

# SEPHARDIC INSTITUTE

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בס"ד

## Parashat Mishpatim Part I Innovations in Law

### 1. Innovative Principles

Following shortly after the Decalogue, which initiated the lawgiving, is וְאֵלֶּה הַמִּשְׁפָּטִים (“And these are the ordinances” [Exod. 21:1]). Beginning with the conjunctive *vav*, the latter are linked to the previous: the innovations in thought latent in the Decalogue are now applied to the particulars of a law code that is contained in the forthcoming section. Indeed, a large portion of the Torah’s civil, domestic, criminal and slavery laws, as well as religious and cultic regulations, are contained in chapters 21–23 of Exodus. Upon being committed to writing, this compendium (with the Decalogue) is termed “The Book of the Covenant” (24:7).

In these ordinances, remarkable progress is made on many fronts of law, including those of human rights and basic principles of fairness and justice. The very fact that laws of different categories are combined in one code – contrary to all previous formulations of law in the ancient Near East in which each type of law was seen as emanating from a different sphere – is itself a significant innovation. This reflects the unity and common source of all the laws, that they are all derived from the one G-d. Henceforth in Torah culture, all applications of law would have to be in harmony with all other law, enabling human conscience and common sense to play much more significant roles than previously.

After “And these are the ordinances,” the opening verse continues with “that you are to place before them” (Exod. 21:1). This locution – rather than a clause such as “that you are to transmit to them” – instructs Moses to provide the public ready access to the law, presenting it as the common heritage of all Israelites. This also is a major advance. In other Near Eastern societies, the law was the possession of the

political heads and the scribal and priestly elites, while general accessibility was restricted. Widespread knowledge of the law was not viewed by the leadership as a societal good.

As the G-d-Israel covenant was structured in accordance with contemporary covenant format,\* so too we note that the Torah articulated many of the laws in our parasha in the distinctive manner of prior legal formulations. Indeed, it uses external similarity to its advantage, subtly invoking the well-known backdrop of a law while it concentrates on the content. Thus, many of the Torah’s laws are drafted in what was the prevalent Mesopotamian casuistic fashion (that is, case law: when this and that are the circumstances, and/or if such and such is done, then the law is as follows). In many cases the Torah vocabulary and syntax is strikingly similar to its antecedents, sometimes appearing as if “lifted” from a previous law code. Nevertheless, the differences are profound.

In this study we will point out a number of fundamental principles behind the laws that are evident to the careful reader of *Parashat Mishpatim*, all hallmarks of Torah law in general. It was application of these principles that brought significant progress in each of the categories they represent. Together, they rendered Torah legislation a veritable legal revolution. The sacredness of each human life and the values of humane treatment and justice for all became deeply embedded into law, fundamentally modifying critical details of the pre-Torah practice of the ancient Near East. To more fully appreciate the extent of the transformation of law manifest in our *parasha*, we will identify the basic innovative principles of the Torah and then survey relevant portions (totaling close to 10 percent) of the leading Mesopotamian law collection of the second

millennium B.C.E., the Hammurabi Code. We will also cite passages from two post-Hammurabi law collections of the ancient Near East.

In perusing the many laws of *Parashat Mishpatim* – as is the case with the rest of the laws of the Torah – the following becomes manifest:

- A human court did not have the option to dispense vicarious punishment (in contrast with Mesopotamian law). Besides there not being a single example of it in the Torah, Exodus 21:31 alludes to a prohibition of vicarious punishment while Deuteronomy 24:16 specifically bans it.
- The taking of human life for crimes against another's property or possessions was totally eliminated.
- Social status within the nation is of no legal consequence except as concerns slaves, whose lot was substantially improved from pre-Torah law. We will discuss this topic in a separate study on this *parasha*.
- Unintentional and accidental killing could no longer be punishable by death; "But concerning one who did not intend [to kill]...I will assign you a place to which he may flee [and find refuge]" (Exod. 21:13).\*\*
- Refuge cannot be provided to a murderer, even at G-d's altar (21:14). Numbers 35:31 states that ransom can never be accepted to spare a murderer.
- Deciding innocence or guilt by subjecting an individual to a challenging ordeal is nonexistent in Torah law. The case of the suspected adulteress (Num. 5:11 ff.) who must drink a potion and, if guilty, suffer a divinely dispensed consequence, is not a true ordeal such as those we find in previous judicial codes. She is not subjected to a life-threatening circumstance in the natural order, such as being forced to swim to safety in a difficult current. No physical harm could befall her at human hands. \*\*\*
- Multiple penalties are not mandated for a single transgression. (Deut. 22:18-19 is an exception, explained by the Rambam as resulting from the multiple aspects of the transgression.)

