from heaven to the earth below by means of the master of all the prophets, the early and the later, and that without this Torah, we would sink like lead in the might depths of the sea, and it would be, God forbid, our destiny to be witnesses to the destruction (see *Igeret Rabeinu Maimon*) — God forbid that it should come to pass, but God has already assured us faithfully that this Torah will not depart from among us, nor from our offspring, from now until forever. We will mention the brief, yet apt, definition of the Gaon, from the yeshiva in Sura, Rabeinu Saadia Gaon, peace unto him, concerning the connection which cannot be severed between our nation and the Torah: "our nation is not a nation without its *Torot* (written and oral). Since our Creator said that our nation will stand eternally like the heavens and earth, by necessity the *Torot*, which give us life, will give us permanency." (*Emunot v'Deot*, *ma'amar* 3)

R. Saadia Gaon's model definition contains the secret of our people's existence, in the sense of "all the rest is commentary, go and learn." (*Shabbat* 31a) This comes to explain the essence of our good fortune of having the Torah of the living God, such that we need not mistakenly consider any separation between the Torah and the state by having to say: the law of the Torah is like the law of the other religions which have nothing to do with religious teaching. For our religion is different from the religions of the world, our Torah preceded our state. The One who established the boundaries of the nations (Deut 32:8) has set aside Israel as his inheritance and impressed his idea of a state through the seal of the religion of Moses and Israel, in such a way that he will realize that the soul of the nation is the holy Torah, which is the source of life and from which the nation is sustained. Anyone who comes to separate the body politic of Israel from Torah from Sinai comes to restrict the soul — like one who says to another, "Break your cask but save its wine."

There are those who wander from the path of life.² There are those who think and have sinful thoughts and either purposefully or by mistake teach themselves and others erroneous ideas about the notion of separating religious and state affairs as well as the separation of judicial and legislative process from the religious judicial system. Moreover, they garb themselves in rabbinic clothing and act as if they have merely arbitrary thoughts regarding this matter, and with lying mouths they make their voices soft and gracious as if they actually have the best intentions for Israel and the Torah in their minds. Regarding them, and those like them, the wisest among men said of them *when he speaks fair, do not believe him: for there are seven abominations in his heart* (Prov. 26:25). *From idle chatter there is pure loss* (Prov. 14:23). How much do these people not really feel anything, because *with paeans to god in their throats and two-edged swords in their hands* (Ps. 149:6), they cut off the hand of that which gives life to the Jewish people, and separating the nation from that source of living flesh from which it sucks its life. Even though they are walking paths of righteousness in their eyes, their end is the path of death for the nation — God forbid.³

Remember the days of old, consider the years of ages past (Deut. 32:7). Turn the pages of our nation's history, cast a cursory, objective glance at them and you will see clearly that always [PAGE 3] there was agreement between the words of the people and

²This paragraph is against the democratic, secular Jewish state.

³Waldenberg proves himself to be against those individuals who felt that giving religion a governmental status undermined religion itself and would weaken the status of Judaism. He did not agree to the idea of separating religion from the state nor the judicial and legislative processes from religious law or judgment.

those of the scholars of Torah. This fact was a First Principle, an axiom not to be debated. It is known by all Israel — young and old — that national life (policy and government) are like all the physical goods in the world, based on spiritual life that gives content and meaning to the world, which come from Torah (Sinai). Torah is like a well of water that comes up, and the leaders of the people should be drawing water from that well. *The well which the chieftains dug, which the nobles of the people started with maces, with their own staffs.* (Num. 21:18) The well has served as the support for generations of wise great sages among Israel, which causes great streams of holiness and purity to flow before all the living beings of the people. "The Law as a whole aims at two things: the welfare of the soul and the welfare of the body. As for the welfare of the soul, it consists in the multitude's acquiring correct opinions corresponding to their respective capacity. As for the welfare of the body, it comes about by the improvement of their ways of living one with another. This is achieved through two things. One of them is the abolition of their wronging each other. This is tantamount to every individual among the people not being permitted to act according to his will and up to the limits of his power, but being forced to do that which is useful to the whole. The second thing consists in the acquisition by every human individual of moral qualities that are useful for life in society so that the affairs of the city may be ordered. The true Law then, which as we have already made clear is unique — namely, the Law of *Moses our Master* — has come to bring us both perfections, I mean the welfare of the states of people in their relations with one another through the abolition of reciprocal wrongdoing and through the acquisition of a noble and excellent character. In this way the preservation of the population of the country and their permanent existence in the same order become possible, so that every one of them achieves his first perfection, I mean also the soundness of the beliefs and the giving of correct opinions through which the ultimate perfection is achieved." (*Guide to the Perplexed*, 3:27)

Always, Torah scholars who stood at the lead of Israel created a structure among the people to prevent them which kept people from fighting among themselves and from allowing one man's position from swallowing everyone else up when they had the power, to understand the words of Torah and integrate Torah and political leadership together, they often mixed together the toraitic and political matters, since they considered the two things as one.⁴ At times it was necessary to create two separate houses within the community — the house of Torah on one side and the house of the kingship on the other. Such an arrangement — under normal circumstances was merely a division of political labor. But an environment of peace existed between them and everyone worked in close relation to one another — making a connection which could not be severed. The house of Torah would serve the house of legislative affairs of the kingship in all matters regarding state issues. The Torah and her judgments were the underlying thread which wove its way through all matters of life for the people and the state. Even in matters of foreign policy, they would seek advice from "the cedars of Lebanon" — that is, the scholars of the *Sanhedrin* would look to Torah as well as to the counsel of experts on a given matter, "they at once took counsel with Ahithofel and consulted the *Sanhedrin* and questioned the *urim v' tumim* and the captain of the King's host was Yonai" (*Berakhot* 3b). The *halakha* declared precisely that, "one does not go out for a voluntary war until after it has been approved by a court of seventy-one." (*Sanhedrin* 2, 15, 20. *Hilkhot Sanhedrin* 5:1 and *Hilkhot Melakhim* 5:2.) So Joseph ben Gurion testified without guile in his book on the Jewish Wars (1:88), [PAGE 4] "for so the *Sanhedrin* sat in the Hall of Hewn Stones and legislated for the people and according to their word did the

⁴Waldenberg here turns *Avot* 3:2 into a praise for a Torah state. The *mishnah* reads: "R. Chanina, the deputy of the priests would say, 'Pray for the welfare of the government, for were it not for the fear of it, people would swallow each other alive.'" R. Chanina, at his time of writing, was referring to the Roman government.

people act in terms of political laws and worshipping God."

Authority was given to leaders of Torah to remove anyone from national leadership if they would place obstacles in place of Torah in the state or rebel against the *Sanhedrin*, as is told in *Rosh Hashana* 22a, where the case of Shazpar the head of Geder is discussed. "It happened once that more than forty pairs of witnesses were on their way to Jerusalem and R. Akiba detained them. It has been taught that R. Judah said: far be it from us to think that R. Akiba detained them. It was Shazpar the head of Geder who detained them, Rabban Gamliel thereupon sent and deposed him from his office (greatness)." This incident occurred during the days of the Second Temple, when the majority of kings did not behave properly.

So too do we read in the *Sefer Ha-kabbalah* of R. Avraham ibn Daud, "for thus it was the custom during the days of the Second Temple that the king — either from the Hasmoneans or their servants, or the descendants of Herod, they would lead the Jewish people to war and handle all national affairs. However, toraitic issues — the laws and judgments — were handled by the *Sanhedrin* and the House of David did as was determined by the High Priest and the *Sanhedrin*."⁵ This means to say that already the moral decline was set in motion in that the leaders of Torah and the standard-bearers did not participate in every matter concerning national affairs, according to the command which was issued for the original leaders and officers who brought the people into the land — namely Joshua, the student of Moses, our teacher, as it is written, *and he shall stand before Elazar the priest, who shall ask counsel for him after the judgment of the Urim before the Lord: at his word shall they go out, and at his word they shall come in, both he, and all the children of Israel with him, even all the congregation.* (Numbers 27:21.)

Rabeinu Shlomo Gaon agrees and confirms this for us by stating succinctly regarding the power of the *Sanhedrin*: "It has authority to rule without trouble or fear" (*Igeret Rashai* 1:3).

⁵In other words, religious matters were separate from political ones.

I will also mention on this matter a wonderful commentary which appears as a side note in the book *Tiv Gittin* of the Gaon R. Ephrayim Zalman Margaliyot, peace unto him, in the section on the spelling of men's names: it is known that the *Sanhedrin*, where seventy languages were known, that it was not an issue of their needing to learn the languages as a type of hobby, since they knew the entire Torah, but rather given the strength of the Torah and its holy names and in their infinite wisdom, they were able to come to know the seventy languages, for as it says in *Sotah* 33a, "that it is permitted to read the Torah in any language," see there and in the *Tosaphot "kol"*. On this topic, it is said *For then I will make the peoples pure of speech*... (Zephaniah 3:9) For they will recognize and know that all seventy languages, in any generation, are a source of division which God used to confuse the people, but there remains one language which is the holy language which unite the people.

These matters will be better understood with another brief sentence which the R. Sharira Gaon offers on the issue of the *Sanhedrin*: from Heaven they were helped and the reasons of the Torah were made clear to them through the *halakha* to Moses at Sinai. Therefore, it is no wonder that the *halakha* was revealed to them as well as the gates of wisdom and knowledge in a secretive format from God to his creations who fear him and will make the *halakha* known.

F

By centralizing the toratic and the national power into the hands of one central individual [PAGE 5] there will be two higher institutions: a legislative body composed of Torah scholars who can legislate laws based on laws of the state which are supported by the well which the chieftains dug, which the nobles of the people started with maces, with their own staffs, (Num. 21:18) and a second body composed of political and military counselors who are knowledgeable in foreign and domestic affairs and can advise on strategy. We find

that there have been a few prominent eras which shine like the heavenly constellations during our people's long history. I will mention the quiet times of our people's life which came at certain times in certain lands, and I will discuss them in abbreviated fashion. Without speaking in terms of the individual's personal life, for those people who will be serving as community leaders, what is most important in the appointment of any official, is that the king or the lay leader must be pure, straight-forward, God-fearing, and all his actions in life must be in observance of the laws of the Torah and her commandments: for any individual who is not God-fearing, even though he is extremely wise, he shall not be appointed to any position among Israel. (See *Hilkhot Melakhim* 1:7) And the words of the true and righteous prophets are full of this. [To our regret, given the majority of individuals in elected positions, and what they may try to be, there are many leaders in our generation who are unwilling to learn from the events of our past, particularly of the days of the First and Second Temples. *The good Lord pardon everyone.* (II Chron. 30:18) There is nothing new in this.]

1) Our beginnings as a people are when we stood on our land in the days of JOSHUA. Joshua was appointed by God, through Moses, to lead the people into the land, to stand as the chief military officer over Israel, to cast down those peoples whom God despised, to bring the people into the land of their ancestors, and to divide up the land to the chief of every tribe and handle all matters governing the people and the state. The people willingly accepted Joshua with the status of a king to the point that anyone who rebelled against his word would be subject to execution. As it is written, *whoever rebels against thy commandment, and will not hearken to thy words in all that thou commandest him, he shall be put to death: only be strong and of good courage.* (Joshua 1:18) So it says in *Yoma* 73b and in *Sanhedrin* 16a: "Scripture says, *and he shall stand before Eleazar the priest, this is the king.*" See there and in the decision of the Rambam, *Hilkhot Melakhim* 1:3, that Joshua was appointed as the king by Moses, our teacher, and his court, see there. In addition, he was

also responsible to see that the people engaged with Torah on a daily basis.⁶ See in Joshua 8:13, in *Eruvin* 63b, *Megillah* 3a, *Sanhedrin* 44b [“And Joshua lodged that night in the midst of the valley. And R. Yohanan said that this teaches that he spent the night in the depths of the law.” See what is written in my book, *Hilkhot Medinah* II 2:5.] He had the commandment to engage in the Torah of God as part of the fulfillment of the commandments: *at that time the Lord said to Joshua, make flint knives and circumcise again the children of Israel the second time* (Joshua 5:2). As he was commanded, so he did, *and Joshua made flint knives, and circumcised the children of Israel at the hill of Ararat* (Joshua 5:3). See *Yevamot* 73b and in *Yalkut Shimoni* there on Joshua (*remez* 16).

Likewise Joshua arranged and edited for them a book of laws based on the foundation of the written Torah of Moses and on what was received from him orally. (See *Terumah* 16a, where it discusses that many hundreds of halakhot were forgotten [PAGE 6] during the days of mourning for Moses. From this we learn that “a thousand and seven hundred arguments *a fortiori* and arguments by analogy and scribal clarifications were forgotten.” See there.) *Joshua assembled the elders, and their heads, and their judges of Israel* (Joshua 23:2, 24:1). He directed their ears to the instruction of God; he strengthened their arms to keep and observe all that was written in the Torah of Moses, deviating neither to the right nor the left, and he legislated for them a book of laws: *So Joshua made a covenant with the people that day, and set them a statute and an ordinance in Shekhem* (Joshua 24:25). (See in the Radak and the Rashi there.) Also, as the Ramban expounds on the verse (Ex. 15:25), that the intention here is not towards the laws of the Torah and its judgments but rather “to the customs and ways of the civilized society, such as *the conditions which Joshua made [upon entering the land]*, which the Rabbis have mentioned, and other such similar regulations.” But these laws of customary behavior are also established upon the foundations of the Torah of Moses, for *its ways are ways of*

pleasantness and all its paths are peace, and upon the general and fundamental principles which were received from his teacher, the Teacher of Israel. Proof from this comes from the following verse, *and Joshua wrote these words in the book of the Torah of God*. (Joshua 24:26). If in his mind, he had fabricated these laws of custom, he would not have edited them into the Torah of God. Indeed, our Sages, peace unto them, in *Makkot* 11a, provide a different interpretation where there is a debate between R. Judah and R. Nehemiah [the debate centers on what part of the Torah did Joshua add to — the verses about Moses’ dying or the cities of refuge.] However, it is well-known, that even after the interpretation, a Bible verse can never lose its literal sense (although its meaning may be extended by the methods of interpretation) [*Yevamot* 11b], when there is no contradiction between the interpretation and the literal meaning. For thus translated Yonatan, “Joshua wrote these words and hid them in the book of the Torah of God.” At any rate, every verse, from chapters 23 and 24 testifies that Joshua combined political leadership with teaching Israel the laws of God and His Torah. He showed them the way of the Torah for them to follow and taught them the commandments so that they would do them and live by them. “Know that every commandment which the Holy One, blessed be He, gave to Moses our Teacher, may he rest in peace, was given with its clarification. First He told him the commandment and then He expounded on its explanation and content, including all that which is included in the Torah. After this, all the people went to teach one another what they had heard from Moses and to write that commandment on scrolls. The leaders roamed over all of Israel to (insure that the people) learn and apply themselves until they would know the traditional version of that commandment and were fluent in reading it. They would then teach the explanations of that God-given precept. That explanation would include all aspects, and they would write the precept and learn by heart the oral tradition. He died, may he rest in peace, after having bequeathed to Joshua that which was endowed to him (Joshua) in the way of interpretation and wisdom, and he became wise. And Joshua and the people of his generation studied

⁶Joshua combined efforts as a Torah scholar, king, judge, and military man.

it. When Joshua, the son of Nun, died, may he rest in peace, he transmitted to the Elders all the explanations of the Torah that he had received from Moses, and also all the laws that were inferred in his lifetime, concerning which no argument existed "Even though the oral Torah was not written, Moses taught it to his court of seventy elders, and Elazar, Pinchas and Joshua learned it from Moses and Joshua, as the student of Moses, delivered the oral Torah and commanded it, for Joshua had learned orally all the days of his life" (Rambam in his introduction to the Mishneh Torah) [PAGE 7]

Likewise, he decreed for them many edicts and ordinances whose fundamental purpose was to create a fence around the Torah and make Israel an exemplary nation before everyone, so that all the people of the world would learn from them understanding and they point them with their finger and praise them and say see [the moon] and then sanctify (RH 20a on Ex. 12:2) As it is written in the Torah of Moses: *Behold, I have taught you statutes and judgments, even as the Lord my God commanded me, that you should act accordingly in the land whither you go to possess it. Keep them therefore and do them; for this is your wisdom and your understanding in the sight of the nations, who shall hear all these statutes, and say, Surely this great nation is a wise and understanding people. For what nation is there so great, that has God so near to them, as the Lord our God is in all things that we call him for? And what nation is there so great, that has statutes and judgments so righteous as all this Torah which I set before you this day?* (Deut. 4:5-8) Their content: "by means of investigating and agreeing on matters of custom between individuals, which neither added to nor subtracted from the commandments, or for matters which were of benefit to people and related to the Torah, they would call them edicts or customs which were prohibited from transgressing" (See there in Rambam's introduction to the commentary on the mishnah) He did not affix borders between edicts which were purely

¹Moses Maimonides, *Commentary to the Mishnah: Introduction to Seder Zeraim and Commentary on Tractate Berachot*, trans. Fred Rosner (New York: Feldheim, 1975), 40-41, 43-44, 62

"religious" and those which were purely "secular" for before the people of Israel — the people of God — everything is considered Torah. Every edict which is ordained is an introduction to the Torah of God. Joshua made the decree about the Netanim during the time when the Temple stood (Yebamot 79a). Joshua ordained for them the benediction [in the Grace after Meals] for the land when they entered the land (Berachot 48b. *Hilkhot Berachot* 2:1), and in the hour when he divided the land, he ordained and made conditions together with his court, ten stipulations all for the goodness and development of the settlements, the partnerships, and the repairing of the world (In *Baba Kamma* 1 and 2, there is more on certain specific edicts which he decreed. Rambam, *Hilkhot Ziknei Mamon* 5:3, Isserles in *Choshen Mishpat* 274 and *Sefer M'irat Anayim* 102. See also in *Baba Batra* 27b and *Hilkhot Bikkurim* 2:11, and the *Lekhem Mishneh* and the *Mishneh Lamelekh* — and there is no room here to go on further) Since he loved Israel, "he stood and made for them roads and highways, and those that were easy to utilize he classified for public use, and those not easy to use he classified for private use" (Eruvin 22b)

2) DAVID, KING OF ISRAEL. The man raised up as the Messiah of the God of Jacob and the sweet singer of Israel. His persona is symbolized by *the high praises of God are in their mouth, and a two-edged sword in their hand.* (Ps. 149:6) The spirit of God spoke to him. God's word was on his tongue. David, King of Israel was a man of war and his hands were filled with the blood of enemies — enemies of God and God's people. He was able to subdue his people beneath him and ground them into the dust of the earth. He was also a mighty warrior in the wars of the Torah and his glory, unlike the kings of the east and the west who sit in their glory with their associations, was to exalt the Torah of God, and to show the nations of the world even to the point that "my hands are dirty with menstrual blood and the blood of the fetus and placenta, which I examine so as to declare a woman clean for sexual relations with her husband" (Berachot 4a). Moreover, he was not ashamed to lower himself before teachers who were wiser than he. (Berachot 4a) When he would

engage in Torah, he would consider himself like a worm and "he would not take his seat on a pillow or coverlet but sat on the ground." (*Moed Katan* 16b) He received the oral Torah from Samuel and his court (Rambam's *Introduction to the Mishneh Torah*), and he would do nothing without consulting and seeking advice first from the *Sanhedrin* (See *Berakhot* 3b, *Sanhedrin* 16a) [PAGE 8] And he merited to be an uncoverer of a tractate ("he set forth in public the tractate he was studying" *Eruvin* 53a and in the Rashi), he also granted rabbinical ordination to scholars (see in the *Yerushalmi Sanhedrin*, beginning of chapter *chelek*, and *Hilkhot Sanhedrin* 4:7, where he mentions that ordained individuals can grant ordination to up to 100 people at one time. In that way, David ordained 30,000 men one day! See also what I wrote earlier in volume I (1:2g). He sat together with scholars on thrones of justice and performed righteousness and justice. "David acted with judgment and charity to all his people." (*Sanhedrin* 6b) And to everyone he declared all the judgments of righteousness (Ps. 119:12). And he was grieved by those who denied the speaking of God. (Ps. 119:158)

So too he decreed many ordinances and edicts for the general public and the individual with the end result being that they would bring the individual and the public to be pure in the path of God and Torah. He and his court ruled on the issue of the *N'tinim*, that they were not to be allowed to enter the community ever, not even at a time when there was no Temple, for he saw "the cruelty and insolence displayed by them when they demanded the seven sons of Saul, the chosen one of the Lord, in order to hang them, and mercilessly slew them." (*Yebamot* 79a, *Hilkhot Issurei Biah* 12:23-24) "Nor would they do a kindness unto the children of Israel by forgiving the sons of their king, notwithstanding that Israel showed them grace at the beginning of their spared lives." (*Hilkhot Issurei Biah* 19:17, see in Rashi *Yebamot* 37a — *N'tinim*, and in the Rashi and *Tosaphot* on *Yebamot* 79a. There is more on this but here is not the place.) Given what happened between Amnon and Tamar, David ruled on the separation of unmarried women even though she was not a forbidden relation (*Sanhedrin* 21b, *Avodah Zarah* 36b, *Hilkhot Issurei Biah* 22:3). He decreed in the

blessing after a meal that we should say "for Israel your people and Jerusalem, your city" (*Berakhot* 48b, *Hilkhot Berakhot* 2:1), he ruled on reciting one hundred blessings every day (*Tur Orach Chayim* 46 in the name of Rav N'turney Gaon — see there) and he ruled on *mishmarot* and increased them to twenty-four (*Taanit* 27a) and he made a statute and an ordinance for Israel that the spoils of war get divided between those who fought in the battle and those who stayed behind to guard the baggage. (I Samuel 30:24-25. *Hilkhot Melakhim* 4:9. See in my book *Hilkhot Medinah* II 9 b)

The spiritual testament of this righteous king to his people was to keep and seeking out all of the commandments of God, as it is written: *Now therefore in the sight of all Israel the congregation of the Lord, and in hearing of our God, observe and seek out all the commandments of the Lord your God: that you may possess this good land, and leave it for an inheritance for your children after you forever.* (I Chron. 28:8) And to his son, Solomon whom God had chosen to sit on the royal throne after David and serve as the king over all Israel, he commanded: *and keep the charge of the Lord thy God, to walk in his ways, to keep his statutes, and his commandments, and his judgments, and his testimonies, as it is written in the Torah of Moses that thou mayest prosper in all that thou doest, and wherever thou turnest thyself.* (I Kings 2:3) He blessed his son with this blessing and with this fundamental request: *Only the Lord give thee wisdom and understanding, and give thee charge over Israel that thou mayest keep the Torah of the Lord thy God. Then shalt thou prosper, if thou takest heed to fulfill the statutes and judgments which the Lord commanded Moses for Israel: be strong, and of good courage; do not dread or be dismayed.* (I Chron. 22:12-13)

His one request was to dwell in the house of the Lord all the days of his life and to behold the beauty of the Lord, and to inquire in his temple. (Ps. 27:4) And at every turn, he considered it as though he dwelled in the house of God as he set God before him at all times.

