

MISHPAT HAMELUKHAH AND THE JEWISH POLITICAL TRADITION IN THE THOUGHT OF R. SHIMON FEDERBUSH

Alan Mittleman

R. Shimon Federbush, a Mizrahi leader, proposed a blueprint for reconciling Jewish law with the law of modern, democratic Israel. He developed a traditional category, mishpat hamelukhah, as a highly flexible mechanism for accommodating the decisions of a Jewish legislature to the pre-state Jewish legal tradition. Federbush represents a comprehensive attempt to reconcile inherited Judaism and modern republicanism. His contribution shows both the promise and the limits of that still urgent project.

If a modern Jewish state were to be shaped in accordance with *halakhic* Judaism, what would it be like? Would such a state resemble the contemporary democracies with their tradition of constitutionally limited government and respect for fundamental freedoms, or would such a state resemble the authoritarian, hierocratic regime of Iran? Who would be the guiding philosopher of such a state, Plato or Locke? Is the tradition of modern republicanism, which informs the contemporary democracies, compatible with the ideal-typical political tendencies of Jewish tradition? If Torah, however broadly conceived, is thought to be the constitution of the Jewish people and polity, could it, a divinely given law, be comparable to any humanly constructed constitution? If it

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is not comparable to any humanly constructed constitution, how could Jews living under its regime enjoy the benefits of constitutional government?

It seems useful to frame the issue of religion and state in constitutional terms, for there is an overlap between the characteristics and benefits of constitutional government and life under the Torah. As Charles McIlwain puts it, "in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."¹ Jewish sources were obviously concerned to limit government and to subject it to legal restraint and review. Thus, the category of constitutionalism is broad enough to describe and analyze both ancient and medieval Jewish examples of self-government, as well as the systems of the contemporary democracies. On the other hand, the idea of a constitution is also well-suited to highlight the differences between Jewish polities and modern ones, especially insofar as moderns understand constitutions to be products of human deliberation and consent, whereas Jews understand the Torah-as-constitution to be God-given.

This essay seeks to address these fundamental questions by investigating the work of a mid-century, *halakhically*-oriented thinker, R. Shimon Federbush (1892-1969). Federbush, a leader in the Mizrahi movement, advocated a substantial incorporation of Jewish legal and political traditions into the polity and culture of Israel. Yet, Federbush was also committed to the modern republican tradition which he encountered during his forty-year stay in the U.S. As a refugee from Nazi Europe, he had a fundamental commitment to a politics that safeguarded transcendent moral values such as equality before the law and freedom of thought and religion. He sought to square the Jewish political tradition, as he understood it, with democratic self-government and its culture of consent, dissent, and participation. Federbush's commitment to modern republicanism is particularly pronounced both in comparison with the leader of his movement, R. Fishman-Maimon, and with his older contemporary on the right, Isaac Breuer, who also advocated an incorporation of Jewish law in the incipient Jewish state. Federbush departs sharply from Fishman-Maimon's advocacy of a renewal of the Sanhedrin precisely because it would circumvent the democratic political process embodied in an elected legislature. While, like Breuer, he embraces a certain conception of theocracy as the Jewish political norm, Federbush differed radically from Breuer insofar as his conception of Torah-as-constitution is dynamic and nationalistic. Breuer's is highly metaphysical and reifi-

cationist. In the case of Fishman-Maimon, the dividing issue is by *whom* and *how* should public matters be decided in a modern Jewish state. In the case of Breuer, the issue is what is a constitution; specifically, *what* is the Torah-as-constitution. Before turning to an analysis of Federbush, however, let us briefly consider some of the theoretical issues that underlie inquiry in this field.

Torah-as-Constitution and Modern Constitutionalism

The problem of religion and state in the Jewish tradition, as a theoretical problem, involves the status of the Torah-as-constitution. As in any constitutional inquiry, there is the question of *what* a constitution is. The issue here is not so much whether a constitution is a single text, a set of basic laws, or a collection of institutions, as *what* makes a constitution authoritative. That is, why should a constitution obligate; what is the source of its authority? What grounds a constitutional order? Does a constitutional order derive its authority from an act, originary or on-going or both, of a free people, or does such an order derive its legitimacy from its coherence with natural right or some other transcendent source? Is constitutional legitimacy conventional or transcendent? The divide in modern legal theory has been between positivism and natural law, in all their many varieties.² Jewish thinkers have sought to apply both of these frameworks to Torah. Construing Torah as a series of heteronomous divine commands, Marvin Fox or Alan Yuter, for example, reject any appeal to moral values which can be known by autonomous reason. Basing his approach on Hans Kelsen, Yuter substitutes a divine sovereign for Kelsen's state. David Novak, on the other hand, construes Torah as a positive law in harmony with a prior, epistemically available, natural law.³ Neither of these approaches seems to capture, however, the paradoxically hetero- or theonomic yet humanly consensual and articulated constitutionalism of the Torah. Can this be described in modern constitutional language?

One notable attempt to break through the positivist-natural law stalemate that might also shed light on Torah-as-constitution is that of the constitutional theorist Will Harris. Following the broadly Kantian approach of transcendental deduction, Harris argues that externally situated questions about the grounding of a constitutional order fundamentally misrepresent the reality of constitutionalism. Constitutions are texts which allow citizens to imagine and inhabit an interpretable social world. The interpretation of a constitutional reality must itself be situated within the constitu-

tional order. The transcendental question about what grounds such an order must be posed and answered from within the order, taking the form of “what conditions make possible the way of life that we have together?”

