

WHAT NEVER WAS AND NEVER WILL BE REBELLIOUS SON – SUBVERTED CITY – INFECTED HOUSE

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The word *halakha*, the term for Jewish law, is derived from the Hebrew word *halakh* ["go" or "proceed"]. It emphasizes two dimensions: (1) knowledge, in this case of the Torah ["guidance"] and (2) action, the proper way to perform one's *mitzvot* [spiritual-moral obligations]. The entire system assumes that Divine instruction in the Torah can be translated into action. The *ordinances, decrees and judgments* are practical instructions, *not in heaven* but here on earth (Deut. 30:12).

What are we to make then of laws that appear totally impractical? Rabbinic interpretation has served the purpose of clarifying difficult biblical passages. Three instances are collected in the Babylonian Talmud and *tosefta* of cases "that never were and never will be":

- 1) the infected house [*bayit menuga*] that is to be razed (Lev. 14: 34-55);¹
- 2) the subverted or apostate city [*ir-nidahat*] that is to be laid waste (Deut. 13:13-18);²
- 3) the rebellious son [*ben sorer umoreh*] who is to be put to death at the request of his parents (Deut. 21:18-21).³

In each case, the preceding *Mishnah* lays down such a thicket of rules that the talmudic discussion concludes that the law is impractical. Yet, in two cases, Rabbi Jonathan, an eyewitness, demurs: "I saw it [the city] and sat on its ruin"; "I saw him [the rebellious son] and I sat on his grave." In the third, we have an actual *beraita* where Rabbi Eliezer says in Rabbi Zadok's name that: "there was a place [an infected house] in the Gaza area." Rabbi Simeon ben-Judah asserted that infected bricks [from a demolished house] could be found in the Galilee."

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The sages recognized, of course, that by adopting the "never was and never will be" rule in these cases, a sensational issue was raised: Could the Torah contain instructions that were in fact impossible to execute? The sages ask: "Why then was it written?" The Talmud and *tosefta* answer: "Explain it and receive reward." This is supplemented by an explanation in the case of the rebellious son offered by Rabbi Simeon in a *beraita*, who comes to the same conclusion but advances a reason why this law was only theoretical: "Just because this [boy] ate a *tartimar* [400 grams] of meat and drank half a *log* [250 grams] of Italian wine, his father and mother can take him out to be stoned? It follows that this never was and never will be. Why then is it written, "Explain it and receive reward"? Thus, Rabbi Simeon apparently proposes the radical notion that the very injustice of the statute as written is so totally incompatible with the Torah's standard of righteousness that it must be consigned to the theoretical. On similar lines, it is the same Rabbi Simeon who sought to restrict the possible number of cities subject to destruction as subverted cities so that "Israel will not be destroyed."⁴

This is very strange and made all the stranger by the subsequent testimony of Rabbi Jonathan, Rabbi Eliezer for Rabbi Zadok, and Rabbi Simeon ben-Judah. These are all major figures, and a *beraita* is involved, yet because of the apparent injustice of it, all is set aside, including Rabbi Jonathan's striking eyewitness account. As a consequence, modern commentators in particular have tended to view this as a case where the rabbis "humanized" the Mosaic law, the passage of time having changed the social mores.⁵ Rabbi Simeon's reasoning on the apparent injustice of it would seem to support this view.

Yet, this too does not work well. The talmudic rabbis did not approach interpretation with the notion that the Torah contains laws so inhumane they had somehow to be set aside. Also, there are many other subjects, ranging from the red heifer through the laws of Shabbat, of purity especially of *ka-shrut*, that complicated a Jew's life for reasons often not readily apparent. The rabbis could develop procedures but no definitive rationale. Yet, in none of these cases did the rabbis render the laws impractical.