[PAGE 9]

A summation of the matter: You desire to know and to feel a measure of the great

love of our king, David, peace unto him, for the Torah of God — a love equivalent to *if a man would give all the substance of his house for love it would utterly be condemned.* (Song of Songs 8:7) The extent to which the Torah served as his constant guide in matters both "ethical" and "religious," domestic as well as foreign can be understood if you go and learn well the book of Psalms which he assembled with a holy spirit from start to finish. And if you are truly sensitive, when you reach Psalm 119, your soul will be overwhelmed and enthused as you prepare to enter the equivalent of a reception room to the holy of holies of the book. You will sense the strength of the Most High and be pushed into the internal holiness, and by a magical spiritual gesture, you will begin to read the pleasantness and wonderful sweetness of the section which begins *Happy are those whose way is blameless, who walk in the Torah of the Lord.* (Ps. 119:1) and continue verse-by-verse. You will shudder, shaken in awe from the greatness which you find in your attempt to direct your labor all the days of your life, and by the feeling of enjoyment which can be found among all the wondrous feelings, which is to rejoice in God, and to benefit from the brilliance of God's presence — thus you will know that the life of the true kingdom, which is followed by nothing, is nothing except for being wrapped in the golden crown of the eternal Torah of life. Only then will you begin to understand the inner relationship between God and those who fear him, why God chose David his servant as the one to lead his people and to anoint with the eternal holy oil of anointing to be the ruler of his people with the warning of holiness. *I will keep my truth with Him for evermore, and my covenant shall stand fast with Him. His seed also will I make to endure for ever, and His throne like the days of heaven. His seed shall endure forever, and His throne shall be like the sun before me. It shall be established forever like the moon, and the witness in the sky is sure.* (Sela.) (Ps. 89:29-30,37-38)

3) In the days of the kingdom of SOLOMON. Scripture testifies that *and Solomon reigned over all the kingdoms from the river to the land of the Philistines, and to the border*

of Egypt. (1 Kings 5:1) And God bestowed upon him such royal majesty as had not been on any king before him in Israel. (1 Chronicles 29:25) He ruled over the entire world (Sanhedrin 20b) and his wisdom was greater than that of any man before, and his knowledge was as wide as the sand that is on the sea shore so that all the peoples came to seek his wisdom. (From 1 Kings 5) The more that his wisdom increased and his reign, the more he came to know that the beginning of wisdom is the fear of God. (Ps. 111:10) God gave the fundamental task in governing to Solomon the need to give cunning to fools and knowledge to youth and to call out to people to follow the ways of justice, along paths of justice, and daily to keep guard of the doors of the wisdom of the Torah, whose ways are long and wider than the sea. *The sum of the matter, when all is said and done: Revere God and observe His commandments! For this applies to all mankind.* (Ecc. 12:13) (See Yalkut Shimoni Kohelet remez 965) He brings up the words of his ethics which were spoken by the Holy One in three books: Proverbs, Song of Songs, and Ecclesiastes. (See Yalkut Shimoni 1 Kings remez 172.) He drew his great lesson from the wisdom of what is written: *and besides being wise, Kohelet also taught the people knowledge, for he weighed, and sought out, and set in order many proverbs.* (Ecclesiastes 12:9)

[PAGE 10] How was this teaching of knowledge to the people expressed? On this, Rabba spoke in Erubin 21b: *"he also taught the people knowledge"* he taught it with notes of accentuation [he fixed it with vowels and marks between the letters of the text based on his version which he learned] and illustrated his teaching with parables. Yes, he pondered and sought out and set in order many proverbs. Said Ulla said R. Eleazar, in the beginning the Torah was like a basket without handles, until Solomon came along and made handles for it. (See Rashi: where he says that Solomon affixed borders and separations for the people to keep from getting involved in transgressions, namely sexual transgressions.) And also the thousands of proverbs which were said to be from the words of the Torah and the words of the scribes, as Rav Hammuna explained there: "what is the meaning of the verse of scripture,

and he spoke three thousand proverbs and his songs were a thousand and five? (I Kings 5:12)" When he requested one time to make great the wisdom in his heart, to turn from one teaching of the Torah of Moses, and to judge a decision which was in his heart and not based on testimony or from the teaching "a divine voice came out and said to him, the words of truth are written directly in front of you, *by the mouth of two witnesses...*" (*Rosh Hashana* 21b) All his wisdom was destroyed and it was as if it never was, as when he transgressed on the *yud* of *yarbeh* with regard to the command, *and he shall not multiply (yarbeh)* (horses, wives, gold), as explained in the *Yerushalmi Sanhedrin* 2:6, "the book of Deuteronomy went up and spread itself out before the Holy One, blessed be He. It said before him, 'Master of the Universe, you have written in your Torah that any covenant part of which is null is wholly nullified. Now Solomon wishes to uproot a *yud* of mine.' Said to him the Holy One, blessed be He, 'Solomon and a thousand like him will be null, but not one word of yours will be nullified.'"

Solomon's first axiom as king was that the highest wisdom is to know how to judge equitably between two individuals. Therefore, when God appeared to him in visions of the night and granted him permission to ask for any gift, he did not ask for wealth and length of days. Nor did he ask for an extension to his borders or the subjugation of his enemies. He also did not ask for a reign of peace and general economic prosperity for his land, even though these are apparently the fundamental tasks of the king with regard to his subjects and the things which provide the basis of what a king does for his land and for length of days. The only thing he asked was: *Give therefore thy servant an understanding heart to judge thy people, that I may discern between good and evil: for who is able to judge this thy so great people?* (I Kings 3:9) To understand how to explore the depths of the law in order to acquit or convict in handing a fair judgment, for he reasoned that he stood there to judge not just before a book of laws of dried-up chapters which were created in a narrow framework and reduced to the influence of the time and place like a book of non-Jewish laws which were

decided based on what the majority of the people in that particular time and place needed, but rather he stood before a holy Torah with laws of life which were decided for humanity by the God of Life and those laws were not given under any kind of influence of time or place. "You may not hold back your view on anyone's account. The judges should know Whom they judge, and before Whom they judge, and Who it is Who judges them." (*Sanhedrin* 6b) Therefore, he had such great fear from all this that he asked only for a listening heart, as interpreted in *Sifre* Deuteronomy (1:9): "Is it possible that Solomon could not sit in judgment over Israel, this man of whom it is said *And the Lord gave Solomon wisdom* (I Kings 5:26), *And Solomon's wisdom excelled the wisdom of all the children of the east, and all the wisdom of Egypt. For he was wiser than all men: than Ethan the Ezrahite, and Heman, and Calcol, and Darda, the sons of Mahal, and his fame was in all the nations round about* (I Kings 5:10-11)? Such a man could not judge them? Rather he spoke to them thus: 'I am not like all the other judges: a mortal king sits on his tribunal and issues judgments for execution by the sword, by strangulation by burning, [PAGE 11] or by stoning, and it means nothing (to him). And if by right he should take one sela, he takes two, or if two, he takes three, or if a denar, he takes a mina. I am not like this. If I (unjustly) find a person guilty in monetary matters, I am held to account for it as if it were a capital case.' Hence scripture says, *Rob not the weak, because he is weak, neither crush the poor in the gate: for the Lord will plead their cause and despoil of life those that despoil them* (Prov. 22:22)."

As for the king, so too for the people. They began to fear before the king and to accept the yoke of the kingdom not when he began to rule over the people or when he subdued their enemies gathered around them, and not when he succeeded to orchestrate the political and economic affairs of the land, but rather when he judged with righteousness and justice with a judgment of truth as it is written: *And all Israel heard the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him.*

to do judgment. (I Kings 3:28) "For at any time when man does justly, the wisdom of God is in his midst" (*Zohar Bereshit* 265). For wisdom and understanding of the people of Israel in the eyes of all the peoples is in sitting on the throne of the kingdom of the land — *therefore he made thee [Solomon] king over them, to do judgment and justice* (II Chronicles 9:8) "But whatever he [the king] does should be done by him for the sake of Heaven. His sole aim and thought should be to uplift the true religion, to fill the world with righteousness, to break the arm of the wicked, and to fight the battles of the Lord" (*Hilkhot Melakhim* 4:10).

King Solomon was able to govern as effectively as he did because he had a wise and enlightened perspective, for no wisdom is like that of the Torah. He necessarily gave supremacy to the Torah of God — to its commandments and laws more than to any other source of wisdom in the world. He dedicated himself in body and soul to erect a fence around the Torah. He made strong fences around the Torah² so that no man could come up and chop off one of the branches of Torah. He enacted ordinances which provided increased protection, holiness, and purity. He ruled on forbidden sexual unions — incest of second degree, intermarriage forbidden by rabbinical enactment (*Yebamot* 21b, and in the Rashi) and he made edicts with his court on the purity of the washing of the hands and regarding forbidden sexual relations (*Shabbat* 14b-15a, *Hilkhot Avot HaTumah* 8:8). He and his court also enacted ordinances on *eruv*: "It is forbidden for neighbors to carry within a private domain that is divided into different dwellings, unless all the inhabitants join together in an *eruv* before the commencement of the Sabbath. This [restriction] applies to courtyards, lanes, and cities." He instituted this decree "so that the common people would not err and say, 'Just as it is permitted to transfer articles from the courtyards to the streets of a city and its marketplaces, and to bring articles in [from these domains] to a courtyard, it is permitted to take articles from the city to the fields and from the fields into the city.'" [Moreover, they would operate under the mistaken] impression that the marketplaces and streets — since

²Avot 1:1

they are the public domain — are like fields and deserts. [This would lead them to further error, causing them to] say that only a courtyard is a private domain, and they would think that there is no prohibition against the transfer of articles, and that it is permitted to transfer articles from a private domain to a public domain [and from a public domain to a private domain]. So too, he ruled for the welfare of the people of the land that "travelers during the summer might walk on privately owned field paths until the falling of the second rains" (*Baba Kamma* 81b, *Hilkhot Nizikei Mamon* 5:4). So that it would be fixed that people would have fear for the Holy Temple, he ordained that it be mentioned in the blessing after a meal "for the great and holy house" (*Berakhot* 48b, *Hilkhot Mibekhorot* 2:1).

[PAGE 12] This is not the place to explore at length the explanations of halakhic authorities concerning King Solomon's penchant for loving foreign women and during his final years how his wives turned his heart after other gods. (See I Kings 11) For it is not our intention in this exposition to uncover the private lives of the leaders of our people, but it is as clear as the sun that it is essential that the leaders be strict concerning their personal behavior, "because he (the king) could be the reason which causes others to go astray. One could say that it is enough for the servant to be like the master. But if the master is transgressing, the servant may merely copy his actions. As it is written, *it is no favorable report I hear the people of the Lord spreading about* (I Samuel 2:24) which is to say that you (the leader) is causing others to transgress in your actions by doing the opposite of what is suitable for you" (Meiri *Shabbat* 55b) and therefore, "when the great one who is suitable to rule the people or the one who is appointed sins and is caught afterwards, he is doubly punished." (Meiri) The Holy One, blessed be He, is very strict with him, and from the verses in scripture we see the severity of the measure of judgment from Heaven on Solomon, and how a collar of disgrace is hung on his head for all his actions which were not suitable for a king and which were performed without abandon and no attention paid to the greatness of his task as king. We will content ourselves with the following citation, from what our sages

of old say "whoever says Solomon sinned errs, for it is said *And his heart was not perfect with the Lord his God as was the heart of David his father* (1 Kings 11:4) — it was like the heart of David his father that it was not the same, but he also never sinned. This is the sense of the matter *for it came to pass, when Solomon was old, that his wives turned away his heart* (1 Kings 11:4) — he had the power to stop his wives from doing those things but he didn't stop them, so Scripture regards him as though he personally had sinned" (*Shabbat* 56b) Before Solomon married the Pharaoh's daughter, and so to with the rest of the foreign women, he converted her (*Yehamot* 76a)

How wondrous are the words of Rambam on this matter (*Hilkhot Issurei Bi'ah* 13:14-17) "It should not be imagined that Samson, the deliverer of Israel, or Solomon, king of Israel, who was called *the beloved of the Lord*, married foreign women while these were still heathens. Rather, the essence of the matter is as follows. The proper procedure, when a man or a woman comes forth with the intention of becoming a proselyte, is to examine them; perchance they come to embrace the faith in order to gain money. Consequently the court did not receive any proselytes throughout the days of David and Solomon, in the days of David, lest they should become proselytes out of apprehension, and in Solomon's time, lest they should become proselytes on account of the might, the prosperity, and the greatness which Israel then enjoyed. Nevertheless, many became proselytes in the presence of laymen during the days of David and Solomon, and the Great Court was apprehensive on that account. Now since Solomon caused the women to become proselytes first, before marrying them — and so did Samson — and it is a known fact that these women had become proselytes for ulterior motives, and since Samson and Solomon made them proselytes without the sanction of the court, therefore Scripture regarded them as heathens remaining in their state of prohibition. Moreover, their later actions showed the true reasons for their former ones, for they continued to worship their idols and built high places for them, which is why Scripture holds Solomon responsible as though he had built them himself, as it is

said, *then did Solomon build a high place* (1 Kings 11:7). A proselyte who has not undergone an examination, or was not made acquainted with the commandments and the punishment for transgressing them, but was circumcised and immersed in the presence of three laymen, is deemed a proselyte. Even if it becomes known that he had become a proselyte because of some ulterior motive, once he is circumcised and immersed, he has left the status of a heathen, but apprehension should be felt concerning him until his righteousness shall have become apparent. Even if he reverts to his previous state and worships idols, he is considered merely a renegade Israelite; his act of betrothal remains valid [PAGE 13] and it remains the finder's duty to return to him his lost property, for once a person immerses himself, he attains the status of an Israelite. That is why Samson and Solomon kept their wives, even though their secret motives were revealed."

The teaching of Rambam which specifies that Solomon converted the foreign women without the sanction of the court, since it was a known fact that they converted for ulterior motives, which is contrary to what is taught in *Yehamot* 76a which asks how Solomon converted the daughter of Pharaoh when it says that converts were not accepted during either the days of David or Solomon. It teaches: "was there any reason for it but that the motives of the proselytes might be the benefits of the royal table? Such a woman (as the Pharaoh's daughter) was obviously in no need of it (hence she could be accepted)." If this can be said regarding the daughter of Pharaoh but not for the rest of the foreign women whom Solomon married, why doesn't the Talmud ask: if that is the case for the daughter of Pharaoh, then forget about that case. But for the rest of the foreign women, how was Solomon able to marry them and convert them?

We could say that the g'mara could have raised that objection but preferred to raise the following objection: "then draw the conclusion [that the marriage with a forbidden woman is valid] because she was an Egyptian of the first generation." Afterwards, Rav Papa replies: "Are we supposed to submit to Solomon? Solomon never got married." In which

case it can be replied that there is no difficulty with the rest of the foreign women because Solomon never married them either, rather he just clung to them in love, but not in a marriage. See there in the *g'mara* as well in Rashi and the *Tosaphot*.

But this refutation is contradicted in the words of Rambam, which states clearly that Solomon married them in reality [and what is written in the *Yerushalmi Sanhedrin* 2:6 with which Rambam agrees — see there. And some say that Solomon reasoned as did R. Shimone in *Yebamot* 76b — “that the women are permitted immediately.” See Radak I Kings 3:3.] One cannot say that Rambam understood the intention of the Talmud to apply only to the daughter of Pharaoh just because the Talmud uses singular language: “it was on account of the enormous ardor with which he loved her that Scripture regards it as though he had married her,” because the Talmud relies on the verse from Scripture about Solomon which reads *of the nations concerning which the Lord said to the children of Israel, you shall not go among them, neither shall they come among you, for surely they will turn away your heart after their gods, Solomon did cleave unto them in love*, (I Kings 11:2) [and not in marriage, Rashi]. This verse uses plural language — on the multiple foreign women he loved, and not just regarding the daughter of Pharaoh. For if he did indeed marry the rest of the foreign women, then would not that make for a great difficulty for the Talmud to ask at that point if the daughter of Pharaoh is like the rest of the foreign women, what is there to say, how did he convert them and marry them? Also, if he did not marry them really, then the Rambam would not have needed to go on extensively about how Solomon converted and married them, since he didn't really marry them. For behold, the Torah really only forbids marriage (see *Hilkhot Issurei Bi'ah* 12:2), see the Talmud there. This is not the place to go on at length with regard to these matters.

