MODERN ISSUES IN JEWISH LAW

*by SHMUEL SHILO**

שנתון המשפט העברי של המכון לחקר המשפט העברי. כרכים א–ה. בעריכת מנחם אלון. האוניברסיטה העברית בירושלים בהוצאת המכון לחקר המשפט העברי. ירושלים. תשל"ה – תשל"ח. כרך א' 372 ע'. כרך ב' 453 ע'. כרך ג'–ד' 436 ע'. כרך ה' 406 ע'

(*Shenaton Ha-Mishpat Ha-Ivri*, I–V. Edited by Menachem Elon. The Hebrew University of Jerusalem, Annual of the Institute for Research in Jewish Law, published by the Institute for Research in Jewish Law 1975-1978, vol. I, 372 pp.; Vol. II, 453 pp.; Vol. III–IV, 436 pp.; Vol. V, 406 pp.).

In 1978 Vol. V of the Hebrew University's Institute for Research in Jewish Law's *Shenaton* appeared, and in the next few pages we will give a synopsis of the articles which appeared in the four volumes (volumes III–IV came out as one double volume) since the appearance of Vol. I in 1974. The articles cover a very wide range of topics in Jewish Law; not only are the topics varied, but so are the approaches and methods of the different authors.

Scholarship in Jewish Law in Israel today is very much different from what it was not so many years ago. In these volumes, there is not even one article on biblical law and only a minority of the articles in these volumes concern themselves specifically with Talmudic law. Under the influence of the editor, Professor Menachem Elon, who was the founder and head of the Institute for Research in Jewish Law for many years (until his appointment as a Justice to the Supreme Court of Israel), the main thrust of Israeli scholarship has been concerned with post-Talmudic sources, with the Talmud, of course, remaining the basic source. Jewish law was a developing and living law for two millenia, and until modern times the Jewish people had their own religious and legal autonomy. Until the era of the Emancipation Jews continued to live their daily lives according to Jewish law, bringing their disputes to the Rabbinical authorities and not to the Gentile courts. A vast literature of case law (the responsa literature) grew and flowered, and these sources, especially those written during the Middle Ages, became an immense treasure trove of Jewish Law.

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Almost fifty articles are included in the four volumes of the *Shenaton* covering all the major legal headings. More than half the articles concern Jewish civil law and family law, and there are also articles on criminal law, philosophy of law, comparative law, practice and procedure, constitutional and administrative law, law and history and legal bibliography. Since about one third of the articles deal with questions of family law, we will begin our survey with the family law essays.

Family Law

It is not at all puzzling why so much has been written, recently, on questions pertaining to family law. This is the only branch of Jewish law which is also the positive law of all Israeli Jews, whether he be religious agnostic or atheist. The State of Israel has incorporated the family law of the different religious communities in Israel as the law of the State. Matters of marriage and divorce are in the exclusive jurisdiction of the Israeli religious courts. Therefore scholarship on topics of family law is not only theoretical in nature but may also have practical application and may influence the Jewish population as a whole, in Israel. The questions dealt with in the various *Shenatonim* include monogamy and bigamy, civil marriage, coercion of divorce, temporary separation between spouses, residential agreements between spouses, the responsibility of a husband for his wife's monetary obligations, custody of children, abortion, blood tests for proof of paternity, evidence in matrimonial causes, proselytes, and three articles concerning the legal ramifications of adultery.

S.Z. Havlin's article on *The Takkanot of Rabbenu Gershom Ma'or Hagola in Family Law in Spain and Provence (in the Light of Manuscripts of Responsa of RASHBA and R. Isaac de Molina)* (*Shenaton* Vol. II, 200-257) is a most scholarly piece of work discussing the famous ban on bigamy and the outlawing of divorcing a wife without her consent, attributed to R. Gershom (Ashkenaz, 960-1028). Havlin compares the extant manuscripts of responsa written in the Middle Ages, to printed editions of responsa which bring the text of the ban. The essay adds much to one's understanding of both the contents of the ban and the awareness of it by other Jewish communities and its acceptance by them. Havlin also prints, for the first time, texts which until now have only been available in manuscript, and in his introduction to these texts and in his comments to them has added much to our understanding of the most well-known and important piece of legislation of post-Talmudic times.