All these are in contrast to previous law.

Torah advances concerning slavery law and the subjects of "an eye for an eye" and bodily mutilation

will be addressed in separate studies on our *parasha*. In our *Parashat Ki Tese* studies we will revisit the topic of contrasting Torah innovations in law with previous formulations.

## 2. Selections from the Code of Hammurabi

A relatively well-preserved copy of the Code of Hammurabi, king of Babylon in the 18<sup>th</sup> century B.C.E., was inscribed in the Akkadian language and in cuneiform script in fifty-one columns on a stele more than seven feet tall. It originally contained about 320 paragraphs (as modern scholarship divides them), about 280 of which are extant. Unquestionably, it was a major effort on the part of the king with his legal advisers. Their purpose was to foster justice and increase equity in the land by providing guidelines to promote improvements in contemporary law. The code was stated to be Hammurabi's presentation to the gods to demonstrate his great concern for justice; clearly, it was designed for greatness.

However, judges were not required to adhere to its specifics, and often did not, possessing the right to use a large repository of precedent and common law as well as their personal judgment in ruling. Throughout the region, the "oral law" generally had a degree of primacy; it was acknowledged that the written codes did not provide an adequate resolution of all the factors that would relate to a particular case.

Nevertheless, the Hammurabi Code was a grand intellectual construct that reflected the fundamental concepts underpinning legal thought and the general tone of law in the ancient Near East in the time frame prior to the Torah. The other ancient Near Eastern codes of the relevant period, despite differences with the Hammurabi Code, were in agreement with it as far as the Torah principles highlighted above are concerned.

The following is excerpted from the translation of the Code of Hammurabi as found in Pritchard's *Ancient Near Eastern Texts* (pp. 163-177):

§2. If a seignior [an aristocrat] brought a charge of sorcery against a seignior, but has not proved it, the one against whom the charge was brought shall throw himself into the river [the Euphrates], and if the river has then overpowered him, his accuser shall take over his estate; if the river has shown that seignior to be

innocent and he has accordingly come forth safe, the one who brought the charge shall be put to death while the one who threw himself into the river shall take over the estate of his accuser.

**§8.** If a seignior stole either an ox or sheep...if the thief does not have sufficient to make restitution, he shall be put to death.

**§§9–11.** When a seignior has found his lost property in the possession of another seignior...[if] the seller was the thief, he shall be put to death... [if] the purchaser was the thief, he shall be put to death...If the (professed) owner of the lost property has not produced witnesses attesting to his lost property, since he was a cheat and started a false report, he shall be put to death.

**§§15–16.** If a seignior has helped either a male slave of the state or a female slave of the state or...of a private citizen to escape through the city gate, he shall be put to death. If a seignior has harbored in his house either a fugitive male or female slave... and has not brought him forth at the summons of the police, that householder shall be put to death.

**§§21–22.** If a seignior made a breach in a house, they shall put him to death in front of that breach and wall him in. If a seignior committed robbery and has been caught, that seignior shall be put to death.

**§25.** If a fire broke out in a seignior's house and a seignior who went to extinguish it cast his eye on the goods of the owner of the house and has appropriated the goods...that seignior shall be thrown into that fire.

**§109.** If outlaws have congregated in the establishment of a woman wine seller and she has not arrested those outlaws and did not take them to the palace, that wine seller shall be put to death.

**§110.** If a hierodule (a woman in the service of a god), who is not living in a convent, opened the door of a wine shop or has entered a wine shop for a drink, they shall burn that woman.