Therefore, according to my humble opinion, it can be said that Rambam interpreted the Talmud to be asking how Solomon was able to carry this all out on his own given that he was the one who decreed that converts were not to be accepted in his day. The *g'mara*

replies that Solomon reasoned that the daughter of Pharaoh, and the rest of the foreign women whom he married, were different, for they did not hold ulterior motives, but the court truly [PAGE 14] opposed the whole episode, from the very beginning, knowing that the women lusted after Solomon's table (i.e., his wallet) and his great wisdom. Therefore Scripture considers them idolaters and remaining forbidden. Thus the *g'mara* only asks that surely Solomon had some halakhic justification permitting him to marry these women against the opinion of his court, for if he had none, then he never would have rebelled against the word of God [On this matter of kings acting on their own, and not by the will of the sages, we also see in the case of Hezekiah, the king of Judah, *Berakhot* 10b, *Pesachim* 56a, *Sanhedrin* 112b — we don't have time now to expand on these matters.] See also the refutation which was mentioned above. Rambam brings out the point in his exposition of the scripture, which calls them ‘foreign’ and by emphasizing, “Now since Solomon caused the women to become proselytes first — and it is a known fact that these women had become proselytes for ulterior motives, and since Samson and Solomon made them proselytes without the sanction of the court, therefore Scripture regarded them as heathens remaining in their state of prohibition.” It must be said that where Rambam writes “it is a known fact” he intends to designate that the matter was known to a court and therefore they did not convert the women, but Solomon did not know that fact from the outset for had he known such a thing, he surely would not have married them, but he made a mistake in the matter and thought that since they did not need the benefits of the king's table, he could safely convert them with a full heart. Only in the end did he learn of their mischievous ways and he did not separate them from him even though their secret had been revealed to him, for he followed the law of the apostate Jew.*

As has been expressed, it is not in our realm here to delve into clarifying matters surrounding all that is written about the life of King Solomon. For all who have eyes to see

*Note: therefore we see the danger in lay people making their own halakhic decisions.

and a heart to understand see the honesty which was contained in Solomon who remained a beloved one of God, who in his reaching had become withdrawn from God. He meditated on God and called out to sin and in his stumbling with every minor deviation from the ways of the God, and in disgracing God, that stood as an even greater punishment, for "it would have been better for that righteous man had he served 'something else' but that Scripture should not say of him *and Solomon did that which was evil in the sight of the Lord*" (*Shabbat* 56b, see there in the Rashi, who says that it would have been better if Solomon had performed some kind of idol worship, for it comes to teach you that it is not easy to understand the ways of one who could have protested.) We will conclude our discussion on this matter with something from *Midrash Rabbah* Song of Songs: "you find cases of a righteous man begetting a righteous, a wicked man begetting a wicked, and a wicked man begetting a righteous. Solomon, however, was a king son of a king, a wise man son of a wise man, a righteous man son of a righteous man, a nobleman son of a nobleman. You find that whatever is stated of the one is stated of the other. Said R. Simon in the name of R. Yochanan from Beth Gubrin, who had it from R. Joshua b. Levi: since you are comparing him, compare him in all particulars. Just as his father had all his iniquities forgiven, as it says, *The Lord hath put away thy sin, thou shalt not die* (II Sam. 12:13), so with him too, and more still, there rested on him the holy spirit, and he composed three books: Proverbs, Ecclesiastes, and The Song of Songs." All of this, why? Because the pillars of the world are the great righteous ones who despite the essence of their beings stumbled into iniquity and sinned before God. God then smote their hearts and gave them pains like the beating of a hammer, punishing them without cessation until they were comforted for what had happened and they removed all sin from their thoughts and came to the conclusion that they would sin no more but rather turn to God with a full heart in sobbing and supplication.¹⁰ The mysteries

¹⁰Waldenberg's footnote: The Gaon of Vilna has a wonderful interpretation for the following verses of psalm 32, *I acknowledge my sin [PAGE 15 — in the footnote] to thee, and my iniquity I have not hid, I said I will confess my transgressions to the Lord; and thou didst forgive my*

are known and he (David) knew to admit to them [PAGE 15] that he would not return again to sinning ever. Therefore God heard the voice of their cries and he made for them a sign of goodness to return to them happiness and salvation! This is the spirit of his holiness.

4) King YEHOSHAPHAT strengthened and fortified his kingdom to a greater extent than did his predecessors and all the people had complete confidence in him. Just as he strengthened and fortified from within by ordering glorious fortifications built for his land, so too did he strengthen and fortify the security walls toward the outside by making treaties of trade and friendship with his kingdom's neighbors and distant lands. He placed strong, able soldiers, eight men of the army (as leaders) along with 160,000 mighty and courageous strong soldiers. (See II Chronicles 17 and *Hilkhot Medinah* vol. II, 1:2c)

And just as he was making his kingdom stronger, so too was he giving his heart to understand that the foundation of all this strength (literally, the two pillars of the Temple) lies exclusively in trust in God and in religious conduct, which can only be accomplished through persistent study of the holy Torah and by following its laws and judgments as the laws of the land; therefore, his heart was elevated by the ways of God and spoke a message to his people: *believe in the Lord your God, so shall you be established; believe in his prophets, so shall you prosper.* (II Chron. 20:20) Thus he placed all his energy into lifting up the light of the crown of God's Torah and to turn the heart of the people to the Torah and to the commandments.

In order to make this idea a concrete reality, he appointed ministers to go out and *teach in the cities of Judah* and their people were the teachers of Torah from among the Kohanim and the Levites. Those workers in holiness carried out this task, *and they taught in*

iniquity. Selah. David confesses his sin by saying *I have sinned*, (II Samuel 12:13) but does not go on to recite the confessional. The Gaon of Vilna explains that David was about to recite the full version of the confession but before he could go on any further, Nathan the prophet interrupted and said *the Lord also has commuted your sin*.

Judah, and had the book of the Torah of the Lord with them, and went about throughout all the cities of Judah, and taught the people. For the merit of teaching Torah, the fear of the Lord fell upon all the kingdoms of the lands that were round about Judah, so that they made no war against Yehoshaphat. Thus did Yehoshaphat continue to grow greater. (See II Chron 17)

Yet it all seemed little in the eyes of Yehoshaphat so he rose up and went out on his own before the people from Be'er Sheva to Har Ephraim to conduct this holy work, and he preached his word to them by speaking to their hearts that they would be strengthened in the fear of God. *And that through him the Lord's purpose might prosper* (Isa 53:10). He succeeded in returning them to the God of their ancestors.¹¹

[PAGE 16] In order to fortify the great spiritual revival which broke out among the people, he appointed toraitic judges in Jerusalem and in all the cities of Judah to settle their disputes according to the judgment of God for the people turned their ears to the tradition in order that their cases might be judged in fear of the Lord with faith and hearts turned to God. And awesome and fearful call went out to the judges: *take heed what you do, for you do not judge for man, but for the Lord, who is with you in judgment. And now let the fear of the Lord be upon you; take heed and do it, for there is no iniquity with the Lord our God, nor respect of persons, nor taking of gifts.* (II Chron. 19:6-7) "Know before Whom you judge, and Who it is Who judges you." (*Sanhedrin* 6b).

"Now is it possible for mortal man to judge his creator? [for Yehoshaphat said that *you do not judge for man, but for the Lord.*] But the Holy One, blessed be He, said 'it was I who declared [on the New Year] that Reuben should have a hundred dinars, and that Simeon should have nothing. Yet you have taken them from this one and [in false judgment] handed them over to that one! It is my task to pay him and to exact payment from that man [who

¹¹Waldenberg changes the tense of the verb to succeed. In the text we read, *וַיִּצְלַח*, yet Waldenberg writes *הִצְלִיחַ*.

causes a miscarriage of justice].'" (*Yerushalmi Sanhedrin* 1:1. See also in *Tanchuma parashat Shofetim* 7.)

Yehoshaphat, together with his court, enacted a decree for the protection of Holy of Holies and ordered a daily immersion before entering the Levite camp. (See II Chron. 20:5; *Pesachim* 92a and Rashi, *Zevachim* 32b, and *Tosaphot*.)

5) King HEZEKIAH gave his whole heart toward fulfilling the will of God, the God of his ancestors and made known his greatness throughout the world. He devoted himself to strengthen the people by performing the commandments of God and glorifying the greatness of the Torah. He succeeded in his task, as Scripture relates, *and in every work that he began in the service in the house of God, and in the Torah, and in the commandment, to seek his God, he did it with all his heart, and he prospered.* (II Chron. 31:21) "until the Holy One, blessed be He wanted to make Hezekiah the Messiah." (*Sanhedrin* 94a).

He ordered the Kohanim and the Levites to purify themselves and to purify the Temple to remove the that which was unclean from the Temple, which is to say remove the idolatry — that Ahaz had placed there — which is as impure as a *niddah* (Radak), and he brought the ministers of the city to the Temple that they might make a sacrifice on the altar of God by the hand of the Kohanim, the sons of Aaron and offer the song of God with the Levites. They were to sing songs and praise God with the words of David and Asaf the seer. However, Hezekiah declared together with the ministers of the community and the entire community in Jerusalem and those who were wise in the words of Torah, that they would keep the passover in the second month because the priests had not sanctified themselves in sufficient numbers and the people had not gathered in Jerusalem. Therefore, messengers had to run from city to city to announce the royal proclamation that the people needed to return to their God, the God of Abraham, Isaac, and Israel. When it was made clear to Hezekiah that he and his ministers acted contrary to the halakha, he sought mercy from God for

himself and those sages who agreed with him (II Chronicles 29. See *Berakhot* 10b; *Sanhedrin* 12b, *Hilkhot M'v'at Mikdash* 5:17-18. There is more to be said on this but not for right now.)

Therefore he encouraged the people to give the portion of the priests and the Levites, that they might adhere firmly to the Torah of God. [PAGE 17] (II Chron. 31:4) and he also proclaimed that for those who hold fast to the Torah of God, they have a portion, and for those who do not hold fast to the Torah of God has no portion. (*Sanhedrin* 90b, *Hullin* 130b)

He did well in the eyes of God when he did away with the book of cures so that they may ask for mercy (*Berakhot* 10b and Rashi) and so that their hearts do not surrender to sickness but rather will receive healing immediately (Rashi *Pesachim* 56a. See also Rambam's explanation to the mishnah for there is no room here to go on further). His ancestors also let a little room for him (Hezekiah) to distinguish himself to break the pieces of the bronze serpent that Moses had made since the people were going astray on account of it. (*Hullin* 7)

He increased the study of Torah during his generation — even more than was done during the generation of Moses and Joshua (see *Sanhedrin* 20a and the Rashi s.v. *doro*). What did he do? "He affixed a sword at the door of the house of study and said, 'whoever does not take up study of the Torah will be pierced by this sword.' They searched from Dan to Beer Sheva and found no ignoramus, from Gabbath to Antipatris and found no boy or girl, no man or woman, not expert in the laws of uncleanness and cleanness." (*Sanhedrin* 94b) He did not stop encouraging the people to the point that he called them "my children," as it is written, *my children, be not now negligent* (II Chron. 29:11) Since he taught the entire Torah to Israel and students are called 'children.' (*Sifre Ve'etchanan* 6:7)

Since the people of Hezekiah's generation accepted and received upon themselves the words of their righteous king and they made the yoke of the Torah heavy for themselves such that they were worthy that a miracle should be done for them, just as was done for those

who passed through the sea and trampled over the Jordan, therefore, the people that studies the Torah with intensity shall not be delivered into the hands of him who distresses it. (*Sanhedrin* 94b)

6) King YOSHIYYAHU was crowned as king in the earliest part of his childhood when he was merely eight years old. *For in the eighth year of his reign, while he was still young, he began to seek after the God of David his father, and in the twelfth year he began to purge Judah and Jerusalem of the high places and the asherim, and the carved idols, and the molten images. Now in the eighteenth year of his reign, when he had purged the land, and the house, he sent Shafan the son of Azalyahu, and Maaseyahu the governor of the city, and Yoah the son of Yahaz the recorder to repair the house of the Lord his God.* (II Chronicles 34:1,3,8) "He despised the idols and he broke the high places and he cut down the *asherim* such that it was his merit to shine before the Holy One, blessed be He and the holy throne." (*Pirkei R. Eliezer* 17) He dedicated his life so that the people would give themselves over to fulfilling the commandments of God, praising and glorifying the Eternal King. By his word, the people made a passover for God as it is written in the book of the covenant: *Since the time of the prophet Samuel, no Passover like that one had ever been kept in Israel; none of the kings of Israel had kept a Passover like the one kept by Yoshiyyahu* (II Kings 23, II Chronicles 35) [See in *Shabbat* 55b if Yoshiyyahu was a *ba'al teshuvah* or if he ever sinned — no room here to go on further.] When he heard the words of the Torah which Hilkiyya the High Priest found in the house of God, which wrote of things to come mainly in rebukes such as *the Lord will drive you, and the king you have set over you, to a nation unknown to you or your fathers, where you shall serve other gods, of wood and stone* (Deut. 28:36), he felt the great anger of God for our ancestors not having obeyed all that is written in Scripture, so he rent his clothing and began to follow the word of God (II Kings 22, II Chronicles 34 and in Rashi and Radak). His only thought was that the blame was upon him,

as he was the head of the people and its leader. He declared with fear and trembling "it is my duty to fulfill" **[PAGE 18]** the words of this Torah (*Yerushalmi Sotah* 7:4). For upon him (the king) the Torah gave a special command *and it shall be with him, and he shall read therein all the days of his life: that he may learn to fear the Lord his God, to keep all the words of this Torah and these statutes, to do them.* (Deut. 17:19) "keep all the words of this Torah — this is the written Torah, and these statutes — this is the oral Torah and the interpretations of the Torah, to do them — to perform the edicts which are issued by later kings" (*Ha'amek Davar*).

The Ran provides a wonderful interpretation to this story (*D'rush* 11, s.v. *va'an savur*): "because the power of the king is not regulated by the normal judicial system of the Torah, he might become oppressive with the laws of the Torah like a judge. For if he is not full with a fear of God, he will come to overdo punishment, more than what is required by ordinances. Thus, he is commanded to have a *sefer Torah* with him at all times, and it shall be, when he sits upon the throne of his kingdom, that he shall write for himself a copy of this Torah in a book... (Deut. 17:18). This means that with regard to the commandments of the Torah, if he negates any commandment out of a need for his generation, his intention should not be so that he can transgress the commandment or unload the yoke of the fear of heaven from upon him, but rather that he wishes to keep all the words of this Torah and these statutes, to do them. So that if he either adds to or takes away from the Torah, his intention should be to increase the observance of the commandments. To explain by way of an example, if the king should execute the murderer despite the absence of witnesses (an abuse of Torah law), he should not do this as a demonstration of his power but as an effort to enforce the law of the Torah (i.e., *you shall not murder*)."¹² See in *Sanhedrin* 21b and in the *Sifre* that explains "when he is in session in court, it (the Torah) is with him," which is to say that like the words of the Ran mentioned above, that even when sitting in judgment in

¹²Intent is what matters.

accordance with the might of the kingdom, regardless, the king must sit with the Torah beside him so that he will remember to act in accordance with the Torah and fulfill all its laws and judgments. [I saw in the *Torah T'mimah* on the Torah that explained what was written in Talmud and *Sifre* as pertaining to what comes up in *Sanhedrin* 19a that "a king does not judge and others do not judge him — only the kings of the House of David (judge)." Therefore, the intention of "he sits in judgment with the Torah" refers to the laws of the government and the laws of the state and other similar matters. The matter of "the king does not judge" is concerned with the sanhedrin, or is hinting at the kings of the House of David. According to my humble opinion, I do not understand the essence of the comment. For it is clearly expressed in *Sanhedrin* 19a that the kings of Israel do not judge except in the later time period of Yannai when there was a special case — see there. If that is the case, then what is the place of the *Torah T'mimah*'s comment compared to the explanation of our Sages of blessed memory in matters of Torah and the foundation of judgment? See there in R. Tzvi Chayes and there is no room here to expound further.]

Since King Yoshiyyahu was concerned that all his judgments which he had made be in accord with the Torah, "every judgment he made between the age of eight and eighteen he reviewed" (*Shabbat* 56b).

In his devotion to lead the people in the way of Torah and the commandments, this righteous king succeeded in delaying the destruction which had already "approached in giant steps" in his days. For his eyes were not destined to see the evil which God had already conspired to bring upon the place and its residents had they not heeded the words of Torah.

[PAGE 19] King Yoshiyyahu did great things in fulfilling the words of Torah and succeeded so that it would be written about him, *and like him was there no king before him, that turned to the Lord with all his heart, and with all his soul, and with all his might, according to all the Torah of Moses; neither after him arose there any like him.* (II Kings 23:25) Jeremiah the prophet particularly mourned Yoshiyyahu's death and crowned him

with the description of *the breath of our nostrils, the anointed of the Lord* (Lamentations 4:20). He was also mourned in the book of mourning which defines him as "among all the kings of Israel who rose up to set ordinances, never did there arise one like him from the days of Avigdor. Our Sages, of blessed memory, wrote, *"I will cause the sun to set at noon*": this refers to the day on which Yoshiyahu died." (*Moed Katan* 25b).

We have only touched on the general subjects of great time periods which serve as splendid and glorious illustrations. The clear principle that undoubtedly arises from these time periods is that those individuals lived during a time when two things came together as one: the Torah and the State which worked arm-in-arm — the toraitic foundation was inseparable from the political foundation of the kingdom. Moreover, it (Torah) was placed beside the king and was used in all his work.

Although there were problems, one after the other, people were helping each other in order to cooperate. The Torah aided conduct of a stable political society so it would not fall captive to an enemy. Indeed, the words of the *paytan* seemed to be fulfilled: our ancestors trusted in God. They grew to be great and succeed. Their actions bore fruit in all matters of life but then there were those who were led astray and rebelled against God. The leaders acted rudely and recklessly. Individuals who knew nothing about the Torah of Moses, were stubborn in their thinking, managed to lack sufficient knowledge, and refused to learn, led the people astray, and from defeat to defeat.

G

The framework for an effective running of the government operates when there are two houses co-existing and working together: one house which is filled with sages (Torah scholars); one house which is made up of strategists (secular knowledge sages). When the two houses operate harmoniously, with each side trying to strengthen relations with the

other, then a miracle occurs, and the power is concentrated in the center as the glory and beauty of God is exalted and God's holy Torah rests between their shoulders. A particularly good example of this is from the time of Ezra and Nehemiah.¹³

The tasks were divided into two, on the basis of their essence. One task involved a spiritual function and the other task was a political function. For spiritual and Torah-related tasks, Ezra the Kohen was appointed. He was *a ready scribe in the Torah of Moses, which the Lord God of Israel had given*. (Ezra 7:6) He wrote the words of the commandment of God and his laws for Israel with the wisdom of God which was in his midst and he *prepared his heart to seek the Torah of the Lord, and to do it, and to teach in Israel statutes and judgments*. (Ezra 7:10) As the ruler of political and state matters, Nehemiah the son of Hakhalya was appointed with authority from the kingdom to oversee the construction of the Holy Temple and the erecting of fortifications and walls around Jerusalem. He was a man of many mighty deeds, charged with being a mighty soldier and establishing security in the land that was destroyed by war so that it might be a healthy state once again.

In reality, if we look much closer, we will see that in truth, the life-giving spirit of Torah has given life to both of these great leaders. [PAGE 20] Torah has given one life to the one body politic. Both have worked so well together because their ultimate interest — religion and ruling — have clung together and spring from the same source.

When we study the matter, we find that at the same time that Nehemiah was concerned with the security of life and the settlement, he also busied himself with the strength and foundation of Torah. Moreover, in his service to King Armon in Shushan the capital, we find that already, there he worries his heart over the destruction of the Holy Temple as he sits, lamenting and mourning and pleads with supplications before God and recites his confessions: *We have dealt very corruptly against thee, and have not kept the*

¹³By using the example Ezra and Nehemiah, Waldenberg places himself in line with many Mizrahi members who saw the newly gained sovereignty comparable to the return of the exiles following the Babylonian conquest.

commandments, or the statutes, or the judgments, which thou didst command thy servant Moses. (Nehemiah 1:7) When he began building the walls of Jerusalem, he remembered and was reminded of the workers who performed their tasks with fear of the great and awesome God. Just as in one hand he had (a stone for fortifying the wall) so too in the other, he performed the holy work of the Lord and fortified the wall of religion and closed up the holes in the wall. Just as the walls were completed and the doors hung on its entrances, the time had come to fortify the walls of Torah as well as construct fences and borders around the Torah. He took a section of the activity in the awesome task of forging a covenant through the Torah in standing before the great Water Gate which separates us from the heavens, and he placed it as the fundamental piece for the legislative body of the people which was the Great Assembly. There Nehemiah stood arm-in-arm with his friend, Ezra the scribe, on the platform, to his right, so they could be brothers who supported and helped one another in all that was commanded to the people to establish every detail in fulfilling the Torah of Moses as a scroll of law and edicts for the people and the state. It was, for all the signatories of the scroll, a moment of accepting the commandments as a bridge for all matters of life on the earth.