I.M. Mazuz in *Civil Marriage and their Consequences* (III-IV, 233-270), discusses the validity of and problems arising out of civil marriages, according to Jewish law. After a general introduction to the questions entailed, Mazuz discusses, one by one, first the legal basis of Jewish law's possible recognition of civil marriages as valid, and he then analyzes the sundry legal ramifications such a recognition would entail. Mazuz examines the monetary rights of such a husband and wife and follows up with an analysis of the legal ramifications of such rights. Some of the author's conclusions are that where the couple resides in a country that permits only civil marriage it seems that the civil marriage would be recognized by Jewish Law. In

countries where one may perform a religious marriage ceremony, civil marriage would not be recognized as valid by Jewish Law. In any event, writes Mazuz, one must make a clear distinction between questions of one's personal status and between those concerning monetary matters between the spouses. Mazuz ends his essay with some practical suggestions for the Rabbinical courts.

One of the most pressing problems in Jewish Law is the granting of a divorce by a recalcitrant husband. Since, according to Jewish law, a divorce is a private act of the husband performed under the supervision of the Rabbinical court, the divorce must be given by the free-will of the husband. The Rabbis seldom coerce a husband to grant his wife a divorce for fear of the bill of divorce becoming void due to its having been given under force. The Talmud mentions a few instances where the court may use its power of coercion on the husbands but these examples are usually looked upon by the Rabbis in post-Talmudic times as being a *numerus clausus* and in most cases the Rabbis are not willing to compel a husband to divorce his wife even where the objective circumstances cry out for such a solution.

Zorach Warhaftig in his article on *Coercion to Grant a Divorce in Theory and in Practice* (III-IV, 153-216), deals with the problem at length, examining both Talmudic and post-Talmudic literature, as well as commenting on the policy of Israel's Rabbinical courts. The author has no quick and ready solutions to the problem, but his article stimulates the reader to rethink about many of these most difficult problems which Jewish law must cope with today.

M. Corinaldi in his article on *The Remedy of Temporary Separation between Husband and Wife, as Reflected in the Decisions of the Rabbinical Courts* (I 184-218), shows how the Rabbinical courts of the State of Israel developed and refined a concept of temporary separation between spouses – a remedy which is not specifically found in the classic sources of Jewish law, especially when this entails the coercing of a husband to leave the couple's dwelling. This last remedy, although rare, is not completely rejected by the Rabbinical courts. The author also discusses grounds for separation and he systematically catalogues and analyzes the situations which may and do lead to a court-ordered separation. The most common circumstances are threefold: 1) a temporary separation until domestic harmony can be achieved, or until a divorce is given; 2) an intermediary relief when a claim for divorce is before the court; 3) an intermediary arrangement between the time a judgment for divorce is given and the actual divorce takes place.

Itamar Warhaftig discusses in two different articles questions of monetary matters concerning husband and wife. In his first article on *Husband's Liability for the Debts of His Wife in Jewish Law* (II, 258-291), the author explores the question – to what extent is a wife looked upon as her husband's agent so that he will be bound by her actions in connection with a third party. In addition to analyzing the position of Jewish law, the author also compares Jewish law to both English and Israeli law. In his second article, on *Residential Agreement between Spouses in Rabbinical Courts* (III-IV, 377-392), I. Warhaftig analyzes a judgement of Israel's

Rabbinical court concerning a residential agreement between spouses and this decision serves as a springboard for a lengthy discussion of the problematical rule in Jewish law about obligations concerning insubstantial things.

D. Sinclair's essay on *The Legal Basis for the Prohibition on Abortion in Jewish Law (With Some Comparative Reference to Canon, Common and Israeli Law)* (V, 177-208), spans many centuries and a number of legal systems. Abortion is not specifically prohibited either in the Torah or in the Talmud. Because of this, the Rabbis had to look for and find a logical-legal bais for the prohibition of abortions in a more roundabout way than by a clear unambiguous ban by the universally accepted sources of the law. This led to many interesting and fruitful discussions and to diverging trends of thought. The author investigates the development of this attempt to find the legal basis for outlawing abortion in Jewish law. Sinclair also compares the attitude of Jewish law to other ancient legal systems. He shows that according to these ancient legal systems, abortion is not akin to murder. On the other hand, it appears that there is an albeit unwritten prohibition against abortion where there is no conflict between the needs of the mother and those of the foetus. All this is in opposition to Canon law which views the foetus as a living soul and abortion as murder. Canon law even went so far as to prohibit abortion even when the mother's life is in danger. Only under certain special circumstances does Canon law allow an abortion when the mother's life is in danger. Canon law is based, concerning abortion, on Greek philosophy and the extreme views of the early Christians concerning the love of one's fellow-man. Opposition to abortion was one of the central tenets of early Christianity. In Jewish law two views developed concerning the status of the foetus: 1) the foetus is a potential soul; 2) the foetus is a part of its mother. From these two basic views of the status of the foetus emerged the differences between the Rabbis concerning their attitude toward abortion, and the many discussions regarding the different stages of pregnancy. The author also comments on recent legislation in a number of jurisdictions concerning abortion, and probes, in particular, the law in the State of Israel.

