

## CONTEMPORARY RELIGIOUS LIFE AND THOUGHT IN ISRAEL

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BOOK DESCRIPTION :

### JEWISH LAW - SELECTED RESPONSA

by

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When the State of Israel was established, many Jews hoped that the law of the state would be Jewish law as practised in most Jewish communities in the Diaspora. For many reasons, the state simply continued the British practice under the Mandate, except that marriage law and personal status were entrusted to rabbinical courts. British and other legal precedents are often quoted in the courts though in some cases judges have resorted to Jewish law. In 1969, Mosad HaRav Kook published a collection of essays on the possibility of introducing Jewish law in the state of Israel, edited by Judge Dr. Jacob Bazak, "*The Jewish Law and the State of Israel*" (Hebrew), Jerusalem 1969. And in 1971 the same Israeli jurist compiled an anthology of rabbinical Responsa in civil and criminal law from the 11th century until 1492, in order to show the possibilities of Hebrew law. The following is a translation of the most important parts of the introduction. Subsequently a number of cases cited in the book are summarized. The book itself gives the exact words of the query and reply.

#### *Introduction*

The responsa literature conceals within itself endless reserves of Torah and wisdom, beliefs and opinions, history and folk-lore. However, above all and in the forefront the responsa literature is a fundamental and pre-eminent source for the development of Hebrew law. From it, it becomes clear how great Jewish judges in their generations decided in the light of the halakhah the practical problems that were raised in daily life in the domain of civil as well as in the domain of criminal law. Whereas the interpretative Talmudic literature and collections of rulings are in the main speculative and theoretical, the responsa literature is alive and vibrant, filled

\* Jewish Law - Selected Responsa; an anthology of rabbinical Responsa in civil and criminal law from the 11th century until 1492, selected and edited by Jacob Bazak. Published by Yehudah Orenstein, Yavneh Publishing House Ltd., Tel Aviv, 1971, 289 pp. Hebrew title: משפט והלכה - מבוחר תשובות

with important practical matters of commercial business, labour laws, torts, penal law and more besides.

The problems themselves, comprising a live and detailed description of the incidents related, are frequently as important as the replies from many aspects. It goes without saying that the replies themselves, which are decisions of law given by these spiritual giants and wise-hearted scholars, whose supreme judicial authority is recognised unreservedly in halakhic literature, constitute binding judicial precedents in the halakhah and are an inseparable sector of the living Hebrew law in exactly the same manner as are the two Talmuds and the works of the commentators and the codifiers.

Although it is already possible to recognise the first signs of responsa on halakhic topics in the Talmudic era its main development occurred in the Gaonic period from the end of the sixth century until about 1040. From all the diasporas of the exile, problems were sent to the academies of Sura and Pumbedita in Babylon, and the *Geonim* replied from there, mainly during the month of Adar.

The problems not only related to the domain of halakhah and justice, but also touched upon beliefs and opinions and the meaning of difficult parts of Scripture and the Talmud. The way in which the responsa of the *Geonim* were compiled is testified to by R. Nathan Ha-Bavli: "This was the custom in replying to problems. Every day of the month of Adar, he placed before them all the queries that had reached him and authorised them to reply to them ... each one then spoke out his view according to his wisdom, arguing for and against; discussing every matter, and reflecting with great care, while the head of the academy listened to their words ... he continued to consider their words until the truth was clear to him. Thereupon he ordered the scribe to write the reply. This went on day after day until replies were sent to all the queries addressed to them during the year from the communities of Israel. Towards the end of the month the replies and the queries were read in the presence of the whole company, the head of the academy signed, and they were then sent to those concerned in the matter." The responsa were first written in Aramaic but in the course of time in Hebrew or even in Arabic.

After the Gaonic era there were on the one hand the responsa of the Spanish scholars and on the other those of the French scholars ... Between the 15th and 18th centuries the main responders were centred in Italy, Turkey, Germany and Poland. During this period, clarity gave way to dialectical acumen and the responsa became lengthier and more entangled ... The responsa literature did not end with these and to the present day it continues to develop, to flourish and to spread to many countries.

Sometimes the responsa of an author were collected by his son or disciple or by the author himself. Some responsa found their way into the collection of a different responder so that it is often difficult to identify the

author. Many responsa are still in MS and have not yet been printed. In general the text of the query is cited in a fragmentary or an abridged form, so that the query must be arrived at by the contents of the reply. At times however important details do not appear in the reply itself so that the reader is mistaken in his understanding of the matter at issue. Sometimes a table of contents was written by the author or by his disciple and from them it is possible to complete important details not appearing in the query or the reply. It is also necessary to be on guard for changes in a responsa made to satisfy the censor, and for these reasons it is essential that scientific editions of responsa be published.

With the establishment of the State of Israel and the renewal of national independence, it would have been right to restore our original laws of aforetime. Instead of being dependent upon precedents established by Gentile scholars in their courts of law, we could henceforth turn to the Hebrew sources of law, particularly to the rabbinical responsa, extracting from them the guidance, counsel, wisdom and law that they have accumulated as a result of grappling with the legal problems of daily life during the course of hundreds of years, and at the same time having continuous and unceasing recourse to the sources of Hebrew law and the cultural and spiritual life of the Jewish people. Today it is apparently clear that one of the main reasons this expectation has hitherto not been fulfilled, despite the intimate desire for this by the best of our jurists of all classes, lies in the fact that the sources of Hebrew law are nowadays sealed books.

