



# **Windows onto Jewish Legal Culture**

## **Fourteen Exploratory Essays**

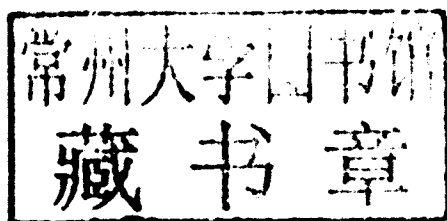
**Hanina Ben-Menahem**

**Arye Edrei**

**Neil S. Hecht**

**Editors**

**VOLUME ONE**



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All the chapters in *Windows onto Jewish Legal Culture: Fourteen Exploratory Essays* have been edited for publication by Nessa Olshansky-Ashtar, and the editors wish to express their gratitude and appreciation for her painstaking work.

# Contributors

1. Controversy	Hanina Ben-Menahem
2. Legal formalism	Hanina Ben-Menahem
3. Exigency authority	Hanina Ben-Menahem
4. Erroneous rulings	Arye Edrei
5. Finality of judgment	Eliav Shochetman
6. Self-help	Shimshon Ettinger
7. Law of the pursuer	Arnold Enker
8. Equity	Hanina Ben-Menahem
9. Charity and distributive justice	Benjamin Porat
10. Euthanasia	Daniel Sinclair
11. Agency	Shimshon Ettinger
12. Employee and independent contractor	Berachyahu Lifshitz
13. Unjust enrichment	Itamar Warhaftig
14. Free market competition in Jewish law	Sinai Deutch

## Note to the reader

The chapters of *Windows onto Jewish Legal Culture: Fourteen Exploratory Essays* are replete with references to halakhic authorities and their writings. Many of these authorities are customarily referred to by acronyms of their names (e.g., Rashi, the Hida) or of the titles of their best-known works (e.g., the Shela, the Shakh); or by the titles of these works themselves (the Tur, the Arukh Hashulhan). To assist the reader in identifying these individuals, a list of the rabbinical authorities cited or referred to is provided at the end of each volume, along with a brief bio-bibliographic description. The authorities and scholars are listed alphabetically by their first name in English; in some cases they are also listed by their acronym (Rashi, the Rabad) or other commonly-used appellation (Maimonides, Gerondi). When a book title is used to refer to an individual, it is not italicized.

In references to the Talmud, m, b, j, or t prefixed to the tractate name indicates whether the Mishnah, the Babylonian Talmud, Jerusalem Talmud, or Tosefta is being referred to.

# Introduction

This book is not an introduction to Jewish law. Rather, it takes the reader on a journey through largely unmarked territory, seeking to provide an idea of the complexity, multi-dimensionality, and unevenness of the area being explored. It assumes that the traveler has a general idea of the terrain she is exploring. It does not seek to present the 'received' view, that is, the generally accepted view, but rather to present an analysis of the subject from the author's perspective.

Accordingly, the target audience of this volume is made up of those to whom the basic elements of Jewish legal culture are somewhat familiar, for though the book does provide background information on the principal concepts and legal sources, it does not present a comprehensive overview of the structure, history, and sources of Jewish law.

The Jewish legal heritage, in the broad sense, is best thought of as a legal culture rather than a legal system. The term 'legal system' assumes an organized institutional hierarchical order, an order that can hardly be said to have existed throughout Jewish history. Jewish legal culture is generated by various constituencies, between which there is often tension: the rabbinical establishment; the teachers and students of the law at the rabbinical academies (*yeshivot*), where they study the canonical texts of Jewish law, engaging in debate and dialogue as questions arise; the lay leadership, which conducts the civic affairs of Jewish communities; members of the community, who, by adopting certain customs and comportments on their own, force the establishment to acknowledge these behaviors, either condoning them or seeking to repress them; and the Gentile societies within which Jews live. As to the latter, it is important to keep in mind that there has always been a certain trickle-down effect by which Gentile mores penetrated and were unconsciously absorbed by Jewish communities.

The term 'Jewish law,' the usual English epithet for *halakha*, covers legal arrangements in a wide range of geographic areas and historical eras, from biblical times to the present. Jewish law, the foundational texts of which are the Torah (the Pentateuch) and the Talmud, is a normative system regulating all aspects of daily life, private and public, including ritual, property, family, commercial, tort, and penal law. In the public domain, it encompasses the judiciary, communal regulations, taxation and constitutional law.

Since the destruction of the Second Temple almost 2,000 years ago, Jewish law has not been the positive law of any state, and its central institution, the Great Sanhedrin—the high court—has been defunct. Moreover, since that time, certain parts of Jewish law, especially those corresponding to modern criminal law, have not been in force. A tension



between this anomalous reality and the ideal of a sovereign Jewish regime in its own territory with its own institutions, reflected in the frequently-encountered term "in our day," which connotes the inferiority of our times, pervades Jewish law.