D. Frimer writes on *The Establishment of Paternity through Blood-Testing in Israeli Law and Jewish Law* (V, 219-242). The questions examined are threefold: 1) To what extent does the legal system (Israeli and Jewish) accept the scientific community's view that a blood test is a valid way of establishing paternity; 2) Even if the particular legal system is willing to accept the scientists' position, to what extent is the system willing to admit the blood test as legally acceptable evidence and proof; 3) May the court force a party to have a blood test against his will?

The basic rule of evidence in Jewish law is that testimony must be given in the presence of the parties involved. Exceptions to this rule are already mentioned in the Talmud. In his article on *Testimony in the Absence of a Party (Ex-Parte) in Matrimonial Matters* (V, 321-360), S. Shilo considers the rule and its exceptions in the special context of evidence given in matrimonial matters. The author emphasizes where, when and how certain views were developed, accepted or rejected. The subject is examined comprehensively, from the earliest Rabbinical sources which discuss the issue through an analysis of the decisions of the Rabbinical courts in Israel.

Three articles concerning adultery appeared in the volumes, each one written in a completely different manner. One deals with the Talmudic period, another with the Middle Ages and the third – a dogmatically written essay not particularly connected with a specific period.

S. Friedman compares Talmudic law to ancient legal systems of the East. In his introduction the author examines the problems of and emphasizes the need to compare Talmudic law to ancient Eastern legal systems, and is surprised that very little scholarship has been undertaken in that direction. Specifically, Friedman probes *The Case of the Woman with Two Husbands in Talmudic and Ancient Near Eastern Law* (II, 360-382), i.e. the situation discussed in the *Mishnah* of the tenth chapter of the tractate *Yevamot* concerning a man who left his wife to go abroad: Witnesses appeared, testifying that he died; the woman remarried and then her first husband reappeared. This same case is also discussed in detail in a number of ancient Near Eastern legal systems such as those of Eshnuna, Hammurabi and Assyria. In these non-Jewish legal systems a woman whose husband left her may remarry if she has no means of sustenance, and if her first husband was forced to leave her he may remarry her on his return; if he left in his own free will, he may not remarry her. In the *Mishnah* it is laid down, that if the woman remarried on her own, without the permission of the court, she may return to her original husband if he returns. If, however, she remarried with the court's permission, she must be divorced from both of her husbands. According to Friedman's interpretation the reason for her losing both husbands is not – as is generally accepted – a desire on the part of the Rabbis to punish her for not seriously investigating the alleged death of her husband, but rather the Rabbis viewed both marriages as valid marriages according to the law, and since both men were married to this one woman, both were therefore forbidden to continue living with her. In the later Amoraic period, the *Amoraim* explained the situation and reasoning behind the law differently – interpretations which evolved between the early and late Amoraic periods. The author writes, specifically taking issue with Aptowizer, that the Syro-Nestorian law concerning this situation was not influenced by the Talmud.

The traditional position of Jewish law which is that a married woman who has intercourse with someone other than her husband is forbidden to continue living with her husband, became especially problematical in the Middle Ages. At that time Jews were often seized by non-Jews and held as prisoners, either for the purpose of ransom or in order to force them to convert to Christianity. When a Jewish woman was seized and later freed, the question arose whether after her imprisonment she was allowed to return and live with her husband, since she may have found it very difficult or well nigh impossible to keep her chastity under such conditions. According to Jewish law, if a woman is coerced into having relations with another, i.e. a woman who is raped, she is allowed to return to her husband. But a special problem arises if such a woman is married to a *kohen* (a member of the priestly line). If the wife of a *kohen* is raped, she is forbidden to continue living with her husband.