We find Nehemiah also involved with the fulfillment of particular commandments which have nothing to do with political matters. He gave a command to the priests which was not written for them, *they should not eat of the most holy things, till there stood up a priest with Urim and with Tummim* (Ezra 2:63, Nehemiah 7:65. See also in Ketubot 24b and in Rashi Qiddushin 69b and in Rashi). Then he contended with the rulers, asking *why is the House of God forsaken?* He entered the storehouses and appointed treasurers over the treasures of the House of God (Nehemiah 13). He saw the Sabbath being profaned and *in Judah some (were) treading winepresses on the sabbath, and bringing in sheaves of corn, and lading asses...and all manners of burdens, which they brought into Jerusalem on the sabbath day.* He immediately involved himself in the seriousness of the matter by

reprimanding the people. He directed his speech to the nobles of Judah on this evil thing which was being done by profaning the sabbath and thereby adding wrath to Israel. He issued a *nakhshon* (an edict) which ordered the gates of Jerusalem to be closed during Shabbat to all who come to sell their wares and he directed the guards placed at the gates, and he scolded the traders themselves. (Nehemiah 13) He forbade any trading or selling on the Sabbath. (See Rashi in Beitzah 27b s.v. *ein poskin damim*. See also Rashi Beitzah 37a s.v. *mishum mikakh umimkar* — no room here to go on further with this matter). And he legislated on the handling of vessels on Shabbat (*Shabbai* 123b and in Rashi s.v. *mishnah zo*, and see in *Yerushalmi Shabbai* 17:1).

[PAGE 21] The greatest complaint which Nehemiah made known had to do with the issue of mixed marriages. Using sharp and fiery words, he provoked and quarreled with the ministers and officers who were the first ones guilty of this offense. He also waged war against them with all his strength. Nehemiah uses forceful language which applied to those of his day but which remain for all time. *In those days also I saw Jews who had married wives of Ashdod, of Ammon, and of Moav: and their children spoke half in the speech of Ashdod, and could not speak in the language of Judah, but according to the language of various other peoples. And I contended with them, and cursed them, and beat some of them, and pulled out their hair, and made them take oath by God, saying, You shall not give your daughters to their sons, nor take their daughters to your sons, or for yourselves. Did not Solomon king of Israel sin by these things? and even though among many nations there was no king like him, who was beloved of his God, and God made him king over all Israel: nevertheless the foreign women cause even him to sin. Shall we then hearken to you to do all this great evil, to transgress against our God in marrying foreign wives?* (Nehemiah 13:23-27)

Surely, the great fear of this prominent political leader regarding the treachery performed by individuals against God would insight individuals to turn from doing evil

while establishing the political state of the people. Therefore, he grabbed the religion of Moses and stood it at the top of the political order of the state and used it to help establish the political order of the people as well. He joined the people and the state beneath the Torah. He used his heart to dress the political behavior in the splendid garments of the laws of Torah in order to direct the people toward the fundamental direction of Torah — the behavior which would make Israel a miracle — a light unto the world — to repair and make the world whole in the kingdom of God such that the world will only come to know Adonai — God alone.

H

Some researchers claim and mistakenly argue that the reason for the destruction of the Second Temple was on account of the priests who were supposed to serve as religious officiants who involved themselves in political matters. The truth is that "it is not the mouse that steals but the hole." (*Gittin* 45a)

The priests were inclined to go after profit and they forgot the Torah of God. It was a mistake for them to get involved with political matters. It was not that they wanted to place the rule of the Torah over the people, rather the opposite is the case. Because they wanted to place their rule over the Torah and they distorted the Torah's laws and judgments, the Second Temple was destroyed. Because of their actions, debate increased and unfounded hatred emerged between themselves and the people. Anger of the people rose up such that the voice of the people was like the voice of God causing them to distinguish between the kingdom which fought for the protection of the people versus the one that did not work on behalf of the people but rather for their ruin by their own hands.

A superficial look upon this time period is sufficient in order to demonstrate the truth of these words. The Sages, of blessed memory, express with their powerful, holy perspective

on the gloomy situation of those days — a period of time when the priests were supposed to be concerned with religious affairs but pursued profit or gain. The Sages write in a short, yet sharp exposition of a time when the souls of the priests descended into a dark abyss. They wrote: "Said Rabbah bar bar Hannah said R. Yohanan, What is the meaning of the verse of Scripture, *The fear of the Lord prolongs days, but the years of the wicked shall be shortened* (Prov. 10:27)? *The fear of the Lord prolongs days* — [PAGE 22] this refers to the First Temple, which stood for four hundred and ten years, and yet in which served only eighteen high priests. *But the years of the wicked shall be shortened* — this refers to the Second Temple, which stood for four hundred and twenty years, and in which more than three hundred high priests served. Subtract from the total the forty years during which Simeon the Righteous served, as well as the eighty years in which Yohanan the High Priest served, the ten in which Ishmael b. Phabi served — and some say eleven that R. Eleazar b. Harsom served. Then go and calculate: each one scarcely lived out his year!" (*Yoma* 9a) "For they were evil and after one year you wouldn't find them there any longer." (Rashi *Yoma* 8b s.v. *makhlifin otah*) "The priests of the Second Temple were appointed based on money which they gave the High Priest of the House of the Hasmoneans." (Rashi 8b s.v. *mitokh shenotnin*) [See also in the *Tosaphot* where they comment on Rashi, "but it is not clear that they were High Priests." There is no room here to go on further.] And in the *Yerushalmi* they say that they would kill each other with witchcraft — see there and in the Meiri at the beginning of *Yoma*.

How perfect is this description by Rashi in Song of Songs (6:12) on the verse, *without my knowing it, my soul set me among the chariots of a princely people*. Rashi writes, "the assembly of Israel complains *without my knowing it*, to guard against sin lest in my glory and my greatness, I stumble into unfounded hatred and dissension as that which arose in the House of the Hasmoneans, namely Horkenos and Aristobolus to the point that the Roman kingdom entered and took from them the kingship and made him a servant such that

my soul set me to be the chariots so that the generous nations of the world could ride upon," to there his wording. Aristobol was the first to deviate from the priesthood and grab the reins of government and develop corrupt ways as if he were killing his mother, and from his hands came the evil which destroyed the House of Israel.

An even more detailed description of the behavior of the High Priests of those days we find in the *Tosefta of Menahot* (13:4 actually found in 13:21) and in *Pesachim* 57b, where it teaches: "Woe is me because of the House of Boethus. Woe is me because of their staves [they would whip and lash people, *minkhat bikkurim*] Woe is me because of the House of Qados. Woe is me because of their pen [they wrote an evil letter, *minkhat bikkurim*] Woe is me because of the House of Elchanan. Woe is me because of their whispering [they gave evil advice, *minkhat bikkurim*] Woe is me because of the House of Elisha. Woe is me because of their animals roasted in their entirety (this does not appear in *Pesachim* or in the *Menahot Tosefta*) [In another version from power, a hidden light] Woe is me because of the House of Ishmael ben Phiabi. For they are High Priests, and their sons, treasurers, and their sons-in-law, supervisors, and their servants come and beat us with staves." See in Rashi *Pesachim*.

The situation got so bad that there came a point at which High Priests were appointed who were unable even to read the *Tanakh*, as it is taught in *Yoma* 18b: "if he was used to reading [Scriptures], he read. And if not, they read for him. And what do they read for him? In Job, Ezra, and Chronicles. Zekhariah b. Qebutal says, 'many times I read for him in the book of Daniel'."

They also did not know the laws of uncleanness and cleanness as we find in Haggai the prophet who asked the priests a question of Torah and they did not know how to reply (see Haggai 2 and *Pesachim* 16 and 17).

Now, the priests and the Levites ordinarily did try to separate themselves from getting involved with matters related to the kingdom, [PAGE 23] but not, God forbid, because their involvement in political matters might cause damage to the community, but rather because it is as important as breathing itself that they should remain separate and apart from the eyes of the world in order to make themselves holy and to sanctify the Holy of Holies. Also, so they may cast off from their neck the massive responsibility which people have requested so that they might serve in the work of the priesthood — to serve God and fulfill the obligation established by the people. On account of that, they have been separated from the ways of the world and they are called in the name of the warrior of God as it is said, *bless, Lord, his substance (warrior servant)* (Deut. 33:11). But his task is one of glory and honor, involving the spiritual behavior of the state: "They were set apart to worship the Lord, to serve Him, and to teach His upright ways and His righteous judgments," which were written in the Torah which He gave to His people Israel in holiness, so that it may enlighten the path and they may follow its ways in their matters of state so that it will be well and good for them and for the people. (See Rambam's *Hilkhot Shmitah v'Yovel* 13:12-13.)

Similar to this, the Ramban writes on the Torah (Genesis 49:10) in his explanation of the fate of the Hasmoneans, "who were saints of the Most High, without whom the learning of Torah and the observance of Commandments would have been forgotten in Israel, and despite this, they suffered such great punishment. It is also possible that, [in addition to the Hasmoneans having sinned for assuming royalty when they were not of the tribe of Judah], they sinned in ruling on account of their being priests, who have been commanded: *Guard your priesthood in everything that pertaineth to the altar, and to within the veil; and ye shall serve; I give you the priesthood as a service of gift.* (Num. 18:7). Thus it was not for them to rule, but only to perform the service of God." Which is to say, as we were reminded above, given their great holiness, they did not need to accept upon themselves the yoke of political

leadership, but only their strong attachment to God and their separation from the natural ways of life. Since our people live a life of holiness — separate from the world — they require the presence of the sacred ritual leadership to exemplify this separateness. In accordance with that, they continued the assurance of a special Divine Providence for the entire community to leave them (untouched) by all their enemies around them. They also blessed all the acts of the people with an internal authority — for this, they brought together the priests and the rest of the Levites. In their designated task, they brought an added advantage to their people, more so than anything they could have received from an external worldly source. Thus the Ramban reasons that while the Hasmoneans did much good in seizing political leadership, this did not rectify the damage they caused by abandoning the state of absolute devotion to the Temple service which is the essence of the priesthood. This great commandment caused them to transgress and stray from doing that which was required of them: serve God. We could go on at length.

See also in the Ramban that he explains prior to this with a decided reason (as opposed to a possible reason) for the matter of the punishment of the Hasmoneans. It was on account of the following transgression: "they ruled even though they were not of the seed of Judah and the house of David, and thus they completely removed 'the sceptre' and 'the lawgiver' from Judah. And their punishment was measure for measure, as the Holy One, blessed be He, caused their slaves to rule over them, and it is they who destroyed them." See there. This reason pertains to the time when the king was selected from the house of David. Therefore, we find that before it was determined that the king would come from the house of David, the political rule of the state could be done by the priests like Eli, the judge. Thus, only if there was a king appointed could you appoint someone else. It was permitted to appoint an advisory council to help with political matters of state [PAGE 24] from any tribe. In place of a king, they stood as advisors for matters which involved the kingdom and as a general authority. See also regarding the justice of the priest, our teacher the Gaon R.

Avraham Yitzhak ha-Kohen Kook, of blessed memory 144 22 regarding the topic of the Hasmoneans. There is more on this matter but no room here to go on.

A summation of this issue!

The judgments of the Torah of Moses wrap around the Torah of both the spiritual and political behavior of the people like a scarlet thread. When they are brought together, they double their power and give added meaning to one another for the essence of the life of the nation. Contained in the Torah is the vital force, the life-blood for the soul of the people and the life of the state so its rule may be continued to be established! May its spring never dry up nor its branches ever be cut off!

Political authority must be stamped with the spirit of Torah. Political life needs to be awakened in the root of roots of the life of Torah. For the fundamental foundation of the state is based first and foremost on the marital union of the state and the Torah. It is the state's soul and through Torah, it will maintain itself.

The sages of Torah have always persisted in ordinances for the general welfare and have almost always used the Torah as a compass before the people in order to direct their words in political matters so that they would not stray from the path of the written, traditional, binding, and unifying Torah which should never be cut loose and is as inseparable from the people/state as a flame to a burning ember. Initially, they used a decided, objective opinion in appointing kings, patriarchs, and head of the Diaspora. During the passage of time, they found that according to *halakha*, they were unable to continue their practices. They took an interest in expressing knowledge of Torah in creating governing councils of the kingdom, and according to their word, things were decided and established.

The concept of using the law of Torah requires us to use the broadest available political terms. It will serve as a candle for the legs of the state at every dark corner to which it turns. The authority of the state must look to the Torah as a guide which it can use as a central point in the shapeless abyss into which it travels.

By following this holy path, may we merit that the spirit of God will hover on all our paths and may God make pleasant all our deeds and grace us with an understanding towards one another and towards those outside to the glory and splendor of the entire people.

Volume Three, Chapter One, Section One: POLITICAL LIFE

Introduction and Analysis

In this first section of the chapter, Waldenberg begins by tracing the inception of political relations. He claims that when God made two human beings, politics began. Human beings are political by nature which is a natural part of God's creation. Since God endowed humans with the ability to choose, they are forever in a mode of working with their fellow humans in social-political relations.

Rambam discusses, at length, the notion that man is political by nature. Waldenberg cites the *Guide to the Perplexed*, where Rambam discusses this idea. According to Rambam, man's nature is to be political and God endowed humans with the knowledge and abilities to be able to handle themselves in a social environment. Although the evil inherent in mankind did cause God to consider destroying the creation, God realized that an easy solution to guarantee an ordered world lay in giving mankind a ruler who could administer law and ethics. That ruler would be in the form of a king.

Given man's inherent desire to be political, the potential for evil seems to increase. Therefore, one might erroneously think that if man were living alone, he would be free from sin and could spend all his time worshipping God. Not so, according to the Sages. Waldenberg draws on Hillel's words: "Do not separate yourself from the community." This advice serves as a guide for the modern sages who wanted to draw on all to participate in the creation of the modern government (as long as they were interested in Torah). By drawing into the realm of government, the opportunity to fulfill the words of Torah presents itself. More importantly, participation in the general community is for the benefit of everyone. Taxation alone requires people to commit themselves to the community. So too, in times of distress, the community's distress is also the individual's distress.

Waldenberg draws on an interpretation provided in R. Yitzhak Arama's *Akeidat Yitzhak*. Tradition teaches that man lives on three planes. 1) He relates exclusively to himself, 2) he relates to his immediate family, 3) he relates to society at large. In each situation, man is obligated to live by the words of Torah and act in a responsible way. If he neglects his community and shuns the Torah, he shall be reproached. The Torah, the Rambam explains, is the foundation of foundation stones which can guide the community. It contains matters of the present and the eternal together. In fulfilling the words of Torah, Israel stands to serve their role as *a light unto the nations*. Reiterating the idea, expressed elsewhere, that foreign legal systems must be abandoned by the Jewish

community, Waldenberg harkens to Sinai by concluding his section with the words, "Happy is the man of Israel who knows how to find the path of gold — the holy way — to make a connection to and to hold in all the recesses of his soul the soul of the nation in both intent and action, to participate with the body politic in forming the character of a state that joins the political aspects of living with the flaming torch of Torah from Sinai."

Translation of Volume Three, Chapter One, Section One: POLITICAL LIFE

*And God saw all that he had done.
Behold, it was very good.. (Genesis 1:31)*

Behold, it was good... This is the kingdom of heaven, very... This is the earthly kingdom. Is then the earthly kingdom very good? How strange! [It earns that title] because it exacts justice for men, [hence it is written] I, even I, have made the earth, and created man upon it. (Isa. 45:12) (Bereshit Rabbah 9:13, Yalkut Shimoni at the end of 'A')

A) On the day that the Lord God made the earth and the heavens, and created man on the earth, the "book of the generations of man" became the fundamental rule of Creation. The development of humankind became the basis for the transformation of human society for the general good.

The history of humankind grabs a leading place in the story of the generations because it is for this creation alone that God chooses to place His crown of glory, as it is written, *So God created mankind in His own image, in the image of God He created him; male and female He created them. (Gen. 1:27)* God charged man to serve as the leader and the ruler on arranging and ordering the world, forcing all of creation to surrender beneath his feet; thus, he ruled all of the creatures of the world and the treasures of the earth. By his decision were they to have their tasks affixed as it says in the blessing of the creation of humankind immediately after the creation, *and God blessed them, and God said to them, be fruitful, and multiply, replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the birds of the air, and over every living thing that moves on the earth. (Gen. 1:28)* This matter was given a good and fair expression in King David's poetic language, peace unto him, the anointed of the God of Jacob, who set words to music upon looking at the grandeur of creation and seeing the direction in which the creation was

headed: *What is man that thou art mindful of him? and the son of man, that thou visitest him? Yet thou hast made him a little lower than the angels, and thou dost crown him with glory and honour. Thou makest him to have dominion over the works of thy hands; thou hast put all things under his feet: all sheep, and oxen, and also the beasts of the field; the birds of the sky, and the fish of the sea; whatever passes through the paths of the seas.* (Psalm 8:5-9)

B) In order to fulfill this role, man had to be totally separated from the rest of creation. God united in his being a variety of different and contradictory strengths. God placed in his hand the power to choose, man was endowed with a variety of powers allowing him to be free. So that he could lead by his nature and by his intelligence and acquire goodness and completeness. God impressed upon him his special nature as a political animal. Great is man! He is inclined to human society, whose end is a truly exalted one.

These matters appear in a concentrated and summarized way in Rambam's *Guide to the Perplexed*. He writes: [PAGE 26] "It has been explained with utmost clarity that man is political by nature and that it is his nature to live in society. He is not like the other animals for which society is not a necessity. Because of the manifold composition of this species — for, as you know, it is the last one to have been composed — there are many differences between the individuals belonging to it, so that you can hardly find two individuals who are in any accord with respect to one of the species of moral habits, except in a way similar to that in which their visible forms may be in accord with one another. The cause of this is the difference of the mixtures (temperaments), owing to which the various kinds of matter differ, and also the accidents consequent to the form in question. For every natural form has certain accidents proper and consequent to it, those accidents being other than those that are consequent to matter. Nothing like this great difference between the various individuals is found among the other species of animals, in which the difference between individuals belonging to the same species is small, man being in this respect an exception. For you may

find among us two individuals who seem, with regard to every moral habit, to belong to two different species. Thus you may find in an individual cruelty that reaches a point at which he kills the youngest of his sons in great anger, whereas another individual is full of pity at the killing of a bug or any other insect, his soul being too tender for this. The same holds good for most accidents.

Now as the nature of the human species requires that there be those differences among the individuals belonging to it and as in addition society is a necessity for this nature, it is by no means possible that his society should be perfected except — and this is necessarily so — through a ruler who gauges the actions of the individuals, perfecting that which is deficient and reducing that which is excessive, and who prescribes actions and moral habits that all of them must always practice in the same way, so that the natural diversity is hidden through the multiple points of conventional accord and so that the community becomes well ordered.

Therefore, I say that the Law, although it is not natural, enters into what is natural. It is a part of the wisdom of the deity with regard to the permanence of this species of which He has willed the existence, that He put it into its nature that individuals belonging to it should have the faculty of ruling. Among them there is the one to whom the regimen mentioned has been revealed by prophecy directly; he is the prophet or the bringer of the *nomos*. Among them there are also those who have the faculty to compel people to accomplish, observe, and actualize that which has been established by those two. They are a sovereign who adopts the *nomos* in question, and someone claiming to be a prophet who adopts the Law of the prophet — either the whole of it or a portion."¹

These words of Rambam correspond to what our Sages taught in *Avot* (3:2), "R. Hananiah, Prefect of the Priests, says, 'Pray for the welfare of the government. For if it were

¹Moses Maimonides, *The Guide to the Perplexed* by Moses Maimonides, translated by Shlomo Pines (Chicago: University of Chicago, 1963), 381-2.

not for fear of it, one man would swallow his fellow alive.” Which is to say that it teaches that there is a great difference in the natures of different people, “for the mind of each is different from that of the other.” (*Berakhot* 58a) For thus our Sages of blessed memory explained the verse *and dost make men like the fishes of the sea, like the creeping things, that have no ruler over them*’ (*Habakkuk* 1:14). “Why are human beings compared to the fish of the sea?” — just as with the fish of the sea, whoever is bigger than his fellow swallows his fellow, so in the case of human beings, were it not for fear of the government, whoever is bigger than his fellow would swallow his fellow. R. Hananiah, Prefect of the Priests, says, “Pray for the welfare of the government.” For if it were not for fear of it, one man would swallow his fellow alive.”

