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THE DIALECTIC OF THE HALAKHAH

by

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THE DIALECTIC OF THE HALAKHAH

Philosophers of Judaism find it impossible to interpret their subject without considering its many antinomies. In Judaism, God is immanent as well as transcendent. The prophets articulate lofty ideals of universalism at the same time that they emphasize the particularistic character of the chosen people. Law is of primary importance while the message of freedom is grafted on almost every precept. Other-worldliness and this-worldliness commingle in virtually all the concepts. And the most visionary of hopes co-exist with an unmistakable pragmatism, even with a hardened realism.

Judaism's antinomies are important for an understanding of not only its theology and ethics, but also its Halakhah. Indeed, the data of Jewish theology and ethics are usually derived from the Law which fixes the essential character of all of Judaism. Unfortunately, however, many who are presently called upon to resolve questions of Jewish law are often oblivious to the antinomies which are implicit in their subject. Altogether too frequently they seize upon one or another of two or more possible antithetical values or interests between which the Halakhah veers, and they assume that there must be an exclusive commitment to that single norm. The dialectic of the Talmud, however, reveals quite the contrary. Implicit in almost every discussion is a balancing of the conflicting values and interests which the Law seeks to advance. And if the Halakhah is to be viable and at the same time conserve its method and its spirit, we must reckon with the opposing values where such antinomies exist. An equilibrium among them must be achieved by us as objective halakhic experts rather than as extremists

propounding only one of the antithetic values.

The very process of halakhic development involves the quest for such equilibrium. On the one hand, there are the authorities: revealed texts, revealed norms, and the dicta of sages whose prescriptions are almost as sacred as the revealed data (because what the sages of each generation ordain becomes part of the tradition which the revealed texts enjoin us to obey). On the other hand, the Law's doctors are themselves partners in the development of the Law. Indeed God abdicated in their favor when He bequeathed the Law to them. He thereby restrained Himself from any further revelations. The Talmud tells us that Rabbis are not to rely upon heavenly voices or miracles. They are to act as sovereigns in the sphere of halakhic creativity allocated to them. Can one conceive a more difficult equilibrium than this—subservience to mountains of authority coupled with a well-nigh arrogant usurpation of legislative and judicial power over the divine legacy? Yet both poles play their necessary roles in halakhic development.

If not for Halakhah's theocentric character, it would be no different from other legal systems that are rooted only in history and economics. Because its students are committed to the divine origin of the Law, their creative achievement in the Law is ever oriented to the fufillment of God's Will. In order that we never lose sight of this commitment, the Law includes mandates that are also supra-rational—inexplicable in terms of human values and interests. Thus Dr. Samuel Belkin, president of Yeshiva University, maintains that even the supra-rational commandments of the Torah have a purpose although we may not fathom their reason.[1] These mandates are to be obeyed solely because God decreed them. Such mandates are to be found in every branch of the Law. Obedience to them is of the essence of one's religious experience — one obeys not because one understands but rather because one believes. As children sometimes obey parents not because they comprehend but because they trust, so are we to obey God. It was to conserve this attitude that our Sages hesitated to make too explicit their own analysis of the Law in terms of human values and interests. Such analyses might prompt students to embrace a completely

humanistic approach to the Law which would thus lose its theocentric character altogether. In a general way they did explore the rationale of most of the *mitzvot,* but in the articulation of specific rules they did not presume that they completely fathomed the teleology of all the revealed texts.

Yet God gave the Law to the Jewish people who alone were responsible for its development. As humans they crave to understand what they are commanded to perform. Moreover, their needs are not the same in every age or clime. The Torah itself takes note of these factors. It appeals to man to comprehend the justice-content of the Law. It also bids him to live by the Law, and not perish because of it. Moses' successors were vested with authority not only to interpret the Law but to constitute themselves as authorities in every generation. The Rabbis often undertook not only to rationalize the presumptively supra-rational, but also to suspend, even overrule, the revealed words of God.

The late Justice Benjamin Cardozo once essayed to describe what it is that a judge does when he engages in the judicial process creatively. The conclusion is inescapable that one can acquire the art only after years of pre-occupation with the law, its history, its ideals, its methodology, its philosophy. So is it with Torah — until one has studied long and much from earlier masters, one does not learn how to balance one's commitment to authority with one's obligation to be the master instead of the obedient servant. Both imitation and originality play their part in the process. Modesty coupled with respect for forbears commingles with self-reliance.

