Jewish Law and Decision-Making

A Study through Time

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Contents

Jewish Law and Decision-Making

A Study through Time

Introduction

Jewish law is the oldest applied legal system in the world, spanning more than three thousand years. It has been operative in most civilized countries and continents, throughout the full spectrum of recorded human history and in all stages of societal development, ranging from rural to urban, and from agricultural to commercial and industrial. It has experienced the greatest variety and change in social conditions, including shifts in economic contexts, cultural and political milieus, dramatic crises, and drastic fluxes in both power and powerlessness.

The term "Jewish law" is used in this book to refer to the law of the Jewish people throughout the Biblical Era, the first and second Jewish commonwealths in the land of Israel, the Middle Ages, and up to the present time in numerous lands in which Jewish communities existed all over the world. Although significant differences may be found between the various epochs, it would not be useful in a book of the general character of this one to distinguish between "biblical law," "Israelite law," "talmudic law," "Jewish law," and like terms since there are dominant unifying themes running through all of these periods. As Henri Frankfort succintly stated:

> What constitutes the individuality of a civilization, its recognizable character, its identity which is maintained throughout the successive stages of its existence? . . . We are not, of course, looking for a formula; the character of a civilization is far too elusive to be reduced to a catchword. We recognize it in a certain coherence among its various manifestations, a certain consistency in its orientation, a certain cultural "style" which shapes its political and its judicial institutions, its art as well as its literature, its religion as well as its morals. I propose to call this elusive identity of a civilization its "form." It is this "form" which is never destroyed although it changes in the course of time. And it changes partly as a result of inherent factors—development—partly as a result of external forces—historical incidents. . . . These changes [are] the "dynamics" of a civilization. . . . [This] cultural style . . . amounts to a point of view from where seemingly unrelated facts acquire coherence and meaning. . . . It imparts to their achievements—to their arts and institutions, their literature, their theology—something distinct and final, something which has its own peculiar perfection.[1]

1. H. Frankfort, *The Birth of Civilization in the Near East* (New York, 1955), pp. 2–3, 25.

In addition to its many other values, Jewish law permits the comparative study of the law and social dynamics of society at different stages of development and allows the examination of various hypotheses regarding decision-making, by enabling scholars to isolate different variables in the multitude of observed societies.[2] In this sense, Jewish law may come closer than any other legal system in affording the opportunity for legal studies as an empirical science.

Approaches to Jewish Law

Traditionally, however, the study of Jewish law and the Talmud has often proceeded on the assumption that law is a body of rules, operating as a closed system, completely divorced from human events and societal conditions and detached from developments resulting from the interactions of people competing for societal values in a variety of activities and institutional patterns. So, too, little regard has been paid to the effects on decisions of the perspectives, personalities, and backgrounds of decision-makers. Similarly, students of Jewish law have often paid slight attention to the underlying, sometimes unspoken, assumptions of Jewish law regarding values, ethics, and tradition, along with the social contexts, historical antecedents, and converging social forces.

This prevailing approach to Jewish law implies that a legal decision, especially by a court, would be reached on any "issue" of law simply and solely by first determining the "applicable" legal doctrines and principles and then by logically analyzing and following deduced conclusions through a winding rational maze, until one eventually emerged with a "legal" decision, dictated solely by application of deductive logic to these *a priori* principles of law. When carried to extremes, as is all too often the case, this process deteriorates into derivational exercises in which there is little conception of either the role of policy in the decision processes or the effects on decisions of conditions in the social contexts. Scholarly work in the area of Jewish law, including contemporary scholarship, has in this vein tended to concentrate on the examination of various doctrines and rules of law that are allegedly to be applied by courts, has largely ignored policy, social conditions, and contexts, and has frequently disregarded decisions made by nonjudicial decision-makers.

2. See E. A. Hoebel, *Law of Primitive Man* (Cambridge, Mass., 1954), pp. vii–viii.

The proponents of the foregoing approach have often seemed completely unaware of its fatal defects. It has long since been pointed out that, even in the area of judicial decision-making, one can often find conflicting lines of case precedent and legal doctrines, all of which can be applied with equal logic to the case at hand.[3] The issue then becomes, which line shall be selected by the decision-maker and why? Similarly, any line of legal precedents that one may choose to follow can legitimately be given a narrow or a wide interpretation, resulting in greatly differing applications to the case at hand. In the same way precedent cases can be "classified" and interpreted, both as to the facts and law, in many different ways, leading to divergent results. Which facts of any given case are emphasized and which are relegated to a position of minor importance can also play a vital role in judicial decisions. The above factors alone should indicate the difficulty, if not the impossibility, of relying solely on the application of deductive logic to given "principles" of law in order to reach decisions in judicial cases.