Although some segments of the halakha are valid only in the land of Israel, the jurisdiction of Jewish law is personal, not territorial, and applies to Jews everywhere.

The role of Jewish legal culture in post-biblical Jewish civilization cannot be overestimated. The law is not only the force that held Jews together, both in the land of Israel and throughout the Diaspora, but its study and interpretation are also the primary focus of Jewish intellectual endeavor, by far overshadowing philosophy, homiletics and Kabbala. Study of the law is a paramount religious duty, to be carried out daily by laymen as well as scholars. Social and personal success are measured by achievement in studying the law. Furthermore, students are encouraged to speak their mind, even if their opinions diverge from the received view, empowering individuals to participate in the evolution of the law. Though limited to those actually engaged in Torah study, this participation has a ripple effect, generating a sense in the community that the law, being an ongoing enterprise rather than dictated from above, is democratic, so to speak. Another element that reflects the participatory dimension of Jewish legal culture is the cardinal, all-embracing decision-making principle that the law is decided in accordance with the majority view.

The formative era of Jewish law is the talmudic period, during which the foundational texts of Jewish law—the Mishnah and the Talmud—were composed. The Mishnah is the preeminent compilation of the teachings of the Tannaim, sages who lived in Palestine in the first two centuries CE. Arranged thematically, it covers the entire legal spectrum: family law, civil law, agricultural law, ritual law, criminal law, etc. The Mishnah itself became a focus of interpretative analysis by later sages, the Amoraim, whose work was not limited to commentary on the law, but also addressed the general culture of the time. Palestinian Amoraic academies produced the Jerusalem Talmud, compiled around 400 CE; Babylonian Amoraic academies produced the Babylonian Talmud about a century later. Redaction is far more evident in the latter than the former.

The evolution and philosophy of Jewish legal culture cannot be understood without a firm grasp of talmudic law. The unique position of the Babylonian Talmud vis-à-vis later works is grounded in the fact that it is the latest text universally accepted by Jewish legal culture as halakhically authoritative. Its authority was established by the Geonim, heads of Babylonian talmudic academies after the Muslim conquest of Babylonia. From then on, every legal discussion takes as its starting point the Babylonian Talmud's position on the question at hand, though it is not necessarily upheld as law. Most of the halakhic literature is essentially elaboration of and commentary on the Talmud. Due to its interpretative

nature, halakhic creativity emerges in successive layers, in tree-ring fashion. As earlier contributions are always retained, the evolution of Jewish legal culture can be traced relatively easily.

A potentially misleading duality between the exposition of the law and its implementation in practice has always existed in Jewish law. The use of exact measurements and precise, detailed formulations (*midot veshiurim*), and the avoidance of such abstract formulations as 'reasonable behavior' and 'bona fide conduct,' could create the impression that talmudic law is a dry legalistic system within which rights and obligations are rigid and decisions pedantic. But this impression is fundamentally incorrect. Talmudic law as applied in practice (*halakha lemaase*) cannot be inferred from its theoretical exposition (*halakha*). This distinction is not imposed upon the sources, but found in the sources themselves. Thus, for example, the Talmud explains a misunderstanding as follows: "He was talking in terms of theoretical law, and they understood him as if he were talking about implementation of the law" (jBeitza 2:1[61b]); and states: "One who inquires about practical law must state that he is inquiring for practical purposes.... [given] a practical inquiry and a theoretical inquiry, the practical takes precedence" (tSanhedrin 7:7).

Any attempt to describe Jewish law must therefore carefully distinguish between theoretical law and law intended for implementation. With respect to the talmudic period, an account of the latter can be provided on the basis of episodes, precedents, and rulings reported in the Talmud itself; for the post-talmudic period, the responsa literature is a more reliable source for ascertaining the law intended for implementation than the other genres of halakhic writing. The responsa literature, which originated in the Geonic period, and has flourished ever since, consists mainly of legal opinions issued in response to queries submitted by courts regarding cases before them. Over the years, a corpus of some 250,000 responsa has accumulated; part has been electronically indexed by the Bar Ilan Responsa Project. Another source of information about actual application of the law is extant records of the legal activity, judicial and legislative, of various communities (*pinkasei hakehilot*) from centuries past, as well as collections of extant legal instruments.

This wealth of legal material, virtually every layer of which refers to, comments on, or takes issue with earlier views, is adduced frequently in the chapters of this book. Invoking this literature underscores its vitality, and gives readers a sense of the ongoing halakhic conversation, to which scholars from all periods and from around the world have contributed. Readers are invited to work through and participate, in their own ways, in this continuing discussion.