The need to achieve equilibrium among values is even more apparent when one is dealing with the rules of law themselves. Particularly in the area of personal status do we find the dialectic of the Talmud balancing opposing interests and veering between antithetical values. In this paper we shall attempt to demonstrate that the Jewish law of personal status represents, in part, the achievement of an equilibrium between conflicting interests.

True, many of the norms remain supra-rational. Without such theocentric roots, the Law would become altogether positive in character. But there are many areas for rabbinic creativity

and in these areas rabbis must be mindful of ends.

THE LAW OF SLAVERY

Without reference to the existence of conflicting values in the Jewish law of personal status, one might accuse the Halakhah of discrimination against the non-Jew in general and the non-Jewish slave in particular. The provisions applicable to Jewish slaves were in fact more liberal than those applicable to non-Jewish slaves. However, an analysis of the different interests which the Law sought to conserve will more than justify the less favored status accorded non-Jewish slaves. For the Rabbis sought to balance their love of freedom with their firm insistence on high moral standards for the Jewish people. In the case of Jewish slaves, the love of freedom was the dominant interest; in the case of non-Jewish slaves that value yielded to the concern for sexual morality.

Jewish Slaves

It is incontrovertible that the elimination of Jewish slavery was a goal of the Halakhah. Those who heard on Mount Sinai that all Jews were God's servants were not to become indentured to co-religionists who shared with them a common bondage to the same Master. Therefore, the circumstances under which the Written and Oral Law tolerated Jewish slavery were very limited. A Jew could be sold by the court only if he had stolen and was so destitute that he could not atone for his crime by the payment of money.[2] However, to punish such a sinner with slavery meant that the plight of his family would be even further aggravated. For that reason the master was required to support the slave's entire family.[3] The Halakhah was, nonetheless, concerned that wife and children have the benefit of a free head of the household. It therefore ordained that the slave be permitted to redeem himself from his bondage whenever he acquired funds for that purpose. His wife was allowed to engage in gainful employment in order that he might accumulate such funds. None of her earnings belonged to her husband's master, even though the master remained responsible for her and her chil-

dren's maintenance.[4] The amount the slave was to pay the master for his freedom was proportionate to the still unexpired portion of his six-year term of slavery. If the slave had no wife and children of his own prior to his enslavement, the master was not permitted to give him a non-Jewish slave as a mate, lest he become so attached to her that he choose to remain a slave and never wed and raise a family of Jewish freemen.[5] The Law sought not only to advance the ideal of freedom but also to conserve the many values of Jewish family life. Even in those isolated instances where the master was permitted to cause the Jewish male slave to mate with a non-Jewish female slave — the only instance justifying the contention that the master owned the very body of the slave — the moral standards of a monogamous relationship were applicable and promiscuous relationships were prohibited.[0] The institution of slavery was never to place in jeopardy the lofty moral ideals of the Law. That is also why no compromise whatever was permitted in connection with the Jewish female slave. She was automatically emancipated at puberty unless she had theretofore wed her master or his son.

Non-Jewish Slaves

In the case of Jewish slaves, the ideals of freedom and family morality are seldom in conflict. However, the Law pertaining to non-Jewish slaves can only be understood in the light of the conflict that prevailed between these values. The Halakhah rarely permitted even a non-Jew to be enslaved without giving him sufficient status as a Jew to insure the protection of his life and limb and his partial participation in the religious life of family and community. As such, he had a higher status than even a free Gentile. If the non-Jew did not want to be subject to the Law, his master was required to sell him to a non-Jew.[7] If he were bought originally from a non-Jew with the express proviso that he not be converted to Judaism, then he had to acquiesce at least to the observance of the seven Noahide laws.[8] It seems, however, that non-Jewish slaves preferred Jewish owners. As a consequence of their becoming members of a Jewish household, pursuant to the performance of the appropriate rituals, they could not be harmed with impunity. There was no

