TALMUDIC INSIGHTS ON HUMAN RIGHTS

EMANUEL RACKMAN

A reprint from
JUDAISM: *A Quarterly Journal of Jewish Life and Thought*
Vol. I, No. 2, April 1952

TALMUDIC INSIGHTS ON HUMAN RIGHTS

EMANUEL RACKMAN

As never before in human history, the safeguarding of human rights has become a matter of international concern. The Charter of the United Nations acknowledged that their violation was a cause of World War II and that their protection had become vital to peace. Furthermore, in the debates within the Israeli Kenesset the principal argument advanced in favor of the adoption of a written constitution was that it would protect human rights. Jews, therefore, might well consider some talmudic insights with regard to the nature and implementation of those human rights that have become particularly controversial in our day. Perhaps both Israel and humanity at large could profit by these insights.

I

In the American political system, judicial review is one of the most important techniques for the protection of human rights. As a result, one may suecessfully challenge before the courts the constitutionality of a law duly enacted by a legislative body. One may also challenge the constitutionality of an official act performed by a state or federal officer. Many scholars argue that the power which the courts thus exercise really constitutes a usurpation on their part. Nonetheless, they concede that the power has had a benign effect upon civil liberties. That is also why several modern states now provide for judicial review in their own constitutions, while several others have urged a similar system for the United Nations, whereby a special international tribunal would hear cases involving the violation of human rights protected by international covenant.

When Dr. Leo Kohn drafted a constitution for the State of Israel, he too proposed assigning to the Supreme Court of his country the power to declare statutes unconstitutional. The proposal was publicized in the United States as an Israeli borrowing of an American pattern. The doctrine of judicial review is, however, one of the most ancient of Jewish jurisprudence.

In effect, the doctrine makes it possible for an individual to challenge the mandate of a law-making body or law-enforcing officer on the ground that the law violates the highest law of the state, which, in the case of the United States, is a written constitution. Similarly, according to Jewish law an individual may disobey the mandate of a king and defend his disobedience before the Sanhedrin on the ground that the mandate is in violation of the provisions of the Torah. If the court upholds the contention of the accused, he is acquitted.

Joshua was told, "Whosoever would rebel against thy commandment, and will not hearken unto thy words in all that

EMANUEL RACKMAN, rabbi at Far Rockaway, N. Y., is lecturer in political philosophy and jurisprudence at the Yeshiva University in New York.

thou commandest him, shall be put to death" (Joshua 1:18). Queries the Talmud:[1] "[Is the punishment to be applied] even if [the disobedience is due] to words of the Torah?" The answer is no. Wherefore Maimonides[2] expounds: "He who disobeys a king's mandate because he is engaged in the performance of one mitzvah or another, even an insignificant one, is relieved of guilt,. . .and *one need not add that if the mandate itself involves the violation of one of God's mandates, it need not be obeyed"* (my emphasis.—E.R.).

In addition, talmudic sources support the view that the king could not suspend the rules of the Torah even in an emergency. Only the Sanhedrin could do so and the Sanhedrin was a quasi-legislative and judicial body.

Courts in ancient Athens reviewed laws. They tried a law even as they tried a man. Cicero too was wont to appeal to a higher law in the light of which an unjust law might be regarded as a nullity. Jews, however, applied the principle with regard to a written constitution — their Torah — and retained it even after the institution of kingship. This whole outlook goes back to the Bible. The Pentateuch subjected kings to the rule of law, and the prophets ever pressed this point. Here, it seems, we have the closest analogue in antiquity to the modern view that courts may supervise the exercise of political power and make sure that it remains within the framework of the state's written constitution. If an official violates the fundamental charter of government, the aggrieved party has recourse to the courts. Individuals thus have rights which they can assert against the sovereign.

This principle was later extended to apply not only to a Jewish king — subject to the rule of the Torah — but also to a non-Jewish state within which the Jewish community enjoyed a measure of autonomy in the administration of justice. The Jewish courts protected individuals against the unlawful mandates of those who exercised executive power within the community. Above the community, however, there was the state whose law superseded the law of the autonomous community, at least with regard to civil matters. Yet the rabbis held that if the state's action was discriminatory in character and offended against the fundamental rule of equal protection of the laws, Jews were not bound to respect the law of the state.

