

THOUGHTS ON THE DEATH PENALTY: FROM THE WRITTEN LAW TO THE ORAL LAW

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The Torah, the Written Law, prescribes the death penalty for a variety of crimes, yet the Sages of the Talmud were most reluctant to implement such death sentences. In characteristic fashion, their reluctance to do so may actually be based on the Torah itself.

The practical application of the death penalty is the subject of a dispute among four of the most illustrious Sages. Rabbi Eleazar ben Azariah (head of the Sanhedrin) declared: "A Sanhedrin that puts a man to death once in 70 years is called a murderous tribunal." Rabbi Tarfon and Rabbi Akiva said, "Had we been in the Sanhedrin, no one would ever have been executed." Rabban Simeon ben Gamaliel observed: "If so, they [these rabbis] would multiply shedders of blood in Israel!" (Mishnah *Makkot* 1:10). In practice, the death penalty was made almost impossible to apply through various legal requirements.

The Torah is life-oriented: *It is a tree of life to those who grasp it* (Prov. 3:18). In sharp contrast to the Egyptian cult of the dead, which had food for the spirits of the dead placed in their tombs, the Children of Israel were instructed to *choose life and prosperity* (Deut. 30:15, 19). Rejection of the cult of the dead is evident in the chapter dealing with first fruits (*bikkurim*) and the year of the tithe (*shenat ha-ma'aser*): *'nor have I given any of it to the dead'* (Deut. 26:14). Such abhorrence of the heathen cult is also found in Psalms: *They attached themselves to Baal Peor, and ate sacrifices offered to the dead* (Ps. 106:28).

This promotion of life may have guided the Sages in limiting the death penalty. The Torah also declared the sacredness of man, based on the fact that man was created in the image of God. The respect due to man is extended even to one hanged for a crime deserving capital punishment. The Torah decrees that he is to be buried on the same day, *for one whose body is hanged is a reproach to God* (Deut. 21:23). Rashi, based on TB *Sanhedrin* 46b, takes this to mean that it offends the Almighty, because man was created in the image of God.

The idea that a rule specifically mentioned in the Torah can be modified, and even practically annulled by the Sages, is not uncommon. Some practices were halted at a certain point in history. When murder became widespread, the rite of the *eglah arufah* (breaking the neck of a heifer) ceased; and when adultery increased, the *sotah* (bitter waters) ordeal was discontinued (Mishnah *Sotah* 9:9). Other regulations were never implemented, such as the death penalty for a rebellious son and the destruction of a condemned city (TB *Sanhedrin* 71a). Best known, however, is the rule of *an eye for an eye* (Lev. 24:20), interpreted by the Sages to mean monetary compensation. While the terminology of the Bible indicates that justice ideally demands "an eye for an eye," this cannot be administered in practice and monetary compensation must therefore be substituted (TB *Bava Kamma* 83b-84a).

This concept of a rabbinic power to interpret Torah, even in opposition to what may be viewed as the "pure" Torah law, is illustrated in the Talmud with the case of the oven of Akhnai, which was made of separate parts with a layer of sand between each (TB *Bava Metzia* 59b). This oven was the cause of a dispute between two great scholars, R. Eliezer ben Hyrcanus and R. Joshua, as to whether it could contract *tumah* (ritual impurity). R. Eliezer performed miracles in proof of his argument, but R. Joshua, speaking for the majority, rejected the use of miracles to prove points of Jewish law.

R. Eliezer then said to them: "If the *halakhah* agrees with me, let it be proved from Heaven," whereupon a heavenly voice (*bat kol*) cried out: "Why do you dispute with R. Eliezer?" But R. Joshua explained, "We pay no attention to a heavenly voice . . . because it was written in the Torah at Mount Sinai, *You shall not side with the majority to do wrong* (Ex. 23:2)". The Talmud then asks, "What did the Holy One do in this hour? He laughed (with joy), saying, 'My sons have defeated Me!'"

This daring statement has grave implications. The Torah, encompassing all of man's life, contains laws and values that may sometimes clash with one another. The holiness of the Sabbath and the sanctity of human life may thus conflict. The Bible ordains that violating the Sabbath is punishable by death (Ex. 31:14), yet the Sages decreed that human life supersedes the holiness of the Sabbath and that the Sabbath may be desecrated to save a person's life (TB *Shabbat* 151b). One value must give way in favor of the other. Similarly,

the death penalty may clash with some fundamental beliefs in the Torah that emphasize the sacredness of human life. Thus, while the Torah may prescribe execution for certain crimes, the Sages, while keeping a death sentence "on the books," will fall back on the Torah's own principles and legislation to soften or eliminate its implementation. While keeping the letter of the law intact, it is emptied of its content by the Sages in order to keep the spirit of the law alive.