difference whatever in the law of homicide, whether wilful or accidential, between one who killed a Jewish freeman and one who killed a non-Jewish slave.[9] Torts committed againts the non-Jewish slave were actionable. Though the recovery was the master's, the injuring of slaves was deterred by the very fact that the tort was actionable. The master himself did not escape with impunity for his own torts against his non-Jewish slave. Emancipation of the slave might be the consequence of the master's tort. Under certain circumstances the master would even pay the death penalty for killing his slave,[10] though the Law also sought to protect his disciplinary authority. If a master refused to feed his non-Jewish slave (presumably as a disciplinary measure), the community performed this obligation for the slave as it performed it for the poor generally. The Rabbis even penalized a Jewish master who sold his slave to a non-Jew who would not respect the non-Jewish slave's right to observe Sabbaths and festivals.[11] The master was compelled to repurchase the slave, though the cost of the repurchase might be ten times the amount of the original sale. Moreover, the master could not sell a non-Jewish slave even to a Jew who resided outside the Holy Land.

Nonetheless, the Law frowned upon the emancipation of the non-Jewish slave. Such emancipation would give the non-Jewish slave the status of a full-fledged Jew and the Law did not encourage this way of increasing the Jewish population. The Law abhorred the less stringent sexual code prevailing among non-Jews. Many authorities even observed that the non-Jewish slave might prefer slavery, with its license for promiscuity, to freedom as a Jew with its stern limitations on sexual relationships.[12] Not having been reared in a milieu which stressed the high moral standards of the Law, the non-Jewish slave was not to be catapulted into a free society which would make him unhappy or which he would corrupt. Nonetheless, our Sages ruled that if by emancipation a moral purpose was achieved or a *mitzvah* fulfilled, one may violate the injunction against freeing a non-Jewish slave. For example, the Law urges that a promiscuous non-Jewish female slave be freed in the hope that she marry and establish a monogamous relationship with a husband, in-

fidelity to whom would be less probable because of the threat of the death penalty.[13]

Rules applicable to non-Jewish slaves thus involve a delicate balancing of the values of freedom and family purity. In the case of Jewish slaves the two values usually yield the same result, or at least are seldom in conflict with each other.

Employer-Employee Relationships

While an analysis of the master-slave relationship may be altogether academic, the relationship of employer and employee has contemporary significance. Jewish law was always aware of the danger that the wage earner might sink to the low status of a slave. It does not matter that he freely contracted to work — a man might also freely contract to be a slave! Therefore, the values which the Law seeks to conserve in the rules governing the employer-employee relationship are essentially those of master-slave relationship — freedom and morality. However, an added value was considered — the sanctity of the pledged word. Jewish labor law developed as a delicate balancing of all these values.

If a man sold himself as a slave for a fixed term, the Law might tolerate the voluntary forfeiture of his freedom. Many people are too immature to cherish freedom; they prefer security. Others might choose slavery in order to obtain bulk sums at the time of sale. The Halakhah, therefore, did not outlaw the transaction. However, the man who voluntarily sold himself into slavery could not expect thereby to enjoy the looser standard of sexual morality; he was not permitted to mate with non-Jewish female slaves. He could not choose a form of family life less holy than a freeman. Moreover, if he sought escape from other moral and religious standards by becoming indentured to Gentiles, his family was compelled to redeem him.[14]

More common than voluntary servitude was the long-term wage contract. Here the conflicting values are freedom and the sanctity of the pledged word. To protect the first value, the contract could not extend beyond the three-year period; otherwise the employer-employee relationship might approach the master-slave relationship. In addition, the employee was permitted to

quit at any time, even before the expiration of the three year term. The employer was bound for the full period.

However, favoring the employee so that he could quit at any time hardly induces respect for the pledged word of a party to a contract. For that reason, if as a result of the breach of promise the employer suffered an irreparable loss, the employer's promise to increase the wage because of the threat of a walk-out is unenforceable.[15] Thus the employee's freedom did not become license to do harm.

These simple principles are also applicable to organizations of laborers. The law recognizes the right of workers to organize and bargain with employers. The majority in the group may bind the minority. The individual worker may leave the group, but if he accepts employment it has to be on terms fixed by his colleagues.[16] The duly constituted municipal authorities may exercise some power over the decisions of the unions to insure the fairness of their regulations.[17] But in the final analysis the Law seeks to safeguard the freedom of the individual laborers and the groups they constitute even as it strives to make them fulfill their commitments to each other and to their employers where there is injurious reliance upon their pledged word.