G.I. Blidstein in *The Personal Status of Apostate and Ransomed Women in Medieval Jewish Law* (III-IV, 35-116), does a most thorough job of research and analysis – both legal and historical. He shows that during medieval times, in addition to the older question of the status of women who were captured and imprisoned, a new situation arose bringing with it its own problems. What does Jewish law say about the right of women to return to their husbands after having converted to Christianity, and then returned to the Jewish fold? A distinction was made by the Rabbis between forced and voluntary apostasy. Blidstein shows that in most cases of forced conversion, the woman was permitted to return to her husband. In voluntary conversion, she was usually prohibited from doing so. One reads in the responsa literature of the period, how the Rabbis evolved a new outlook towards the Gentiles, and developed different attitudes towards various types of seizure and detention. The general attitude of the Rabbis was that a Jewish woman, even under the most trying circumstances, would be able to hold out and remain faithful to her husband. But although the general position taken by the Rabbis was one of leniency, with the imprisoned woman being allowed to return to her husband, the fate of a *kohen*'s wife was different. Here, because of the rule that even non-willful intercourse prohibits her from again living with her husband, the attitude was usually stringent, the wife of the *kohen* being almost always separated from her husband. As an afterthought, Blidstein remarks that on certain basic questions there is a rift between the views of Ashkenazic scholars and those of the Spanish School (Most of Bildstein's study concerns Ashkenazic Jewry). But he poses some questions which remain unanswered. Is this difference due to differing methods of conversion resorted to by the Christians in Germany, France, and Spain which led to the Rabbis' taking dissimilar stands, or perhaps the differences between Ashkenazi and Spanish Jewry on this issue stemmed from a different Jewish view of their own surrounding environments.

If adultery is committed mistakenly either due to a mistake of fact or one of law, it appears that the woman may continue to live with her husband. In the third article revolving around adultery, M. Drori examines *The Concept of "Shgaga" in Jewish Law: Mistake of Law and Mistake of Fact* (I, 72-97), as it is applied to adultery. The author scrutinizes these two types of error, comparing the position of Jewish law to that of English and Israeli law, both in the specific context of adultery and in the more general one of legal and factual error. The author concludes that concerning adultery the law does distinguish between these two types of error. Therefore, if a woman has intercourse with a man, while she mistakenly thinks that he is her legal husband, she may continue to live with her legally recognized husband. But, on the other hand, a woman committing adultery with another, mistakenly thinking that one is permitted to do so, or under the mistaken impression that she is not married or that she is divorced, the mistake is seen as a mistake of law, and this is not considered technically "shgaga" – mistake; this woman is prohibited from continuing to live with her husband like an ordinary adulteress.

Z.W. Falk in his *Trends in the Laws of Conversion* (I, 183-197), discusses the prerequisites for conversion to Judaism in Talmudic times and concludes that the

Gentile coming to convert was not pressed to take upon himself all the commandments, but it was enough if he took upon himself those commandments explained to him in the process of conversion. Only if on his part he showed that he was not willing to accept some commandment of Judaism, this was valid cause not to convert him.

Civil Law

The entries on civil law cover a wide spectrum of law headings. There are articles on the capacity of minors, partnership, bailment, pledge, multiplicity of obligations, illegal contracts, interest, and three studies on different aspects of agency.

In his *Fundamental Principles in Talmudic Civil Law as Reflected in the Law of the Minor* (I 21-44), S. Albeck reiterates his well-known position that Jewish law usually prefers objective to subjective criteria, and the subject of the capacity of minors is used as a further example of his views. Albeck's study is not only an examination of the law concerning the capacity of minors, but is an essay on questions of the different legal consequences of acts, where individual conduct is deemed to be in line with what would be expected of the majority of people, of all people or only of certain unusual individuals. This threefold division between general, majority, and minority behaviour, is the basis for much of Albeck's theory of objective criteria found throughout the Jewish legal system.

Is a partnership, according to Jewish law, a legal entity in itself? S.D. Revital asks this question in his *The Nature of Partnership in Jewish Law* (I, 263-270), and his answer to this query is not a simple one. It seems that Jewish law has found a middle way between a legal persona in itself and a conglomerate of joint individual rights. It seems that Revital is of the opinion that partnership in Jewish law is closer to the latter than to the former.

In M. Corinaldi's *Sub-bailment in Jewish Law and in the Bailees Law, 5727-1967* (II, 383-453), the author analyzes the relationships between the three parties involved, bailor, bailee and sub-bailee. For example, if the sub-bailment is made with the bailor's knowledge, does the sub-bailee automatically become the bailor's bailee and is the legal relationship between the original bailee and the bailor nullified, or does the original relationship remain with a new one added -- that between bailee and sub-bailee? When the sub-bailment was made without the bailor's knowledge, is there privity between bailor and sub-bailee? Does sub-bailment have an effect on the original liability of the bailee? Corinaldi, at the end of his detailed study, compares Jewish law with the Israeli law of bailment. He concludes that the Israeli solution to the question of sub-bailment without the bailor's knowledge is similar to the position of Jewish law; on the other hand, the Israeli solution is different in the case of sub-bailment with the bailor's approval.