The works of the codifiers and the collections of responsa were written in a milieu where learning of, and persistent reflection upon, the Talmud and its commentaries was the lot of every intelligent man. To turn night into day by studying Torah was the religious duty of every Jewish youth and man of even medium intellectual ability. When the scope of study and science broadened and living changed in appearance, that brilliant era ended. Erudition is no longer the lot of every Jewish intellectual even if he is a student of Torah, and one who has not frequented those places of learning which devote most of their time to reflection on Torah in its widest sense, not only lacks erudition, but is incapable of understanding unaided even a single chapter of halakhah. Moreover, even a student of Torah is not always able to arrive at the explanation and meaning of a halakhic excerpt save after much strain and exertion.

However, the Torah was not given to angels, and one has no right to become reconciled to the fact that in our generation eminent Jewish jurists, or other intellectuals, cannot directly and easily turn to our sources of halakhah and law and understand them without excessive difficulty and considerable effort. The pages of these sources require to be open before everyone and this can be accomplished if many scholars will devote themselves to the publication anew of the main Jewish halakhic literature, edited,

ordered, clarified and commented upon with a clear and easy commentary. It is primarily necessary to publish in this manner the principal volumes of responsa, or at the very least the legal sections of them, in order to make them accessible to all lawyers and scientists. Only thus will it be possible to make use of these superior legal sources abundantly and fruitfully in our judicial life in Israel. These principles were borne in mind in compiling this work, "*Jewish Law – Selected Responsa*", whose purpose is to place before the intelligent Hebrew reader the rabbinical responsa literature. The present volume includes a selection of responsa from the end of the Gaonic period to the expulsion from Spain. A number of responsa in civil and criminal law have been selected from each of the outstanding responders in their generations to the present day. The responsa are fully explained in as clear a language as possible. References to the Talmud and its commentators, briefly referred or alluded to in the responsa, are cited in full in the notes, giving the sources and explaining and commenting on them ... At the end of each responsa references to additional sources and laws dealing with the same topic are cited, in particular to works and legal articles relevant to the topic.

Every group of responsa has a short biography of its author prefaced to it ... As far as possible the text is given from the first edition before the censor had touched it. Those responsa have been chosen which have some connection with the legal problems of today. Care has been taken not to cite long and involved responsa in order not to burden the reader for whom it is intended.

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### *Some examples*

Here follow a number of examples that appear in the book taken from different ruling authorities in the abridgement given them by the author. Only the name of the author and the year of his death is given.

*Joseph Ibn Migas* (d. 1141), Spanish rabbi of Seville (p. 20): Has one who has not studied the halakhah but has reflected much on the responsa of the *Geonim* and the halakhic codes the right to rule in Law? The questioner points out the defects in the Gaonic responsa – many are marred by errors due to the copyists, others are not attributed to their real authors – in others the author later changed his mind. Moreover, the person intending to rule in accordance with the Gaonic responsa lacks the fear of Heaven. Ibn Migas answers: One who rules in accordance with the Gaonic responsa is more praiseworthy than one ruling directly from the Talmud. Nowadays no-one is deemed worthy of distinguishing between the different laws cited in the Talmud. As for lack of fear of Heaven – this is a fault in a permanent judge, but if he merely judges those who have chosen him as an arbitrator – this does not constitute a hindrance.

*Moses b. Maimon* (Maimonides) (d. 1204.), Spanish rabbi of Cairo (p. 37): If A was obliged to repay B in one type of coinage, but later that coinage was changed for one of lesser value, has A to repay B in the current, or in the original, coin? Maimonides replies that he must repay the original coinage if it is available, but if not then the value of the original must be assessed.

*Meir ha-Levi Abulafia* (d. 1244), Castilian rabbi (p. 41): Between the courtyards of A and B stands a wall which is the property of both. A wishes to pierce the wall in order to place beams resting upon the whole wall, but B argues that A has the right to penetrate to half the thickness of the joint wall. Abulafia decided that the wall as a whole is their joint property and the portion of each partner is not limited to half the thickness of the wall, hence A has the right.

*Meir of Rottenburg* (d. 1293), German rabbi (p. 54): Has a person the right to appeal against the judgment of a court before another court, and what follows if it becomes evident that the first court erred? Meir replied that the first court must change their judgment, or compensate the litigant from their own pockets, since they made him liable unjustly.

*Solomon ben Adret* (d. 1310), Spanish rabbi (p. 66): A brought customers to the shop of B and then demanded a commission for his services, since it was customary for shop-keepers to pay such commission. Solomon decided that the claim was justly based.

*Idem* (p. 73): A wished to open a window in his house to overlook B's court. At the time this would not harm B through the tort of overlooking. B claimed that when he builds in his property A would be overlooking him from that window. Solomon decided that B could prevent A from opening the window although at the time he did him no harm.

*Asher b. Jehiel* (d. 1327), German rabbi living in Toledo (p. 113): A owed money to B. To prevent B obtaining satisfaction from his property, A deeded all his property to C. Asher decided that since it was obvious that the gift was a trick, B could take payment from this property although now it nominally belonged to C. This conclusion was arrived at by comparison with other cases in the Talmud. The sages of the Talmud could not put on record all possible cases, hence one must infer one case from another.

*Jacob Weill* (15th c.), German rabbi (p. 235): A woman brought her husband to court, claiming that he wasted his money on card playing and behaved in an unruly manner in taverns, and demanded that he divorce her and pay her marriage settlement. The husband denied it all and promised henceforth to behave properly. Jacob Weill decided that the husband's assurance was to be accepted and he was not obliged to divorce her.

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