The Meiri well explains this passage from *Pirkei Avot*: this command comes not just to warn us to respect the glory of the kingdom and to fear it but also to require that we increase our prayers for welfare for the kingdom because the authority of mankind is divided into two parts — a) the toraitic authority, the dominion of the Sages [PAGE 27] b) the political authority, the dominion of the rulers and the judges. When the authority of the sages is missing, that of the political authority is not, but when the political authority is lacking, then both are missing — see there.

See also in the book *Sha'arei Tzion* of the Gaon Ben Zion, of blessed memory, the head of the *beit din* of Bialistock in his essay regarding the honor for a king in the beginning of his book which explains this very issue from the midrash which we included at the beginning of this section: “very... This is the earthly kingdom.” He includes this because at the beginning of the creation, the Holy One, may His name be blessed, governed and ruled the world. Therefore, He created from the outset all which was to fill the earth: beasts, animals, birds, and all the creatures of the sea. Afterwards, He then created mankind to rule and govern all the creatures, as related in Scripture, *and have dominion over the fish of the sea, and over the birds of the air, and over every living thing that moves on the earth.* (Gen

1:28) For the Holy One, may His name be blessed, saw that man too required government, for there would come those among the creation who would destroy his neighbor and trample upon his friend. Thus the whole intention of creation and civilization would be negated. For each one would do as his heart desires, which for some people means evil from the time they are born and they are worse than animals in a forest. They use their intelligence to commit [ref: to Isa 1:5] all the abominations. If so, all of creation would be destroyed, and mankind’s world would be worse than if they had never been created. So, the Holy One, may His name be blessed, saw at the beginning of the creation that He would have to create a kingship in the land with a ruler over all the people so as to incline them to do that which was good and follow the laws. Someone who would stop them if they began to pursue evil. So He gave him a whip and a rein in order to accomplish his task and so that he could rule all the people of the kingdom in peace and harmony. All the people acted like one body and though like many limbs attached to the same body. Everyone helped each other and aided their friends. This was how the settlement of the creation was established, which is why it is written, *And God saw all that he had done. Behold, it was very good.* (Genesis 1:31) which comes to be interpreted as referring to the earthly kingdom. It was based on the earthly kingdom that all that was created was considered to be very good. It is not that without the earthly kingdom, it would not have been good, for were it so, then, God forbid, the whole creation would have been in vain. See there in the full discussion.

We have not entered into an explanation here as to which would be preferable: A kingdom with a king or a kingdom administered by ministers — see what we have already discussed in *Hilkhot Medinah*, 1:3. But it is understood that the same direction which exists in a monarchy would also exist in a government of ministers.

C) Moving from the loftiness of this last subject of the working together of man and his fellow man, we explore further by looking into what R. Aaron Ha-Levi wrote in his

book, *Sefer haHinnukh*, regarding the root of the commandment forbidding the utterance of a curse against a sovereign leader, "[at the root of the precept lies the reason that] it is impossible for a settle community of human beings [to exist and function] without making one among them head over the others, to obey his order and carry out his decrees: for in their views people are divided from one another, and all will never agree on any one view in order to do any one particular thing. The result will be an idle standstill and the death of all activities. For this reason it is necessary to accept the view of one among them, be it good or bad, that they may successfully engage in the business of the world. Sometimes great benefit will result from his counsel, and sometimes the reverse; but all this is better than quarreling. [PAGE 28] which causes a complete idle standstill. Now, since the one appointed as head is the cause of the benefit we have mentioned, whether he is the chief to guide us in the ways of faith or the chief in royal government, to safeguard a man from his neighbor who is stronger than he — (it is a fitting and worthy thing that we should not treat his honor lightly, nor curse him, even when not in his presence, and all the more certainly not before witnesses — so that we should not come, as a result to quarrel or differ with him. For a bad habit to which a man accustoms himself privately leads ultimately to action, and as regards quarreling or differing with him, we have already written of the great loss that would ensue in its wake."

D) Not only is man's social aspect equal to his individual aspect, but the Kuzari of R. Yehuda Ha-Levi, of blessed memory, gives preference to the duty of the individual toward the community — over the fulfillment of his individual needs. In his explanation to the Kuzari, the community is added to because of the individual. "He, however, who joins the majority spends little, yet remains in safety, because one replaces the defects of the other. The city is in the best possible condition, all its inhabitants enjoying its prosperity with but little expenditure, which all share alike. If the individual, however, neglects this 'portion of

the whole' which is the basis of the welfare of the commonwealth of which he forms a part, in the belief that he does better in spending it on himself, sins against the commonwealth, and more against himself. For the relation of the individual is as the relation of the single limb to the body: should the arm, in case bleeding is required, refuse its blood, the whole body, the arm included, would suffer. It is, however, the duty of the individual to bear hardships, or even death, for the sake of the welfare of the commonwealth. He must particularly be careful to contribute his 'portion of the whole,' without fail."²

In another place, when the Kuzari asked the Rabbi to tell him about the pious ones, the Rabbi answered: "A pious man is, so to speak, the guardian of his country, who gives to its inhabitants provisions and all they need. He is so just that he wrongs no one, nor does he grant anyone more than his due."

When the Kuzari realized that his question was not answered accordingly, because he asked about a pious man and not a prince, he asked the question again and the Rabbi responded: "The pious man is nothing but a prince who is obeyed by his senses, and by his mental as well as his physical faculties, which he governs corporeally, as it is written, *He that ruleth his spirit [is better] than he that taketh a city* (Prov. 16:32). He is fit to rule, because if he were the prince of a country he would be just as he is to his body and soul. He subdues his passions, keeping them in bonds, but giving them their share in order to satisfy them as regards food, drink, cleanliness, etc. He further subdues the desire for power, but allows them as much expansion as avails them for the discussion of scientific or mundane views, as well as to warn the evil-minded. He allows the senses their share according as he requires them for the use of hands, feet, and tongue, as necessity or desire arise. The same is the case with hearing, seeing, and the kindred sensations which succeed them; imagination, conception, thought, memory, and will power, which commands all these; but is, in its turn,

²Yehudah Ha-Levi, *The Kuzari: An Argument for the Faith of Israel*, translated by Hartwig Hirschfeld (Schocken Books, 1964), 156-157. Kuzari 3:19.

subservient to the will of intellect. He does not allow any of these limbs [PAGE 29] (†) faculties to go beyond their special task or encroach upon another. If he, then, has satisfied each of them (giving to the vital organs the necessary amount of rest and sleep, and to the physical ones waking, movements, and worldly occupation), he calls upon his community as a respected prince calls his disciplined army, to assist him in reaching the higher or divine degree which is to be found above the degree of the intellect. He arranges his community in the same manner as Moses arranged his people around Mount Sinai. He orders his will power (to receive every command issued by him obediently and to carry it out forthwith).¹⁰⁷

E) Regarding this issue of the superiority of the general community over that of the individual, we can find a proof-text in the words of our Sages, of blessed memory, who wrote in *Baba Kamma* 50b, "There was a case in which someone was removing stones from his property into the public domain, and a certain righteous man came upon him. He said to him, 'Empty head! How come you are removing stones from a domain that is not yours to a domain that is yours?' The others ridiculed him. Some time later the man had to sell his field, and he was walking in that very public domain and stumbled on those very stones. He said, 'Well did that righteous man speak to me, when he said "How come you are removing stones from a domain that is not yours to a domain that is yours?"' In the eyes of righteous one, it is known and revealed that from the outset, it is better to place the needs of the community ahead of those of the individual. For it takes a discerning eye to be able to see the ultimate evil results which can result from selfish efforts by those who place the needs of the individual above those of the community. For in the end, the one who sins against the commonwealth, sins even more against himself."

F) Regarding this, there is the declaration from the *tanna* in *Pirkei Avot* 2:4 —

¹⁰⁷Ibid., 137-138, Kuzari 3:3-5

"Hillel used to say: do not separate yourself from the community." See in the commentaries to the *mishnah* how many wonderful interpretations there are for this line. And all of them are the words of the Living God. From our perspective, we will examine the glorious work which is brought in the *Midrash Shmuel*. R. Shem Tov ibn Shem Tov, of blessed memory, explains that a person who lives an isolated life and does not participate in communal affairs seems to be living a divine life and performing the will of God. For one who separates from the community can be assured of avoiding sin and doing anything evil. Living off alone, there is only one thing he can do with his days: worship God. Therefore, there are many who believe this act of separation is a holy act. For all the evil which comes upon a man only occurs when he participates in communal life. Notice that when the woman was created, Satan was created as well. And behold that when Cain and Abel were born, jealousy was born with them. For the one killed the other unwilling was Cain to share the world with Abel. And it was when Adam began to wander the earth, that one group began to mix with the other and thus came sexual desire, jealousy, and ambition. Therefore, it seems that to many that separation is important, good, and logical. But the *tanna* said that separation is not a good thing for it is not possible for man to be alone and separate, for man is political by nature, as it says, *it is not good for man to be alone*. For man's needs are many and he is unable to fill his needs alone without a political community. So too, for the health of one another, man needs to befriend each other. Cities of untamed savages would be born if people did not teach one another. The sage learns from all people. Therefore, wisdom requires participation in communal life for the completeness of body and soul. One who separates will not be able to transgress, but so too he will be unable to perform the commandments. A non-social person cannot be described to us as righteous and not as evil; [PAGE 30] he has more in common with a wild beast than with a human. By drawing away from the community, one becomes more detached and separated, bring darkness on himself and is at an extreme disadvantage like one who is weak-minded and sits alone. Therefore,

we are warned by this sage that it is not appropriate to separate from the community. Such is the case for those who follow the path of God, but for those who are evil and transgressors. David said, *I have hated the congregation of evil doers* (Psalm 26:5) and Jeremiah said, *(Oh that I were in the wilderness, (that I might leave my people, an assembly of treacherous men.)* (Jer. 9:1). Joining together with the community is obligatory for prayer, for he does not despise their prayer, *behold, (God is mighty and despises not any* (Job 36:5). To bring about righteousness, there needs to be people around to do and receive the acts of goodness. As it says in scripture, *the nobles of the people are gathered together* (Psalm 47:10) which they could not do if they separated themselves. This warning comes to teach us that a community is necessary for assessing and collecting property and crop taxes among the people — so much the more so is the community necessary for the worship of God, as it is written, *I will be with him in trouble* (Psalm 91:15), *I will go down with thee into Egypt* (Gen 46:4). For all these citations and reasons, Hillel said, “do not separate yourself from the community.” To there his wording.

See also in the interpretation of the righteous R. Yosef Yabetz, of blessed memory, on *Pirkei Avot* who writes in a parallel fashion that “this warning forbids one from evading his responsibility to join with the community in the payment of taxes, so let everyone do their share.”

Do not be surprised by the desire of this commentary to exalt the heavens regarding the obligation of participation in the community. For greater than these do we find in the Ran on the Rif, tractate *Moed Katan* where he comments on what he finds in tractate *Smakhot* 2:10 — We do not occupy ourselves with [the corpses of] those who separated themselves from the community in any respect. Their brothers and relatives clothe themselves in white, wrap themselves in white and eat and drink and rejoice because an enemy of the All-present perished, as it is stated, *Do not I hate them, O Lord that hate Thee? And do not I strive with those that rise up against Thee? I hate them with utmost hatred; I*

count them mine enemies. For the intension here is “to forbid people from pursuing others to make their lives more miserable with property and crop taxes.” See also in the *Chidushei haRan* on *Moed Katan*.

G) Now, one may be surprised by the interpretation of the Ran which calls for a great punishment for one who separates himself from the ways of the public and also refuses to carry the burden of the community, those who refuse to participate in the community are likened to those who hate God.

Truly though, we find something similar to this in *Taanit* 11a. “Our Rabbis have taught. When Israel is in trouble and one of them separates himself from the community, then the two ministering angels who accompany every man come and place their hands upon his head and say, “so-and-so who separated himself from the community shall not behold the consolation of the community.” Another [*Baraita*] taught: when the community is in trouble, let not a man say, ‘I will go to my house and I will eat and drink and all will be well with me.’ For of him does so Scripture say, *and behold joy and gladness, slaying oxen and killing sheep, eating flesh and drinking wine. let us eat and drink, for tomorrow we shall die.* (Isa 22:13). What follows after this verse? *And the Lord of Hosts revealed Himself in mine ears; surely this iniquity shall not be expiated by you till ye die.* (Isa. 56:12). But rather a man should share in the distress of the community, for so we find that Moses, our teacher, shared in the distress of the community, as it is said, *But Moses’ hands were heavy; and they took a stone, and put it under him, and he sat thereon* (Ex. 17:12). Did not then Moses have a bolster or a cushion to sit on? This is then what Moses meant [to convey], ‘As Israel are in distress I too will share with them. He who shares in the distress of the community [PAGE 31] will merit to behold its consolation.” [We will stop here with this matter, but for the *halakha* see in *Orach Hayim* 574:5.]

We have learned from this passage, first of all, the one who separates himself from

his community commits a serious transgression. One who does this equates himself with one who commits a transgression for which there is no repentance except death. There are some sins for which only death atones. (See *Yoma* 85, 86 and *Shevuot* 13a) Secondly, the participation in the distress of the community needs to be of a kind which does not bring a substantial benefit to the public. It may be compared to how Moses did not put cushions and pillows under him. And it is similar to the prohibition of not having sexual relations during years of famine. Even though Joseph was not suffering from the famine, he still refrained from sexual relations to tie himself to the suffering of his brothers. So it is determined in *Orach Hayim* 574 4. Which is to say that the commandment to share in the communal distress is also for sharing in the mutual testing, which is a test of the spirit and the soul, which returns us to the image of the limb not separating from the body. The community's distress is also the individual's distress.⁴

I will mention again the wording of the one who separates himself, which was mentioned above, "the one who separates himself, even though he has not committed a transgression, is unable to perform the communal commandments." We find that Rambam writes using almost this very language (*Hilkhot Teshuvah* 3:11) the one who separates from the public, even though he has committed no transgression, nonetheless separates himself from the whole of Israel and cannot perform the communal commandments. He does not enter into their distress, so too he does not share in their fasting. Rather he goes about his life in his own way, as one of the many nations of the world, yet he is not one of them either. He has no share in the world to come. See there.

See in my book, *Hilkhot Medinah* 1:5:1 where I gave a lengthy explanation of the laws regarding the one who separates himself from the community based on the legal codes.

⁴[See in the Maharsha in the first section where he continues in the discussion from *Taanit*, "Perhaps a man will say, 'who is there to testify against me?' The very stones of his house and its beams testify against him..." He also discusses the one who will not share in the communal distress out of modesty.]

We shall continue on this matter merely in terms of how it effects the community and the state.

H) These are the issues of which Rambam and Yehuda Ha-Levi discussed above and which we brought in letters B and D. Since we mentioned them they have a source in the words of our sages, of blessed memory. In the *Akedat Yitzhak*, a book by R. Yitzhak Arama, of blessed memory, he returns to the teachings of our sages and uses their language in a logical format to discuss this issue in chapter 43.¹

"Man lives on three planes. 1) He relates exclusively to himself, 2) he relates to his immediate family, 3) he relates to society at large.

Whereas at first glance one may think that as far as man's relations with himself are concerned there could be no question of him being unjust or immoral, this in fact is not so. True, the Talmud acknowledges that he who inflicts injury upon himself is not held accountable for a misdemeanor. However, this pertains only to outward manifestations of man's conduct. Developing his intellectual capacities without simultaneously developing his moral capacities, puts man in a position where by becoming a split personality he can commit injustice and immorality against himself.

[PAGE 32] Concerning man's relations with his family, the case could be made that inasmuch as man's wife is viewed as part of his body, and his children and his slaves are his property, that he does not really need to restrict his impulses in his conduct toward them and would therefore be incapable of committing injustice against them. Nonetheless such relationships are tempered by considerations of moral obligations over and beyond mere legal definitions. Our appeal to God on New Year's day to treat us either as children of a father or as slaves of a master bear this out.

¹The translation of the *Akedat Yitzhak* comes from Eliyahu Munk's "condensed" translation which gives the essence of the wording.

It is on the third plane — man's relationship with society at large — that man's duty to act morally is most evident. Concerning all his business dealings, man needs to observe justice and fairness, as well as ensure that no fellow human being suffer physical harm on his account." Included in these matters of political life are the tort laws.

It is most fitting for a man that they give him the chance to survive at the peak of his intellectual potential. Study leads to ultimate perfection according to different weightiness. The path for study seeks to close you and drive you. Without God's Torah, which is the modern compromisor and great mediator, one can make reality and potential meet. In not probing deeper into these behaviors, in the end, without a doubt, you will have turned the order upside down. In preferring that which you seek, you'll confront objectives like a closed book and you will remain in your foolish abbreviated life. Were it not for the divine Torah and all of the many great interpretations to draw one closer to his own wholeness, one's world would be confused and turned upside down without any way to enter what would be a sealed book, unable to cross into it. He would remain outside and without intelligence. Similar to what is said to this, "he looked and became demented" (*Hagigah* 14b) He saw divine reality and was maimed. The world stood like a wall. But when you study according to the natural order, start with what comes first in nature and then everything else will open in its time.

1) This idea of naturally ordering the world [PAGE 33] is used in essence in order to encourage us to be righteous now so later we may enter Paradise and draw near to the divine knowledge. The concept appears in the Kuzari, as Yehuda Ha-Levi speaks of doing justice, loving mercy and similar matters, "These are the rational laws, being the basis and preamble of the divine law, preceding it in character and time, and being indispensable in the administration of every human society. Even a gang of robbers must have a kind of justice among them if their confederacy is to last. When Israel's disloyalty had come to such a pass

that they disregarded rational and social principles (which are as absolutely necessary for a society as are the natural functions of eating, drinking, exercise, rest, sleeping, and waking for the individual), but held fast to the sacrificial worship and other divine laws. He was satisfied with even less. It was told to them: "You might observe those laws which rule the smallest and meanest community, such as refer to justice, good actions, and recognition of God's bounty. For the divine law cannot become complete till the social and rational laws are perfected. The rational law demands justice and recognition of God's bounty." (*Kuzari* 2:48)

1) For just as "it (the Torah) is a part of the wisdom of the deity with regard to the permanence of this species of which He has willed the existence, that He put it into its nature that individuals belonging to it should have the faculty of ruling," (*Guide to the Perplexed* 2:40) so too was it the wisdom of the Blessed One to give as an inheritance the Divine Torah to the children of Israel, a people near to Him, so that they would have a comprehensive knowledge of all matters of life — combining matters of the present and the eternal together. Thus, they could arrive at the longed-for purpose of being a light unto the nations and to reach as a means to an end the conclusion: "the foundation of all foundations and the pillar of wisdom is to know that there is a Primary Being who brought into being all existence. All the beings of the heavens, the earth, and what is between them came into existence only from the truth of His being." (*Hilkhot Yesodei HaTorah* 1:1) This is the great teaching which the Holy One, blessed be He, gave to this world so that they might inherit the world-to-come. "Accordingly if you find a Law the whole end of which and the whole purpose of the chief thereof, who determined the actions required by it, are directed exclusively toward the ordering of the city and of its circumstances and the abolition in it of injustice and oppression, and if in that Law attention is not at all directed toward speculative matters, no heed is given to the perfecting of the rational faculty, and no regard is accorded to opinions

being correct or faulty — the whole purpose of that Law being, on the contrary, the arrangement, in whatever way this may be brought about, of the circumstances of people in their relations with one another and provision for their obtaining, in accordance with the opinion of that chief, a certain something deemed to be happiness — you must know that Law is *nomos* and that the man who laid it down belongs, as we have mentioned, to the third class, I mean to say to those who are perfect only in their imaginative faculty. If, on the other hand, you find a Law all of whose ordinances are due to attention being paid, as was stated before, to the soundness of the circumstances pertaining to the body and also to the soundness of belief — a Law that takes pains to inculcate correct opinions with regard to God, may He be exalted in the first place, and with regard to the angels, and that desires to make man wise, to give him understanding, and to awaken his attention, so that he should know the whole of that which exists in its true form — you must know that this guidance comes from Him, may He be exalted, and that this Law is divine.” (*Guide to the Perplexed* 2.40) “A religion of divine origin arises suddenly. It is bidden to arise, and it is there, like the creation of the world.” (*Kuzari* 1.81)