The Legitimacy of Children

The Law was also concerned with antithetical values in the question of legitimacy. On the one hand, the level of morality was to be maintained. Since courts can hardly deal with anything but overt acts, and since most sinful sexual relationships are consummated in secret, these would normally lie beyond the reach of the Law's sanctions. For that reason the Law had to employ a different kind of deterrent — the fear lest the illicit intercourse yield a bastard. On the other hand, this might require the abuse of the innocent, and in justice, paraphrasing a biblical and talmudical dictum, it is inevitably asked: "Shall one enjoy the sin and another pay the penalty?"

Here again we have a conflict in values. To promote sexual morality, the Law induces the dread that the sinner will bear the burden of an illegitimate child. The same Law, however,

eloquently ordains that no one shall be punished for another's sin. Talmudic texts and commentaries give abundant evidence of the delicate balancing of the interests involved here. The social stigma and ostracism, the consequence of illegitimacy, was magnified to the horror and chagrin of all sensitive souls, while at the same time the Law made it virtually impossible to prove that any one was a bastard and frowned upon the publicizing of such rare instances as were conclusively established.[18]

In an interesting set of hypothetical cases the Talmud informs us by inference that the stigma attached to illegitimacy was so great that the mothers of illegitimate infants would rather murder than abandon them.[19] If one came upon a foundling whose mother took precautions to insure the child's survival, though she was then and there abandoning it, the foundling was presumed to be legitimate, for if the child was illegitimate the mother would rather have sought its death. So successfully did the Law induce the dread of illegitimacy!

Yet how could illegitimacy be proved? Children born out of wedlock were legitimate. Moreover, children born of certain unlawful marriages were legitimate. Only such children were bastards who were products of incestuous or adulterous relationships in which no lawful marriage could ever be consummated between the parties, such as a child born of cohabitation between mother and son. But how could one prove that a child was born of an adulterous relationship when every husband was presumed to be the father of all children that his wife bore? Even if the husband was away for years, who could tell but that he came on a magic carpet in the dead of night to cohabit with his wife and impregnate her?[20] Or who knows but that the wife conceived artificially? Even the mother's admission that the child was illegitimate had no probative value. She was incompetent to testify. Her husband's testimony was also unacceptable for he was conclusively presumed to be the father. If he sought to deny paternity of his wife's child, his testimony would place his wife in jeopardy as an adulteress, and he was therefore incompetent to testify. A natural father might testify that a person whom he knows to be his son is illegitimate. But who would be so foolish as to volunteer such information! And who

could ever be sure that a particular child was his! That the community may have doubts is not sufficient basis for the attachment of an adverse status to the child. The Law made this clear: only they whose illegitimacy is certain are bastards, not they whose illegitimacy is doubtful.

The ancients were no less sensitive than moderns to the ethical problem involved in penalizing children for the sins of their parents. In one talmudic text a method is indicated for the termination of a marriage by annulment instead of divorce, and as a result acts of adultery theretofore committed by the wife are no longer punishable. Since the annulment is retroactive, it follows that the woman was not wedded when she cohabited with men other than the one whom she once regarded as her husband and who now, as a consequence of the annulment, was nothing more than one of her many sex partners. The Rabbis, however, asked about the status of children that she bore during the period of the marriage before its annulment. The retroactive annulment would make all of them legitimate since there was no adultery whatsoever. Would not this be a way of subverting the biblical directives on bastardy? The Rabbis answered: "Would that we had equally effective ways of removing all illegitimacies!"[21] And they did expound other ways.

True, they never completely declined to use the stigma of illegitimacy as a deterrent for illicit intercourse. The only effective deterrent had to involve the suffering of the guiltless. Yet the Law also reduces the incidence of such suffering to a minimum. It encouraged a minimum of notoriety when a judgment of illegitimacy was inescapable. The Rabbis would communicate the information to each other clandestinely once in seven years.[22] Even when the Messiah comes and reveals unto each and every Jew the name of the tribe whence one descends, he will nonetheless withhold all information about legitimacy and illegitimacy. If a bastard — concealing his identity — had managed to marry into a family of lofty status, and by imputation had acquired the same status for himself, the Messiah will not betray him![23]

It is typical of the Law's method that it first creates the badge of illegitimacy, and then mitigates the evil consequences. The Law has to do both in pursuit of the interests it seeks to fulfill.