S. Lerner, in his *Equity of Redemption in Jewish Law* (V, 155-176), discusses a moral-legal question of the prerogative of the creditor to execute his right and take

final possession and ownership of the pledge where authority to do so was specifically agreed upon by creditor and debtor. Lerner analyzes the nature of a pledge and the essence of such a condition, in the context of the equity of redemption rule found in Jewish law. In the appendix to his article, Lerner compares Jewish law to the Israeli Pledge Law, 1976.

N. Rakover discusses in his *Multiplicity of Obligees in Jewish Law* (I, 271-299), the responsibility of joint obligees in various legal circumstances; debtors, bailees, sureties, obligees, inheritors, tortfeasors, and thieves. The author compares Jewish law to Israeli law and he even prepares the text for a proposed law based on the principles of Jewish law concerning joint obligees. In Israeli law the general rule is that both obligees are liable jointly and severally. In Jewish law the principle is different. Each obligee is liable for half of the obligation and is a surety for the other half. As a result of this basic difference, there are varying solutions to questions which arise as a result of multiple obligations e.g. the creditor's waiver of his right to one of the obligees; is this a waiver to the other obligees as well?

In his essay on *The Validity of a Contract Made on Shabbat and on Yom Tov* (I, 300-313), E. Schochetman deals with one of the major questions arising within the context of the general problem of the legal validity of acts tainted with illegality. The specific question discussed is similar to what are known as blue-law statutes in America and similar legislation in other Christian countries, prohibiting certain activities including legal transactions, on Sundays. Shochetman concludes that where the defect in the contract is caused only by the *time* of entering into it e.g. on the Sabbath, the contract is valid.

As is well-known, Jewish law forbids the taking of any interest whatsoever from a brother Jew. B.Z. Eliash in his *Ideological Roots of the Halakhah: A Chapter in the Laws of Interest* (V, 7-78), takes a dogmatic a-historical approach to some basic problems of the laws of interest. The author is well aware of his method and the possible criticism of his method by other scholars, but he explains why in his opinion, at least concerning the specific topic he discusses, such a method is scholarly valid. In his study Eliash examines thoroughly two very important topics in connection with interest: 1) The reason for the prohibition against taking interest and 2) Nominalism and realism as criterions for determining whether a certain transaction is or is not tainted with interest. In spite of the author's avowed dogmatic approach, he succeeds in showing that within the Talmudic period itself the law concerning interest developed dynamically, and Eliash also perceives three different schools of thought. He also succeeds in showing that there was a clear difference between the Babylonian and Palestinian schools. In general, one can conclude that there was an evolution from a nominalistic approach in early Tannaitic times to a realistic view in the late Amoraic period.

A. Kirschenbaum and S. Shilo write on different aspects of the law of agency. A. Kirschenbaum discusses a quite technical but important rule of the law of agency in his *The Rule "Milei Lo Mimseran Le-Shaliach" in the Jewish Law of*

Agency (A Theoretical Analysis) (V, 243-284). S. Shilo contributes a review essay of N. Rakover's book on Agency, in his *On the Jewish Law of Agency* (I, 314-327). In another article on the law of agency by Shilo, *Unexpected Profits Accruing to the Agent in Connection with the Object of the Agency in Jewish Law and the Israeli Law of Agency, 5725–1965* (III-IV, 341-375), the author shows that there is a basic difference between the Jewish and Israeli legal systems concerning the specific question under discussion i.e. unexpected profits. This difference stems from the theoretical disparity concerning the nature of agency in these two legal systems. Israel and most modern legal systems view agency as a quasi-trust; Jewish law understands agency more in the context of a master-servant relationship. As a result, Israeli law views profits accruing to the agent as always belonging to the principal; Jewish law is willing, under certain circumstances, to allow the agent to take some, or even all, of these unforeseen profits.

Criminal Law

Of the four contributions in the field of criminal law, two articles have strong historical settings, two of which are almost totally legal in nature.

A. Kirschenbaum, in his *Jewish Law of Agency for Illegal Acts, Pt. II* (I, 219-230), not only discusses the legal problem of the responsibility of agent and principal for criminal acts committed by an agent at the principal's heeding, but also the historical question of whether the principles enunciated in the Tannaitic sources were influenced by the trial of Herod before a Jewish court. G. Leibson in his legal-historical discussion of *Determining Factors in Herem and Nidui (Ban and Excommunication) During the Tannaitic and Amoraic Periods* (II, 292-342) shows how the ban developed during its different stages both in Palestine and in Babylonia. The author concludes that although the Talmud lists the grounds for proclaiming a ban, the list is not a *numerus clausus* – even though the Talmud specifically states that the ban may be proclaimed for twenty-four negative types of conduct. The extension of the ban to other types of conduct is especially evident concerning Babylonian Amoraim. Leibson shows that in Babylon the ban was extended to cover many other situations, as a means of coercion and punishment.