"The general rule is that if a king promulgates a law applicable to everyone, and not to one person in particular, then property [acquired by the king in consequence thereof] is not regarded as a theft [in his hand]."[3] Otherwise, it *is* theft, and Jewish courts will not protect subsequent purchasers even though they may have acquired their titles from the sovereign. In the same spirit, the rabbis reasoned that God rewarded the Egyptian midwives who had saved children of the enslaved Hebrews, though in doing so they had violated the command of their monarch; this command was discriminatory, affecting only Jewish males, and therefore was not to be obeyed. By the same token, Jewish courts might very well hold today that, in the light of an international covenant on human rights, an act in violation thereof by any duly constituted legislative or executive body, whether local, federal, or supra-national, and whether within or without Israel, was a nullity. Few modern states are prepared to go this far.

[1] B. Sanh. 49a.
[2] Mishneh Torah, Hilkot Melakim, III, 9.
[3] Shulhan Aruk, Hoshen Mishpat, CCCLXIX, 8.

II

The assertion of rights against the sovereign has been appropriately called "Liberty against Government".[4] There are indeed many ways in which, in democratic countries, government may be restrained from action. More recently, there have emerged rights in the sense of privileges — ways in which one may expect one's government to act positively for one's welfare. One of the most significant of these rights is the right to gainful employment — the right to work — or at least the right to subsistence.

Within the Commission on Human Rights of the United Nations, this matter was the subject of much controversy between East and West. The right itself, however, was proposed as early as 1789 in the French National Assembly, when Deputy Target suggested the inclusion of the following in the Declaration of Rights of Man and Citizen: "The state must guarantee to each man the means of existence by assuring him property, work or aid in general."

There is a situation in which the Talmud recognizes this right and its rationale is most significant. According to Jewish law, a wilful homicide might be punished by death. Asylum from the wrath of the next of kin was, however, offered to him who committed an accidental homicide. In most cases, such asylum involved exile from one's residence to a special city. But that meant losing one's means of livelihood. Therefore, the rulers of the city in which asylum was sought were obliged to provide the refugee with subsistence and a place to live.

Rabbi Isaac explained the significance of the verse, "and that fleeing unto one of these cities he might live" (Deut. 4:42). This implies, "provide the means for a livelihood.[5]" If the refugee was a scholar, he was even to be provided with a college for the continuance of his calling.[6] As a matter of fact only such cities were to be designated for purposes of asylum as could easily afford employment.[7] The rationale is clear. If the refugee was denied a livelihood, he was, in effect, made to suffer a death penalty and the death penalty was reserved only for those who committed wilful homicide. The refugee, who had committed an accidental homicide, was entitled to live, and that meant that he had to be furnished employment or subsistence.

The United States Supreme Court in Traux v. Raich,[8] by Justice Hughes, virtually expressed the same view. The State of Arizona had enacted a statute which placed certain limitations on the employment of aliens. As a result, Raich lost his job. He sought relief in the courts and the statute was held unconstitutional as an interference with the power of Congress to offer hospitality to aliens. "The authority to control immigration — to admit or exclude aliens — is vested solely in the federal government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for *in ordinary cases they cannot live where they cannot work"* (my emphasis.— E.R.).

The right to live in a state must inevitably mean the right to work, and what was a special instance in Jewish jurisprudence must become the rule for all inhabitants of the earth. That is why the proposed Israeli constitution set it forth unequivocally for Israeli citizens,

* See E. S. Corwin's book so entitled (Baton Rouge: Louisiana State University, 1948).

[6] B. Makkot 10a.

[a] J. Makkot 6.

[7] B. Makkot 10a; Rashi's and Meiri's commentaries *ad loc*.

[8] 239 U.S. 33, 36 Sup. Ct. 7 (1915).

as did the Fundamental Principles of Israel's First Kenesset.