Again we see how halakhic creativity involves a continuous oscillation between conflicting values.

A similar dialectic can be found in innumerable folios of the Talmud dealing with virginity. To impress girls with the importance of pre-marital chastity, the Law makes much of the maidenhead. Special ceremonies marked the marriage of the virgin. The amount specified for her benefit in the Ketubah (marriage contract) was double the amount indicated for a widow or divorcee.

7 Only a virgin was eligible for marriage to the High Priest. And the Law did not indulge the girl to pretend to be that which she was not. The husband could complain to the court that he had been deceived. In fact, the wedding date was fixed on the eve of a day when the court would be in session in order that the husband might make diligent application for the annulment of the marriage for fraud, or at least the reduction of the benefits due his wife because she was not a virigin.[21] On the basis of such texts alone, one might even be tempted to say that the Law was overestimating the value of virginity per se. This, however, is not the case. The Rabbis were concerned rather with the importance of sanctions that would encourage chastity. As in the case of bastardy, they simply wanted a threat that would deter. Yet, if a husband did come complaining, it was almost impossible for him to prevail. Virtually any facts the wife offered in justification were believed. She might even claim that she was raped after her betrothal (*kiddushin)* and she would lose naught unless she were married to a priest. She might claim accidental loss of virginity, in which case the marriage was not affected even though the amount indicated in her Ketubah might be reduced (some rabbis maintained that even this loss would not be sustained). In communities where between betrothal and the consummation of the marriage — the interval was usually a year — the bride and groom were permitted to see each other without benefit of chaperone, she could attribute the loss of virginity to her premarital intimacy with her husband. Rare indeed were the circumstances where the husband's complaint was of any avail. The Rabbis gave the husband cause for even greater distress. If he did complain they cross-examined him as to how he had become such an expert that he was able to

us see how these values affect the legal rules and make the Jewish law of divorce more intelligible to moderns.

The Roles of Husband and Wife

The marital status is initiated when the groom performs a symbolic act of acquisition with the consent of the bride or her father. Similarly, to dissolve the relationship the Torah demands that he initiate the action. The husband must cause the bill of divorce to be written. Critics of the Law question this focus of attention upon the male. However, it is not difficult to accept the logic of the Halakhah which requires that he who created the state of *kiddushin* should be the one to undo it.

The husband's active role in creating the marriage bond is derived from a premise that is present in all of Judaism — including the Kabbalah — that the male is regarded as the active principle in the universe and the female as the passive principle. In nature it is the male who actualizes the reproductive potential of the female. In wooing, too, Judaism regarded the male as the proposer.

Yet the consent of the female is considered most important. Without it the marriage may not be consummated. The Law magnifies the role of the wife's consent in sexual relations too. Ultimately, her consent to a divorce became one of the Law's requirements. The need for her consent was slower in coming only because the Law was more preoccupied with her protection against hate and abandonment, and assumed that it served no purpose to keep her wedded to a man who did not respect her. The Ketubah was created to discourage divorce. It obliged the husband to make adequate provision for his wife's maintenance throughout the marriage and substantial payments in the event of divorce or widowhood. This obligation reduced the incidence of divorce and shielded the wife against desertion by her mate. Subsequently, the consent of the wife became a legal prerequisite to its validity. In this way the Law virtually equalized the roles of the spouses in both marriage and divorce, although it was still the male who was to perform the necessary acts.

The substitution of a rabbinic tribunal for the husband as the initiating agent has been proposed as a solution to the present

not marry her first husband. This is a significant deterrent to hasty divorces and also to the lawful exchange of wives by husbands who would make a mockery of the marital relationship. Divorces are thus given the effect of finality. For this reason cohabitation between a man and a woman after their divorce might invalidate the divorce. The Law glorifies friendship, but does not favor the "friendship" of divorced couples of which modern society has a notorious incidence.