Both A. Enker and E.C. Benzimra write on necessity and duress in Jewish criminal law. In his *Homicide Committed in Circumstances of Duress and Necessity in Jewish Law* (II, 154-174), A. Enker discusses, inter alia, the preservation of many lives by sacrificing an individual, the duty to volunteer to save another's life and homicide committed under duress or necessity. E.C. Benzimra, in his *Bloodshed by Necessity in Jewish and Israeli Law (On the Adequate Means of Rescue and the Blood Balance)* (III-IV, 117-152), discusses some of the topics considered by Enker in his article, occasionally taking a different approach and coming, at times, to different conclusions.

Procedure and Evidence

In another article, similar in approach and method to his former one, G. Leibson writes again on a legal topic in a specific historical setting – *The Use of "Gezerta" during the Gaonic Period and the Early Middle Ages* (V, 79-154). The study probes the development of different types of oaths or quasi-oaths taken in court by a party to a dispute.

The development of the law also plays a major role in A.M. Fuss's *Written Testimony in Jewish Civil Law* (III-IV, 327-340). The author discusses the changing views concerning written evidence which, according to strict law, is not acceptable as valid evidence. Although according to the Bible and the Talmud only parol (oral) evidence is accepted by the court, Fuss shows how this barrier was broken during certain periods. The change in attitude is explained by the author as a reaction to pressing economic needs of the time. In historical perspective these deviations from the rule were only of a temporary nature and the basic view of Jewish law remained i.e. only parol evidence is considered valid.

Constitutional and Administrative Law

A most important contribution to the scholarship of Jewish law and history is made by the four comprehensive articles concerning the rights and powers of the Jewish community and of communal legislation. A. Grossman writes on Ashkenazic Jewry, A. Nachalon has contributed two essays on Sephardic Jewry, and M. Elon's contribution is an overview and is not especially connected with any one specific historical setting.

In his *The Attitude of the Early Scholars of Ashkenaz towards the Authority of the "Kahal"* (II, 157-199), A. Grossman shows how the leading scholars in Ashkenaz in the Middle Ages slowly but surely gave more and more power to the rule of the community. The Ashkenazic-French scholars of the 12th-13th centuries did not usually base their decisions concerning the place of the community in Jewish law, on the views of their predecessors of the eleventh century. Perhaps, Grossman conjectures, the growth of the cities and the corporate framework of the times in the surrounding Christian communities influenced this slowly changing attitude. Or, maybe, Grossman writes, this attitude is due to the special problems faced by the community as a result of its rapid growth. Grossman shows that some halakhic scholars also took part in the communal leadership in eleventh century Ashkenaz.

In the first of two complementary articles, A. Nachalon writes on *The Authority of Communal Enactments ("Takkanot Ha-Kahal"): The Legislative Body according to the Tashbetz* (I, 142-178). The article describes the legislative body in the North Africa Jewish community in the fourteenth and fifteenth centuries, on the basis of an analysis of the responsa of R. Simon b. Ẓemah Duran [Spain and North Africa, (1361-1444)], the leading Rabbinic authority of his time in North Africa. This study is significant both for historians – Nachalon portrays the Jewish community

and its internal organization in fourteenth and fifteenth centuries North Africa – and especially for jurists, who are presented with an analysis of the legal basis of both legislation and the legislator. The main topics discussed are: who has the right to legislate for the community, what are the rights of the minority vis à vis the majority concerning communal legislation, and to what extent did Jewish law (as interpreted by the scholars of the time, mainly R. Simon Duran) accept the communal leaders as against the religious leadership – again in relation to communal legislation.

In his second article on *The Communal Enactments ("Takkanot Ha-Kahal"): Their Legal Nature according to the Tashbetz* (III-IV, 271-326), A. Nachalon not only analyzes the legal nature of the enactments but also the legal basis of the community's rights to legislate. The community's rights to force one to comply with its legislation is also probed, both theoretically and in its practical application. The author concludes that communal legislation is a norm of Jewish public law and one of the main ancillary features of this right to legislate is the right to compel compliance with the law. Legislation relating to private individuals is also classified as part of communal legislation. Another conclusion reached by Nachalon is that the community may not pass enactments contrary to religious law. As to forms of coercion for non-compliance with the enactments of the community, the most popular one was excommunication. This form of coercion was in the hands of the community and could be resorted to by majority vote of the members of the community and its leaders.