Ill

Particularly acute at the present time is the violation which civil liberties are suffering under the impact of the cold war. Forced confessions have become the principal basis for convictions behind the Iron Curtain in crimes of a political nature, and to some degree also in the United States in crimes of violence, particularly when members of racial minorities are involved. Moreover, the constitutional immunity with regard to self-incrimination is being weakened at the hands of many agencies of the state.

Traditional Jewish law held any and all confessions — no matter how voluntarily offered — to be without legal effect as far as the state was concerned. Confessions of debts or thefts might obligate one to make payment or restitution to an aggrieved party at the latter's instance. But the confessions were nullities in criminal proceedings. As a matter of fact, the person making the confession could not even be impeached as a witness in a subsequent and different proceeding on the ground that he had confessed to the commission of an immoral act.

Furthermore, even if such a person did confess to a crime he had himself committed and the confession was made while testifying with regard to a crime committed by another, the court would usually strike out the confession unless it was absolutely impossible to separate the confession from the remaining testimony. In such a case, all the testimony would fail. Thus the confession was still without significance. So inviolate was the rule against self-incrimination!

The Talmud[9] establishes this rule against self-incrimination by means of a syllogism. Relatives are incompetent to testify against each other. A man is a relative to himself. Therefore, he is incompetent to testify regarding himself. Nonetheless, one does find that a man may make admissions against his interest which might give rise to suits for money judgments by persons in whose favor the admission was made. Logically, the same syllogism ought to apply. Yet the Talmud indicates that with regard to financial obligations, an admission might create a liability in the maker of the admission and a power to sue in the party for whose benefit the admission was made. It is only the state that is barred from taking this advantage. This is thus another instance of "liberty against government".

What is of special interest, however, is the rationale of the Jewish rule. The confession is a nullity because of the incompetency of the confessor to testify. In the United States, in a federal investigation, a man may be forced to incriminate himself with regard to an act which is a crime under state law, but not under federal law. The immunity against self-incrimination guaranteed by the federal constitution applies only to self-incrimination under federal law.[10] The Jewish rule would bar any self-incrimination whatever because of the incompetency of the confessor. In addition, the immunity guaranteed by the federal constitution applies only to crimes, and not to matters which are not punishable by law. Jewish law, on the other hand, would apply to anything.

The truth is that while law-enforcing agencies have been aided by the gradual contraction of the immunity against self-incrimination, personal freedom has also suffered. Jewish law, on the other hand, gave legal recognition to admissions

[9] B. Sanh. 9b.

[10] U.S. v. Murdock, 284 U.S. 141, 52 Sup. Ct. 63 (1931).

against interest when they involved the waiver of one's wealth. One, however, could not waive one's flesh or freedom.

IV

Another problem that is becoming of increasing importance to lovers of freedom in America is the difficulty one is presently experiencing in obtaining defense counsel when one is accused of a crime in which public passions are engaged. Yet a way must be found to insure an adequate defense. Otherwise, the trial is in danger of becoming a mockery of justice. Jewish law was deeply concerned about the adequacy of the defense.

Trial procedure according to Jewish law did not call for representation by counsel; the judges were usually counsel for the accused as well as his tribunal. It is therefore significant that no one could be convicted in a criminal case unless there was at least one judge who found grounds for acquittal and was the champion of the accused. A unanimous agreement as to guilt meant the prisoner's release.[11]

Rabbi Kahane said: "If the Sanhedrin is unanimous for conviction, then the prisoner is acquitted. We derive this from the requirement that even if only a majority wants to convict, the verdict must be delayed for a day in the hope that the minority for acquittal will influence the majority. But if there is unanimity for conviction, the delay would be futile. Thus a basic requirement of fair criminal procedure cannot be effectively fulfilled. And if there cannot be such fulfillment, acquittal follows."