[PAGE 34] K) Happy will be those who follow the customs of the Israelite political system which will be chosen to be brought into the courtyard and draw near to the House of God. Those who do will be satisfied from his goodness, to aspire to follow the paths of Torah from the bottom of the essential Israelite tradition which is carved on the stones of the political spirit. Doing so entails abandoning the foreign ways of Egypt, Rome, Greece, and others. For those who follow their ways do not seek a holy path. You shall not defile yourself with the foreign bread of the other peoples. For the Hebrew people are not like all the others. The Hebrew people are from their outset in amazement from the spiritual conditions which are superior since they emanate from the Father of Generations who is the Giver of Torah. In no way can he be freed from them, as it says from his holy prophet, *and*

that which comes into your mind shall never come about, that you say: We will be like the nations, like the families of the countries, to serve wood and stone. As I live, says the Lord God, surely with a mighty hand, and with a stretched out arm, and with anger poured out will I be king over you. (Ezekiel 20.32-33)

Our teacher, the Gaon R. Avraham Yitzhak ha-Kohen Kook, of blessed memory, in his great usage of language which is direct and to-the-point on matters of Judaism and its history, was able to express ideas which should be drawn in and understood as relate to our issue. He says the assembly of Israel is not a normal nation, rather, it is the ideal essence of humankind. It appears among the nations of the world in a similar manner by being called “a nation,” just as all the classifications of people are called. It has always appeared as a nation throughout the ages and in various places of the world. Its many appearances have been in revealed in different periods and ways. It reveals itself by itself and at other times, other segments of humanity by it. Other people have done good because of the assembly of Israel. It always strives to climb to the higher level of spirit, so it does not scatter its strength any further in appearing time after time in place after place. Unless everyone can discover it in a clear place and distinguish in a clear manner thus “Nations shall see your victory, and every king your majesty, And you shall be called by a new name which the Lord Himself shall bestow.” (Isa. 62.2) So too does the penetrating *aggadah* say: “in the future all the prophets will say together the song in one voice, *the voice of thy watchmen is heard: they lift up the voice; together they shall sing: for they shall see eye to eye, the Lord returning to Tziyon.* (Isa. 52.8) (*Sanhedrin* 91b) For the future, the ideal of ideals is that which is guaranteed for the assembly of Israel which is expected clearly for all of its life as a nation in spirit and in action, given the strength of our position. We are merely the masters of the souls who “ride on the great sea which all of the rivers of the world flow to.” We will not go to do evil on some other field, to find there some other essential waters or providential waters, the ideal sea for us is our future, for thus said Moses, the man of God in his prayer: *O satisfy us in the*

morning with thy steadfast love; that we may rejoice and be glad all our days. Make us glad according to the days wherein thou hast afflicted us, and the years in which we have seen evil. Let thy work appear to thy servants, and thy glory to their children. (Psalm 90 14-16)

Happy is the man of Israel who knows how to find the path of gold — the holy way — to make a connection to and to hold in all the recesses of his soul the soul of the nation in both intent and action, [PAGE 35] to participate with the body-politic in forming the character of a state that joins the political aspects of living with the flaming torch of Torah from Sinai

Ve.

Volume Three, Chapter One, Section Two: THE ROLE OF GOVERNMENT IN POLITICAL LIFE

Introduction and Analysis

The overarching guide for the modern state's government, if it was to operate according to Jewish law alone, would have been the Scriptural verse *And thou shalt do that which is right and good in the sight of the Lord that it may be well with thee, and that thou mayst go in and possess the good land which the Lord swore to thy fathers* (Deut. 6 17-18). For the Rabbis, this verse covers any principle or act which is not included in the Torah since it speaks to the general behavior of the populace. For this verse to serve as the guide for the government, there is an assumption on the part of the Rabbis that those who serve in the government will be God-fearing and able to determine that which is right and good.

For the religious Zionists, Torah stood as the sole source for crafting the government. Searching foreign legal systems for direction, as discussed earlier, was idolatrous. Waldenberg draws upon Josephus (Yosef ben Mattiyahu) to understand early Israelite rule. Josephus names Israelite rule as a theocracy and demonstrates what the religious Zionists of the twentieth century were hoping to re-establish in modern Israel. Combining the efforts of those engaged in politics along with those involved with the religious aspects of the people was the reality Josephus portrays and the dream of Waldenberg and others. Waldenberg draws on Rambam's discussion of governmental rule operating *b'shem shamayim* — for the sake of Heaven. Since God is the ultimate Ruler, man must enforce His will. Waldenberg introduces a vital quote from the Gaon R. Alexander Moshe Ibn Lapidut who emphasizes that religion and the state need each other. They can help each other achieve their respective goals. Most importantly, religion helps infuse morality (ideally) into the government. People unquestionably need a governmental form to help them operate in a social context. So too, those same people need religion to help them determine how to structure their behavior. The association between government and religion, for Lapidut, is as natural as the connection between Heaven and earth.

Waldenberg next brings in the words of the Meiri who explains that Moses was unique among religious leaders by combining knowledge of political behavior along with an imaginative power which enabled him to be wise and just. Considering the history of the Jewish people, Waldenberg concludes that Torah has consistently stood as the source of life for our people. Torah teaches that the kingship and priesthood are both necessary and must co-exist. They

walk best when they walk together, arm-in-arm under the crown of Torah. The king provides the desired structure for government and the priests are the soul of the nation, a spiritual center.

To the secularists who wanted to create a strict separation between religion and government, Waldenberg replies that they misuse Jewish history by pointing to days when the priests were corrupt and abused their power. Those who associate the general institution of the priesthood with the corrupt priests show no understanding of the goodness which can flow from religion and state working together. Returning to the message set out in the beginning of the section, Waldenberg concludes with the notion that the current generation can choose to do that which is right and good in the sight of the Lord, which for the religious Zionists meant infusing the state with religion.

Translation of Volume Three, Chapter One, Section Two: THE ROLE OF GOVERNMENT IN POLITICAL LIFE

A) Scripture states: *You shall diligently keep the commandments of the Lord your God, and His testimonies, and His statutes, which He has commanded thee. And thou shalt do that which is right and good in the sight of the Lord, that it may be well with thee, and that thou mayst go in and possess the good land which the Lord swore to thy fathers.* (Deut. 6:17-18)

The Ramban writes about this verse: "Our Rabbis have a beautiful *midrash* on this verse. They have said: *that which is right and good* refers to a compromise and going beyond the requirement of the letter of the law." The intent of this is as follows: At first he [Moses] stated that you are to keep His statutes and His testimonies which He commanded you, and now he is stating that even where He has not commanded you, give thought, as well, to do what is good and right in His eyes, for He loves the good and the right. Now this is a great principle, for it is impossible to mention in the Torah all aspects of man's conduct with his neighbors and friends, and all his various transactions, and the ordinances of all societies and countries. But since He mentioned many of them — such as, *Thou shalt not go up and down as a talebearer; Thou shalt not take vengeance, nor bear any grudge; neither shalt thou stand idly by the blood of thy neighbor; Thou shalt not curse the deaf; Thou shalt rise up before the hoary head* and the like — he reverted to state in a general way that, in all matters, one should do what is good and right, including compromise and going beyond the requirements of the law. Other examples are the rabbinic ordinances concerning the prerogative of a neighbor, and even what they said [concerning the desirability] that one's youthful reputation be unblemished, and that one's conversation with people be pleasant. Thus [a person must seek to refine his behavior] in every form of activity, until he is worthy of being called *good and upright*."

We have learned from the words of the Ramban that since it is impossible to mention

in the Torah all of the specific behaviors of the people and the state in terms of changing times and surroundings, these verses from the holy Torah come to instill in our minds all of the behaviors and decrees which individuals and the state need so that they can be founded upon a set of principles which are good and upright — to which we have already alluded. We will follow them as the laws of the state only after weighing our decisions so that we will follow laws which are good and upright in the eyes of God.

Similar to what the Ramban writes, the *Magid Mishneh* writes (*Hilkhot Shkhenim* 14:5) regarding the matter of the law of the next-door neighbor: (In this law, we learn that if two people are interested in buying your property, and one of the two potential buyers has property which borders your property, you should sell to that one.) The *Magid Mishneh* says, “our pure Torah gave the general prescription of *you shall be holy* to the measure of man, and the intention is as our Sages explained, ‘sanctify thyself by self-restraint from what is permitted to thee,’ (*Yebamot* 20a) and thereby not be longing for desires (and other material goods) for it says *And thou shalt do that which is right and good* which comes to mean that one should act in good and upright way with other human beings, and it is not necessary to specify exactly every kind of law since the commandments of Torah apply in every time and season and they are obligatory. The measure of man and his behavior alternate according to the time and individual.”

On the one side, man's behaviors alternate depending on his time [PAGE 36] and personality, on the other hand, it is necessary to direct them according to the general commandments of the Torah. Therefore, the government must consist of God-fearing people, for only they can distinguish properly between forms of government, proper and improper behavior to the point that they will follow the path on which the light of our holy Torah dwells and defines the borders — *her ways are ways of pleasantness and all her paths are peace*. For any matter which is hard for them, those who are filled with the spirit of wisdom and knowledge, counsel and might, and a fear of God will turn to Torah. Those who

are able to give their minds to Torah in any matter and serve God for the laws of the state *do that which is good and right in his eyes*.

B) It should not be easy in our eyes to disparage, God forbid, the holiness of state authority, because the matter involves our very lives. The essence of our being is in our chosenness as a great nation with a spiritual insight which God gave us to draw near to him. In giving us a fixed place as our inheritance, in the land of prophecy which is directed toward the gate of Heaven, we are obligated absolutely to know the laws of the God of the land and to equip ourselves with the righteous laws and judgments in our political lives as well. For those (religious) laws go hand-in-glove as the ultimate source of law, since they are the laws and judgments of the Torah of the living God which was given to us at Horev from the mouth of God, by the hand of Moses, his faithful servant. In no way, do we have the power to choose for ourselves a political program which imitates or compares to any other nation's political processes. The only starting point for our political foundation, where the ultimate beginning is his wisdom, is fear of God. For the very emerging environment is one where the spirit of the Jew's fundamental Torah hovers.

The author of *N'tinah Lager* spoke well in his interpretation of *parashat V'zot HaBracha* in explaining the verse, *And he was king in Yeshurun, when the heads of the people and the tribes of Israel were gathered together* (Deut. 33:5) — it is known that the reign of Solomon was like that of Britain — a government divided into three parts. The king was the ruler/governor, those who sat closest to the king were called ‘the House of Lords,’ and the individuals who were elected by the people for a set term were called ‘the House of Delegates (Commons).’ The Torah itself is our inheritance as the children of Jacob, and in no way can we free ourselves from its prescriptions since our kings, ministers, and priests accepted the Torah for themselves, and subsequently for us and our children. So, when it says, *And he was king in Yeshurun*, this means Moses, king of Israel. When it says, *when the*

heads of the people... were gathered — these are the ones who sit closest to the king. When it says, *the tribes of Israel* — this refers to the ones who are selected for a set term by the people of the state. *Moses commanded us a Torah, the inheritance of the congregation of Jacob* (Deut. 33:4). It is necessary to understand this in the context of *And he was king in Yeshurun*... like the lock on a door which bars a gate from end to end.

C) This idea implies that Jewish government flows from a Divine source. Those who rule among the people and are neither above the law nor the source of the law but they have been appointed to protect the law. Yosef ben Mattiyahu (Josephus) [PAGE 37] expresses in his book *Antiquities of the Jews*, also known as *Against Apion*, fighting the war for his Torah and his people, a desire to explain to the non-Jewish world the form of Israelite rule. These are the words which pertain to our matter: "Indeed, every people is different from one another — especially in their behaviors and their laws. At the heart of the matter is as follows: there are some who place governmental rule in the hands of one (monarchy) and then there are others who place the power in a number of key individuals (oligarchy), and they rule for the masses. However, our way of legislating law is not to place power in one of these types of rule but rather in a 'divine government' (theocracy) since God alone can make a state and its form of government holy... do not consider fear of God as relegated to (one) of the good stages, but that the rest of the stages are for worshiping God... and God did not omit anything for those who observe the commandments such that they would need to create or fix anything or determine a matter based on the will of their hearts."¹

This type of divine government which is given the title of "theocracy" is greater than any kind of democracy, no matter how perfect. Moreover, any democracy which is not attached to a type of theocracy, or to use different words, "with an absolute rule (exclusive) of the Torah in the political life of the state," will end sooner or later in the destruction of

holy limits and the deterioration of the general situation to one of anarchy (abandonment, dispersion, complete lack of rule and order), in which everyone wants to leave their own personal subjective impression on the democracy. Within this format, the values of the people and the holy state from generation to generation will be sacrificed on the altar of a counterfeit democracy. *Where there is no vision the people become unruly* (Prov. 29:18).

This vision which appears in the response of Yosef ben Mattiyahu to the nations is similar to what the men of Israel said to Gideon, in Judges 8:22-23: *Then the men of Israel said to Gideon, Rule thou over us, both thou, and thy son, and thy son's son also: for thou hast delivered us from the hand of Midyan. And Gideon said to them, I will not rule over you, neither shall my son rule over you: the Lord shall rule over you.* The men of Israel thought that on account of his victory with the people of Midyan that Gideon would be a suitable ruler over them. He could rule without limits and do whatever he wished, just as they saw in the customs of the kings and rulers of the nations of the world. Gideon directed his words to those who understood that the rulers of the other nations of the world were not like the rulers of Israel. For in the lexicon of the Jewish people, the concept of rule by force and power did not exist: the rule of man is done by man — or by the people — for his detriment. But every act of the people is done as an act performed by the hand of the Almighty who created the heavens and the earth and governs it with all its creatures. The words of the Rambam clarify the task of the king, "but whatever he does should be done by him for the sake of Heaven. His sole aim and thought should be to uplift the true religion, to fill the world with righteousness, to break the arm of the wicked, and to fight the battles of the Lord." (*Hilkhot Melakhim* 4:10). So too, he speaks to the commandment that "he should deal graciously and compassionately with the small and the great, conduct their affairs in their best interests, be wary of the honor of even the lowliest." (*Hilkhot Melakhim* 2:6).

[PAGE 38] So learns the Raibag the message in the response of Gideon to the men of Israel: the judges of Israel and their good customs were not used for ruling in Israel in a way

¹Josephus Flavius *The Antiquities of the Jews* translated by Dr. Y. N. Simchoni, II: 15-16.

that they would contradict the Torah, rather the Torah rules over those rulers. For they too were required to follow in the paths of Torah, as we are reminded in Deuteronomy, *These are the words which Moses spoke to all Israel* (which most certainly applies to the king as well). In that regard did Gideon reply, *I will not rule over you, neither shall my son rule over you; the Lord shall rule over you*. (Ralbag Judges 10 in *Toalet haTaz*)

D) In general, it is upon us to know with complete decisiveness that a lasting rule which will have the strength of influence upon the citizens of the state can be created, only by the deep penetrating influence of religious faith in the midst of the citizens. For when a pure religious faith is built up in the midst of the citizenry, then when it comes to making a connection between the citizenry and the authority of the government, it will be done with sincerity and a framework of wholehearted confidence.

See how the Gaon R. Alexander Moshe Ibn Lapidot, of blessed memory, explored this issue in the introduction to what he wrote in his book on responsa, *Zikhron Ya'akov* to his father-in-law R. Ya'akov, of blessed memory, the head of the *beit din* in Brisk. The essence of what he wrote, which is applicable for our discussion, is that religion and government need each other. Sometimes, it appears that the authority of the city and state in relation to religion are opposed to one another. In reality, they help each other and given their respective strengths, they can support each other properly. For Creation itself is made up of opposites and this is its fulfillment. Religion helps in establishing a state. A state is unable to coerce except in external matters, but purity of the heart and the improvement of morality are accomplished only through the limits set by religion. The power of the government will be strengthened by the powerful hand of religion and its authorities as it works with promises of the heart and soul, for *a threefold cord is not quickly broken*. (Ecc. 4:12) But if religion is taken light-heartedly, then there can be no confidence. It has been told in a story about the righteous Gaon Maharash from Racine in his travels with a Christian

who did not bow down to the cross. When it came time to part ways, and he did not remove his hat, the Maharash, may his righteous memory be for a blessing, returned to his home because he feared for his life as he did not want to be associated with this coachman who had no religion (or moral value) in his life and subsequently could not be trusted and was therefore suspected capable of murder. When we conceive of the world in this way, we will see that in a natural way, the world revolves around itself in circles and everything learns from everything else. Divine Providence is great and circles around all that happens and fills up the world. Man, in relation to himself and his behaviors is the center, as it is written, "man is a small world." Between people are multiple circles, which is where an individual's behavior has an impact on other people — be it in the marketplace, in synagogues, on *kabbuzim* or in terms of the authority of the government. For without the government, there could be no personal association. Just as there are small inner chambers within a great palace, which when taken together make up the palace, so too, do individual limbs come together to make a body and together they need each other. So too is man comprised from specific pieces, strengths and feelings. And the world is comprised of different elements, climates, and creatures. The world collectively is made up of its individual parts. Man needs to deal with his portion and understand that all behaviors are linked onto one general chain, with links that intertwine and obligate everyone to each other. The more that individuals fulfill their role and responsibility, the more that the general world [PAGE 39] will be made stronger. For there is no general without the specific. Their association together on the earth will be eternal like the heavens over the earth.

E) Yoseph ben Mattiyahu added an explanation in his book, that there is a difference between our legislator Moses and the lawgivers of the rest of the nations of the world throughout history. He wrote, among other things, "our legislator is the most ancient of all the legislators whom we have anywhere heard of...and all those legislators who are so

admired by the Greeks, they seem to be of yesterday, if compared with our legislator — in so much as the very name of a law was not so much as known in old times among the Grecians — but the multitude was governed by wise maxims, and by the injunctions of their king. It was also a long time that they continued in the use of these unwritten customs, although they were always changing them upon several occasions, but for our legislator, who was of so much greater antiquity than the rest, he exhibited himself to the people as their best governor and counselor, and included in his legislation the entire conduct of their lives, and prevailed with them to receive it, and brought it to pass, that those that were acquainted with his laws did most carefully observe them.”²

So did Yosef ben Mattiyahu speak to the people in their language. We, who wish to explain to ourselves the difference between our legislator and his divine chosenness, and those lawmakers of the rest of the nations, should recite the wonderful words of the Meiri's introduction to tractate *Avot*, in his explanation, he writes (regarding what appears in *Sifre* at the end of *parashat V'zot Habrakha*), “for there never again arose a prophet in Israel like Moses, none has arisen in Israel, but one has arisen among the nations of the world. And who was he? Balaam.” And thus writes the Meiri: you already know from the book of the Sages that the completion of the individual's intellectual power cannot be done without the preparation of his power of imagination. He will be, according to his nature, a sage if he engages in and struggles with the necessary dealings of study, but he will not come close to prophecy. If he is the opposite, which is to say that he is complete in regard to his imaginative power but has not completely prepared his intellectual power, or if he is complete in both of these matters [perhaps we should say, but rather] has not fulfilled himself of study, he [PAGE 40] will have strength in magic, dreams which accurately portray the future, in performing customs, and doing wonders by solving dreams — even

though he is not a complete person — such that he is a master of charm and a prophet of lies. If he has not studied, his strength lies in political authority/behaviors. Yet, when he is complete with both of these powers, then his soul is made complete. If the divine will flows on his imaginary and intellectual powers, he will prophesize, and he will be among the prophets of truth. Balaam's imaginary power was very great, but he lacked sufficient intellectual power. For the Scripture calls him strong in one regard. They say of him that he was open-eyed, which is to say he had his eyes open. What our Sages really mean to say of him, though, is that he has one eye open and one eye closed. In order not to make a mistake in his utterance, Balaam was *prostrate, but with eyes unveiled* (Num. 24:4). The Sages, of blessed memory, say that he was blind in one eye, which explains why he was weaker in his intellectual capacity. Regarding the division of his power, our Sages say, “none has arisen in Israel.” But as you know, our Torah comes make us complete in all matters, which have to do with the fulfillment of divine measures, which leads to speculative, rational knowledge. The rest of the “Torah” of the ancient nations and religions do not know from such knowledge but rather, only of political behaviors and customs which have to do with people relating to each other in terms of the state. We find that we alone are in a situation which requires a prophet of truth who contains both styles of strength to help us become complete in matters of our holy Torah which includes all of the political behaviors and all of the rational laws which the other nations know as well. Yet the ancient nations required only a prophet or a leader who could lead them in terms of political behaviors for their imaginary power (speculative thinking). Given their need, Balaam was sufficient for the intellectual nations from the side of his nature, as Moses, our teacher, peace unto him, was perfect for Israel for social and political matters. It is written in the words of our Sages, of blessed memory, in *Rosh Hashana* 21b, “there arose not a prophet again in Israel like Moses. Among the prophets there arose not, but among the kings there did arise.” Who? Solomon. He was a prophet and a king sent to govern the people. It is said that Solomon

²The Works of Josephus: New Updated Version, translated by William Whiston (Peabody, MA: Hendrickson, 1988), 803. From “Flavius Josephus Against Apion,” Book II: 16.

combined everything that was required in governing the people in terms of being direct and just, as did Moses when he judged and made the law known to the people. It is not to say that Solomon stood on the same level as Moses. God forbid, for there is none like him. So wrote the Meiri.