M. Elon's essay on *Authority and Power in the Jewish Community: A Chapter in Jewish Public Law* (III-IV, 7-34), is unusual. The main part of this study consists of a scholarly discussion of the authority and power of the Jewish community – i.e. a scholarly analysis of the situation in the past, when the Jewish community was autonomous and Jews conducted their own internal matters by themselves. But, near the end of the article, Elon considers the relevance of all this for us today. In this final chapter of his article, the author surveys and analyzes decisions of Israel's Supreme and Rabbinical Courts relevant to the topic discussed. He criticizes the almost complete lack of emphasis in the Israeli school system on the topics examined in the article, and concludes with some more personal incisive comments on the problem of religion and State in Israel.

Philosophy of Law and Comparative Law

In *The "Oven of Akhanai": Various Interpretations of an Aggadah* (I, 45-56), I. Englard does just what his title states: brings and discusses various interpretations of one of the best known *Aggadot* in the Talmud, that of the oven of Akhnai. Englard opens his article with Silberg's interpretation that the main point of the Aggadah is an extreme example of the rule of law i.e. even God himself is bound by man-made law emanating from God's original rule that the law is decided by a majority rule of mortals. The author then goes on to include a number of other meanings given to the *Aggadah* which, in Englard's view, are at least as valid as Silberg's interpretation.

H.H. Cohn in his *On Measures and Measurements* (III-IV, 217-232), also discusses a subject on which Silberg has written. Cohn's article discusses the many different kinds of measures and measurements mentioned in the Talmud, and sheds light, albeit indirectly, on S. Albeck's views.

F. Shifman, in his *On the Concept of Doubt ("Safek") in Halakha and Law* (I, 328-352), surveys the problem of doubt in law – both in the decision making context of the judge's duties and in the Jewish legal system in general. The sub-topics of this study are e.g. the power and duty which the halakhic scholars have to decide differences of opinion between the scholars of Jewish law, and responsibility of the judge both toward the parties and in the eyes of God. In the second part of this essay Shifman discusses the different rules of decision-making in doubtful cases. In his final few pages the author considers the question as it is found in other religious legal systems, mainly Islamic and Canon law.

As we have seen above, many of the articles included in the volumes under review compare Jewish law to other legal systems. But only in Y. Meron's *Meeting Points of Jewish and Moslem Law* (II, 343-359), do we find an article whose essence is a comparison of two different legal systems. There are similarities between them. Perhaps even one system influenced the other in certain respects. Meron, for example, shows that there is much in common regarding the attitude of both legal systems to the decision-making process, to legislation and to the manner of classification – as well as striking parallelisms between a number of legal institutions.

Legal Biblography

In addition to the review essay by Shilo mentioned above, S.Z. Havlin, E. Schochtman and M. Corinaldi also contributed review essays to the various volumes.

In his *Critical Editions of Rabbinic Literature – "Sanhedrin Gedolah"* (I, 98-141), S.Z. Havlin utilizes his review of "Sanhedrin Gedolah" – commentaries on the tractate of Sanhedrin, as a springboard for more general comments on critical editions of Rabbinic literature. The author makes some scathing comments on the volumes under review – but in the end even he must admit that the publication of critical – though flawed – editions of early manuscripts and printed editions is on the whole a most valuable service to those interested in furthering their understanding of the Talmud and Rabbinic literature.

E. Schochetman in his *The Babylonian Talmud with Halakha B'rura and Berur Halakha* (III-IV, 409-430), reviews the scientific edition of the tractate Succah. The idea behind the edition is a good one – formulated by the late Chief Rabbi of Palestine Rabbi Kook – of adding to the Talmud, the *halakha* as finally determined by later Rabbinical authorities, since in the Talmud itself, the final position of what the law should be, is usually not stated. This is the purpose of the "Halakha B'rura". The avowed aim of the "Berur Halakha" is to show how the decided *halakha* emerged from Talmudic discussion. Schochetman shows that in many instances the

"Halakha B'rura" is incomplete or even incorrect, and that the "Berur Halakha" is sometimes lacking in its explanation or, on the other hand, too verbose and not to the point.

M. Corinaldi's review essay concerns itself with questions of contemporary Israel. In reviewing M. Shawa's *The Personal Law in Israel* (III-IV, 393-408), Corinaldi praises the book's high standard but disagrees with Shawa concerning a number of points such as: to what extent is Jewish law the personal law of Israeli Jews and to what extent are the Rabbinical courts bound to accept Israeli civil law?