We will, therefore, propose an alternative explanation, advancing these two perspectives: First, that the laws in question, especially that of the rebellious son, were practical, that they were intended to curtail inhumane actions, and their logical end was to eliminate them. Second, this did not mean that the

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practices in question were halted all at once. Alongside the Torah law, there were social habits of long standing that continued for centuries. Some, such as idol worship, were ended only with great difficulty. In the *Guide for the Perplexed*,⁶ Maimonides advances this idea with respect to animal sacrifices. In his view, the custom of sacrificing animals had too strong a hold on humanity to be eliminated, but it was severely curtailed, limited to one location (Jerusalem), to the members of one family (the priests), to only ritually pure people, etc. While he does not advocate the elimination of the practice, Maimonides argues that sacrifices are inferior to the obligation of prayer, which is valid in all places at any time.

THE REBELLIOUS SON

What was the intent of the law on the rebellious son? On plain reading it appears to be a deterrent against juvenile misbehavior. Some commentators go so far as to declare that the execution of such a child at the outset would prevent a worse crime, such as homicide. This suggestion of a pre-emptive strike against a juvenile who is a potential criminal seems a striking injustice.⁷ Except in the case of the *rodef*, where one is enjoined to kill a would-be murderer who is pursuing his victim, the Torah holds no other examples of even an adult being put to death in anticipation of a crime, much less a juvenile.

It is, therefore, arguable that the law was intended as a deterrent, not against the child but rather against his parents. Indeed, the only rationale quoted, that of Rabbi Simeon, makes precisely this point: Should the parents be allowed to have the boy stoned just because of gluttony? The Torah thus distinguishes Jewish society sharply from other ancient cultures that give extraordinary powers to the father; the Code of Hammurabi and Roman law allow the *pater familias* the power of life or death over his family.⁸ The Torah thus deals with a common social phenomenon, the unlimited power of the male parent, but protects against excess. In the case of the rebellious son, the parental right to kill becomes theoretical if the talmudic rules are followed. This is done by restricting all elements of the theoretical power: the boy has only a few months during which the crime must be committed; the particulars of the infraction are specified and limited (consumption of a vast amount of meat and wine in a short time); he must be warned and warned again; the boy

can be convicted only by consent of both parents, using the same words; and last, but surely not least, "the elders of the city must convict him," removing ultimate jurisdiction from the parents altogether.⁹

A.H. Freimann points out¹⁰ that this interpretation is strengthened by the location of the passage, coming immediately after restrictions on the father's right to disinherit a son because he dislikes the mother (Deut. 21:17). This very same passage specifies the double portion for the first-born son. In our view, this is yet a further limitation on the father's power to give indiscriminately to the first-born son, in contrast, for example, to Hammurabi's Code that allows unlimited preference to the firstborn.¹¹

THE SUBVERTED CITY

Here, too, a general social protection against idolatry faces severe restriction in practice. The agents of subversion must be at least two adult males from the town, and from the tribe in whose territory the town is found; a majority of the male population must be found guilty of collective apostasy; the town's population must number at least 100 but less than the tribe's majority; every single person must have been warned and given a chance to repent; only the Great Sanhedrin could make the declaration.¹²

There are examples of other nations' codes to cite on this issue, and the Bible itself includes two illustrative examples. Sodom, the subverted town *par excellence*, is destroyed but only by command of God Himself (Gen. 19). In the case of the Benjaminites and the concubine-on-the-hill (Jud. 19-21), an entire tribe was nearly extinguished by the wrath of the other tribes, and this is accounted a great disaster. In short, the Torah, following the same pattern as the rebellious son, acts to *restrict* rather than to enlarge a huge potential abuse: the majority attacking the minority.¹³

THE INFECTED HOUSE

The Talmud cites the laws concerning this phenomenon as an example of how the Torah takes care not to cause undue loss to the individual Israelite.¹⁴ The rules are every bit as elaborately restrictive as the preceding cases of the rebellious son and wayward city: Among the requirements¹⁵ are: The house is cleared of its possessions *before* the priest arrives to condemn it; the law applies only to private houses; Jerusalem, not being the possession of any one

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tribe, is exempt; every effort is made to preserve the house by, among other things, scraping the walls and stones. In short, the priest's ability to condemn property for reason of apparent ritual infection is severely limited.