**§116.** If the pledge [of a debtor seignior] has died from beating or abuse in the house of his distrainer, the owner of the pledge shall prove it against his

merchant, and if it was the seignior's son, they shall put his son to death.

**§129.** If the wife of a seignior has been caught while lying with another man, they shall bind them and throw them into the water. If the husband of the woman wishes to spare his wife, then the king in turn may spare his subject.

**§132.** If the finger was pointed at the wife of a seignior because of another man, but she has not been caught while lying with the other man, she shall throw herself into the river [submitting to the river as divine judge] for the sake of her husband.

**§§196–198.** If a seignior destroyed the eye of a member of the aristocracy, they shall destroy his eye. If he broke a seignior's bone, they shall break his bone. If he destroyed the eye of a commoner or broke the bone of a commoner, he shall pay one mina of silver (sixty shekels).

**§§209–210.** If a seignior struck a seignior's daughter and caused her to have a miscarriage, he shall pay ten shekels of silver for her fetus. If [she] died they shall put his daughter to death.

**§§211–212.** If by a blow he caused a commoner's daughter to have a miscarriage, he shall pay five shekels of silver. If that woman has died, he shall pay one-half mina of silver (thirty shekels).

**§§229–230.** If a builder constructed a house for a seignior but did not make [it] strong, with the result that [it] collapsed... If it has caused the death of the son of the owner of the house, they shall put the son of that builder to death.

**§§250–252.** If an ox, when it was walking along the street, gored a seignior to death, that case is not subject to claim. If a seignior's ox was a gorer and the city council made it known to him that it was a gorer, but he did not pad its horns or tie up his ox, and that ox gored to death a member of the aristocracy, he shall give one-half mina of silver. If it was a seignior's slave, he shall give one-third mina of silver.

### **3. Law Codes Subsequent to Hammurabi**

The Middle Assyrian Laws continued most of the underlying themes of the previous codes although there are significant differences. More than one hundred paragraphs inscribed on tablets in the 12<sup>th</sup> century B.C.E. – but dating from several centuries before – have survived. They exhibit a tendency to considerably greater severity in punishment than the Hammurabi Code. They call for the death penalty more frequently and prescribe more bodily punishment, including mutilation, such as eye gouging, castration and cutting off limbs. They impose crushing monetary penalties and mandate more instances of multiple punishments for the same violation. Following are several excerpts (from the summary provided by the Internet Ancient History Sourcebook).

**I. 40.** If the wives of a man, or the daughters of a man, go out into the street, their heads are to be veiled. The prostitute is not to be veiled. Maidservants are not to veil themselves. Veiled harlots and maidservants shall have their garments seized and fifty blows inflicted on them and bitumen poured on their heads.

**I. 57.** In the case of every crime for which there is the penalty of the cutting-off of ear or nose or ruining of reputation or condition, as it is written it shall be carried out.

**I. 58.** Unless it is forbidden in the tablets, a man may strike his wife, pull her hair, her ear he may bruise or pierce. He commits no misdeed thereby.

**II. 8.** If a man meddle with the field of his neighbor, they shall convict him. Threefold shall he restore. One of his fingers they shall cut off, a hundred blows they shall inflict upon him, one month of days he shall do the king's work.

**III. 2.** If a man sell the son or daughter of a man, who on account of debt was dwelling in his house, they shall convict him, he shall lose his money; and he shall give his minor son to the owner of the property; one hundred lashes shall they inflict upon him, twenty days shall he do the king's work.

A law collection from the Hittites (located in what is now central Turkey), inscribed in the mid-13<sup>th</sup> century B.C.E. but dating to previous centuries, although generally under the influence of Mesopotamian law,

made a number of changes. It lessened the great number of transgressions that receive capital punishment. In some cases it permitted a heavy fine even for premeditated murder. This reflected the influence of the wealthy classes in the application of law and led to gross favoritism in the dispensation of capital punishment. The law strengthened the king's control of the nation by granting him ownership of all the land (whereas private property had previously been the norm) and only individuals who served in the king's soldiery were allowed control over their land. Modern scholars attribute these changes to the militaristic orientation of Hittite society.

Hittite religious law moved toward greater tolerance of other peoples' gods by becoming indiscriminately polytheistic. Whenever they conquered a people, they adopted the gods of that people into their religious system.