MAN A UNIVERSE

When Cain slew his brother, God said to him, *'The blood [plural in Hebrew] of your brother cries out to Me from the ground!'* (Gen. 4:10). The Sages use this verse when admonishing witnesses in capital crimes, warning them that whereas in non-capital cases a man may pay monetary compensation, in capital cases the suspect is accountable not only for the blood of the victim but for the blood of his posterity as well, hence the use of the Hebrew plural for "blood." Scripture indicates that all mankind arose from the creation of a single man, Adam. Therefore, according to the Sages, one who has caused the death of a single man is regarded as having led a whole world to perish. Conversely, one who saves a single person is considered to have saved a whole world. These remarkable declarations about the infinite worth of man are based on the Mishnah (*Sanhedrin* 4:5).

The importance of human life, deduced from the same basic principles in the Torah, is expressed in the authoritative edict found in TB *Sanhedrin* 74a: that the only time Jews are required to sacrifice their lives is when they are ordered to commit idolatry, murder or adultery, or during a time of religious persecution (*shemad*) when violating a basic commandment is publicly enforced.

TWO WITNESSES

The Torah decrees that only the testimony of two or more witnesses (together) can result in a person's death sentence for a capital crime (Deut. 17:6). This piece of legislation has some weaknesses and some unexpected consequences. The witnesses could be lying. Indeed, biblical history records the death of the innocent Naboth (I Kgs. 21:13) on the evidence of two false witnesses. This episode shows that even Jezebel, the Phoenician princess,

was aware of the biblical legislation and abused it, finding two scoundrels to act on her behalf. The wanton murder of Naboth, fearlessly denounced by Elijah, contributed to the eventual demise of both Jezebel and King Ahab.

Recognizing the potential weakness of the two-witness rule, the Torah warned against false testimony in the Decalogue – *You shall not bear false witness against your neighbor* (Ex. 20:13) – and enacted a law against malicious schemers (*edim zomemim*) to punish false witnesses: *You shall do to him as he schemed to do to his fellow* (Deut. 19:19). The Torah evidently understood that its own system contained a weakness and thus hinted that the Sages should take further precautions, making it functionally impossible to convict anyone of a capital crime. Indeed, the two-witness law had some remarkable corollaries that were exploited by the Sages.

It is told of the venerable R. Simeon ben Shetah that he saw a man pursue his fellow into a ruin. Soon after, he saw him emerge with a bloodied sword in his hand, leaving a murdered man inside the ruin. R. Simeon exclaimed, "But what can I do, for it is written in the Torah (Deut. 17:6), *At the mouth of two witnesses!*" (TB *Sanhedrin* 37b). Here we find a rigorous application of the requirement for two witnesses (together). In spite of overwhelming circumstantial evidence, the great Sage, basing himself on Torah law, was reluctant to bring the murderer to justice. The story ends with the murderer subject to Divine punishment, killed by the bite of a venomous snake. This, too, provided the Sages with textual and theological support for keeping the death penalty on the books, as a deterrent, but leaving the actual administration of that punishment to God.

As in the case of "an eye for an eye," justice ideally demands the death penalty: *If anyone mortally wounds a human being, he shall be put to death* (Lev. 24:17). Here, monetary compensation is not permissible: *You shall not accept a ransom for the life of a murderer* (Num. 35:31). Man is responsible for ensuring that murderers are punished: *Whoever sheds the blood of man, by man shall his blood be shed* (Gen. 9:6). Since life is sacred and witnesses are often unreliable, the death penalty was rarely enforced. Instead, the Mishnah informs us that imprisonment was substituted (*Sanhedrin* 9:5), an idea codified by Maimonides in *Hilkhot Rotze'ah* 4:8.

A derivation of the biblical two-witness rule is Rabba's statement that "no man can declare himself wicked" (TB *Yevamot* 25b), which led to the general

banning of self-incrimination. (In rare instances, a person may confess and the disclosure can have legal consequences.) This law against self-incrimination sharply contrasts with some European legislation up to the late eighteenth century, when the burden of vindicating oneself was placed on the accused and torture was used to extract a confession. The Spanish Inquisition (only abolished in 1834) is a classic example of this type of jurisdiction. As a youth, I lived in the city of Brno (formerly Czechoslovakia), where the ancient Spielberg fortress still had its old torture chambers.

CONCLUSION

The Torah prescribes the death penalty for a number of capital crimes. We have noted the great hesitation of the Talmudic Sages to impose the death sentence. They based their reluctance on certain principles contained in the Torah: Man created in the image of God; the human being's infinite worth; the enactment of the two-witness rule and its remarkable corollaries. Rabbi Moshe Feinstein, in a letter to New York Governor Hugh Carey (*Iggerot Moshe, Hoshen Mishpat 2:68*), summed up the Jewish view of the death penalty in this way, "On the one hand, the purpose of capital punishment is to let people know the severity of these prohibitions so that they will not transgress them. On the other hand, the laws of capital punishment emphasize the importance of each soul... As a consequence of all these safeguards, only once in many years would someone be convicted of murder."

In my opinion, the State of Israel deserves praise for remaining true to its tradition in functionally abolishing the death penalty. Theoretically, a death sentence may be passed on any Nazi and on terrorists arraigned before a military court with a special tribunal of three. Although execution remains on the statute book as a deterrent, it is performed on extremely rare occasions, as in the case of the Nazi war criminal Adolf Eichmann. The State of Israel is thus following the approach of our Sages and their interpretation of the spirit infusing Torah law.