How splendid and glorious is this lofty teaching from the Meiri, of blessed memory, who gives a clear and deep expression to the difference between us and the rest of the nations of the world, and to our need for doing that which suits our being and existence. Our existence is based on our Torah which incorporates political behavior as well as rational knowledge — for in that way the holy Torah which was given to us by the Creator of creation is unique. We also have a prophet of truth who legislated and taught the people, namely Moses, our teacher, peace unto him, who was able to stand between us and God, the Giver of the Torah. We stand in contrast to the rest of the nations who, according to their being and existence only require the abstract political customs and behaviors which govern the state, based on the fulfillment of the imaginary strength. Thus, it is enough for them to have a political governor, who can give rise to political behaviors and fulfilling the imaginary strength alone.

F) In summation, Yosef ben Mattiyahu concludes "and where shall we find [PAGE 41] a better or more righteous constitution than ours, while this makes us esteem God to be the governor of the universe, and permits the priests in general to be the administrators of the principal affairs, and withal intrusts the government over the other priests to the chief high priest himself! Which priest our legislator, at their first appointment, did not advance to that dignity for their riches, or any abundance of other possessions, or any plenty they had as the gifts of fortune; but he intrusted the principal management of divine worship to those that exceeded others in an ability to persuade men, and in prudence of conduct. These men had the main care of the law and of the other parts of the people's conduct committed to them;

for they were the priests who were ordained to be the inspectors of all, and the judges in doubtful cases, and the punishers of those that were condemned to suffer punishment. What form of government then can be more holy than this!"

To complete our discussion of these matters, it is well to point out the words of the Rambam (*Hilkhot Shmitah v'Yovel* 13:12) where he explains why the Tribe of Levi was granted no right in the share of the Land of Israel: "Because they were set apart to worship the Lord, to serve Him, and to teach His upright ways and His righteous judgments to the many, as it is said, *They shall teach Jacob Thine ordinances, and Israel Thy law* (Deut. 33:10). They were consequently set apart from the ways of the world: they may not wage war as do the rest of Israel, they have no share in the Land, and they may acquire nothing for themselves by physical force. They are rather the host of the Holy Name, as it is said, *Bless Lord, his host* (Deut. 33:11). It is He, blessed be He, who acquires for them, as it is said, *I am thy portion and thine inheritance* (Num. 18:20)."

We will also mention here exalted words of the Meiri in his interpretation of the words from Psalm 133:1, *Behold, how good and how pleasant it is for brothers to dwell together in unity!* He writes: the Torah commentators have greatly troubled themselves with understanding the peculiarity of these words. Some have followed the simple meaning, others the midrashic meaning, while some have explored the hidden meaning. According to my opinion, the root of the verse can be found in its most simple reading which relates the preceding psalm, since there we read of praises for those who serve God and stand in the house of the Lord with great desire and much yearning, which refers to the kingship and the priests. It is known that the behavior of our people has often centered on two soulful-enriching acts: prophecy and priesthood. As it is written, *They shall teach Jacob Thine ordinances* (Deut. 33:10). Thus the behavior of the people is completed in all aspects when *how good and how pleasant it is when they dwell together*, which is to say that when

*Whist, 805. From "Flavius Josephus Against Apion," Book II: 21-22 (really 22-23).

everyone sits in his place. One might compare the priest to oil. Just as oil sits above water and floats on the rest, so is the fulfillment of the (priest's) soul as it is above all the rest. For it teaches all the portions and humility. Another way the priesthood can be compared to oil is that it is superior to all other liquids. The kingship is likened to dew, for just as the world needs the dew every night and day, so too mankind needs the kingship and the kingship needs the people in order to continue its judgments. In order to survive, the king's behavior needs to be neither too passionate or not angry like a torrential rain — but rather moderate, as it says in *Avot*, "be deliberate in judgment" (*Avot* 1:1). Solomon said, *the king's wrath is like the roaring of a lion and his favor is the dew upon the grass*. (Prov. 19:12) Mount Hermon is not close to Zion, so how can Scripture say *like the dew of Hermon descending upon the mountains of Zion* (Psalm 133:3)? According to my opinion, the kingship which is on the mountains of Zion is pleasant and sweet like the dew of the Hermon which will descend in its place upon the land. The memory of the Hermon is remembered in all its greatness where it was dry as in the verse, *and the Lord shall utterly destroy the tongue of the sea of Egypt* (Isaiah 11:15). The dew appears there in great abundance, likewise the authority of the kingdom is revealed to the political community and is established in that way.

[PAGE 42] And it says concerning Zion, *for there the Lord has commanded the blessing*, (Psalm 133:3) for the peace of its inhabitants and *even life evermore* (Psalm 133:3) which hints at life in the world-to-come.

G) Behold, our people is a special brigade of individuals, by its very existence and also in regard to the political behavior of the state. As every government is considered to be the highest rung in the social ladder, in our unique form, there can be no content, at any time unless within the organization, we find the healing medicine of religious and toraitic customs enacted at every rung of our spiritual ladder of the government. The Torah serves as

the holy Torah for our people. It is a Torah of life. The nature of the Torah is such that it serves as a manifestation of the chariot of the Divine Presence and brings a spiritual essence into the world, *and behold a ladder set up on the earth, and the top of it reached to heaven; and behold the angels of God ascending and descending on it*. (Gen 28:12) (See *Midrash Rabba* and *Yalkut Shimoni parashat Vayetze*.) For anyone who is a student of history and has paid attention to the process of our people over the years, will notice that generally speaking, when times are good for our people, as a nation, we are founded upon two central pillars: the priesthood and the kingship. Additionally, what applies to both of these entities is the crown of Torah. The crown of Torah embodies and emphasizes that which deals with the crowns of priesthood and of kingship. These two entities walk together, arm-in-arm like twin brothers. As it is written, *and he [Joshua] will stand before Elazar the priest*. (Num. 27:21) "For Joshua needs Elazar and Elazar needs Joshua" (*Sifre*). Together, they determined all the customs and manners of the state and acted like a lock and key governing the state from end-to-end. The political authority made its impression on the form of the government, and the priests, in their spiritual functioning, made their impression on the overall form of life led by the people in distinguishing between that which is holy and that which is profane.

Since the priesthood carried within itself the heart upon which the soul of our nation depended, adorned with the crown of Torah, there were certain parts of the Torah which were given specifically for the priestly class over those individuals involved with the kingship in order to emphasize not so much that the kingship did not rely on the laws and judgments of the Torah, but just the opposite — that the kingship was entirely reliant upon the laws and the judgments of the Torah. As it says in the *Sifre Zuta*, *"and he [Joshua] will stand before Elazar the priest"*. The Holy One, Blessed be He, decided that Elazar was so great that even the king would stand before him." In addition to this, preference was given to the High Priest over the prophet of God, which is explained in terms of the king and his particular relationship with High Priest in Rambam *Hilkhot Melakhim* 2:5. "All the people

come before him when he is disposed to see them, they stand in his presence, and bow down to the ground. Even the prophet stands in the presence of the king and bows down to the ground, as it is written: *Behold Nathan the prophet. And when he was come in before the king, he bowed down before the king with his face to the ground.* (1 Kings 1:23) The High Priest, however, comes before the king only when he is disposed to do it, he does not stand in his presence, but the king stands before him, as it is said: *And he shall stand before Elazar the priest.* (Num. 27:21) The preference flows from the obligation of the king to honor those who serve those who carry the banner of the Torah and to be subordinate to them and the authority of the Torah. As Rambam says in that very *halakha*, "So too, it is incumbent upon the king to give honor to students of the Torah. When the members of the Sanhedrin and Sages of Israel visit him, he shall rise before them and seat them at his side. This is the way Jehoshaphat the King of Judah [PAGE 53] acted. When he saw even the disciple of a scholar, he rose from his throne, kissed him, called him, 'my teacher, my master.'" The rest of the *halakha* uses the language of "however" which teaches that the source and the reason are one in the same, which is to say that the obligation of the king is to divide his honor to those who carry the banner of Torah and those who are the students and teachers of Torah.⁴

H) Those among the community of secular scholars who make the decisively erroneous claim that there is a potential comparison between the pure Jewish priesthood — a life in its essence as pure as the heavens — and the governing, secular priesthood — whose hands were filled with blood and whose garments were stained and dripping with the blood of the innocent. To mention them together in one breath as if to compare the two and to teach one thing from another is to take a lesson from the profane and apply it to that of the holy — mixing a separation between that which is the realm of religion with that

⁴The rest of the *halakha* explains that the king only does this in the privacy of his own home, so that there will be no question that he is in charge and everyone will fear him.

which is the realm of politics. Those who speak in this way, generally speaking, stand with both feet on the border of Judaism. Yet, when they arrive at the place of pure marble stones on the floor of the holy priesthood, it appears as if they lose their minds in an attempt to equate good times with time periods when it is known that there was unparalleled wickedness in which the personnel of the priesthood was in decline and the people were living by the sword. For a variety of causes, people were more inclined to leave the source of living water — the eternal Torah, and the quality of the priesthood is reflected in the words of our Sages, the holy ones, of blessed memory, "They said to him, let the children of gentiles come to peace, who do the deeds of Aaron, but let the son of Aaron not come to peace, who does not do the deeds of Aaron" (*Yoma* 71b). To hide your eyes from the era which shines forth with a light as bright as the firmament of the heavens, from which we can discern a time in which there was no strict differentiation between the holy and the profane — between Israel and the nations. When they acted in a destructive manner and committed many transgressions as they lifted up their hearts in prayer despite what the scripture said. Because of their mixing of the words, they acted in a licentious manner and committed many atrocities before the people who began to fear the rule of the priesthood since they took the reins of government into their hands and did according to their own will.

As distant as the east is from the west and as high as the heavens are above the earth, so too is the rule of the holy nation's (Israelite) priesthood distant and high from the ways of the religion of the Gentile zealots who have chosen to call themselves by the borrowed name, 'priesthood'. The first one (the priesthood of the Jews) is wrapped in holy glory which is superior for its attachment to following the word of God and keeping his covenant. The Jewish priesthood operates in order to teach Torah to the people and teach laws of righteousness, as it is said, *They shall teach Jacob Thine ordinances, and Israel Thy law* (Deut. 33:10), "which comes to teach that all of the teaching was brought out only by their mouths. (See *Sifre* and *Yoma* 26a). The latter wrapped themselves in the glory of their fanatic

priesthood which led to their destructive ways. And the two are directed toward opposite purposes. These issues are known and ancient. Here is not the place to discuss them further. Those who mix up these two separate realms show that they miss the essence of the true meaning of this holy name (*k' huna*) [PAGE 44] which God gave only to us — *a kingdom of priests and a holy nation*. We will be satisfied to reply to them with a short, and to-the-point reply like that of R. Yehudah Ha-Levi to the Kuzari: "The 'dead' nations which desire to be held equal to the 'living' people can obtain nothing more than an external resemblance. They built houses for God, but no trace of Him was visible therein. They turned hermits and ascetics in order to secure inspiration, but it came not. They, then, deteriorated became disobedient, and wicked, yet no fire fell down from heaven upon them, nor rapid pestilence, as a manifest punishment from God for their disobedience."⁷

As a part of the political governmental rule over us, it is for us to teach ourselves and our children day and night, the deep and meaningful lesson of R. Yehudah Ha-Levi who assembled the essential knowledge of our people and the unique obligation of our special customs together in saying: "Israel amidst the nations is like the heart amidst the organs of the body; it is at one and the same time the most sick and the most healthy of them."⁸ It is in our power to turn ourselves toward good or evil.

⁷Hirschfeld, 107.

⁸Ibid., 109.

Volume One, Chapter One, Section Three: The Form of Government

Introduction and Analysis

A government for the modern Jewish state will not be led by an arrogant, dictatorial ruler — at least not a government in line with Jewish law. According to the toraitic principles adhered to by the Jewish community, a ruler can only maintain his position based on a system of ministers and popular (educated) consent. The holy Torah prevents arrogance on the part of the ruler, as it says regarding a ruler in Deuteronomy 17, *his heart be not lifted up above his brethren to the end that he may prolong his days in his kingdom*. The king serves the people and performs his tasks for their welfare. A king should not expect honor. The real honor is the privilege to serve the community. The true king is the King of kings. The earthly king, as well as the people, must remember God is the Almighty. Nonetheless, the people must fear their earthly ruler in order to preserve the social well-being of the community. Conversely, the king must show respect to the people by acting with great humility.

Moses was the first social-political leader of Israel. One of his first leadership roles was the appointing of judges. Interestingly, Waldenberg returns to the primacy of appointing judges, which helps us understand why his first chapter of volume one was devoted to establishing judges and officers. Waldenberg cites Abravanel who demonstrated, by way of example through several small and large cities, the need to appoint great and lesser councils to adjudicate cases which inevitably arise. Jethro's advice is drawn upon again to understand the form of the government for a Jewish community. The Gaon of Vilna assigns roles to the sets of captains or judges, recommended in Jethro's advice. The GR"A says that the captains over the thousands were the real heads of the people. The captains over the hundreds were the judges. The captains over the tens were officers who enforced verdicts. The captains over the fifties were the teachers of Torah — the elders. Waldenberg also cites the GR"A to discuss the form of government. The GR"A uses the body as a metaphor to explain five types of rulers. The head represents those rulers of the community who would fight both inside and outside on behalf of the people. The eyes are the judges, the heart stands for the elders, the mouth symbolizes those students of the Oral Torah, and the legs are the officers who enforce the law. This metaphor well portrays an organic community which wears the Torah as an outer garment to provide protection and authority for the law.

Ultimately, the Torah is able to stand as the source for law and governmental form, regardless of the era, given the words *and thou shalt do that*

which is right and good in the sight of the Lord. This verse from Deuteronomy, which was emphasized above in section two, is held in Waldenberg's esteem as the basis for the legitimacy of his work. In his eyes, striving in the modern era to create a constitution based on the *halakha* could qualify as *that which is right and good in the sight of the Lord*.

Translation of Volume Three, Chapter One, Section 3: THE FORM OF GOVERNMENT

Already we have mentioned above in section one, part two of this volume that we would not expand on the discussion of which is preferred — rule by king or rule by ministers — for already we have brought up these matters in the first section of our book.

[PAGE 45] What we want to do here is clarify the body and structure of government itself, the ways it will achieve its tasks, and the measure of participation on the part of the people in consultation on the general administration of governmental affairs.

A) Our holy Torah rejects entirely the rule of one individual whose arrogance leads him to imitate, as if it were possible, the power of an almighty ruler, who could raise himself up above everybody else as if the lives [PAGE 46] of everyone in his state are his property to govern and to lead toward good or evil — depending on his will. The will of Torah is that Yeshurun's government will be built on the basis that its rulers and those who are ruled are in mutual consent together. *And he was king in Yeshurun, when the heads of the people and the tribes of Israel were gathered together.* (Deut. 33:5) "On the condition that the heads of the people would gather together and work with the members of the tribes of Israel — the great ones would listen to the lesser ones such that there was a mixing between the groups. No one group [PAGE 47] would try to rule over the other. (Gaon R. Moshe Hephetz, of blessed memory, *parashat V'zot HaBracha* 2) Due to this, the holy Torah finds a need to specify its prohibition against arrogance precisely with regard to the king even though God has anointed him and chosen him to stand in service to the people, *whom the Lord thy God shall choose* (Deut. 17:15), by the word of a prophet. (*Sifre parashat Shofetim*) As it says in the section on the king (and why he must learn to fear God and do all the words of the Torah) *that his heart be not lifted up above his brethren... to the end that he may prolong his days in his kingdom...* (Deut. 17:20), moreover [PAGE 48] "Scripture has thus admonished him for whom it is proper to be haughty and majestic that his heart must be as humble as that

of his brethren of lower status, because conceit is a reprehensible character trait, and it is loathsome to God even in a king. To God alone is the greatness and exaltation, and to Him alone is the praise.¹ It also serves the purpose of calling the attention [PAGE 49] of the king to the fact "that the kingship is not a matter which is specifically attached to the king, but it is an entity that was given to him by the people or by the Holy One based on the needs of the people or his own needs. Scripture states, *Better is a poor and a wise child than an old and a foolish king, who no longer knows how to take care of himself. From out of prison one came forth to reign.* (Ecc. 4:13) We find that the kingdom does not cling to the king, but the title is attached to him for the sake of the general welfare. Therefore, it is not proper for the king to see himself as a ruler and a governor over the people but rather as a servant for them, based on their needs. Thus our Sages spoke in *Horayot* 10b, "it appears to you that in summoning you for this promotion, I am handing over to you great authority; but in fact what I am handing over to you is servitude, for it is said, *And they spoke to him saying, if today you will be a servant of this people...* (1 Kings 12:7)" Thus did David write, *left up your heads o you gates... and the King of glory shall come in. Who is this King of glory? The Lord strong and mighty...* (Ps. 24:7) R. Yonah, of blessed memory, wrote in his *Megilat Setarim* that all kings do not rule over honor but honor rules over them. For if the masses of people were to place all their glory in the king, then if they wanted to remove all that glory from among them, they would have need to remove the entire kingship. We find that the king does not rule over honor but honor rules over them. Ultimately, the Holy One is the King of Glory and he rules and governs over the (earthly) king. Real honor is to do good for people — not to be arrogant. It is no more fitting for a king to get too arrogant with his honor than for a wise man to be arrogant in his wisdom. That is first and foremost. So too it is suitable that he does become arrogant in terms of his kingdom more than what is suitable for one who has acquired much wealth and property. This commandment of the king is intended specifically for him so that he should not become arrogant over the people. (*Derashot Ha-*

Ran #11)

Therefore, God set us apart from those whose governments are badly structured. In the days of ancient Israel, the king was considered by other nations as a type of divine creature. The great and good among the people would express the meditations of their hearts by saying that "the service of the king to the people in political life is like the heart in the body of a living animal or like the relationship of God and the universe"² (See Abravanel Deuteronomy, *parashat Shofetim* s.v. *hahakdamah ha-achit*). People make a great mistake in thinking that it is suitable to serve him and to fear him in such a way that it seems like everything depends on him. Our holy Torah comes to teach us that even though the Torah says, "*then thou mayst appoint a king over thee*" — meaning that the fear of him should be upon you³ (*Sifre* Deuteronomy 17:15. *Sanhedrin* 20b) "The attitude of his subjects toward the king should be one of awe and reverence" (*Hilkhot Melakhim* 2:1) But the obligation to show reverence does not come out of the essential greatness of the king, or his separation from the rest of flesh and blood. This reverence must rather come on account of the general welfare. It is for the people's own good to fear the king. Otherwise, good government will be impossible as the social bond separates, and people will not achieve their proper decrees without social unrest. Therefore, as the people are obligated to show honor and fear for their king, so too, the king is required to show reverence for the public. "Just as Scripture accords great honor to the king and bids all pay him honor, so it bids him cultivate a humble and lowly spirit, [PAGE 50] as it is written, *And my heart is humbled within me* (Ps. 109:22)" (*Hilkhot Melakhim* 2:6) He must also show honor to his people since his glory is dependent upon their honor. "He must not exercise his authority in a supercilious manner, as it is said: *that his heart be not lifted up above his brethren* (Deut. 17:20). He should deal graciously and compassionately with the small and the great, conduct their affairs in their best interests, be wary of the honor of even the lowliest. When he addresses the public collectively, he

¹There can be no people without a king.

shall use gentle language, as did David when he said *Hear me, my brethren, and my people* (I Chron. 28:2). It is also written *(if thou wilt be a servant unto this people this day, then they will be thy servants forever)* (I Kings 12:7). At all times, his conduct should be marked by a spirit of great humility. None was greater than Moses, our teacher, yet he said *And what are we?* *Your murmurings are not against us* (Ex. 16:8). He should put up with the cumbrances, burdens, grumbings, and anger of the people as a nursing father puts up with a sucking child. The Bible styles the king 'shepherd,' [as it is written] *to be shepherd over Jacob His People* (Ps. 78:71). The way in which a shepherd acts is explicitly stated in the prophetic text: *Even as a shepherd that feedeth his flock, that gathereth the lambs in his arms, and carrieth them in his bosom and gently leadeth those that give suck* (Isa. 40:11). "The king must especially remember that 'his heart is the heart of the whole congregation of Israel.'" (*Hilkhot Melakhim* 3:6) "Scripture lays particular stress on (the danger) of his heart being turned away from God, as it is said *that his heart turn not away* (Deut. 17:17). Therefore Scripture exhorts him more than any other Israelite to cleave to the Law, as it is said *all the days of his life* (Deut. 17:19)." [PAGE 51] And he is obligated to "engage day and night in the study of the Law and the needs of Israel." (*Hilkhot Melakhim* 3:5) For if he removes his heart from the matter, then so too will all of Israel, which will lead to trouble for the community and make him and all of them worthy of condemnation.