Because divorce is so final, and in the case of *Kohanim* absolutely irrevocable, the Law seeks to impress the spouses with the awesome character of the step they are taking. Anything less than a meticulously formal procdure would cause people to underestimate the sanctity of marriage, mentioned in the husband's recitation of an ancient wedding formula, "Behold thou art consecrated unto me." The dissolution of an act of consecration requires the services of a scribe who will prepare a personalized instrument at the husband's request. The Rabbis added the requirement that the instrument include an exact rendition of the attendant circumstances of time and place. Interestingly enough, since the divorce severed all bonds between the spouses, the bill of divorce must be a detached piece of parchment, an object whose very detachment from mother earth symbolizes the rendering asunder of two individuals.

Reformers in Judaism have made of divorce a matter of purely secular concern. The Rabbis would not tolerate a condition born of a solemn act of consecration to come to an end without the Law's involvement. Even animals once consecrated to Temple use cannot pass to another status without a form of redemption; without some formal act, even their death does not release them from their erstwhile holiness. How could the Law be less attentive to marital relationship! Talmudic authorities may have debated the validity of divorce granted by non-Jewish courts.[25] However, the weight of authority and practice supported the position that divorce, like marriage, must follow a Torah pattern.[20] Tradition prescribes how the divorce shall be written, attested, and delivered. The slightest variation might invalidate it.

The Conflict of Values

The formality and finality of the divorce are means used by the Law to insure a high regard for the sanctity of the marital relationship. Occasionally these means came into conflict with the ideal of consent which, philosophically speaking, is a badge of human freedom. Strict formal requirements in any branch of jurisprudence are usually the greatest hindrance to the fulfillment of the consent (or will) of a person. The Law has to veer between these values in many a situation.

If consent is all important, then conditions ought to be permitted. Obviously conditions detract from finality. Conditions may or may not be fulfilled, and the divorce may or may not become effective.

The Law, however, does permit the stipulation of conditions. The conditions most often suggested in the Talmud are those benefiting the wife — conditions that would prevent her from becoming a "grass widow" or spare her the burden of the levirate law. In her interest the Law's concern for finality is compromised and the area of consent is expanded. However, the Talmud suggests that often conditions tend to make the wife even more the prisoner of her marital bonds. If, for example, a husband should grant a divorce conditional upon his not returning home by a certain date, and he should be prevented from returning by unavoidable accident or duress, the condition ought not to be regarded as fulfilled. If so, no such conditional divorce would ever in fact emancipate a pious woman. She would always fear that non-fulfillment of the condition was due to duress or unavoidable accident. For that reason the Rabbis rule that duress or unavoidable accident does not affect the divorce. The Law makes the value of the divorce's finality more important than the value of consent. The husband is presumed *ab initio* to waive his right ever to claim duress or unavoidable accident.

For similar reasons, the Law sometimes compromises its concern for the rigidly formal character of the divorce and its manner of execution. In the event of an emergency the Law relaxes the strict requirements circumscribing the husband's designation of an agent to give his wife the writ. If the husband was en route

to captivity and wanted to release his wife from the marriage bond, or if the husband was dying and wanted to release his wife from the ties of the levirate law, his authorization of the divorce could be most informal. In such a case the Sages expanded the area of consent and made it the overriding factor. Form was sacrificed.

Yet in other situations they did the very opposite. They restricted the power of the husband to revoke the agency he had created to give his wife a divorce. Their most revolutionary achievement was their use of force against the husband, compelling him to say that he consents to the execution of a divorce to his wife in such cases when they felt that the marriage ought to be terminated. The wife can precipitate such action in many instances. Sometimes she might forfeit her Ketubah, but she nonetheless obtains her freedom. Here actual consent was ignored altogether and all the emphasis was placed on form.

How did the Rabbis rationalize their performance? They were loath to tamper with biblical requirements. But they presume that every marriage is consummated with the understanding that it is subject to rabbinic authority and that their will is the will of the spouses forever. The consent on which they rely is an imputed consent — indeed, imputed from the date of the marriage.

The conflict between the values of finality and consent is most evident in the later development of the Law's attitude toward conditional divorces. It has already been observed that to permit conditions in the granting of divorces is to magnify the area of consent and to diminish the element of finality. It is interesting that when the wife's consent to the divorce was not a prerequisite for its validity and there were few restrictions on the husband, the Law permitted the use of conditions in the hope that fewer divorces would become final. But when the wife's consent to the divorce became a prerequisite for its execution and delivery, (about 1000 C.E.), the granting of conditional divorces was generally outlawed. The communities could well afford to be more concerned about finality than consent, particularly since the special circumstances in which the use of conditions might be helpful to the wife could be handled differently. Yet until today

some forms of conditional divorce are in use, as in the case of soldiers going off to battle who, following the precedent of King David's soldiers, divorce their wives conditionally or absolutely pending their return by a fixed date.