The enterprise of making an inhabitable world by writing a text requires a spaciousness and rigor of imagination, the capacity to project a workable image of an order not previously present. The central proposition begins to establish the position of *constitutionalism* — with its assertive world-making and restrictive text-binding character — as an independently theorized third term beyond *natural law* and *legal positivism*, which have in our discourse purported to exhaust the possibilities of political justification.⁴

Recalling the “internal realism” of Hilary Putnam, Harris refuses to reify any alleged metaphysical foundation for a constitutional order, yet he also refuses to abandon the practice of seeking the source of its authority. He locates the grounds of constitutional authority within the ongoing hermeneutic culture of a republican community of interpreters.

In this crucially self-referential enterprise, a purposefully composed text creates its own normative author. It constructs the popular sovereign it needs to be authoritative, and it nurtures the political life of a People whose citizenship provides it with the only reality it can have or need. What they have modeled is themselves, in public and realizable form. This People and these Citizens are not merely the analytical necessities for explaining the validity of the Constitution. Their persistent commitments and practices give the project its three-dimensionality as a meaningful world.⁵

The force of this theory is to describe a constitutional order as a rich and self-sufficient form of life which produces its own knowledge, as well as its own canons for how to adjust that knowledge to political and social reality. A constitution produces a textually organized culture. The persistence of a community of interpreters within this culture “to go to the trouble” of understanding themselves and their social world by constant reference to the text, ratifies the text as fundamental. The text becomes both a model of and a model for a world.

In some ways, this approach describes the world of Torah better than standard positivist or natural law philosophies. Only on the fringes of the Torah’s world do philosophical interpreters worry about the fit or grounding of its social order with some imagined prior world of nature. The question of the actual coherence of the Torah order with the supervening will of God, while not irrelevant, is also secondary vis-a-vis the hermeneutic practices of the system. The Torah is not in heaven. Within the order, imminent standards

of interpretation and decision-making prevail. It is also the case that this model, with its rich discourse of a people imagining and enacting themselves in their hermeneutic practice, captures the lived thickness of Jewish existence more fully than the pale divine command theory of positivism. Nonetheless, on an ideal-typical level, it is clear that Harris's eminently modern model of a constitution and traditional Jewish views of Torah must diverge. Torah cannot ultimately be disentangled from its divine source. Recourse to the will of God, however irrelevant to the interpretation of *halakhah* and the decision of the *posek*, cannot be jettisoned as a ground for the legitimacy of the system as a whole. The divine origin of the Torah must inevitably mean that the question "what is a constitution?" will be answered differently by Jews (i.e., those Jews who would take Torah as their constitution) and by modern republicans. While late modern and post-modern thinkers are embarrassed by the scandal of foundationalism, Jewish thinkers cannot dispense with it. A ready example is Lenn Goodman's *On Justice* which returns the question of ontology to the heart of ethics. Goodman advances a neo-Platonic account of being in order to reject conventionalist accounts of justice. Justice is founded on the deserts of beings, depending upon where they lie in a cosmic order of rank.⁶ Between those committed to Torah-as-constitution and modern republicans, there is then a certain incommensurability in how the question "what is a constitution" is to be settled.

In addition to the question of *what*, there are the questions of *who* and *how*. Who is fit to interpret the norms of common life, whatever their character and source? How are these norms to be implemented? If a constitution is primarily thought of as law (the "what" question), then expert legal interpreters such as judges and courts would be its primary interpreters (the "who" question). If a constitution is primarily the blueprint for and the ongoing actualization of a shared form of life, then its interpreters are the whole of its citizens.⁷ How is the Torah-as-constitution to be conceived? If it is constructed primarily as a body of *halakhic* rules, then those with specialized expertise in the rules, i.e., rabbinic decisors, would figure as the leading class of interpreters. If Torah, however, is conceived as something broader and more fundamental than law, namely as the basis for a morally oriented, politically organized collective life, then the class of qualified interpreters broadens to all of those who share in its moral orientation and in the commitment to its realization. (This latter move, as we shall see, is essentially the one taken by Federbush. He opens the interpretation of Torah up to all Jews who care about the common project of a Jewish polity.)

The question of “who” cannot be disentangled from the question of “how.” How is power effectively exercised in a constitutional order? Given that power cannot be arbitrary, where should it reside: in courts, legislatures, princes, or presidents? How should it be distributed? How should its holders come to exercise it or lose it? These questions are also acute for any Jewish polity. What role should rabbis (which rabbis?) have in decisions of public matters? Is there a secular sphere in which valid decisions can be made despite Torah guidelines if need be? How could such a sphere be constitutionally articulated and empowered?

The modern question about religion and state invariably comes down to the defense of such a sphere against the claims of religion to circumvent open-ended and rational deliberation. The value of deliberation rests on the presumed sovereignty of the people which is juxtaposed to the presumptive claims of the clerical representatives of God. From Machiavelli on, the constitutionalized intrusion of official religion into the processes of governance has been rejected, whether as an obstacle to civil peace or rational rule or, latterly, personal freedom.⁸ What hope is there then for a Jewish theory that is committed both to the incorporation of Jewish law (with a constitutional status for its rabbinic interpreters) and to a modern republic with its endorsement of deliberation and popular sovereignty? That is the question Federbush hopes to answer.

