

**מערכות שיפוטיות מקבילות במשפט העברי**

אהרון קירשנבאום

**Concurrent Jurisdictions in Jewish Law**

(The Practical Criminal Procedure as Posited by the Medieval Authorities in General and by Maimonides in Particular)

Aharon Kirschenbaum

*The theoretical model of criminal adjudication posits three concurrent judicial bodies: (1) the (Small) Sanhedrin operating on the basis of the "classical" Jewish law, namely, on the basis of Mosaic law as interpreted by the Oral Tradition; (2) the Royal Court; and (3) the Rabbinical Court (similar to the Small Sanhedrin) exercising emergency powers. The last two bodies are of an exclusively practical nature, for the maintenance of law and order, administration of justice, and the apprehension and conviction of law-breakers. These bodies are not subject to the cumbersome rules of procedure laid down by the classical Torah law; hence, they are much more efficient in the administration of justice than the classical Small Sanhedrin. We, therefore, call these bodies an expression of "practical" Jewish law.*

*The "practical" judicial bodies operate on the basis of flexibility. In contrast with Torah law that demands "judicial truth," i.e., decisions reached only through formally authorized methods (two qualified eye-witnesses, the administration of a prior warning to the accused, formally prescribed deliberate proceedings), the "practical" judicial procedure was expected to achieve "factual truth" in a flexible manner. The court had great discretion in indictments, in defining the criminal act, in admitting witnesses, and in the modes of punishment.*

*This essay delineates the differences between the Royal Court and the Rabbinical Court in the exercise of emergency powers, their respective purposes and their areas of jurisdiction.*

*The existence of two concurrent "practical" judicial bodies raises the problems of conflict, overlap, and division of labor. Where the two jurisdictions overlap, the solution proposed is as follows: the Rabbinical Court would not exercise its emergency powers but would conduct itself according to Torah law. If it found the accused "factually" guilty but not in accordance with*

*the Torah standards of "judicial truth," it could not convict. It would report its findings to the Royal Court which would then execute the judgment.*

**This article appears in the Hebrew section on p. 1.**

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## תקנות ציבור והיחיד בתלמוד

שלום אלבק

### **Regulations Concerning the Public and the Individual in the Talmud**

Shalom Albeck

*When individuals unite for a common cause or a common life, such as the citizens of one city or one community or members of the same profession, their organization needs the power of enforcement in order to enforce its common interests upon its members. Examples include the levying of taxes, participating in building the city walls, constructing water wells, streets, and synagogues for the city, regulating standards of conduct for professionals so that the public is not harmed, etc. These regulations which set standards for the conduct of the public toward the individual and the individual toward the public are called "public law" and they regulate enforcement of the public will on the individual. The regulations concerning the behavior of individuals toward one another, and that do not include any enforcement powers, are called "private law."*

*In the writings of the Talmudic sages, no special behavioral regulations are mentioned with regard to the conduct of the public toward the individual and there is no public law. All public issues in the Talmud are decided according to private law, that is, according to the laws governing relations between individuals. Nevertheless, these laws do have an enforcement quality, according to the Talmudic sages.*

*According to the Talmud, the citizens of a city can make regulations and fine those who disobey them. They may also enforce their decisions on issues such as property and behavior in general by force of their majority, according to the laws of partnership in private law. The enforcement authority of the majority on the minority and on individuals that is inherent in the partnership laws is based on the principle that every freely-entered agreement to create judicial rights, to transfer them from party a to party b, and to cancel them, and also the conditions that they agree to attach to them, will be based upon the full-fledged agreement of each side, and this common decision usually is reinforced by a kinyan (binding action). However, the agreement of each side is not based upon what the person who is a party to the agreement agrees to in his mind, but rather according to what we can assume that most people in this situation and in these circumstances would agree to. Therefore, it may be that the minority or the individual will be bound to an agreement even if he does not agree to it himself because most of the people in that situation would agree not to go back on this agreement. This principle of the objectivity of agreements is the source for the enforcement authority of the majority on the minority or on the individual; that is, it enforces what the majority agreed would be suitable for them and should be done and according to the conditions that the majority think are suitable.*

*However, the enforcement authority of the majority on the minority in partnership issues does not exist when the decision contradicts halakhah, and in every such case the minority should seek the advice of the halakhic authorities. Even if the decision of the entire public contradicts halakhah, by this decision they stop being a public of Jewish partners and the partnership is cancelled.*

**This article appears in the Hebrew section on p. 25.**



## כוחו החורג של בית דין לעומת כוחו של מלך

איתמר ורהפטיג

### The Authority of the Court versus the Authority of the King

Itamar Warhaftig

*The law of the Torah represents a value system. However, in certain areas, especially in criminal matters, there is a disparity between the requirements of the Torah and the requirements of society. This disparity may be overcome in two ways: one, through the special authority of the court — punishing beyond the requirements of Torah law (see Sanhedrin 46:1); and two, through the authority of the king (Rambam, Hilkhoh Melakhim, 73). This article deals with the similarities and differences of these two paths according to the goals of each of them.*

**This article appears in the Hebrew section on p. 41.**

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## החובה לציית לפקודות המלך הסותרות את ההלכה

אליאב שוחטמן

### The Duty to Obey the King's Command When It Contradicts *Halakhah*

Eliav Shochetman

*The two biblical sources cited for the authority of the king of Israel cannot serve as a basis for the king's authority when they involve acts that are forbidden according to Torah law. Indeed, the king does have special authority, but it does not include the authority to disobey the commandments of the Torah. If the king gives a command to disobey the Torah, he should not be obeyed*

*because God's will is the ultimate command and everyone, including the king himself, is subject to God. The rule dina demalkhuta dina, the necessity to obey the king's law, is relevant only to those issues where there is no contradiction between the law and the religious commandment.*

**This article appears in the Hebrew section on p. 57.**

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### כשדינא דמלכותא אינו דינא

שמואל שילה

### **When the Law of the Kingdom is Not Law**

Shmuel Shilo

*The general rule in Jewish law is that one must comply with the government's laws and decrees. This rule is arrived at from a number of sources, the main one being the well-known legal maxim in Jewish law — "the law of the kingdom is law" (dina demalkhuta dina). However, there are exceptions to this rule and there are times when one is not obliged to comply with the state's rules. It may even be incumbent upon the individual to defy the laws of the state. When this is the case — usually because of the basic immorality of the law — one must not only refrain from abiding by the law, but it is also incumbent upon one to clearly protest against the "illegal" regulation. The essay also discusses the parameters of "illegal" laws, including regulations of the military and others given within the army. The essay concludes with a short discussion of passive resistance and civil disobedience both in general and particularly in the Jewish tradition.*

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