Since Near Eastern law codes were generally not mandated law for the judges but guidelines and advisory, it is understandable why Torah laws were presented within a suzerain-vassal covenant framework. The stipulations a suzerain spelled out in a covenant that he entered into were absolute requirements. The Torah law codes, incorporating critical differences, were uniformly placed within a covenant structure so as to ensure that its advances were not left to the discretion of the judge or to previous widespread practice. The Oxford Bible Commentary, because it did not fully appreciate the Torah's innovations, was surely mistaken on that point in making the following comment on our section:

There is also a good deal of overlap in content between this section and the Mesopotamian codes. This does not mean that the laws have been borrowed from a foreign source, simply that legal style and stock examples were similar all over the ancient Near East. Laws of this type were probably not used as the basis of judicial decisions. The skill of judges lay not in the interpretation of a body of written law, but in being able to perceive how a dispute could best be resolved and where justice lay in a particular case. Laws such as these would help in educating them in this skill, but they did not have to rely on them in reaching a verdict. That is why the laws here do

not have the detail and precision one would expect in a modern body of law. They are probably borrowed from an old legal text to illustrate the kind of justice required (Oxford Bible Commentary, 2001, p. 82).

## Endnotes

\* See our study *The G-d-Israel Covenant: On Meaning and Format*

\*\* The case of an ox that killed a person after the ox-owner had been warned several times that his ox had gored yet failed to guard it, appears, on the surface, to be an exception. After mandating death for the ox, the law states: וְגַם בְּעֵלָיו יוּמָת (“and also its owner shall die” [Exod. 21:29]). The passage continues: “But if ransom is placed upon him, he shall pay his life-redemption in accordance with the amount set upon him” (vv. 29-30). Despite the fact that such an owner is criminally liable for trifling with the life of others and surely incurs a large measure of guilt for the life lost, we must assume that he had been an unintentional protagonist as concerns his ox’s act.

The *Mekhilta*, however, takes this case together with the biblical prohibition of accepting ransom for the life of one who killed intentionally (Num. 35:31), and concludes that it cannot be mandating death at the hands of a human court but rather death at the hand of Heaven, and it is not an exception to the general rule. In the Talmud, a question is asked on this interpretation: perhaps only a man who himself murdered is precluded from redeeming his life with ransom, but in the case that his ox killed, ransom is acceptable, and if the owner does not pay it he is put to death at the hands of the human court. The Talmud proceeds to reject this and to derive from another verse that the owner’s death is to be at the hand of Heaven. Numbers 35:21 is interpreted to be making the categorical statement that in cases of killing only

an actual murderer is put to death, not one whose ox killed (*b. Sanh.* 15b). Commentators furnish other explanations to support the conclusion that the death of the ox owner is at the hand of Heaven.

Be that as it may, in peshat our passage appears to mean that one who was warned about his repeatedly goring ox, yet was negligent with it to the extent that it killed a person, is not considered an unintentional protagonist in the full sense of the word. On some level, he is to be viewed as deserving of the death penalty. Nevertheless, he should be redeemed, since in the final analysis he did not actually kill intentionally. The formulation, “if ransom is placed,” cannot be taken to mean that sometimes the owner is put to death but sometimes ransomed, for if it is allowed to spare his life it surely must always be the practice, consistent with everything else in the Torah. Rather, the phrase should be seen as designed to emphasize the seriousness of his liability, that he is קְרוֹב לְמַזִּיד, “close to intentional.”

\*\*\* Rabbi S. D. Sassoon pointed out that against the background of ancient society the law regarding the suspected adulteress appears to have been instituted to at least partly serve a humanitarian purpose, to be an outlet for a jealous and enraged husband’s anger. The law would often protect the woman from possible violence and sometimes even death at the hands of her husband. Such abuses are well-known from the days when governmental law did not much interfere with domestic situations and the husband was virtually considered an “owner” of his wife, while she was mostly bereft of personal rights. (This problem still exists in certain regions of the world today.) Under the priest’s jurisdiction a proper resolution may be arrived at (see our study on *The Wayward and Rebellious Son*).