Theocracy and Democracy

Federbush answers the question of *what* the Torah-as-constitution is by recourse to the idea of covenant. Covenant is the fundamental Jewish category. It represents the free, uncoerced choice of all the people for a way of life based on consent. The political order (*sefer medini*) arises from consent. The consensual, covenant-making act precedes the giving of the Torah. Thus, law — whatever its source — is predicated on consent. “There is no force to law (*tokef l’hukato*) without the consent of the people.”⁹ Consent looms large in Federbush’s thought. Not only was the Sinai covenant contracted with popular consent, but the ongoing authority of public law requires consent. Only what the people accept and consent to has the force of law (35).¹⁰ If the majority of the people, on their own or through their representatives, reject legislation, even after it has become law, it becomes void. Federbush sees an ongoing embodiment of popular consent in the fact that Joshua needed to re-covenant with Israel at Shechem, even though his authority was accepted by them, in order for the To-

rah's law to have force (36). Kings needed to secure the consent of the people for their *mishpat ha-melukhah*. In the same spirit, the Talmud (Berachot 55) lays down that a *parnas* cannot be appointed over the public (*tzibur*) unless the public accepts him (*elah im kayn nimlakhim b'tzibur*) (37).

In proposing covenant as the fundamental category, Federbush is trying not only to underscore consent as the ground of authority, but also to articulate the unique circumstances of constitution-making. The constitution, although it contains law, precedes law. It arises prior to any law-making body, such as a legislature, which it authorizes. The constitution arises in the free will of an assembled people. Yet, this people is not quite the people it wants to become. By accepting a constitution, Torah, the people is also making itself, imagining its own possibility. This possibility, the ideal type of a *medinat ha-torah*, is a state where moral ends are pursued in a moral way. In Federbush's view, the early states of antiquity were purely affairs of defense and aggression. Ethics pertained to the interpersonal, not the political realm. The ideal of a moral state, first mooted in Greece, is achieved, at least on an ideal level, in Israel. Israel's breakthrough vis-a-vis Greece comes with the idea of human equality. In the ideal *medinat ha-torah*, both the Israelite and the resident alien have full equality of rights (15, 20-21). (Later, Federbush will argue for the moral and legal necessity of complete equality between citizens of different religions in the State of Israel, even to the extent that a non-Jew may be prime minister of the country if that is the will of the people!) The people can imagine themselves as a political people working toward a moral polity because the covenant — which precedes the state — has given them a utopian political vision (*hazon medini*).¹¹

Israelite covenantalism, Federbush believes, has inspired both the polity building of the American Puritans (32) and the social contract tradition, which he evidently endorses. The latter is based on the early modern political philosophers' reading of Scripture. Unlike those moderns, however, Federbush wants to uphold the idea of theocracy and transvalue it for the sake of democracy. Unlike Hobbes, for example, Federbush believes that consenting, covenant-making humans — in this case, Jews — did not alienate their rights to a human sovereign. "In the making of a covenant, the children of Israel did not give up their rights for the good of a human sovereign (*shilton enoshi*), rather, they gave their rights to God" (34). The consequence of this is that they retain a radical equality vis-a-vis one another. By making God their ruler, they deprive any presumptive human ruler of full legitimacy. Citing Spinoza with approval, Federbush endorses the idea of theocracy. The

rule of God in theory made for a democratic order in practice. "The Hebrews retained for themselves the right to govern themselves. They did not transmit this right to any ruler. The king was therefore only a public administrator (*menahel 'inyanei ha-am*) in terms of fixed, prior principles to which he was also subject" (34). Theocracy, for Federbush, necessitates democracy. In this way, Federbush lays the ground for the legitimacy of the State of Israel, as an expression of popular political and legal, that is, constitutional will.

Federbush's interpretation of the concept of theocracy is both realistic and republican, like Martin Buber's.¹² That is, he believes that early Israel was both descriptively and normatively theocratic. He rejects the later corruptions of the term into hierocracy as wholly out of keeping with the original character of the Torah constitution. This will come out more fully as we consider his construction of *mishpat ha-melukhah* and *mishpat ha-torah* below. Let us note here that Federbush endorses another typical feature of modern republicanism: that religion should not have coercive power in the public realm (28). Although he is not always consistent, Federbush generally follows Mendelssohn. Religion should exemplify, instruct, reform. It must not coerce. He shrewdly observes that in the U.S., with its tradition of governmental non-involvement (*ayn ha-shilton ha-medini mit'arev b'inyanei ha-emunah*), religious institutions and practices are far more vital than in European Catholic countries with long traditions of establishment (29). But beyond sociological observation and concession to the spirit of the times, Federbush posits that the division between religious authority and political authority is a matter of fundamental principle. This is, in fact, the major thrust of his entire work: that there is a categorical distinction between Torah law (*mishpat ha-torah*) and civil law (*mishpat ha-melukhah*). Each of these have their own proper sphere, their own *who* and *how*. The legitimacy of the modern republican project of the State of Israel, from a traditionalist point of view, rests on articulating the basis, scope and powers of civil authority constituted under *mishpat ha-melukhah*. Thus, as a provisional answer to the question of *what* the Torah-as-a-constitution is, Federbush might answer: The Torah is a product of divine-human and human-human covenanting, based on consent, that allows for a principled yet dynamic relationship with political and historical reality.¹³ The instrument for negotiating the relationship between the moral principles embedded in the practice of covenanting and political and historical reality is *mishpat ha-melukhah*.