In addition, of course, there are other substantial difficulties in maintaining such a view of law. It has been observed that a judge often reaches a decision on one ground but then proceeds to justify and rationalize it by writing a legal opinion in which he cites legal principles and precedent cases that are not the real reasons for the decision. Often the real grounds for his ruling are affected by unconscious motivations, unknown even to the judge himself.[4] The American legal realists, in leveling their devastating criticism of traditional approaches to law, have greatly emphasized and elaborated upon such "hidden" factors in judicial decision-making and the sometimes "instinctive" reaction of judges to fact patterns. It is also by now widely recognized that the social, economic, and cultural class and background of the judge as well as his personality, can have a substantial effect on his decisions. Similar complex factors affect the many vital nonjudicial areas of legal decision-making.

Clearly, too, a "mechanical" approach to law without regard to social developments assumes a very stable legal system and presupposes the certainty of the law. This is regarded as shaped exclusively by rules and principles that themselves are unchangeable. What this view ignores is that for law to be effective and "just" it must reach and further accepted basic goals. As society and its underlying conditions change, as they invariably do, so the law also must change if it is to avoid undesired and even ludicrous decisions. Vital to the law are "the creation of techniques that efficiently and effectively solve the problems posed . . . so that the basic values of the society are realized through the law, and not frustrated by it."[5] Exclusive concentration on how a particular norm fits syntactically into a rule structure can be of little use in developing a well-ordered society, although it may have mystical connotations and satisfy an aesthetic feeling for logical symmetry.

Furthermore, the manner in which norms are applied is vital. It has been aptly remarked:[6]

> Even when . . . rules are known and clear in words, one does still not know the legal system, save as he studies case after case in which rules have come into question, or have been challenged or broken. Thus only as one makes cross-check in action on how far the known "rules" are rules which are followed and on how they are "followed," and on what else happens in addition to their being followed, can he be certain what his data are. A fortiori must one go to the cases of hitch or trouble when procedural and remedial matters lack ritual or verbal form.
>
> For, to repeat, the idea of "legality" carries with it the idea not only of right, but of remedy. It includes not only the idea of prescribed right conduct, but that of prescribed penalty (or type of penalty) for wrong, . . . [the] recognizably proper persons to deal with offenders, or of recognizably proper ways of dealing with offenders and of recognizable limits on proper dealing with them. . . .
>
> The techniques of *use* of any legal form or rule, are, if anything, more important than the form and rule themselves. The techniques of operation of the legal personnel, and the latter's manner of handling the techniques, these commonly cut further into the nature of a society's legal system than does the "law" itself. But they must be dug out of the cases in which actual troubles have been dealt with.

In order for law not to strait-jacket society, authoritative decisions must take account of changed conditions and new developments in many diverse areas, ranging from social customs, to religious, philosophical, and ethical perspectives, to new instruments of production, forms of credit, ownership devices, and modes of travel. Law, then, must stress its overriding goals and assess existing and projected societal conditions, deter-

3. See R. Von Jhering, *Law as a Means to an End*, trans. Husik (Boston, 1913), and *The Struggle for Law* (Chicago, 1879), p. 12; B. N. Cardozo, *Paradoxes of Legal Science* (New York, 1927); M. McDougal, "The Ethics of Applying Systems of Authority: Balanced Opposites of a Legal System," in H. Lasswell and H. Cleveland, eds., *The Ethics of Power* (New York, 1962), p. 221.

4. K. N. Llewellyn, "Some Realism about Realism—Responding to Dean Pound," 44 *Harvard Law Review* (1931): 1222; J. Frank, *Law and the Modern Mind* (New York, 1931), p. 130; see also his *Are Judges Human?* 80 *University of Pennsylvania Law Review* (1931): 17, and his *Courts on Trial* (New York, 1949).

5. Hoebel, *Law of Primitive Man*, p. 281.

6. Llewellyn and Hoebel, *The Cheyenne Way* (Norman, Okla., 1941), pp. 26, 27.