To sum up: contrary to the usual interpretation, the cases of the rebellious son, the subverted town and the infected house, are not intended to deter the would-be sinners (the son, the townspeople, the homeowner) but rather to bridle the exercise of potentially great injustice: the vengeful father, the angry majority and the corrupt priest. In each of these instances, the Torah takes what was probably a prevailing social practice and turns it from the practical to the theoretical.

There are other examples of how the Torah restricts social customs with great potential for abuse. Levirate marriage is limited to the surviving brother; the cases of Judah and Tamar (Gen. 38), and the case of Boaz and Ruth (Ruth 3-4), suggest that there existed a sense of family obligation well beyond this limit. Once the halakhic rules were in place, the social practices disappeared. The legislation then became the subject of study only. Thus, Rabbi Simeon catches the point of the law when he notes that the parents should not have the power to condemn their children for minor offenses, while Rabbi Jonathan notes that such things had, in fact, happened. The majority view is that when the halakha is in place, these social practices no longer exist and the rules established to prevent them are of only academic interest.

NOTES

1. Τοσεφτα Νεγαμ 6:1; B. Σανηεδριν 71α.
2. Sanhedrin 14:1.
3. Tosefta Sanhedrin 11:6; B. Sanhedrin 71a.
4. Tosefta Sanhedrin 14:1.
5. Σεε Μιδραση Ταβναμ, π. 131.
6. Book III, Chapter 32, tr. Shlomo Pines (Chicago: University of Chicago Press, 1964).
7. This law was a regular target of the *maskilim* in the 19th Century, who pointed out that the juvenile was treated more harshly than an adult, who could not be convicted of capital punishment unless he committed the crime and there were at least two witnesses. See, for example, YaShaR (Isaac Samuel Reggio), article on *ben sorer umoreh* in *Hechalutz*, Vol. 3 (1857).
8. Boaz Cohen, *Jewish and Roman Law: A Comparative Study* (New York: Jewish Theological Seminary, 1966) Vol. 1, p. 171. "As is well known, Roman Law is characterized by the great power granted to the father as the *pater familias*. The *patria potestas* which includes the power of life and death was never legally curbed but was not exercised in later times." Cohen cites the

Code of Justinian 8-47-10. Also *Encyclopaedia Judaica*, Vol. 13 pp. 1603-1604, and for similar laws of Hurrian customs dealing with rebellious son, *ibid.* 12:1290.

9. See, Prologue by Harry M. Orlinsky to Arnold B. Ehrlich, *Mikra Ki-pheshuto* (New York: KTAV, 1969) p. 348.

10. *Encyclopedia Mikrait* (Jerusalem: Mosad Bialik, 1954) Vol. 2, pp. 161-162.

11. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard (Princeton: Princeton University Press, 1955) p. 173.

12. B. Sanhedrin 16a.

13. Arnold B. Ehrlich noted this connection between the subverted city and the Pilegish bagivah (concubine on the hill) affair, *Mikra Ki-pheshuto*, *ibid.* p. 332.

14. See the *Talmudic Encyclopaedia*, ed. by Rabbi S. Y. Zevin, Vol. 11, p. 240.

15. The other requirements: (1). The house must be illuminated, and cannot be dark. (2). It must have at least four-by-four cubit square *amot*. (3). It must have exactly four walls; houses with three or five walls, or rounded walls are exempt. (4). Every wall must be made of stones, wood, and soil. (5). It must be used for human habitation, not for animals. (6) It must have at least eight stones, two per wall. (7). It must be standing on the ground; a balcony in the air is exempt. (8). It must belong to Jews. (9). It must be in Israel. For a full analysis of these requirements and their sources see Shlomo Feldman, *Sha'arei Da'at* (Jerusalem, 2000) pp. 406-407.

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