Mishpat ha-Torah and Mishpat ha-Melukhah

The Torah-as-constitution engenders two broad spheres of legal and political creativity, a religious authority (*reshut ha-datit*) and a civil authority (*reshut ha-medinit*) (27). (Federbush also uses the concept of *ketarim* — *keter kehunah* and *keter malkhut* — to designate these two spheres.) The division was anticipated by the relative separation of roles between Moses and Aaron. This separation was constitutionalized by Moses when he designated Joshua to be his successor in the domain of political leadership, while Elazar succeeded Aaron in the domain of religious leadership (45). This Mosaic distinction is presupposed by Deuteronomy 17:9, when it counsels Israel to take its difficult questions to the “levitical priests or the magistrate in charge at the time.” In Federbush’s view, the principle of two *ketarim* was only breached during the later Hasmonean dynasty when the priestly Hasmoneans assumed the royal title. He cites with approval Nachmanides’ comment on Genesis 49 that the dynasty was punished due to this infringement on constitutional separation of authorities (27).

The Torah constitution frames a regime in which power is divided between authorities. Each of these authorities has its own legal framework, *mishpat ha-torah* (or *mishpat torani*) or *mishpat ha-melukhah* (or *mishpat ‘ivri* or *mishpat yisrael*). By using traditional language, Federbush tries to avoid importing an inappropriate, modernist distinction between religion and politics into ancient Judaism. The traditional language invokes a valid distinction. The distinction between two spheres can be maintained in an ancient context where kings and priests clearly had different functions. It is somewhat more difficult to sustain when leadership of the people passes to rabbis who incorporate both political and religious functions. Who represents *mishpat ha-torah*? Who represents *mishpat ha-melukhah*? While civil leaders, such as *parnassim* represent the latter, rabbis can represent both the latter and the former. Rabbis seem to wear two hats. Rabbis are as responsible for extending and developing *mishpat ha-melukhah* as “laymen.” The consequence of this is that, because rabbis are so involved in *mishpat ha-melukhah*, it is hard to know from Federbush what is left of *mishpat ha-torah*.

Within the context of this (largely exilic) situation, Federbush seems to mean by *mishpat ha-torah* predominantly religious-cultic matters, that is, those matters most reminiscent of sacrificial procedures, as well as fixed *halakhic* rules. However, it is unclear from his text what, at the end of the day, really does fall into this category. Citing Hillel’s *prosbul* as an example, he is convinced

that the Torah gives sages broad power (indeed, gives them a duty) to innovate. One “fixed” part of Torah can be set aside to safeguard another and thereby preserve the whole (9). So what actually counts as fixed *halakhah* settled *mishpat ha-torah*? Again, this is not quite clear. Federbush believes that much of the edifice of Jewish law, constructed over centuries in the diaspora, has now become questionable (9). Statehood represents a fundamental shift. Rabbis must not avoid responsibility for making hard choices to preserve Torah under new conditions of national sovereignty (11). Bold innovation requires the renewal and cultivation, in a systematic fashion, of *mishpat ha-melukhah*. The force of his view is that, in a Jewish state, *mishpat ha-torah* is subordinated to *mishpat ha-melukhah*. As the more dynamic, pragmatically oriented domain of the collective enterprise, *mishpat ha-melukhah* rescues *mishpat ha-torah* from otherworldliness and irrelevancy. Similarly, those who represent *mishpat ha-torah* are subordinated to the representative, democratic institutions of the state. There is to be no clerical estate, no council of Torah sages, so to speak, with veto power over democratically formulated legislation. While there must be a chief rabbinate with a proper interest in promoting education about and commitment to Jewish law, it ought to have no coercive power (28).

Before further elaborating his conception of *mishpat ha-melukhah*, it is worth clarifying the conceptual framework of his discourse. As a religious Zionist, Federbush seems to have accepted the idea of “Hebrew law,” *mishpat ivri*, as an organizing category for the study of the Jewish legal tradition. *Mishpat ivri* represented an attempt to construe the edifice of Jewish law as a product of historic, national creativity. German university-trained scholars such as Asher Gulak, influenced by the romanticist historian Friedrich Carl von Savigny, saw in Jewish law the unfolding of the Jewish nation’s *Volksgeist*.¹⁴ In Gulak’s view, as David Myers puts it, Jewish law revealed a “uniquely ethical dimension: Jewish law entailed no segregation of law and morality; nor was it beholden to any single political leader or state organ, but rather to the ideal of social justice under God’s dominion.”¹⁵