In *Bava Metzia III Sugya I (A Study of Medieval Codification in the Light of Talmudic Style)* (V, 209-218), S. Friedman continues to study Talmudic passages using the method he has been developing over the past few years, by breaking down passages to their bare bones and explaining where and when later passages were added and how these additions sometimes altered, even radically, the original meaning of the earlier passages. Friedman then goes on to show how post-Talmudic scholars were or were not aware of these changes and how their view effected the decision-making process.

I. Ta-Shma writes on *The Nature and Characteristics of "Sefer Ha-Maor" by R. Zerahya Ha-Levi* (V, 361-406), but the contents of his article go much further than analyzing R. Zerahya Ha-Levi's (Provence, 12th century) commentary to R. Isaac Alfasi's (North Africa, 1013-1103) opus magnum: the first all-encompassing halakhic decision-making treatise. Ta-Shma writes that one of the main reasons for the writing of "Sefer Ha-Maor" was to point out the differences between the Sephardic and Provencal schools of thought and customs. Ta-Shma discusses the place of Alfasi's work in Provence, the attitude to the accepted halakhic giant, Alfasi, in Provence, and also the place of custom in Jewish law in general and in Provence in particular.

In his *De Collatio Legum Mosaicarum et Romanarum* (I, 231-262), A.M. Rabello analyzes the *Lex Dei* or, in its more well-known name, the *Collatio Legum Mosaicarum et Romanarum* – a treatise written in Latin which compares the law of Moses with Roman law. Rabello discusses two main questions: who is the author of the book and where was it written. Besides, Rabello considers the author's methodology and attempts to set the date of its composition. After very detailed reference to the possible answers to the questions posed, and after analyzing the views of other scholars who wrote on this topic, Rabello's conclusions are that the book was written by a Roman Jew who seems to have also had a general legal education, between the years 296-313. The purpose of the book is to prove to Roman lawyers that ancient Jewish law includes laws and norms which are also found in Roman law.

About one third of volume II of the *Shenaton* consists of E.E. Urbach's *The Responsa of R. Asher b. Yehiel in Manuscripts and Printed Editions* (II, 1-153). Urbach compares the printed edition of R. Asher's (Ashkenaz, Spain, 1250-1327)

classic responsa to manuscripts of the same printed responsa and to other responsa still in manuscript. Urbach not only publishes in full some responsa found in manuscript, for the first time, and adds eye-opening comments to the above, but he also systematically points out the important differences between the printed editions of Asher's responsa and the manuscripts referred to. No serious scholar can now refer to the responsa of R. Asher b. Yehiel without opening this volume of the *Shenaton* and comparing the printed edition of Asher's responsa with Urbach's supplement. A detailed index of Asher's responsa is found at the end of Urbach's article – which makes it very much easier to use the article as a quick reference when dealing with the responsa of Asher.

The reader of this review must by now have become aware that although the *Shenaton* is devoted to Jewish law, much more is found between its covers – especially discussions relevant to historians. We have pointed to many aspects of history in the articles which have appeared, a good example being those dealing with public law. All those articles were written primarily for their juridic analysis – historic considerations being an important by-product. One article, though, was written mainly in order to give the reader a glimpse into the life patterns of a Sephardic Jewish community.

I. Ta-Shma's *Jewish Judiciary and Law in the Eleventh and Twelfth Centuries in Spain (as Reflected in the Responsa of Alfasi)* (I, 353-372), is primarily a thorough study of Alfasi's responsa in order to throw light on the question – to what extent was the general Jewish population in the Sephardic communities of the eleventh and twelfth centuries versed in Torah literature. It is more or less well-known that during these centuries, in Ashkenaz and in France, there is a wealth of Rabbinic Scholarship, including hundreds of important scholars, and that at the same time in Spain, the Golden Age produced outstanding works by Jewish poets, linguists scientists and biblical commentators. What is generally unknown is the extent to which there was knowledge of Jewish law during these two centuries in Spain. Ta-Shma poses this question and concludes that from the responsa of R. Isaac Alfasi the following picture emerges: The community is led and instructed by the elder and by elected representatives; this leadership is accepted by the community. In general the population is religious and the Jews abide by Jewish law in all their daily activities – including not only in matters of ritual but also in their monetary dealings as well. Major criminal acts are almost unheard of. The vast majority of the Jews are observant but ignorant. This typical Jew following the lead of the few elitist scholars, turned to the Jewish courts when he had a dispute with his fellow Jew, and thus decisively contributed to the continuing dynamic development of Jewish law.

Volume VI of the *Shenaton* is now being prepared under the editorship of Menachem Elon and Shmuel Shilo.

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