B) Immediately when Israel went out of Egypt, the House of Jacob from a people of a strange language (Ps. 114:1) lacking any ground beneath their feet, already Judah became his sanctuary and Israel his dominion. (Ps. 114:2) Moses was set up as the faithful shepherd who would create social and political order among the people. And before Israel was given the Torah, Moses consulted with the *shekhinah* and appointed judges over the tribes. Individuals who were able and God-fearing, who were wise and too embarrassed to act in an evil manner toward the people. Based on their merits, they were appointed and he placed

them as heads over the people: *Captains over the thousands, captains over the hundreds, captains over the fifties, and captains over the tens, and officers among your tribes.* (See Exodus 18, Deuteronomy 1, and what I wrote on this in my first volume of *Hilkhot Medinah* 1:B)

How was this breakdown of levels determined and what was the essence of each level? See Abravanel's interpretation of the Torah where he offers one explanation for these matters. In a large city, which rules over many territories, there are matters which are inappropriate for them to do unless, when there are a thousand people who have been appointed to handle the situation. So too, there are matters which are agreed upon to be dealt with by one hundred appointed individuals to act in a certain manner. There are times when the community agrees on a group of fifty or even forty to handle certain matters. There are cases where ten individuals have been appointed to hear every case and situation which arises before a community. You should know that there are places which carry on in this manner: in cities like Venice where there is a great council over more than 1,000 individuals and there is a council in Pragachy which is made up of 200 souls. There is also a council of forty people in a place called Corinth, and there is another council of ten people in a place called Koshigav. I have no doubt that in terms of this issue regarding the captains over the thousands, captains over the hundreds, captains over the fifties, and captains over the tens—that it refers to situations where there are a thousand rulers who serve on one council, there are councils of one hundred people, councils of fifty people, and councils of ten people. This was to happen for every tribe since this number is not related to [PAGE 52] those who are judged but rather to the judges and the leaders who according to the quality of the matter, advisers were appointed to lead them. So wrote Abravanel.

Abravanel gives an insight from Torah on the general order and the form which the government is to take and the types of political consultation which ought to take place. There is also a truly wonderful interpretation which we find in the Gaon of Vilna, of blessed

memory, on the above verse from which we can learn, based on Torah, how to divide the various responsibilities of state authority for our people in different territories and how to divide up tasks among special units. We also discover how the living spirit of Jewish governance is wrapped up in lofty traditional values. We also learn how the form of its expansion into every way of the life of the people will be made possible for this unique people. These are his words: *officers among your tribes* — this refers specifically to the heads and not to the ministers: *heads and officers among your tribes*. For the early ones were also heads and ministers of the tens were officers and judges. At a fundamental level, they were officers as it is written in *parashat Nitzavim*, *your captains of your tribes, your elders, and your officers* — even though the *g'mara* believes them all to be judges of Israel, as it is written *and let them judge the people at all seasons* (Ex. 18:22). Nonetheless, each person has his specific appointment. It is curious why there were captains over the fifties, which when doubled make a unit of one hundred. At issue, is the four-part division of leadership among Israel: judges, officers, heads, and elders. The judges (*shofetim*) were the judges. The officers were the ones who went down among the people to enforce the verdicts. The heads were the ones who directed the people in every matter as they were coming and going. The elders were the ones who taught Torah. This is the order: the captains over the thousands were the ones who directed the people and were really the heads. The captains over the hundreds were the judges. The captains over the tens were the officers who went down among the people to enforce the verdicts. The captains over the fifties were the teachers of Torah to the people of Israel, they were the elders. As it is written, *the Lord will enter into judgment with the elders of his people, and its princes* (Isa. 3:14). *Elders* — these are the captains over the fifties; *its princes* — these are the captains over the hundreds, who are the judges. As it is written, *the staff shall not depart from Judah, nor the sceptre from between his feet*. And it says in *Sanhedrin 5a*: “the staff... refers to the exilarch of Babylonia... the sceptre refers to the grandsons of Hillel in the land of Israel who teach Torah in public.” We

know that judgment is administered only during the day, but Scripture states, *[this book of Torah shall not depart out of thy mouth], thou shalt meditate therein day and night*. Therefore, the elders needed only be half in number since the judges judge by day but the elders teach day and night. The captains over the fifties were these men of truth, of whom we have spoken. They were superior above everybody else which is why they were singled out from Isaiah's curse, *For, behold, the Master, the Lord of hosts, takes away from Jerusalem and Judah the stay and the staff, the captain of fifty*. (Isa. 3:1-3). Our Sages, of blessed memory, say “these are the ones who know how to give and take in the five parts of the Torah, which has in it fifty portions. As it says in Isaiah [it is not clear what is intended here. See in *Hagigah* 14a]. Then there was the grouping of the heads and the captains over the tens were the officers. Then there were those who directed the people, who served during a time of war as the directors as it is written, *And Moses was angry with the officers of the host, the captains over thousands and captains* [PAGE 53] *over hundreds*. Also, *And the officers who were over the thousands of the host, the captains of thousands, and captains of hundreds, came near to Moses*. (Numbers 31:14, 48). In *parashat Nitzavim* we read, *your captains of your tribes, your elders, and your officers, with all the men of Israel...* (Deut. 29:9). *Your captains* were the heads over everybody and were the *captains over thousands*. *Your tribes* were the *captains over the hundreds* and served as the judges, as it is written, *the staff shall not depart from Judah* (Genesis 49:10). *Your elders* were the *captains over the fifties*. *Your officers* were the *captains over the tens* and served as the officers. Following them, you are left with *all the men of Israel*. To there. (See *Yalkut* and the interpretation of the GR”A to the Bible which was published in the book of the GR”A in 5714.) See also another interpretation to this in what the GR”A wrote regarding Isaiah 1:5, where he writes based on the illumination of the five types of rulers — 1) Heads of the community. These are the individuals who go out and come in to fight and protect the community; 2) Eyes of the community. These are the judges who oversee all the transgressions. 3) Heart of the

community. These are the elders and the ones who sit in the yeshivot. They learn the written Torah which is as central as the heart. 4) Mouth of the community. These are the individuals who learn the oral Torah which is revealed in a similar to the way in which the mouth reveals that which is in the heart. Yet the heart does not divulge the mouth, which is to say that the oral Torah was not allowed to be revealed, therefore two of every one hundred were set aside to study and teach all day. 5) Legs of the community. These are the officers. (See in the GR" A also on verse 5 where he seems to say that the heart of the community and the mouth of the community can be combined to make up the captains over the fifties.)

We have brought these words of the Gaon of Vilna to this part of the discussion because they are like a salve for the eyes. His explanation penetrates into the depths of the spiritual foundation of our holy Torah which serves as the doors to the state. At the heart of his words is a great vision which sees the organic state wrapped in a covering comprised of the Torah and the commandments. These are brought together based on an understanding of the authority of Torah and its meaning as well as the general political authority. They are to be used together and united and used as a type of training tool for the fundamental completion of the people. They have the resiliency to cast foundations stones, when the free people settle in the land make eternal structures in the land of their birth. (See above in the introduction to our words for this chapter. Also, in *Hilkhot Medinah* 1:2. See *Megillah* 6a where it discusses the future of the ministers of Judah teaching Torah to the public. See also in the *Darkhei Moshe* to the R. Tzvi Chajes in his article, "History of the Sects.")

See also in *Hilkhot Medinah* 1:1:9E, where we discussed the interpretations of the *rishonim* in understanding the officers as either special rulers who had their own independent ruling power or as a part of the greater establishment who ruled underneath the ruler-judges. Also see in letter A what the Malbim wrote in explaining that the *captains over the tens* were the officers.

C) The people in the various classes in every division is represented principally by a legislative, central, protecting, regional government by representatives distinguished in Torah, being God-fearing, and knowledgeable in matters of political science (see *Ha'amek Davar*,² on Numbers 1:15). Also, the man whom God has chosen is to have a faithful heart, be learned, and suitable to be the leader over the public. Regardless, he is chosen by consultation [PAGE 34] with the public (See *Berachot* 55a³). Thus was every man chosen from among the house of his fathers as the head of his house. So too was every man chosen who served as the head over all the houses of his father's tribe (See *Ha'amek Davar*). They are described as ministers, princes, and generals, princes of Israel, princes of the community, men of renown of the community, men of renown of the assembly, princes of the staff, princes of the fathers, heads of the thousands of Israel. Each man by his camp and each man by his banner performs the tasks of his position and his rank for which he was selected to do that which he is most suitable and fulfil the spiritual role based on the number of votes who selected him.⁴

See *Ha-amek She'elah* [Netziv's commentary to the *She'iltot*] for *parashat Va'eichanan* (*She'iltot* #142). *Ha'amek Davar* — was published by Mossad HaRav Kook, with additions added by the writer's own hand. He explains that the authority of the *Nasi* is based on the authority of the community, which is not divided among the thousands. The heads over the thousands in Israel are the captains of the army for war, in which case everyone is divided into thousands. See there. Thus does the *Ha-amek* discuss on the Torah (Numbers 1:16) that the thousands is not applicable except for men of war which are broken into

²*Ha-amek Davar* is a commentary to the Torah, by the Netziv (Naftali Zvi Yehuda Berlin, 19th century).

³Reference to a statement made by R. Isaac, "people do not appoint a leader over the community unless they have consulted the community."

⁴[See Numbers 1, 3, 10, 17, 27, 31, 34, and more. See also the commentaries there. See also in the I Chronicles 25, 26, 27, 29, 32.]

groups of hundreds and thousands. See in *Ha'amek Davar* how he explains the princes of the tribes and how they were selected based on their merit to be the captains over thousands and stand as the leader in a time of war.

D) From time to time, the form of government indeed changes according to technical and social factors which emerge in political life. But that rule must be according to the set compass course which leads us in the lofty destination of ethics as set by the Torah and the prophets, who stand as the pointer for righteous political order. Within the Torah, the ways of our people is to be found. So too, each individual will find his proper disposition scattered throughout the variety of her teachings and commandments in our holy Torah. This notion has been given a divine expression in the first commandment regarding general political matters about the special spiritual nature and framework of the Holy One, who set (Israel) as *a treasure from among all peoples*. Scripture states, *and you shall be to me a kingdom of priests, and a holy nation* (Ex. 19:5-6). According to the succinct point of *Ha'amek Davar*, who wrote that the intention of this lofty command is "without this condition of observing the Torah and worshiping God, it would be impossible for them to be Israel, to continue to be *to me a kingdom of priests*, that is, a political structure based upon relations between human beings which are conducted in a *good and right* manner, like aristocrats. The Torah does not explain what is meant by *good and right*. So too, we must keep in mind that at different points in time and in different places *good and right* can have different meanings. If so, there is no condition on Judaism at this point with a fixed law, rather there is the will of God in this."

E) Those responsible for framing the form of the government are not only those who happen to be high-ranking officials, but also, the people of all walks of life. Often, the leaders frame the ways of the government not according to their conscience but rather based

on the spirit of the people who have chosen them to be there. In order to please them [PAGE 55] in this way, they will be granted full confidence and merit the length of days in the position of power in the government.

The *Ba'al Malekhei Makhshevet* has explained well the Rashi on Leviticus 4:3 who explains the text *if the anointed priest shall sin so as to bring guilt upon the people*. Rashi explains that "when the High Priest sins, it is the guilt of the people; for they are dependent upon him." This is a strange incident. Tobias sinned and Ziggod was punished!¹ The Holy One, blessed be He, causes the teacher to sin and the student to atone.² Where is the righteousness in all this iniquity? He explains that the king and the ministers who rule usually do so according to the customs and nature of the people. Therefore the people love them. Therefore the Holy One, blessed be He, commanded Israel *to place a king from among your brethren*, so that his customs would be the same as his people. So too, he would follow in their manners, and he would choose to observe their customs and actions. For thus Saul said, *I have sinned; for I have transgressed the commandment of the Lord, and thy words: because I feared the people and obeyed their voice.* (1 Samuel 15:24). Thus we find in the case of Nineveh, they wrapped themselves in sackcloth and sought repentance, *for the word came to the king of Nineveh* (Jonah 3:6). He followed after the rule (precedent) of his people. If that is the case, if the majority of the people reasoned that they could cause their king to sin, if they sinned, then he would have to sin as he followed their ways, as Samuel said, *if both you and also the king that reigns over you will follow the Lord you God.* (1 Samuel 12:14). From this scriptural citation we learn that *if the anointed priest shall sin* then certainly the people beneath him will incur the guilt for the *guilt (is) upon the people*. Both

¹ "One sins and the other one is punished. In *Pesachim* 113b, we read that the Holy One, blessed be He, hates... he who sees something indecent in his neighbor and testifies against him alone. As it once happened that Tobias sinned and Ziggod alone came and testified against him before R. Papa, [whereupon] he had Ziggod punished. 'Tobias sinned and Ziggod is punished!' exclaimed he, 'Even so,' said he to him, 'for it is written, *one witness shall not rise up against a man*, (Deut. 19:15) whereas you have testified against him alone: you merely bring him into ill repute."

he and they are brought into the realm of sin.

Likewise, there is a joining of many beliefs into one authority to bring together the many individuals who seek to control the government and grab the top position. For that to happen, the first condition is to create a good, general prevention in the social, political field, by gathering together these seventy faces of Torah and determining the intention behind the phrase *when the heads of the people and the tribes of Israel were gathered together*. As the *Or Ha'Chayim* explains: "Our verse also hints that the kingdom of Israel will endure only if the heads of the people assemble together (keep the peace amongst themselves) not if the leaders of the people are split. If the leaders are split, the tribes themselves will not be able to maintain their unity. A look at Jewish history shows that as long as the people were united under David and Solomon the king and the nation were extremely successful, whereas as soon as a split developed the fortunes of the Jewish people took a turn for the worse." On account of this reason, did the idolatry of Jeroboam and others after him start. Division causes destruction, peace and unity bring blessing.

Chapter Six Conclusion

In 1955, the Knesset passed the Dayanim Law which regulated provisions for the judges of rabbinical courts. One of the most divisive pieces of the legislation had to do with the proposed pledge of allegiance to which the *dayanim* would swear. The secularists proposed that the *dayanim* swear "allegiance to the state and its laws." The words, "and its laws" were particularly problematic for the religious community because of the potential problem which would ensue if the state enacted laws contrary to Torah. The mere existence of this debate shows the difficulty in building a bridge between the Torah and the state, the religious and secular parties.

In his book in 1961, Moshe Silberg called for a modern Israeli code that would draw upon Jewish law which "had not yet become obsolete (and would) satisfy the vital needs of this generation."¹ He proposed nothing short of creating a new legal code — not a condensed *Shulchan Arukh* but something fresh and useful using the best parts of the old together with the new. Reviewing the new state's legal corpus, Silberg writes, "it is clear therefore, that the present condition cannot long continue to exist [that of Israel having a 'mosaic' of laws — French, English, Turkish...], and that the Jewish state will necessarily have to work toward the creation or acceptance of a unitary legal system, and under these circumstances is there anything more plausible than the return to the sources of Jewish law?"² Barring the creation of a new legal code, Silberg worries that Israel will "be satisfied with the offspring of strangers and to be content with the continued existence of the alien systems of the law bequeathed to us by the Ottoman empire and the Mandatory government."³

Silberg is clear in his desire to rely upon traditional Jewish sources for a new Israeli

¹Silberg, 152.

²Silberg, 148.

³Silberg, 153.

code. He admits to the inherent difficulty of creating a legal system based on Jewish religious presuppositions given the religiously heterogeneous Israeli society. Perhaps one of the greatest problems faced by the religious community is the general desire to maintain the *halakha* in its original, classical sense. Until the *Torah She 'baal'peh* is "freed from its *Galut*-imposed shackles,"⁴ as Eliezer Berkovits proposes, a unity of *halakha* and democracy — on a national dimension is not feasible.⁵

Eliezer Waldenberg's effort, along with that of S. Z. Shragai, Y. L. Maimon, and many other vocal religious Zionists will long be noted as a sincere attempt to present the means by which the modern state could be structured on Torah. The overwhelming push by the secularists away from Torah as the sole source of Israeli law has led to a modern Israel based upon a host of legal sources. However, the Knesset does maintain a loyalty to Torah by consulting the rabbis of the generation on pertinent issues and giving an eye to Torah when no legal precedent exists.

In the 1950s, Israel was an experiment in government. Waldenberg drafted his composition hoping to shape the form of the final structure. Today, as Israel approaches her fiftieth anniversary, the experiment has clearly become a fixed institution. The government and the land indeed are a mosaic. Contrary to early Mizrahi dreams, two separate worlds and judicial structures — religious and secular — do exist. Rabbinic courts operate by the grace of a governmental agreement. Despite the government's approval of the rabbinic courts, many of those who use the state-supported courts do not view the host country as a force in their lives. The religious community today is of a different mind set than that of fifty years ago. Working with the *halakha* to help it shape the state while respecting the state and allowing it to shape the *halakha* is anathema to the current trend among the ultra-orthodox who would rather desecrate the Shabbat in order to throw stones at non-orthodox Jews than

⁴Berkovits, 93.

⁵Berkovits, 117.

respect the idea of pluralism

In 1996, following the election of Benjamin Netanyahu, a court of elections discovered that in many religiously-observant neighborhoods, more ballots made their way into the ballot boxes than there were voters for the specific voting station. A forgery of ballots clearly had occurred. Evidently, the neighborhood leaders knew about the activity, because ten days following the elections, Rav Dov Landau issued a *p'sak halakha* which prevented anyone knowing about the forging of elections from reporting the information to the government.⁶ Only if the forger committed the crime again, could someone report the original crime, according to Landau's ruling. By using the *halakha* against the modern state, rabbis like Landau demonstrate the great disparity between the religious Zionists of the early state and today's orthodox community. Waldenberg and his associates tried to use the *halakha* in conjunction with the state. Today's trend is to use the *halakha* against the state. Had *Hilkhot Medinah* become the constitution of the modern state, perhaps the radical rulings of extreme rabbis would be unnecessary. So too, if *Hilkhot Medinah* did serve as the basis for the laws of the state, large segments of the community would have been forced into a level of religious observance which was inconsistent with their own predilections.

I would like to conclude with one of Waldenberg's prayers in hope that the ways of Torah and God's light will lead the people Israel. "By following the holy path (of Torah), may we merit that the spirit of God will hover on all our paths and may God make pleasant all our deeds and grace us with an understanding towards one another and towards those outside to the glory and splendor of the entire people."⁷

⁶*Ha-arets*, June 26, 1996.

⁷*Hilkhot Medinah, Volume III, Chapter 1, Introduction, page 24.*

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