Federbush’s penchant for seeing Jewish law as a national enterprise informed by fundamental Hebraic social values such as equality or justice (*tzedek*), as well as his frequent use of the term *mishpat ivri*, indicates his adoption of this perspective. As such, “*halakhah*” or as he puts it, *mishpat ha-torah*, seems to be a function of a more embracing paradigm. It emerges out of the covenantal, interpretive life of a constitutional people. It responds to the need of the constitutional people to constitute itself as a polity in

history. Federbush is therefore in no sense a traditional *halakhist*. Indeed, he believes that many *halakhot* are outmoded products of the diaspora (toward which he has a quite ambivalent attitude). At any rate, Federbush believes that the true freedom offered now to Jews by the Jewish state must be accompanied by a true renewal of *mishpat ivri*. To avoid Ahad Ha-am's "slavery in the midst of freedom" and to effectively pursue redemption, law in Israel must return to its biblical, talmudic, and subsequent sources. What saves this vision from reaction or antiquarianism is Federbush's frank admission that *mishpat ha-melukhah*, although never abandoned, did shrivel in the diaspora and now needs bold and innovative advancement, as well as his bouyant confidence that it can be advanced in a consistently republican and humane direction. Rabbis, in Federbush's scheme, must be on the side of such advancement.

Strictly speaking, *mishpat ha-melukhah*, a term deriving from I Samuel 10, designates the power given to properly constituted civil authority to frame the laws of the polity, including its civil (*ezrahi*) and criminal (*plili*) laws, and especially to frame the duty of the citizen toward the state (*hovat ha-ezrah klapei ha-medina*) (49). Citing a responsum of Rav Kook, Federbush extends the category even further to include all matters of public policy and political decision bearing on the public welfare (50). Following Maimonides, R. Nissim, and others, Federbush endorses the view that civil authority can, indeed must, bypass or suspend Torah law when, in its judgment, that is required.

Mishpat ha-melukhah is the golden thread uniting the Jewish political experience. Recalling nationalistically oriented historians such as Y. Baer, Federbush believes that properly constituted civil authority was present in every phase of historical Jewish existence. The entire Jewish communal experience, from antiquity to the present, took place under the constitutional umbrella of *mishpat ha-melukhah*. This continuity implies that, although the State of Israel does represent a radical opportunity for renewal and fundamental shift in perspective, it does not represent a total break with the past. For Federbush, there is no return to history. The Jews never left it.

The continuous instantiation of properly constituted authority which characterizes the internal political history of the Jewish people derives from the people itself (51). In a time without a king, the powers of the king revert to the people who constitute whatever form of governance they find acceptable. For Federbush, the optimal regime is republican. Leaning heavily on Abravanel and his talmudic antecedent, R. Nehorai, Federbush argues that appointing a king was an aberrancy which offended against the fundamental

commitment of the Torah to the equality of all its citizens (40). The law granting the appointment of a king was permissive rather than obligatory. Some laws, such as those relating to the beautiful captive or the blood avenger, were solely intended to restrain essentially pagan practices which had become prevalent in Israel. Kingship, in Federbush's view, was one of these. When the conditions that the law was intended to restrict become outmoded, then the law becomes outmoded as well. Thus the Talmud has made it impossible to restore kingship as there is no longer a Sanhedrin of 71 and a prophet to crown him (42). There is no question that the State of Israel cannot be a monarchy, but must be a republic.

Even in the days when there was a king, his power was limited by the constitution. The king's power to punish rebels, for example, was understood by the Talmud to derive from a consensual authorization by the people, given in the time of Joshua (85).¹⁶ However, the people as a whole retain their right to rebel (indeed, they have a *duty* to rebel) should the king become a tyrant (*rodan*) (86). According to R. Nissim, a king (or those other forms of regime which are authorized to promulgate *mishpat ha-melukhah*) must only be obeyed when his laws are righteous laws (*hukei tzedek*) (87).¹⁷

Constitutionally limited secular governance is fully legitimated by the category of *mishpat ha-melukhah*. In addition to matters of governance per se, Federbush also wants to legitimate "secular" forms of judgment and arbitration. He cites talmudic evidence to show that secular courts, that is, courts that decided civil and even criminal matters on the basis of equity and prudence rather than positive *halakhah*, existed in ancient Syria ('*arkhaot she-besurya*) (55).¹⁸ Their decisions are acceptable if accepted by the people. Agreeing with R. Menachem Meiri that the appointment of non-rabbinic judges is valid even if rabbinic experts are available, Federbush validates the courts of the State of Israel. He does so not to bow to necessity, but to exalt the republican principle of popular sovereignty.

This principle leads Federbush to argue against those who, like the leader of his movement, R. Judah Fishman-Maimon, wanted to renew the Sanhedrin as a way of developing *mishpat ha-melukhah* after its long latency in the diaspora. There are three positions, according to Federbush, in the debate on the renewal of the Sanhedrin. Some partisans want to give the "ruler's staff to the upholders of Torah," thus bringing the nation under the rule of Torah. All legislation would have to come out of the Sanhedrin. Others want to create an authoritative, universally recognized *halakhic* body that could settle questions and resolve disagreements within the

Orthodox (*haredi*) world. Federbush does not give either of these much credence (92-93). The third position accords much more with his outlook: the role of a renewed Sanhedrin would be one of sweeping advancement. It would not merely resuscitate unused *halakhot*, but comprehensively rework *mishpat ivri* under the new conditions of national sovereignty. This would be similar to R. Johanan ben Zakkai's making the court at Yavneh functionally equivalent to the Sanhedrin of Jerusalem.