The meaning of this rule is often misunderstood. It does not mean that at the conclusion of the trial and the judges' deliberations there had to be at least one vote for acquittal. That would not protect the accused at all from a court bent on conviction, for obviously one judge could always vote perfunctorily for acquittal and satisfy the legal requirement that there be at least a lonely dissenter. The rule called instead for at least one judge to discover grounds for defense, which he would press. And if, in conclusion, the majority of judges were indined to convict rather than acquit, the case could not be disposed of until the judges had spent at least an additional day in deliberations — so vital was adequate consideration of the defense to meet the requirements of a fair trial.

V

It would thus appear that Jewish law was very much concerned with those human rights whose protection is sought by the most recent protagonists of these rights. However, there was also concern for one's freedom to dissent from the established religious authority, even in a system erroneously called "theocratic".

Needless to say, there was no compromise with anything resembling idolatry or its propagation. The law, however, permitted such diversity in thought and practice that it is difficult to imagine that the constituted authority ever sought excessive regimentation. The law of "Zaken Mamreh" indicates that our sages even distinguished between overt acts in defiance of constituted authority, which were punishable, and verbal criticism, which was permitted. The distinction is brought out in connection with an elder who had taught a doctrine or decided a case in a manner which the highest court held to be in error. The elder in his official capacity could not apply the rule which his superiors had reversed but he was free to say — and even to teach — that his superiors had erred.[12] "If the

[11] B. Sanh. 17a.

[12] B. Sanh. 86b.

elder returns [from the appellate court] to his city and continues to teach as he had orginally taught, he is acquitted. He is guilty only if the erroneous teaching was used in a practical decision."

According to one school of thought, the elder could be penalized in only one instance for defiance of the Sanhedrin. That instance was when his official act forthwith caused the person aggrieved to lose his heavenly reward for the performance of a religious duty. If the victim of the error had the opportunity to verify the elder's decision with other elders before relying thereon, the elder bore no guilt for his own defiant negation of the Sanhedrin's will. The Talmud could discover only one such possibility.[13] This view bears interesting resemblance to the "clear and present danger" rule, for only when the elder's defiance of constituted authority caused immediate damage did it involve the offender in criminal liability.

VI

Most interesting of all, perhaps, was a Jew's immunity from being compelled to support what might be regarded as his country's established religion. The Biblical system of tithes and its abuse by non-Jews during the middle ages have blinded most moderns to the fact that according to the Talmud there were no legal sanedons for their collection. The state did not collect the tithes.[14] "The tithes. .. are fundamental in Torah. Nonetheless, their collection was left to the [free will of the] common people." Nor were the priests and levites permitted to solicit them. They were not even permitted to assist in the harvesting of crops lest their presence constitute an indirect hint that they should receive their share.[15] Jews were exhorted to pay the tithes, but that was all. As a matter of fact, a man might simply set the tithe aside and do no more. The rest of his crop might then be eaten without violating any religious prohibition. And thereafter he might forever withhold delivery of the tithes to the levites.

Two objectives were achieved by permitting the system of tithes to operate on a voluntary basis. First, philanthropy would remain within the province of free will. Secondly, the clergy would receive their due in the measure in which they were beloved by the people. Both objectives would have been defeated had the state enforced collection. And that is why, despite the great laxity that prevailed in the payment of tithes by the peasants, the rabbis never gave these tithes the status of a tax.

The same was generally true of gifts to the priests who took care of the sacrifices in the temple. In most cases, the priests were to receive only a share of voluntary offerings for services rendered in connection therewith.

The rabbis, of course, applied even more stringent rules to themselves. They could be compensated only for time lost from the pursuit of their gainful vocalions. In any event, support of the established religion was in the main voluntary.

The Talmud is a veritable mine of materials pertaining to human rights, and he who would probe its folios will be rewarded with the enrichment of his insights as well as the enhancement of his appreciation of historic Judaism. One hopes that Jewish social scientists will apply their talents to these neglected sources.

[13] B. Sanh. 88b.

[11] B. Shab. 32a and 32b; and Rashi's commentary on 32b.

[15] Mishneh Torah, Hilkot Terumot, XII, 18.