It thus appears that the Law's dialectic with regard to divorce veers between concern for the sanctity of the marital relationship and concern for the freedom of the parties.

The Present

It is with regard to divorce law that there is presently the greatest need for halakhic creativity. Those who clamor for change make it appear that the Halakhah is unfair to women. Those who resist change rest their case on numerous maxims which make one dread any tampering with the sanctity of the marital status. Neither group does justice to the Halakhah. The former ignore the overwhelming evidence to be found in thousands of talmudic folios which deal with the obligations of a husband to a wife. The latter freeze the Halakhah against further development by ignoring the dialectic which is the very essence of the halakhic process.

True, the talmudic dialectic is not necessarily a quest for a reconciliation of opposites in a new synthesis. More often, it seeks the retention of the antithetical values and their fulfillment in the legal order. Thus, tradition continues to live on, but the future is not altogether determined by the past. The dialectic confirms the role of history while allowing for progress. However, he who takes one polar view or another all the time seldom equivocates. If the Israeli rabbinate were to follow this course in matters of personal status it would rapidly forfeit its exclusive jurisdiction in this area. Fortunately, it appreciates its grave responsibility. However, in its fear of, or respect for, the extremists it often fails to take the steps which it knows are required by the halakhic process and consonant with its goals. Perhaps a candid articulation of the process and its goals would not only enhance the general appreciation of the Law and contribute to its development, but also relegate the extremists to peripheral status in the traditionalist Jewish community, where they can then serve in the role of vigilantes as in any social system. Cer-

tainly something must be done to prevent a recurrence of the late Chief Rabbi Herzog's sad confession that he had devised halakhic means of promoting the equality of men and women in rights of inheritance but was prevented from implementing his decision by extremist colleagues in Israel.[27] The result was that the people of Israel ultimately had to ignore their halakhic experts and legislate, through their popularly elected Knesset, a law not based on Halakhah but in fact closer to halakhic axiology than that 01 the position of the Chief Rabbi's controversialists. It is important that the Knesset shall not be forced by rabbinic intransigence to act in matters of family law. The *Kulturkampf* in Israel would then be on in earnest and a hopeless schism would inevitably follow. The Israeli rabbinate can avert such a tragedy. It can further develop the talmudic dialectic and not freeze the law in one or another pole of the antinomies.

NOTES

1. S. Belkin, *The Philosophy of Purpose* (New York: Yeshiva University, 1958).
2. *Kiddushin* 18a.
3. *Ibid.* 22a.
4. Maimonides, *Hil. Avadim* 3:2. Nachnianides disagrees; see comment of *Mishneh le'Melekh, ad loc.*
5. *Kiddushin* 20a.
6. Maimonides, *Hil. Avadim* 3:5.
7. *Yevamot* 48b.
8. Maimonides, *Hil. Milah* 1:6.
9. *Makkot* 8b.
10. Exodus 21:20.
11. *Gittin* 43b.
12. *Ibid.* 13a.
13. Maimonides, *Hil. Avaditn* 9:6.
14. *Ibid.* 2:7.
15. *B. Metzia* 75b.
16. *B. Batra* 8b and 9a.
17. See M. Findling, *Techukat ha-Avodah* (Jerusalem: Schreiber, 1945), pp. 119-20.
18. *Kiddushin* 71a.

19. *Ibid.* 73a, b.
20. Comments of Tosafot and Asheri on *Kiddushin* 73a, and text cited by them from Jerusalem Talmud.
21. *Shitah Mekubetzet, Ketubot* 3a.
22. *Kiddushin* 71a. The medieval rabbis were more vigilant.
23. *Ibid.* 71a, and Maimonides, *Hil. Melakhim* 12:3.
24. *Ketubot* 2a.
25. *Gittin* 10b.
26. See I. Porat, *Mevo ha-Talmud* (Cleveland: 1941), pp. 60-62.
27. See I. Herzog, "Hatzaat Tekanot bi-Yerushot," *Talpioth* (Nisan 5713), pp. 36-37.