After reviewing the nearly unlimited powers that sages assembled in a Sanhedrin would have, Federbush shrinks from the idea of renewal on *halakhic*, sociological, but also republican grounds. *Halakhically*, Federbush sides with what was apparently Maimonides' later position, that *semikha* cannot be restored (98). Sociologically, Federbush observes that if R. Jacob Berab was unable to gather consent for a restoration of *semikha* in the sixteenth century, how much more so would it be impossible today. Not only have most of the Jewish people, in Israel and elsewhere, abandoned Orthodoxy, but the Orthodox are badly divided amongst themselves. Furthermore, Judaism's historic tendency toward lenient rulings has been replaced by a culture of restriction. If the contemporary rabbinate cannot even decree a fast day to commemorate the victims of the Shoah, how could a Sanhedrin boldly innovate in an Orthodox world dominated by an ethos of *humra* (99)? These conditions undermine the consent necessary for a Sanhedrin to have authority. Restoring a Sanhedrin, even if possible, under conditions where its authority would not be recognized by society or state, would be grievous for Torah. At any rate, the courts of the State of Israel, which do have the support and consent of the people of Israel, fill the role that a Sanhedrin and its subsidiary courts would have (100). However, Federbush has not abandoned, as a theoretical possibility, the desirability of an eventual Sanhedrin. Until the time that society is ready for such an eventuality, the chief rabbinate should be strengthened and enhanced. Its authority should be broadened and "the best among us" should be appointed to it to judge according to Torah (101). The precise sphere of its authority, however, is not defined by Federbush.

The lingering tension between republican and democratic principles, on the one hand, and the range and scope of religious authority or influence, on the other, is an outstanding problem in Federbush's thought. This may be explored by reference to some concrete cases. Slightly less than half of Federbush's book is devoted to fundamental political-theoretical questions, with the remainder dedicated to specific domains of policy and law. An inves-

tigation of a few of these areas will give us some sense of what a politics of *mishpat ha-melukhah* would be like.

Aspects of Life under *Mishpat Ha-Melukhah*

Ideally, there is a distinction between law and ethics: ethics does not require sanctions. Ethics flows from loving one's neighbor as oneself. The sages of Israel, however, introduced ethically-oriented commandments, backed by legal sanctions, in order to solidify moral awareness in their society. These moral commandments can serve as a basis for social legislation today. In fact, Federbush claims, the morally directed legislation of ancient Israel inspires the social legislation of the progressive societies today (103). By moral commandments or legislation, Federbush has in mind *mitzvot* such as burying the dead, dowering brides, welcoming guests, visiting the sick, and ransoming captives, all of which were derived, according to Maimonides, from the commandment to "love your neighbor as yourself."¹⁹ Present legislation should be developed on the model, and in terms of the spirit, of this ancient *mishpat ivri*.

Federbush would involve the state in a primary cultural question. He argues that one of the first tasks of government is to secure Hebrew as a national language. He bases himself on a *mishnah* which requires that public declarations be in Hebrew.²⁰ Citing other *halakhic* and *aggadic* sources, Federbush contends that using Hebrew as a daily language is both a social and political necessity, and a redemptive spiritual duty (*hiyuv leumi v'mitzvah datit k'ehad*) (105).

Spreading Hebrew literacy depends, of course, on the larger project of spreading literacy. Federbush envisions an expansive state role in education. Basing himself on a well-established Talmudic precedent whereby education became a public matter already in the Second Commonwealth, he extends the State's duty to the establishment of schools of all kinds.²¹ The State has a duty to establish primary and secondary schools, vocational and technical schools, liberal arts and professional institutions. Girls and boys are to have equal access. Women's education is non-problematic for him. Indeed, it is a positive value and a necessity. Indeed, women can hold high elective and judicial office in the republic if the people so will. Curricula should include not only the requisite academic subjects, but sports, exercise and self-defense (107). Just as the state is obligated, through ancient precedent, to support schools of Torah, it is also obligated to develop secular education through *mishpat ha-melukhah*.

Federbush also considers areas of taxation, tariffs and price fixing. The self-governing *kehillah* had much experience in the area of taxation. He notes that a long development of medieval *mishpat ha-melukhah* worked to distribute tax burdens more equitably. A shift took place from a head tax toward an asset-based income tax (108). Nonetheless, while the past can instruct and the spirit of prior law can guide, the legislator must be aware of prevailing conditions and of fundamental changes in economic life over the centuries. Although the sources do not provide explicit support for a progressive income tax, Federbush believes that this is what social equity requires (108). He also believes that government must take an activist role in breaking up monopolies, setting affordable prices for essential commodities, and insuring competition. The Talmud and later sources present numerous examples of governmental intervention against price gouging and cartels (110). Federbush rejects *laissez faire*, although his optimal balance between markets and command is not clear.