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# Distinguishing features



# 1 Controversy

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## 1 Introduction

Controversy pervades Jewish law. Not only is it the case that, with regard to almost every legal issue, opposed opinions have been voiced, but the halakhic literature is also replete with discussions about controversy

#### 4 WINDOWS ONTO JEWISH LEGAL CULTURE I

and its ramifications.<sup>1</sup> The self-awareness of the rabbinical authorities with regard to the pervasiveness of legal controversies is reflected in the adage “controversy is an inherent characteristic of the Torah.”<sup>2</sup> “Controversy” is sometimes used to denote real-time debate and dialogue over a contentious question among those engaged in Torah study, during which the disputants attempt to persuade each other of the correctness of their respective views. This real-time debate is sometimes referred to as “the war of the Torah.”<sup>3</sup> However, another sense of “controversy,” which will be our primary interest, refers to holding contradictory opinions after all such attempts to persuade the opposite side of the correctness of one’s view have failed.

This chapter will focus on rabbinical attitudes to controversy. It seeks to open a window onto the nature and centrality of controversy in the talmudic literature by presenting the sources and inviting the reader to be actively engaged in interpreting them and perhaps formulating his own readings, however novel. The material will be presented according to the logic of the sources themselves, and not in a linearly thematic fashion. The connections will become clear in due course, when all the pieces are in place.

As our discussion of controversy unfolds, we will move between two different planes of halakhic discourse. The first is that of the conceptual issues that arise from the phenomenon of controversy; the second that of the practical questions that arise in the wake of controversy. How is a ruling to be reached in case of a dispute? How should the individual conduct himself? How is the obligation to study the law to be fulfilled? How is legal uniformity to be achieved?

Although discussion about controversy occupies the halakhic mind, it is a cross-cultural concept, and thus, it is possible—and perhaps, recommended—to analyze controversy in universal rather than exclusively Jewish terms. Readers should bear this in mind, and are invited to relate the concepts that appear in the halakhic sources to more general philosophical categories.

1 See H. Ben-Menahem, N.S. Hecht, and S. Wosner (eds). *Controversy and Dialogue in the Jewish Tradition: A Reader*, with an interpretive essay by H. Ben-Menahem (London: 2005).

2 See R. Israel Isserlein, *Trumat Hadashen*, Pesakim Ukhtavim #238.

3 See, e.g., Sifre Deuteronomy, Haazinu (Finkelstein edition, p. 370): “And Scripture states, “All of them valiant, wagers of war” (II Kings 24:16). Now what valor can people who are going into exile display? And what war can people wage when they are fettered in shackles and bound by chains? Rather, “valiant” refers to those who are valiant in Torah study. This is like the thrust of the verse, “Bless the Lord, O you His angels, valiant and mighty, who do His word ...” (Ps. 103: 20); “wagers of war”—who engaged in dialogue and debate [lit., give and take] in the war of the Torah, as it is said, “Wherefore it is said in the book of the Wars of the Lord” (Num. 21:14).”



## 2 Sources evincing a positive attitude to controversy

The talmudic sources manifest two distinct attitudes to controversy, one of which is clearly favored over the other. The preferred attitude views controversy in a positive light. Below, we will explore what this positive evaluation entails. For now, however, we will simply characterize it as a non-critical attitude. The other attitude is hostile to controversy, seeking to minimize it. On this approach, controversy is at best tolerated as a necessary evil, and not seen as a phenomenon to be encouraged and fostered. We will begin our examination with a discussion of sources that reflect the former attitude.

The first text we will consider is one of the seminal *sugyot* on controversy in the talmudic corpus. Though it is not presented as an introduction to talmudic legal thinking, it nonetheless serves, philosophically, to fulfill that role, by providing the background against which the phenomenon of controversy should be understood. Referred to endlessly in the post-talmudic literature, almost every aspect of the *sugya* has generated numerous interpretations. Our analysis will present a deconstruction of the text, revealing the internal tensions and oppositions it harbors.

### 2.1 bEruvin 13b

R. Abba stated in the name of Samuel: For three years there was a dispute between the house of Shammai and the house of Hillel, the former asserting, The law is in accordance with our views, and the latter contending, The law is in accordance with our views. A heavenly voice (*bat kol*) went forth, announcing, Both [lit., these and those] are the words of the living God, but the law is in accordance with the view of the house of Hillel. Since, however, both are the words of the living God, what was it that entitled the house of Hillel to have the law fixed in accordance with its view? Because they were kindly and modest, they studied their own views and those of the house of Shammai, and were even so humble as to mention the words of the house of Shammai before their own.

As may be seen from what we have learned: If a man had his head and the greater part of his body within the booth (*suka*) but his table in the house, the house of Shammai ruled it invalid but the house of Hillel ruled that it was valid. Said the house of Hillel to the house of Shammai, Did it not happen that the elders of the house of Shammai and the house of Hillel went on a visit to R. Johanan b. Hahoranit and found him sitting with his head and greater part of his body within the booth while his table was in the house? The house of Shammai replied, That constitutes proof?! [lit., from there proof?] They indeed told him, If you have always acted in this manner you have never fulfilled the