It is clear that Federbush's state would have a somewhat paternalistic cast. Developing the ancient law of *ma'akeh* (Deut. 22), for example, Federbush would have the state intensively involved in guarding the health of its citizens. One area where it would do so is occupational safety. *Mishpat* would be developed to compel employers to minimize risk on factory floors (112). The image that emerges from such social legislation is of an interventionist welfare state on a European social democratic model. The goal and ground of such legislation is the promotion and protection of the common good (*tovat ha-klal*). Federbush's assumption is that such laws are simply desirable, and that an educated and enlightened populace would agree to them. But, to use a typical case, would a motorcycle rider who does not want to wear a helmet have a right to do so under Federbush's *mishpat ha-melukhah*? It is not clear how he would deal with liberals of a Millian sort who reject paternalism on principle.

A more difficult example of the tension between a modern, secularized democracy and a paternal, religiously informed republicanism may be found in Federbush's consideration of issues bearing on the Land of Israel. Here the tension between frameworks of normativity becomes acute. Federbush believes that the conquest of the land (*kivush ha-aretz*) is a *mitzvah* (114). This seems to be an example of fixed *halakha*. He tries to balance his seemingly absolute commitment to the equality of all citizens, including national minorities, with what he takes to be a corollary of *kivush ha-aretz*, namely, that Jews must have sovereignty (*ribonut*) in the land. Whereas non-Jews can hold elected office, enjoy

equality before the law, or operate their own courts if they so choose, Jewish sovereignty means Jewish control of the land. This means: a) conquest of the land from foreigners is a commandment of the Torah incumbent on all generations; b) it is forbidden to abandon the land and incumbent to develop it; c) Jews are commanded to dwell in the land; d) it is forbidden to divide the land and to alienate any portion of it within its historic boundaries; e) it is forbidden to give control over the land to another people; f) if the non-Jewish inhabitants of the Land of Israel flee during a war (as was, he notes, actually the case), it is incumbent on Jews to settle the places they deserted; g) it is forbidden to found another land as a homeland for Jews if all of the Land of Israel is not in Jewish hands. This is the view of Nachmanides, which Federbush quotes with apparent approval (116). On their face, such absolutized laws would leave a Jewish government little room for policy-making in the area of, for example, territorial concession. It is not clear how Federbush would balance his affirmation of representative government with these seemingly inflexible principles of the Torah.

We can get some indication of this balance from a related matter of policy. As a consequence of the commandment to dwell in the Land of Israel (*yishuv b'eretz yisrael*), the right to leave the Land of Israel is not absolute. The Torah imposes restrictions on who may leave, and for what purposes.²² Although there are some disagreements between commentators, Federbush concludes that the criteria for permission to leave are two: first, the trip abroad must be for a reason that ultimately is for the good of the land and its inhabitants (*l'tovat yishuv eretz yisrael*); second, the one who departs must have the intention to return (118). If one does not have the intention to return, it would be forbidden even to leave for a necessary purpose such as Torah study or marriage. Federbush derives from this that, according to *mishpat ivri*, the state should restrict exit visas to those citizens who must travel either for acts such as Torah study or marriage, or whose business is for the good of the state. Additionally, the state should grant visas only for limited amounts of time and only to those citizens whose declared intention is to return. Should a citizen (*ezrah yisraeli*) intend to settle permanently in the diaspora, he should not be allowed to leave (119).

This remarkably illiberal policy recommendation brings into clear view the huge gulf between a republic with the Torah as its constitution and a modern constitutional republic. Although Federbush began his political analysis with a doctrine of rights reminiscent of contractarianism, he comprises, indeed, repudiates that

doctrine when the Torah imposes a restriction which he cannot or will not undo. Of course, that Federbush is unwilling to loosen restrictions on what, in human rights terminology, is the “right to leave” does not mean that a properly constituted legislature operating under *mishpat ha-melukhah* would agree. Federbush’s system, after all, is remarkably flexible in its insistence that fixed Torah laws can be suspended in order to preserve other laws or principles. Federbush might agree that in 1998, unlike 1952, the Jewish population has reached a sufficiently critical mass so that citizens do not need to be prevented or discouraged from taking casual trips abroad. Nonetheless, it is at such junctures that the fundamental theoretical differences between Federbush’s republic and the modern, secular republic appear.

Conclusion

Among the weaknesses of Federbush’s political thought is, as we have seen, the lack of a clear-cut plan for separating spheres of authority. Although he has secured a theoretical separation between *mishpat ha-torah* and *mishpat ha-melukhah*, he has not given us a well articulated framework for institutionalizing these authorities. Furthermore, he has not devised a proper separation of powers within the *keter malkhut* itself. A separation and balance of powers between executive, legislative, and judicial branches seems to be presupposed, but is not worked out in any adequate detail. Consequently, crucial matters in the design of government are unaddressed, which is to say that vital issues of freedom are unaddressed. These are serious weaknesses, indeed.

But Federbush’s strengths, while not exactly compensating for his weaknesses, are considerable. Perhaps his book should be viewed not as a fully developed theory of the Torah-as-constitution, but as an affirmation of republican politics searching for a Jewish expression. Federbush’s contribution was to situate the modern political triumph of the Jewish people — the State of Israel — in an ancient and ongoing political tradition. Furthermore, he construed that tradition as basically republican in nature. Even though his project builds in areas of conflict between secularly and religiously-oriented moral and political approaches, he also diminishes conflict at a fundamental level by validating the state and its institutions. His emphasis on the covenantal origins of the Jewish polity elegantly ties the modern republic to the Mosaic theocracy. In addition, his stress on consent as the ground of public authority as well as the flexibility of *mishpat ha-melukhah* constantly work

to offset the more unacceptable implications of theocracy. He has built a fertile tension into his own system.

The theoretical appeal of Federbush's system becomes clear in a brief comparison with Isaac Breuer. In Breuer's posthumously published Hebrew work, *Nahaliel*, he describes his own *medinat ha-torah*.²³ Breuer's understanding of Torah-as-constitution is, unlike Federbush's, highly metaphysical. For Breuer, the Torah is a metahistorical "creation law," absolute, unnatural, and unchanging. It is in no sense a human artifact, a product of political reflection and judgment. Politics and history are enmeshed in a fallen cosmos, over which the Sabbath veils of causality and individuation have been cast. To live according to Torah lifts one out of an ontic alienation, both personal and corporate, into a sphere of holiness. Yet this remarkably apolitical, contemplative vision has a thoroughly political cast. Breuer believes that Torah is, in fact, a constitution. Torah's full range is only apparent in a state where its laws rule. Jewish life, in its fullness and truth, is only achievable in such a state. *Nahaliel* sketches such a state, drawing almost entirely on Maimonides' *Mishneh Torah*. Because the Torah is an absolute law, a law exempt from transformation, growth, or decay, Breuer's political vision has a more purely utopian character than Federbush's. Although he has not fully worked out the constitutional mechanisms, it is clear that, in an important sense, the people rule in Federbush's republic. For Breuer, however, the law, not the people, rules. And the law is in no sense the expression of a general will. It is the expression purely and solely of the divine will. Breuer's book culminates in the laws of the rebuilt Temple, where the Shekhina will dwell in the Holy of Holies and history will reach its sought-for end. The concluding chapters of Federbush's work, in revealing contrast, deal with warfare, treaties, and the ethics of euthanasia. We can thus see a vast difference in scale between the two efforts. Despite its limitations, Federbush's work was intended as a contribution to an essentially practical and political discourse. Breuer's work remains embedded in a vision more unabashedly metaphysical than political. Both intend that the Torah be the constitution of the Jewish polity, yet *what* that Torah is could not be more different. Nor could the matters of *who* or *how* be settled more differently. Of course, a radical secularist would be equally disinterested in both accounts, but that should not diminish the distance between them. What a modern state that embraces the Torah as its constitution would look like depends very much on what is meant by Torah and on who does the drafting.

Notes

1. Charles McIlwain, *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1940), p. 24.
2. For a review of these issues, see Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: University of Chicago Press, 1963), chs. 18-19. See also H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1978), ch. 9.
3. David Novak, *Jewish Social Ethics* (New York: Oxford University Press, 1992), pp. 22-38.
4. William F. Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993), p. ix.
5. *Ibid.*, p. xi.
6. Lenn E. Goodman, *On Justice: An Essay in Jewish Philosophy* (New Haven: Yale University Press, 1991), especially chs. 1, 4.
7. On the need to move constitutional theory away from dependence on legal and philosophy of law paradigms, see Harris, *op cit.*, pp. 19-29.
8. For the views of the leading political philosophers of early modernity against religion, see Douglas Kries, ed., *Piety and Humanity: Essays on Religion and Early Modern Political Philosophy* (Lanham, MD: Rowman & Littlefield, 1997).
9. Shimon Federbush, *Mishpat ha-Melukha b'Yisrael* (Jerusalem: Mosad Ha-Rav Kook, 1973), p. 34. All subsequent references to this text will be by page reference only.
10. See Y. Shabbat 1:5; Y. Horayot 1:5.
11. By "utopian," I do not mean something fantastic and unreal, but rather intend Karl Mannheim's sense of the implicit ideal tendency of a political project. A utopia is an immanent and regulative norm.
12. For Buber's major statement on theocracy, see his *The Kingship of God*, Richard Scheimann, trans. (New York: Harper & Row, 1967).
13. It may perhaps be objected at this point that too little has been said about Torah as a divine-human covenant. Federbush actually says almost nothing on this point; he has no apparent doctrine of revelation. His discourse on covenant is almost exclusively framed in political terms.
14. On Gulak and the construction of the discipline of *mishpat ivri* as an aspect of Zionist historiography, see David N. Myers, *Re-Inventing the Jewish Past: European Jewish Intellectuals and the Zionist Return to History* (New York: Oxford University Press, 1995), p. 88. On Savigny and the historical school, see Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*, pp. 138-142.
15. David N. Myers, *op. cit.*, p. 89.
16. Sanhedrin 49a.

17. Comment on Nedarim 28, cf. R. David b. Zimra; Mishneh Torah, Laws of Kings 3:8.
18. Sanhedrin 23a.
19. Mishneh Torah, Laws of Mourning 14:1; Laws of Gifts to the Poor 8:10.
20. Sotah, ch. 7.
21. Baba Batra 21a.
22. Mishneh Torah, Laws of Kings, 5:9.
23. Isaac Breuer, *Nahaliel* (Jerusalem: Mossad Ha-Rav Kook, 1982). For a full treatment of Breuer's political philosophy, see Alan Mittleman, *Between Kant and Kabbalah*, (Albany: State University of New York Press, 1991), ch. 4.